A Digest of

Recent Canadian Appellate Case Law

(Mostly Statutory Interpretation Cases)

of Possible Interest to Legislative Drafters

– January 2010 to July 2012 –

prepared by Ruth Sullivan, Department of Justice, Canada

1392290 Ontario Ltd. v. Ajax (Town), 2010 ONCA 37

retrospective application

vested rights

The appellants own commercial property in Ajax. In 2000, this property was severed into two parcels: one 9.79 acre parcel (the "child parcel") and one 28.29 acre parcel (the "mother parcel"). The appellants retained the mother parcel and conveyed the child parcel to Home Depot. At the time, the Act did not impose tax consequences on severance or subdivision.

Amendments to the Act came into force on January 1, 2001 and December 5, 2001. These amendments imposed a new taxation scheme on certain "eligible" properties including property "that was subdivided or was subject to a severance". The appellants applied to Superior Court for a declaration that the amendments did not apply to severances that occurred in 2000, so that the mother parcel would continue to enjoy favorable tax treatment.

[8] Section 447.70(21) of the Act defines an "eligible property" as a property	[8]L'article 447.70 (21) de la Loi définit «bien admissible» S'entend d'un bien, selon le cas :
(a) to which subsection 447.65 (8) or 447.68 (8) applies,	a) auquel s'applique le paragraphe 447.65 (8) ou 447.68 (8);
(b) that ceases to be exempt from taxation for 2001 or thereafter,	b) qui cesse d'être exonéré d'impôts pour 2001 ou une année ultérieure;
(c) that was subdivided or was subject to a severance,	c) qui a fait l'objet d'un lotissement ou d'une séparation;
(d) whose classification changes for 2001 or a later year, or	d) dont la classification change pour 2001 ou une année ultérieure;
(e) that is prescribed by the Minister of Finance;	e) qui est prescrit par le ministre des Finances.

Issue: Did paragraph 447.70(21)(c) of the Act apply to the appellants' mother parcel?

Judgment:

(a) Distinction between retroactivity and retrospectivity

[32] In *Benner v. Canada (Secretary of State)*, 1997 CanLII 376 (SCC), [1997] 1 S.C.R. 358 at para. 39, Iacobucci J., in discussing the distinction between a retroactive statute and a retrospective statute, adopted the following statement from E.A. Driedger, "Statutes: Retroactive Retrospective Reflections" (1978), 56 Can. Bar Rev. 264 at pp. 268-69:

> A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past

> event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event. [Emphasis in original.]

[33] There are two relevant time periods: when the event takes place, and when that event starts to have legal effects. In this case, the "event" is the severance of the original parcel, and the "legal effects" are the tax consequences. Simply put, in our case, the amendments are retrospective if they impose different tax consequences for 2001 onwards for a 2000 severance - future consequences for past actions. If they imposed different tax consequences for the years preceding 2001, as well as 2001 onwards – past and future consequences for past actions – they would be retroactive.

[34] The analysis is further complicated in two scenarios: (i) where a new law is passed while the events are still taking place; and (ii) where a new law is passed while the legal effects are ongoing: see *Épiciers Unis Métro-Richelieu Inc. v. Collin*, 2004 SCC 59 (CanLII), [2004] 3 S.C.R. 257.

[35] This case is not analogous to the first scenario, since the severance is deemed to be instantaneous. However, our case is analogous to the second scenario, since the property was already being taxed – albeit at a favourable rate. The legal effects of the severance had already crystallized when the law changed in 2001.

(b) The common law presumption

[36] There is a strong common law presumption that legislation does not apply retroactively if it would interfere with vested rights: *Gustavson Drilling (1964) Ltd. v. M.N.R.*, 1975 CanLII 4 (SCC), [1977] 1 S.C.R. 271. A similar presumption exists with respect to retrospective application. Where vested rights are affected, the courts will find retrospective application only if this legislative intent is express or "plainly manifested by unavoidable inference": *Dikranian* at para. 33.

[37] The legal test was set out in *Dikranian* at paras. 37-38. There are two requirements. First, the appellants' legal (or juridical) situation must be tangible and concrete rather than general and abstract; they must point to a specific right. Second, this legal situation must have been sufficiently constituted at the time of the new statute's commencement; the appellants must demonstrate that they have exercised that right

[38] In essence, this test demands that the rights be "crystallized" and "have inevitability and certainty." While a party may claim it has an accruing right, it can do so only "if its eventual accrual is certain and not conditional on certain events": *Niagara Escarpment Commission v. Paletta International Corp.* (2007), 39 M.P.L.R. (4th) 6 (Ont. S.C.), citing *R. v. Puskas*, 1998 CanLII 784 (SCC), [1998] 1 S.C.R. 1207 at para. 14. In particular, as noted in *Dikranian*:

> [T]he mere possibility of availing oneself of a specific statute is not a basis for arguing that a vested right exists. As Dickson J. (as he then was) clearly stated in *Gustavson Drilling*, the mere right existing in the members of the community or any class of them at the date of the repeal of the statute to take advantage of the repealed statute is not a right accrued. ... In other words, the right must be vested in a specific individual.

[39] The appellant in *Dikranian* was found to have a vested right in the interest payment terms set out in a loan certificate issued by the government. This holding strongly suggests that the success of the claim turns on the characterization of the right at issue. As noted in R. Sullivan, *Construction of Statutes*, 5th ed. (Toronto: Lexis-Nexis, 2008) at p. 714 and 717:

> [T]he contract was simply a mechanism by which the government delivered a benefit to a class of persons; what the new legislation interfered with was less a contractual right than a statutory benefit. If the appellant's rights had been characterized in this way – as public law rights – the outcome would not be so obvious.
>
> ...
>
> As Dickson J. wrote in *Gustavson Drilling*,
>
> > no one has a vested right to the continuance of the law as it stood in the past; in tax law it is imperative that legislation conform to changing social needs and governmental policy. A taxpayer may plan his financial affairs in reliance on the tax laws remaining the same; he takes the risk that the legislation may be changed.

[40] She further notes at p. 717, "What Dickson J. says of tax legislation applies to all legislation. Once the government undertakes to regulate a matter to protect the interests of particular groups or the public at large, individuals who organize their affairs on the assumption that "promised" advantages will not be withdrawn do so at their own risk."

[41] The appellants argued that they had a vested right to the continuance of the cap/clawback scheme. An alternative argument – that the appellants had a vested right to sever their property without adverse tax consequences – was canvassed in oral argument. In my view, *Gustavson* is a complete answer to both submissions. The appellants have not demonstrated a specific right within the meaning of *Dikranian*. They have no vested rights and the presumption does not apply.

[43] Finally, as noted above, the eligible/comparable property scheme was implemented in order to correct a mistake and defect in the law. There was general consensus that the pre-CVA taxation scheme was outdated and unfair; there was equal agreement that a sudden transition to a CVA scheme would likewise create unfairness. Tax unfairness is clearly a public harm with widespread and serious consequences. This backdrop, in my view, would in any event have deprived the presumption against retrospectivity of much of its impact.

[44] The retrospective application of s. 447.70(21)(c) is commensurate with the concern for tax fairness. Severance and subdivision materially change the characteristics of the property in question; this change should in turn impact the level of taxation. An impact that results in these newly created parcels being taxed at a level similar to "comparable properties", as contemplated by s. 447.70(21)(c), cannot be said to undermine the purpose of the legislation, viewed as a whole.

[45] In conclusion, the definition of "eligible property", insofar as it includes lands subdivided or severed, operates retrospectively.

[Comment: Unlike *Hayward v Hayward*, this case uses the term "retrospective" as defined in the Epicier case. However, notice that it suggests that the presumption against the retrospective application of legislation is rebutted if the legislation does not interfere with vested rights.

Agraira v. Canada (Minister of Public Safety and Emergency Preparedness), 2011 FCA 103

legislative evolution

responsible Minister

Mr. Agraira applied for permanent residence under the *Immigration and Refugee Protection Act* (IRPA) but was found to be inadmissible on the ground that he was a person described in paragraph 34(1)(*f*) of the Act. A then applied under subsection 34(2) of the *IRPA* for ministerial relief. The Minister of Public Safety denied that relief and A applied for judicial review.

34. (1) A permanent resident or a foreign national is inadmissible on security grounds for […]	**34.** (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants …
(*c*) engaging in terrorism;	*c*) se livrer au terrorisme;
(*f*) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in Acts referred to in paragraph (*a*), (*b*) or (*c*).	*f*) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un Acte visé aux alinéas *a*), *b*) ou *c*).
(2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.	(2) Ces faits n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national.

Issue:

In interpreting the decision-making power conferred on the Minister by subsection 34(2), can a regulation that changes which Minister is responsible for making the decision narrow the considerations to be taken into account in making that decision?

Judgment:

In the Federal Court, Justice Mosely held that the Minister's decision was unreasonable, in part because the Minister failed to take into account and balance the range of factors that prior case law and departmental guidelines had identified as relevant to determining what is in the

"national interest". In addition, the Minister's analysis could be characterized as a finding that because Agraira had committed an act described in subsection 34(1) of the Act, relief would not be granted. On this approach, it could never be in the national interest for a person to whom subsection (1) applies to be admitted to Canada.

The Federal Court of Appeal reversed the decision of Justice Mosely and upheld the decision of the Minister to deny relief. Pelletier J.A. held that subsection 34(2) did not require the Minister to consider anything other than national security and public safety in considering the "national interest" in subsection 34(2) of the Act. This conclusion was based largely on the effect of amendments that transferred ministerial responsibility for relief applications under subsection 34(2) from the Minister of Citizenship and Immigration first to the Solicitor General and then to the Minister of Public Safety. The latter transfer of ministerial responsibility was considered to be evidence of Parliament's intention to make security issues the primary focus in evaluating an application under subsection 34(2) of IRPA.

50 The Minister of Public Safety exercises his discretion under subsection 34(2) of the [Act] in the context of the entire legislative scheme. When that scheme is taken as a whole, it is clear that the transfer of responsibility of the processing of applications for ministerial relief to the Minister of Public Safety was intended to bring security concerns to the forefront in the treatment of those applications. As a result, the notion of "national interest" in the context of subsection 34(2) must be understood in terms of the Minister of Public Safety's mandate. In my view, this means that the principal, if not the only, consideration in the processing of applications for ministerial relief is national security and public safety, subject only to the Minister's obligation to Act in accordance with the law and the Constitution. …	[**50**] Le ministre de la Sécurité publique exerce le pouvoir discrétionnaire que lui confère le paragraphe 34(2) de la LIPR dans le contexte du régime législatif en entier. Lorsqu'on considère ce régime dans son ensemble, on constate que le transfert de la responsabilité du traitement des demandes de dispenses ministérielles au ministre de la Sécurité publique visait à ramener à l'avant-plan les préoccupations en matière de sécurité lors de l'examen de ces demandes. Il s'ensuit que la notion d'« intérêt national » dans le contexte du paragraphe 34(2) doit s'interpréter en fonction du mandat confié au ministre de la Sécurité publique. À mon avis, cela signifie que les principaux, voire les seuls, facteurs dont on tient compte lors du traitement des demandes de dispense ministérielle sont la sécurité nationale et la sécurité publique, sous réserve uniquement de l'obligation du ministre de se conformer à la loi et à la Constitution. […]
61 To summarize, the transfer of responsibility for disposing of applications for ministerial relief to the Minister of Public Safety is intended to bring security and public safety issues to the forefront in the assessment of those applications. Thus the aspect of national interest which is in issue in these applications is national security and public safety. The assessment of such applications does not require the Minister to engage in a balancing exercise because the test is not a net-detriment test . …	[**61**] Pour résumer, le transfert de la responsabilité du traitement des demandes de dispenses ministérielles au ministre de la Sécurité publique vise à ramener à l'avant-plan les questions de sécurité nationale et de sécurité publique lors de l'examen de ces demandes. L'aspect de l'intérêt national qui est en cause dans les demandes en question est la sécurité nationale et la sécurité publique. L'examen de ces demandes n'oblige pas le ministre à se livrer à une pondération parce que le critère applicable ne vise pas à déterminer si les effets préjudiciables l'emportent sur les effets bénéfiques. […]

[Please note that this decision has been granted leave to appeal to the Supreme Court of Canada*.]

* Hearing date: 2012-10-18

*BPCL Holdings Inc. v Alb*erta, 2006 ABQB 757, 2008 ABCA 153

presumption of validity

"respecting"

overlapping provisions

Section 66 of Alberta's *Public Health Act* at the relevant time included the following definition and enabling authorities:

> "private place" means a private dwelling, and privately owned land…
>
> "public place" includes …
>
> (viii) accommodation facilities, including all rental accommodation;
>
> 66(1) The Lieutenant Governor in Council may make regulations
>
> (n) respecting the prevention and removal of nuisances;
>
> (s) respecting the location, operation, cleansing, disinfection, disinfestation, equipping and maintaining of public places;
>
> (t) respecting the cleansing, disinfection and disinfestation of private dwellings;
>
> (2) If a code, standard, guideline or body of rules relates to any matter on which regulations may be made under subsection (1) and the code, standard, guideline or body of rules has been published and is available to the public, the Lieutenant Governor in Council may, in addition to or instead of any regulation that may be made under subsection (1), by regulation declare the code, standard, guideline or body of rules to be in force either in whole or in part and with any specified variations.

The Lieutenant Governor in Council made regulations requiring the owner of housing premises to ensure that the premises are structurally sound, safe and secure and in good repair. These regulations were challenged on the ground that they did not relate to public health.

Issue: Were the regulations valid?

presumption of validity

Per Fayden J.A. at para 9:

[9] …As indicated by this Court in ***Heppner v. Province of Alberta*** reflex, (1977), 6 A.R. 154 at para. 25, 4 Alta. L.R. (2d) 139 (S.C. A.D., "[a] court when considering the validity of subordinate legislation must proceed on the assumption that such legislation is within the authority conferred by the Act and will not declare it invalid unless there is clear evidence to support such a finding."

per Slatter J. at para 31:

[31] I agree with the Applicants that the general provision that housing be "in good repair" must be interpreted and applied as if it contained the proviso "and that non-repair has an effect on public health". As the Court held in ***Newell County v. Standard Gravel & Surfacing of Canada Ltd.*** reflex, (1954), 12 W.W.R. 166 (C.A.) at pg. 168:

> . . . if the words used are capable of a reasonable construction that would keep the enactment within the limits of jurisdiction, they are so construed.

"respecting"

Per Slatter J. at para 10-12:

[10] The *Act* provides that the Lieutenant Governor in Council may make regulations "respecting" certain topics. This raises the question of the extent to which there must be a connection between the powers granted and the subject matter of the regulation. Clearly, if the regulation has nothing to do with the subject matter of the statute, and is merely a colourable attempt to use the regulation-making powers, it will be invalid. This is so even if the regulation may peripherally accomplish some valid purpose: ***Heppner v. Minister of the Environment*** reflex, (1977), 4 Alta. L.R. (2d) 139 (C.A.). But apart from colourable regulations, to what extent may the Court examine the connection between the regulation and the regulation-making power?

[11] A number of possible tests for the required connection between the power and the regulation come to mind:

- a real and substantial connection;
- there is any arguable connection between the power and the regulation;
- the regulation can be demonstrably justified to be within the power;
- the connection must be beyond *de minimus*, but need be no more;
- the regulator need only show a *potential* connection between the power and the regulation
- the regulator must show a *reasonable* connection between the power and the regulation
- the regulator must show a *substantial* connection between the power and the regulation
- the subject of the regulation is *predominantly* directed to the purpose of the power

There is very little authority on this point. Probably no fixed standard can be set, and the issue must be decided upon the wording of the statute: see E.A. Driedger, *The Composition of Legislation* (1976, 2d ed.) at pp. 190-92. Clearly, the word "respecting" is a wide one: ***Dynamex Canada Inc. v. Canadian Union***

of Postal Workers, 1999 CanLII 9345 (FCA), [1999] 3 F.C. 349, 241 N.R. 312 at para. 22 (C.A.); ***R. v. Clark***, 2000 ABCA 246 (CanLII), 2000 ABCA 246, [2000] 11 W.W.R. 595, 84 Alta. L.R. (3d) 321, 266 A.R. 343, 148 C.C.C. (3d) 132 at para. 7. As the Court held in ***Nowegijick v. The Queen,*** 1983 CanLII 18 (SCC), [1983] 1 S.C.R. 29 at pg. 39, "The phrase 'in respect of' is probably the widest of any expression intended to convey some connection between two related subject matters." It can be contrasted with the words "for the purpose of" that were in issue in ***Heppner***, or words like "as may be deemed necessary or advisable" as discussed in ***Teal Cedar Products (1977) Ltd. v. Canada***, reflex, [1989] 2 F.C. 158 (C.A.). In my view the regulation must have a real and meaningful connection with the power to be "respecting" the power. Regulations that have only a speculative or *de minimus* connection to the power will be *ultra vires*, but the regulation need not be predominantly or substantially connected to the subject matter of the statute to be "respecting" the object. If it appears that the dominant motivation in passing the regulation is outside the scope of the statute, the regulation will be invalid as colourable: ***Heppner***.

[12] … Whatever the inherent scope of "public health", the regulation need only have a meaningful connection to "maintaining public places" to be "respecting" that topic.

Per McFayden J.A. at para. 8

I agree with the chambers judge's reasoning that a real and meaningful connection must exist between the Housing Regulation and the Standards, on the one hand, and the authority granted to the Lieutenant Governor by virtue of ss.66(1)(n) and (s), on the other. I also agree with the chambers judge's conclusion, and generally with his reasons, that the challenged provisions meet this test.

overlapping regulatory schemes

per Slatter J. at para. 33-34

[33] The Applicants argue that many of the issues covered by the *Housing Standards* are also covered by the *Alberta Building Code*, and that double regulation should not be presumed. There is nothing inherently *ultra vires* about multiple regulation. For example, an abattoir may be regulated at one level for its environmental impact, at another level for worker safety concerns, at a third level for public safety concerns, and at a fourth level for public health reasons. Nevertheless, where multiple regulation is in place, the court can have regard to the overall cohesion of the system in interpreting any particular power: ***Bell ExpressVu Limited Partnership v. Rex***, 2002 SCC 42 (CanLII), 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 27. In performing this analysis, a key provision is s. 75 of the *Act*, which provides that the *Public Health Act* prevails over all other statutes except the *Alberta Bill of Rights*.

[34] It is clear that many of the topics covered by the *Housing Standards* are also covered by the *Alberta Building Code*: structural soundness, weatherproofing, electrical service and many other topics come to mind. There is an essential difference between public health regulation and building regulation, which is recognized by the *Housing Standards*:

> Housing regulations and standards are distinct and separate from building and construction codes. However, these differences are often not well understood and many people may use "housing" and "building" interchangeably. The primary intent of the

> *Minimum Housing and Health Standards* is to establish minimum conditions which are essential to good health and which make housing premises safe, sanitary and fit for human habitation. The Housing Regulation and corresponding *Minimum Housing and Health Standards* govern the conditions and maintenance, the supplied utilities, and the use and occupancy of housing. In contrast, the principal purpose of a building code is to regulate the construction of buildings by setting minimum regulations for public health, fire safety and structure sufficiency.
>
> …

overlapping provisions

Per Slatter J. at para 26-27

… On a plain reading of the *Act*, the proper interpretation of the provisions is that apartment buildings may well be both private dwellings and public places. To the extent that the *Act* imposes different standards on those two types of facilities, apartment buildings would have to comply with both. There is no basis on the wording of the *Act* for arguing that the definition of private places overrides the definition of public places, nor is there any basis for saying that apartment buildings can only fall into one and not both categories. Further, if apartments are not "rental accommodation" it is difficult to see what s. 1(ii)(viii) includes.

[27] To illustrate, s. 59 gives wide powers to enter and inspect any public place. Section 60 gives narrower powers to enter and inspect any private place. Since an apartment building appears to encompass both private dwellings and a public place, an executive officer wishing to enter an apartment unit may have to comply with both, which effectively means that the more stringent provisions in paragraph 60 would apply…incorporation of internally generated document

subdelegation

Per McFayden J.A. at para 15-19

The appellants also raise a new issue on this appeal, whether the Lieutenant Governor has improperly delegated its responsibility *vis-a-vis* the Standards to the Minister of Health and Wellness. The essence of the appellants' submission is that the adoption of the Standards effectively permits the Minister to regulate in an area that has been expressly granted to the Lieutenant Governor, and constitutes an improper delegation of delegated authority. Accordingly, the appellants seek a declaration that the entirety of the Standards is *ultra vires*.

[16] This argument … is … based on the respondents' admission that the Standards were created in July 1999 for the sole purpose of being adopted by the Housing Regulation. …

[18] I agree with the submission of the respondent that the Lieutenant Governor's adoption of the Standards that were in existence is specifically authorized by s. 66(2) of the Act and is valid.

[19] The more difficult question is whether the Lieutenant Governor may enact a standard that provides for the incorporation of future amendments by another body. However, that issue is moot, given that the Standards of concern here have not been amended. Further, as this point was not argued on the

Barbour v. The University of British Columbia, 2010 BCCA 63

retroactive application

application to pending appeals

A class action was brought against UBC to recover parking fees and fines collected by the University. The University conceded at trial that its constituting Act did not authorize it to charge parking fees or impose fines for failure to pay. However, it claimed to be exercising the common law rights of a property holder. When it lost at trial, it appealed. While the appeal was pending, the legislature amended ss. 27 and 50 of the *University Act* to give the University a power to impose and collect fines. It also enacted the following transitional provision.

> 16 (1) In this section, "**pre-amendment provision**" means any of the following sections, as those sections read at any time before their amendment by this Act:
>
> ...
>
> (d) sections 27 and 50 of the *University Act*.
>
> (2) Despite any pre-amendment provision and despite any decision of a court to the contrary made before or after the coming into force of this section, if a rule, bylaw or other instrument made under a pre-amendment provision is authorized under ... section 27 or 50 of the *University Act*, as amended by this Act,
>
> (a) the rule, bylaw or other instrument is conclusively deemed to be valid for all purposes,
>
> (b) all actions taken under the rule, bylaw or other instrument are conclusively deemed to be valid including, without limitation,
>
> (i) the collection of a fee,
>
> (ii) the removal, immobilization or impoundment of a vehicle in contravention of the rule, including for failure to pay a fee levied under the rule, bylaw or other instrument, and
>
> (iii) the imposition of a penalty, including a fine, for failure to pay a fee levied under the rule, bylaw or other instrument, and
>
> (c) no refund, restitution or other compensation may be paid in respect of fees or penalties, including fines, collected under the rule, bylaw or other instrument.
>
> (3) This section is retroactive to the extent necessary to give full force and effect to its provisions and must not be construed as lacking retroactive effect in relation to any matter by reason that it makes no specific reference to that matter.

Issue: what is the effect of this legislation on the pending appeal?

Judgment:

[16] The respondent refers us to three general principles relevant to the interpretation of the amendments and transitional provisions:

1. a presumption against retroactive application of statutory provisions;

2. a presumption against interference with vested rights; and

3. a presumption against interference with pending litigation.

[22] … [O]n our reading the Legislature has done exactly that which courts say it must do in order to pass legislation with retroactive effect – express the intention clearly. We see no room for a contrary conclusion.

[32] We consider it is clear in Canada that the Legislature may enact legislation that has the effect of retroactively altering the law applicable to a dispute. While a Legislature may not interfere with the Court's adjudicative role, it may amend the law which the court is required to apply in its adjudication.

Canada (Attorney General) v. Friends of the Canadian Wheat Board, 2012 FCA 183

"manner and form"

The Friends of the Wheat Board sought a declaration that that the Minister of Agriculture and Agri-Food failed to comply with his statutory duty under section 47.1 of the *Canadian Wheat Board Act*, R.S.C. 1985, c. C-24 ("*CWB Act*"), to consult with the Canadian Wheat Board and to obtain the consent of wheat and barley producers before introducing Bill C-18 in Parliament, a Bill to enact the *Marketing Freedom for Grain Farmers Act*.

47.1 The Minister shall not cause to be introduced in Parliament a bill that would exclude any kind, type, class or grade of wheat or barley, or wheat or barley produced in any area in Canada, from the provisions of Part IV, either in whole or in part, or generally, or for any period, or that would extend the application of Part III or Part IV or both Parts III and IV to any other grain, unless

(*a*) the Minister has consulted with the board about the exclusion or extension; and

47.1 Il ne peut être déposé au Parlement, à l'initiative du ministre, aucun projet de loi ayant pour effet, soit de soustraire quelque type, catégorie ou grade de blé ou d'orge, ou le blé ou l'orge produit dans telle région du Canada, à l'application de la partie IV, que ce soit totalement ou partiellement, de façon générale ou pour une période déterminée, soit d'étendre l'application des parties III et IV, ou de l'une d'elles, à un autre grain, à moins que les conditions suivantes soient réunies :

a) il a consulté le conseil au sujet de la mesure;

(*b*) the producers of the grain have voted in favour of the exclusion or extension, the voting process having been determined by the Minister.	*b*) les producteurs de ce grain ont voté — suivant les modalités fixées par le ministre — en faveur de la mesure.

Judgment

The Friends succeeded at first instance. Campbell J. wrote:

[30] By construing the liberal interpretation of the *Act* which best ensures the attainment of its objects, I find that the *Act* was intended to require the Minister to consult and gain consent where an addition or subtraction of particular grains or types of grain from the marketing regime is contemplated, and also in respect of a change to the democratic structure of the CWB. As the Applicants argue, it is unreasonable to interpret the *Act* to conclude that while the Minister must consult and gain consent when extracting or extending a grain, she or he is not required to consult or gain consent when dismantling the CWB; the point is made as follows: … Under the Minister's interpretation of section 47.1, farmers would be denied a vote "when it is most needed", namely, in circumstances where the CWB's exclusive marketing mandate is to be eliminated. That interpretation is not only inconsistent with the principle that the words of a statute must be placed in context, but is contrary to common sense.	[[30] En retenant une interprétation libérale de la Loi qui est compatible avec réalisation de son objet, je conclus que la Loi visait à exiger du ministre qu'il procède à une consultation et qu'il obtienne le consentement des producteurs dans les cas où il envisage l'inclusion ou l'exclusion de grains ou de types de grain au régime de commercialisation, ainsi que la modification à la structure démocratique de la CCB. Conformément à ce que prétendent les demandeurs, il est déraisonnable d'interpréter la Loi de manière à conclure que, bien que le ministre doive consulter et obtenir le consentement des producteurs lorsqu'il exclut ou inclut un grain, ce dernier n'a pas une telle obligation à l'égard du démantèlement de la CCB. Voici l'argument en ce sens : [traduction] […] Selon l'interprétation que le ministre donne à l'article 47.1, les agriculteurs n'auraient pas le droit de vote « dans le cas où ce vote est le plus nécessaire », soit dans des circonstances où le pouvoir exclusif de la CCB en matière de commercialisation serait aboli. Non seulement cette interprétation est incompatible avec le principe que les mots d'une disposition doivent être remis dans leur contexte, mais elle va à l'encontre du bon sens.
[31] Section 39 of Bill C-18 proposes to replace the whole marketing scheme of wheat in Canada by repealing the *Act* after a transition period. I find that it was Parliament's intention in introducing s. 47.1 to stop this event from occurring without the required consultation and consent.	[31] L'article 39 du projet de loi C-18 propose de remplacer l'ensemble du régime de commercialisation du blé au Canada par l'abrogation de la Loi, après une période de transition. À mon avis, le législateur ovulait, en présentant l'article 47.1, empêcher qu'une telle situation se produise si l'on n'avait pas au préalable tenu une consultation et obtenu le consentement es producteurs.

The Friends lost on appeal. The Federal Court of Appeal engaged in a lengthy analysis of the legislative evolution and history of the Canada Wheat Act and reached the following conclusion:

[57] …[s]ection 47.1 of the *CWB Act* only concerns the exclusion of certain kinds or grades of wheat or barley from the CWB's compulsory price pooling system or marketing monopoly, or the inclusion of certain grains into that monopoly or into the compulsory price pooling system.	[57] …[L]'article 47.1 de la Loi sur la CCB n'a trait qu'à l'exclusion ou à l'inclusion de certains types ou grades de blé ou d'orge par rapport au système de mise en commun obligatoire des prix ou du monopole de commercialisation de la CCB.
[58] The limited scope of section 47.1 is further evidenced by the fact that the changes under the *1998 Amendments* referred to above concerning section 47, including the addition of a subsection 47(5) which called for barley producer votes, were never proclaimed into force. That is a further indication that the government of the day did not intend to provide producers with an extensive veto power over all aspects of the *CWB Act*	[58] La portée restreinte de l'article 47.1 est de plus confirmée par le fait que les changements susmentionnés aux modifications de 1998 en rapport avec l'article 47, y compris l'ajout d'un paragraphe 47(5) qui prévoyait la tenue d'un scrutin parmi les producteurs d'orge, ne sont jamais entrés en vigueur. C'est là un signe de plus que le gouvernement de l'époque n'avait pas l'intention de donner aux producteurs un vaste droit de veto sur tous les aspects de la Loi sur la CCB.

On the manner and form issue, Mainville J.A. wrote:

The "manner and form" argument	*L'argument relatif à la « forme »*
[82] It is undisputed that one Parliament cannot bind another Parliament not to do something in the future. As noted in Hogg P., *Constitutional Law of Canada* (5th ed. Supp, vol. 1. loose leaf), at 12.3(a): > If a legislative body could bind itself not to do something in the future, then a government could use its parliamentary majority to protect its policies from alteration or repeal. This would lay a dead hand on a government subsequently elected to power in a new election with new issues. In other words, a government while in office could frustrate in advance the policies urged by the opposition.	[82] Il n'est pas contesté qu'un parlement ne peut obliger un autre à ne pas faire une certaine chose dans l'avenir. Comme il est indiqué dans Hogg P., *Constitutional Law of Canada* (5e éd. suppl., vol. 1, feuilles mobiles), à la section 12.3a) : > [TRADUCTION] Si un organe législatif pouvait s'engager à ne pas faire une certaine chose dans l'avenir, un gouvernement pourrait dans ce cas recourir à sa majorité parlementaire pour protéger ses politiques contre une modification ou une abrogation quelconque. Cette mesure lierait les mains d'un gouvernement qui serait par la suite porté au pouvoir dans le cadre d'une nouvelle élection comportant de nouveaux enjeux. Autrement dit, un gouvernement en place pourrait faire échec à l'avance aux politiques que prône l'opposition.
[83] There is also little doubt that "[t]he formulation and introduction of a bill are part of the legislative process with which the courts will not meddle": *Reference Re Canada Assistance Plan (B.C)*, above at p. 559, and that"[a] restraint on the executive in the introduction of legislation is a fetter on the sovereignty of Parliament itself":	[83] Il ne fait pas de doute non plus que « [l]a rédaction et le dépôt d'un projet de loi font partie du processus législatif dans lequel les tribunaux ne s'immiscent pas » : *Renvoi relatif au Régime d'assistance publique du Canada (C.-B.)*, précité, à la page 559, et que « [t]oute restriction imposée au

Ibid. at p. 560.	pouvoir de l'exécutif de déposer des projets de loi constitue une limitation de la souveraineté du Parlement lui-même » : *ibid.*, à la page 560.
[84] The respondents, however, submit that section 47.1 of the *CWB Act* creates obligations on the Minister acting in his executive capacity rather than in his parliamentary capacity. Consequently, they assert that the Minister's obligation set out in section 47.1 requiring him to consult with the CWB and to obtain an affirmative vote of grain producers prior to introducing legislation is nevertheless enforceable and binding notwithstanding these important constitutional principles.	[84] Les intimés soutiennent cependant que l'article 47.1 de la Loi sur la CCB impose des obligations au ministre en sa qualité de membre de l'exécutif plutôt qu'en sa qualité de membre du Parlement. Ils estiment donc que l'obligation qu'impose l'article 47.1 au ministre de consulter la CCB et d'obtenir un vote favorable des producteurs de grains avant de présenter un projet de loi est néanmoins exécutoire et impérative, malgré ces principes constitutionnels importants.
[85] The appellants answer that only "manner and form" provisions of a constitutional nature may restrict the method by which legislation may be introduced into, and adopted by, Parliament. The appellants further argue that section 47.1 of the *CWB Act* is not such a constitutional "manner and form" provision which can impose procedural requirements on Parliament's ability to adopt legislation, and that section 47.1 is consequently unenforceable under the doctrine of parliamentary sovereignty.	[85] Les appelants rétorquent que seules les dispositions « de forme » de nature constitutionnelle peuvent restreindre la manière dont le Parlement peut présenter et adopter une loi. De plus, soutiennent-ils, l'article 47.1 de la Loi sur la CCB n'est pas une disposition de forme de nature constitutionnelle qui assortit d'exigences procédurales la capacité qu'a le Parlement d'adopter des lois, et que cet article est donc inapplicable selon le principe de la souveraineté parlementaire.
	[
[86] I have serious reservations concerning the enforceability of section 47.1 of the *CWB Act* considering the doctrine of parliamentary sovereignty, the Supreme Court of Canada's decision in *Reference Re Canada Assistance Plan (B.C)*, above, and the provisions of subsection 2(2) of the *Federal Courts Act.* A provision requiring that legislation be introduced into Parliament only insofar as an outside corporation or small outside group agrees does not appear to me to be merely a procedural requirement. The effect of such a provision is to relinquish Parliament's powers in the hands of a small group not forming part of Parliament. I seriously doubt such a provision could be used to impede the introduction of legislation in Parliament or could result in the invalidation of any subsequent legislation adopted by Parliament: *Reference Re Canada Assistance Plan (B.C.)*, above at pp. 563-64, quoting approvingly in this regard King C.J. in *West Lakes Ltd. v. South Australia* (1980), 25 S.A.S.R. 389 at pp. 397-398; see also *Canada (Attorney General) v Canada (Canadian Wheat*	86] J'ai de sérieuses réserves au sujet de l'applicabilité de l'article 47.1 de la Loi sur la CCB, eu égard au principe de la souveraineté parlementaire, à la décision que la Cour suprême du Canada a rendue dans le *Renvoi relatif au Régime d'assistance publique du Canada (C.-B.)*, précité, et aux dispositions du paragraphe 2(2) de la *Loi sur les Cours fédérales*. Il ne me semble pas qu'une disposition prescrivant qu'un projet de loi ne peut être déposé au Parlement que si une société extérieure ou un petit groupe externe y consent constitue simplement une exigence procédurale. L'effet d'une telle disposition est de céder les pouvoirs du Parlement aux mains d'un petit groupe qui n'en fait pas partie. Je doute sérieusement qu'une telle disposition puisse faire obstacle à la présentation d'un projet de loi au Parlement ou mener à l'invalidation d'une loi quelconque que le Parlement adopterait par la suite : *Renvoi relatif au Régime d'assistance publique du Canada (C.-B.)*, précité, aux pages 563 et 564, citant en y souscrivant à cet égard le juge en chef King dans *West Lakes Ltd. v. South Australia* (1980), 25 S.A.S.R. 389, aux pages 397 et 398; voir aussi l'arrêt *Canada (Procureur*

Board), 2008 FCA 76 (CanLII), 2008 FCA 76, 373 N.R. 385 at para. 4. [87] I need not however finally decide this question given the conclusion reached above concerning the limited scope of section 47.1 of the *CWB Act*. As noted by J. Goldsworthy, in *Parliamentary Sovereignty, Contemporary Debates* (Cambridge University Press, 2010) at p. 174, "[o]ne of the most important questions not settled by the doctrine of parliamentary sovereignty is whether, and how, Parliament can make the legal validity of future legislation depend on compliance with statutory requirements as to procedure or form." It would be inappropriate for this Court to decide such an important and far reaching constitutional question when it is not strictly necessary to do so in order to determine the outcome of this appeal.	*général) c. Canada (Commission canadienne du blé)*, 2008 CAF 76, 373 N.R. 385, au paragraphe 4. [87] Il n'est toutefois pas nécessaire que je tranche de façon définitive cette question, vu la conclusion tirée plus tôt à propos de la portée restreinte de l'article 47.1 de la Loi sur la CCB. Comme l'a signalé J. Goldsworthy dans son ouvrage *Parliamentary Sovereignty, Contemporary Debates* (Cambridge University Press, 2010), à la page 174 : [TRADUCTION] « [l']une des questions les plus importantes que le principe de la souveraineté parlementaire ne règle pas est celle de savoir si - et comment - le Parlement peut faire en sorte que la validité juridique d'une loi à venir dépende du respect des exigences prescrites en matière de procédure ou de forme ». Il ne conviendrait pas que la Cour tranche une question constitutionnelle aussi importante et d'une portée aussi considérable s'il n'est pas strictement nécessaire de le faire pour déterminer l'issue du présent appel.

