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ARTICLES

Doing Business in Canada and the Judicial Review of Wrongful Government Statutory and Regulatory Action

*by Gordon F. Henderson**

and

Emilio S. Binavince†

I. INTRODUCTION

In the context of United States-Canada trade relations, the variety of government regulatory constraints is a significant consideration in doing business in Canada. This is true whether or not the business activity is encompassed within the regulatory scheme of a United States-Canada treaty, convention or executive agreement. In Canada, an international agreement or treaty, does not directly establish rights and obligations of persons; only the statute implementing such treaty or agreement can alter or affect the private rights of persons. For this reason, the Canadian statutory or administrative rules are, in practice, more significant than the express guarantees found in the treaty, convention or agreement.

These statutory or administrative rules, though often established as rules regulating internal municipal law problems, divorced from any general international law or treaty law considerations, also apply to the business or commercial activity of foreign nationals. In recent years, particularly in the last ten to fifteen years, statutory and administrative rules specifically directed to foreign business, particularly American, have been established. The large majority of these rules were established by the federal government, and less significantly by the government of the provinces or municipalities.

The impact of these rules upon the climate of foreign investment generally, and particularly upon the security of such investment, the equitable return, and the ability of the investor to expatriate the earnings or

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capital, have been the subject of much debate among politicians, economists and businessmen in Canada and abroad. The quality of that debate is undoubtedly high, but it is significantly impaired by the absence of an appropriate consideration of the mechanisms to overturn arbitrary or unfair statutory regulation and actions of government. Although it is true that the words "nationalistic," "protectionist," "confiscatory" and similar epithets come near to describing accurately the thrust, if not the motive, of many recent government enactments, it is our view that the foreign investor is not at the mercy of this ever mounting number of arbitrary and unfair government rules and action. There are effective and swift legal weapons in Canada's legal system to challenge such rules and actions. An absence of meaningful legal protection in Canada's legal system cannot therefore be alleged. More often in the instances of well-publicized problems of foreign investors, it is the faltering will of the foreign investor to mount a powerful challenge to government action that has permitted government action to take its course and not the absence of the mechanism of legal protection.

It is imperative to place in perspective the increasing concern of American investors in doing business in Canada inspired by recent rules enacted and actions taken by the Canadian federal government. For this purpose, three considerations that are essential to a meaningful safeguard against arbitrary or unfair government rules and action will be examined. First, a review of the substantive rules that could be invoked, not only against regulatory, but also against legislative action; second, a description of the procedural mechanism to mount a challenge, namely, judicial review; and third, an examination by way of illustration, of some recent strategies of protection through judicial review in certain areas of business activity where there is a substantial amount of American investment.

II. THE CONSTITUTIONAL CONSIDERATIONS

A. *In General*

The Constitution of Canada is a relevant consideration in challenging government rules and action affecting business in two respects. First, it provides the parameters of jurisdiction of the various courts that could entertain a proceeding launched by the aggrieved party.¹ Second, it provides the most important grounds for challenging government rules and action.²

The Canadian constitutional regime, though similar to the English constitutional regime, cannot be seen simply as a mirror reflection of the English system. This fact is, more often than not, the major source of many American misunderstandings surrounding the availability of sub-

¹ The British North America Act, 1867, 30 & 31 Vict., ch. 3, §§ 96-101 [hereinafter cited as Constitution Act, 1867].

² Constitution Act, 1982, ch. 11, sched. B, pt. I, § 24(1) [hereinafter cited as Charter].

stantive and procedural approaches to challenging government rules and action. The preamble to the Constitution Act, 1867, abets this misunderstanding when it states that Canada was created with a "constitution similar in Principle to that of the United Kingdom."³ A consideration of one of the cornerstones of the constitution of the United Kingdom, the doctrine of the supremacy of Parliament and its role in Canadian constitutional law, reveals substantial differences between the constitutions of the United Kingdom and Canada. In the United Kingdom, as Dicey, in a classic statement, described: "English judges do not claim or exercise any power to repeal a Statute, whilst Acts of Parliament may override and constantly do override the law of the judges. Judicial legislation is, in short, subordinate legislation, carried on with the assent and subject to the supervision of Parliament."⁴ From the doctrine of "Parliamentary sovereignty as it exists in England," Dicey argued the "non-existence of any judicial or other authority having the right to nullify an Act of Parliament, or to treat it as void or unconstitutional."⁵

B. *The Constitutional Framework of Judicial Review*

The Canadian constitutional scheme, cast in the absolutism of Parliamentary sovereignty in England, inspires some insecurity in the minds of U.S. businessmen who have lived under a constitutional regime where arbitrary and unfair statutes have been routinely held invalid by the courts. The judicial power has been found to have its fundamental basis on Article III of the Constitution as held by the U.S. Supreme Court in *Marbury v. Madison*.⁶ It may come as a surprise to American businessmen that the Canadian constitutional scheme in relation to judicial review is nearer to that of the United States than that of England. The doctrine of Parliamentary sovereignty has never insulated statutes from judicial review, and the courts in Canada, unlike the courts in England, have held statutes invalid. The power of the courts to hold an enactment of Parliament invalid has been justified on a number of grounds. One ground was advanced by the Privy Council, in *Attorney General of Ontario v. Attorney General of Canada* (otherwise known as *Local Prohibition case*);⁷ it appears to have analogized, by relying on the *City of Toronto v. Virgo*,⁸ the Parliament of Canada and the legislatures of the provinces to the legislative bodies of municipal corporations, thus not wholly immune from judicial review with respect to their legislative actions.⁹ Accordingly,

³ Constitution Act, 1867, preamble.

⁴ A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 60-61 (10th ed. 1959).

⁵ *Id.* at 91.

⁶ 5 U.S. (1 Cranch) 137 (1803).

⁷ 1896 A.C. 348.

⁸ 1896 A.C. 88 (P.C. 1895).

⁹ See also J.H.A. STREET, THE DOCTRINE OF ULTRA VIRES 416-17 (1930).

statutes that are beyond the competence of Parliament or of a legislature to enact are generally characterized as *ultra vires* or outside of their powers.¹⁰

The Ontario Court of Appeal, on the other hand, has in fact even gone further and it based its justification on a ground similar to that developed in *Marbury v. Madison*, on the basis of Article III of the U.S. Constitution. The court stated that the provisions of the Constitution Act, 1867, relating to the judiciary, particularly sections 96 to 101, have the same function as Article III of the U.S. Constitution, thus making them constitutionally established courts.¹¹ Accordingly, it has been argued that the Canadian superior courts, like the central royal courts, were guaranteed jurisdiction to supervise not only the actions of public officials and agencies, but also the various legislatures.¹²

Another theory, perhaps more persuasively, argues that the power of the courts to review statutory enactments is implied from the existence of a written constitution that establishes a federal scheme in the distribution of powers. The imperial statute creating the Privy Council's Judicial Committee with jurisdiction as final appeal in all matters from the colonies,¹³ like all imperial laws enacted for the colonies, was applicable to Canada and was a part of Canadian constitutional law. Accordingly, the legislatures of Canada and the provinces have never been as absolutely supreme as the Parliament of England. For this reason, the immunity of legislative enactment from judicial review in England was never a part of the constitutional principle in Canada, even during its colonial status, and since Canada became a sovereign nation independent from the United Kingdom,¹⁴ not a part of Canada's constitutional law. Chief Justice Kerwin, in *British Columbia Power Corp. v. British Columbia Elec. Co.*¹⁵ supported this position:

In a federal system, where legislative authority is divided, as are also the prerogatives of the Crown, as between the Dominion and the Provinces,

¹⁰ The Privy Council and, particularly, the Supreme Court of Canada, have unequivocally recognized that Canada and its provinces are more than mere municipal corporations. While a municipal corporation merely exercises a delegated power, Parliament and the legislature of the provinces have been held as more than exercising a mandate delegated by the Imperial Parliament. See *Hodge v. The Queen*, 9 App. Cas. 117, 132 (1883); *Liquidators of the Maritime Bank v. Receiver General of New Brunswick*, 1892 A.C. 437, 441-43. Undoubtedly, Canada and the provinces are perceived today as "sovereign" within their own sphere of powers as allocated by §§ 91 and 92 of the Constitution Act, 1867. See *Montreal v. Montreal Street Ry.*, 1912 A.C. 333, 344, where even the sovereignty of a province was supported.

¹¹ *Ottawa Valley Power Co. v. Hydro-Electric Power Comm'n*, 1937 Ont. 265, 333.

¹² See Lederman, *The Independence of the Judiciary*, 34 CAN. B. REV. 769, 1139, 1160, 1175 (1956). This argument is questionable since the existence and jurisdiction of the central royal courts were subject to the power of Parliament in England.

¹³ 3 & 4 Will. IV, ch. 41 (1833); 7 & 8 Vict., ch. 69, § 1 (1844).

¹⁴ See *Re Offshore Mineral Rights of British Columbia*, 1967 S.C.R. 792, which held that Canada acquired sovereignty between 1926 and 1931.

¹⁵ 1962 S.C.R. 642.

it is my view that it is not open to the Crown, either in right of Canada or of a Province, to claim a Crown immunity based upon an interest in certain property, where its very interest in that property depends completely and solely on the validity of the legislation which it has itself passed, if there is a reasonable doubt as to whether such legislation is constitutionally valid. To permit it to do so would be to enable it, by the assertion of rights claimed under legislation which is beyond its powers, to achieve the same results as if the legislation were valid. In a federal system it appears to me that, in such circumstances, the court has the same jurisdiction to preserve assets whose title is dependent on the validity of the legislation as it has to determine the validity of the legislation itself.¹⁶

This is more particularly true since April 17, 1982 when the Constitution Act, 1982 came into force.¹⁷ Section 52 of the Constitution Act, 1982 provides: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."¹⁸

The government of England is, of course, dissimilar to the government of Canada in more ways than simply in relation to the doctrine of Parliamentary sovereignty. Fundamentally, Canada, like the United States, is a federal state, whereas England is a unitary state. The Canadian conception of federalism, reflected in its politics, government and institutions, is, however, very much unlike the conception of federalism in the United States, and analogies are not always useful. For one thing, the judicial scheme in Canada is largely unitary, and a parallel court system is an exception. The Supreme Court of Canada has been, since 1949, not only the highest appellate court in constitutional and federal law, but also the highest appellate court in all matters of provincial and municipal law.¹⁹ Its jurisdiction does not yield to a distinction between federal and state jurisdiction. The provinces cannot, accordingly, make the highest court of the province the final appellate court on any subject matter even one within its jurisdiction to legislate. For instance, in *Crown Grain Co. v. Day*,²⁰ the Judicial Committee of the Privy Council considered a Manitoba statute that made a judgment of the court of the province relating to liens final and conclusive and that no appeal from it may be taken. It was held that insofar as this statute defeated the jurisdiction of the Supreme Court of Canada to act as general appellate court of Canada, the statute was *ultra vires*. Conversely, the highest court of a province has competence to adjudicate, as a rule, on all matters of federal and provincial

¹⁶ *Id.* at 644-45.