Canada (Attorney General) v. Mavi, 2011 SCC 30

administrative interpretation – regulations, forms

source of discretion - "may", nature of decision

Under both the former *Immigration Act* and the current *Immigration and Refugee Protection Act* (IRPA), citizens and permanent residents wishing to sponsor relatives under the family class immigration regime must sign an undertaking. While the content of the undertaking has varied over time, it has always included a promise to provide for the sponsored relative's essential needs and to ensure that the relative will not require social assistance during the sponsorship period. It has always provided that the sponsor is obliged to repay the amount of any benefit received by the relative from a prescribed assistance program during the sponsorship. The applicants in *Mavi* had all signed such undertakings, and all were in breach of their undertaking to repay the amount of social assistance received by their relative. Relying on subsection 145(2) of the IRPA, the government of Ontario sought to recover the amounts owing.

Right to sponsor family member **13.** (1) A Canadian citizen or permanent resident may, subject to the regulations, sponsor a foreign national who is a member of the family class. **…**	**Droit au parrainage : individus** **13.** (1) Tout citoyen canadien et tout résident permanent peuvent, sous réserve des règlements, parrainer l'étranger de la catégorie « regroupement familial ». **…**

Obligation (3) An undertaking relating to sponsorship is binding on the person who gives it. **Debts due — sponsors** **145.** (2) Subject to any federal-provincial agreement, an amount that a sponsor is required to pay under the terms of an undertaking is payable on demand to Her Majesty in right of Canada and Her Majesty in right of the province concerned and may be recovered by Her Majesty in either or both of those rights. **Recovery of debt** (3) A debt may be recovered at any time. [Subsection 118(2) of the former Act was in much the same terms]	**Obligation** (3) L'engagement de parrainage lie le répondant. **Créance : répondants** **145.** (2) Sous réserve de tout accord fédéro-provincial, le montant que le répondant s'est engagé à payer au titre d'un engagement est payable sur demande et constitue une créance de Sa Majesté du chef du Canada et de Sa Majesté du chef de la province que l'une ou l'autre, ou les deux, peut recouvrer. **Recouvrement** (3) Le recouvrement de la créance n'est pas affecté par le seul écoulement du temps.

Focusing in particular on the word "may" in the subsection, the applicants argued that subsection 145(2) confers a discretion on the government that has to be exercised fairly and on a case by case basis, taking into account the personal circumstances of each debtor.

Issues:

Whether the Minister owes a duty of procedural fairness when attempting to recover sponsorship debt under subsection 145(2)

Whether sponsorship undertakings are mere contracts whose enforcement does not give rise to a duty of procedural fairness

The role of regulations in interpreting a statute

The role of administrative forms, authorized by statute, in interpreting a statute

The Judgment:

Whether a duty of procedural fairness is owed.

The Court began with the following statement of general principle:

[39]… while the content of procedural fairness varies with circumstances and the legislative and administrative context, it is certainly not to be presumed that Parliament intended that administrative officials be free to deal unfairly with people subject to their decisions. On the contrary, the general rule is that a duty of fairness applies … but the general rule will yield to clear statutory language or necessary implication to the contrary.	39] […] même si les exigences de l'équité procédurale varient en fonction des circonstances et du contexte législatif et administratif, on ne peut certainement pas présumer que le législateur a voulu permettre à l'administration de traiter inéquitablement ses administrés. La règle générale veut au contraire qu'il y ait obligation de faire preuve d'équité, sauf disposition législative claire ou déduction nécessaire écartant son application.

In the view of the Court, use of the word "may" in subsection 145(2) was somewhat significant. Binnie J. wrote:

[54] The applications judge thought the word "may" simply enables either level of government to enforce the undertaking. The point, however, is that nothing in the relevant sections explicitly requires Her Majesty to pursue collection of debts irrespective of the circumstances. Legislative use of the word "may" usually connotes a measure of discretion (Interpretation Act, R.S.C. 1985, c. I-21, s. 11). This is as one would expect. It seems too clear for argument that Parliament intended the federal and provincial Crowns to deal with debt collection in a rational, reasonable and cost-effective way.	[54] Selon la juge des requêtes, le législateur emploie le verbe « pouvoir » uniquement pour habiliter *l'un ou l'autre* ordre de gouvernement à faire respecter l'engagement. Ce qu'il faut souligner toutefois c'est qu'aucune des dispositions applicables n'*exige* expressément de Sa Majesté qu'elle recouvre une créance sans tenir compte des circonstances. Habituellement, l'emploi du verbe « pouvoir » par le législateur connote un certain pouvoir discrétionnaire (*Loi d'interprétation*, L.R.C. 1985, ch. I-21, art. 11). C'est l'interprétation qui paraît la plus naturelle. Il paraît trop manifeste pour soutenir le contraire que le législateur a voulu un recouvrement des créances — à l'échelon fédéral ou provincial — rationnel, sensé et économique.

In concluding that a duty of procedural fairness was owed, Binnie J. relied primarily on purpose and scheme analysis. Nearly all of the sponsorship scheme was set out in the Regulations. Section 135 of the Regulations was critical in Binnie J.'s analysis because it showed that the government had discretion: "the government is authorized to limit enforcement to whatever amount is agreed upon with the sponsor."

135. For the purpose of subparagraph 133(1)(*g*)(i), the default of a sponsorship undertaking (*a*) begins when (i) a government makes a payment that the sponsor has in the undertaking promised to repay, or (ii) an obligation set out in the undertaking is breached; and (*b*) ends, as the case may be, when (i) the sponsor reimburses the government concerned, in full or in accordance with an agreement with that government, for amounts paid by it, or (ii) the sponsor ceases to be in breach of the obligation set out in the undertaking.	**135.** Pour l'application du sous-alinéa 133(1)*g*)(i), le manquement à un engagement de parrainage : *a*) commence, selon le cas : (i) dès qu'un paiement auquel le répondant est tenu au titre de l'engagement est effectué par une administration, (ii) dès qu'il y a manquement à quelque autre obligation prévue par l'engagement; *b*) prend fin dès que le répondant : (i) d'une part, rembourse en totalité ou selon tout accord conclu avec l'administration intéressée les sommes payées par celle-ci, (ii) d'autre part, s'acquitte de l'obligation prévue par l'engagement à l'égard de laquelle il y avait manquement.

Enforcement of undertakings as contracts

The Crown cited the *Dunsmuir* case in arguing that the undertakings were mere contracts which do not give rise to a duty of procedural fairness. This argument did not succeed. Binnie J. wrote:

[48] *Dunsmuir* dealt with an employment relationship that was found by the Court to be governed by contract. The fact the contracting employee was a senior public servant did not turn a private claim for breach of contract into a public law adjudication. Here, on the other hand, the terms of sponsorship are dictated and controlled by statute. The undertaking is required by statute and reflects terms fixed by the Minister under his or her statutory power. …	[48] Dans l'arrêt *Dunsmuir*, la Cour statue sur un lien d'emploi qui, selon elle, ressortit au droit contractuel. Même si l'employé contractuel était un haut fonctionnaire, le recours privé pour rupture de contrat n'est pas devenu pour autant un recours de droit public. Par contre, dans la présente affaire, la loi fixe et régit les conditions du parrainage. L'engagement du répondant procède d'une exigence légale, et ses clauses sont établies par le ministre en vertu d'un pouvoir qu'il tient de la loi. [...]

Reliance on Regulations to interpret statutes

The Court justified its reliance on the regulations to assist in the interpretation of the Act as follows:

[57] The Regulations are also an important part of the statutory context. In *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152, Deschamps J. noted that regulations "can assist in ascertaining the legislature's intention", particularly where the statute and the regulations form an integrated scheme (para. 35). See also *Greater Toronto Airports Authority v. International Lease Finance Corp.* (2004), 69 O.R. (3d) 1 (C.A.), at paras. 102-4; *Ward-Price v. Mariners Haven Inc*. (2001), 57 O.R. (3d) 410 (C.A.), at para. 29. Professor Sullivan notes at p. 370 of her treatise that "[w]hen regulations are made to complete the statutory scheme, they are clearly intended to operate together [with the enabling statute] and to be <u>mutually</u> informing" (Sullivan on the Construction of Statutes (5th ed. 2008) (emphasis added)). Section 2(2) of the IRPA states that references to "this Act" include the Regulations.	[57] Le Règlement constitue aussi un volet important du contexte légal. Dans l'arrêt *Monsanto Canada Inc. c. Ontario (Surintendant des services financiers)*, 2004 CSC 54, [2004] 3 R.C.S. 152, la juge Deschamps dit que la consultation du règlement « est utile dans la détermination de l'intention du législateur », surtout lorsque la loi et ses règlements forment un tout (par. 35). Voir par ailleurs *Greater Toronto Airports Authority c. International Lease Finance Corp.* (2004), 69 O.R. (3d) 1 (C.A.), par. 102-104, *Ward-Price c. Mariners Haven Inc.* (2001), 57 O.R. (3d) 410 (C.A.), par. 29. Comme le fait remarquer la professeure Sullivan, [TRADUCTION] « [l]orsqu'un règlement sert à compléter le régime législatif, il est clair que l'intention du législateur est que la loi et le règlement soient appliqués ensemble et forment <u>un tout</u> » (*Sullivan on the Construction of Statutes* (5e éd. 2008), p. 370 (je souligne)). En outre, le par. 2(2) de la *LIPR* énonce que toute mention de celle-ci vaut mention du Règlement.

Reliance on administrative forms to interpret statute

In its analysis of the statutory scheme, the Ontario Court of Appeal relied not only on the regulations made under the IPRA, but also on the content of the undertakings entered into by sponsors under the Act. The content of the undertakings was fixed by the Minister under a statutory power to make forms. With respect to the undertakings, Binnie J. wrote:

[61] Unlike the Court of Appeal, I interpret the *IRPA* and its regulations without reference to the terms of the sponsorship undertakings themselves, which are drafted by the Minister and his officials and can be (and are) modified from time to time. At best the undertakings reflect an administrative interpretation of the legislative framework. It would be different in the case of forms that are actually appended to statutes, and which therefore carry the authority of Parliament, which is not the case here. See *Houde v. Quebec Catholic School Commission*, [1978] 1 S.C.R. 937, at p. 947; Sullivan, at pp. 408-09. [67]… The importance of the signed undertakings in the administrative law context is that they lay the foundation for the application of the doctrine of legitimate expectations, as discussed below….	[61] Contrairement à la Cour d'appel, j'interprète la *LIPR* et le Règlement sans égard au texte des engagements de parrainage, car ce texte est établi par le ministre et ses fonctionnaires et peut changer (et change effectivement) à l'occasion. Les engagements sont tout au plus le reflet d'une interprétation administrative du cadre législatif. Il en irait autrement d'un formulaire annexé au texte de la loi, qui y serait dès lors assimilé, mais ce n'est pas le cas des documents considérés en l'espèce. Voir l'arrêt *Houde c. Commission des écoles catholiques de Québec*, [1978] 1 R.C.S. 937, p. 947; Sullivan, p. 408-409. [67] […] L'importance de l'engagement signé dans le contexte du droit administratif réside dans le fait qu'il jette les bases de l'application de la théorie de l'attente légitime analysée plus loin. […]

Canada (Attorney General) v. Mercier, 2010 FCA 167

overlapping powers

On May 5, 2008, under section 97 of the *Corrections and Conditional Release Act*, the Commissioner of the Correctional Service of Canada issued a Directive banning smoking and possession of smoking items, indoors and outdoors, within the perimeter of federal correctional facilities, except for aboriginal religious and spiritual practices. Under section 98, the Directive was designated a Commissioner's Directive.

The respondents sought judicial review on the grounds that their Charter rights had been violated and on the further grounds that the Directive exceeded the powers conferred on the Commissioner by section 97.

Issues:

Were the respondents required by section 57 of the *Federal Courts Act* to give provincial Attorneys General notice of the constitutional issue?

Was the Directive invalid in any case having regard to the regulation making powers conferred on the Governor in Council by section 96 of the *Corrections and Conditional Release Act*?

Federal Courts Act	*Loi sur les cours fédérales*
57. (1) If the constitutional validity, applicability or operability of an Act of Parliament or of the legislature of a province, or of regulations made	**57.** (1) Les lois fédérales ou provinciales ou leurs textes d'application, dont la validité, l'applicabilité ou l'effet, sur le plan constitutionnel, est en cause

under such an Act, is in question before the Federal Court of Appeal or the Federal Court … the Act or regulation shall not be judged to be invalid, inapplicable or inoperable unless notice has been served on the Attorney General of Canada and the attorney general of each province in accordance with subsection (2).	devant la Cour d'appel fédérale ou la Cour fédérale … ne peuvent être déclarés invalides, inapplicables ou sans effet, à moins que le procureur général du Canada et ceux des provinces n'aient été avisés conformément au paragraphe (2).

Corrections and Conditional Release Act	*Loi sur le système correctionnel et la mise en liberté sous condition*
70. The Service shall take all reasonable steps to ensure that penitentiaries, the penitentiary environment, the living and working conditions of inmates and the working conditions of staff members are safe, healthful and free of practices that undermine a person's sense of personal dignity.	**70**. Le Service prend toutes mesures utiles pour que le milieu de vie et de travail des détenus et les conditions de travail des agents soient sains, sécuritaires et exempts de pratiques portant atteinte à la dignité humaine.
96. The Governor in Council may make regulations …	**96**. Le gouverneur en conseil peut prendre des règlements : […]
(e) providing for the matters referred to in section 70;	e) régissant les questions visées à l'article 70;
97. Subject to this Part and the regulations, the Commissioner may make rules (a) for the management of the Service; (b) for the matters described in section 4; and (c) generally for carrying out the purposes and provisions of this Part and the regulations.	**97.** Sous réserve de la présente partie et de ses règlements, le commissaire peut établir des règles concernant : *a*) la gestion du Service; *b*) les questions énumérées à l'article 4; *c*) toute autre mesure d'application de cette partie et des Règlements
98. (1) The Commissioner may designate as Commissioner's Directives any or all rules made under section 97.	**98.** (1) Les règles établies en application de l'article 97 peuvent faire l'objet de directives du commissaire.
(2) The Commissioner's Directives shall be accessible to offenders, staff members and the public.	(2) Les directives doivent être accessibles et peuvent être consultées par les délinquants, les agents et le public.

Judgment:

Is the Commissioner's Directive a regulation for purposes of section 57 of the *Federal Court Act*?

Nadon J.A. wrote:

[57] Section 2 of the *Interpretation Act*, R.S. 1985, c. I-21, defines "regulation" as follows:

"regulation" includes an order, regulation, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established (a) in the execution of a power conferred by or under the authority of an Act, or (b) by or under the authority of the Governor in Council; [Emphasis added]	« règlement » Règlement proprement dit, décret, ordonnance, proclamation, arrêté, règle judiciaire ou autre, règlement administratif, formulaire, tarif de droits, de frais ou d'honoraires, lettres patentes, commission, mandat, résolution ou autre acte pris : a) soit dans l'exercice d'un pouvoir conféré sous le régime d'une loi fédérale; b) soit par le gouverneur en conseil ou sous son autorité. [Non souligné dans l'original]

[58] Section 97 of the Act confers upon the Commissioner the power to make rules and subsection 98(1) confers upon him the power to designate "any or all rules made under section 97" as a "Commissioner's Directive". Consequently, it is my view that a "Commissioner's Directive" is a "rule … or other instrument issued, made or established *(a)*in the execution of a power conferred by or under the authority of an Act"within the meaning of section 2 of the *Interpretation Act*. Thus, the Directive constitutes, for the purposes of subsection 57(1) of the *Federal Courts Act*, a "regulation" and, as a result, a notice of constitutional question is necessary to challenge its constitutionality.	[58] L'article 97 de la Loi confère au commissaire le pouvoir d'établir des règles, et le paragraphe 98(1) prévoit que « [l]es règles établies en application de l'article 97 peuvent faire l'objet de directives du commissaire ». J'estime en conséquence que les « directives du commissaire » sont une « règle judiciaire ou autre [...] ou [un] autre acte pris : *a*) [...] dans l'exercice d'un pouvoir conféré sous le régime d'une loi fédérale » au sens de l'article 2 de la *Loi d'interprétation*. La Directive constitue donc un « texte d'application » (« regulations ») au sens du paragraphe 57(1) de la *Loi sur les Cours fédérales*, et un avis de question constitutionnelle est nécessaire pour en contester la constitutionnalité.

[Note that the definition of "regulation" relied on by Nadon J. is set out in subsection 2(1) which begins with the following words:

2.(1) In this Act,	2. (1) Les définitions qui suivent s'appliquent à la présente loi.

Compare the comment of Charron J. in Canada v. Canada, 2011 SCC 25 at para 71 (see p. 36 of this text).

Is the Commissioner's power to make Directives constrained by the regulation-making power of the Governor in Council?

[63] I am satisfied that the Commissioner is not prohibited from issuing Directives regarding matters found in section 70 simply because the Act authorizes the Governor in Council to make regulations in regard to those matters.	[63] J'estime que le simple fait que la Loi autorise le gouverneur en conseil à prendre des règlements régissant les questions visées à l'article 70 n'empêche pas la prise de directive à leur égard par le commissaire.
[64] First, section 70 of the Act makes it clear that it is CSC's duty to "take all reasonable steps to ensure that … the living and working conditions of inmates and the working conditions of staff members are safe, healthful…".	[64] Premièrement, l'article 70 de la Loi énonce clairement qu'il incombe au SCC de prendre « toutes mesures utiles pour que le milieu de vie et de travail des détenus et les conditions de travail des agents soient sains, sécuritaires [...] ».
[65] Second, limiting the Commissioner's ability to issue Directives because of the Governor in Council's power to enact regulations is, in my view, inconsistent with the opening words of section 97, which make it clear that the Commissioner's power to make rules is "[S]ubject to this Part and the regulations". In other words, while the Commissioner may make rules, the Governor in Council may make regulations-in relation to the same subject matter and if it does, the regulations prevail over the rules. Given the nature of the Commissioner's duties and the broad discretion that he has been given in order to carry them out, Parliament surely did not intend to prevent the Commissioner from issuing Directives by reason of section 96.	[65] Deuxièmement, il serait incompatible avec le libellé introductif de l'article 97 – lequel énonce clairement que le pouvoir du commissaire en matière de directives s'exerce « [s]ous réserve de la présente partie et de ses règlements » – de limiter la capacité du commissaire d'établir des directives à cause du pouvoir réglementaire du gouverneur en conseil. Autrement dit, le commissaire peut établir des règles, et le gouverneur en conseil peut prendre des règlements sur les mêmes questions; s'il le fait, ses règlements ont préséance sur les règles. Étant donné la nature des obligations du commissaire et le vaste pouvoir discrétionnaire qui lui a été dévolu pour lui permettre de s'en acquitter, il n'entrait certainement pas dans l'intention du législateur que l'article 96 empêche le commissaire d'établir des directives.
[67] Lastly, I believe that it is likely that Parliament intended significant overlap between the Commissioner's power to issue Directives and the Governor in Council's authority to enact regulations. The prevailing approach to resolving conflicts between legislation and subordinate legislation, which is somewhat analogous to the doctrine of federal paramountcy, in no way precludes overlap.	[67] Je crois probable, enfin, que le chevauchement substantiel entre le pouvoir du commissaire d'établir des directives et le pouvoir réglementaire du gouverneur en conseil était voulu par le législateur. Le mécanisme auquel on recourt pour résoudre les conflits entre lois et textes de législation déléguée, qui s'apparente quelque peu à la doctrine de la prépondérance fédérale, n'interdit nullement le chevauchement
[68] In many administrative schemes, such overlap will be highly desirable, as instruments of administrative decision-making like Directives, rules and guidelines, are typically more flexible and easier to institute, revoke or change as the circumstances require: *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198 (CanLII), 2007 FCA 198, at paragraphs 90-109, particularly 106-109; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, 1992 CanLII 110 (S.C.C.), [1992] 1 S.C.R. 3, at paragraphs 41-42; see also R. Sullivan, *Sullivan on*	[68] En matière administrative, il arrivera souvent que le chevauchement soit éminemment souhaitable, car les instruments du processus décisionnel administratif que sont les directives, règles et lignes directrices offrent généralement plus de souplesse et sont plus faciles à établir, révoquer ou modifier en fonction des besoins : *Thamotharem c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2007 CAF 198, aux paragraphes 90 à 109, en particulier les paragraphes 106 à 109; *Friends of the Oldman River Society c. Canada (Ministre des Transports)*,

the Construction of Statutes, 5th ed., (Markham: LexisNexis Canada, 2008), at 623-24. Flexibility is likely an important part of the rationale for overlapping authority in the scheme established by the Act; different aspects of the same matter may be better addressed by Regulation or by Directive.	[1992] 1 R.C.S. 3, aux paragraphes 41 et 42; voir aussi R. Sullivan, *Sullivan on the Construction of Statutes*, 5e éd., (Markham: LexisNexis Canada, 2008), aux pages 623 et 624. La souplesse est probablement une raison d'être importante du chevauchement de pouvoirs existant dans le régime établi par la Loi; un règlement ou une directive peuvent chacun traiter plus efficacement différents aspects d'une même question.

Canada (Canadian Human Rights Commission) v. Canada (Attorney General), 2011 SCC 53

presumption of consistent expression rebutted by presumption against tautology

legislative history – bills that die on the order paper

legal terms of art

administrative interpretation

In 1998 M filed a complaint with the Canadian Human Rights Commission concerning incidents occurring before her dismissal from the military in 1995. The complaint was eventually heard by the Canadian Human Rights Tribunal, which found that her complaint of sexual harassment was substantiated. In 1995 the relevant provisions of the *Canadian Human Rights Act* read as follows:

53. (2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, it may . . . make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that it considers appropriate:	**53.** (2) À l'issue de l'instruction, le membre instructeur qui juge la plainte fondée, peut […] ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire :
(a) that the person cease the discriminatory practice and, in order to prevent the same or a similar practice from occurring in the future, take measures …	*(a)* de mettre fin à l'acte et de prendre, […] des mesures de redressement ou des mesures destinées à prévenir des actes semblables, notamment […]
(c) that the person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice; and	*c*) d'indemniser la victime de la totalité, ou de la fraction des pertes de salaire et des dépenses entraînées par l'acte;
(d) that the person compensate the victim, as the Tribunal may consider proper, for any or all additional cost of obtaining alternative goods,	*d*) d'indemniser la victime de la totalité, ou de la fraction des frais supplémentaires occasionnés par le

services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice. (3) In addition to any order that the Tribunal may make pursuant to subsection (2), if the Tribunal finds that … (*b*) the victim of the discriminatory practice has suffered in respect of feelings or self-respect as a result of the practice, the Tribunal may order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine.	recours à d'autres biens, services, installations ou moyens d'hébergement, et des dépenses entraînées par l'acte; (3) Outre les pouvoirs que lui confère le paragraphe (2), le tribunal peut ordonner à l'auteur d'un acte discriminatoire de payer à la victime une indemnité de cinq mille dollars, s'il en vient à la conclusion, selon le cas : […] (*b*) que la victime en a souffert un préjudice moral.

[9] The Tribunal awarded $4,000 (plus interest, taking the award to the maximum of $5,000, the statutory limit at the time), to compensate the appellant for "suffering in respect of feelings or self respect." It found that the version of the Act which was in force when Ms. Mowat filed her claim applied to the case, and substantial amendments made in 1998 should not apply retroactively. It then asked for further submissions regarding her claim for legal costs, which she indicated totaled more than $196,000. At issue was whether the Tribunal's authority to award a complainant "any expenses incurred by the victim as a result of the discriminatory practice" under ss. 53(2)(*c*) and (*d*) of the *CHRA* includes the authority to award legal costs. [10] In a separate decision, Member Sinclair reviewed the conflicting Federal Court jurisprudence and policy considerations favouring reimbursement and found that he was empowered to award legal costs 2006 CHRT 49 (CanLII), (2006 CHRT 49 (CanLII) (the "costs decision")). Without recovery of legal costs, he found, any victory would be "pyrrhic" (para. 29). He then awarded $47,000 in partial satisfaction of Ms. Mowat's legal bills, an amount which he based on the volume of evidence for the substantiated sexual harassment allegation in comparison with the rest	[9] Le Tribunal accorde à l'appelante la somme de 4 000 $ qui, majorée de l'intérêt, atteint 5 000 $, soit le maximum alors prévu par la loi pour le préjudice moral (par. 7). Il conclut à l'application des dispositions de la Loi qui étaient en vigueur au moment où M^{me} Mowat a déposé sa plainte et à la non-rétroactivité des modifications substantielles apportées en 1998 (par. 399-401). Il demande ensuite à l'appelante de lui présenter des observations complémentaires au sujet des dépens réclamés s'élevant au total à plus de 196 000 $. Il lui fallait décider si le pouvoir du Tribunal d'indemniser la victime « des dépenses entraînées par l'acte [discriminatoire] » conféré aux al. 53(2)*c*) et *d*) de la *LCDP* comprenait celui d'adjuger des dépens. 10] Dans une décision distincte, après examen de la jurisprudence contradictoire de la Cour fédérale et des considérations de principe favorables au paiement des frais de justice, le membre instructeur Sinclair s'estime investi du pouvoir d'adjuger des dépens (2006 TCDP 49 (CanLII) (la « décision relative aux dépens »)). Il conclut que le plaignant qui aurait gain de cause sans pouvoir recouvrer ses dépens remporterait une victoire fort « coûteuse » (par. 29). Il accorde alors à M^{me} Mowat 47 000 $ pour ses frais juridiques, un montant qu'il établit en fonction du nombre d'éléments de preuve présentés à l'appui de l'allégation de harcèlement sexuel —

of the unsubstantiated complaints.	dont le bien-fondé est reconnu — par rapport au reste de la preuve offerte à l'appui des allégations rejetées.

Issue: Did the Tribunal make a reviewable error in deciding that it could award compensation for legal costs?

Judgment (written by Lebel and Cromwell JJ.):

[35] Turning to the text of the provisions in issue, the words "any expenses incurred by the victim", taken on their own and divorced from their context, are wide enough to include legal costs.	[35] En ce qui concerne le texte des dispositions en cause, considérés isolément et indépendamment de leur contexte, les mots « des dépenses entraînées par l'acte » sont suffisamment larges pour englober les dépens.
…	[…]
[37] It is significant, in our view, that the phrase "that the person compensate the victim . . . for any expenses incurred by the victim as a result of the discriminatory practice" appears twice, in two subsequent paragraphs. The wording is identical, but on each occasion it appears, the reference to expenses is preceded by specific, but different, wording. The repetition of the reference to expenses and the context in which this occurs strongly suggest that the expenses referred to in each paragraph take their character from the sort of compensation contemplated by the surrounding words of each paragraph. So, in s. 53(2)(*c*), the person must compensate the victim for lost wages and any expenses incurred by the victim as a result of the discriminatory practice. In s. 53(2)(*d*), compensation is for the additional costs of obtaining alternate goods, services, facilities, or accommodation in addition to expenses incurred. If the use of the term "expenses" had been intended to confer a free-standing authority to confer costs in all types of complaints, it is difficult to understand why the grant of power is repeated in the specific contexts of lost wages and provision of services and also why the power to award expenses was not provided for in its own paragraph rather than being repeated in the two specific contexts in which it appears. This suggests that the term "expenses" is intended to mean something different in each of paragraphs (*c*) and (*d*).	[37] Il nous paraît significatif que l'expression « indemniser la victime [. . .] des dépenses entraînées par l'acte » figure dans deux alinéas successifs. Le texte est identique, mais chaque fois, le renvoi aux dépenses est précédé d'un libellé particulier et différent. La répétition du mot « dépenses » et le contexte dans lequel celui-ci est employé donnent franchement à penser que la nature des dépenses visées dépend du type d'indemnité prévu par le libellé particulier de chacun de ces alinéas. Ainsi, à l'al. 53(2)*c*), l'auteur de l'acte discriminatoire est tenu d'indemniser la victime des pertes de salaire et des dépenses entraînées par l'acte. À l'alinéa 53(2)*d*), l'indemnité vise les frais supplémentaires occasionnés par le recours à d'autres biens, services, installations ou moyens d'hébergement, en plus des dépenses entraînées par l'acte discriminatoire. Si l'emploi du mot « dépenses » vise à conférer le pouvoir distinct d'accorder des dépens pour tous les types de plaintes, on conçoit difficilement que ce pouvoir soit attribué non seulement dans le contexte de la perte de salaire, mais aussi dans celui de la fourniture de services et que le pouvoir d'adjuger des dépens ne fasse pas l'objet d'un alinéa distinct au lieu d'être prévu dans le contexte précis de deux alinéas. On peut en conclure que l'intention du législateur était de faire en sorte que le mot « dépenses » ait un sens différent à chacun des al. *c*) et *d*).
[38] The interpretation adopted by the Tribunal makes the repetition of the term "expenses" redundant and fails to explain why the term is linked to the particular types of compensation described in each of those paragraphs. This interpretation therefore violates	[38] L'interprétation retenue par le Tribunal rend superflue la répétition du mot « dépenses » et n'explique pas le rattachement de ce terme à l'indemnité visée par chacun des alinéas. Elle va à l'encontre de la présomption d'absence de tautologie qu'établissent les règles d'interprétation législative. La professeure Sullivan signale d'ailleurs à la p. 210 de son ouvrage que

the legislative presumption against tautology. As Professor Sullivan notes, at p. 210 of her text, "[i]t is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain.	[TRADUCTION] « [l]e législateur est présumé ne pas utiliser de mots superflus ou dénués de sens, ne pas se répéter inutilement ni s'exprimer en vain.
…	[…]
[40] Moreover, the term "costs", in legal parlance, has a well-understood meaning that is distinct from either compensation or expenses. It is a legal term of art because it consists of "words or expressions that have through usage by legal professionals acquired a distinct legal meaning": Sullivan, at p. 57. Costs usually mean some sort of compensation for legal expenses and services incurred in the course of litigation. If Parliament intended to confer authority to order costs, it is difficult to understand why it did not use this very familiar and widely used legal term of art to implement that purpose. As we shall see shortly, the legislative history of the statute also strongly supports the inference that this was not Parliament's intent.	[40] Qui plus est, dans le vocabulaire juridique, le terme « dépens » possède un sens bien défini qui diffère de celui d'« indemnité » ou de « dépenses ». Il s'agit d'un terme technique propre à la langue du droit en ce qu'il correspond à [TRADUCTION] « un mot ou une expression qui, du fait de son emploi par les professionnels du droit, a acquis un sens juridique distinct » (Sullivan, p. 57). Les « dépens » s'entendent habituellement d'une indemnité accordée pour les frais de justice engagés et les services juridiques retenus dans le cadre d'une instance. Si le législateur a entendu conférer le pouvoir d'adjuger des dépens, on comprend mal pourquoi il n'a pas employé ce terme juridique consacré et largement répandu pour le faire. Nous verrons plus loin que l'historique de la loi donne aussi sérieusement à penser que telle n'était pas l'intention du législateur.
…	[…]
[43] … Legislative evolution consists of the provision's initial formulation and all subsequent formulations. Legislative history includes material relating to the conception, preparation and passage of the enactment….	[43] […] L'évolution législative s'entend de la formulation initiale, puis subséquente, d'une disposition, et l'historique législatif, des éléments touchant à la conception, à l'élaboration et à l'adoption du texte de loi. […]
[44] We think there is no reason to exclude proposed, but unenacted, provisions to the extent they may shed light on the purpose of the legislation. While great care must be taken in deciding how much, if any, weight to give to these sorts of material, it may provide helpful information about the background and purpose of the legislation, and in some cases, may give direct evidence of legislative intent: Sullivan, at p. 609; Côté, at p. 507; *Doré v. Verdun (City)*, 1997 CanLII 315 (SCC), [1997] 2 S.C.R. 862, at para. 37). This Court, in *M. v. H.*, 1999 CanLII 686 (SCC), [1999] 2 S.C.R. 3, has held that failed legislative amendments can constitute evidence of Parliamentary purpose: paras. 348-49, *per* Bastarache J.	[44] Nous croyons que rien ne justifie d'oublier les dispositions envisagées mais non retenues dans la mesure où elles peuvent contribuer à la détermination de l'objet de la loi. Une grande prudence s'impose quant à l'importance éventuelle qu'il convient de leur accorder. Cependant, elles peuvent renseigner utilement sur l'historique et l'objet de la loi et, dans certains cas, offrir un élément de preuve direct de l'intention du législateur (Sullivan, p. 609; Côté, p. 507; *Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862, par. 37). Dans l'arrêt *M. c. H.*, [1999] 2 R.C.S. 3, notre Cour a statué qu'un projet de modification législative rejeté pouvait servir à établir l'intention du législateur : par. 348-349, le juge Bastarache.
…	[…]
[46] Before the *Canadian Human Rights Act* was enacted in 1977, there was an earlier attempt to enact	[46] L'adoption en 1977 de la *Loi canadienne sur les droits de la personne* a été précédée par le dépôt, en 1975, du projet de loi C-72 intitulé *Loi visant à compléter la législation canadienne actuelle en matière*

similar legislation. In 1975, Bill C-72, *An Act to extend the present laws in Canada that proscribe discrimination and that protect the privacy of individuals*, 1st Sess., 30th Parl., received first reading. It provided a specific costs jurisdiction for the Tribunal *in addition to* authority to award expenses which was expressed in wording that was virtually identical to the current s. 53(2). Clause 37(4) of Bill C-72 read as follows: (4) The costs of and incidental to any hearing before a Tribunal are in the discretion of the Tribunal, which may direct that the whole or any part thereof be paid by any party to such hearing.	*de discrimination et de protection de la vie privée*, 1re sess., 30e lég., qui a franchi l'étape de la première lecture. Le projet conférait expressément au Tribunal le pouvoir d'adjuger des dépens *en plus de* celui d'accorder une indemnité pour les frais. Le libellé des dispositions en cause était pour ainsi dire identique à celui de l'actuel par. 53(2). Le paragraphe 37(4) du projet de loi C-72 disposait : (4) Les dépens de l'enquête et les frais qui en découlent sont laissés à la discrétion du tribunal.
[47] Bill C-72 died on the order paper. When Bill C-25, which ultimately became the *CHRA* in 1977, was introduced, the explicit authority to award costs, which had been granted in cl. 37(4) of Bill C-72, was deleted, while the authority to award expenses was retained….	[47] Le projet de loi C-72 est mort au Feuilleton. Lors du dépôt du projet de loi C-25, devenu la *LCDP* en 1977, le pouvoir exprès d'adjuger des dépens que prévoyait le par. 37(4) du projet de loi C-72 a été omis, alors que celui d'indemniser des frais occasionnés a été retenu. […]
[48] This piece of the legislative history of the provision before us strongly suggests that "costs" was used as a term of art when the intention was to confer authority to award legal costs. This view is further reinforced by amendments that were proposed, but not enacted, in 1992. Clause 24(3) of Bill C-108, *An Act to amend the Canadian Human Rights Act and other Acts in consequence thereof*, 3rd Sess., 34th Parl., 1991-92, provided that the Tribunal could order the Commission to pay costs….Clause 21 (adding s. 48.9(1)(*h*)) also would have allowed the Human Rights Tribunal Panel, with the approval of the Governor in Council, to make rules of procedure governing awards of interest and costs.	[48] Ce volet de l'historique des dispositions qui nous intéressent permet de conclure que le terme technique « dépens » est employé lorsqu'il s'agit de conférer le pouvoir d'indemniser une partie de ses frais de justice. Cette interprétation se voit confirmée par les modifications proposées en 1992, mais non adoptées par la suite. En effet, le par. 24(3) du projet de loi C-108 — *Loi modifiant la Loi canadienne sur les droits de la personne et d'autres lois en conséquence*, 3e sess., 34e lég., 1991-92 — prévoyait que le Tribunal pouvait condamner la Commission aux dépens. […] De plus, l'art. 21 (qui ajoutait l'al. 48.9(1)*h*)) aurait permis au Comité du tribunal des droits de la personne d'établir, avec l'approbation du gouverneur en conseil, des règles de procédure régissant l'adjudication des frais, des dépens et des intérêts.
[49] These provisions received first reading in December of 1992, but did not proceed further and were not enacted. However, they again show that the word "costs" was understood to be a legal term of art to be used when the intention was to confer authority to order payment of legal costs.	[49] Ces dispositions ont franchi l'étape de la première lecture en décembre 1992, mais elles n'ont connu aucune suite, de sorte qu'elles n'ont pas été adoptées. Cependant, elles montrent encore une fois que le mot « dépens » était perçu comme un terme technique propre au droit et que son emploi visait à conférer le pouvoir de condamner au paiement des frais de justice.
…	[…]
[53] A further element of context is that the Commission itself has consistently understood that the *CHRA* does not confer jurisdiction to award costs and has repeatedly urged Parliament to amend the Act in this	[53] S'inscrit également dans le contexte le fait que la Commission elle-même a toujours considéré que la *LCDP* ne conférait pas le pouvoir d'adjuger des dépens et qu'elle a maintes fois exhorté le législateur à

respect. … [56] While, as noted, the Commission's views about the limits of its statutory powers are not binding on the court, they may be considered. The Commission is the body charged with the administration and enforcement of the *CHRA* on a daily basis and possesses extensive knowledge of and familiarity with the Act. Its long-standing and consistently held view that the Act does not allow for costs, while not determinative, is entitled to some weight in the circumstances of this case. [57] The respondent also urges us to consider parallel legislation in the provinces and territories and we agree that this is a useful exercise in this case. […] [58] The Court has made use of parallel legislation as an interpretative aid in other cases. For example, in *Canada (Attorney General) v. Public Service Alliance of Canada*, 1991 CanLII 88 (SCC), [1991] 1 S.C.R. 614, Sopinka J. looked at several pieces of comparable provincial legislation to assist him in determining whether the federal legislation allowed the Public Service Staff Relations Board to decide who is an employee under its enabling legislation (pp. 631-32). Another example of this approach is found in *Morguard Properties Ltd. v. City of Winnipeg*, 1983 CanLII 33 (SCC), [1983] 2 S.C.R. 493, where Estey J. relied on a comparative analysis between Manitoba's legislation, and that of the other provinces, when deciding whether Winnipeg intended to freeze property tax assessments (pp. 504-5). [59] In this case, resort to parallel provincial and territorial legislation is helpful in one limited respect. It tends to confirm the view that the word "costs" is used consistently when the intention is to confer the authority to award legal costs.	corriger la situation en modifiant la Loi. […] [56] Comme nous le signalons précédemment, même si elle n'est pas liée par la conception que la Commission se fait de l'étendue de son pouvoir légal, une cour de justice peut en tenir compte. La Commission administre et applique la *LCDP* au quotidien, si bien qu'elle en a une connaissance approfondie. Le fait qu'elle estime depuis longtemps et avec constance que la Loi ne permet pas d'adjudication des dépens revêt une certaine importance dans les circonstances de l'espèce même s'il n'est pas décisif […]. [57] L'intimé nous incite par ailleurs à tenir compte des dispositions législatives parallèles des provinces et des territoires et nous convenons qu'il s'agit d'une entreprise utile en l'espèce. […] [58] La Cour a déjà examiné en parallèle les dispositions législatives de différents ressorts. Ainsi, dans l'arrêt *Canada (Procureur général) c. Alliance de la Fonction publique du Canada*, [1991] 1 R.C.S. 614, le juge Sopinka étudie quelques lois provinciales comparables afin de déterminer si la loi fédérale considérée permet à la Commission des relations de travail dans la Fonction publique de décider qui est un employé en application de sa loi habilitante (p. 631-632). De même, dans l'arrêt *Morguard Properties Ltd. c. Ville de Winnipeg*, [1983] 2 R.C.S. 493, le juge Estey recourt à une analyse comparative de la loi manitobaine et de celles d'autres provinces pour décider si la ville de Winnipeg entendait geler des évaluations foncières (p. 504-505). [59] Dans le cas qui nous occupe, le recours aux dispositions législatives équivalentes des provinces et des territoires n'est indiqué qu'à une fin bien précise. La démarche tend à confirmer que le législateur emploie toujours le mot « dépens » lorsqu'il veut conférer le pouvoir d'adjuger des dépens.

Canada (Citizenship and Immigration) v. Saji, 2010 FCA 100

"pursuant to"
"under"

Ms Saji filed a notice of application to appeal the decision of a citizenship judge, which denied her application for citizenship. The Minister moved to strike that application on the grounds that it was statute-barred. When the Minister's motion was dismissed by the Motions Judge, he sought to appeal.

Issue: Was the Minister's appeal precluded by subsection 14(6) of the *Citizenship Act*?

14. (5) The Minister or the applicant may appeal to the Court from the decision of the citizenship judge under subsection (2) by filing a notice of appeal in the Registry of the Court within sixty days after the day on which (*a*) the citizenship judge approved the application under subsection (2); or (*b*) notice was mailed or otherwise given under subsection (3) with respect to the application. (6) A decision of the Court pursuant to an appeal made under subsection (5) is, subject to section 20, final and, notwithstanding any other Act of Parliament, no appeal lies therefrom. **18**. (3) A decision of the Court made under subsection (1) is final and, notwithstanding any other Act of Parliament, no appeal lies therefrom.	**14**. (5) Le ministre et le demandeur peuvent interjeter appel de la décision du juge de la citoyenneté en déposant un avis d'appel au greffe de la Cour dans les soixante jours suivant la date, selon le cas : *a*) de l'approbation de la demande; *b*) de la communication, par courrier ou tout autre moyen, de la décision de rejet. (6) La décision de la Cour rendue sur l'appel prévu au paragraphe (5) est, sous réserve de l'article 20, définitive et, par dérogation à toute autre loi fédérale, non susceptible d'appel. **18**. (3) La décision de la Cour visée au paragraphe (1) est définitive et, par dérogation à toute autre loi fédérale, non susceptible d'appel.

The Federal Court of Appeal concluded that the Motions Judge's dismissal of the Minister's motion to strike Ms Saji's application on the ground that it was statute-barred was not a decision "pursuant to an appeal made under subsection (5)" of the *Citizenship Act*, because it was unrelated to the ultimate question to be decided by the Federal Court on the appeal under subsection 14(5), namely, whether the citizenship court judge had erred in not approving Ms Saji's application.

In the course of his judgment Evans J.A. commented on the use of "under" and "pursuant to" in sections 14 and 18 of the Act:

[20] Subsection (5) refers to the right of "the Minister or the applicant to appeal from a decision of a citizenship judge under subsection (2)". Subsection	[20] Le paragraphe (5) prévoit que « le ministre et le demandeur peuvent interjeter appel de la décision du juge de la citoyenneté ». Le

(2) requires the citizenship judge to approve or not to approve a citizenship application in accordance with the citizenship judge's determination under subsection (1) of whether the applicant meets the statutory requirements of citizenship.	paragraphe (2) prévoit que le juge de la citoyenneté doit approuver ou rejeter la demande de citoyenneté selon qu'il conclut ou non à la conformité de celle-ci avec les exigences en matière d'attribution de citoyenneté prévues au paragraphe (1).
[21] It is asserted in the memorandum of fact and law submitted on behalf of the Minister in this appeal that subsection (6) applies only to a decision by the Federal Court "under subsection (5)", that is the citizenship judge's approval or non-approval of the citizenship application.	[21] Dans le mémoire des faits et du droit présenté dans le cadre du présent appel pour le compte du ministre, il est dit que le paragraphe (6) ne s'applique qu'à la décision de la Cour fédérale [sur l'appel] « prévu au paragraphe (5) », c.àd. la décision du juge de la citoyenneté d'approuver ou de rejeter la demande de citoyenneté.
[22] This is not quite accurate: subsection (6) precludes an appeal to this Court from a decision of the Federal Court "pursuant to an appeal under subsection (5)". On their face, the words "pursuant to" may seem to broaden the scope of subsection (6) beyond the question appealed to the Federal Court, namely, whether the citizenship judge erred in approving or not approving an application for citizenship. In contrast, subsection 18(3) precludes an appeal to this Court from the Federal Court of "a decision under" subsection (1), which concerns, among other things, the revocation of citizenship. It is presumed that when Parliament uses different words on the same topic, in the same statute, it intends them to have different meanings.	[22] Cela n'est pas tout à fait exact : le paragraphe (6) interdit d'interjeter appel à la Cour d'une décision de la Cour fédérale « rendue sur l'appel prévu au paragraphe (5) » [en anglais, « *pursuant to an appeal under subsection (5)* »]. Selon leur sens manifeste, les mots « *pursuant to* » [en français, « rendue sur »] peuvent sembler élargir la portée du paragraphe (6) au-delà de la question qui fait l'objet de l'appel à la Cour, soit, la question de savoir si le juge de la citoyenneté a commis une erreur en approuvant ou en rejetant une demande de citoyenneté. À l'opposé, le paragraphe 18(3) interdit d'interjeter appel à la Cour d'une « décision de la Cour [fédérale] visée au » paragraphe (1), qui concerne, entre autres choses, la révocation de la citoyenneté. Il faut supposer que, lorsque le législateur emploie des termes différents sur un même sujet et dans une même loi, il entend leur donner des sens différents.
[23] However, the French version of subsection 14(6), « *La decision de la Cour rendue sur l'appel prévu au paragraphe (5)* » suggests a narrower meaning. In addition, jurisprudence arising from the interpretation of another preclusive provision of the *Citizenship Act*, subsection 18(3), indicates that the words "pursuant to" in subsection 14(6), do not include every Federal Court decision made in the context of a citizenship appeal.	[23] Cependant, la version française du paragraphe 14(6), « *La décision de la Cour rendue sur l'appel prévu au paragraphe (5)* », fait ressortir un sens plus étroit. De plus, la jurisprudence issue de l'interprétation d'une autre disposition limitative de la *Loi sur la citoyenneté*, le paragraphe 18(3), indique que les termes [anglais] « *pursuant to* » [en français, « rendue sur »] au paragraphe 14(6) ne couvrent pas toutes les décisions rendues par la Cour fédérale dans le contexte d'un appel en matière de citoyenneté.

Canada (Information Commissioner) v. Canada (Minister of National Defence), 2011 SCC 25

reliance on expert evidence to establish ordinary meaning

reliance on administrative interpretation

reliance on legislative silence

statutes in pari materia (related legislation)

These appeals bring together four applications by the Information Commissioner of Canada for judicial review of refusals to disclose certain records under the *Access to Information Act*. Three applications concern refusals to disclose records located within the offices of a former Prime Minister, Minister of Defence and Minister of Transport. The fourth application concerns the refusal to disclose parts of the former Prime Minister's agenda in the possession of the RCMP and the Privy Council Office.

Issues:
Is the Prime Minister's Office part of the Privy Council Office? Are the offices of Ministers part of the government institutions they head?
If not, can records that are physically located in those offices nonetheless be "under the control" of the government institutions they head?
Is the Prime Minister an "officer" of a government institution?

"government institution" means	« institution fédérale »
(a) any department or ministry of state of the Government of Canada, or any body or office, listed in Schedule I, and	a) Tout ministère ou département d'État relevant du gouvernement du Canada, ou tout organisme, figurant à l'annexe I;
(b) any parent Crown corporation, and any wholly-owned subsidiary of such a corporation, within the meaning of section 83 of the Financial Administration Act;	b) toute société d'État mère ou filiale à cent pour cent d'une telle société, au sens de l'article 83 de la Loi sur la gestion des finances publiques.
Right to access to records	Droit d'accès
4. (1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is	4. (1) Sous réserve des autres dispositions de la présente loi mais nonobstant toute autre loi fédérale, ont droit à l'accès aux documents relevant d'une institution fédérale et peuvent se les faire communiquer sur demande :
(a) a Canadian citizen, or (b) a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act, has a right to and shall, on request, be given access to any record under the control of a government institution.	a) les citoyens canadiens; b) les résidents permanents au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés.
Personal information 19. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the	Renseignements personnels 19. (1) Sous réserve du paragraphe (2), le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant les renseignements personnels visés à l'article 3 de

Privacy Act. "personal information" means information about an identifiable individual that is recorded in any form including ,[…] but, for the purposes of [...] section 19 of the Access to Information Act, does not include … (j) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual […].	la Loi sur la protection des renseignements personnels. « renseignements personnels » Les renseignements, quels que soient leur forme et leur support, concernant un individu identifiable […] toutefois, il demeure entendu que, pour l'application […] de l'article 19 de la Loi sur l'accès à l'information, les renseignements personnels ne comprennent pas les renseignements concernant : […] j) un cadre ou employé, actuel ou ancien, d'une institution fédérale et portant sur son poste ou ses fonctions […].

[Charron J. wrote the majority judgment. She began by reviewing the trial judge's reasons for concluding that Ministers' offices are not government institutions.]

[27] ... First, Kelen J. considered evidence from political scientists about how government actually works to determine the ordinary meaning of the term "government institution" according to the experts. He held that this evidence demonstrated that the PMO and the relevant ministerial offices are not part of the "government institution" for which they are responsible (paras. 50-52). ... Fourth, following the enactment of the *Access to Information Act*, the Information Commissioner's 1988-1989 Report to Parliament indicated that Ministers' offices were *not* subject to the provisions of the Act. The Commissioner adopted the same view in 1991, and again in 1997. These original interpretations confirm that the office of the Information Commissioner itself understood the intent of Parliament was not to include the PMO or a Minister's office in the government institutions listed in Schedule I of the Act (paras. 61-65). Fifth, since the time the Commissioner publicly urged Parliament to amend the legislation to clarify that the PMO and ministerial offices are subject to the Act, Parliament amended the Act several times, including recent amendments as part of the 2006 *Federal Accountability Act*, S.C. 2006, c. 9, and has not chosen to make this amendment. While	[27] […]En premier lieu, le juge Kelen a examiné les témoignages de politologues au sujet des rouages de l'appareil gouvernemental afin de déterminer le sens ordinaire que les experts donnent à l'expression « institution fédérale ». Il a estimé que ces témoignages démontraient que le CPM et les cabinets des ministres concernés ne font pas partie de l'« institution fédérale » dont ils sont responsables (par. 50-52). […] Quatrièmement, à la suite de l'adoption de la *Loi sur l'accès à l'information*, le Commissaire à l'information a déclaré, dans le rapport soumis au Parlement pour 1988-1989, que les cabinets des ministres *n*'étaient *pas* assujettis aux dispositions de la Loi. Le Commissaire a repris ce point de vue en 1991, puis de nouveau en 1997. Ces interprétations initiales confirment que le bureau même du Commissaire déduisait que le législateur entendait ne pas inclure le CPM ou les cabinets des ministres dans les institutions fédérales énumérées à l'annexe I de la Loi (par. 61-65). Cinquièmement, depuis que le Commissaire a invité publiquement le législateur à modifier la Loi pour préciser que le CPM et les cabinets des ministres sont assujettis à la *Loi sur l'accès à l'information*, le législateur a modifié la Loi à plusieurs reprises, notamment à l'occasion de l'adoption récente de la *Loi fédérale sur la*

Parliament's intention may not always be inferred from legislative silence, in this case, the silence is clear and constitutes relevant evidence of legislative intent: *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305, at para. 42 (paras. 66-67).	*responsabilité*, L.C. 2006, ch. 9, sans toutefois apporter la précision demandée. Bien qu'on ne puisse pas toujours déduire l'intention du législateur du silence de la loi, le silence du législateur constituait en l'espèce une preuve claire et pertinente de son intention : *Société Télé-Mobile c. Ontario*, 2008 CSC 12, [2008] 1 R.C.S. 305, par. 42 (par. 66-67).

[The Commissioner submitted that expert evidence is inadmissible to establish the ordinary meaning of a legislative text. The Court agreed with the Government's response to this submission, which it summarized as follows.]

[32] ... the Government submits that expert evidence can be properly used as an interpretative aid in discerning the ordinary meaning of words by Parliament when such evidence is relevant and reliable: *Francis v. Baker*, [1999] 3 S.C.R. 250, at para. 35; and *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533, at para. 47. Further, Kelen J.'s reasons demonstrate that the expert evidence played a limited role in his analysis. He did not rely on any expert opinion on the meaning of the words used by Parliament as contended, given that no such opinion was tendered by the witnesses. He considered this evidence, rather, to situate the interpretative exercise in its proper context, an approach which was then correctly upheld by the Federal Court of Appeal.	[32] […] le gouvernement affirme que l'on peut régulièrement utiliser les témoignages des experts pour faciliter l'interprétation afin de discerner le sens courant des termes employés par le législateur lorsque ces témoignages sont pertinents et fiables : *Francis c. Baker*, [1999] 3 R.C.S. 250, par. 35; et *Bristol-Myers Squibb Co. c. Canada (Procureur général)*, 2005 CSC 26, [2005] 1 R.C.S. 533, par. 47. Il ressort par ailleurs des motifs du juge Kelen que les témoignages d'experts ont joué un rôle limité dans son analyse. Contrairement à ce qu'on a affirmé, le juge Kelen ne s'est fondé sur aucune opinion d'expert pour déterminer le sens des termes employés par le législateur, puisque les témoins n'ont formulé aucune opinion en ce sens. Il a plutôt tenu compte de ces témoignages pour situer l'exercice d'interprétation dans son contexte, une méthode que la Cour d'appel fédérale a eu raison de confirmer par la suite.

[The Court also approved the trial judge's reliance on the definition of "control" in the Canadian Oxford Dictionary as an aid to interpretation. It adopted the following test for control.]

[50] ... where the record requested is not in the physical possession of a government institution, the record will nonetheless be under its control if two questions are answered in the affirmative: (1) Do the contents of the document relate to a departmental matter? (2) Could the government institution reasonably expect to obtain a copy of the document upon request?	[50] […] La Cour d'appel fédérale a accepté ce critère en précisant que, dans le contexte des présentes affaires dans lesquelles l'institution n'a pas le document en sa possession matérielle, le document relèvera quand même de l'institution fédérale si l'on répond par l'affirmative aux deux questions suivantes : (1) Le contenu du document se rapporte-t-il à une affaire ministérielle? (2) L'institution fédérale pourrait-elle raisonnablement s'attendre à obtenir une copie du document sur demande?

[On the third issue, the trial judge concluded that the Prime Minister, as head of a government institution, is an officer of that institution. He relied on the definition of "public officer" in the *Financial Administration Act*, which includes "a minister of the Crown and any person employed in the federal public administration". He also relied on the definition of "public officer" in the federal *Interpretation Act*, which includes "any person in the federal public administration who is authorized by or under an enactment to do or enforce the doing of an act or thing or to exercise a power, or on whom a duty is imposed by or under an enactment". Charron J. wrote:

[71] I agree with the Federal Court of Appeal that Kelen J. erred in relying on the definition of "public officer" in two other statutes. It is clear that the definition of "public officer" found in the *Financial Administration Act* is a broad definition which deals with an unrelated subject and operates in a different context. The definition contained in the *Interpretation Act* could arguably be relevant, as s. 3(1) states: "Every provision of this Act applies, unless a contrary intention appears, to every enactment, whether enacted before or after the commencement of this Act". However, I find no support for incorporating the definition of "public officer" in this context. First, while there may be overlap between the two terms, the term "public officer" used in the *Interpretation Act* is simply not the same as the term "officer . . . of a government institution" used in the *Privacy Act*. Second, the definition "public officer" is contained in the list of definitions under s. 2 of the *Interpretation Act*, which is expressly stated to apply "[i]n <u>this</u> Act". The definition is not repeated in the definitions contained in s. 35, which conversely, apply "[i]n <u>every</u> enactment"....	[71] Je suis d'accord avec la Cour d'appel fédérale pour dire que le juge Kelen a commis une erreur en se fondant sur la définition de l'expression « fonctionnaire public » donnée par deux autres lois. Il est évident que la définition de l'expression « fonctionnaire public » que l'on trouve dans la *Loi sur la gestion des finances publiques* est une définition large qui porte sur un tout autre objet et qui s'applique dans un contexte différent. On pourrait soutenir que la définition que donne la *Loi d'interprétation* est pertinente, si l'on tient compte du libellé du par. 3(1) qui dispose : « Sauf indication contraire, la présente loi s'applique à tous les textes, indépendamment de leur date d'édiction. » Je ne vois toutefois rien qui justifierait d'incorporer la définition de « fonctionnaire public » dans ce contexte. En premier lieu, bien que les acceptions du terme « cadre » et de l'expression « fonctionnaire public » puissent se recouper, cette dernière expression, telle qu'elle est employée dans la *Loi d'interprétation*, n'est tout simplement pas la même que l'expression « cadre [. . .] d'une institution fédérale » que l'on trouve dans la *Loi sur la protection des renseignements personnels*. En deuxième lieu, la définition de « fonctionnaire public » se trouve dans la liste des définitions qui sont prévues à l'art. 2 de la *Loi d'interprétation*, et qui, selon ce que cette Loi précise bien, ne s'appliquent qu'« à la <u>présente</u> loi ». Cette définition n'est pas reprise dans les définitions que l'on trouve à l'art. 35, lequel, à l'inverse, s'applique « à <u>tous</u> les textes ». […]

Carter Brothers Ltd. v. The Registrar of Motor Vehicles for the Province of New Brunswick, 2011 NBCA 81

Consistency between Act and Regulations

Section 1 of the *Motor Vehicle Act* defines "motor vehicle" to mean "every vehicle that is self propelled", except for farm tractors and electric trolleys. It also defines "special mobile equipment":

"special mobile equipment" means every vehicle not designed or used primarily for the transportation of persons or property and incidentally operated or moved over the highways, including road construction or maintenance machinery, ditch digging apparatus, well-boring apparatus, concrete mixers and any other vehicle of the same general class;	« matériel mobile spécial » désigne tout véhicule qui n'est pas conçu ou utilisé principalement pour le transport de personnes ou de biens et qui est occasionnellement conduit ou déplacé sur les routes, et s'entend notamment du matériel de voirie, des creuse-fossé, foreuses de puits, bétonnières et de tous autres véhicules de cette catégorie générale;

Section 5.1 authorizes the Lieutenant-Governor in Council to make regulations establishing classes of motor vehicles and special mobile equipment for registration purposes and specifying the conditions governing their classification.

Section 16 authorizes the Lieutenant-Governor in Council to make regulations prescribing fees not otherwise provided for under the *Act*.

The Lieutenant-Governor made the following regulation:

7(6) For an item of special mobile equipment used solely for the purpose of transporting and developing power for well drilling machinery, wood cutting, threshing or for like purposes, and to which some part of the equipment is permanently attached, the annual registration fee shall be $70.00.	**7**(6) Les droits annuels d'immatriculation du matériel mobile spécial servant uniquement au transport de l'appareillage et à la production d'énergie pour le forage de puits, l'abattage du bois, le battage ou autres usages similaires, et dont une partie y est attachée à demeure, sont de 70,00 $.

Issue: Could the appellant be denied registration of its vehicle as special mobile equipment upon payment of the $70 fee if its vehicle came within the definition of that term in the Act, even though it did not come within the definition of that term in the Regulations?

Judgment:

[16] What is striking about s. 7(6) of the General Regulation is that its wording departs substantially from the definition of "special mobile equipment" set out in s. 1 of the *Motor Vehicle Act*. …It appears to limit or narrow the scope of the statutory definition by introducing other criteria. First, the special mobile equipment (*i.e.*, motor vehicle) must be used solely for the purpose of	[16] Ce qui est frappant dans le par. 7(6) du *Règlement général*, c'est que son libellé s'écarte considérablement de la définition de l'expression « matériel mobile spécial » qui est énoncée à l'art. 1 de la *Loi sur les véhicules à moteur*. […] [L]e par. 7(6) du *Règlement général* semble limiter ou restreindre la portée de la définition de la *Loi* en introduisant d'autres critères. Premièrement, le

transporting and developing power for equipment such as that used in well drilling, wood cutting or threshing. Second, some part of the mobile equipment must be permanently attached. [17] .... No one would quibble with the understanding that the Lieutenant-Governor in Council has no authority to adopt a regulation which has the effect of amending a definition found within the statute, by either narrowing or expanding the scope of the statutory definition. [18] One is left to ponder why the Lieutenant-Governor did not simply draft s. 7(6) of the General Regulation in simple terms, such as: "The registration fee for special mobile equipment is $70". Certainly it was open to the Lieutenant-Governor in Council to create two or more sub-classifications for special mobile equipment by imposing different conditions solely for the purpose of setting differential registration fees. For example, one sub-class of special mobile equipment could have provided for an annual registration fee of $70, while the fee for another sub-class could have been fixed at $100. While it would have been permissible for the Lieutenant-Governor in Council to establish sub-classifications for special mobile equipment and to adopt different conditions or criteria to effect that purpose, at the end of the day each sub-classification would have to fall within the statutory definition. But this is not what happened. The General Regulation sets out only one classification for special mobile equipment. Hence, we are left with an apparent inconsistency between the statutory definition and the concept of special mobile equipment set out in the General Regulation.	matériel mobile spécial (c.-à-d. le véhicule à moteur) doit servir uniquement au transport de l'appareillage et à la production d'énergie pour le forage de puits, l'abattage du bois ou le battage. Deuxièmement, une partie du matériel mobile doit être attachée à demeure. [17] […] Nul ne contesterait la notion que le lieutenant-gouverneur en conseil n'est aucunement habilité à adopter un règlement qui a pour effet de modifier une définition de la loi en restreignant ou en accroissant sa portée. […] [18] Il faut donc se demander pourquoi le lieutenant-gouverneur n'a pas simplement rédigé le par. 7(6) du *Règlement général* en termes simples, en utilisant par exemple la formule suivante : [TRADUCTION] « Les droits d'immatriculation du matériel mobile spécial sont de 70 $ ». Certes, il était loisible au lieutenant-gouverneur en conseil de créer deux sous-classes ou plus de matériel mobile spécial en imposant différentes conditions uniquement dans le but de fixer des droits d'immatriculation différents. Par exemple, les droits annuels d'immatriculation d'une sous-classe de matériel mobile spécial auraient pu s'élever à 70 $ tandis les droits correspondant à une autre sous-classe auraient pu être fixés à 100 $. Certes, le lieutenant-gouverneur en conseil aurait parfaitement eu le droit de créer des sous-classes de matériel mobile spécial et d'adopter des conditions ou des critères différents pour arriver à cette fin, mais au bout du compte, chaque sous-classe devrait entrer dans le champ d'application de la définition qui se trouve dans la *Loi*. Or, ce n'est pas ce qui s'est produit. Le *Règlement général* ne crée qu'une classe de matériel mobile spécial. Nous nous retrouvons donc devant une contradiction apparente entre la définition de la *Loi* et le concept de matériel mobile spécial énoncé dans le *Règlement général*.

Robertson J.A. resolved the issue by holding that the statutory definition prevailed over the regulatory one.

Catalyst Paper Corp. v. North Cowichan (District), 2012 SCC 2

"**unreasonable**"

CPC sought to have a municipal tax bylaw set aside on the basis that it was unreasonable because it imposed a disproportionate burden on CPC having regard to factors such as the taxpayer's relative consumption of municipal services.

Issues:
Can municipal by-laws be set aside for unreasonableness?
What is the standard for reviewing municipal by-laws?
What is the test for reasonableness in this context?

Judgment:
The Court noted that under section 197 of B.C.'s *Community Charter* municipalities have "a broad and virtually unfettered legislative discretion to establish property tax rates in respect of each of the property classes in the municipality" and an express authority to set different tax rates for different property classes.

Despite the breadth of the enabling authority, the Court held that the bylaws could be set aside for unreasonableness. McLachlin J. wrote:

14] In *Thorne's Hardware Ltd. v. The Queen*, 1983 CanLII 20 (SCC), [1983] 1 S.C.R. 106, at p. 115, the Court, referring to delegated legislation, drew a distinction between policy and legality, with the former being unreviewable by the courts: > The Governor in Council quite obviously believed that he had reasonable grounds for passing Order in Council P.C. 1977-2115 extending the boundaries of Saint John Harbour and we cannot enquire into the validity of those beliefs in order to determine the validity of the Order in Council. (See also pp. 111-13) However, this attempt to maintain a clear distinction between policy and legality has not prevailed. In passing delegated legislation, a municipality must make policy choices that fall reasonably within the scope of the authority the legislature has granted it. Indeed, the parties now agree that the tax bylaw at issue is not exempt from substantive review in this sense. [	[14] C'est sur cette toile de fond que j'aborde la question que nous sommes appelés à trancher : la révision judiciaire sur le fond des règlements municipaux en matière de taxation. Dans *Thorne's Hardware Ltd. c. La Reine*, [1983] 1 R.C.S. 106, à la p. 115, la Cour, faisant référence à la législation déléguée, a établi une distinction entre la politique et la légalité, la première ne pouvant être révisée par les tribunaux : > Le gouverneur en conseil a manifestement cru avoir des motifs raisonnables de prendre le décret C.P. 1977-2115 qui étendait les limites du port de Saint-Jean et nous ne pouvons nous enquérir de la validité de ces motifs afin de déterminer la validité du décret. (Voir aussi les pp. 111-113.) Cependant, cette tentative de conserver une distinction claire entre la politique et la légalité n'a pas été maintenue. En exerçant son pouvoir législatif délégué, une municipalité doit faire des choix de politique qui relèvent raisonnablement de l'étendue de l'autorité qui la législature lui a octroyée. De fait, les parties conviennent maintenant que le règlement en matière de taxation en cause dans la présente affaire n'est pas, en ce sens, soustrait à la révision sur le fond.

15] Unlike Parliament and provincial legislatures which possess inherent legislative power, regulatory bodies can exercise only those legislative powers that were delegated to them by the legislature. Their discretion is not unfettered. The rule of law insists on judicial review to ensure that delegated legislation complies with the rationale and purview of the statutory scheme under which it is adopted. The delegating legislator is presumed to intend that the authority be exercised in a reasonable manner. Numerous cases have accepted that courts can review the substance of bylaws to ensure the lawful exercise of the power conferred on municipal councils and other regulatory bodies[…].	[15] Contrairement au Parlement et aux législatures provinciales, qui jouissent d'un pouvoir législatif inhérent, les organismes de réglementation ne peuvent exercer que les pouvoirs législatifs qui leur ont été délégués. Leur pouvoir discrétionnaire n'est pas sans limites. La primauté du droit exige que le contrôle judiciaire de la législation déléguée s'assure que celle-ci est bien conforme à la raison d'être et à la portée du régime législatif sous lequel elle a été adoptée. Il faut présumer que le législateur qui délègue un pouvoir s'attend à ce que celui-ci soit exercé de manière raisonnable. Il a été reconnu dans de nombreux cas que les tribunaux peuvent réviser le contenu des règlements municipaux afin d'assurer l'exercice légitime du pouvoir conféré aux conseils municipaux et à d'autres organismes de réglementation […].

[16] This brings us to the standard of review to be applied. The parties agree that the reasonableness standard applies in this case. The question is whether the bylaw at issue is reasonable having regard to process and whether it falls within a range of possible reasonable outcomes: *Dunsmuir*, at para. 47.	[16] Cela nous amène à la norme de contrôle qu'il convient d'appliquer. Les parties conviennent qu'il s'agit de la norme de la décision raisonnable en l'espèce. La question est donc de savoir si le règlement contesté est raisonnable, eu égard au processus qui a mené à son adoption, et s'il s'inscrit dans un éventail d'issues possibles raisonnables : *Dunsmuir*, au par. 47.
[17] Where the parties differ is on *what the standard of reasonableness requires in the context of this case*. This is the nub of the dispute before us. Catalyst argues that the issue is whether the tax bylaw falls within a range of reasonable outcomes, having regard to objective factors relating to consumption of municipal services, factors Catalyst has outlined in a study called the "Consumption of Services Model". The District of North Cowichan, on the other hand, argues that reasonableness, in the context of municipal taxation bylaws, must take into account not only matters directly related to the treatment of a particular taxpayer in terms of consumption, but a broad array of social, economic and demographic factors relating to the community as a whole. The critical question is what factors the court should consider in determining what lies within the range of possible reasonable outcomes. Is it the narrow group of objective consumption-related factors urged by Catalyst? Or is it a broader spectrum of social, economic and political factors, as urged by North Cowichan?	[17] Là où les parties divergent d'opinion, c'est sur *ce que la norme de la décision raisonnable impose dans le contexte de la présente affaire*. C'est ici que se situe le nœud de l'affaire. Catalyst soutient que la question est de savoir si le règlement s'inscrit dans un éventail d'issues raisonnables eu égard à des facteurs objectifs se rapportant à la consommation de services municipaux, facteurs que Catalyst a décrits dans une étude intitulée « The Consumption of Services Model » (« *Le modèle basé sur la consommation de services* »). De son côté, le district de North Cowichan avance que la norme de la décision raisonnable impose, dans le contexte des règlements municipaux en matière de taxation, que l'on tienne compte non seulement de questions se rapportant directement au traitement réservé à un contribuable en particulier selon qu'il consomme ou non des services municipaux, mais également de toute une gamme de facteurs sociaux, économiques et démographiques qui touchent la collectivité dans son ensemble. La question cruciale est de savoir quels facteurs le tribunal de révision doit prendre en compte pour déterminer quelles sont les issues possibles raisonnables. S'agit-il du groupe restreint de facteurs objectifs ayant trait à la consommation que propose Catalyst? Ou s'agit-il plutôt d'un éventail plus large de facteurs sociaux, économiques et politiques, comme le prétend le district

…	de North Cowichan?
	[…]
[19] The case law suggests that review of municipal bylaws must reflect the broad discretion provincial legislators have traditionally accorded to municipalities engaged in delegated legislation. Municipal councillors passing bylaws fulfill a task that affects their community as a whole and is legislative rather than adjudicative in nature. Bylaws are not quasi-judicial decisions. Rather, they involve an array of social, economic, political and other non-legal considerations. "Municipal governments are democratic institutions", *per* LeBel J. for the majority in *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64 (CanLII), 2000 SCC 64, [2000] 2 S.C.R. 919, at para. 33. In this context, reasonableness means courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable.	[19] Il ressort de la jurisprudence que la révision des règlements municipaux doit refléter le large pouvoir discrétionnaire que les législateurs provinciaux ont traditionnellement conféré aux municipalités en matière de législation déléguée. Les conseillers municipaux qui adoptent des règlements accomplissent une tâche qui a des répercussions sur l'ensemble de leur collectivité et qui est de nature législative plutôt qu'adjudicative. Les règlements municipaux ne sont pas des décisions quasi judiciaires. Ils font plutôt intervenir toute une gamme de considérations non juridiques, notamment sur les plans social, économique et politique. Comme l'a dit le juge LeBel au nom de la majorité dans *Pacific National Investments Ltd. c. Victoria (Ville)*, 2000 CSC 64, [2000] 2 R.C.S. 919, au par. 33, « [l]es administrations municipales forment des institutions démocratiques ». Dans ce contexte, la norme de la décision raisonnable signifie que les tribunaux doivent respecter le devoir qui incombe aux représentants élus de servir leurs concitoyens, qui les ont élus et devant qui ils sont ultimement responsables.
[20] The decided cases support the view of the trial judge that, historically, courts have refused to overturn municipal bylaws unless they were found to be "aberrant", "overwhelming", or if "no reasonable body could have adopted them", para. 80, *per* Voith J. See *Kruse v. Johnson*, [1898] 2 Q.B. 91 (Div. Ct.); *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp.*, [1948] 1 K.B. 223 (C.A.); *Lehndorff United Properties (Canada) Ltd. v. Edmonton (City)* (1993), 146 A.R. 37, (Q.B.), aff'd 1994 ABCA 276 (CanLII), (1994), 157 A.R. 169 (C.A.).	[20] Les causes déjà jugées appuient le point de vue du juge de première instance selon lequel les tribunaux ont traditionnellement refusé d'invalider des règlements municipaux à moins qu'ils n'aient été jugés [TRADUCTION] « aberrants » ou « choquants », ou si « aucun organisme raisonnable n'aurait pu les adopter » (par. 80, le juge Voith). Voir *Kruse c. Johnson*, [1898] 2 Q.B. 91 (C. div.); *Associated Provincial Picture Houses, Ltd. c Wednesbury Corp.*, [1948] 1 K.B. 223 (C.A.); *Lehndorff United Properties (Canada) Ltd. c. Edmonton (City)* (1993), 146 A.R. 37 (B.R.), conf. par (1994) 157 A.R. 169 (C.A.).
[21] This deferential approach to judicial review of municipal bylaws has been in place for over a century. As Lord Russell C.J. stated in *Kruse v. Johnson*:	[21] Cette retenue dans la façon d'aborder la révision des règlements municipaux existe depuis plus d'un siècle. Comme l'a affirmé le juge en chef lord Russell dans *Kruse c. Johnson :*
> [C]ourts of justice ought to be slow to condemn as invalid any by-law, so made under such conditions, on the ground of supposed unreasonableness. Notwithstanding what Cockburn C.J. said in *Bailey v. Williamson*, an analogous case, I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws, made under such authority as these were made, as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found	> [TRADUCTION] [L]es cours de justice doivent faire preuve de circonspection avant de déclarer invalide un règlement pris dans ces conditions au motif qu'il serait déraisonnable. Malgré ce que le juge en chef Cockburn dit dans une affaire analogue, *Bailey c. Williamson*, je ne veux pas dire qu'il ne peut y avoir de cas où la Cour aurait le devoir d'invalider des règlements, pris en vertu du même pouvoir que ceux-ci l'ont été, en se fondant sur leur caractère

to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires." But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there. [Emphasis added; pp. 99-100.]	déraisonnable. Mais déraisonnable en quel sens? On peut penser, par exemple, à des règlements partiaux et d'application inégale pour des catégories distinctes, à des règlements manifestement injustes, à des règlements empreints de mauvaise foi, à des règlements entraînant une immixtion abusive ou gratuite dans les droits des personnes qui y sont assujetties, au point d'être injustifiables aux yeux d'hommes raisonnables; la Cour pourrait alors dire « le Parlement n'a jamais eu l'intention de donner le pouvoir de faire de telles règles; elles sont déraisonnables et *ultra vires* ». C'est en ce sens et uniquement en ce sens qu'il faut, à mon avis, considérer la question du caractère raisonnable. Un règlement n'est pas déraisonnable simplement parce que certains juges peuvent estimer qu'il va au-delà ce qui est prudent ou nécessaire ou commode, ou parce qu'il n'est pas assorti d'une réserve ou d'une exception qui devrait y figurer de l'avis de certains juges. [Je souligne; pp. 99-100.]
These are the general indicators of unreasonableness in the context of municipal bylaws. It must be remembered, though, that what is unreasonable will depend on the applicable legislative framework. For instance, Lord Russell C.J.'s reference to inequality in operation as between different classes is inapt in the context of many modern municipal statutes, which contain provisions that expressly allow for such inequality. Subsection 197(3) of the *Community Charter*, which allows municipalities to set different tax rates for different property classes, is such a provision.	Il s'agit là des indicateurs généraux de ce qui est déraisonnable dans le contexte des règlements municipaux. Il faut cependant garder à l'esprit que ce qui est déraisonnable dépendra du cadre législatif applicable. Par exemple, l'application inégale pour des catégories distinctes dont parle le juge en chef lord Russell ne convient guère au contexte de plusieurs lois municipales contemporaines, qui contiennent des dispositions permettant expressément une telle inégalité. Le paragraphe 197(3) de la *Community Charter*, qui permet aux municipalités de fixer des taux d'impôt variant en fonction des catégories d'immeubles, est un exemple d'une telle disposition.
…	[…]
[24] It is thus clear that courts reviewing bylaws for reasonableness must approach the task against the backdrop of the wide variety of factors that elected municipal councillors may legitimately consider in enacting bylaws. The applicable test is this: only if the bylaw is one no reasonable body informed by these factors could have taken will the bylaw be set aside….	[24] Il est donc clair que les tribunaux appelés à réviser le caractère raisonnable de règlements municipaux doivent le faire au regard de la grande variété de facteurs dont les conseillers municipaux élus peuvent légitimement tenir compte lorsqu'ils adoptent des règlements. Le critère applicable est le suivant : le règlement ne sera annulé que s'il s'agit d'un règlement qui n'aurait pu être adopté par un organisme raisonnable tenant compte de ces facteurs […].