¹⁷ *Operation Dismantle v. The Queen*, No. T-1679-83 (Fed. Ct. T.D. Sept. 27, 1983) (as yet unreported).

¹⁸ Charter, § 52(1).

¹⁹ Constitution Act, 1949.

²⁰ 1908 A.C. 504 (P.C.).

law.²¹

The superior courts of the provinces were contemplated by the Constitution Act, 1867, as the main machinery in the exercise of judicial power in Canada. Section 101 of the Constitution Act, 1867, however, authorized Parliament "notwithstanding anything in [the Constitution Act, 1867] from Time to Time [to] provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada."²² Pursuant to this provision, the Parliament of Canada created the Supreme Court of Canada and the Exchequer Court of Canada, the predecessor of the Federal Court of Canada, in 1875.²³ Accordingly, while the Supreme Court of Canada and the Federal Court of Canada were contemplated by the constitution,²⁴ they are creations of Parliament.²⁵ Furthermore, whereas the Supreme Court of Canada was contemplated as a "General Court of Appeal for Canada" that could have final and broad jurisdiction in all cases, the Federal Court of Canada can only be given competence to cases that relate to the "better administration of the Laws of Canada," and not in matters relating to the administration of the laws of the provinces.²⁶

The term "laws of Canada" that the Federal Court of Canada was established to administer includes statutes enacted by Parliament regulating the business activities of an American investor.²⁷ The problem that may arise is whether there is a "law of Canada" that the federal court may administer in cases where one sues a statutory authority or the Crown in Right of Canada for damages arising from unlawful administrative action or a constitutionally invalid statute. Further, it may arise as a question whether the recovery of moneys paid (for instance a license fee, or tax) or property conveyed to Canada as a result of such action or statute could be launched in the Federal Court of Canada.²⁸ The Supreme Court of Canada in *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*²⁹ held that the term "laws of Canada" refers to federal legislation, regulation and federal common law, and includes the rules relating to various areas of law within the scope of the competence of Parliament to legislate pursuant to section 91 of the Constitution Act, 1867. The Supreme Court expressly recognized that there is such thing as "federal

²¹ *The Queen v. Thomas Fuller Constr. Co.*, [1980] 1 S.C.R. 695, 713.

²² Constitution Act, 1867, § 101.

²³ See 38 Vict., ch. 11 (1875) (Can.).

²⁴ Constitution Act, 1867, § 101.

²⁵ 38 Vict., ch. 11 (1875) (Can.).

²⁶ Federal Court Act, Can. Stat., ch. 1 (1970-71-72), as amended by CAN. REV. STAT., ch. 10, § 3 (2d Supp. 1970) [hereinafter cited as CAN. REV. STAT., ch. 10 (2d Supp. 1970)].

²⁷ *Id.*

²⁸ For an example, see the discussion of the back-in provisions of the Canada Oil and Gas Act, Can. Stat., ch. 81, §§ 1-73 (1980-81). See *infra* notes 249-58.

²⁹ [1977] 2 S.C.R. 1054.

common law," and this term includes the common law rules relating to liability of the Crown in Right of Canada arising from wrongful action such as tort or contract.³⁰

On the other hand, the Constitution Act, 1867 was characterized by Justice Estey, in *Northern Telecom Ltd. v. Communications Workers of Canada*³¹ as not a "law of Canada" within the meaning of section 101 of the Constitution Act, 1867, "because it was not enacted by the Parliament of Canada. . . . The inherent limitation placed by section 101 . . . on the jurisdiction which may be granted to the federal court by Parliament therefore might exclude a proceeding founded on the Constitution Act."³² Whether this *obiter dictum* decrees that the Federal Court of Canada cannot entertain a proceeding to enforce the Canadian Charter of Rights and Freedoms³³ and that such proceedings must be brought before a superior court of a province is an open question.

In our opinion, the reason given by Justice Estey is irrelevant and cannot be supported in law. To follow his reasoning, even the Crown liability rules at common law and maritime law, for instance, where no enactment by Parliament is made, cannot come within the jurisdiction of the federal court, a position which the cases clearly reject. Insofar as the Constitution of Canada is concerned, it should be enforceable in every court, in a superior court of the province, or in the federal court. The reasoning in *Northern Telecom Ltd.*³⁴ applies, and there is nothing constitutionally significant in the term "laws of Canada" to preclude the force of this reasoning. The Constitution of Canada is not only a "law" of Canada; it is the supreme law of Canada,³⁵ and it is giving too much weight to form over substance to argue that Parliament has no competence to confer upon the federal court the jurisdiction to administer it.

Before the organization of the federal court on June 1, 1971,³⁶ the

³⁰ See also *McNamara Constr. Co. v. The Queen*, [1977] 2 S.C.R. 654; *The Queen v. Thomas Fuller Constr. Co.*, [1980] 1 S.C.R. 695. There are many difficult problems which are beyond the scope of this paper to analyze. One problem occurs when a private party is involved as a third party, and has liability arising from provincial law. Another relates to the question of whether the federal statute creates a cause of action that the Federal Court could properly entertain, or whether it is only a statutory right whose breach is sanctionable pursuant to a provincial law. See *Regina v. Saskatchewan Wheat Pool*, [1978] 2 F.C. 470 (Trial Div. 1977) (concerning the Canada Grain Act, Can. Stat., ch. 7 (1970-71-72)); *Regina v. Rhine*, [1979] 2 F.C. 651 (App. Div.) (concerning Prairie Grain Advance Payments Act, CAN. REV. STAT., ch. P-18 (1970)); *Regina v. Prytula*, [1979] 2 F.C. 516 (App. Div.); *Canadian Pacific Ltd. v. United Transp. Union*, [1979] 1 F.C. 609 (App. Div. 1978); *McKinlay Transp. Ltd. v. Goodman*, [1979] 1 F.C. 760 (Trial Div. 1978).

³¹ *Northern Telecom Canada Ltd. v. Communications Workers of Canada*, 48 N.R. 161 (1983).

³² *Id.* at 167.

³³ Charter, ch. 1, sched. B, pt. I.

³⁴ *Northern Telecom Ltd.*, 48 N.R. at 161.

³⁵ Charter, § 52(1).

³⁶ CAN. REV. STAT., ch. 10 (2d Supp. 1970).

Parliament of Canada had conferred upon the Exchequer Court jurisdiction on very specific areas of law, such as patents, admiralty, income tax and Federal Crown liability; it was not given general supervisory jurisdiction over federal regulatory tribunals.³⁷ This power was exercised by the superior courts of the provinces, who also exercised general review jurisdiction over provincially established regulatory tribunals. With the coming into force of the Federal Court Act,³⁸ the jurisdiction of the superior courts of the provinces has been substantially limited and the jurisdiction of the federal court expanded and made exclusive in certain instances. For instance, the Trial Division has, as a rule, exclusive original jurisdiction in all cases where relief is claimed against the federal "Crown."³⁹ In addition, the Trial Division and the Federal Court of Appeal have been established as the courts having exclusive jurisdiction to supervise and review the actions of federal regulatory tribunals and any body or person "having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the Constitution Act, 1867."⁴⁰

The constitutional authority of Parliament to direct that the review of the actions of federal tribunals be taken to the federal court was, until recently, under some doubt. The Supreme Court of Canada, in *Northern Telecom Ltd.*⁴¹ considered whether the review jurisdiction of the Federal Court of Appeal, pursuant to section 28(4) of the Federal Court Act, can be sustained on constitutional grounds. Justice Estey, adopted the words of Justice Taschereau in *Valin v. Langlois*⁴² that Parliament, for the administration of its laws, may alter the jurisdiction of the provincial civil courts, and "it has the power to do so *quoad* all matters within its authority."⁴³ He concluded:

That the Federal Parliament can direct the review of the actions of a federal board to the Federal Court is no longer in doubt in our law. . . . If, in the operations of subsection (1) [of Section 28 of the Federal Court Act], Parliament can require the Federal Court to review the actions of the Canada Labour Relations Board . . . it would seem to matter little that the same question with the same ancillary steps attached is raised in

³⁷ The original Federal Court Act repealed The Exchequer Court Act, CAN. REV. STAT., ch. E-11 (1970).

³⁸ CAN. REV. STAT., ch. 10 (2d Supp. 1970).

³⁹ The term "Crown" has an uncertain meaning today. In most cases, it refers to the executive as represented by the Governor in Council (Cabinet) which is the Queen's representative in Canada. In other cases, it is taken to mean Canada as a federal state as distinguished from the provinces. *Id.* § 17(1).

⁴⁰ *Id.* § 17(3)(a)(b).

⁴¹ *Northern Telecom Ltd.*, 48 N.R. at 161.

⁴² 3 S.C.R. 1 (1880).

⁴³ *Id.* at 76.

futuro rather than in retrospect. It is not, therefore, in my view, a violation of the Constitution Act to include subsection (4) in Section 28.⁴⁴

As developed in the cases, there are now only two exceptions to this exclusive federal court jurisdiction to review actions of regulatory tribunals. The first relates to the exercise of some powers conferred by a statute upon a judge who is appointed by the Governor-General pursuant to section 96 of the Constitution Act, 1867. If the statutory power is exercisable by him as a section 96 judge, then the ordinary review process, by way of an appeal to an appellate court of the province, would apply. If, on the other hand, the statutory power were conferred upon him, not as a judge but as a specially designated person for the purposes of the statute then he comes within the definition of a "federal board, commission or other tribunal";⁴⁵ the judge would be acting in the capacity of "*persona designata*."⁴⁶ For this reason, his action would be reviewable by the federal court. The Supreme Court of Canada, in *Herman v. Deputy Attorney General of Canada*⁴⁷ and in *Minister of National Revenue v. Coopers & Lybrand*⁴⁸ has held that the special capacity of *persona designata* of a section 96 judge should be found only if the intention of Parliament to this effect is clear, otherwise it must be taken as a rule that Parliament intends the judge to act *qua* judge. The test, said Justice Dickson in *Herman*, is as follows:

The tests to be applied in considering whether such a contrary intention appears in the relevant statute can be cast in the form of a question: is the judge exercising a peculiar, and distinct, and exceptional jurisdiction, separate from and unrelated to the tasks which he performs from day-to-day as a judge, and having nothing in common with the court of which he is a member?⁴⁹

Considering, therefore, the narrow definition of *persona designata* as defined by this test, the general supervisory review of the actions of superior court judges, taken pursuant to a federal statute, would generally be through an appeal to an appellate court in a province rather than through the Federal Court of Canada.

The second exception relates to the challenge of the jurisdiction of the federal regulatory board based on a constitutional ground. In this case, the review jurisdiction is not exclusive to the federal court but concurrent with the superior court of a province. The Supreme Court of Ca-

⁴⁴ *Id.*

⁴⁵ CAN. REV. STAT., ch. 10, § 28(1) (2d Supp. 1970).