[Comment: The Court in this case appears to conflate reasonableness as a standard of review with unreasonableness as a ground of invalidity.]

Cronauer v. Grande Prairie (Subdivision and Development Appeal Board), 2011 ABCA 164

"may"

A municipal by-law conferred authority on a Board to issue various permits, including Development Permits. The Board attached a condition to a Development Permit requiring the holder to obtain an additional permit from Alberta Transportation and claimed that it was authorized to do so under paragraph 3.18(d).

The Bylaw stated, under the heading "Transportation and Municipal Road Standards":

s. 3.13(g) All developments may require a permit from Alberta Transportation or its successors.

...

s. 3.18(a) A Development Permit shall be required for all signs.

...

(d) Signs may also require a permit from Alberta Transportation.

Issue:

"X may also require": does such a formulation merely convey information or does it confer a power?

Judgment:

[12] Mr. Cronauer argues that neither of these provisions grant a discretion upon the SDAB to impose conditions but, rather, both are merely statements giving information although found within the body of the Bylaw. In other words, rather than granting authorization to the SDAB to impose the challenged condition, these sections simply advise the reader that other laws exist which impose the requirement that a permit be obtained from Alberta Transportation.

[13] It is imaginative to suggest that this Bylaw uniquely contains statements of general information in the midst of other provisions, each of which actively imposes a discretion, obligation or right, when such a drafting approach is not used in other legislation. …

[14] Mr. Cronauer offers nothing from the context, the scheme or the object of the Bylaw, nor from any other aide to interpretation of the intent of the County in passing the Bylaw, which supports his argument that the format of the Bylaw is exclusive in this respect. The sections in question are found within the body of the legislation, not in a preamble, nor in a news release advising of their implementation. He does not suggest that other portions of the Bylaw are mere "information bulletins", without legal effect.

[15] That said, ss. 3.13(g) and 3.18(d) do not expressly state that a condition requiring that a permit be obtained from Alberta Transportation may be attached to a development permit. However, no other possible interpretation is offered for the words "All developers may require a permit from Alberta Transportation..." or "Signs may also require a permit from Alberta Transportation" once one disposes of the argument that these are merely information statements. Applying Driedger's modern principle of statutory interpretation, is there any other interpretation which could be put on these words, one which does not grant the SDAB authority to impose the challenged condition?

Dell Computer Corp. v. Union des consommateurs, 2007 SCC 34, [2007] 2 SCR 801

retroactive application

pending appeals

In April of 2003 some 500 Quebec consumers took advantage of an error on Dell's Web site to order computers at a price well below the price at which Dell was willing to sell them. When Dell refused to fill the orders, D. put Dell in default and sought to institute a class action against it. Dell responded by applying to refer the dispute to arbitration under an arbitration clause contained in the terms of the sale contract on which D relied.

In November of 2006, the Quebec Minister of Justice tabled Bill 48, *An Act to amend the Consumer Protection Act and the Act respecting the collection of certain debts* ... in the National Assembly. One of the Bill's provisions prohibited obliging a consumer to refer a dispute to arbitration. That provision came into force the day after the hearing of the appeal before the Supreme Court of Canada.

Issue: Does the prohibition apply to prevent the dispute between Quebec consumers and Dell being referred to arbitration?

Judgment:

112 Pursuant to s. 18 of Bill 48, s. 2 came into force on December 14, 2006. Section 18 reads as follows: **18.** The provisions of this Act come into force on 14 December 2006, except section 1, which comes into force on 1 April 2007, and sections 3, 5, 9 and 10, which come into force on the date or dates to be set by the Government, but not later than 15 December 2007.	112 Par l'effet de l'art. 18 de la Loi 48, l'art. 2 est entré en vigueur le 14 décembre 2006. Voici le texte de l'art. 18 : **18.** La présente loi entre en vigueur le 14 décembre 2006, à l'exception de l'article 1, qui entrera en vigueur le 1er avril 2007, et des articles 3, 5, 9 et 10, qui entreront en vigueur à la date ou aux dates fixées par le gouvernement, mais au plus tard le 15 décembre 2007.
Bill 48 has only one transitional provision, s. 17, which provides that the new ss. 54.8 to 54.16 of the *Consumer Protection Act* do not apply to contracts entered into before the coming into force of the Bill. The instant case is not one in which s. 17 is applicable. However, if ss. 17 and 18 are read together, it would seem at first glance that, aside from the provisions referred to in s. 17, Bill 48 applies to contracts entered into before its coming into force. Is this true? And is Bill 48 applicable in the case at bar?	La Loi 48 comporte une seule disposition transitoire, l'art. 17, lequel prévoit que les contrats conclus avant l'entrée en vigueur de la loi sont exclus de l'application des nouveaux art. 54.8 à 54.16 de la *Loi sur la protection du consommateur*. Ce n'est pas le cas en l'espèce. Cependant si l'on fait une lecture corrélative des art. 17 et 18, il semble à première vue que, sauf les dispositions visées à l'art. 17, la Loi 48 s'applique aux contrats conclus avant son entrée en vigueur. Est-ce le cas? Et qu'en est-il de l'application de la Loi 48 à l'instance en cours?
113 Professor P.-A. Côté writes in *The Interpretation of Legislation in Canada* (3rd	113 Comme l'a écrit le professeur P.-A. Côté, *Interprétation des lois* (3e éd. 1999), p. 213, «

ed. 2000), at p. 169, that "retroactive operation of a statute is highly exceptional, whereas prospective operation is the rule". ... that "[a] statute has immediate effect when it applies to a legal situation that is ongoing at the moment of its commencement: the new statute governs the future developments of this situation" (p. 152). A legal situation is ongoing if the facts or effects are occurring at the time the law is being modified (p. 153)....	l'effet de la loi dans le passé est tout à fait exceptionnel, alors que l'effet immédiat dans le présent est normal ». « Il y a effet immédiat de la loi nouvelle lorsque celle-ci s'applique à l'égard d'une situation juridique en cours au moment où elle prend effet : la loi nouvelle gouvernera alors le déroulement futur de cette situation » (p. 191). Une situation juridique est en cours lorsque les faits ou les effets sont en cours de déroulement au moment de la modification du droit (p. 192).[…]
115 Can the facts of the case at bar be characterized as those of an ongoing legal situation? If they can, the new legislation applies. If all the effects of the situation have occurred, the new legislation will not apply to the facts.	115 Les faits de l'espèce peuvent-ils être qualifiés de situation juridique en cours? Si c'est le cas, la loi nouvelle s'applique. Si la situation est entièrement survenue, la loi nouvelle ne s'appliquera pas aux faits.
116 The only condition for application of Dell's arbitration clause is that a claim against Dell, or a dispute or controversy between the customer and Dell, must arise (clause 13C of the Terms and Conditions of Sale). All the facts of the legal situation had therefore occurred once Mr. Dumoulin notified Dell of his claim. Thus, all the facts giving rise to the application of the binding arbitration clause had occurred in their entirety before Bill 48 came into force.	116 La seule condition de mise en œuvre de la clause d'arbitrage de Dell est la naissance d'une réclamation, d'un conflit ou d'une controverse contre Dell (clause 13C des Conditions de vente). La situation juridique est donc entièrement survenue lorsque M. Dumoulin a communiqué sa réclamation à Dell. Ainsi, tous les faits donnant lieu à l'application de la clause d'arbitrage obligatoire se sont entièrement produits avant l'entrée en vigueur de la Loi 48.
117 Since there is nothing in Bill 48 that might lead to the conclusion that it applies retroactively, there is no reason to give it such a scope.	117 Comme la Loi 48 ne comporte aucune indication permettant de conclure qu'elle s'applique de façon rétroactive, il n'y a pas lieu de lui donner une telle portée.
119 Second, I find it highly unlikely that the legislature intended that s. 2 should apply to *all* arbitration clauses in force before December 14, 2006. For example, neither a consumer who is a party to an arbitration that is under way nor a consumer whose claims have already been rejected by an arbitrator should be able to rely on s. 2 and argue that the arbitration clause binding him or her and the merchant is invalid in order to request a stay of proceedings or to have the unfavourable arbitration award set aside. Failing a clear indication to the contrary, when a dispute is submitted for a decision, the decision maker must apply the law as it stands at the time the facts giving rise to the right occurred.	119 Deuxièmement, il m'apparaît fort improbable que le législateur ait voulu que l'art. 2 s'applique à *toutes* les clauses d'arbitrage en vigueur avant le 14 décembre 2006. Par exemple, un consommateur qui serait partie à un arbitrage en cours ou même un consommateur dont les prétentions n'auraient pas été retenues par l'arbitre ne devrait pas être fondé à invoquer l'art. 2 et à prétendre que la clause d'arbitrage le liant au commerçant est invalide, et ainsi à réclamer l'arrêt de l'instance ou obtenir l'annulation de la sentence arbitrale qui lui serait défavorable. À moins d'indication claire à l'effet contraire, lorsqu'un litige est soumis pour décision, le décideur doit se reporter à la loi en vigueur au moment où les faits générateurs de droit se sont produits.
120 I accordingly conclude that since the facts triggering the application of the arbitration clause	120 Par conséquent, j'arrive à la conclusion que,

had already occurred before s. 2 of Bill 48 came into force, this provision does not apply to the facts of the case at bar.	comme les faits entraînant la mise en œuvre de la clause d'arbitrage s'étaient déjà produits avant la date d'entrée en vigueur de l'art. 2 de la Loi 48, cette disposition ne s'applique pas aux faits de l'espèce.

Edmonton (City) v. 360Networks Canada Ltd., 2007 FCA 106, [2007] 4 FCR 747

legislative evolution – explains drafting

ejusdem generis (limited class)

Relying on sections 42 and 43 of the *Telecommunications Act*, the Canadian Radio and Television Commission determined the method for calculating the fee payable by MTS Allstream Inc. (Allstream), a telecommunications carrier, for using Edmonton's light rail transit (LRT) lands to house its fibre optic transmission lines.

One of several issues to be decided in the judicial review of that decision was the interpretation of the words "highway or other public place" in section 43 of the Act. This phrase defines the lands that are subject to carriers' right of entry for the purpose of constructing, maintaining and operating transmission lines. Edmonton argued that the phrase "other public place" should be interpreted narrowly to mean places with the essential characteristics of a highway. In its view, the CRTC committed an error of law when it adopted a broader approach to defining "public place" and concluded that the inside of buildings owned by a municipality and the walls of LRT tunnels could be a "public place".

43. (1) … (2) Subject to subsections (3) and (4) and section 44, a Canadian carrier or distribution undertaking may enter on and break up any highway or other public place for the purpose of constructing, maintaining or operating its transmission lines and may remain there for as long as is necessary for that purpose, but shall not unduly interfere with the public use and enjoyment of the highway or other public place.	**43.** (1) […] (2) Sous réserve des paragraphes (3) et (4) et de l'article 44, l'entreprise canadienne et l'entreprise de distribution ont accès à toute voie publique ou tout autre lieu public pour la construction, l'exploitation ou l'entretien de leurs lignes de transmission, et peuvent y procéder à des travaux, notamment de creusage, et y demeurer pour la durée nécessaire à ces fins; elles doivent cependant dans tous les cas veiller à éviter toute entrave abusive à la jouissance des lieux par le public.

[60]The interpretative problem seems to result from the fact that much of the language of sections 43 and 44 has been borrowed from older legislation, enacted when the transmission lines principally contemplated were telephone or telegraph wires strung on poles along roads or electricity cables buried under roads. Hence, the corresponding phrase in *The Railway Act*, starting in 1899 [S.C. 1888, c. 29, s. 90 (as am. by S.C. 1899, c. 37, s. 1)], was "highway, square or public place"[emphasis added]. When used as a third item after "highway" and "square", the meaning of "public place" may well have been coloured by the presence of these more precise words and interpreted *ejusdem generis.*	[60] Ce problème d'interprétation semble découler du fait qu'une grande partie du libellé des articles 43 et 44 a été empruntée à d'anciennes dispositions législatives qui avaient été édictées à l'époque où les lignes de transmissions principalement visées étaient des câbles téléphoniques ou télégraphiques fixés à des poteaux installés sur le bord des routes ou des câbles électriques enfouis sous des routes. C'est ainsi que l'expression correspondante dans la *Loi sur les chemins de fer* a été tour à tour, à partir de 1899, « chemins, places ou autres lieux publics » ou « voie publique, square ou autre lieu public » (« *highway, square or public place* »). La signification de l'expression « lieu public » employée en troisième lieu après « voie publique » ou « chemins » et « place » ou « square » aurait pu être influencée par la présence de ces termes plus précis et être interprétée selon le principe *ejusdem generis*.
[61]However, the interpretation of the phrase "other public place" should be informed more by its contemporary setting in the present *Telecommunications Act*, than by its historical antecedents. Thus, the removal of "square" from the current Act seems to me to broaden the meaning of "other public place". When a more general word or phrase follows a single word, the *ejusdem generis* presumption of statutory interpretation is of little assistance. A list of one does not normally establish a single *genus*: *Ferguson v. MacLean*, [1930] S.C.R. 630, at page 653.	[61] Cependant, l'interprétation de l'expression « autre lieu public » doit se fonder davantage sur le contexte contemporain de l'actuelle *Loi sur les télécommunications* plutôt que sur ses versions antérieures. C'est pourquoi il semble que la suppression du mot « place » dans la loi actuelle a pour effet d'élargir la signification de l'expression « autre lieu public ». Lorsqu'un mot ou une expression plus générale suit un mot seul, la présomption *ejusdem generis* d'interprétation législative n'est pas très utile. Une liste comportant un seul élément n'établit pas une catégorie unique : *Ferguson c. MacLean*, [1930] 2 R.C.S. 630, à la page 653.
[62]Although counsel could not point to any statutory purpose that would support limiting "other public place"to a "highway-like" place, they noted that a significant contextual consideration was that the statutory provisions deal with the grant of permission for carriers to "enter on and break up" [emphasis added] a highway or other public place. They argued that these words were not apposite for describing access to buildings, such as the LRT tunnels, stations and pedways: in these contexts, "enter in" would be more apt than "enter on",and "break up" would be largely irrelevant.	[62] Même si les avocats n'ont pas été en mesure d'indiquer les objectifs législatifs qui justifieraient de limiter la portée de l'expression « *other public place* » ou « autre lieu public » aux endroits « assimilables à des voies publiques », ils ont souligné que les dispositions législatives visant l'octroi aux entreprises de télécommunication de l'autorisation d'avoir « accès » à toute voie publique ou tout autre lieu public et d'y « procéder à des travaux, notamment de creusage » (« *enter on and break up* ») constituent une considération contextuelle importante. Ils ont fait valoir que ces termes ne sont pas adéquats pour décrire l'accès à

	des structures telles que les tunnels, les stations et les trottoirs du TRL : dans ces contextes, les mots « *enter <u>in</u>* » dans la version anglaise auraient été plus appropriés que « *enter <u>on</u>* » et les mots « *break up* » seraient non pertinents.
[63]The words "enter on and break up" are time-honoured and are derived from earlier legislation governing rights of access for regulated carriers. The verbs "enter", "break up" and"open" have appeared in the *Railway Act* since 1899. Their retention in the current legislative scheme should not be taken as an indication that Parliament intended the words "other public place" to have a narrower meaning than that indicated by their ordinary usage and the objects of the current Act.	[63] Les mots « *enter on and break up* » (« accès » et « procéder à des travaux ») sont consacrés par l'usage et tirent leur origine des premiers textes de loi régissant les droits d'accès des entreprises de télécommunication réglementées. Les verbes « *enter* », « *break up* » et « *open* » (« entrer », « creuser » et « ouvrir ») figurent dans la *Loi sur les chemins de fer* depuis 1899. Le fait que le législateur les ait conservés dans le cadre législatif actuel ne doit pas être considéré comme un indice qu'il voulait que les mots « *other public place* » (« autre lieu public » ait un sens plus restreint que celui qui découle de leur sens ordinaire ou des objets de la Loi actuelle.
[64]Sections 42 to 44 of the Act appear to have been drafted, in part at least, by "cut and paste." The history of statutory language should not determine the meaning of words or phrases when used in a relatively new Act if this would thwart the effective administration of the legislation. As already noted, the objects of the *Telecommunications Act* include encouraging the efficient and orderly development of communications networks by providing a regulatory framework which is responsive to advances in telecommunications technology and to the introduction of a competitive business environment and market forces.	[64] Les articles 42 à 44 de la Loi semblent avoir été rédigés, du moins en partie, par la méthode « couper/coller ». L'historique du libellé législatif ne doit pas déterminer le sens des termes ou expressions employés dans des textes de loi relativement nouveaux si cela a pour effet de faire entrave à l'application efficace de la loi. Ainsi qu'il a déjà été souligné, l'un des objets de la *Loi sur les télécommunications* est d'encourager le développement efficace et ordonné des réseaux de télécommunications en prévoyant un cadre réglementaire réceptif à l'avancement technologique des télécommunications et à l'entrée en jeu des forces du marché et de la concurrence commerciale.

Engel v. da Costa, 2008 ABCA 152

vested right
limitation period
discoverability principle

On June 2, 2005, an amendment to Alberta's *Police Act* came into force which created a one year limitation period for a complaint of police conduct starting from the date when "the events on which it is based occurred".

> 43(11) The chief of police, with respect to a complaint under subsection (1), or the commission, with respect to a complaint under subsection (2) or section 46(1), shall dismiss any complaint that is made more than one year after the events on which it is based occurred.

Engel filed a complaint with Chief of Police da Costa on June 30, 2005, alleging police misconduct by seven police officers occurring between October 31, 1999 and February 12, 2004, as well as by an eighth officer who allegedly committed similar misconduct on July 31, 2004. The misconduct involved unauthorized searches of Engel's name on the CPIC information system.

Issue: Does the limitation period apply in respect of misconduct that could not have been known to the complainant before the amendment came into force?

Judgment:

[5] Engel contends that he was not aware - and could not have become aware earlier - of the alleged misconduct before the time limitation, if applicable, expired. Engel, therefore, submits that the time limit should not bar his complaints against the other seven officers. He also contends that the time limit in question was not enacted until after the alleged misconduct of those officers and, as a result, should not apply to his complaint in any event.

[15] The appellant argues that s. 43(11) removes a citizen's right to complain about police action and that such removal is a matter of substance not procedure. He therefore asserts that it is not appropriate to consider any presumption of immediate effect of procedural enactments… [w]e find it unnecessary to address the point whether a limitation period like this is a procedural matter *vis-a-vis* a complaint such as by Engel. By comparison, it may be arguable that the limitation in s. 43(11) creates a "substantive right" of police officers not to be "further troubled by any claims": see ***Castillo v. Castillo***, 2005 SCC 83 (CanLII), [2005] 3 S.C.R. 870, [2005] S.C.J. No. 68 (QL), 2005 SCC 83 at para. 7. That question also does not have to be decided here. We would observe, however, that it has long been held that a right of appeal is a matter of procedure, not substantive law: ***R. v. Howard Smith Paper Mills Ltd.***, 1957 CanLII 11 (SCC), [1957] S.C.R. 403, 26 C.R. 1, [1957] S.C.J. No. 24 (QL). ***Bolster*** extended that principle to the ability to seek judicial review….

[16] Ultimately, the appellant's argument depends on whether the ability to make a public complaint of police misconduct involves a vested right….

[24] The jurisdiction of the Legislature to fix a limit which overcomes any "vested right" to complain about police misconduct cannot be doubted…. [T]here is nothing in the wording or context of s. 43, and specifically in s. 43(11), which suggests that the ability to make a formal complaint was a "vested right" within the meaning of ***Dikranian v. Québec,*** 2005 SCC 73 (CanLII), [2005] 3 S.C.R. 530, [2005] S.C.J. No. 75 (QL), 2005 SCC 73 at paras. 37 to 40 or ***Gustavson Drilling***, *supra* at p. 283. As Dickson J. pointed out in ***Gustavson Drilling***, *supra* at p. 282: "No one has a vested right to continuance of the law as it stood in the past: .....". The right to take advantage of a statute that previously existed does not mean the persons who might have used it were possessed of a vested and a tangible, concrete and distinctive *juridical situation.*

[25] ***Dikranian*** also uses the terms "accrued rights" and "existing status" to refer to situations where it would be unjust to take away the right of the person or an existing status. Fairness in that regard is noted also by ***Sullivan and Driedger***, *supra* at pp. 545 to 546. Nonetheless, Parliament or a Legislature may, within their Constitutional jurisdiction, expressly override expectations or even fiduciary duties: ***Authorson v. Canada***, 2003 SCC 39 (CanLII), [2003] 2 S.C.R. 40, [2003] S.C.J. No. 40 (QL), 2003 SCC 39 at paras. 38 to 41. The common law principle about "vested rights" does not relate to abstract notions of a citizen's right to complain about government services. It relates to acquired or crystallized rights or status which are meaningful to the possessor thereof in an acquired or held personal rights sense….

[26] The Legislature was not obliged to provide an opportunity to complain about police misconduct. In creating that opportunity or ability, it did not establish a quantifiable vested right possessed by all citizens which it could not limit or adjust as it saw fit. The Legislature saw the enactment of such an ability as being good social policy. The expression of social policy does not of itself create vested rights.

[27] As regards the application of a discoverability principle to the interpretation of s. 43(11), we note that discoverability is a principle that emerged in tort law. The appellant has not cited cases where discoverability has been related to time limitations on disciplinary procedures or to penal or sanction proceedings. If there is a vested right in these situations, it would arguably lie with the person targeted for penalty or sanction, not with the informant or complainant: see, by analogy, ***Castillo***. …

[Comment: the discussion of retrospective application in this case has been omitted because it is based on claims made in the *Sullivan and Driedger on the Construction of Statutes*, 4th ed., which have been proved incorrect by subsequent case law.]

Evans v. Jensen, 2011 BCCA 279

inherent jurisdiction

"may"

In 2008, while the following version of Rule 37B(5) was in force, the defendant Jensen made an offer of settlement which the plaintiff refused. At the end of the trial, the plaintiff was awarded an amount of damages well below the amount offered in the offer of settlement. The defendant

sought single costs for the period following that offer. The trial judge refused on the ground that he had no jurisdiction to award such costs.

Rules 37B(5) of B.C.'s Rules of Court as they read in 2008:

> **Cost options**
>
> (5) In a proceeding in which an offer to settle has been made, the court may do one or both of the following:
>
> (a) deprive a party, in whole or in part, of costs to which the party would otherwise be entitled in respect of the steps taken in the proceeding after the date of delivery of the offer to settle;
>
> (b) award double costs of all or some of the steps taken in the proceeding after the date of delivery of the offer to settle.
>
> **Considerations of court**
>
> (6) In making an order under subrule (5), the court may consider the following:
>
> (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or on any later date;
>
> (b) the relationship between the terms of the settlement offered and the final judgment of the court;
>
> (c) the relative financial circumstances of the parties;
>
> (d) any other factor the court considers appropriate.

The previous version of this Rule provided that if a plaintiff received less than the amount offered by the defendant in an offer to settle, "the plaintiff is entitled to costs assessed to the date the offer was delivered, and the defendant is entitled to costs assessed from that date." A subsequent amendment provided additionally for an award of double costs. These provisions were in force until replaced by Rules 37B(5) and (6) quoted above. Subsequently, in 2009, Rule 37B(5) was amended to include a provision for single costs in the circumstances of this case (as well as other costs order options).

Issues:

1. Do Rules 37B(5)and (6) represent a complete code with respect to the costs awardable in proceeding in which an offer to settle is made, thereby ousting the inherent jurisdiction the court to fix costs?

2. Does Rule 37B(5)(b) by necessary implication authorize an award of single costs for steps taken after the offer to settle?

Judgment:

The Court relied on precedent in concluding that the Rules represent a complete code.

[26] [I]n *Cridge v. Harper Grey Easton*, 2005 BCCA 33 (CanLII), 2005 BCCA 33, leave to appeal to SCC ref'd, [2005] 2 S.C.R. vii, … the Court stated, at paras. 23-24:

> While, subject to abiding by established principles, a Supreme Court judge has a broad discretion in awarding costs, it remains open to the Lieutenant Governor in Council in promulgating the *Rules of Court* to restrict the exercise of that discretion as may be appropriate where it is thought that to do so will achieve a desired objective. The purpose of Rule 37 is to encourage the settlement of litigation through prescribed consequences in costs as in sub-rule (24). Given that the sub-rule provides for the litigants' *entitlement* to costs while affording no discretionary alternative, I consider it clear that there is no room for judicial discretion where sub-rule (24) applies.
>
> Rule 37 is, as stated in *Brown v. Lowe*, a complete code. It is important that the Rule be uniformly applied to give effect to its purpose. Litigants must be able to make offers of settlement under the Rule with confidence that the Rule will be applied when costs are awarded. [Emphasis in original.]

[34]… Counsel for the defendant refers to the word "may" [in the chapeau of Rule 37B(5)] as indicating that the court is permitted to make "one or both" of the orders set out in Rule 37B(5), but is not restricted to only those two options. He submits that there is no logic in allowing a court to award a defendant double costs where a plaintiff is awarded less than the amount contained in an offer to settle, but not to permit the court to award single costs. Whereas an express provision for double costs must be included if it is to be awarded, since double costs are a creature of statute, he submits the same cannot be said of single costs, which were available to the court both before and after the enactment of Rule 37B(5)….

[35] … If the options include single costs, there is no reason they should not include other options. In other words, once this door is opened, there is no principled basis for restricting the trial judge from choosing any option which the trial judge thinks fit in the particular circumstances of the case. To extend the options available in this manner would encourage an individualized approach to costs which is not in keeping with the most obvious and accepted intent of this Rule, namely to promote settlement by providing certainty to the parties as to what to expect if they make, or refuse to accept, an offer to settle.

[36] Nor am I persuaded that the word "may" in Rule 37B(5) imports the permissive approach to the interpretation of the Rule advocated by the defendant. … While s. 29 of the *Interpretation Act*, R.S.B.C. 1996, c. 238 provides that the word "may" in an enactment is to be construed as"permissive and empowering", this is an instance in which the words cannot reasonably be read, in context, to permit three or more options for an award of costs where the precise words used are "one or both".

[37] In determining whether Rule 37B(5) confers a discretion to make orders for costs beyond those set out in 37B(5)(a) and (b), I find it noteworthy that Rule 37B(6) expressly includes a discretion permitting the court to consider additional matters not delineated in that subrule.

[43] What of the fact that the version of Rule 37B(5) in issue was only in effect for one year before it was amended to provide expressly for the addition of single costs as an option available to the court? While it may be tempting to speculate that the Legislators had intended to enact this option in Rule 37B(5), and that its omission was an inadvertent oversight, this would be pure speculation and inconsistent with any rule of statutory interpretation of which I am aware.

[45] It is interesting to note that the Legislature subsequently amended Rule 37B(5) to again provide for an option of single costs and that such an option is contained in the current *Supreme Court Civil Rules*. That fact, however, is neutral in the context of statutory interpretation, and cannot be used either as support for the defendant's submission that the provision was omitted by inadvertence, or as support

for the *amicus'* submission that the new provision was intended to add an option not previously available under the Rule. (See s. 37 of the *Interpretation Act*, *supra*.)

[46] It is apparent from this analysis that my reasons for finding that the trial judge was correct in his interpretation of Rule 37B(5) also dispose of the argument that a provision for single costs may be read into the Rule by necessary implication. This is simply another way of framing the argument that the trial judge erred in his interpretation of the Rule by finding that such a power did not exist. For the reasons I have given, I reject this submission.

Friesen (Brian Neil) Dental Corp. et al. v. Director of Companies Office (Man.) et al., 2011 MBCA 20

interpretation of bilingual legislation

Section 12 of the *Business Names Registration Act* provides that a business name shall not be registered if it is the same as, liable to be confused with, or closely resembles a name that is already registered. Section 13 of the Act gives the Director the power to direct that a registered name be changed if the name is the same as one already registered or if it is "so similar thereto as to be liable to be confounded therewith, or is otherwise on public grounds objectionable."

Section 14 provides as follows:

Application to Court of Queen's Bench 14(1) A person who feels aggrieved (a) as a result of the acceptance and registration of a declaration under this Act or the refusal to accept and register a declaration under this Act; ... (c) by a direction made by the Director under section 13 or the refusal of the Director to make a direction under section 13; or ... may apply to the Court of Queen's Bench for an order (e) cancelling the registration of any declaration referred to in clause (a) or ... (g) changing the name set out in the declaration ... and the Court may so order and make any further order it thinks fit.	Requête à la Cour du Banc de la Reine 14(1) Quiconque s'estime lésé : a) par suite de l'acceptation et de l'enregistrement d'une déclaration visée par la présente loi ou [...] c) par les instructions visées à l'article 13 ou le refus de donner de telles instructions [...] peut en appeler devant la Cour du Banc de la Reine. Celle-ci peut, par ordonnance : e) annuler l'enregistrement de toute déclaration visée à l'alinéa a) ou [...] g) changer le nom contenu dans la déclaration […] Le tribunal peut également rendre toute autre ordonnance qu'il estime indiquée.

Issue: Does s. 14 provide for an appeal or a hearing de novo?

Judgment:

21 Looking to the language of the specific section, I see that the English version of s. 14 simply states that one "may apply" for an order from the Court of Queen's Bench.

22 However, the French version of the *BNRA* (*Loi sur l'enregistrement des noms commerciaux*) clearly indicates that the application is an appeal.

23 The words "peut en appeler" would normally be translated in this context as "may appeal it," as opposed to "may apply," which is used in the English version of s. 14 of the *BNRA*. Indeed, a computerized search reveals that the word "appeler" appears in 76 Manitoba statutes, and in almost all of those statutes, when the French word "appeler" is used, the English version uses the word "appeal" (the one other exception besides the *BNRA* is *The Manitoba Water Services Board Act*, C.C.S.M., c. W90 at s. 8(2)). How then does one interpret the relevant provision in light of the discrepancy between the English and French versions of the section?

24 The two fundamental rules of interpretation applying to bilingual legislation are described in The Honourable Mr. Justice Michel Bastarache *et al.*, *The Law of Bilingual Interpretation* (Markham: LexisNexis Canada Inc., 2008) as follows (at p. 15):

> The bilingual model is based upon two fundamental principles, which we will discuss in this section. The first principle is the Equal Authenticity Rule. According to this rule, both the English and French versions of a statute are equally authentic statements of legislative intent, and neither one is supreme or paramount over the other. The second principle is the Shared Meaning Rule. This rule provides, in short, that both versions of the statute are expressions of the same legislative intent and that courts interpreting statutes should, as far as possible, attempt to ascertain that intent through a determination of the shared or common meaning of the two versions.
>
> ….

25 Thus, it is the duty of the court to read both the French and English version of the *BNRA* together in order to determine the legislative intention. They are of equal validity and one version cannot simply be chosen over the other. However, there is here clearly a discrepancy between the French and English versions, making it difficult to easily ascertain the legislative intention.

26 Consequently, the second fundamental rule of interpretation of bilingual legislation, "the Shared Meaning Rule," (Bastarache, at p. 15) comes into play. In *R. v. Daoust*, 2004 SCC 6 (CanLII), 2004 SCC 6, [2004] 1 S.C.R. 217, the leading case on bilingual interpretation, Bastarache J. discussed this rule at some length (at paras. 26, 28-30):

> The Court has on several occasions discussed how a bilingual statute should be interpreted in cases where there is a discrepancy between the two versions of the same text. For example, in *Schreiber v. Canada (Attorney General)*, 2002 SCC 62 (CanLII), [2002] 3 S.C.R. 269, 2002 SCC 62, at para. 56, LeBel J. wrote:
>
> > A principle of bilingual statutory interpretation holds that where one version is ambiguous and the other is clear and unequivocal, the common meaning of the two

versions would *a priori* be preferred; see: Côté, [*The Interpretation of Legislation in Canada*, 3rd ed. (Scarborough: Carswell, 2000)], at p. 327; and *Tupper v. The Queen*, 1967 CanLII 14 (SCC), [1967] S.C.R. 589. Furthermore, where one of the two versions is broader than the other, the common meaning would favour the more restricted or limited meaning: see Côté, *supra*, at p. 327; *R. v. Dubois*, 1935 CanLII 1 (SCC), [1935] S.C.R. 378; *Maurice Pollack Ltée v. Comité paritaire du commerce de détail à Québec*, [1946] S.C.R. 343; *Pfizer Co. v. Deputy Minister of National Revenue for Customs and Excise*, 1975 CanLII 194 (SCC), [1977] 1 S.C.R. 456, at pp. 464-65; and *Gravel v. City of St-Léonard*, 1977 CanLII 9 (SCC), [1978] 1 S.C.R. 660, at p. 669.

….