⁴⁶ *Id.*

⁴⁷ [1979] 1 S.C.R. 729.

⁴⁸ [1979] 1 S.C.R. 495.

⁴⁹ [1979] 1 S.C.R. at 749. For a discussion of this problem, see Macdonald, *Federal Judicial Review Jurisdiction Under Section 2(g) of the Federal Court Act: The Position of Section 96 Judges*, 11 OTTAWA L. REV. 689 (1979).

nada in *Jabour v. The Law Society of British Columbia*⁵⁰ held that in spite of the purported exclusivity of federal court jurisdiction as established by the Federal Court Act⁵¹ the superior courts in the provinces retained their historic jurisdiction to entertain proceedings challenging the constitutionality of constitutional application of a federal statute in the context of an administrative action taken by a federal board.⁵² It must be noted, however, that the Supreme Court of Canada reached this conclusion as a matter of interpretation of the Federal Court Act and not as a matter of constitutional law.⁵³

The Supreme Court of Canada's conclusion that the historic jurisdiction of the provincial superior courts remained "undisturbed by federal legislation which removed the judicial review by such court of administrative action taken by a federal court pursuant to a federal statute"⁵⁴ was affirmed in *Northern Telecom Ltd.*⁵⁵ The Court explained that the reason for this conclusion was the inconvenience of the provincial courts participating in the execution and administration of federal laws without the authority of first assuring themselves that the statute before them is a valid statute. This rationale clearly extends only to a case where a challenge to the constitutionality of the statute is in issue; if the case raises no constitutional question, but exclusively traditional administrative law questions, then the federal court, not the superior court of the province, has jurisdiction. Conversely, the federal court has jurisdiction concurrently with the superior court of the provinces, to entertain a judicial review raising a constitutional question and exclusive jurisdiction if it raises only administrative law questions.⁵⁶ Justice Estey, in *Northern Telecom Ltd.* summarized the above rule as follows:

It follows from *Canard, supra*, and more recently from the decision of this Court in *Canada Labour Relations Board v. Paul L'Anglais Inc.* . . . that the same constitutional question might be brought before a provincial court by its appropriate process. A question of administrative review by the Federal Court under the Federal Board's parent statute, which raises no constitutional question, could not be so referred to the provincial superior court. The nexus between the Federal Court and the constitutional issue here arising is the proceeding under the Federal Court Act which in turn arises from the patently valid proceedings of the Board conducted under the admittedly valid provision of the Canada Labour Code. In the surrounding circumstances the federal court is in the same position as any statutory court, provincial or federal, and therefore can

⁵⁰ 137 D.L.R.3d 1 (1982).

⁵¹ CAN. REV. STAT., ch. 10, § 28(1) (2d Supp. 1970).

⁵² See also *Attorney General of Canada v. Paul L'Anglais, Inc.* (Sup. Ct. Can., Apr. 7, 1983) (unpublished decision) (on file at Canada-United States Law Journal office).

⁵³ *Jabour*, 137 D.L.R.3d at 6, 16.

⁵⁴ *Northern Telecom Ltd.*, 48 N.R. at 165.

⁵⁵ *Id.*

⁵⁶ CAN. REV. STAT., ch. 10, § 28(1) (2d Supp. 1970).

determine the constitutional issue arising as a threshold question in the review of the administrative action in issue.⁵⁷

C. *The Nature of Executive Action*

In relation to the executive power, Canadian federalism is less unitary than in relation to the judicial power, although executive government and authority in Canada are, at least as a matter of legal theory, vested in Her Majesty, the Queen.⁵⁸ The federal Governor-General and the provincial Lieutenant-Governors are not "[V]iceroy in the full sense," as Viscount Haldane in *Bonanza Creek*⁵⁹ pronounced, but it is now clear that as a matter of practical constitutional law, the Governor-General in Council at the federal level and the Executive Council, at the provincial level, exercise the powers of executive government relating to Canada and the provinces respectively. For this reason, although the Crown is indivisible and the sovereign head of each province and of Canada as a whole is the Queen, the powers of the Queen in relation to Canada are exercisable only under the control and advice of the executive administration of the Governor in Council.⁶⁰ The same applies to regal powers in relation to the province: the executive administration of the provincial Executive Council has exclusive competence.⁶¹ This is clearly illustrated in the property provisions of the Constitution Act, 1867, where the ownership of properties is vested in the same Crown, but the control, management and disposition of these properties are made only at the instance of the executive administration of the province or of Canada.⁶² A transfer of property from Canada to a province, or *vice versa*, is not by a conveyance of the private law nature, but by executive action such as an Order-in-Council or despatch.⁶³ In some material respects, therefore, the executive power in Canada follows broadly the allocation of legislative powers between the legislature of the provinces and Canada.⁶⁴

In terms of challenging executive action, Canadian constitutional law distinguishes executive action derived from prerogative powers of the Crown (at least to the extent that these powers are not altered by statute in the exercise of the superior power of Parliament) from the powers that

⁵⁷ *Northern Telecom Ltd.*, 48 N.R. at 167.

⁵⁸ *Bonanza Creek Gold Mining Co. v. The King*, [1916] 1 A.C. 566 (P.C.).

⁵⁹ *Id.*

⁶⁰ Constitution Act, 1867, § 12.

⁶¹ *Id.*

⁶² Constitution Act, 1867, § 92(13).

⁶³ See *Attorney General of British Columbia v. Attorney General of Canada*, 14 App. Cas. 295, 301-302 (1889) (Lord Watson); *Saskatchewan Natural Resources Reference*, 1931 S.C.R. 263, 275 (Newcombe, J.).

⁶⁴ *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, 1892 A.C. 437; *Criminal Law Amendment Act Reference*, 1970 S.C.R. 777; *Anti-Inflation Act Reference*, [1976] 2 S.C.R. 373.

are derived from statute.⁶⁵ In the first instance, unless prerogative power has been modified by statute, or its existence, scope and application under common law is an issue,⁶⁶ judicial review of executive action can only be founded on constitutional grounds,⁶⁷ and it has been contended that there is a limit to the ability of the Court to assert jurisdiction to review. In these cases, it is argued that the check to executive action is to be found in the political arena, not in the courts. On the other hand, if the power is founded on a statute, the mere fact that the holder of the power is a minister, or the Governor-General or a Lieutenant-Governor, provides no exemption from judicial review.⁶⁸

D. The Nature and Scope of the Legislative Power

The last and most significant constitutional consideration relates to the fundamental grounds upon which arbitrary or unfair statutory government action could be challenged. Canada's primary organic law, the Constitution Act, 1867, makes an allocation of legislative powers between the federal Parliament and the provincial legislature. Section 91 defines the scope of the powers assigned to Parliament and section 92 defines the scope of provincial legislative competence.⁶⁹ This allocation of legislative powers has served as a quantitative constitutional safeguard that has been invoked to challenge the validity of federal and provincial statutes.⁷⁰ In this regard, the task relates to the characterization of the "matter" in relation to which the statute is enacted. The judicial task here is "formal authority" not "substantive fairness" of the statute. Although there were courageous attempts by the courts to test the intrinsic fairness of enacted statutes before April 17, 1982,⁷¹ the Constitution Act, 1867 has not provided guarantees against arbitrary or unfair statutory action by Parliament and the legislatures. The Canadian Bill of Rights, enacted in 1960,⁷² has recognized certain qualitative guarantees against arbitrary statutory action of the federal government, but it has only the force of a statute, not a constitution.⁷³ For this reason, it was taken only as directing an

⁶⁵ *Re Multi-Malls Inc. v. Ministry of Transportation*, 73 D.L.R.3d 18 (Ont. Ct. App. 1977).

⁶⁶ *Attorney General v. De Keyser's Royal Hotel Ltd.*, 1920 A.C. 508 (H.L.).

⁶⁷ See Charter, §§ 24, 32, 52.

⁶⁸ See *Doctors Hospital v. Minister of Health*, 12 Ont. 2d 164 (1979); *Inuit Tapirisat v. Attorney General of Canada*, [1980] 2 S.C.R. 735.

⁶⁹ Constitution Act, 1867, §§ 91, 92.

⁷⁰ See Binavince, *Economic Growth Through Constitutional Safeguards: The Canadian Experience*, 17 MCGILL L.J. 189 (1971).

⁷¹ See, e.g., *Reference re Alberta Statutes*, 1938 S.C.R. 100; *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299; *Switzman v. Elbling*, 1957 S.C.R. 285. For details, see D.A. SCHMEISER, *CIVIL LIBERTIES IN CANADA* 13-16 (1964).

⁷² CAN. REV. STAT., (App. III 1970), as amended by Can. Stat., ch. 38, § 29 (1970-71-72). Original version at Can. Stat., ch. 44 (1960) [hereinafter cited as Can. Stat., ch. 44 (1960)].

⁷³ *Robertson v. The Queen*, 1963 S.C.R. 651.

approach to the construction of federal statutes. As a yardstick to statutory interpretation, any federal statute was to be construed so as not to abrogate or infringe the rights recognized in the Bill of Rights. Parliament, however, has the power to expressly exempt a statute from the operation of the Bill of Rights.⁷⁴ In the event that no such express exception is made, the Supreme Court of Canada has held that the statute may be declared "inoperative."⁷⁵

On April 17, 1982, the Canadian Charter of Rights and Freedoms came into force, and since this date arbitrary or unfair statutes that infringe the Charter may now be held void and ineffective. The Charter today represents one of the most formidable weapons to attack the substantive quality of both federal and provincial legislative action.

The Charter operates to control the action of Parliament of Canada and the Government of Canada, as well as the legislature and Government of a Province.⁷⁶ The Charter and other instruments which form part of the "Constitution of Canada," are as earlier stated, "the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of inconsistency, of no force and effect."⁷⁷ Section 24 of the Charter confers upon the courts the broad power to grant "such remedy as the court considers appropriate and just in the circumstances"⁷⁸ in order to rectify the infringement or denial of a right or freedom guaranteed by the Charter. The rights and freedoms enshrined in the Charter include some of the basic individual freedoms contained in the United States Bill of Rights.⁷⁹ In addition, the Charter guarantees democratic rights,⁸⁰ mobility rights,⁸¹ and language rights,⁸² rights that are not specifically recognized in the American Bill of Rights.

One unfortunate provision of the Charter is the recognition of a power of Parliament and of the legislatures of the provinces to override the guarantees of the Charter as to certain fundamental freedoms (such as the freedom of religion, speech and association) and legal rights (such as due process rights, the right against unreasonable search and seizure, the rights in relation to the minimal process, and the right to equality).⁸³ Although the validity of the override statute or provision has a time limit of five years,⁸⁴ it may be extended for as many five-year periods as Parlia-

⁷⁴ *Id.*

⁷⁵ *Regina v. Drybones*, 1970 S.C.R. 282.

⁷⁶ Charter, § 32.

⁷⁷ *Id.* § 52(1).

⁷⁸ *Id.* § 24(1).

⁷⁹ *Id.* §§ 1, 2, 7, 8, 9, 10.