27 Applying this reasoning to s. 14(1) of the *BNRA*, it is clear that there is a discrepancy between the English and French versions of the section. The English version indicates that an aggrieved person "may apply" for an order, which is ambiguous since it is not clear whether it is an application for appeal, an application for judicial review, or an application for a hearing *de novo*. On the other hand, the French version indicates that the aggrieved person "peut en appeler," may appeal the decision of the Director. This version is unambiguous and plain. It is an appeal that is contemplated by the French version. It is consequently an appeal that is common to both versions. According to the shared meaning rule, then, s. 14(1) should be interpreted to mean that the application to the court is an application for an appeal, unless this meaning is not consistent with the legislative intent.

28 However, the conclusion that the application in s. 14(1) is in the nature of an appeal does not end the discussion. A statutory appeal can still require that a hearing *de novo* take place. For example, *The Court of Queen's Bench Small Claims Practices Act*, s. 12(5) specifically provides that an appeal "shall be a new trial."

29 In the present case, the appellant argued that the application should have been treated as a hearing *de novo* because the *BNRA* does not indicate that the parties should file with the court a record of the earlier proceedings and because s. 14(1) of the *BNRA* gives the court the power to make "any further order it thinks fit."

….

33 Next, as has been noted, in other Manitoba statutes where the Legislature intended a hearing *de novo*, the intention was explicitly so stated or at least there was an explicit reference to the right to present further evidence. Beside the fact that the provision in question used the word "appeal," *The Farm Lands Ownership Act* as a whole did not contain any language indicating that a fresh hearing was envisioned or that further evidence could be heard on the appeal. There was nothing that indicated the Legislature intended anything other than an appeal on the record.

[Comment: This case illustrates the growing trend to rely on computer searches in preparing statutory interpretation arguments]

Greater Vancouver Regional District v. British Columbia (Attorney General), 2011 BCCA 345

manner and form

British Columbia's *Musqueam Reconciliation, Settlement and Benefits Agreement Implementation Act (* the *"Reconciliation Act")* implemented an agreement with the Musqueam First Nation by transferring certain lands owned by the District to two companies designated by the Musqueam. The District claimed that because the transfer was made without notice to or consultation with the District, the Province had violated paragraph 3(c) of the *Local Government Act* and the *Reconciliation Act* was therefore invalid.

The District argued that paragraph 3(c) established a "manner and form" requirement with which subsequent legislation such as the *Reconciliation Act* must comply in order to be valid.

Issue: what is the legal effect of paragraph 3(c)?

B.C.'s *Local Government Act*

Principles for Government Relations

3 The relationship between regional districts and the Provincial government in relation to this Act is based on the following principles:

(a) cooperative relations between the Provincial government and regional districts are to be fostered in order to efficiently and effectively meet the needs of the citizens of British Columbia;

(b) regional districts need the powers that allow them to draw on the resources required to fulfill their responsibilities;

(c) notice and consultation is needed for Provincial government actions that directly affect regional district interests;

…

B.C.'s *Interpretation Act*

Power of repeal and amendment

15 (1) Every Act must be construed as to reserve to the Legislature the power of repealing or amending it, and of revoking, restricting or modifying a power, privilege or advantage that it vests in or grants to any person.

Judgment:

Newbury J.A. wrote:

[33] …The phrase "manner and form" (which originates in colonial legislation) is used to differentiate procedural requirements from restraints on the "content, substance or policy" of legislation (see Hogg, *supra*, at 12-11). Restraints of the latter kind are not permitted to interfere with the authority of

government [i.e. sovereign legislatures] to repeal, amend or pass legislation. On the other hand, laws that prescribe the "manner and form" in which legislation must be enacted have been upheld – albeit mainly in the constitutional or quasi-constitutional context....

[39] I agree that whether or not section 3 of the *Local Government Act* is constitutional or quasi-constitutional legislation may not be determinative…. In this regard, I note Professor Hogg's opinion that it is "reasonably clear" a legislative body "may be bound by self-imposed [as opposed to constitutional] procedural (or manner and form) restraints on its enactments" (*supra*, at 12-11). The author notes that various federal and provincial laws 'redefining' or 'changing the nature' of the legislative process have been upheld, or accepted without challenge. For example, he says:

> ... [T] the federal Parliament could provide that a law to abolish the office of Auditor General must first be approved by a referendum of voters, or a provincial Legislature could provide that a law altering the constituencies for elections must be passed by a two-thirds majority in the legislative assembly. These "manner and form" laws, which purport to re-define the legislative body, either generally or for particular purposes, are binding for the future. A law which purported to disregard these hypothetical examples of manner and form laws, for example, by purporting to abolish the office of Auditor General without a prior referendum, or to alter the provincial electoral law by a simple majority, would be held to be invalid by the courts….

[42] I am not convinced that it is not open to Parliament or a provincial legislature to enact legislation that validly requires government or government officials to consult with a stated person or group before it may legislate in a particular way. At the least, I would say that attempts to enforce such a provision would not be bound to fail as a "renunciation *pro tanto* of the lawmaking power". …

[43] The real obstacle in my view to the GVRD's prospects of success in this case lies in the fact that s. 3(c) does not purport to create any requirement or obligation on the part of the Province. The law seems clear that any manner and form restraint must be imperative – it must not merely state a "principle" or a "need" that underlies a "relationship" as here, but must be sufficiently clear to overcome the right of the legislative body to bind itself as the manner and form of enacting future laws.

[45] … As the chambers judge noted, s. 3(c) does not specify how much notice is required or to whom it is to be given, nor does it describe what degree and manner of consultation are "needed". The phrase "Provincial government actions" is also vague – arguably, it may refer to actions of the executive branch of government, rather than to the enactment of laws by Legislature. In any event, it is not, to quote Professor Hogg yet again, "unmistakeably addressed to the future actions of the enacting legislative body". (*Supra*, at 12-18.) Section 3(c) purports only to state a principle on which the relationship between regional districts and the Province is based (or on which the Province hopes it will be based). It does not state that no action shall be taken by the Province that directly affects"regional district interests" without notice and consultation; nor does it state that the Province shall provide notice and consult before taking any action that directly affects regional district interests. It is plain and obvious that s. 3(c) creates no legally enforceable obligation on the part of the Province that could result in the invalidity of the statute….

Hayward v. Hayward, 2011 NSCA 118

retrospective application

In 1995 GH made a will naming his wife his sole executor and sole beneficiary. At the time the will was made, section 19 of the *Wills Act* read as follows:

> 19 No will ... is revoked otherwise than by ... another will ... or the destruction of the will with the intention to revoke it

The couple divorced in 2004. GH died in 2008, a few weeks after the following amendment to the *Wills Act* came into force.

> 19A Notwithstanding section 19, ... where, after the testator makes a will, the testator's marriage is terminated by a judgment absolute of divorce or is declared a nullity,
>
> ... the will shall be construed as if the former spouse had predeceased the testator.

GH had not made a new will nor had he revoked the 1995 will. Relying on the amendment, his son applied for and was granted administration of the estate. The former wife then applied to have the son removed and herself appointed as sole executor and declared beneficiary of the estate.

The application was allowed at first instance. The judge refused to apply section 19A because to do so would give the provision retrospective effect.

Issue: whether applying section 19A to these facts would be a retrospective application and if so whether retrospective application was intended by the legislature.

Judgment:

Starting at paragraph 32, the Court reviews cases decided by various courts of appeal interpreting the temporal application of provisions similar to section 19A. In the end it adopts the reasoning of the Ontario Court of Appeal in *Page Estate v. Sachs*, [1993] O.J. No.269 (C.A.).

[33] Blair, J.A., writing for the Ontario Court of Appeal [in *Page Estate v. Sachs*], stated:

> 6 Section 17(2) of the Act is a classic example of retrospective legislation which alters the legal effect of a previous Act, the making of a will, after it has occurred. It fits the definition of a retrospective statute by Professor Driedger in Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983) at p. 186, as one that
>
> > . . . changes the law only for the future, but it looks to the past and attaches new prejudicial consequences to a completed transaction. . . .

[34] With regard to s. 43, [which makes section 17(2) applicable to wills made before, on or after March 31, 1978], he stated:

> 10 The effect of s. 43 is to attach new and prejudicial consequences from the standpoint of a spouse to a will made at a time in the past before a marriage is terminated....

[43] The conclusion in *Page Estate* did not hang on the existence of s. 43. Even before referring to that provision, the Ontario Court of Appeal had already determined that s. 17(2) was retrospective [i.e. intended to have retrospective application]. Accordingly, the decision was not distinguishable on the basis that there is no equivalent provision in our *Wills Act.*

[47] Section 19A satisfies the test established by Professor Driedger and set out in para 56 of the *Nova Scotia Pharmaceutical Society* decision quoted earlier, namely:

> ... is there anything in the statute to indicate that the consequences of a prior event are changed, not for a time before its enactment, but henceforth from the time of the enactment, or from the time of its commencement if that should be later?

In my view, the wording of s. 19A clearly shows that the consequences of divorce (a prior event) are a change from the time that provision took effect. The absence of any transitional provision makes no difference to the analysis.

[48] Where, as here, the words are clear, the text of the enactment itself is sufficient to determine legislative intent. It is not necessary to search for guidance in the presumptions which assist statutory interpretation, nor in materials surrounding the enactment that might throw some light in the search for legislative intent.

[49] Here the presumption against retrospectivity which applies to prejudicial statutes such as s. 19A is fully answered by the clear wording of that text. The presumption against inference with vested rights is not applicable because, as the Supreme Court of Canada explained in *Dikranian*, in order to have a vested right, an individual's legal situation must be tangible and concrete and this legal situation must have been sufficiently constituted at the commencement of the new statute. Nancy Hayward's entitlement under the will was no more than an expectancy; it did not become a reality until George's passing. Accordingly, she did not have a vested right which would bring that presumption into play.

[Comment: This case is interesting because it suggests that applying new legislation to facts that have not previously produced any legal right or affected anyone's legal position may nonetheless be retrospective. This analysis is inconsistent with the account of retrospective application set out in *Épiciers Unis Métro-Richelieu Inc., division "Econogros" v. Collin.*]

Idle-O Apartments Inc. v. Charlyn Investments Ltd., 2010 BCCA 460

retrospective application

British Columbia's *Land Title Act* contains the following provisions.

> 73(1) Except on compliance with this Part, a person must not subdivide land into smaller parcels than those of which the person is the owner for the purpose of
>
> (a) transferring it, or
>
> (b) leasing it, for a life, or for a term exceeding 3 years.

(6) An instrument executed by a person in contravention of this section does not confer on the party claiming under it a right to registration of the instrument.

In 1974, after the coming into force of section 73, the parties executed a lease of a parcel of unsubdivided land for a term of 99 years, contrary to subsection 73(1). Some years later, after a dispute, the lesser informed the lessee that the lease was invalid and unenforceable and demanded possession of the leased land. When the lessee refused, the lesser in 2004 commenced an action for a declaration that the lease was illegal and unenforceable.

The lesser relied on two decision of the B.C. Court of Appeal. In *International Paper Industries Ltd. v. Top Line Industries Inc.* (1996), 20 B.C.L.R. (3d) 41 (C.A.), the B.C. Court of Appeal held that "the effect of s. 73 was that a lease of unsubdivided land for a term exceeding three years was illegal and unenforceable, and did not create any personal rights between the parties." In *Top Line Industries Inc. v. International Paper Industries Ltd.*, 2000 BCCA 23, the B.C. Court of Appeal held that a lease granted in violation of the statutory prohibition in s. 73 was void *ab initio*.

Idle-O commenced its action on May 27, 2004. After procedural delays and adjournments, a summary trial was heard June 22-23, 2006, and judgment was reserved. In May 2007, the *Land Title Act* was amended by adding s. 73.1 (*Miscellaneous Statutes Amendment Act (No. 2)*:

73.1 A lease for a parcel of land is not unenforceable between the parties to the lease by reason only that

(a) the lease does not comply with this Part, or

(b) an application for the registration of the lease may be refused or rejected.

The parties applied to the trial judge to make submissions about the application of s. 73.1 and were heard in February of 2008. A judgment was finally rendered some months later.

Issue: What is the effect of s. 73.1 on the lesser's application for a declaration of invalidity and unenforceability?

Judgment:

The B.C. Supreme Court concluded that because section 73.1 is "clearly remedial legislation … passed to bring fairness and equity to a situation like this," it should apply to the 1974 lease. This conclusion was also based on the following reasoning:

> I adopt the observation by Professor Côté in The Interpretation of Legislation in Canada, "... the statute applying immediately in the present does not allow for the survival of previous legislation." This case is still before the courts. The former legislation is not. The recent amendment is. The recent amendment governs the rights and obligations between these parties.

On appeal, the B.C. Court of Appeal concluded that "There is no basis in law for concluding that the Legislature intended s. 73.1 to have retrospective effect." Levine J.A. wrote:

[22] The trial judge set out the background to the enactment of s. 73.1, as provided to her in the respondent's submissions (at paras. 72-77):

> The defence points to the concerns that the *Top Line* case caused. In July 2005, the British Columbia Law Institute issued a report, "Report on Leases of Unsubdivided Land and the Top Line Case". …[a]fter setting out its summary and criticism of the *Top Line* case, and detailing its consultation process, the BCLI recommended legislative reform to the B.C. Provincial Legislature. In faulting *Top Line*, the report stated at page 5, "The Land Title Act does not dictate the harsh result of invalidity; it only provides that such leases cannot be registered." Further at page 5, the report stated:
>
> > Other criticisms of *Top Line* have focussed on the effect that the decision could have on commercial leasing. The court touched on these concerns when it referred to "... the desirability of holding parties to their contractual obligations...." A Declaration that an agreement is void *ab initio* can cause a disaster for one party and a windfall for the other. Even in the absence of a windfall, parties to leases similar to the one in *Top Line* may have an incentive to litigate. …
> >
> > [Emphasis added]
>
> At page 10 of its report, the BCLI recommended that the legislature enact legislation to address the difficulties created by the *Top Line* case. Their recommendation was an amendment to the *Land Title Act*.
>
> The suggested draft legislation by the BCLI was as follows:
>
> *1 The Land Title Act, R.S.B.C. 1996, c. 250 is amended by adding the following section:*
>
> > 73.1 (1) A purported lease executed in contravention of section 73 must take effect as a licence for the purpose of creating personal rights and obligations among the parties to it.
> >
> > (2) Nothing in subsection (1) affects the right of the purported lessee to claim damages for breach of contract.
> >
> > (3) Subsection (1) applies to purported leases executed before or after the subsection comes into force, unless the purported lease is the subject of a proceeding commenced before the subsection comes into force.
>
> When Bill 35 was put forward last year, that being the *Miscellaneous Statutes Amendment Act (No. 2)*, by the Attorney General, the explanatory note issued by the legislature stated as follows:
>
> > Section 25: [Land Title Act, section 73.1] provides that a lease or an agreement for lease of part of a parcel of land is not unenforceable for specified reasons only, abrogating a 1996 ruling of the British Columbia Court of Appeal in *International Paper Industries Ltd. v. Top Line Industries Inc.*
>
> Counsel for the defendant then produced the Official Report of the Debates of the Legislative Assembly for May 14, 2007, when the Attorney General moved the enactment of Bill 35. The Attorney General stated as follows:

> Amendments to the Land Title Act will also create new opportunities for farmers by ensuring they can enter into valid, enforceable long-term leases for unused portions of agricultural land. The amendment addresses side effects of a 1996 decision, a court case that interpreted the act's requirements on leases on unsubdivided land. The decision has resulted in confusion, extra costs for farmers and an unintended burden on local governments. The amendments will enhance farmers' abilities to affordably access unused farmland and set out requirements for leases with terms exceeding three years. The change will promote certainty for land agreements and reduce unnecessary litigation.

[26] The starting point for the analysis of the effect of s. 73.1 is that there is nothing in its wording that expressly provides for retrospective application. In the absence of any express intent to apply legislation retroactively or retrospectively, legislation is construed as so applying only "by necessary implication required by the language of the Act":see *Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue)*,

[29] The evidence of legislative intent – the BCLI Report, the explanatory note when the amendment was introduced in the Legislature, and the excerpt from Hansard – do not support the decision. While they provide some evidence that s. 73.1 was enacted in response to *Top Line*, there is no specific evidence that the Legislature intended the amendment to be applied retrospectively. If anything, the rejection of the expressly retrospective draft provision suggested by the BCLI would tend to indicate that the Legislature considered and decided against s. 73.1 having retrospective effect.

[30] Nor can the amendment properly be characterized as procedural. Section 73.1 has the effect of granting substantive rights in respect of a previously otherwise unenforceable lease.

[35] In this case, the "operative event" to which s. 73.1 would apply was either the creation of the lease in 1978 or the commencement of the proceedings in 2004, both of which occurred long before the amendment was enacted. There is no procedural basis, as in *Acme Village* and *CAIMAW*, to apply s. 73.1 to the lease, other than on the basis that it is retrospective in effect, and there is no basis in law to give the lease [sic] retrospective effect.

[36] The trial judge's conclusion that s. 73.1 must be given retrospective effect on the basis that it is remedial legislation is not supported by the well-established legal principles that govern the interpretation of statutes and their applicability. It follows that the lease is invalid and unenforceable, as dictated by the decision in *Top Line*.

[37] There is no question that this result creates what the BCLI referred to in its report on the implications of *Top Line*: "A Declaration that an agreement is void *ab initio* can cause a disaster for one party and a windfall for the other." These parties carried on for 26 years on the basis that they had entered into a valid lease. However, unless and until this Court decides that *Top Line* was wrongly decided, or the Legislature makes it clear that s. 73.1 is to be given retrospective effect, leases entered into before the enactment of s. 73.1 on May 31, 2007 are invalid and unenforceable.

Jackson v. Vaughan (City), 2010 ONCA 118

vagueness

"believes on reasonable grounds"

subdelegation

Section 81 of Ontario's *Municipal Elections Act* provides that a person entitled to vote in a municipal election who believes on reasonable grounds that a candidate for office contravened the Act may apply to the council for an audit of the candidate's election finances. An application triggers s.83(3) and possibly the other provisions set out below.

In this case, the council received an application, appointed an auditor, received and reviewed the auditor's report and passed a resolution to prosecute, appointing W to act on their behalf and instructing him to pursue charges "for which reasonable and probable grounds exist for believing that an offence has been committed, as may be determined in the legal opinion of Timothy J. Wilkin."

81. (3) Within 30 days after receiving the application, the council or local board, as the case may be, shall consider the application and decide whether it should be granted or rejected.	**81.** (3) Dans les 30 jours qui suivent sa réception, le conseil municipal ou le conseil local, selon le cas, examine la demande et décide s'il y a lieu d'y accéder ou de la rejeter.
Appointment of auditor (4) If it is decided to grant the application under subsection (3), the appropriate council or local board shall, by resolution, appoint an auditor to conduct a compliance audit of the candidate's election campaign finances.	**Nomination d'un vérificateur** (4) S'il est décidé d'accéder à la demande aux termes du paragraphe (3), le conseil municipal ou le conseil local pertinent nomme, par voie de résolution, un vérificateur afin de procéder à une vérification de conformité du financement de la campagne électorale du candidat.
Duty of auditor (6) An auditor appointed under subsection (4) shall promptly conduct an audit of the candidate's election campaign finances to determine whether he or she has complied with the provisions of this Act relating to election campaign finances and prepare a report outlining any apparent contravention by the candidate.	**Fonctions du vérificateur** (6) Le vérificateur nommé en vertu du paragraphe (4) procède promptement à la vérification du financement de la campagne électorale du candidat en vue de déterminer si celui-ci s'est conformé aux dispositions de la présente loi se rapportant au financement des campagnes électorales et rédige promptement un rapport exposant les contraventions apparentes commises par le candidat.
Consideration of report, legal proceeding (10) The council or local board shall consider the report within 30 days after receiving it and may commence a legal proceeding against the candidate for any apparent contravention of a provision of this Act relating to election campaign finances.	**Examen du rapport, instance** (10) Le conseil municipal ou le conseil local examine le rapport dans les 30 jours qui suivent sa réception et peut introduire une instance judiciaire contre le candidat à l'égard des contraventions apparentes à une disposition de la présente loi portant sur le financement des campagnes électorales.

Issue: Is section 81 void for vagueness? Does it confer excessive discretion?

Judgment:

[24] The appellant submits that … [s]ection 81 of the Act … grants discretion but fails to give direction on how it should be exercised, thereby permitting its arbitrary exercise. Examples of the alleged vagueness in s. 81 include: the creation of an ill-defined power given to an auditor to determine whether there has been a contravention of the *Act*; lack of guidance on what constitutes "reasonable grounds", a "compliance audit" or an "apparent contravention"; and, no articulation of the factors that a council is to take into consideration in determining whether to grant or refuse an application for a compliance audit or commence a legal proceeding pursuant to s. 81.

[29] The application judge reviewed the relevant jurisprudence and noted the governing legal principles set out in *Nova Scotia Pharmaceutical Society* at pp. 639-40, 642.[4] …A statutory provision is not impermissibly vague if it sets out boundaries of permissible and impermissible conduct so as to provide a basis for legal debate. … Legislation must not give unfettered discretion to a decision maker because doing so will deprive the judiciary of the means of controlling the exercise of the discretion. The provision must give a sufficient indication as to how decisions are to be reached and the determinative factors or elements that are to be considered.

[30] With respect to the specific examples of vagueness alleged by the appellant and set out above, the application judge found that in carrying out the audit, the auditor is not exercising discretion in the legal sense of the word. The auditor will need to interpret the *Act* and may be incorrect in that interpretation. However, any errors in that regard are subject to judicial oversight through the prosecution process.

[31] The nature of a compliance audit emerges from s. 81(6) of the *Act*. The word "compliance" refers to compliance with a provision of the *Act* relating to election campaign finances. There is nothing vague or ambiguous in the word "compliance". It is not for the auditor to determine whether an apparent contravention is a real contravention. That determination is made by the judge of the Ontario Court of Justice hearing the prosecution. Thus, there is no impermissibly broad delegation of power to the auditor.

[32] The phrase "reasonable grounds" is not impermissibly vague. The law is replete with provisions using the standard of "reasonable grounds" and courts have had little difficulty in applying the term to specific fact situations….

[33] The fact that terms such as "compliance audit" and "apparent contravention" are not defined does not render s. 81 impermissibly vague….

[34] The failure to articulate factors that a council is to take into consideration when determining whether to commence legal proceedings does not lead to the conclusion that the council may exercise that power arbitrarily. As the application judge explains at paras. 99 -101 of his reasons, there is no "unfettered discretion" in a municipal body:…

[36] I would dismiss this ground of appeal because, as the application judge explained, s. 81 is not impermissibly vague. A law will not be struck down for vagueness simply because reasonable people might disagree as to its application to particular facts: see *Nova Scotia Pharmaceutical Society* at p. 640; *Cochrane* at paras. 43-44. …When the words of s. 81 are given their ordinary meaning and read grammatically, in the context of the legislation as a whole including sections 66-82.1, they … set out the boundaries of permissible and impermissible campaign finance activities which give fair notice and operate to limit enforcement discretion. As well, the administrative law principles that apply to municipalities and the terms of the City's by-laws limit Council's enforcement discretion. And,

ultimately, whether a candidate has contravened the *Act* is a determination made by a judge, thereby ensuring judicial oversight of the auditor's conclusion of an apparent contravention.

Merck Frosst Canada & Co. v. Apotex Inc., 2011 FCA 329

(application for leave to appeal to the SCC dismissed)

declaratory provision
retroactive application
pending appeal
presumption of validity
explanatory note

In the early 1990's, Apotex wanted to market a generic version of a drug to which Merck held the patent. As required under the *Patented Medicines (Notice of Compliance) Regulations*, Apotex applied to the Minister of Health for a Notice of Compliance. Merck responded by applying to the Federal Court under subsection 6(1) of the Regulations for an order to prohibit the Minister from issuing the Notice of Compliance. The prohibition order was granted. Apotex then appealed to have the prohibition order set aside first to the Federal Court of Appeal, where it lost, and eventually to the Supreme Court of Canada, where it was successful. The Minister then issued the Notice of Compliance, and Apotex applied for compensation under section 8 of the Regulations as amended in 1998.

8. (1) If an application made under subsection 6(1) is withdrawn or discontinued by the first person or is dismissed by the court hearing the application or if an order preventing the Minister from issuing a notice of compliance, made pursuant to that subsection, is reversed on appeal, the first person is liable to the second person for any loss suffered during the period (*a*) beginning on the date, as certified by the Minister, on which a notice of compliance would have been issued in the absence of these Regulations, unless the court concludes that (i) the certified date was, by the operation of *An Act to amend the Patent Act and the Food and Drugs Act (The Jean Chrétien Pledge to Africa)*, chapter 23 of the Statutes of Canada, 2004, earlier than it would otherwise have been and therefore a date later than the certified date is more appropriate, or (ii) a date other than the certified date is more appropriate; and (*b*) ending on the date of the withdrawal, the	**8.** (1) Si la demande présentée aux termes du paragraphe 6(1) est retirée ou fait l'objet d'un désistement par la première personne ou est rejetée par le tribunal qui en est saisi, ou si l'ordonnance interdisant au ministre de délivrer un avis de conformité, rendue aux termes de ce paragraphe, est annulée lors d'un appel, la première personne est responsable envers la seconde personne de toute perte subie au cours de la période : *a*) débutant à la date, attestée par le ministre, à laquelle un avis de conformité aurait été délivré en l'absence du présent règlement, sauf si le tribunal conclut : (i) soit que la date attestée est devancée en raison de l'application de la *Loi modifiant la Loi sur les brevets et la Loi sur les aliments et drogues (engagement de Jean Chrétien envers l'Afrique)*, chapitre 23 des Lois du Canada (2004), et qu'en conséquence une date postérieure à celle-ci est plus appropriée, (ii) soit qu'une date autre que la date attestée est plus appropriée;

discontinuance, the dismissal or the reversal.	*b*) se terminant à la date du retrait, du désistement ou du rejet de la demande ou de l'annulation de l'ordonnance.

This version of section 8 came into force four months before the Supreme Court of Canada decided that Merck was not entitled to its prohibition order. The transitional rule in the 1998 Regulations (subs. 9(6)) stated that the amended remedies section (s. 8) applies to applications that are "pending" ("**demandes qui sont pendantes"**) at the time the new Regulations came into force. The first issue dealt with by the Court was whether the NOC application filed by Apotex long before 1998 was still "pending" when the new section 8 came into force. Stratas J.A. wrote:

[17] I agree with the result reached by the Federal Court. Merck's prohibition application was pending when the 1998 Regulations came into force. I also agree with the Federal Court that the correct test for determining whether an application is "pending" is whether the application remains alive either at first instance, or on appeal.	[17] Je souscris à la conclusion de la Cour fédérale. La demande d'interdiction de Merck était « pendante » lorsque le Règlement de 1998 est entré en vigueur. Je suis également d'accord avec la Cour fédérale que, pour déterminer si une demande est « pendante », il faut se demander si elle est encore actuelle, que ce soit en première instance ou en appel.
…	[…]
[25] Despite the above, Merck nevertheless submits that the 1993 Regulations apply. It says that the 1998 Regulations are invalid and, thus, must be disregarded by this Court.	[25] En dépit de ce qui précède, Merck allègue que le Règlement de 1993 s'applique. La société soutient en effet que le Règlement de 1998 est invalide et doit donc être écarté par la Cour.
[26] It urges this result upon us because the transitional provision, as interpreted above, means that the 1998 Regulations have retroactive or retrospective effects and interfere with vested rights. Merck notes that the *Patent Act* does not authorize the making of regulations that have any of those effects or interfere with vested rights.	[26] Elle fait valoir que, selon l'interprétation donnée plus haut à la disposition transitoire, le Règlement de 1998 produit des effets rétroactifs ou rétrospectifs et porte atteinte à des droits acquis. Merck fait remarquer que la *Loi sur les brevets* n'autorise pas la prise de règlements qui produisent de tels effets ou portent atteinte à des droits acquis.
…	[…]
[30] Merck is correct that the making of retroactive or retrospective regulations or regulations that interfere with vested rights on substantive matters must be authorized by the regulations' enabling provisions.	[30] Merck a raison de dire que la prise de règlements rétroactifs ou rétrospectifs ou qui portent atteinte à des droits acquis sur des questions de fond doit être valablement autorisée par les dispositions habilitantes du Règlement.
…	[…]
[35] Merck submits that applying section 8 of the 1998 Regulations to it in this case would create retroactive or retrospective effects or interfere with its vested rights. It says that on May 31, 1993 it applied for	[35] Merck soutient qu'en l'espèce, l'application de l'article 8 du Règlement de 1998 produirait à son égard des effets rétroactifs ou rétrospectifs ou porterait atteinte à ses droits acquis. Elle affirme que le 31 mai 1993, lorsqu'elle a déposé sa demande d'interdiction et obtenu un sursis automatique, elle savait qu'elle courait le risque d'être tenue

an order of prohibition and received an automatic stay, knowing that there was a risk that it would be liable to Apotex for any damage suffered by it by reason of the Minister delaying issuance of an NOC. But it says that risk was defined and framed by the rules set out in section 8 of the 1993 Regulations, the provision that was in force at the time it applied for prohibition. In effect, Merck submits that on May 31, 1993 it acquired a vested right to the benefit and burden of the rules set out in section 8 of the 1993 Regulations.	responsable des dommages-intérêts subis par Apotex parce que le ministre devait retarder la délivrance de l'avis de conformité. Merck mentionne toutefois que ce risque était défini et encadré par les règles énoncées à l'article 8 du Règlement de 1993, qui était en vigueur à la date où elle a déposé sa demande d'interdiction. En fait, Merck soutient qu'elle a acquis, le 31 mai 1993, le droit d'invoquer les avantages et contraintes des règles prévues à l'article 8 du Règlement de 1993.
[36] Putting the submission somewhat differently and colloquially, Merck says that applying section 8 of the 1998 Regulations to it in effect "pulls the rug out from under it." Section 8 of the 1998 Regulations imposes upon it, long after it made its decision to apply for prohibition, a set of rules that is fundamentally different from the rules around which it planned its affairs. Thus, in its view, section 8 of the 1998 Regulations has a retrospective effect upon it.	[36] Formulant sa prétention de manière différente et quelque peu familière, Merck affirme que l'application de l'article 8 du Règlement de 1998 [TRADUCTION] « lui coupe l'herbe sous le pied ». L'article 8 du Règlement de 1998 lui impose, longtemps après qu'elle ait décidé de déposer sa demande d'interdiction, une série de règles fondamentalement différentes de celles sur lesquelles elle s'était fondée pour planifier ses affaires. Elle prétend donc que l'article 8 du Règlement de 1998 a sur elle un effet rétroactif.
…	[…]
[40] There is a rebuttable presumption of validity that applies in cases where regulations are alleged to exceed the scope of the law-making power set out in the parent statute: …. In this case, this means that the burden is on Merck to demonstrate that the application of the 1998 Regulations creates retroactive or retrospective effects, or interferes with a vested right. As is evident from this section of my reasons, I find that Merck has not discharged that burden.	[40] Une présomption réfutable de validité s'applique lorsqu'il est allégué qu'un règlement outrepasse la portée du pouvoir de légiférer conféré par la loi habilitante […]. En l'espèce, il appartient donc à Merck de démontrer que l'application du Règlement de 1998 produit des effets rétroactifs ou rétrospectifs, ou porte atteinte à des droits acquis. Comme il ressort clairement de la présente partie de mes motifs, j'estime que Merck ne s'est pas acquittée de ce fardeau.
[41] Merck submits that this case is similar to *Thiessen v. Manitoba Public Insurance Corp.* reflex, (1990), 66 D.L.R. (4th) 366 (Man. C.A.). In that case, a regulation contained an express limit on damages, but the regulation was later repealed. The Manitoba Court of Appeal held that the defendant had a vested right in the limit on damages under the old regulation. Therefore, in its view, the new regulation, which purported to remove that limit, was retrospective.	[41] Merck soutient que la présente affaire ressemble à l'affaire *Thiessen c. Manitoba Public Insurance Corp.* (1990), 66 D.L.R. (4th) 366 (C.A. Man.), dans laquelle un règlement qui imposait expressément une limite au montant des dommages-intérêts pouvant être octroyés avait été par la suite abrogé. La Cour d'appel du Manitoba a statué que la partie défenderesse avait un droit acquis à la limite imposée au montant des dommages-intérêts par l'ancien règlement. C'est pourquoi elle a conclu que le nouveau règlement, qui visait à supprimer cette limite, était rétroactif.
[42] *Thiessen* is different from the case at bar. When Merck decided to apply for prohibition, it knew that it was potentially subject to an action for damages.	[42] Une distinction doit être établie entre l'affaire *Thiessen* et celle qui nous occupe. Lorsque Merck a décidé de présenter sa demande d'interdiction, elle

When Merck made that decision, section 8 of the 1993 Regulations did not give Merck any rights, such as an affirmative defence or liability cap, that were repealed by the 1998 Regulations. *Thiessen* is a case where, unlike this case, such a right –a liability cap – was repealed by later legislation.

[43] Merck submits that section 8 of the 1998 Regulations greatly expanded liability for damages and created new rights for "second persons" such as Apotex.

[44] … Merck's submission in this case overshoots the mark.

[45] Accompanying the 1998 Regulations was a Regulatory Impact Analysis Statement: Canada Gazette Part II, vol. 132, no. 7 at page 1056. It is appropriate to take into account this Statement as an aid to determining the meaning of the 1998 Regulations: ...

> **Specifying circumstances in which damages or costs can be awarded.** A clearer indication is given to the court as to the circumstances in which damages could be awarded to a generic manufacturer to compensate for loss suffered by reason of delayed market entry of its drug, and the factors that may be taken into account in calculating damages. The court may also award costs to either a generic manufacturer or a patentee, including solicitor and client costs, as appropriate, consistent with Federal Court Rules.

[46] This passage in the Regulatory Impact Analysis Statement suggests that the 1998 Regulations did not work a revolution in the substantive content of section 8 of the 1993 Regulations. Instead, it was aimed at providing a "clearer indication" of the circumstances in which damages could be awarded.

[47] In this way, the 1998 Regulations, for the

savait qu'elle s'exposait à une action en dommages-intérêts. Au moment où elle a pris cette décision, l'article 8 du Règlement de 1993 ne lui conférait aucun droit, comme celui à une défense affirmative ou à une limite de responsabilité, qu'aurait abrogé le Règlement de 1998. *Thiessen* est une affaire où, contrairement à la présente espèce, un tel droit – une limite de responsabilité – avait été abrogé par une loi ultérieure.

[43] Merck soutient que l'article 8 du Règlement de 1998 a eu pour effet d'augmenter substantiellement la responsabilité en matière de dommages-intérêts et de conférer de nouveaux droits à la « seconde personne » comme Apotex.

[44] […] [L]'argument de Merck est exagéré.

[45] Un Résumé de l'étude d'impact de la réglementation accompagnait le Règlement de 1998 : Gazette du Canada Partie II, vol. 132, n^{o} 7, p. 1056. Il convient de tenir compte de ce Résumé afin de déterminer le sens du Règlement de 1998 […]. En voici un extrait :

> **Préciser les circonstances où des dommages-intérêts peuvent être accordés :** De plus grandes précisions sont données aux tribunaux en ce qui concerne les circonstances où des dommages-intérêts pourront être accordés à un fabricant afin de le dédommager des pertes subies à cause du report de la mise en marché de son médicament générique; par ailleurs, des précisions sont aussi données sur les facteurs dont on peut tenir compte pour calculer les dommages-intérêts. Les tribunaux peuvent également accorder les dépens à l'une ou l'autre des parties (fabricant de médicaments génériques ou titulaire de brevet), y compris les honoraires professionnels, le cas échéant, conformément aux Règles de la Cour fédérale.

[46] Cet extrait du Résumé de l'étude d'impact de la réglementation laisse entendre que le Règlement de 1998 n'a pas eu pour effet de révolutionner le contenu essentiel de l'article 8 du Règlement de 1993. Il visait plutôt à apporter des « précisions » sur les circonstances dans lesquelles des dommages-intérêts pourraient être accordés.

most part, made aspects of the section 8 of the 1993 Regulations clearer by declaring, with greater specificity, the bases of liability for damages. Legislation that largely declares the state of an earlier, uncertain law is not retrospective. … [50] Declaratory or clarifying legislation, which corrects defects in the earlier legislation, does not implicate the concerns associated with retrospective or retroactive legislation and may even bolster the known purposes of the earlier legislation…. ... [55] … it would be unfair and would trigger the concern about retroactive or retrospective laws if Merck planned its affairs in reasonable reliance upon a definite, concrete set of rules set out in section 8 of the 1993 Regulations, and then the 1998 Regulations purported to change those rules. If that were the case, one might conclude that the 1998 Regulations unfairly "pulled the rug out "from under Merck. But is that what happened here? [56] In my view, no. When Merck applied for prohibition and made itself potentially subject to an action for damages, it acquired for itself a "black box" of potential liability. I offer three reasons for that conclusion. [57] First, under subsection 8(2) of the 1993 Regulations, the Court had a broad discretion to make "such order for relief by way of damages or profits as the circumstances require." Evidently, the rules and bases for the calculation of damage under section 8 remained to be worked out through judicial clarification. When it brought its prohibition application, Merck would have reasonably expected that there would be future clarifications in the law, at least by courts interpreting the provision. [58] Second, Merck applied for prohibition on May 31, 1993, at an early time in the history of the	[47] Ainsi, le Règlement de 1998 a surtout eu pour effet de rendre plus clairs certains aspects de l'article 8 du Règlement de 1993 en établissant, de manière plus précise, les fondements de la responsabilité relative aux dommages-intérêts. Un texte législatif qui, pour l'essentiel, déclare l'état d'une règle de droit antérieure et ambigüe n'est pas pour autant rétroactif. […] [50] Un texte législatif déclaratoire (ou qui apporte des précisions), qui corrige les lacunes du texte antérieur, ne fait pas intervenir la question de l'effet rétroactif ou rétrospectif et peut même renforcer l'objectif connu de l'ancien texte…. […] [55] […] il serait injuste, sans compter que cela soulèverait la question des lois rétroactives ou rétrospectives, que Merck ait raisonnablement planifié ses affaires en fonction d'un ensemble défini et concret de règles établies à l'article 8 du Règlement de 1993, et que ces règles aient par la suite été modifiées par le Règlement de 1998. Si c'était le cas, on pourrait conclure que le Règlement de 1998 a injustement [TRADUCTION] « coupé l'herbe sous le pied » de Merck. Mais est-ce vraiment ce qui s'est produit en l'espèce? [56] À mon avis, non. Lorsque Merck a présenté sa demande d'interdiction, s'exposant ainsi à une action en dommages-intérêts, elle a alors engagé « à l'aveuglette » sa responsabilité. Trois raisons justifient cette conclusion. [57] Premièrement, en vertu du paragraphe 8 (2) du Règlement de 1993, la Cour détenait un vaste pouvoir discrétionnaire de « rendre l'ordonnance qu'[elle] juge indiquée pour accorder réparation par recouvrement de dommages-intérêts ou de profits ». De toute évidence, les règles régissant le calcul des dommages-intérêts en vertu de l'article 8 restaient encore à préciser par les tribunaux. Lorsqu'elle a présenté sa demande d'interdiction, Merck devait raisonnablement s'attendre à ce que des précisions soient apportées à la loi, à tout le moins par les tribunaux chargés d'interpréter la disposition. [58] Deuxièmement, Merck a déposé sa demande

1993 Regulations. At that time, no significant cases interpreting section 8 of the 1993 Regulations had been decided. It is fair to assume, given the complexity of the wording of section 8 of the 1993 Regulations and the 1993 Regulations themselves, that any decision by Merck to launch an application for prohibition and accept the potential of section 8 liability on May 31, 1993 was pregnant with risk. At that time, Merck should have reasonably expected that there would be clarification in the law later, at least by courts interpreting the provision, if not by the Governor in Council through amending regulations.	d'interdiction le 31 mai 1993, soit peu de temps après l'entrée en vigueur du Règlement de 1993. À l'époque, il n'existait aucune décision importante interprétant l'article 8 du Règlement de 1993. Il est juste de supposer, compte tenu de la complexité du libellé de l'article 8 du Règlement de 1993 et du Règlement de 1993 dans son ensemble, que la décision de Merck de présenter une demande d'interdiction, le 31 mai 1993, et d'engager potentiellement sa responsabilité selon l'article 8 comportait des risques sérieux. À l'époque, Merck devait raisonnablement s'attendre à ce que des précisions soient plus tard apportées à la loi, à tout le moins par les tribunaux chargés d'interpréter la disposition, si ce n'est par le gouverneur en conseil au moyen d'une modification au règlement.
[59] Third, it is fair to say that section 8 of the 1993 Regulations is notorious in judicial circles for its obscurity of meaning. There are many judicial statements to that effect. …	[59] Troisièmement, il est juste de dire que l'article 8 du Règlement de 1993 est reconnu dans le milieu judiciaire pour son sens obscur. Les tribunaux l'ont maintes fois déclaré. […]
[68] Therefore, I conclude that the 1998 Regulations cannot be said to be retroactive or retrospective or interfere with any vested rights of Merck. Accordingly, I agree with the Federal Court judge that the 1998 Regulations are authorized by subsection 55.2(4) of the *Patent Act*, are valid, and apply in this case.	[68] C'est pourquoi j'estime qu'il est impossible d'affirmer que le Règlement de 1998 est rétroactif ou rétrospectif ou qu'il porte atteinte aux droits acquis de Merck. En conséquence, je suis d'accord avec le juge de la Cour fédérale que le Règlement de 1998 est autorisé par le paragraphe 55.2(4) de la *Loi sur les brevets*, qu'il est valide et s'applique en l'espèce.

[Comment: This case is interesting because it focuses on the values underlying transitional rules rather than the rules themselves. It also asserts that the application of new declaratory legislation to past facts does not have retroactive effect.]

Merck Frosst Canada Ltd. v. Canada (Health), 2012 SCC 3

administrative interpretation
statutes in paria – related legislation
reliance on international conventions
departure from precedent
legal terms of art in federal legislation

Health Canada received access to information requests relating to drug submissions made by Merck. It disclosed some information that in Merck's view was a trade secret.

Issues:

- the meaning of "trade secrets/ secrets industriels" in paragraph 20(1)(a) of the *Access to Information Act*
- the meaning of "could reasonably be expected to result in/ risquerait vraisemblablement de causer" in paragraph 20(1)(c) of the *Access to Information Act*

20. (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains (a) trade secrets of a third party; … (c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party. …	20. (1) Le responsable d'une institution fédérale est tenu, sous réserve des autres dispositions du présent article, de refuser la communication de documents contenant : a) des secrets industriels de tiers; … c) des renseignements dont la divulgation risquerait vraisemblablement de causer des pertes ou profits financiers appréciables à un tiers ou de nuire à sa compétitivité. […]

Judgment:

"trade secret"

On the first issue, Cromwell J. began by noting that he is dealing with a legal term of art that may have different meanings in common law Canada and Quebec:

[**104]** … there is no definition of "trade secrets" in the Act. Given that fact and that the term is a familiar legal term which has only a technical meaning, I infer that Parliament intended that the technical legal definition should apply…. **[105]** I turn next to the broad legal context of the term as understood in the civil and common law. In Quebec civil law, two expressions are used to convey the notion of trade secret: "secret industriel" and "secret commercial". While these are technical legal terms, as they are in the common law, they do not have comprehensive definitions. Raymond Doray and François Charette, in *Accès à l'information: Loi annotée, jurisprudence, analyse et commentaires* (loose-leaf), at p. II/22-4, in fact suggest that "*secret industriel*" is a common law notion. ….	[104] […][L]a Loi ne définit pas en quoi consistent les « secrets industriels ». Compte tenu de ce fait, et comme il s'agit d'un terme juridique familier dont le sens est purement technique, je conclus que le législateur voulait que la définition juridique technique de ce terme s'applique […]. [105] J'examinerai maintenant le contexte juridique général du terme au sens du droit civil et de la common law. En droit civil québécois, deux expressions sont utilisées pour transmettre l'idée de secret industriel : « secret industriel » et « secret commercial ». Bien qu'il s'agisse de termes techniques propres au domaine juridique, comme c'est le cas en common law, ils ne sont pas l'objet de définitions exhaustives. En fait, Raymond Doray et François Charrette affirment dans l'ouvrage intitulé *Accès à l'information : Loi annotée, jurisprudence, analyse et commentaires* (feuilles mobiles), à la p. II/22-4, que le « secret industriel » est une notion de common law […].

Cromwell J. considered Federal Court case law interpreting "trade secrets/ secrets industriels" within the meaning of paragraph 20(1)(a) and followed Phelan J. in *AstraZeneca* in adopting Health Canada's *Access to Information Act -- Third Party Information -- Operational Guidelines*, which set out four criteria to be met by a trade secret:

1. the information must be secret in an absolute or relative sense (is known only by one or a relatively small number of persons);
2. the possessor of the information must demonstrate that he has acted with the intention to treat the information as secret;
3. the information must be capable of industrial or commercial application;
4. the possessor must have an interest (e.g. an economic interest) worthy of legal protection.

Cromwell J.found this to be "consistent with" both with the traditional common law meaning of "trade secret" and with the use of "secrets industriels" in the French version of the Act. He rejected Merk's suggestion to rely on the definition of these terms in the *Security of Information Act* and NAFTA:

[116]. … we cannot simply incorporate into the *Access to Information Act*, which contains no definition of the term "trade secrets", definitions adopted in different contexts. The *Official Secrets Act* was amended in the wake of the September 11, 2001 attacks as part of the *Anti-Terrorism Act*, S.C. 2001, c. 41…. The purposes of the *Access to Information Act* and the *Security of Information Act* are significantly different. … it would not be appropriate to import into the access to information context the definition of "trade secret" set out under the heading Economic Espionage in the *Security of Information Act*. [117] As for the appellant's reliance on article 1711 of the NAFTA…. I accept, of course, that to the extent possible domestic legislation should be interpreted so that it is consistent with Canada's international obligations […]. However, Canada is not necessarily required to adopt the treaty definition of "trade secrets" into its access to information law in order to fulfill its treaty obligations. These obligations could be fulfilled in other ways.	[116] […] [N]ous ne pouvons pas introduire tout bonnement dans la Loi — qui ne contient aucune définition du terme « secrets industriels » — des définitions élaborées dans d'autres contextes. La *Loi sur les secrets officiels* a été modifiée dans la foulée des attentats du 11 septembre 2001 par la *Loi antiterroriste*, L.C. 2001, ch. 41[…]. Les objets que visent la Loi, d'une part, et la *Loi sur la protection de l'information*, d'autre part, diffèrent grandement. […] [I]l ne conviendrait pas d'introduire dans le contexte de l'accès à l'information la définition de « secret industriel » qui figure dans la *Loi sur la protection de l'information* sous la rubrique qui traite de l'espionnage économique. [117] Quant à l'argument de l'appelante fondé sur l'article 1711 de l'ALÉNA, […][j]'accepte évidemment que, dans la mesure du possible, les lois internes devraient être interprétées de façon à être compatibles avec les obligations internationales du Canada […]. Toutefois, le Canada ne doit pas nécessairement reprendre dans sa loi sur l'accès à l'information la définition des secrets industriels qui figure dans les traités afin de remplir ses obligations issues de traités. En effet, il existe d'autres moyens de remplir ces obligations. […]

"could reasonably be expected to result in/ risquerait vraisemblablement de causer"

For a period of 20 years this language had been interpreted to require "a reasonable expectation of probable harm". Merck argued the notion of "probable" should be omitted. Its argument failed.

[195] I am not persuaded that we should change the	[195] Je ne suis pas convaincu que nous devrions

way this test has been expressed by the Federal Courts for such an extended period of time. Such a change would also affect other provisions because similar language to that in s. 20(1)(*c*) is employed in several other exemptions under the Act…. In addition, as the respondent points out, the "reasonable expectation of probable harm" test has been followed with respect to a number of similarly worded provincial access to information statutes.	modifier la façon dont les cours fédérales formulent ce critère depuis si longtemps. En effet, une telle modification aurait également une incidence sur d'autres dispositions, car plusieurs autres exceptions prévues par la Loi sont formulées d'une façon semblable à l'al. 20(1)*c*) […]. De plus, comme le souligne l'intimé, le critère du « risque vraisemblable de préjudice probable » a été appliqué relativement à un certain nombre de lois provinciales en matière d'accès à l'information libellées en des termes similaires […].

Cromwell offered the following justification for sticking with the well established test.

[201] I begin with the English text of the provision. The words "could reasonably be expected to result" seem to avoid either the standard of mere possibility or the standard of probability. We must assume, I think, that both of those standards would clearly have been known to the drafters. This suggests that some middle ground was intended: something cannot reasonably be expected to occur if it is a mere possibility; but something may be reasonably expected even if it is not more likely than not to occur. …	[201] Je vais d'abord examiner la version anglaise de la disposition. Les mots « *could reasonably be expected to result* » (« risquerait vraisemblablement de causer ») semblent éviter soit la norme de la simple possibilité, soit celle de la probabilité. Il faut, selon moi, présumer que ces deux normes étaient bien connues des rédacteurs. Cela tend à indiquer qu'on entendait établir une solution mitoyenne : on ne saurait raisonnablement s'attendre à ce qu'une chose se produise si elle ne constitue qu'une simple possibilité; en revanche, on peut raisonnablement s'attendre à ce qu'une chose se produise même s'il n'est pas plus probable qu'elle se produise que l'inverse […].
[202] Turning to the French text of s. 20(1)(*c*), the phrase "*risquerait vraisemblablement de causer*" is a challenging one to interpret. The conditional "*risquerait de causer*" might be rendered into English by either "could" or "would" cause. The drafter here chose the less definite "could." The word "*vraisemblablement*" is capable of meaning "probably" or "likely": see, for example, *Kwiatkowsky v. Minister of Employment and Immigration*, [1982] 2 S.C.R. 856, at pp. 863-64. However, it is often used in federal statutes as the equivalent of the English words "likely" or "reasonably" or to convey the sense of risk of something happening or not happening. Some examples follow. In the *Competition Act*, R.S.C. 1985, c. C-34, s. 11(1), "*qu'une personne détient ou détient vraisemblablement des renseignements pertinents à l'enquête en question*" was drafted in English as "that a person has or is likely to have information that is relevant to the inquiry", and in s. 74.11(4) "*s'il est convaincu que le paragraphe (3) ne peut vraisemblablement pas être observé*" is drafted in English as "where it is satisfied that subsection (3) cannot reasonably be complied with". In the *Criminal Code*, R.S.C., 1985, c. C-46, s. 25.1(9), "*qui entraînerait vraisemblablement la perte de biens ou des dommages importants à ceux-ci*" is drafted in English as "that would be likely to result in loss of or serious damage to property", and in s. 382.1(2) "*sachant qu'ils seront vraisemblablement utilisés pour acheter ou vendre, même indirectement, les valeurs mobilières en cause ou qu'elle les communiquera vraisemblablement à d'autres*	[202] Je vais maintenant examiner la version française de l'al. 20(1)*c*). Le passage « risquerait vraisemblablement de causer » n'est pas facile à interpréter. Le conditionnel « risquerait de causer » peut être exprimé de deux façons en anglais, à savoir par « *could* » ou « *would* ». En l'occurrence, le rédacteur a choisi d'employer celui des deux mots qui exprime le moins de certitude, c'est-à-dire « *could* ». Par ailleurs, le mot « vraisemblablement » peut avoir le sens de « *probably* » ou de « *likely* » : voir, p.ex., *Kwiatkowsky c. Ministre de l'Emploi et de l'Immigration*, [1982] 2 R.C.S. 856, aux pp. 863-864. Toutefois, il est souvent utilisé dans les lois fédérales comme équivalent des mots anglais « *likely* » ou « *reasonably* » ou pour évoquer le risque qu'une chose se produise ou ne se produise pas. Voici quelques exemples. Au paragraphe 11(1) de la *Loi sur la concurrence*, L.R.C., 1985, ch. C-34, le passage « qu'une personne détient ou détient vraisemblablement des renseignements pertinents à l'enquête en question » est rendu en anglais par « *that a person has or is likely to have information that is relevant to the inquiry* », et, au par. 74.11(4), le passage « s'il est convaincu que le paragraphe (3) ne peut vraisemblablement pas être observé » est rendu par « *where it is satisfied that subsection (3) cannot reasonably be complied with* ». Au paragraphe 25.1(9) du *Code criminel*, L.R.C., 1985, ch. C-46, le passage « qui entraînerait vraisemblablement la perte de biens ou des dommages importants à ceux-ci » est rendu par « *that would be likely to result in loss of or serious*

personnes qui pourront en acheter ou en vendre" was drafted in English as "knowing that there is a risk that the person will use the information to buy or sell, directly or indirectly, a security to which the information relates, or that they may convey the information to another person who may buy or sell such a security". In the *Insurance Companies Act*, S.C. 1991, c. 47, s. 294(6), "*provoquerait vraisemblablement une modification sensible du prix des valeurs mobilières de la société*" was drafted in English as "might reasonably be expected to materially affect the value of any of the securities of the company".	*damage to property* » et, au par. 382.1(2), les mots « sachant qu'ils seront vraisemblablement utilisés pour acheter ou vendre, même indirectement, les valeurs mobilières en cause ou qu'elle les communiquera vraisemblablement à d'autres personnes qui pourront en acheter ou en vendre » sont rendus par « *knowing that there is a risk that the person will use the information to buy or sell, directly or indirectly, a security to which the information relates, or that they may convey the information to another person who may buy or sell such a security* ». Enfin, au par. 294(6) de la *Loi sur les sociétés d'assurances*, L.C. 1991, ch. 47, les mots « provoquerait vraisemblablement une modification sensible du prix des valeurs mobilières de la société » sont rendus par « *might reasonably be expected to materially affect the value of any of the securities of the company* ».
[203] As noted earlier, the word "likely" is a good fit with the statute's text of "could reasonably be expected to". The shared meaning rule for the interpretation of bilingual legislation dictates that the common meaning between the English and French legislative texts should be accepted.	[203] Comme je l'ai déjà mentionné, le mot « *likely* » est tout à fait compatible avec le passage « *could reasonably be expected to* ». Or, il existe une règle d'interprétation des lois bilingues selon laquelle il faut retenir le sens commun à la version anglaise et à la version française .

Németh v. Canada (Justice), 2010 SCC 56, [2010] 3 SCR 281

reliance on administrative interpretation

N was found to be a refugee when he came to Canada on the ground that he had a well founded fear of persecution in his native country Hungary. Years later Hungary requested Canada to extradite him. Acting in accordance with the *Extradition Act*, the Minister of Justice ordered his surrender for extradition. N argued that, because of Canada's *non-refoulement* obligations, he could not be extradited back to Hungary so long as he retained his refugee status in Canada.

Issue: Does section 115 of the *Immigration and Refugee Protection Act* prohibit N's extradition?

Judgment: Cromwell J. for the Court

[18] At the heart of the protections accorded to refugees under the Refugee Convention are the provisions relating to expulsion and return. Most relevant to the appeal is Article 33 which addresses the return of refugees to places where they may face persecution. This article embodies in refugee law the principle of *non-refoulement* which has been described as the cornerstone of the international refugee protection regime: United	[18] Les dispositions de la Convention relative aux réfugiés traitant de l'expulsion et du refoulement forment le noyau de la protection accordée aux réfugiés. La disposition la plus pertinente en l'occurrence est l'art. 33 portant sur le refoulement des réfugiés vers des endroits où ils risquent la persécution. Cet article donne corps, en droit des réfugiés, au principe du non-refoulement, considéré comme la pierre angulaire du régime

Nations High Commissioner for Refugees, *Guidance Note on Extradition and International Refugee Protection* (April 2008). Underlining the centrality of this provision is the fact that, by virtue of Article 42 of the Refugee Convention, ratifying states may not make reservations to the *non-refoulement* protections afforded by Article 33.	international de protection des réfugiés : Haut Commissariat des Nations Unies pour les réfugiés, *Note d'orientation sur l'extradition et la protection internationale des réfugiés* (avril 2008). L'article 42 de la Convention relative aux réfugiés souligne le caractère essentiel de cette disposition, en énonçant que les États ayant ratifié la Convention ne peuvent formuler de réserves au sujet de la protection contre le refoulement prévue à l'art. 33.

Principle of Non-refoulement **115.** (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment. (2) Subsection (1) does not apply in the case of a person (*a*) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or (*b*) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.	*Principe du non-refoulement* **115.** (1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée. (2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire : *a*) pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada; *b*) pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée si, selon le ministre, il ne devrait pas être présent au Canada en raison soit de la nature et de la gravité de ses actes passés, soit du danger qu'il constitue pour la sécurité du Canada.
[26] The appellants emphasize the ordinary meaning of the words "removed from Canada" in s. 115(1) and that extradition is a form of "removal". I agree, of course, that the ordinary meaning of these words is broad enough to include removal by any means including extradition. However, according to the often repeated "modern principle" of statutory interpretation, the words used in the *IRPA* must be read in their entire context….	[26] Les appelants mettent l'accent sur le sens ordinaire du mot « renvoyée » au par. 115(1) et soutiennent que l'extradition est une forme de « renvoi ». Il est certain que le sens ordinaire de ces mots est assez large pour englober tout type de renvoi, y compris l'extradition. Toutefois, suivant le « principe moderne » d'interprétation des lois maintes fois répété, les termes de la *LIPR* doivent s'interpréter dans leur contexte global[…] .
[27] Section 115 must be considered in the context of the other provisions of the statute which	[27] Il faut examiner l'art. 115 dans le contexte des autres dispositions de la Loi qui

also deal with the subject of removal. Division 5 of Part I of the *IRPA* addresses "Loss of Status and Removal". The term "removal" is used in connection with the term "removal order" which is a specific order authorized by the *IRPA* in particular circumstances set out in detail therein: see, e.g., ss. 44(2), 45(*d*) and 48. "Removed" and "removal", therefore, are words used in relation to particular procedures under the *IRPA*. This view is reinforced by the *Immigration and Refugee Protection Regulations*, SOR/2002-277. Section 53 of the *IRPA* provides that the regulations made under the *IRPA* may include provisions respecting "the circumstances in which a removal order shall be made or confirmed against a permanent resident or a foreign national": s. 53(*b*). Part 13 of the Regulations, addresses removal. Section 223 specifies that there are three types of removal orders: departure orders, exclusion orders and deportation orders. Surrender orders under the *EA* are not included. The linking of removal to these three types of orders further reinforces the view that the words "removed" and "removal" refer to particular processes under the *IRPA*.	traitent aussi du renvoi. La section 5 de la partie I de la *LIPR* porte sur la « Perte de statut et [le] renvoi ». Le mot « renvoi » y est employé en rapport avec la « mesure de renvoi », une mesure particulière autorisée par la *LIPR* dans des circonstances déterminées qui sont définies de façon détaillée : voir, p. ex., le par. 44(2), l'al. 45*d*) et l'art. 48. Les termes « renvoyée » et « renvoi » sont donc employés en relation avec des procédures particulières établies par la *LIPR*, ce que confirme le *Règlement sur l'immigration et la protection des réfugiés*, DORS/2002-227. L'article 53 de la *LIPR* énonce que les règlements d'application de la Loi peuvent notamment régir « les cas de prise ou de maintien des mesures de renvoi » : al. 53*b*). La partie 13 du Règlement traite du renvoi. L'article 223 du Règlement précise que les mesures de renvoi sont de trois types : l'interdiction de séjour, l'exclusion et l'expulsion. L'arrêté d'extradition pris en vertu de la *LE* n'y est pas mentionné. Le lien établi entre le renvoi et ces trois types de mesure renforce l'opinion que les mots « renvoyée » et « renvoi » concernent des procédures particulières prévues par la *LIPR*.

Newfoundland and Labrador (Office of the Citizens' Representative) v. Newfoundland and Labrador Housing Corp., 2012 NLCA 4

reliance on precedent in statutory interpretation

An employee of the Housing Corporation was suspended from work for 10 months because of a conviction for sexual assault that occurred outside working hours. Acting for the employee, the union grieved the decision and settled when the suspension was reduced to six months. After returning to work, the employee complained to the Citizens' Representative and sought to have the decision to suspend him investigated. The Housing Corporation took the position that the Representative did not have jurisdiction to hold an investigation under the *Citizens' Representative Act* because the employee was not "aggrieved" within the meaning of section 15 of the Act.

Issue: can a party to a voluntary settlement be "aggrieved"?

[15]. The Citizens' Representative may, on a written complaint or on his or her own initiative, investigate a decision or recommendation made, including a recommendation made to a minister, or an act done or omitted, relating to a matter of administration in or by a department or agency of the government, or by an officer, employee or member of the department or agency, where a person is or may be aggrieved.

Judgment:

In concluding that a party to a voluntary settlement cannot be "aggrieved", the applications judge relied on *Harrup v. Bayley* (1856), 6 E1. & B1, 218 (Eng. K.B.*),* a decision that interpreted a town improvement Act which gave a right of appeal from an order for municipal improvements to "any person or persons who may think himself, herself or themselves aggrieved by" any order made under the Act. Lord Campbell, C.J. stated at pp. 223-224:

> In the present case, the Act ... gives an appeal to any person who may think himself aggrieved…. Now how can such a provision apply to a person who wished to complain of the act which he himself has authorized, and expressly required to be done ... Volenti non fit injuria. According to every principle of justice he cannot complain of what was his own act.

The Appeal Court thought reliance on this case was inappropriate.

57 With great respect, I agree with the submission of the Citizens' Representative that *Harrup v. Bayley* does not reflect a comparable circumstance from which to draw guidance in interpreting a modern piece of "ombudsman" type legislation. …In *Harrup v. Bayley* the jurisdiction was to hear and decide an appeal against a municipal decision. As noted above, the jurisdiction of the Citizens' Representative is entirely different. It is simply to consider and report to the appropriate minister or department of government whether, in the view of the Citizens' Representative, a decision by an agency of government might be contrary to law, unreasonable, unjust, oppressive, improperly discriminatory, etc. In that context, a person who could not be described as "aggrieved" in law for purposes of asserting a legal right, could nevertheless, still be aggrieved in the general sense of that word as it is used in s. 15 of the Act.

58 The applications judge, having referred to [*British Columbia Development Corp. v. Friedman (Ombudsman)*, [1984] 2 S.C.R. 447], ought to have applied the principles expressed therein as being more appropriate, if not indeed binding, for the purpose of determining the meaning of "aggrieved" in the context of ombudsman type legislation. Bearing in mind: (i) the observation of Justice Dickson that "This appeal may affect Canadian jurisdictions beyond British Columbia"; (ii) the observation of the applications judge here that " ... much guidance can and should be taken from that case"; and (iii) the similarity of purpose and language in the two statutes, I would consider the interpretation Justice Dickson gave to "aggrieved", used in that legislative context, to be binding on this Court.

Oberg et al. v. Canada (Attorney General), 2012 MBQB 64

manner and form

Former members of the Canadian Wheat Board (CWB), sought an interlocutory order staying the operation of the *Marketing Freedom for Grain Farmers Act* (MFGFA) as of the date of royal assent, pending a decision as to the validity of the Act.

[14] The plaintiffs argue that the New Act is invalid for breaching the rule of law. But, the rule of law is an overarching principle guiding the application of other rights. This principle requires everyone, including government officials, to comply with the law, including the Constitution (*Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217, para. 72). But, again, it does not establish a remedy unless one can point to the law with which the government action conflicts. There is no case of which I am aware where the rule of law *simpliciter* formed the basis for declaring legislation invalid.

[15] The only substantive basis relied upon by the plaintiffs for declaring the New Act invalid is that it was enacted in violation of s. 47.1 of the CWB Act. However, it is my view that s. 47.1 is not addressing the revamping of the single desk. The wording of s. 47.1 refers to the addition or subtraction of particular grains or types of grains from the marketing regime established in Parts III and IV of the CWB Act. The Bill (and the New Act) does not remove a particular type of wheat or barley from the application of Part IV of the CWB Act. As such, it is my view that s. 47.1 did not apply to the Bill.

Addressing the manner and form argument:

[9] … The plaintiffs argue that because s. 47.1 is a manner and form provision, non-compliance with s. 47.1 results in the New Act being invalid.

[10] The plaintiffs draw a comparison to *R. v. Mercure*, 1988 CanLII 107 (SCC), [1988] 1 S.C.R. 234, where there was a challenge to legislation passed in Saskatchewan in English only. In determining that Saskatchewan statutes must be enacted in both English and French, the Supreme Court of Canada relied on a manner and form provision. The Court stated that (at p. 277):

> … A basic provision regarding the manner in which a legislature must enact laws cannot be ignored. I cannot accept that such a provision can be impliedly repealed by statutes enacted in a manner contrary to its requirements ... Since the manner and form of enactment (in English and French) was not entrenched, however, the provision may be modified or repealed, but such repeal or modification must be made in the manner and form required by law at the time of the amendment.

[17] … [I]in my view, s. 47.1 is not a manner and form provision. In *Reference Re Canada Assistance Plan (B.C.)*, 1991 CanLII 74 (SCC), [1991] 2 S.C.R. 525, the Supreme Court of Canada discussed what is necessary in order to impose an effective manner and form requirement. (See also, *Canadian Taxpayers Federation v. Ontario (Minister of Finance)* 2004 CanLII 48177 (ON SC), (2004), 73 O.R. (3d) 621, para. 49.)

[18] First, the Court referred to s. 42(1) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides:

42. (1) Every Act shall be so construed as to reserve to Parliament the power of repealing or amending it, and of revoking, restricting or	**42.** (1) Il est entendu que le Parlement peut toujours abroger ou modifier toute loi et annuler ou modifier tous pouvoirs, droits ou avantages

modifying any power, privilege or advantage thereby vested in or granted to any person.	attribués par cette loi

[19] Sopinka J. stated "This provision requires that federal statutes ordinarily be interpreted to accord with the doctrine of parliamentary sovereignty" (p. 562). This provision also applies to the case at bar.

[20] Sopinka J. indicated that it would have to be shown that Parliament intended, in the face of s. 42(1), to bind itself or restrict the legislative powers of those of its members who are also members of the executive (p. 562).

[21] Section 47.1 does not use language showing that Parliament intended, in the face of s. 42(1) of the *Interpretation Act*, to bind itself or restrict the legislative powers of its members with respect to revamping the single desk or repealing the CWB Act.

[22] Second, the Supreme Court of Canada noted that when it has found "manner and form" restrictions, the instrument creating the restrictions has not been an ordinary statute. The Court cited as an example the *Canadian Bill of Rights* and the section at issue in *Mercure* which was of a constitutional nature. Sopinka J. stated at p. 563:

> … It may be that where a statute is of a constitutional nature and governs legislation generally, rather than dealing with a specific statute, it can impose requirements as to manner and form. But where a statute has no constitutional nature, it will be very unlikely to evidence an intention of the legislative body to bind itself in the future. [Emphasis added]

[23] In my view, the CWB Act is not of a constitutional or quasi-constitutional nature such as the *Canadian Bill of Rights*.

[24] The Court explained the third qualification on manner and form provisions as follows (at pp. 563-64):

> … It is clear that parliamentary sovereignty prevents a legislative body from binding itself as to the substance of its future legislation. The claim that is made in a "manner and form" argument is that the body has restrained itself, not in respect of substance, but in respect of the procedure which must be followed to enact future legislation of some sort, or the form which such legislation must take. In *West Lakes Ltd. v. South Australia, supra*, a "manner and form" argument was rejected. King C.J. said (at pp. 397-98):
>
> > Even if I could construe the statute according to the plaintiff's argument, I could not regard the provision as prescribing the manner or form of future legislation. A provision requiring the consent to legislation of a certain kind, of an entity not forming part of the legislative structure ... does not, to my mind, prescribe a manner or form of lawmaking, but rather amounts to a renunciation *pro tanto* of the lawmaking power. [Emphasis added]

[25] In the present case, a requirement for consent from an entity that does not form part of the legislative structure (the producers) amounts to a substantive constraint on Parliament's legislative capacity and does not relate to the manner or form of its exercise.

[26] Therefore, in my view, s. 47.1 cannot be used by the plaintiffs as a basis for challenging the validity of the New Act.

Ontario (Travel Industry Council of Ontario) v. Gray, 2010 ONCA 518

Administrative interpretation – regulations relied on to interpret Act

Gray was charged with acting as a travel agent without first being registered as a travel agent, contrary to paragraph 4(1)(a) of Ontario's *Travel Industry Act, 2002*. Gray made his living by arranging hotel accommodations for sport teams, for which he was paid commission by the hotels.

Issue: was Gray a travel agent?

1. (1) In this Act, […] "travel agent" means a person who sells, to consumers, travel services provided by another person. "travel services" means transportation, sleeping accommodation or other services for the use of a traveler, tourist or sightseer.	**1.** (1) Les définitions qui suivent s'appliquent à la présente loi. … «agent de voyages» Personne qui fournit moyennant contrepartie, à des consommateurs, des services de voyage assurés par une autre personne. («travel agent») … «service de voyage» Transport ou hébergement pour la nuit offert à un voyageur, un touriste ou un excursionniste, ou tout autre service compris. («travel services»)

Both lower courts assumed that to be a travel agent, a person must sell the services as principal. The Court of Appeal thought this reading of the definition was too narrow having regard to the consumer protection purpose of the Act. It also relied on the definition of "sales in Ontario" in the Regulations made under the Act. Gouge J.A. wrote:

[23] Finally, the task of statutory interpretation can be assisted by examining O.Reg 26/05, which was made pursuant to the Act. The Regulation complements the legislative regime by, for example, detailing the kind of information that must be supplied to a customer before payment for travel services can be accepted. The Act and the Regulation form an integrated scheme for the regulation of the travel industry in the interests of the travelling public. In such circumstances, the Regulation can assist in ascertaining the legislature's intention with regard to a particular matter: see *Monsanto Canada Inc. v. Ontario (Superintendant of Financial Services)*, 2004 SCC 54 (CanLII), [2004] 3 S.C.R. 152, at para. 35. In this case, that matter is what is meant by "selling travel services".

[24] Section 1 of the Regulation defines "sales in Ontario" of travel services by a registered travel agent as "the amount paid or to be paid through the travel agent for all travel services sold in Ontario." This clearly includes both sales where the travel agent sells as a principal and receives payment from the consumer in return, and sales where the travel agent effects the sale on behalf of a service provider, where payment is made later to the service provider. The broader interpretation of the statutory definition of "travel agent" ensures conformity between the legislation and the regulation that together form this integrated regulatory scheme.

[25] I therefore conclude that the proper interpretation of "travel agent" in the Act includes a person who sells travel services to consumers as agent for the provider of those services.

Pacific Abrasives & Supply, Inc. v. British Columbia (Revenue), 2010 BCCA 369

"means … and includes"
noscitur a sociis (associated words)

The definition of "mineral" in B.C.'s *Mineral Tax Act* is imported from the definition of that term in s. 1 of its *Mineral Tenure Act*, which provides:

> "mineral" means an ore of metal, or a natural substance that can be mined, that is in the place or position in which it was originally formed or deposited or is in talus rock, and includes
>
> (a) rock and other materials from mine tailings, dumps and previously mined deposits of minerals,
>
> (b) dimension stone, and
>
> (c) rock or a natural substance prescribed under section 2 (1),
>
> but does not include
>
> (d) coal, petroleum, natural gas, marl, earth, soil, peat, sand or gravel,
>
> (e) rock or a natural substance that is used for a construction purpose on land that is not within a mineral title or group of mineral titles from which the rock or natural substance is mined,
>
> (f) rock or a natural substance on private land that is used for a construction purpose, or
>
> (g) rock or a natural substance prescribed under section 2 (2);
>
> [Emphasis added.]

The Government position is that the phrase "other materials ... from previously mined deposits" encompasses *all* other materials from previously mined deposits, thus capturing the waste products that result from the refining process, including slag. The taxpayer position is that the phrase is modified by the surrounding words, confining "other materials" to those that are naturally occurring, and therefore excluding a non-natural material such as slag.

Issue: did the Chambers Judge err in interpreting paragraph (a) of the definition of "mineral" as being limited to "an ore of metal or a natural substance", therefore excluding slag.

Judgment:

Levine.J.A. for the Court

[18] I agree generally with the appellant that the chambers judge erred in his interpretation and application of the word "includes". There is no basis in law to limit the effect of "includes" to describing a subset of a "whole" in the manner applied by the chambers judge.

[24] The respondent's second argument is that … the word "rock" in the phrase "rock and other materials" operates to confine "other materials" to other rock-like materials. The characteristic of "rock" identified by the respondent as defining the substance, and thus colouring the meaning of "other materials", is that rocks are "natural" substances. ...