⁸⁰ *Id.* §§ 3-5.

⁸¹ *Id.* § 6.

⁸² *Id.* §§ 16-22.

⁸³ *Id.* § 33.

⁸⁴ *Id.* § 33(3).

ment or the legislature wishes.⁸⁵ The Federal Government has indicated, however, that it will not exercise this override power in any statute, but it is now a standard feature of every statute enacted by the Parti Quebecois government in Quebec.

III. THE MODES OF JUDICIAL REVIEW IN THE FEDERAL COURT OF CANADA

A. *In General*

As discussed above, the major avenue for the review of administrative or executive action is the Federal Court of Canada.⁸⁶ In addition, actions that are launched against the Crown in Right of Canada, rather than against an official, must be brought before this Court.⁸⁷ In this section, we will describe the general avenues to judicial review and jurisdiction of the Federal Court. The objective is to show that the review mechanisms existing in Canada at the federal level are more than adequate and that there are no procedural hindrances to a foreign investor seeking review before the Federal Court. As a principle, the Federal Court is as open to foreigners as it is to Canadian citizens and residents.

The provisions relating to judicial review of administrative action in the Federal Court Act confer review jurisdiction on the Trial Division and the Court of Appeal in relation to federal regulatory tribunals. Section 18 provides for the Trial Division's exclusive original jurisdiction "to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal."⁸⁸ Section 28(1) confers jurisdiction to the Federal Court of Appeal "to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal."⁸⁹ The grounds for review before the Trial Division are not specified; presumably, they are the grounds that exist at common law or under the constitutive statute of the administrative body. The grounds for review before the Federal Court of Appeal are the general administrative law grounds of jurisdiction,⁹⁰ error of law⁹¹ or procedural defect.⁹²

One problem of concern to a party is the finality of the decision of a regulatory tribunal and the preclusion of judicial review. There are stat-

⁸⁵ *Id.* § 33(4).

⁸⁶ CAN. REV. STAT., ch. 10 (2d Supp. 1970).

⁸⁷ *Id.* § 17.

⁸⁸ *Id.* § 18(a).

⁸⁹ *Id.* § 28(1).

⁹⁰ *Id.* § 28(1)(a).

⁹¹ *Id.* § 28(1)(b).

⁹² *Id.* § 28(1)(c).

utes which specifically declare that a decision or order of a regulatory tribunal are final and conclusive.⁹³ The effect of such a "privative clause" on the ability of a Federal Court of Canada to review the decision or order of a regulatory tribunal has been considered in relation to section 28, specifically the introductory phrase, "Notwithstanding . . . the provisions of any other Act."⁹⁴ This phrase has been interpreted in *Attorney General of Canada v. Public Service Staff Relations Board*⁹⁵ to override privative clauses enacted before the coming into force of section 28 and those enacted after the coming into force of the section, where the legislation is a consolidation or re-enactment of legislation enacted prior to the coming into force of the section. In *Pioneer Grain v. Kraus*,⁹⁶ the provision was held to override privative clauses afterwards enacted which do not specifically exclude the operation of section 28. Accordingly, it is a rule today in Canada that judicial review is presumed to exist under section 28 and an express grant of such right to judicial review is not necessary.

As to standing, the Federal Court of Canada and the Supreme Court of Canada have been generous in recognizing standing. This question, however, is one that is intimately related to the form of the action or review sought by the American investor. The narrowest rule relating to standing applies in cases of a traditional action where proprietary claims, such as damages or restitution, are sought, and the most expansive has been found in cases of declaratory action.⁹⁷ As to review of regulatory action, section 28(2) of the Federal Court Act gives standing to "a party directly affected by the decision or order."⁹⁸ This has not been interpreted so as to be more restrictive than the common-law rule relating to standing. For instance, in *Puerto Rico v. Hernandez*,⁹⁹ the Supreme Court of Canada held that a foreign state seeking the extradition of the respondent had standing under the section. In *BBM Bureau of Measurement v. Director of Investigation*,¹⁰⁰ the Federal Court of Appeal gave standing to a competitor of one of the parties, because, in addition to having a strong private interest in the proceeding, it was thought that it might be able to bring to the Court a "different perspective."¹⁰¹

Section 18 gives the Trial Division exclusive original jurisdiction to

⁹³ For example, Canada Labour Code, CAN. REV. STAT., ch. L-1, § 122(1) (1st Supp. 1970), as amended by Can. Stat., ch. 27, § 43 (1977-78); Parole Act, CAN. REV. STAT., ch. P-2, § 23 (1970).

⁹⁴ CAN. REV. STAT., ch. 10, § 28(1) (2d Supp. 1970).

⁹⁵ [1977] 2 F.C. 663 (C.A.).

⁹⁶ 36 N.R. 395 (Fed. C.A. 1981).

⁹⁷ See *infra* notes 98-101.

⁹⁸ CAN. REV. STAT., ch. 10, § 28(2) (2d Supp. 1970).

⁹⁹ 14 C.C.C.2d 209 (Can. 1973).

¹⁰⁰ 63 C.P.R.2d 63 (1982).

¹⁰¹ But see *Re Canadian Telecommunications Union v. Canadian Brotherhood of Transp. & Gen. Workers*, 126 D.L.R.3d 228 (1981), where the Court of Appeal refused to give standing to a union which might eventually lose its certification, based on the outcome of the proceedings in question, which involved a different union and a different employer.

issue prerogative writs, injunctions and declarations against a federal board, commission or other tribunal.¹⁰² Section 28¹⁰³ operates notwithstanding section 18 and subsection 28(3) specifically withdraws jurisdiction from the Trial Division to the extent of the review allowed by section 28. Much litigation has arisen over the issue of whether the Trial Division or the Court of Appeal has jurisdiction in any particular application for review. The distinction turns primarily on the words "a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis"¹⁰⁴ in section 28. It has been held that a purely reporting and recommendatory body does not make a "decision or order,"¹⁰⁵ and a decision in the nature of an interlocutory matter is not reviewable under section 28.¹⁰⁶ In the case of *In re Anti-Dumping Act v. In re Danmor Shoe Co. Ltd.*,¹⁰⁷ the Federal Court of Appeal attempted to provide a definitive test and stated:

A decision in the purported exercise of the "jurisdiction or powers" expressly conferred by the statute is . . . clearly within the ambit of section 28(1). Such a decision has the legal effect of settling the matter or it purports to have such legal effect. Once a tribunal has exercised its "jurisdiction or powers" in a particular case by a "decision" the matter is decided even against the tribunal itself. (Unless, of course, it has express or implied powers to undo what it has done, which would be additional jurisdiction.)¹⁰⁸

In that case the Court held that a decision by the Tariff Board that it did not have jurisdiction to review regulations made by the Minister for the computation of the value of goods, and decisions not to accept certain evidence, were not reviewable under section 28, since they were made prior to and apart from the disposition of the applicants' case. Subsequent cases have confirmed that a determination by a tribunal that it lacks jurisdiction, or a decision to refuse to admit certain evidence, is not reviewable.¹⁰⁹ A decision by a tribunal not to hold a preliminary hearing in *Centre for Public Interest Law v. Canadian Transport Commission*,¹¹⁰ was held not to be a "decision or order" within the section. In *Husson v.*

¹⁰² CAN. REV. STAT., ch. 10, § 18(a) (2d Supp. 1970).

¹⁰³ *Id.* § 28(1).

¹⁰⁴ *Id.*

¹⁰⁵ See *Lingley v. New Brunswick Bd. of Review*, [1976] 1 F.C. 98 (Fed. C.A.).

¹⁰⁶ See *Re Anheuser-Busch Inc. v. Carling O'Keefe Breweries of Canada Ltd.*, 142 D.L.R.3d 548 (Fed. C.A. 1982).

¹⁰⁷ *Attorney General of Canada v. Cylien*, 1973 F.C. 1166 (quoting [1974] 1 F.C. 22, 28 (Jackett, C.J.)).

¹⁰⁸ *Id.* at 28.

¹⁰⁹ See *Re Canadian Human Rights Commission v. British American Bank Note Co.*, 116 D.L.R.3d 178 (Fed. C.A. 1980); *Syndicat des Employés de CJRC v. Canada Labour Relations Board*, 24 N.R. 454 (Fed. C.A. 1978).

¹¹⁰ [1974] 1 F.C. 324 (C.A.).

Laplants,¹¹¹ the Federal Court of Appeal held that both those decisions are subject to appeal and those not so subject are reviewable under section 28.¹¹² With respect to the phrase "judicial or quasi-judicial basis," the Supreme Court of Canada in *Coopers Lybrand*¹¹³ stated four criteria to be taken into account:

- (1) Does the statutory language or general context suggest that a hearing is contemplated?
- (2) Does the decision or order directly or indirectly affect the rights and obligations of persons?
- (3) Is the adversary process involved?
- (4) Is there an obligation to apply substantive rules to many individual cases rather than one to, for example, implement social and economic policy in a broad sense?¹¹⁴

Decisions or orders which may be classified as administrative are nonetheless reviewable under section 28 if the authority is required to act judicially or quasi-judicially. In *MacDonald Tobacco v. Canadian Employment and Immigration Commission*,¹¹⁵ for instance, it was held that a judicial element does not necessarily require a hearing. The following cases were held not to involve a decision or order reviewable under section 28:

- (1) A ministerial power to prescribe general rules for determining the "normal value of various types of imported goods" was a legislative power and hence not reviewable in *Minister of National Revenue v. Creative Shoes*.¹¹⁶
- (2) A preliminary determination by a Minister that imported goods were "dumped" was not reviewable in *Re Sabre International Ltd. v. Minister of National Revenue*.¹¹⁷
- (3) A decision by the Petroleum Compensation Board reducing certain compensation earlier ordered payable under the Petroleum Administration Act was not reviewable in *Shell Canada v. Minister of Energy, Mines and Resources*.¹¹⁸

Actions by tribunals that are not reviewable under section 28¹¹⁹ will come within the terms of section 18. In *Martineau v. Matsqui Institution Disciplinary Board*,¹²⁰ the Supreme Court of Canada found that certiorari

¹¹¹ [1977] 2 F.C. 393.

¹¹² The expression "by law" includes common law, statutes and regulations, but does not extend to administrative directives of public employees. See *Martineau v. Matsqui Institution Disciplinary Bd.*, [1978] 1 S.C.R. 118.

¹¹³ [1979] 1 S.C.R. at 495.

¹¹⁴ *Id.* at 500.

¹¹⁵ 36 N.R. 519 (Can. 1981).

¹¹⁶ 1972 F.C. 993 (C.A.).

¹¹⁷ [1974] 2 F.C. 704 (C.A.).

¹¹⁸ 102 D.L.R.3d 638 (Fed. C.A. 1978).

¹¹⁹ CAN. REV. STAT., ch. 10, § 28(1) (2d Supp. 1970).

¹²⁰ [1980] 1 S.C.R. 602.

as a mode of review was available under section 18 against a body exercising administrative functions, and not judicially or quasi-judicially.

Appeals to the Federal Court under specific federal statutes are generally available. They are, as a rule, to be taken to the Court of Appeal,¹²¹ except for those under the Income Tax Act¹²² and the Estate Tax Act.¹²³ If an appeal is provided for, the decision or order is not to be otherwise reviewed to the extent that it may be appealed.¹²⁴ For matters not allocated specifically to the Court of Appeal, the Trial Division has jurisdiction.¹²⁵

The Minister of Justice recently announced some proposed changes to the Federal Court Act.¹²⁶ The proposed amendments would give the Trial Division an exclusive supervisory jurisdiction over appeals in most cases.¹²⁷ Exceptions would include those cases where a tribunal's constitutive act expressly confers jurisdiction on the Court of Appeal. Provision would be made for transfer by the court of cases to the Court of Appeal without their first being heard in the Trial Division.¹²⁸

The sections providing for judicial review would be modified to allow relief to be obtainable on a single application.¹²⁹ Orders would be available compelling a federal tribunal to do an act which it has unlawfully failed or refused to do or unreasonably delayed in doing, or declaring invalid or unlawful or quashing, setting aside, referring back, prohibiting or restraining a decision, order, act or proceeding of a federal tribunal.¹³⁰ The grounds for review would be set out in the Act and would consist of excess of jurisdiction, breach of natural justice rules, error of law whether or not on the face of the record, a finding of fact based on no evidence of fraud or perjured evidence, or any action by the tribunal that was in any other way contrary to law.¹³¹ The court would also be directed to have regard to common law developments, in order to maintain a flexible approach to judicial review. In order to preserve the exclusivity of federal court jurisdiction (in relation to that of provincial superior courts), the present exclusionary language in section 18 would be retained. Other proposed amendments relating to judicial review deal with the power to stay an order, interim relief, technical defects in tribunal actions, standing, review of commercial activities carried on by government and the Royal

¹²¹ CAN. REV. STAT., ch. 10, § 24 (2d Supp. 1970).

¹²² CAN. REV. STAT., ch. 148 (1952).

¹²³ CAN. REV. STAT., ch. E-9 (1970).

¹²⁴ CAN. REV. STAT., ch. 10, § 29 (2d Supp. 1970).

¹²⁵ *Id.* § 26(1).

¹²⁶ MINISTER OF JUSTICE & ATTORNEY GENERAL OF CANADA, PROPOSALS TO AMEND THE FEDERAL COURT ACT (1983).

¹²⁷ *Id.* at 6.

¹²⁸ *Id.* at 7.

¹²⁹ *Id.* at 8.

¹³⁰ *Id.* at 10.

¹³¹ *Id.* at 11.

prerogative.¹³²

B. Declaratory Relief and Civil Action

The Federal Court Act provides for declaratory relief,¹³³ a form of relief not available in the United States.¹³⁴ Declaratory relief can be sought to declare the existence of a person's legal rights or status under a statute, to declare that decisions of administrative bodies are invalid or to determine the constitutionality of a statute. As a method of seeking judicial review of administrative action, section 18 of the Federal Court Act confers jurisdiction upon the Trial division to entertain this proceeding.¹³⁵ If declaratory relief is sought in relation to a civil action where consequential relief is sought against the Crown (rather than against a federal board or commission), then the declaratory proceeding is founded on section 17 of the Federal Court Act¹³⁶ and the proceeding is launched as an ordinary action.

Certain advantages of declaratory relief exist over other forms of judicial review under section 18. For instance, declaratory relief is available for purely administrative action, whereas prerogative remedies, at least until *Martineau v. Matsqui Institution Disciplinary Board*,¹³⁷ were unavailable in such cases.¹³⁸ In addition, declaration action is available against the Crown, whereas equitable remedies, for instance, an injunction may not be brought against the Crown.¹³⁹ Another advantage of declaratory relief is that it can be combined with other remedies such as damages and injunctions.¹⁴⁰

Declaratory relief in Canada is a discretionary relief, but the courts have become increasingly more liberal in granting declaratory relief. The courts have taken the position that they will grant declaratory relief even

¹³² *Id.* at 12-13.

¹³³ CAN. REV. STAT., ch. 10, § 18 (2d Supp. 1970).

¹³⁴ Some might note the similarity between declaratory relief in Canada and the action permitted in the United States. *See* *Nashville, C. & St. L. Ry. v. Wallace*, 288 U.S. 249 (1933).

¹³⁵ CAN. REV. STAT., ch. 10, § 18(b) (2d Supp. 1970).

¹³⁶ *Id.* § 17(1).

¹³⁷ [1980] 1 S.C.R. 602.

¹³⁸ *See* *Lingley*, [1976] 1 F.C. at 98.

¹³⁹ *See* *Denison Mines Ltd. v. Attorney General of Canada*, [1973] 1 Ont. 797 (High Ct.) (a declaration against the Crown is within the exclusive jurisdiction of the Federal Court); *Border Cities Press Club v. Attorney General of Canada*, 1955 Ont. 14 (Ct. App.) (immunity of the crown with respect to prerogative remedies). *See also* *Dyson v. Attorney General*, [1911] 1 K.B. 410 (C.A.), *referred to in* *Attorney General of Canada v. Law Society of British Columbia*, 137 D.L.R.3d 1, 13 (Can. 1982). In the latter case, the court upheld the jurisdiction of a provincial superior court to grant a declaration against the Crown with respect to the constitutional validity of a federal statute, notwithstanding §§ 2, 17 and 18 of the Federal Court Act.

¹⁴⁰ *See* *Klymchuk v. Cowan*, 47 W.W.R. 467 (Man. Q.B. 1964); *Shawn v. Robertson*, [1964] 2 Ont. 696 (High Ct.).

if the declaration is devoid of any legal effect; all that is required is that the relief will have a "practical effect."¹⁴¹

In recent years, declaratory relief has been utilized in cases involving constitutional issues. In *Nova Scotia Board of Censors v. McNeil*,¹⁴² the Supreme Court of Canada made a declaration relating to a provincial legislation that was alleged to be invalid in that it infringed the competence of Parliament under section 91(27) of the Constitution Act, 1867. In *Brant Dairy Co. v. Milk Commission of Ontario*,¹⁴³ the Supreme Court made a declaration of right of a milk producer who claimed a regulation invalid; in *Home Oil Distributors Ltd. v. Attorney General of British Columbia*,¹⁴⁴ the Supreme Court of Canada made a declaration of right under a fuel control legislation whose validity was challenged; and in *Attorney General of Canada v. Reader's Digest Association*,¹⁴⁵ the publisher sought a declaration of right relating to a tax law that affected advertising. In these cases, the Court made full pronouncement on the constitutional issue raised by the plaintiff. *Caloil v. Attorney General of Canada*,¹⁴⁶ is particularly interesting. In this case, declaratory relief was sought in relation to a challenge of the regulations under Part VI of the National Energy Board Act.¹⁴⁷ The pronouncement on the constitutional issue was made although the declaratory relief was denied and the Court found that the regulation was valid. On the basis of these cases and particularly, *Jabour*,¹⁴⁸ the declaratory action has become, in Canada one of the main procedural techniques to challenge the constitutionality of a statute or regulation.

Although the Crown probably cannot be summoned to court on a judicial review under section 18 or 28 of the Federal Court Act,¹⁴⁹ other kinds of actions are available against the Crown. As earlier stated section 17 of the Federal Court Act provides for a mechanism to sue the Government of Canada, or as is usually called, the Crown in Right of Canada.¹⁵⁰ Thus, the Trial Division of the Federal Court is given exclusive original jurisdiction in all cases where relief is claimed against the Crown, except where a contrary statutory provision appears. In *McNamara Construction v. The Queen*,¹⁵¹ the Supreme Court of Canada found that section 17

¹⁴¹ *Solosky v. Canada*, [1980] 1 S.C.R. 821; *Landreville v. The Queen*, 1973 F.C. 1223; *Merricks v. Nott-Bower*, [1965] 1 Q.B. 57, [1964] 1 All E.R. 717 (C.A.) (Lord Denning, M.R.).

¹⁴² [1978] 2 S.C.R. 662.

¹⁴³ 1973 S.C.R. 131.

¹⁴⁴ 1940 S.C.R. 444.

¹⁴⁵ 1961 S.C.R. 775.

¹⁴⁶ 1971 S.C.R. 543.

¹⁴⁷ CAN. REV. STAT., ch. N-6 (1970).

¹⁴⁸ 137 D.L.R.3d at 1.

¹⁴⁹ CAN. REV. STAT., ch. 10, §§ 18(a), 28(1) (2d Supp. 1970).

¹⁵⁰ *Id.* § 17(1).

¹⁵¹ [1977] 2 S.C.R. 654.

was constitutionally valid in its operation in cases involving federal Crown liability in tort or under a contract. The Federal Court, however, is not empowered by the section 17 to entertain a proceeding against the provincial Crown.¹⁵²

The accountability of the Crown to a person for wrongful government action is recognized not only in the context of review but also of liability. At common law, the Crown can be sued for breach of contract, and damages can be recovered.¹⁵³ Although specific performance is not available against the Crown, a declaration is available "as to the right of the subject to specific performance if the circumstances justify it."¹⁵⁴ The Crown immunity from tortious action at common law has been abandoned in Canada. Under the Crown Liability Act,¹⁵⁵ the Crown is made liable in tort for the damages for which it would be liable if it were a private person.¹⁵⁶ As shall be shown later, a wrongful regulatory action as well as an unconstitutional statute may provide the basis for an action for damages against the Crown founded on tort.

IV. STRATEGY OF JUDICIAL CHALLENGE: A CONSIDERATION OF FOUR FEDERAL STATUTES

A. *In General*

Potential challenges to regulatory and statutory actions by the Government of Canada illustrate the viability of judicial review to achieve protection for foreign investment. Four recent statutes which have become the symbols of Canadian nationalism and protectionism will be examined: (1) the Foreign Investment Review Act;¹⁵⁷ (2) the Canada Oil and Gas Act;¹⁵⁸ (Canada's centerpiece of its National Energy Program); (3) the Patent Act;¹⁵⁹ and, the Export and Import Permits Act,¹⁶⁰ which has formed the instrument for insulating the moribund and inefficient Canadian textile industry from foreign competition.

¹⁵² *Union Oil v. The Queen*, [1976] 1 F.C. 74 (C.A.).

¹⁵³ *See R. v. Proud*, 1926 S.C.R. 599.

¹⁵⁴ *See Dominion Building Corp. v. The King*, 1953 A.C. 533, 548.

¹⁵⁵ CAN. REV. STAT., ch. C-38 (1970).

¹⁵⁶ *Id.* § 3.

¹⁵⁷ Can. Stat., ch. 46 (1973-74), as amended by Can. Stat., ch. 52, § 128(2) (1976-77), as amended by Can. Stat., ch. 107, § 63 (1980-81-82) [hereinafter cited as Can. Stat., ch. 46 (1973-74)].