[25] Rocks have many characteristics, only one of which is that they are natural substances. It seems arbitrary to choose one characteristic and use that to limit the meaning of "other materials". Even if, as the respondent argues, "other materials" must be "rock-like", this is hardly a clear basis to exclude slag….

R. v. A. D., 2005 SKCA 21

retrospective application - corroboration rules are procedural transitional provision – absence of

In 2002, AD was charged with having committed incest with a child in 1982. After a preliminary inquiry he was committed to trial despite the absence of corroboration. In 1982 the *Criminal Code* included the following provision:

139(1) No accused shall be convicted of an offence under … section 150 (incest) … upon the evidence of only one witness unless the evidence of the witness is corroborated in a material particular by evidence that implicates the accused.	139(1) Aucun prévenu ne doit être declaré coupable d'une infraction visée par l'article … 150 (inceste) … sur la déposition d'un seul témoin, sauf si cette déposition est corroborée sous un rapport essentiel par une preuve qui implique l'accusé.

In 1983, *An Act to amend the Criminal Code,* which included the following provisions, came into force:

5. Section 139 of the Act is repealed. … **19. Sections 244 to 246 of the Act are repealed and the following substituted therefor:** … **246.4** Where an accused is charged with an offence under section 150 (incest) …, no corroboration is required for a conviction…. **33. An offence committed prior to the coming into force of this Act against any provision of law affected by this Act shall be dealt with in all respects as if this Act had not come into force.**	**5. L'article 139 de ladite lois est abrogé.** **19. Les articles 244 à 246 de ladite loi sont abrogés et remplacés par ce qui suit :** **…** **246.4** La corroboration n'est pas nécessaire pour déclarer coupable une personne accusée d'une infraction prévue aux articles 150 (inceste) …. **33. La présente loi ne s'applique pas aux infractions commises avant son entrée en vigueur.**

In 1988, An *Act to amend the Criminal Code* and the *Canada Evidence Act*, which included the following provision, came into force:

11. Sections 246.4 and 246.5 of the Act are repealed and the following substituted therefor: **246.4** Where an accused is charged with an offence under section 140, 141, 146, 150 (incest)…, no corroboration is required for a conviction….	**11. Les articles 246.4 et 246.5 de la même loi son abrogés et remplacés par ce qui suit :** **246.4** La corroboration n'est pas nécessaire pour déclarer coupable une personne accusée d'une infraction prévue aux articles 140, 141, 146, 150 (inceste)….

Note that section 11 of the 1988 Act re-enacts section 246.4 of the Code and adds new offences for which corroboration is not required.

Issue: In 1988, did Parliament intend to remove the requirement for corroboration of offences occurring before 1983?

Judgment: by Jackson J.A. for the Court:

[9] The learned Queen's Bench judge noted that a number of cases have held that the presumption against retrospective construction has no application to amendments that relate to procedural or evidentiary matters such as corroboration.[9] She found, however, that it was not necessary to enter into the debate regarding whether this was a procedural or substantive matter because section 33 is an express direction that the amendments are not retrospective.[10]

[16] I agree with these cases insofar as they hold that (i) corroboration is a matter of evidence; and (ii) a legislative change with respect to the requirement of corroboration will apply retrospectively in the absence of Parliament's expression to the contrary.

23] … [In *R. v. Batte*, the Ontario Court of Appeal] holds that section 33 recognized "that the Crown could prosecute crimes, like rape and indecent assault, that had occurred prior to the 1983 amendments, even though the *Criminal Code* sections creating those offences had been repealed: see *Interpretation Act*, R.S.C. 1985, c. I-21, s. 43."[28] Thus, he attributes no more meaning to section 33 than would be given to clause 43(d) of the *Interpretation Act*.[29] However, as Lamer C.J. stated in *R. v. Proulx*[30] "[i]t is a well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage."[31] …

[24] I prefer, instead, the reasoning of the Queen's Bench judge whose decision is under appeal with respect to her interpretation of section 33. She interprets section 33 as an expression of Parliament's intention to maintain the requirement for corroboration at the moment of its enactment for those alleged offences committed before January 4, 1983.[32]

[25] The meaning of section 33 seems plain on its face. To use the words of section 33, an offence is not "dealt with in all respects" like another offence if corroboration is required for one offence and not the other.[33]

[26] Support for this interpretation is found in David Watt's text wherein he treats section 33 as unequivocally applying to both procedural and substantive rights:

[29] For three reasons, I conclude that the *1988 Act* modifies the procedural rules for pre-1983 offences such that section 33 does not apply to those matters that come to trial after January 1, 1988.

[30] First, the actual wording of section 33 does not purport to extend beyond its terms. The phrase "this Act" in section 33 refers only to the *1983 Act* itself. Section 33 is not an amendment to the *Criminal Code*, but is a transitional provision contained in the *1983 Act* only. The *1983 Act*, which includes section 33, is an expression of Parliament's intention as of January 4, 1983. The *1988 Act* is an expression of Parliament's intention as of January 1, 1988.

[31] Second, even if section 33 purported to extend beyond its terms, it is questionable whether one piece of legislation can bind future legislative action in such a manner. Just as Parliament would have been able in 1983 to remove the requirement of corroboration and apply the rule retrospectively, it had the same powers to do so in 1988. The procedural law for sexual offences was not "frozen" as of January 4, 1983.

[32] Third, unlike section 33 of the *1983 Act*, the *1988 Act* does amend the *Criminal Code*. The *1988 Act* does not contain a transitional provision, and expressly repeals *and replaces* section 246.4 as contained in the *1983 Act*. To use the words of section 33, at the moment when section 246.4 was repealed by the *1988 Act* the criminal law became "as if (the prior version of section 246.4) had not come into force." The newly-enacted section 246.4 thus becomes the governing standard without the presence of section 33. It expands the list of sexual offences for which corroboration is not required and states again that corroboration is not required for incest.

[33] If I were to interpret the *1988 Act* otherwise, Parliament's choice not to include a transitional provision in the *1988 Act* would have no effect. Such a conclusion was soundly rejected in *Bickford* and the ensuing cases. In my view, Parliament deliberately did not include a transitional provision in the *1988 Act* as it did in passing the *1983 Act*. This choice must in turn govern the application of section 246.4.

Jackson J.A. pointed out that social attitudes toward child sexual abuse evolved significantly during the period between 1983 and 1988. She also referred to the Bageley Commission Report, released in 1984, which recommended removal of the corroboration requirement for offences involving the sexual abuse of children. She concluded:

[39] It is against this backdrop that the *1988 Act* must be considered. The *1983 Act* was a significant, but cautious, step forward in society's and Parliament's thinking regarding sexual offences. By 1988, Parliament saw no need for such caution, and implemented evidentiary changes which had retrospective effect….

R. v. Buena Vista Kennels 1979 Inc., 2010 SKQB 19

subdelegation

vagueness

The defendant has operated a kennel on its property since 1979. In 1982, the Rural Municipality of Corman Park (RM) changed the zoning of the property from "agricultural" to "country residential". Although the zoning was changed, the kennel was "grandfathered" as a non-conforming use. In 2006, the RM enacted *The Noise Bylaw, 2006*, which restricted certain noises. Schedule A attached to the noise bylaw set out hours during which noise was permitted. Schedule A specifically referred to animal kennels and allowed noise concerning such a use from 8:00 a.m. to 8:00 p.m. Monday through Saturday and 9:00 a.m. to 8:00 p.m. Sundays and statutory holidays.

Issue: Is the noise bylaw void for vagueness or for improper subdelegation?

Noise Bylaw

Purpose

2. This Bylaw is enacted to protect, preserve and promote the safety, health, welfare, peace and quiet of the citizens of The Rural Municipality of Corman Park through the reduction, control, and prevention of loud and excessive noise, or any noise which unreasonably disturbs, injures, or endangers the comfort, repose, health, peace or safety of reasonable persons of ordinary sensitivity.

Definitions

3. In this Bylaw,...

m) "noise" means any sound which in the opinion of a Municipal Development Officer, having regard for all circumstances, including the time of day and the nature of the activity generating the sound, is likely to unreasonably annoy or disturb persons or to injure, endanger or detract from the comfort, repose, health, peace, or safety of Persons within the Municipality.

n) "Municipal Development Officer" means the Municipal Administrator or an individual appointed by the Municipal Administrator to enforce the Municipality's bylaws.

General Prohibition

4. (1) No person shall make, continue, or cause to be made or continued, or suffer or permit to be made or continued any noise which is unreasonably loud or excessive.

(2) For the purpose of this Bylaw, a noise will be considered to be unreasonably loud or excessive if it unreasonably disturbs, injures or endangers the comfort, repose, health, peace or safety of reasonable persons of ordinary sensitivity in the vicinity.

(3) Factors for determining whether a sound is unreasonably loud or excessive include, but are not limited to, the following:

a) the proximity of the sound to sleeping facilities, whether residential or commercial;

b) the land use, nature and zoning of the area from which the sound emanates and the area where it is received or perceived;

c) the time of day or night the sound occurs;

d) the duration of the sound;

e) the volume of the sound;

f) the nature of the sound;

g) whether the sound is recurrent, intermittent or constant; and the nature of the event or activity from which the sound emanates.

Judgment

Vagueness

[12] A vague law violates the principles of fundamental justice, which causes a breach of s. 7 if the law is a deprivation of life, liberty or security of the person. A vague law offends two values that are fundamental to the legal system. First, the law does not provide fair notice to persons of what is

prohibited, which makes it difficult for them to comply with the law. Secondly, the law does not provide clear standards for those entrusted with enforcement, which may lead to arbitrary enforcement.

[13] A trilogy of Supreme Court of Canada cases are often referred to as the touchstones for courts when the issue of vagueness in legislation is raised. They are *Reference re ss. 193 and 195.1 of the Criminal Code (Man.)*, 1990 CanLII 105 (SCC), [1990] 1 S.C.R. 1123; *R. v. Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (SCC), [1992] 2 S.C.R. 606; and *Ontario v. Canadian Pacific Ltd.*, 1995 CanLII 112 (SCC), [1995] 2 S.C.R. 1031. In the *Nova Scotia Pharmaceutical* case, Justice Gonthier referred to the legal debate test for vagueness as to whether the legislation is sufficient to provide for legal debate. He stated at pages 639-40:

> A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible; to use the terminology of previous decisions of this Court, and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary. This is an exacting standard, going beyond semantics. The term "legal debate" is used here not to express a new standard or one departing from that previously outlined by this Court. It is rather intended to reflect and encompass the same standard and criteria of fair notice and limitation of enforcement discretion viewed in the fuller context of an analysis of the quality and limits of human knowledge and understanding in the operation of the law.

14] In the *Ontario v. Canadian Pacific Ltd.* case, *supra*, Justice Gonthier provided further direction as to how a court should determine whether a law is vague and stated at para. 47:

> ...Vagueness must not be considered *in abstracto*, but instead must be assessed within a larger interpretive context developed through an analysis of considerations such as the purpose, subject matter and nature of the impugned provision, societal values, related legislative provisions, and prior judicial interpretations of the provision. Only after exhausting its interpretive role will a court then be in a position to determine whether an impugned provision affords sufficient guidance for legal debate.

[17] Counsel for the defendant submits that in order to be valid a noise bylaw should have an objective measurement such as a certain decibel level which could then be measured by a decibel meter. However, setting such a decibel criteria is not likely to resolve uncertainty because, regardless of the decibel level, other factors such as the distance from the noise, the type of weather or atmospheric conditions, other intervening structures and the nature of the noise would also affect the amount of the disturbance of others and the health or safety issues resulting therefrom. The concept of reasonableness, as referred to in the noise bylaw, is one which courts often interpret and is a concept which provides legal guidance for the delineation of the offence. Furthermore, the factors listed in s. 4(3) of the noise bylaw provide further definition such that an objective standard can be applied.

[18] I am satisfied that the noise bylaw provides fair notice of clear standards which are subject to judicial interpretation rather than arbitrary administrative enforcement. I therefore find that the noise bylaw in question meets the criteria set by the Supreme Court of Canada and is not unconstitutionally vague.

Subdelegation

[19] The defendant's position is that pursuant to s. 3(m) of the noise bylaw, a "sound" does not become a "noise" within the meaning of the noise bylaw unless, in the "opinion" of the municipal development officer, the sound satisfies certain criteria. Counsel for the defendant submits that if such a determination is left to a third party, this is an improper subdelegation especially when, as here, it requires the subjective opinion of the person who is making the decision.

[22] *The Municipalities Act*, *supra*, which provides the power for the RM to pass bylaws, also allows for delegation by the RM in certain circumstances. Section 126(2) provides as follows:

> **126** ...
>
> (2) A council may delegate any of its powers or duties to an employee, agent or committee appointed by it, except those powers or duties set out in section 127.

(Section 127 does not include the powers or duties at issue here.)

[23] Section 3(n) of the noise bylaw defines a "municipal development officer" as the municipal administrator or an individual appointed by the municipal administrator to enforce the RM's bylaws. Section 110 of *The Municipalities Act* gives council the power to delegate certain functions as follows:

> **110**(1) Every council shall establish a position of administrator of the municipality.
>
> ...
>
> (3) The administrator shall perform the duties and exercise the powers and functions that are assigned to an administrator:
>
> (a) by this and other Acts; and
>
> (b) by the council.
>
> (4) Subject to the approval of the council, an administrator may delegate any of his or her powers, duties or functions to any employee of the municipality. [Emphasis added.]
>
> ...

[24] As can be seen, therefore, pursuant to *The Municipalities Act*, it is permissible for the council of the RM to delegate to the administrator and, in turn, for the administrator to further subdelegate functions, including the enforcement of the *The Noise Bylaw, 2006*. However, the discretion given to the

administrator or his designate is clearly limited in the noise bylaw by the requirement that in order to constitute a noise, the sound must unreasonably annoy or disturb persons within the municipality. This limitation provides guidance as to the appropriate use of the power delegated. Obviously, the exercise of the power delegated is further limited by the fact that any action taken by the enforcement officer, which can lead to enforcement proceedings, must be proven in a court of competent jurisdiction.

[25] Accordingly, I find that the noise bylaw is not void for improper delegation.

R. v. Loiseau, 2010 QCCA 2224

Retrospective application – substantive versus procedural provisions

When the alleged offence of driving with an excessive blood alcohol concentration occurred, subsection 258(1) of the *Criminal Code* provided that if the lower result of the two breath samples taken from an accused exceeded the legal limit, their blood alcohol concentration at the time the alleged offence occurred was presumed to be at that lower level. This presumption was rebutted by any evidence capable of raising a reasonable doubt, including evidence of what an accused had consumed before driving along with evidence from a toxicologist indicating that, assuming that evidence to be true, the blood alcohol concentration would have been below the legal limit.

After D was charged, but before his trial, the law was changed. The new legislation provided that the result of an accused's lower breath test is conclusive proof of their blood alcohol concentration at the time of the alleged offence, in the absence of evidence tending to show that

- the approved instrument malfunctioned or was improperly operated;
- the malfunction or error resulted in the result of excessive concentration; and
- the accused's blood alcohol concentration would not have exceeded legal limit at the relevant time.

The new legislation also precluded testimony about an accused's alcohol consumption or the rate of elimination from being advanced as evidence tending to show a problem with either the breath testing equipment or the testing procedure.

At L's trial, the judge refused to apply these amendments on the grounds that they introduced a substantive change and were therefore subject to the presumption against the retrospective application of law.

Issue: whether the amendment was procedural or substantive

Judgment of the Court:

[The Court began by noting that different courts across the country had split on the issue of whether the amendment was procedural or substantive.]

[25] Les nouvelles dispositions du *Code criminel*	[25] The new provisions of the *Criminal Code*

sont certainement moins avantageuses pour les accusés. Mais à mon avis cela n'empêche pas fatalement leur applicabilité rétrospectivement. S'exprimant au sujet de ce dilemme, l'auteure Paule Biron écrit[16] : Certaines modifications législatives dans le domaine de la preuve entraînent effectivement des conséquences très sérieuses pour les causes en litige. On pense alors tout naturellement à des dispositions modifiant les règles de corroboration ou renversant le fardeau de la preuve, qui signifient parfois la différence entre une condamnation et le rejet de l'action ou un acquittement. La survie de la loi ancienne devient l'alternative proposée par les procureurs qui contestent l'autorité de la loi nouvelle dont l'application bouleverserait considérablement les prévisions des parties. En grande majorité, les tribunaux ont refusé toutefois d'admettre une telle survie, même dans les cas où la modification désavantageait nettement la position de l'accusé ou du défendeur : … the presumption against a retrospective construction has no application to enactment which affect only the procedure and practice of the Court, even where the alteration which the statute makes has been disadvantageous to one of the parties. [Références omises]	are certainly less advantageous for accused persons. But in my opinion that does not deal a fatal blow to their retrospectivity. Writing about this dilemma, the author Paule Biron remarked:[16] [TRANSLATION] Indeed, certain legislative amendments regarding evidence have very serious consequences for cases at issue. One thinks quite naturally of provisions amending rules of corroboration or reversing the burden of proof, which sometimes mean the difference between a conviction and a dismissal of the action or an acquittal. The survival of the old law becomes the alternative proposed by attorneys who contest the authority of the new law whose application would considerably disrupt the parties' expectations. The great majority of the courts have refused, however, to allow such survival, even in those cases where the amendment would clearly be disadvantageous to the position of the accused or of the defendant: … the presumption against a retrospective construction has no application to enactments which affect only the procedure and practice of the Court, even where the alteration which the statute makes has been disadvantageous to one of the parties. [References omitted]

[26] Les divergents points de vue révélés par la jurisprudence contradictoire et la doctrine citées de part et d'autre démontrent clairement que les deux thèses qui s'affrontent se défendent bien et sont à	[26] The diverging points of view apparent in the contradictory case law and commentary cited by both sides clearly show that the two opposing theses can be defended and are in many respects

maints égards persuasives. Cependant, j'estime que la meilleure approche consiste à qualifier les amendements du *Code criminel* comme étant de nature procédurale, avec pour conséquence que leur application est immédiate à compter de 2 juillet 2008.

[27] En effet, le nouvel article 258 *C.cr*., s'il peut frustrer les expectatives de certains accusés par rapport à l'ancienne formulation, n'a certes pas pour effet de les priver d'un droit substantiel[17]. Or, le concept des droits acquis ne trouve pas application en matière de procédure[18]. Contrairement à ce qu'on a pu prétendre, il ne s'agit pas ici de l'abolition d'un moyen de défense. La présomption d'identité entre les résultats des alcootests et le taux d'alcoolémie existait déjà et demeure; ce sont les possibilités, pour un accusé, de renverser cette présomption qui se sont vues restreintes. Cette restriction, si elle n'est pas sans compliquer la tâche des avocats de la défense, ne saurait toutefois être considérée comme les privant de toute forme de preuve contraire : le législateur entrevoit toujours la possibilité de renverser la présomption d'identité des résultats, bien qu'il ajuste le fardeau de présentation requis pour ce faire en fonction de la fiabilité qu'il accorde désormais aux appareils modernes.

[28] Sans être lié par l'arrêt de la Cour d'appel d'Ontario dans *Dineley*[19], et sans vouloir présumer du sort de la demande en autorisation de pourvoi à la Cour suprême, je suis d'avis qu'il est dans l'intérêt du public canadien que le droit criminel pour une infraction de cette nature soit appliqué de manière uniforme au pays.

[29] Cela dit, il y a lieu de préciser qu'un accusé qui subit un procès dans les mêmes circonstances que celles de M. Loiseau doit impérativement avoir la possibilité, dans les faits, de faire valoir la défense que la loi actuelle lui accorde. Les enseignements de la Cour suprême du Canada dans *Wildman c. La Reine*, sous la plume du juge Lamer, alors juge puîné, demeurent d'actualité :

> Cette disposition [l'article 36 *d*) de la *Loi d'interprétation*] énonce la règle de *common law* selon laquelle il n'existe pas de droit acquis en procédure, pour autant que la mise en oeuvre de la nouvelle procédure

persuasive. I believe, however, that the best approach is to characterize the amendments to the *Criminal Code* as procedural in nature, with the consequence that their application is immediate, starting on July 2, 2008.

[27] Indeed, while the new section 258 *Cr. C.*, compared to the previous wording, may frustrate the expectations of some accused, it does not deprive them of a substantive right.[17] The concept of acquired rights does not find application in procedural matters.[18] Contrary to what has been argued, it is not a matter here of abolishing a means of defence. The presumption of identity between the breathalyzer results and the blood alcohol concentration already existed and remains; the possibility for an accused to reverse this presumption, however, has been restricted. This restriction complicates the tasks of counsel for the defence but should not be considered to deprive them of any form of evidence to the contrary: the legislator still provides for the possibility of reversing the presumption of identity of the results, although it adjusts the burden of presentation required to do so in proportion to the reliability it henceforth ascribes to modern instruments.

[28] Without being bound by the ruling of the Court of Appeal for Ontario in *Dineley*,[19] and without wanting to presume the fate of the application for leave to appeal to the Supreme Court, I am of the opinion that it is in the interest of the Canadian public that the criminal law applicable to an offence of this nature be applied uniformly across the country.

[29] That being said, it must be pointed out that it is imperative for an accused undergoing a trial in the same circumstances as those of Mr. Loiseau to have the opportunity, in practice, to mount the defence that the law currently affords him. The teachings of the Supreme Court of Canada in *Wildman v. R.*, *per* Lamer J., as he then was, are still current:

> This provision [section 36 (*d*) of the *Interpretation Act*[20]], is an enactment of the common law rule that there is no vested right in procedure along with a limitation to the effect that the following of the new procedure must be

soit, en pratique, possible. [Je souligne] [30] Il appartiendra au juge qui présidera le nouveau procès de M. Loiseau de s'assurer que l'écoulement du temps ou toute autre raison semblable entre les événements en litige (le 17 janvier 2007) et la date du nouveau procès ne l'ont pas privé de cette possibilité. S'il n'est pas dans les faits possible pour M. Loiseau, pour les raisons de cette nature, de faire valoir une défense que la loi actuelle lui accorde, le ministère public devra en subir les conséquences.	feasible. [Emphasis added] [30] It will be up to the judge presiding at Mr. Loiseau's new trial to ensure that the time elapsed or any other similar reason between the events at issue (January 17, 2007) and the date of the new trial have not deprived him of this opportunity. If, for reasons of this nature, it is not actually possible for Mr. Loiseau to mount a defence that the current law affords him, the Crown will have to suffer the consequences.

Régie des rentes du Québec v. Canada Bread Company Ltd., 2011 QCCA 1518

Note: Leave to appeal from this judgment to the Supreme Court of Canada has been granted.(Tentatively scheduled for 2013-04-17.)

This is the latest judgment in a series of appeals from, and judicial reviews of, two decisions of the Régie des Rentes du Québec concerning the legal consequences of a shortfall in the funding of a pension plan. In the first series, Quebec's Court of Appeal concluded in April of 2008 that the Régie had erred in interpreting the relevant legislation and it sent the case back to the Régie with a direction to decide the issues in accordance with the Court of Appeal's interpretation. The Régie sought leave to appeal this judgment to the Supreme Court of Canada.

Coincidentally, in April of 2008 a bill was tabled in the National Assembly to amend several of Quebec's pension laws. In June, the Minister responsible for pension legislation proposed amendments to the bill that would have the effect of reversing the Court of Appeal's April judgment. According to the Minister, the Court had misinterpreted the law and an amendment was necessary to rectify this mistake; there was no need to wait for the decision of the Supreme Court of Canada. The bill was enacted at the end of June, including three amendments addressing the erroneous April judgment. The first two amendments added sections 14.1 and 228.1 to *La Loi sur les régimes complémentaires de retraite* [*Supplemental Pension Plans Act*]; they set out the National Assembly's preferred interpretation of the law. The third added section 319.1:

«319.1. Les articles 14.1 et 228.1 sont déclaratoires. ».	319.1. Sections 14.1 and 228.1 are declaratory.

In August of 2009, relying on section 319.1, the Régie ignored the Court of Appeal's 2008 direction and confirmed its initial decision. It held that because the appeal to the Supreme Court of Canada was pending when the 2008 amendments came into force, it was bound to apply the law as declared by the legislature in those amendments. This led to a second series of appeals and reviews.

In October of 2010, the Supreme Court of Canada dismissed the Régie's application for leave to appeal from the Court of Appeal's April 2008 decision.

In 2011, the following issue was before the Court of Appeal.

Issue: Does declaratory legislation apply to a case that is the subject of an application for leave to appeal to the Supreme Court of Canada?

Judgment: FRANCE THIBAULT, J.C.A. for the Court

La loi déclaratoire

[39] Selon la Régie, une cause est pendante tant qu'un jugement n'est pas définitif et irrévocable. Elle soutient que l'existence d'une demande d'autorisation de pourvoi à la Cour suprême du Canada faisait en sorte que, lorsque la loi déclaratoire a été sanctionnée, les parties étaient en présence d'une cause pendante. Par conséquent, la loi déclaratoire, en raison de sa portée rétroactive, s'appliquait au dossier qui était pendant devant la Cour suprême.

[40] La Régie plaide aussi que le raisonnement de la juge d'instance, selon lequel l'arrêt de la Cour d'appel est devenu un jugement définitif et irrévocable après le rejet par la Cour suprême de la requête pour permission d'appeler, ne peut être retenu. La juge d'instance aurait enfin erré en concluant que, une fois l'arrêt de la Cour rendu, seule la Cour suprême aurait pu appliquer la loi déclaratoire.

[41] En résumé, la Régie soutient que la cause étant pendante lors de l'entrée en vigueur de la loi déclaratoire le 20 juin 2008, celle-ci s'appliquait nécessairement au dossier en cours.

[…]

[44] Lorsqu'un texte de loi édicte qu'elle est « déclaratoire », cela signifie que le législateur se saisit du pouvoir normalement dévolu au pouvoir judiciaire et qu'il interprète sa propre loi pour dissiper les doutes quant à son sens ou sa portée. Le législateur dicte alors son interprétation de la loi.

[45] Une loi déclaratoire a un effet rétroactif. Cela entraîne qu'elle change le régime législatif applicable à un fait accompli et qu'elle prescrit la conduite des personnes chargées d'appliquer la loi. Dès que la loi déclaratoire prend effet, le tribunal doit l'appliquer aux affaires qui se présentent devant lui même si les faits qui les ont entraînées sont antérieurs à la promulgation de la loi. En revanche, la loi déclaratoire ne porte pas atteinte à un jugement passé en force de chose jugée à moins d'un texte formel à cet effet.

[…]

[52] Dans ce dossier, ainsi que l'énonce très clairement la juge de première instance, la Cour suprême aurait été tenue d'appliquer la loi déclaratoire si elle avait décidé d'entendre l'affaire. Pendant la période où la requête pour permission d'appeler était pendante devant la Cour suprême, l'arrêt de notre Cour n'était pas passé en force de chose jugée; il n'était pas irrévocable. À compter du rejet par la Cour suprême de la requête pour permission d'appeler, l'arrêt de notre Cour est passé en force de chose jugée; il est devenu irrévocable et donc, il mettait fin à toute contestation sur ce qui en faisait l'objet.

[55] Avant de passer à l'analyse de la question suivante et, à titre pédagogique, je reproduis les énoncés suivants rédigés par la juge d'instance. Ils livrent l'essence des règles entourant l'interprétation et l'application de la loi déclaratoire. Ce condensé est précis, clair et complet :

> 1) Une loi déclaratoire est par essence déclarative et interprétative de l'état du droit. Elle a un effet rétroactif.
>
> 2) Une loi déclaratoire ne modifie pas la loi. Elle établit le sens actuel et passé de la loi, c'est-à-dire le sens que cette loi a toujours eu.
>
> 3) Une loi déclaratoire s'assimile à une décision de justice.
>
> 4) La raison qui justifie habituellement l'adoption d'une loi déclaratoire est la correction d'une erreur judiciaire.
>
> 5) Les tribunaux ont reconnu que la loi déclaratoire s'applique aux causes pendantes et que les causes portées en appel constituent des causes pendantes.
>
> 6) Les causes pendantes sont celles dont on attend le jugement ainsi que celles où un jugement est porté en appel de sorte que le litige demeure toujours pendant devant les tribunaux dans l'attente d'un jugement final, définitif et irrévocable.
>
> 7) Un jugement final est un jugement qui statue sur l'objet même de la demande en justice et qui, disposant des droits des parties, dessaisit le juge de la contestation.
>
> 8) Un jugement définitif est un jugement qui met fin à un litige ou à une contestation pour des motifs de fond ou de procédure et qui a l'autorité de la chose jugée.
>
> 9) Une loi déclaratoire n'emporte pas ouverture des affaires décidées.
>
> 10) Une cause décidée est une cause qui n'est plus pendante.
>
> 11) Une cause décidée est celle qui est tranchée par un jugement définitif et irrévocable qui ne peut plus être contesté en appel et qui met définitivement fin au litige.
>
> 12) Un jugement passé en force de chose jugée échappe à l'application d'une la loi déclaratoire.
>
> 13) Pour qu'une loi déclaratoire s'applique à un jugement (an entered judgment) avant sa mise en vigueur ou à un jugement ayant acquis la force de la chose jugée, le législateur doit manifester son intention de renverser ces jugements (unless the legislature has clearly directed its intention to reversing the decided cases).

Taylor v. Dairy Farmers of Nova Scotia, 2012 NSCA 1

presumed limit on enabling authority – right to trade freely

Dairy production in Nova Scotia operates under a system of statutory supply management, which means that only persons who have a milk quota may produce milk for marketing. It is possible for producers to sell their quota to other producers or to persons wishing to become producers. However, a regulation made under subparagraph 14(1)(e)(iii) of *Nova Scotia's Dairy Industry Act* fixed a maximum price for the sale of milk quota. The regulation's purpose was to encourage the entry of new producers and the expansion of production by existing producers.

Issue: validity of the regulatory price cap

Judgment:

14(1) The Council may delegate the following powers to the Board, including the power to make regulations:

. . .

(e) providing for the regulation of the supply of milk by producers to processors, including the marketing or production milk on a quota basis, and for that purpose
(i) fixing and allotting quota for marketing or production,

(iii) … transferring quota among producers supplying milk and setting the terms and conditions on which the transfer may take place,

[47] The appellants submit that the legislative objective, and s. 14(1)(e)(iii) in particular, should be interpreted to avoid interference with the appellants' freedom to operate their business. … The appellants' factum puts it this way:

> 52. For farmers, such as the Appellants, the restriction on their *ability to operate their business freely* and the financial impact that comes with it is serious. The freedom to carry on business was recognized as important in *Prince Edward Island Retail Gasoline Dealers Assn. v. Prince Edward Island Public Utilities Commission*, [(1981), 37 Nfld & PEIR 46]:
>
> 9. It is always open to the legislative authority to restrict that general common law principle by statutory enactment where it considers it appropriate to do so, and thus restrict that ***individual liberty*** of action. However, any statute which purports to modify what was hitherto part of the common law, such as ***the right to trade freely***, must be clear and distinct in its intention so to do, and in the absence of a concise and ambiguous declaration of intention in the statute, there is no presumption, whether by inference or otherwise, that the common law is to be altered. ... [emphasis added]

[48] The appellants plea for "the right to trade freely" as an interpretive canon is a wayward interloper in this case. If producers had the right to trade raw milk (as opposed to quota) freely, there would be no restrictions on the "right to supply", meaning no quota and no quota value. Mr. Taylor's 33.74 kgs of saleable quota, jointly held with another individual, would be worth about $843,500 at $25,000 per kilogram under Regulation 21. Similarly Bacon Farms' 48.31 kgs of saleable quota would be worth about $1,207,750. If producers had the right to trade (raw milk) freely, their quota value would be zero. The appellants' quota value - the *raison d'être* for this litigation - stems from the supply management system that pre-empts the right to trade freely.

Teva Canada Limited v. Canada (Health), 2012 FCA 106

presumed compliance with Canada's international obligations

[2] In 2007, the Minister of Health placed S-A Co.'s drug, Eloxatin, on a register of "innovative drugs" maintained under C.08.004.1(9) of the federal *Food and Drug Regulations*, which had the effect of preventing Teva from marketing its own version of Eloxatin.	[2] En 2007, le ministre de la Santé a inscrit l'Eloxatine, un médicament fabriqué par Sanofi-Aventis Canada Inc., au registre des « drogues innovantes » qu'il est chargé de tenir en vertu du paragraphe C.08.004.1(9) du *Règlement sur les aliments et drogues* (C.R.C., ch. 870) (le Règlement). Comme nous le verrons, la présence de l'Eloxatine au registre empêchait Teva de

	commercialiser sa propre version de ce médicament.
[3] In 2010, Teva requested that the Minister remove Eloxatin from the register because it did not meet the definition of an "innovative drug". That definition requires that an "innovative drug" contain "a medicinal ingredient not previously approved in a drug by the Minister." In Teva's view, because the Minister had since 1999 authorized thousands of uses of Eloxatin on a case by case basis under an emergency Special Access Program, it must be considered to have been previously approved.	[3] En 2010, Teva a demandé au ministre de retirer l'Eloxatine du registre parce que ce médicament ne satisfaisait pas à la définition de « drogue innovante » qui figure au paragraphe C.08.004.1(1) du Règlement. Selon cette définition, pour être une « drogue innovante », l'Eloxatine doit contenir « un ingrédient médicinal [l'oxaliplatine] non déjà approuvé dans une drogue par le ministre ». De l'avis de Teva, le ministre l'a « déjà approuvé » : depuis 1999, il a autorisé des milliers de fois l'utilisation de l'Eloxatine à titre de traitement d'urgence en vertu du Programme d'accès spécial établi en application du Règlement.

Issue: had the medicinal ingredient in Eloxatin been previously approved within the meaning of subsection C.08.004.1(1)?

C.08.004.1. (1) The following definitions apply in this section	**C.08.004.1.** (1) Les définitions qui suivent s'appliquent au présent article.
…	…
"innovative drug" means a drug that contains a medicinal ingredient not previously approved in a drug by the Minister and that is not a variation of a previously approved medicinal ingredient such as a salt, ester, enantiomer, solvate or polymorph. (*drogue innovante*)	« drogue innovante » S'entend de toute drogue qui contient un ingrédient médicinal non déjà approuvé dans une drogue par le ministre et qui ne constitue pas une variante d'un ingrédient médicinal déjà approuvé tel un changement de sel, d'ester, d'énantiomère, de solvate ou de polymorphe. (*innovative drug*)
(2) Where a new drug submission or abbreviated new drug submission or a supplement to either submission does not comply with section C.08.002, C.08.002.1 or C.08.003, as the case may be, or section C.08.005.1, the manufacturer who filed the submission or supplement may amend the submission or supplement by filing additional information or material.	(2) Lorsqu'une présentation de drogue nouvelle, une présentation abrégée de drogue nouvelle ou un supplément à l'une de ces présentations n'est pas conforme aux articles C.08.002, C.08.002.1 ou C.08.003, selon le cas, ou à l'article C.08.005.1, le fabricant qui l'a déposé peut le modifier en déposant des renseignements ou du matériel supplémentaires.