¹⁵⁸ Can. Stat., ch. 81, §§ 1-73 (1980-81).

¹⁵⁹ CAN. REV. STAT., ch. P-4 (1970), as amended by CAN. REV. STAT., ch. 10, § 65 (2d Supp. 1970) [hereinafter cited as CAN. REV. STAT., ch. P-4 (1970)].

¹⁶⁰ CAN. REV. STAT., ch. E-17 (1970) (last amended at Can. Stat., ch. 82, § 9 (1980-81)) [hereinafter cited as CAN. REV. STAT., ch. E-17 (1970)].

B. A Strategy to Challenge The Foreign Investment Review Act: Relief Under Constitutional and Administrative Law

The Foreign Investment Review Act represents the most comprehensive attempt by Parliament to assert supervision over the problem raised by foreign ownership and control of Canadian enterprises. In spite of its name, it is not a statute that seeks to police all foreign investments in Canada; its application reaches only (a) the acquisition of control of a Canadian business enterprise by "non-eligible" persons;¹⁶¹ and, (b) the establishment of a new business in Canada by these persons.¹⁶² Its scheme does not display the sabre-rattling slogan of nationalism; it is a pragmatic program, largely oriented to the achievement—by international law standards—of widely recognized and valid economic objectives. It is flexible as it allows the Government of Canada to develop an investment strategy for Canadians in partnership with, or supplemented by foreign investment. It relies on political accountability for the result of decisions by the people when the party in power seeks its electoral mandate. Decisions of the the Government of Canada under the Act are more likely to reflect the electorate's perception of public interest rather than the hit-and-miss (mostly miss) stab at the public interest by some regulatory tribunals.

The weakness of its scheme is endemic to the political process, the all-too-human temptation to confuse public interest with partisan interest and public policy with the policy of political convenience. More seriously, it provides the civil servants with the ability to insulate themselves from legal accountability before the courts by hiding behind the politician's cloak of political responsibility to the people. This latter weakness enables the civil servants, by controlling the information flow to the Minister, to assume the real power of decision of the Minister and of the Government of Canada. It, therefore, implies a potential breach not only of the rule of law, but also of the true basis of democratic accountability.

The Foreign Investment Review Act establishes a regulatory scheme for the review and approval of certain investment contemplated or actually made by a non-eligible person.¹⁶³ The Act constructs the regulatory scheme around a prohibition respecting the acquisition of control of a Canadian business enterprise or the establishment of a new business in Canada unrelated to any of its existing Canadian business without such investment being "allowed" by the Governor in Council. It establishes this prohibition by conferring upon a superior court, on application of the Minister, the power to enjoin a contemplated investment or to nullify an investment already made. In addition, it makes liable a non-eligible person for a summary conviction offense if that person makes an actual in-

¹⁶¹ Can. Stat., ch. 46, § 3(1) (1973-74).

¹⁶² *Id.*

¹⁶³ *Id.* § 7.

vestment that has not been previously reviewed by the Foreign Investment Review Agency and the Minister and allowed by the Governor in Council.¹⁶⁴ The power to allow an investment that a non-eligible person desires to make is conferred upon the Governor in Council by sections 12 and 13 of the Act. Allowance is granted if the Governor in Council concludes that the "investment is or is likely to be of significant benefit" to Canada.¹⁶⁵ Section 2(2) establishes certain factors that the Governor in Council is required to consider in reaching his conclusion whether the investment is or is likely to be of significant benefit to Canada.¹⁶⁶ To assist the Governor in Council in reaching a conclusion, the Act requires the Minister to make a "recommendation or submission" to the Governor in Council.¹⁶⁷ The Act establishes the Foreign Investment Review Agency to advise and assist the Minister in the discharge of his function conferred by the Act.¹⁶⁸ To enable the Agency to make its advice to the Minister, the Act establishes a review procedure consisting of the filing of notices and other relevant information that the Act and regulations prescribe.¹⁶⁹

The requirement by the Foreign Investment Review Agency to comply with the review procedures provided under the Act and the Order-in-Council disallowing the transaction may be challenged on (a) constitutional grounds, (b) statutory grounds, and (c) traditional administrative law grounds. The challenge on constitutional grounds would question the authority of Parliament to enact the Foreign Investment Review Act or at least some of its operative provisions. As to statutory grounds, the applicability of the Act to the transaction or the eligibility of the investor may be raised, thus requiring consideration whether there is a "reviewable" transaction involved. The administrative law grounds would call into question the exercise of the statutory powers of the Agency, the Minister and the Governor in Council as well as the appropriateness of the enforcement sanctions that the Minister may rightfully seek from the court to render the investment "nugatory" under section 20 of the Act.¹⁷⁰

The constitutionality of the Foreign Investment Review Act and the application of the Act may be challenged based on the allocation of legislative powers made by sections 91 and 92 of the Constitution Act, 1867, and the qualitative guarantees in the Canadian Charter of Rights and Freedoms. In determining the competence of Parliament to enact the Act, it is relevant to consider the Act's intent, scheme and effect. The Foreign Investment Review Act limits, and in certain instances, prohibits the rights of persons to deal with their property or exercise their civil rights.

¹⁶⁴ *Id.* § 24(1).

¹⁶⁵ *Id.* § 12(1).

¹⁶⁶ *Id.* § 2(2).

¹⁶⁷ *Id.* § 10.

¹⁶⁸ *Id.* § 7.

¹⁶⁹ *Id.* § 8(1).

¹⁷⁰ *Id.* § 20.

The Act subjects to regulatory control the acquisition of shares in a Canadian enterprise or assets of the Canadian enterprise, and the establishment of a business, by the investor.¹⁷¹ Correspondingly, the opportunity of owners of Canadian enterprises to dispose of their properties, or their rights to deal with their properties, are circumscribed, and in other instances frustrated conceivably with serious financial consequences in certain cases.

Generally, legislation in relation to investment, to the purchase and sale of shares or assets, the rights and obligations acquired by the parties and the legal remedies arising from breaches of such obligations and rights are matters within the legislative competence of the provinces within section 92(13) of the Constitution Act, 1867. The legislative competence of the provinces under this provision is, however, not absolute or unlimited. In *John Deere Plan Co. v. Wharton*¹⁷² Lord Haldane stated that the expression "civil rights in the province" is a wide one, extending if interpreted literally, to much of the field of section 91 allocating the legislative competence of Parliament. He, therefore, argued that the expression cannot be so interpreted and it must be regarded as excluding cases expressly dealt with elsewhere in sections 91 and 92 of the Constitution Act, 1867. The words in section 91 declaring that "[notwithstanding anything in this Act] the exclusive Legislative Authority of the Parliament of Canada"¹⁷³ extends to matters in the enumeration in that section permitted the courts to hold that the legislation enacted by Parliament, so long as it strictly relates to the enumerated matters, has paramount authority.¹⁷⁴ For this reason, the Foreign Investment Review Act is not invalid merely because matters of property and civil rights of the vendor and purchaser within the province are affected by the regulatory scheme, provided the Act can be construed as a legislation *in relation to* some matters that are expressly enumerated in section 91.¹⁷⁵

¹⁷¹ *Id.* § 2.

¹⁷² 1915 A.C. 330, 339-40.

¹⁷³ Constitution Act, 1867, § 91.

¹⁷⁴ *Tennant v. Union Bank of Canada*, 1894 A.C. 31, 45-47 (Lord Watson); *see also* *Justice Rand in Switzman v. Elbling*, 1957 S.C.R. 285, 302-03.

¹⁷⁵ *Murphy v. C.P.R.*, 1958 S.C.R. 626, 631-32. In *Munro v. National Capital Comm'n*, 1966 S.C.R. 663, 671, the Court, through Justice Cartwright, stated:

There is no doubt that the exercise of the powers conferred upon the Commission by the National Capital Act will affect the civil rights of residents in those parts of the two provinces which make up the National Capital Region. *In the case at bar the rights of the appellant are affected* [emphasis added]. But once it has been determined that the matter in relation to which the Act is passed is one which falls within the power of Parliament it is no objection to its validity that its operation will affect civil rights in the provinces. . . . The passage from the judgment of Justice Duff as he then was, in *Gold Seal Ltd. v. Dominion Express Co.*, 62 S.C.R. 424, 460 (1921), correctly states the law. It is as follows:

The fallacy lies in failing to distinguish between legislation affecting civil rights and legislation "in relation to" civil rights. Most legislation of a repressive

The legislative powers of Parliament that might be argued to sustain the Foreign Investment Review Act are as follows: (1) the Residuary Clauses,¹⁷⁶ (2) the Regulation of Trade and Commerce,¹⁷⁷ (3) Naturalization and Aliens,¹⁷⁸ and (4) the Criminal Law Power.¹⁷⁹

The Government was not sure which of the above powers provides direct and primary support to the Act. Mr. F.E. Gibson, Legal Advisor of the Department of Justice, stated before the Senate Standing Committee on Banking, Trade and Commerce:

The clear difficulty that I am faced with is that there is no single head of jurisdiction under section 91 of the BNA Act which I can point to and say "... This is criminal law *per se*": There are no clear words. There are many aspects to the particular policy that this bill represents. . . . When I say that I look to a series of heads as supporting this legislation, it is clearly because there is no single head that I can say, "'Four-square,' it falls within that."¹⁸⁰

There is evidence from the Act that Parliament intended to rely on the residual power in enacting the Act. This is clear from section 2(1) of the Act when it states:

This Act is enacted by the Parliament of Canada in recognition by Parliament that the extent to which control of Canadian industry, trade and commerce has become acquired by persons other than Canadians and the effect thereof on the ability of Canadians to maintain effective control over their economic environment is a matter of national concern, and that it is therefore expedient to establish a means by which measures may be taken under the authority of Parliament to ensure that, in so far as is practicable after the enactment of this Act, control of Canadian business enterprises may be acquired by persons other than Canadians, and new businesses may be established in Canada by persons, other than Canadians, who are not already being carried on by them in Canada, only if it has been assessed that the acquisition of control of those enterprises

character does incidentally and consequentially affect civil rights. But if in its true character it is not legislation "in relation to" the subject of "property and civil rights" within the provinces, within the meaning of section 92 of the British North America Act, then that is no objection although it is passed in exercise of the residuary authority conferred by the introductory clause.

¹⁷⁶ Constitution Act, 1867, § 91(29).

¹⁷⁷ *Id.* § 91(2).

¹⁷⁸ *Id.* § 91(25).

¹⁷⁹ *Id.* § 91(27). Mr. F.E. Gibson, Legal Adviser, Department of Justice, stated before the Standing Senate Committee on Banking, Trade and Commerce on May 23, 1973, PROCEEDINGS, 29TH PARL. 1ST SESS. ISSUE No. 2, ISSUE No. 11, and on May 30, 1973, PROCEEDINGS, 29TH PARL. 1ST SESS. ISSUE No. 4, ISSUE No. 19, that the Department of Justice looks to the "Peace, Order, and Good Government" clause, to the "Trade and Commerce" clause, the alien head and the criminal law head. See also PROCEEDINGS OF THE H.C. STANDING COMMITTEE ON FINANCE, TRADE AND ECONOMIC AFFAIRS, 29TH PARL. 1ST SESS. ISSUE No. 26, ISSUE No. 37.

¹⁸⁰ ISSUE No. 4, *supra* note 179, at 23.

or the establishment of those new businesses, as the case may be, by those persons is or is likely to be of significant benefit to Canada, having regard to all of the factors to be taken into account under this Act for that purpose.¹⁸¹

The residual power, since the *Anti-Inflation Act Reference*,¹⁸² has been construed to apply only in times of emergency, and it is doubtful whether the doctrine of "national concern" which tends to expand the residual power and upon which obviously section 2(1) of the Act relies, would be recognized today. It is clear that even Lord Watson, whose seminal thoughts in *Attorney General of Ontario v. Attorney General of Canada (Local Prohibition Case)*¹⁸³ provided the foundation for the "national concern" doctrine, had warned that the residual clause ought to be strictly construed to be confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislative powers with respect to any of the classes of subjects enumerated in section 92 of the Constitution Act, 1867.

As to the "naturalization and aliens" powers, it must be conceded that a foreigner's right to acquire property or to engage in business in Canada comes within the ambit of the powers of Parliament. Viscount Dunedin, in *In Re Insurance Act of Canada*¹⁸⁴ clearly confirmed that there is "no doubt that the Dominion Parliament might pass an act forbidding aliens to enter Canada or forbidding them so to enter to engage in any business without a license, and further they might furnish rules for their conduct while in Canada."¹⁸⁵ Nonetheless, the Foreign Investment Review Act reaches more broadly than creating restrictions to property rights of aliens; it treats Canadian citizens not resident in Canada as equivalent to aliens. The Supreme Court of Canada, in *Morgan v. Attorney General of Prince Edward Island*¹⁸⁶ rejected the argument that federal authority could restrict the property rights of Canadian citizens on the basis of this power. Chief Justice Laskin was emphatic in his view that Parliament's legislative powers in relation to naturalization, alienage and citizenship confer upon Parliament the power to create "any immunity from provincial regulatory legislation otherwise within its (the province's) constitutional competence."¹⁸⁷ Clearly, the converse is true: Parliament cannot deprive a Canadian citizen of a right that is made available by the validly enacted laws of a province. In any event, any power of Parliament to make residency a condition to the right of a citizen to pursue the gaining of livelihood is now clearly invalid under section 6 of the

¹⁸¹ Can. Stat., ch. 46, § 2(1) (1973-74).

¹⁸² [1976] 2 S.C.R. 373.

¹⁸³ 1896 A.C. 348.

¹⁸⁴ 1932 A.C. 41 (P.C.).

¹⁸⁵ *Id.* at 51.

¹⁸⁶ [1976] 2 S.C.R. 349.

¹⁸⁷ *Id.* at 364.

Charter.¹⁸⁸

The invocation of the power of the "Regulation of Trade and Commerce" under section 91(2) of the Constitution Act, 1867 is likewise difficult to sustain.¹⁸⁹ Firstly, it is questionable whether the making of an investment is a "trade and commerce" as now understood in cases. The scheme of the Act is clearly not to regulate the transborder flow of capital, but the regulation of control of Canadian enterprises. In fact, the Act does not examine the source or nature of funding of an investment, and even an internally generated capital funding by Canadians would not preclude the review under the Act or a disallowance of an acquisition on the ground that it does not provide "significant benefit" to Canada.¹⁹⁰ The current practice of the Agency shows that the regulation of the Act reaches into the matters of ownership, management, organization, employment and operation of a business, not into the "flow" of commerce that had been identified by the Supreme Court of Canada as a major jurisdictional requirement for the operation of the trade and commerce power of Parliament.¹⁹¹ Lastly, the scheme of the Act is not the "regulation" of trade and commerce, but the acquisition of control of a business. As articulated in *MacDonald v. Vapour Canada Ltd.*,¹⁹² regulation means an oversight not only of the entry, but mainly of the operation, by a monitoring system, of a commerce.

As to the criminal law power, the Act is clearly not, in substance, a statute defining an offense and providing penalties upon its commission. The criminal sanction is simply an enforcement mechanism in aid to the main scheme of the Act: to control foreign investment in Canada. As was analyzed in *MacDonald*, it is doubtful whether this use of the criminal sanction can be argued as basis for transforming the Act into an enactment pursuant to Parliament's criminal law power.

The statutory and administrative law grounds for review are more complex and nebulous, but are significant and require detailed examination. The Act requires a non-eligible person¹⁹³ or a group containing such a person to give notice to the Foreign Investment Review Agency of any prescribed investment by that person or group.¹⁹⁴ The applicability of the Act to an acquisition could be challenged in Court. Under section 5(3) of the Act, a special statute enacted by Parliament which may conflict with the Foreign Investment Review Act shall prevail over the Act.¹⁹⁵ Accordingly, the Act is considered a statute of general application and may yield

¹⁸⁸ Charter, § 6(2).

¹⁸⁹ Constitution Act, 1867, § 91(2).

¹⁹⁰ Can. Stat., ch. 46, § 12(1) (1973-74).

¹⁹¹ See Reference Re Agricultural Products Marketing Act, [1978] 2 S.C.R. 1198, 1293-94; *Labatt Brewers v. Attorney General of Canada*, 30 N.R. 496 (Can. 1982).

¹⁹² 66 D.L.R.3d 1 (Can. 1976).

¹⁹³ Can. Stat., ch. 46, § 3(1) (1973-74).

¹⁹⁴ *Id.* §§ 8(1), 8(2).

¹⁹⁵ *Id.* § 5(3).

to another statute which establishes another scheme. Another approach was used, albeit unsuccessfully, in *Dow Jones v. Attorney General of Canada*,¹⁹⁶ where it was held that the Act applies and that notice was required when a non-eligible person was acquiring control of a Canadian business enterprise, notwithstanding the fact that control was previously held by another non-eligible person. The trial judge held that the Act is not retroactive, but once the business is resold to a non-eligible person the Act does apply, and continues to apply on each occasion that control is sought by a non-eligible person. The *Dow Jones* case came before the Trial Division of the Federal Court pursuant to section 17(3)(b) of the Federal Court Act¹⁹⁷ as a special stated case in which the Crown and the plaintiff had agreed on the facts.

The case of *Attorney General of Canada v. KSC Ltd.*¹⁹⁸ provides an illustration of a challenge based on the statutory requirement of acquisition of "control." It was held in this case that 51 percent ownership of the shares of a private company was, if not conclusive of control, a situation which at the very minimum would place a heavy onus of disproof on the Foreign Investment Review Agency.¹⁹⁹ Thus, in that case control was held to be vested in the Canadian sales manager of the company, who held 51 percent ownership of the shares, notwithstanding loan agreements, management and pricing policies which, it was alleged, resembled franchising provisions. The result was that control was not vested in the non-eligible owner of the remaining shares and the Act was held not to apply to the acquisition.

The specific provisions of the Act relating to the exercise of the powers of the Agency and the Minister provide several avenues to mount a judicial challenge. Upon receiving the notice given under section 8, the Minister must review it, along with any other information submitted to him by a party to the investment, any undertakings by a party, and any representations from a province likely to be affected.²⁰⁰ If the Minister feels that the investment is likely to be of significant benefit to Canada,²⁰¹ he recommends to the Governor in Council that the investment be allowed.²⁰² If he cannot do so, he must allow the investors to make further representations, after which he recommends to the Governor in Council that the investment be either allowed or not.²⁰³ Also, in some other cases the Minister may be required by the Governor in Council to give this further opportunity.²⁰⁴ The Governor in Council then decides whether or

¹⁹⁶ 113 D.L.R.3d 395 (Fed. Ct. T.D. 1980), *aff'd*, 122 D.L.R.3d 731 (Fed. C.A. 1981).

¹⁹⁷ CAN. REV. STAT., ch. 10, § 17(3)(b) (2d Supp. 1970).

¹⁹⁸ No. T-4045-82 (Fed. Ct. T.D. May 31, 1983) (as yet unreported).

¹⁹⁹ Can. Stat., ch. 46, § 7 (1973-74).

²⁰⁰ *Id.* § 19.

²⁰¹ *Id.* § 2.

²⁰² *Id.* § 10.

²⁰³ *Id.* § 11.

²⁰⁴ *Id.* § 12(2).

not to allow the investment, depending on whether or not it is considered likely to be of significant benefit to Canada.²⁰⁵

Various investigatory and remedial provisions are contained in the Act. The Minister may order an investigation,²⁰⁶ and may apply to a court for orders authorizing various investigatory activities.²⁰⁷ In order to enforce the provisions of the Act, the Minister may apply for an injunction restraining activities connected with the investment,²⁰⁸ an order rendering an investment nugatory²⁰⁹ or an order requiring compliance with an undertaking.²¹⁰ The Act also provides that all usual rights of appeal are available from decisions and orders of courts made pursuant to the Act.²¹¹

The general doctrine of fairness applies to the exercise of the above statutory powers aside from the strict compliance with the procedures provided by the Act. In the light of practice by the Agency and the Minister, two problems might be considered. First, the practice of the Agency and the Minister to solicit and consider submission of third parties which it directly or indirectly encourages to propose a competing investment. The Act does not authorize communication of a proposed investment by a party to a third person, much less invite such person to make a submission or a competing acquisition. Indeed, the Act penalizes instances of disclosure of such information.²¹² In addition, the Act requires that only materials submitted by the parties to the investment and the representations of the provinces may be considered.²¹³ Accordingly, a recommendation made to the Minister by the Agency or to Cabinet by the Minister may be invalid in that it relied upon extraneous materials or considerations. Second, the various factors or criteria against which the investment shall be considered are specified.²¹⁴ In practice, however, the Agency and the Minister have developed an approach of not only considering, but also deciding upon, its recommendation on the basis of "policies" of individuals, politicians and Departments of Government that have no status under the Act.²¹⁵ Accordingly, the standards for decision used in a particular investment may well be unauthorized or arbitrary and subject to challenge.

An attack against the action of the Agency or the Minister has been adopted in a number of cases. In *British Columbia Products v. Minister*

²⁰⁵ *Id.* § 12.

²⁰⁶ *Id.* § 15.

²⁰⁷ *Id.* §§ 16(2), 17.

²⁰⁸ *Id.* § 9.

²⁰⁹ *Id.* § 20.

²¹⁰ *Id.* § 21.

²¹¹ *Id.* § 23.

²¹² *Id.* § 14.

²¹³ *Id.* § 7.

²¹⁴ *Id.* § 2(2).