Judgment : Stratas J.A. for the Court

[13] Teva says that "previously approved" must be interpreted to include mass authorizations under the Special Access Programme. To hold otherwise is to give Sanofi-Aventis an inordinate and unjustifiable monopoly for a number of years.…	[13] Teva affirme que les mots « déjà approuvé » doivent être interprétés de manière à englober les autorisations accordées massivement en vertu du Programme d'accès spécial. Soutenir qu'il en va autrement reviendrait à accorder à Sanofi-Aventis un monopole excessif et injustifiable durant de nombreuses années[…].
…	

[	[…]
34] … Subsection C.08.004.1(1) of the *Regulations* is a limited, special purpose section. It is designed to implement certain specific treaty obligations undertaken by Canada: subsection C.08.004.1(2) of the *Regulations*. These obligations are found in three treaty provisions: paragraphs 5 and 6 of Article 1711 of the *North American Free Trade Agreement* and paragraph 3 of Article 39 of the *Trade Related Aspects of Intellectual Property Rights Agreement*, both *supra.*	[34] […] Le paragraphe C.08.004.1(1) du Règlement est une disposition dont l'objet est limité et particulier. Il est conçu pour permettre la mise en oeuvre de certaines obligations que le Canada a contractées par traité : paragraphe C.08.004.1(2) du Règlement. Ces obligations sont prévues dans les trois dispositions suivantes : les paragraphes 5 et 6 de l'article 1711 de l'*Accord de libre-échange nord-américain*, précité, et le paragraphe 3 de l'article 39 de l'*Accord sur les aspects des droits de propriété intellectuelle qui touchent au commerce*, précité.
...	[…]
[37] Of … relevance to the meaning of "previously approved" is the repeated mention in these treaty provisions of the concept of marketing approval …. Article 1171, paragraphs 5 and 6 of the *North American Free Trade Agreement* obligate Canada to protect data necessary for "approving of marketing" of pharmaceutical products for at least five years from when Canada granted "approval to the person that produced the data for approval to market its product." Article 39, paragraph 3 of the *Trade Related Aspects of Intellectual Property Rights Agreement* similarly refers to data required "as a condition of approving the marketing of pharmaceutical" products. In Canada, market approval under the *Regulations* means the issuance of a notice of compliance and a drug information number.	[37] À cet égard, le fait que les dispositions des traités renvoient à plusieurs reprises à la notion d'approbation de la commercialisation ou, comme Teva le dit, à l'« autorisation de vente » est plus révélateur. En vertu des paragraphes 5 et 6 de l'article 1711 de l'*Accord de libre-échange nord-américain*, le Canada a l'obligation de protéger les données nécessaires à l'appui d'une demande d'« approbation de la commercialisation » de produits pharmaceutiques pendant une période d'au moins cinq années à partir du moment où le Canada a donné « son autorisation à la personne ayant produit les données destinées à faire approuver la commercialisation de son produit ». De la même manière, le paragraphe 3 de l'article 39 de l'*Accord sur les aspects des droits de propriété intellectuelle qui touchent au commerce* renvoie aux données auxquelles les pays membres « subordonnent l'approbation de la commercialisation de produits pharmaceutiques ». Au Canada, l'approbation de la commercialisation sous le régime du Règlement se traduit par la délivrance d'un avis de conformité et l'attribution d'une identification numérique de drogue.
[38] Given that the definition of "innovative drug" in subsection C.08.004.1(1) of the *Regulations* was intended to implement these treaty provisions, "previously approved" in subsection C.08.004.1(1) must mean a previous marketing approval, *i.e.*, the previous issuance of a notice of compliance and a drug information number ….	[38] Compte tenu du fait que la définition du terme « drogue innovante » énoncée au paragraphe C.08.004.1(1) du Règlement a pour objet de mettre en oeuvre les dispositions susmentionnées, les mots « déjà approuvé » au paragraphe C.08.004.1(1) doivent se rapporter à une approbation antérieure de commercialisation, à savoir la délivrance d'un avis de conformité et l'attribution d'une identification numérique de

[39] Accepting Teva's interpretation – interpreting "previously approved" in subsection C.08.004.1(1) of the *Regulations* to include authorizations granted under the Special Access Program – would undercut the treaty provisions….	drogue […]. [39] En acceptant l'interprétation de Teva, à savoir que le terme « déjà approuvé » figurant au paragraphe C.08.004.1(1) du Règlement vise notamment les autorisations accordées en vertu du Programme d'accès spécial, on contrecarrerait l'effet des dispositions pertinentes des traités […].

Toussaint v. Canada (Citizenship and Immigration), 2011 FCA 146

overlapping powers

Subsection 25(1) of the *Immigration and Refugee Protection Act* authorizes the Minister to grant a foreign national permanent resident status or an exemption from any criterion or obligation of the Act on humanitarian and compassionate grounds.

25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from <u>any applicable criteria or obligation of this Act</u> if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	25. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever <u>tout ou partie des critères et obligations applicables</u>, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

The Regulations governing applications under subsection 25(1) require evidence of payment of a $550 fee. In drawing attention to these regulations, Shawlow J.A. noted in obiter that:

[14] Paragraph 26(*b*) of the *IRPA* permits regulations to be made regarding "permanent resident status", including "the acquisition of that status". That would include regulations stipulating the procedural requirements for a subsection 25(1) application.	[14] L'alinéa 26*b*) de la LIPR permet la prise de règlements portant sur « le statut de résident permanent », notamment « l'acquisition du statut », ce qui comprend des règlements établissant les exigences procédurales des demandes présentées au titre du paragraphe 25(1).

The fee for the subsection 25(1) application was fixed under section 89 of the Act, which authorizes regulations governing fees and also the waiver of fees by the Minister.

89. The regulations may govern fees for services	89. Les règlements peuvent prévoir les frais pour les

provided in the administration of this Act, and cases in which fees may be waived by the Minister or otherwise, individually or by class.	services offerts dans la mise en œuvre de la présente loi, ainsi que les cas de dispense, individuellement ou par catégorie, de paiement de ces frais.

When the applicants in this case submitted a request for permanent residence in their subsection 25(1) application, no regulations had been made providing for a Ministerial fee waiver.

Instead of including evidence of payment of the fee in their application, they included evidence of their poverty and a request that the fee be waived. The Minister refused to consider their application until the fee was paid.

Issue:

Does subsection 25(1) authorize the Minister to waive the fee for a subsection 25(1) application?

Judgment:

In concluding that the subsection does authorize such a waiver, Sharlow J.A. considered a range of contextual factors based on the parties' submissions, which she summarized at para 37:

"(a) the general principle that immigration is a privilege, not a right; (b) the statutory objectives of the *IRPA* as stated in section 3; (c) whether the existence of section 89 of the *IRPA* implies that the question of fee waivers was intended to be solely a matter for regulation by the Governor in Council; (d) the fact that the criteria used to assess a subsection 25(1) application include financial self sufficiency in Canada; and (e) whether requiring fee waivers to be considered with a subsection 25(1) application is absurd because it would be unduly cumbersome."	a) le principe général voulant que l'immigration soit un privilège, et non un droit; b) l'objet énoncé à l'article 3 de la LIPR; c) la question de savoir si, du fait de l'article 89 de la LIPR, la dispense du paiement des frais était censée uniquement faire l'objet d'un règlement pris par le gouverneur en conseil; d) le fait que l'autonomie financière au Canada compte parmi les critères servant à évaluer une demande présentée au titre du paragraphe 25(1); e) la question de savoir si le fait d'exiger que la dispense du paiement des frais soit considérée en même temps que la demande présentée au titre du paragraphe 25(1) est absurde parce que cela serait trop compliqué. J'examinerai successivement chacun de ces facteurs.

Concerning the impact of section 89 on the scope of the Minister's discretion in subsection 25(1), Sharlow J.A. wrote:

[47] The Minister argues that the existence of section 89 is an indication that Parliament intended the Minister to have no discretion to waive fees except as permitted by a regulation enacted by the Governor in Council. According to the Minister, to find a fee waiving authority within subsection 25(1) would suggest that Parliament has provided for competing authorities. I see no reason to read that much into section 89. In my view, section 89 and subsection 25(1) are capable of standing together no matter which interpretation of subsection 25(1) is adopted.	[47] Le ministre soutient que l'article 89 est une indication que le législateur voulait que le ministre ne dispose d'aucun pouvoir discrétionnaire pour dispenser du paiement des frais sauf dans la mesure autorisée par un règlement pris par le gouverneur en conseil. Selon le ministre, conclure à l'existence d'un pouvoir de dispenser du paiement des frais au paragraphe 25(1) donnerait à entendre que le législateur a prévu des pouvoirs concurrents. Je ne vois aucune raison d'interpréter ainsi l'article 89. À mon avis, l'article 89 et le paragraphe 25(1) peuvent coexister, peu importe

	l'interprétation adoptée à l'égard du paragraphe 25(1).

[48] I see no reason in principle why Parliament would not see fit to authorize the Minister to waive the fee for a subsection 25(1) application on humanitarian and compassionate grounds or public policy grounds, necessarily on a case by case basis, while at the same time authorizing the Governor in Council to enact regulations governing when a fee may be waived "by the Minister or otherwise, individually or by class." The scope of the regulation making authority in section 89 is plenary – it permits regulations to be made for the waiver of any of the dozens of fees imposed in Part 19 of the *Regulations*, most of which have nothing to do with subsection 25(1). In my view, there is ample scope for the enactment of regulations relating to fee waivers without encroaching on the authority given to the Minister under subsection 25(1). … [55] In my view, there is nothing in the scheme of the *IRPA* or the statutory context to compel the conclusion that the obligation under paragraph 10(1)(*d*) of the *Regulations* to pay a fee for a subsection 25(1) application is not within the scope of the phrase "any applicable criteria or obligation of this Act" in subsection 25(1) of the *IRPA*.	[48] Je ne vois en principe aucune raison pour laquelle le législateur n'aurait pas jugé approprié d'autoriser le ministre à accorder une dispense du paiement des frais à l'égard d'une demande fondée sur des motifs d'ordre humanitaire ou d'intérêt public en application du paragraphe 25(1), nécessairement au cas par cas, tout en autorisant en même temps le gouverneur en conseil à prendre des règlements régissant les cas de dispense, par le ministre ou autrement, « individuellement ou par catégorie ». La portée du pouvoir de réglementation à l'article 89 est absolue – il permet la prise de règlements prévoyant les cas de dispense à l'égard de la douzaine de frais imposés dans la partie 19 du Règlement, dont la plupart n'ont rien à voir avec le paragraphe 25(1). À mon avis, il laisse amplement de latitude pour la prise de règlements concernant la dispense du paiement des frais sans empiéter sur le pouvoir conféré au ministre en vertu du paragraphe 25(1). […] [55] À mon avis, rien dans le régime de la LIPR ou le contexte législatif n'oblige à conclure que l'obligation, prévue à l'alinéa 10(1)*d*) du Règlement, de payer des frais relativement à une demande fondée sur le paragraphe 25(1) ne fait pas partie de « tout ou partie des critères et obligations applicables ».

Wallot c. Québec (Ville de), 2011 QCCA 1165

overlapping provisions

interference with property rights

The Ville de Québec adopted a bylaw to protect the potable water in Lac Saint-Charles, the primary source of water for the city. One of the strategies adopted was to prevent further erosion of the lake's shoreline. The bylaw required owners of riparian property to establish and maintain a permanent band of foliage – a mixture of trees, bushes and herbaceous plants – extending 10 to 15 meters from the shore (depending on the configuration of the property).

Certain property owners sought to have these provisions set aside on the grounds that they were not authorized by the *Municipal Powers Act.*

Issues :

Is the general power to make bylaws conferred by section 19 of the *Municipal Powers Act* limited by the specific provision respecting measures to protect potable water in the *Charter of Ville de Québec ?*

Does section 19 authorize such extreme interference with property rights ?

Loi sur les compétences municipales	*Municipal Powers Act*
4. En outre des compétences qui lui sont conférées par d'autres lois, toute municipalité locale a compétence dans les domaines suivants : […] **4°** l'environnement;	4. In addition to the areas of jurisdiction conferred on it by other Acts, a local municipality has jurisdiction in the following fields: ... (4) the environment;
19. Toute municipalité locale peut adopter des règlements en matière d'environnement	19. A local municipality may adopt by-laws on environmental matters.
Charte de la Ville de Québec **147.** Dans un règlement adopté en vertu de l'article 19 de la Loi sur les compétences municipales (chapitre C-47.1), le conseil de la ville peut régir ou prohiber, même à l'extérieur du territoire de la ville, toute construction ou toute activité susceptible de contaminer une source d'alimentation de l'aqueduc de la ville ou d'en affecter le débit.	*Charter of Ville de Québec* **147**. In a by-law under section 19 of the Municipal Powers Act(chapter C-47.1), the city council may regulate or prohibit, even outside the city limits, any construction or any activity liable to contaminate the supply for the city waterworks system or affect its flow.

[35] Les appelants … avancent de plus, en restreignant la portée du pouvoir de prohiber à celui énoncé à l'article 147 de sa charte, que le législateur n'a pas voulu par une loi générale (*Loi sur les compétences municipales*) donner à l'intimée le droit de réglementer au-delà d'une loi spéciale (*Charte de la Ville de Québec*).

[36] Contrairement à ce que plaident les appelants, l'article 147 ne limite pas l'activité réglementaire de l'intimée. Cette disposition, portant sur un objet plus spécifique, ne la met pas en opposition avec les dispositions plus étendues que contient la *Loi sur les compétences municipales*. L'article 147 accorde simplement le pouvoir exprès à la Ville de protéger sa source

d'alimentation en eau potable, et ce, même si la source de la contamination est située à l'extérieur de son territoire. Les articles 4.4, 6.1 et 19 de la *Loi sur les compétences municipales* sont à l'évidence des dispositions de portée plus générale et viennent compléter les pouvoirs de l'intimée afin de lui permettre de s'acquitter avec efficacité de ses obligations en matière environnementale.

[…]

[41] En l'espèce, les appelants affirment que les contraintes imposées par le règlement sont prohibitives au point de constituer une expropriation déguisée. Selon eux, son effet premier est de leur retirer la jouissance de leur droit de propriété tout en leur laissant seulement les obligations liées à l'exercice de ce droit. …

[45] Dans *R. c. Tener*, la Cour suprême réfère à la notion de « négation absolue » du droit d'accéder à un bien-fonds avant de pouvoir déduire qu'il y a expropriation. …

[46] Plus récemment, notre Cour dans l'affaire *9034-8822 Québec inc. c. Sutton* s'en remettait à une norme semblable en énonçant que :

> [49] En conséquence, à moins que la réglementation n'équivaille à une véritable confiscation de la propriété privée, le seul préjudice économique résultant de l'imposition de restrictions à l'exploitation ne peut affecter la validité de la réglementation. [références omises]

[47] Les tribunaux ont donc reconnu que, pour être considérée illégale, une restriction réglementaire doit équivaloir à une « négation absolue » de l'exercice du droit de propriété ou encore à « une véritable confiscation » de l'immeuble. Les limitations qui tendent à ne stériliser qu'une partie de ce droit sans toutefois priver son titulaire de l'utilisation raisonnable de sa propriété ne seront pas jugées abusives.

The appeal was dismissed.

Yugraneft Corp. v. Rexx Management Corp., 2010 SCC 19

domestic-international law interface

reliance on Vienna Convention to interpret treaties incorporated into domestic law

Yugraneft applied to the Alberta Court of Queen's Bench for recognition and enforcement of a foreign arbitral award more than three years after the award was rendered. Under Alberta's *Limitations Act,* the application was time-barred.

In Alberta, the recognition and enforcement of foreign arbitral awards is governed by the *International Commercial Arbitration Act*, which incorporates into Alberta law both the international *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* and

the *UNCITRAL Model Law on International Commercial Arbitration.* Both the Convention and the Model Law are silent on the issue of a limitation period.

International Commercial Arbitration Act

Interpretation

1(1) In this Act,

(a) "Convention"means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration in New York on June 10, 1958, as set out in Schedule 1;

(b) "International Law" means the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on June 21, 1985, as set out in Schedule 2.

(2) Words and expressions used in this Act have the same meaning as the corresponding words and expressions in the Convention or the International Law, as the case may be.

Application of Convention

2(1) Subject to this Act, the Convention applies in the Province.

…

Application of International Law

4(1) Subject to this Act, the International Law applies in the Province.

…

Aids in interpretation

12(1) This Act shall be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the Act in their context and in the light of its objects and purposes.

(2) In applying subsection (1) to the International Law, recourse may be had to

(a) the Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session (June 3‑21, 1985), and

(b) the International Commercial Arbitration Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration,

Issue: Does the limitation period established by the *Limitations Act* apply to a foreign arbitral award?

Judgment by Rothstein, J.:

[14] As neither the Convention nor the Model Law expressly imposes a limitation period on recognition and enforcement, a threshold question is whether *any* limitation period can apply. Article V of the Convention and art. 36 of the Model Law	[14] Comme ni la Convention ni la Loi type n'imposent expressément un délai de prescription pour la reconnaissance et l'exécution, il faut d'abord se demander si *un* délai de prescription s'applique. L'article V de la Convention et

purport to set out an exhaustive list of the grounds on which the recognition and enforcement of an award may be refused, but make no mention of local limitation periods. This omission might be taken to mean that a Contracting State cannot refuse to recognize and enforce a foreign arbitral award on the grounds that the application was brought after the expiration of a local limitation period.	l'art. 36 de la Loi type sont censés établir une liste exhaustive des motifs pour lesquels la reconnaissance et l'exécution d'une sentence peuvent être refusées, mais ils ne mentionnent aucunement les délais de prescription prévus dans la législation locale. Du fait de cette omission, on pourrait conclure qu'un État contractant ne peut refuser de reconnaître et d'exécuter une sentence arbitrale étrangère au motif que la demande a été présentée après l'expiration d'un délai de prescription prévu dans la législation locale.

[15] However, art. III of the Convention stipulates that recognition and enforcement shall be "in accordance with the rules of procedure of the territory where the award is relied upon". Thus, the "rules of procedure" of the jurisdiction in which enforcement is sought will apply, insofar as they do not conflict with the express requirements of the Convention. The question then is whether limitation periods fall under the rubric of "rules of procedure", as that term is used in the Convention. [16] This question arises because not all legal systems treat limitation periods — or extinctive prescription, as it is known in civil law jurisdictions — alike. Those built on the common law tradition have tended to conceive of them as a procedural matter, while those following the civil law tradition generally consider them to be a question of substantive law (*Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, at pp. 1068-70). … [19] … The Convention's text was designed to be applied in a large number of States and thus across a multitude of legal systems ….The text of the Convention must therefore be construed in a manner that takes into account the fact that it was intended to interface with a variety of legal traditions. [20] … When the Convention was drafted, it was well known that various States characterized limitation periods in different ways, and that States in the common law tradition generally treated them as being procedural in nature. All else being equal, if the Convention were applied in a common law	[15] Toutefois, l'art. III de la Convention prévoit que la reconnaissance et l'exécution se font « conformément aux règles de procédure suivies dans le territoire où la sentence est invoquée ». Ainsi, les « règles de procédure » du ressort où l'exécution est demandée s'appliqueront, dans la mesure où elles ne vont pas à l'encontre des exigences expresses de la Convention. Il s'agit donc de savoir si les délais de prescription sont des « règles de procédure » au sens que la Convention donne à ce terme. [16] Cette question se pose parce que tous les systèmes juridiques ne considèrent pas les délais de prescription — ou la prescription extinctive, comme on l'appelle dans les systèmes de droit civil — de la même manière. Les systèmes de common law ont eu tendance à considérer la prescription comme une question de procédure, alors que les systèmes de droit civil la considèrent généralement comme une question de fond (*Tolofson c. Jensen*, [1994] 3 R.C.S. 1022, p. 1068-1070). […] [19] […] Le texte de la Convention a été conçu pour être appliqué dans de nombreux États et, par conséquent, dans une multitude de systèmes juridiques. […] Le texte de la Convention doit donc être interprété en tenant compte du fait qu'il visait à composer avec une variété de systèmes juridiques. [20] […] Lors de la rédaction de la Convention, ses auteurs savaient fort bien que les différents États considéraient les délais de prescription de différentes façons, et que les États de common law les considéraient généralement comme étant de nature procédurale. Toutes choses étant par ailleurs

State, the term "rules of procedure" found in art. III would *prima facie* include any local limitation periods applicable to the recognition and enforcement of foreign arbitral awards by virtue of local law. It is therefore significant that the Convention's drafters did not include any restriction on a State's ability to impose time limits on recognition and enforcement proceedings. Such an omission implies that the drafters intended to take a permissive approach.

[21] The second reason why art. III should be viewed as permitting the application of local limitation periods is that this reflects the practice of the Contracting States. In interpreting a treaty, courts must take into account "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" (*Vienna Convention on the Law of Treaties*, art. 31(3)). A recent study indicates that at least 53 Contracting States, including both common law and civil law States, subject (or would be likely to subject, should the issue arise) the recognition and enforcement of foreign arbitral awards to some kind of time limit.

…

[25] The CAC argues that Alberta limitations law cannot apply to the recognition and enforcement of foreign arbitral awards because Canadian common law considers such rules to be substantive in nature. The *Limitations Act* or any other statute imposing a general limitation period therefore does not qualify as a "rule of procedure" under art. III.

…

[27] It is true that the majority in *Tolofson* held that, in a conflict of laws context, limitation periods should, as a general matter, be treated as substantive in nature, so that a claim will be subject to the limitation period of the *lex loci delicti* (or, in this case, the *lex loci contractus*). However, the question in this case is not whether *Canadian law* considers limitation periods to be "substantive" or "procedural" in nature. Rather, the question is whether local time limits intended to apply to

égales, si la Convention était appliquée dans un État de common law, le terme « règles de procédure » que l'on trouve à l'art. III inclurait à première vue tout délai de prescription applicable, suivant la loi nationale, à la reconnaissance et à l'exécution des sentences arbitrales étrangères. Le fait que les rédacteurs de la Convention n'aient pas restreint la possibilité, pour les États, d'assujettir les demandes de reconnaissance et d'exécution à des délais est donc révélateur. Une telle omission suppose que les rédacteurs voulaient conserver une approche permissive.

[21] La deuxième raison pour laquelle l'art. III devrait être interprété comme permettant l'application des délais prévus dans la législation locale est que cela reflète la pratique des États contractants. Lorsqu'ils interprètent un traité, les tribunaux doivent tenir compte « de toute pratique ultérieurement suivie dans l'application du traité par laquelle est établi l'accord des parties à l'égard de l'interprétation du traité » (*Convention de Vienne sur le droit des traités*, par. 31(3)). Selon une étude récente, au moins 53 États contractants, y compris des États de common law et de droit civil, assujettissent (ou assujettiraient vraisemblablement, si la question devait se poser) la reconnaissance et l'exécution de sentences arbitrales étrangères à un délai de prescription […].

[…]

[25] Le CAC prétend que les règles de prescription albertaines ne peuvent s'appliquer à la reconnaissance et à l'exécution des sentences arbitrales étrangères parce que, selon la common law canadienne, il s'agit de règles de fond. La *Limitations Act* ou toute autre loi qui impose un délai de prescription général ne peut pas constituer une « règle de procédure » au sens de l'art. III.

[…]

[27] Dans *Tolofson*, les juges majoritaires ont effectivement conclu que, en cas de conflit de lois, les délais de prescription devraient, de façon générale, être considérés comme ayant un caractère substantiel, de sorte qu'une demande sera assujettie au délai de prescription du droit du lieu du délit (ou, en l'instance, le droit du lieu du contrat). Toutefois, la question en l'espèce n'est pas de savoir si le *droit canadien* considère que les délais

recognition and enforcement fall within the ambit of "rules of procedure" as that term is used in art. III of *the Convention*.	de prescription ont un caractère « substantiel » ou « procédural ». Il s'agit plutôt de savoir si les délais prévus dans la législation locale et censés s'appliquer à la reconnaissance et à l'exécution sont des « règles de procédure » au sens que l'art. III de *la Convention* donne à ce terme.
[28] The answer to this must be yes. As noted above, the Convention takes a permissive approach to the applicability of local limitation periods. The only material question is whether or not the competent legislature intended to subject recognition and enforcement proceedings to a limitation period. If it did, the limitation period in question will be construed as a "rule of procedure" as that term is understood under the Convention. How domestic law might choose to characterize such a time limit, either in the abstract or in a conflict of laws context, is immaterial. The question at issue in *Tolofson* is not relevant to the matter at hand.	[28] Une réponse affirmative s'impose. Je le répète, la Convention conserve une approche permissive relativement à l'applicabilité des délais de prescription prévus dans la législation locale. La seule question importante est celle de savoir si la législature compétente avait l'intention d'assujettir la procédure de reconnaissance et d'exécution à un délai de prescription. Si elle en avait l'intention, le délai en question sera interprété comme une « règle de procédure » au sens de la Convention. La façon dont le droit interne caractérise un tel délai de prescription, que ce soit dans un contexte abstrait ou de conflit de lois, importe peu. La question en litige dans *Tolofson* n'est pas pertinente en l'espèce.
[29] The CAC's contention is therefore misplaced. Even if this Court were to characterize a given statutory limitation period, such as the one found in s. 3 of the *Limitations Act*, as "substantive" in nature, that would not in and of itself prevent the limitation period in question from being applicable to the recognition and enforcement of foreign arbitral awards. Instead, the Court must determine whether a potentially applicable limitation period was intended to apply to the recognition and enforcement of foreign arbitral awards. If it was, then it may properly be applied as a local "rule of procedure" pursuant to art. III.	[29] La prétention du CAC est donc sans fondement. Même si notre Cour devait considérer un délai de prescription donné, comme celui prévu à l'art. 3 de la *Limitations Act*, comme ayant un caractère « substantiel », cela n'empêcherait pas l'application du délai de prescription à la reconnaissance et à l'exécution des sentences arbitrales étrangères. La Cour doit plutôt déterminer si un délai de prescription potentiellement applicable devait s'appliquer à la reconnaissance et l'exécution des sentences arbitrales étrangères. Si tel était le cas, le délai peut alors être correctement appliqué comme une « règle de procédure » locale au sens de l'art. III.

Zen v. Canada (National Revenue), 2010 FCA 180

"with any modifications that the circumstances require"

Under subsection 227.1 of the *Income Tax Act*, Z was jointly and severally liable for the tax debt of a corporation of which he was a director.

227.1 (1) Where a corporation has failed to deduct or withhold an amount … the directors of the	**227.1** (1) Lorsqu'une société a omis de déduire ou de retenir une somme, … les administrateurs de la

corporation at the time … are jointly and severally, or solidarily, liable, together with the corporation, to pay that amount and any interest or penalties relating to it.	société, au moment où celle-ci était tenue de retenir la somme, sont solidairement responsables, avec la société, du paiement de cette somme, y compris les intérêts et les pénalités s'y rapportant.

The Minister issued a notice of assessment that calculated the tax debt (including accrued interest and penalties) at the moment of assessment. Many years later Z paid the amount of the assessment, but refused to pay the subsequently accrued interest on the grounds that he was not obliged to pay such interest without receiving a further assessment, which would be subject to a right of objection and appeal. The question to be decided in this case was whether Z was required to pay the interest that accrued on the unpaid debt after the Minister issued the notice of assessment to him without the benefit of a further assessment. The governing provision was subsection 227(10).

227.(10) The Minister may at any time assess any amount payable under (a) … section 227.1 or 235 by a person, … and, where the Minister sends a notice of assessment to that person or partnership, Divisions I and J of Part I apply with any modifications that the circumstances require.	**227.** (10) Le ministre peut, en tout temps, établir une cotisation pour les montants suivants : *a)* un montant payable par une personne en vertu … des articles 227.1 ou 235 ; […] Les sections I et J de la partie I s'appliquent, avec les modifications nécessaires, à tout avis de cotisation que le ministre envoie à la personne ou à la personne ou à la société de personnes

Subsection 161(1) of the *Income Tax Act* (in Division I) obliges a taxpayer to pay interest on an assessed tax debt that remains unpaid if certain conditions are met, one of which is that "the total of the taxpayer's taxes payable/ le total des impôts payables par le contribuable" must exceed another total.

Z no longer owed taxes, but the amount of interest he owed brought him within subsection 161(1) if the provision could be modified to apply to interest.

Issue: Could the court rely on the underlined words in subsection 227(1) to make subsection 161(1) applicable to interest?

Judgment

Evans J.A. reviewed case law in the Tax Court suggesting that replacing "mutatis mutandis" with English and French formulations effected a substantive change:

[50] The current legislative phrase, "with any modifications that the circumstances require", has been considered in *Lord Rothermere Donation v. Her Majesty The Queen*, 2009 TCC 70, 2009 DTC 312 at para. 21 (*Rothermere*). In that case, Justice Archambault held that the current phrase (in the French text *« avec les modifications nécessaires »*) enables more extensive changes to be made to a statutory provision than were permitted by *mutatis mutandis*: no longer are they limited to points of detail.

[51] Justice Archambault also noted (at para. 21) that when the words *mutatis mutandis* were first replaced, the English version referred to "such modifications as circumstances require". The English version of the text, but not the French, was subsequently changed again, and "any" was substituted for "such". Justice Archambault observed that if Parliament had intended to preserve the narrow scope that the courts had given to *mutatis mutandis*, it could easily have expressly limited permitted modifications to points of detail, rather than permitting any modifications that circumstances require.

[52] Whether the changes to the statutory text also changed the law is not an easy question. The words *mutatis mutandis* in subsection 227(10) seem first to have been replaced with English and French words in 1983 by the *Income Tax Act (No. 2)*, 29-30-31-32 Elizabeth II, 1980-81-82-83, c. 40, subsection 123(2). The English text of subsection 227(10) was amended again by the *Income Tax Amendments Act, 1997*, c. 19, subsection 226(3), which changed "such modifications" to "any modifications" in the English version; no corresponding change was made to the French text.

[53] It is reasonable to conclude that when Parliament in 1983 replaced the Latin phrase in subsection 227(10) with "plain" English and French words it merely intended to make the provision more accessible. This suggests that the change was in the nature of a consolidation of the law. There is a strong presumption that consolidations are not intended to make substantive changes to the law.

…

[54] On the other hand, the amendments to the pre-1983 version were enacted by Parliament as a small part of a large series of amendments to the ITA, and the change to the English text in 1997 was

[50] L'expression que l'on trouve dans la version actuelle de la loi, « avec les modifications nécessaires » (en anglais « *with any modifications that the circumstances require* »), a été examinée dans *Lord Rothermere Donation c. Sa Majesté la Reine*, 2009 CCI 70, 2009 DTC 312, au paragraphe 21 (*Rothermere*). Dans cette affaire, le juge Archambault a conclu que l'expression susmentionnée que l'on trouve dans la version anglaise actuelle permet d'apporter des changements plus importants à une disposition législative que ne le permettait l'expression latine *mutatis mutandis*. À son avis, les modifications ne se limitent plus à des points de détail.

[51] Le juge Archambault a également fait observer (au paragraphe 21) que l'expression latine *mutatis mutandis* qui se trouvait dans la version anglaise a d'abord été remplacée par l'expression « *with such modifications as the circumstances require* ». Le juge Archambault a fait observer que, si le législateur avait eu l'intention que l'on continue d'appliquer l'interprétation restrictive adoptée par les tribunaux à l'expression *mutatis mutandis*, il lui aurait été facile de permettre les adaptations nécessaires aux points de détail au lieu de permettre toutes les « modifications nécessaires ».

[52] Il n'est pas facile de savoir si les modifications apportées à un texte de loi ont également pour effet de changer le droit. Il semble que l'expression *mutatis mutandis* au paragraphe 227(10) ait été remplacée pour la première fois en 1983, tant dans la version française que dans la version anglaise, par la *Loi de l'impôt sur le revenu (n^o^ 2)*, 29-30-31-32 Elizabeth II, 1980-81-82-83, ch. 40, paragraphe 123(2). La version anglaise du paragraphe 227(10) a été modifiée de nouveau par la *Loi de 1997 modifiant l'impôt sur le revenu,* ch. 19, paragraphe 226(3), qui a remplacé les mots « *such modifications* » par « *any modifications* »; aucune modification correspondante n'a été apportée à la version française.

[53] On peut raisonnablement conclure que, lorsqu'il a remplacé en 1983 l'expression latine qui se trouvait au paragraphe 227(10) par des mots « courants » tant dans la version française que dans la version anglaise, le législateur souhaitait simplement rendre cette disposition plus accessible, ce qui permet de penser que cette modification se voulait une simple codification de textes législatifs. Or, une consolidation est présumée n'apporter aucune modification de fond aux textes législatifs (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5^e^ éd. (Markham (Ontario), LexisNexis Canada Inc., 2008) aux pages 655 à 659).

[54] Par ailleurs, les modifications apportées à la loi, dans sa rédaction en vigueur avant 1983, ont été

made for reasons other than the elimination of Latin. These considerations suggest that the amendments to subsection 227(10) may have been intended to have had a substantive effect.

[55] However this may be, I need express no concluded opinion on the matter. I am satisfied that, when the modification power conferred by subsection 227(10) is viewed contextually and purposively, the modification required to subsection 161(1) to make it applicable to an assessment under subsection 227(10) in respect of the liability imposed by subsection 227.1(1), is closer to a change in point of detail than to a change to the very substance of subsection 161(1).

…

[73] A statutory modification provision confers an unusual power on courts. The normal role of the judicial branch of government with respect to legislation is to interpret and apply the law as enacted by the Legislature. A cornerstone of parliamentary democracy is that changes to the law require the authorization of the Legislature. However, the exigencies of administration in the modern state have also long required Legislatures to delegate extensive law-making powers. In Canada, these powers are most often delegated to politically accountable bodies and officials with an institutional expertise in public administration, such as the Governor (or Lieutenant Governor) in Council, individual Ministers of the Crown, and municipalities.

[74] The fact that courts have neither of these qualities counsels a cautious approach to the scope of the power delegated to them to modify provisions of the ITA, and indicates that it should be interpreted more narrowly than the current text suggests. Thus, determining whether a proposed modification is permitted by the delegated power (to use the terminology associated with *mutatis mutandis*: is it a change in detail or in substance?) requires a court to consider whether considerations of efficiency outweigh the benefits of subjecting it to the scrutiny of the normal legislative process.

[75] In my opinion, the modifications to subsection 161(1) proposed in the present case do not warrant the costs of requiring a Parliamentary amendment. They do not involve the kinds of technical issues, policy choices or wide ranging implications for the administration of the ITA which our notions of democratic and responsible

adoptées par le législateur dans le cadre d'une longue série de modifications apportées à la LIR, et les modifications apportées en 1997 à la version anglaise ne visaient pas à remplacer l'expression latine. Il s'ensuit que les modifications qui ont été apportées au paragraphe 227(10) se voulaient peut-être des modifications de fond.

[55] Quoi qu'il en soit, il n'est pas nécessaire que je me prononce sur la question. Je suis convaincu que, lorsqu'on situe dans son contexte et selon la méthode téléologique le pouvoir de modification conféré par le paragraphe 227(10), la modification qui doit être apportée au paragraphe 161(1) pour rendre celui-ci applicable à une cotisation établie en vertu du paragraphe 227(10) relativement à la responsabilité imposée par le paragraphe 227.1(1) se rapproche davantage d'une modification portant sur des points de détail que d'une modification portant sur l'essence même du paragraphe 161(1).

[…]

[73] Une disposition législative prévoyant un pouvoir de modification confère un pouvoir inusité aux tribunaux. Le rôle habituel de l'organe judiciaire de l'État relativement aux lois consiste à interpréter et à appliquer les lois édictées par le législateur. Une des pierres angulaires de la démocratie parlementaire est le principe voulant qu'il faille obtenir l'autorisation du législateur pour pouvoir modifier la loi. Toutefois, les impératifs que commande l'administration des États modernes obligent depuis longtemps les assemblées législatives à déléguer des pouvoirs législatifs étendus. Au Canada, ces pouvoirs sont le plus souvent délégués à des organismes tenus de rendre des comptes sur le plan politique ou encore à des autorités possédant des compétences spécialisées institutionnelles en administration publique, tels que le gouverneur en conseil (ou le lieutenant-gouverneur), certains ministres de la Couronne ou les municipalités.

[74] Le fait que les tribunaux ne possèdent aucune de ces qualités invite à faire preuve de prudence lorsqu'il s'agit d'examiner la portée du pouvoir qui leur est délégué en matière de modification aux dispositions de la LIR, et il permet de penser que ce pouvoir devrait être interprété plus restrictivement que ce que le texte actuel donne à penser. Ainsi, pour déterminer si une modification proposée est permise par le pouvoir délégué (pour reprendre la terminologie associée avec l'expression *mutatis mutandis* : s'agit-t-il d'une modification portant sur un point de détail ou d'une modification de fond?), le tribunal doit déterminer si les considérations relatives à l'efficacité l'emportent sur les avantages que représente le fait d'assujettir la

government require to be left to be resolved through the legislative process.	modification à l'examen minutieux du processus législatif habituel. [75] À mon avis, les modifications proposées en l'espèce au paragraphe 161(1) ne justifient pas les coûts qu'entraînerait le fait d'exiger une modification par le législateur. Ces modifications ne comportent pas d'importantes conséquences en ce qui concerne l'application de la LIR et elles ne portent pas sur le genre de questions techniques ou d'orientations qui, en raison de notre conception du gouvernement démocratique responsable, requièrent d'être traitées par le législateur.

Some factors relied on by Evans J.A. in reaching this conclusion:

- applying subsection 161(1) would not change the amount of tax owed by a taxpayer in Z's position
- the interest debt originated in the failure to pay taxes that were payable
- if subsection 161(1) did not apply, a taxpayer in Z's position could trigger an "unending succession of notices of assessment, notices of objection, and appeals, which are apt to serve little purpose other than to delay the collection of tax" (para 71).