²¹⁵ *Id.*

of *Industry, Trade and Commerce*²¹⁶ an interim injunction was obtained under section 18 of the Federal Court Act²¹⁷ restraining the Minister from proceeding with an investigation under the Foreign Investment Review Act²¹⁸ from making an application for an injunction or for an order rendering the investment nugatory, or from seeking to force applications for approval of the investment to be made. The main action was for a declaration that the plaintiff was not a non-eligible person. The plaintiffs in that case also applied under section 28 of the Federal Court Act for judicial review of the decision of the Minister to issue demand letters pursuant to section 8(3) of the Foreign Investment Review Act. In *Western Forest Products v. Minister of Industry, Trade and Commerce*,²¹⁹ it was held by the Court in response to this application that a demand by the Minister for notice under subsection 8(3)²²⁰ was not a decision reviewable under section 28 of the Federal Court Act, but it was for the party to seek relief under section 18 of the Federal Court Act. Where an investment is the subject of an order made under section 19 of the Foreign Investment Review Act, an application may be made to the Court to vary or revoke the order.²²¹ In *Central Cartage Co. v. Attorney General of Canada*,²²² an injunction was varied so as not to apply to certain dispositions of shares to be made pursuant to previously-executed agreements.

The Order-in-Council issued by the Governor in Council is more difficult to challenge. To provide a foundation for analysis of the grounds to challenge the Order-in-Council, it is first necessary to consider its legal effect and nature. A decision of the Governor in Council to disallow an investment under section 12²²³ coupled with an order under section 20²²⁴ rendering the investment nugatory has the potential to constitute a confiscation of property. In Canada, the taking of a person's property by the government of Canada or a province is not exclusively accomplished by the method provided in a general expropriation statute. The procedure to be followed, the official or person who is authorized to accomplish the taking, and whether compensation is to be paid or not, are all matters that a provincial legislature or the Parliament of Canada may provide for in a statute. Lord Pearson, in *Rugby Water Board v. Share Fox*,²²⁵ succinctly stated this point when he stated: "Compulsory acquisition and

²¹⁶ 15 B.L.R. 161 (Fed. Ct. T.D. 1981), *aff'd*, No. A-735-81 (Fed. C.A. June 9, 1983) (as yet unreported).

²¹⁷ CAN. REV. STAT., ch. 10 (2d Supp. 1970).

²¹⁸ Can. Stat., ch. 46 (1973-74).

²¹⁹ No. A-676-81 (Fed. C.A. Mar. 23, 1982) (as yet unreported).

²²⁰ Can. Stat., ch. 46, § 8(3) (1973-74).

²²¹ *Id.* § 19(5).

²²² [1982] 1 F.C. 145 (C.A.).

²²³ Can. Stat., ch. 46, § 12 (1973-74).

²²⁴ *Id.* § 20.

²²⁵ 1973 A.C. 202.

compensation for it are entirely creatures of statute.”²²⁶ The basis for this principle is the constitutional doctrine of Parliamentary sovereignty: the power “to make or unmake any law whatever.”²²⁷ In Canada, as long as it does not encroach upon the powers allocated to the provincial Legislatures under the Constitution, the Parliament of Canada could enact a law that authorizes any official or even private person to take the property of another for the benefit of the public or for the benefit of another private person.²²⁸ The only qualification to the above rule is the hesitation of the courts to find that compensation is not to be paid, but even this so-called “presumption” as to compensation can be overridden by explicit language.²²⁹

The nature and legal effect of an Order-in-Council disallowing an investment under section 12 can be further elucidated by considering the following factors as provided in the Foreign Investment Review Act:

1. Pursuant to section 2(1) of the Act, the disallowance is a “measure” taken under authority of Parliament to ensure that control of Canadian business enterprises may be acquired only if the Governor in Council has assessed that the acquisition of control is of significant benefit to Canada;

2. The question of “significant benefit” to Canada is exclusively within the competence of the Governor in Council to decide;²³⁰

3. The disallowance is a final decision of the Governor General in Council that, under Canadian law, declares the investment a nullity;

4. The consequences that flow from the disallowance are more far-reaching than those of a declaration of nullity *simpliciter*: the parties to the transaction will not be restored to their old positions. The court, under section 20, is given powers that, as will be shown below, are more analogous to a power relating to execution of a judgment.²³¹

A disallowance, therefore, may have the effect of annihilating property rights acquired under a transaction. This annihilation is more serious in its effect than a divestiture order in an antitrust case in the United States, since the position of a party under the Foreign Investment Review Act can be worse, as a consequence of the enforcement of the disallowance order, than its position before acquisition. A disallowance embodies a finding or conclusion of fact and law by the Governor in Council that, as required in section 2(1) of the Foreign Investment Review Act, the investment in question is not “of significant benefit to Canada having regard to all the factors to be taken into account under this Act for that

²²⁶ *Id.* at 215.

²²⁷ See A.V. DICEY, *THE LAW OF THE CONSTITUTION* 39 (10th ed. 1965).

²²⁸ See *Florence Mining Co. v. Cobalt Lake Mining Co.*, 18 Ont. L.R. 275, 279 (1909).

²²⁹ See *London & North Western Ry. v. Evans*, [1893] 1 Ch. 16.

²³⁰ Can. Stat., ch. 46, § 12(1) (1973-74).

²³¹ *Id.* § 12.

purpose."²³²

In challenging the disallowance, it is necessary to distinguish between the exercise of discretion and the observance of statutory procedure. The first is difficult, if not impossible to review; the second, like any other statutory powers, may be reviewed by the courts. As a general rule, in the exercise of his statutory powers, as contrasted to the exercise of prerogative power of Her Majesty, the Governor in Council, like any other person or groups of persons exercising statutory powers, must keep within the law as laid down by Parliament. The failure to abide by the terms of the statute will invite judicial scrutiny to ensure that the statute will be carried out in accordance with its terms.²³³ No appeal or judicial review is available from the decision of the Governor in Council where there was evidence to support its decision whether he reached the correct decision in the exercise of the statutory power or not. The reason is that in these cases, the issue for decision is not a matter of law or jurisdiction, but a question of public interest and public convenience, which are matters of general public policy.²³⁴ In the view of the Supreme Court of Canada in *Attorney General of Canada v. Inuit Tapirisat*, the power to be exercised was "legislative in nature," not administrative, hence no hearing was required.²³⁵

A finding of fact and law in an Order-in-Council that an investment is not "of significant benefit to Canada" is, in view of the factors listed in section 2(2),²³⁶ therefore, a decision of general policy, similar to a decision on "public interest" in *Inuit Tapirisat*, hence not amenable to judicial review. For the same reason, the refusal to allow an investment is not less an economic, political or social determination, than was the determination of a telephone tariff in the *Inuit Tapirisat* case.

Nonetheless, an avenue to review, though indirectly, is available in the proceeding to enforce the disallowance under section 20²³⁷ of the Act. A section 20 proceeding is a method of judicial enforcement of the Order-in-Council refusing to allow an investment and is available to the Minister. An Order-in-Council is not self-executing; it cannot be the basis of direct executive action. Pursuant to the scheme of the Act, the legal consequences or situations that have arisen as a result of the transactions subject to disallowance are to be reversed through the judicial process, not executive action. A section 20 application, therefore, cannot only result in a mere *declaration* that the investment is a nullity; it is designed

²³² *Id.* § 2(1).

²³³ *Attorney General of Canada v. Inuit Tapirisat*, [1980] 2 S.C.R. 735, 755-56.

²³⁴ See *Re Davisville Investment Co. v. City of Toronto*, 15 Ont. 2d 553, 555-57 (1977), and *Inuit Tapirisat*, [1980] 2 S.C.R. at 735.

²³⁵ Can. Stat., ch. 46, § 2 (1973-74).

²³⁶ *Id.* § 20.

²³⁷ *Wilson v. Esquimalt & Nanaimo Ry.*, [1922] 1 A.C. 202; *Border Cities Press Club v. Attorney General of Ontario*, [1955] 1 D.L.R. 404.

"to render" the investment nugatory.²³⁸ Accordingly, it is a mechanism to erase, destroy or reverse the legal consequences arising from or situation created as a result of, the actual investment. The actions that may be taken by authority of the court, as enumerated in section 20(2) and (3), are not simply declaratory; they represent substantive relief and are intended to create a new legal situation similar to an execution to satisfy a judgment. The revocation or suspension of voting rights under section 20(2)(a) and the disposition of any shares under section 20(2)(b) are similar to the relief provided under ordinary corporation law in Canada.²³⁹ The disposition of property under section 20(2)(c) is similar to the enforcement of a judgment by attachment and sequestration. The all-encompassing power granted under section 20(3) is similar to the appointment of a receiver by way of equitable execution. In all of these cases, the actions taken are designed to satisfy and enforce a judgment and to provide to persons acquiring rights or title thereunder with documentary evidence of their rights or title that would be recognized at law. Section 20 recognizes, however, the power of the court to decide whether it makes an order to render the investment nugatory or not, and it considers as "required" in the circumstances and "just and reasonable" to the parties.²⁴⁰ Accordingly, a party can raise not only legal but also equitable grounds to oppose the section 20 proceeding.

An application to the Federal Court of the Attorney General pursuant to section 20 of the Foreign Investment Review Act does not constitute an appeal, but constitutes an originating proceeding taken by the Attorney General to enforce an Order in Council disallowing in investment. While the disallowance order itself cannot be appealed, an attack based on the Constitution of Canada, on a breach of the statute and other administrative law grounds may be raised. The enforcement proceedings taken under section 20 (or under sections 19 or 21) may be opposed in court by the party or parties affected, causing the effect of the disallowance order to be suspended or even avoided. A decision of the Court in the enforcement proceedings can also be appealed to the Court of Appeal or Supreme Court of Canada as provided for in section 23.

In summary, the arbitrary or invalid operation of the Foreign Investment Review Act upon the acquisition made by an American investor is not shielded from scrutiny by the courts. The procedures and the substantive grounds upon which an attack could be mounted provide, in our view, adequate safeguards and must be aggressively pursued by the investor if he has a clear and legitimate ground to feel prejudiced by the substance or application of the Act. In our view, the Act does not confer as broad powers as are claimed in practice by the Agency, the Minister and

²³⁸ Can. Stat., ch. 46, § 20(1)(c) (1973-74).

²³⁹ Canada Business Corporations Act, Can. Stat., ch. 33 (1974-75), *last amended at* Can. Stat., ch. 115 (1980-81-82).

²⁴⁰ Can. Stat., ch. 46, § 20(2)(c) (1973-74).

the Cabinet.

C. A Strategy to Challenge the Back-In Provisions of the Canada Oil and Gas Act: Relief under Contract Law

One of the most controversial programs of the government of Canada in recent years was chronicled by the National Energy Program announced on October 28, 1980.²⁴¹ At that time, the Government of Canada found that "of the top 25 petroleum companies of Canada, 17 are more than 50 percent foreign owned and foreign controlled, and these 17 account for 72 percent of Canadian oil and gas sales."²⁴² The legal framework for the refashioning on the industry was outlined in the Program, and the centerpiece for the acquisition of greater government or Canadian interest in the industry is the Canada Oil and Gas Act which was enacted to introduce numerous changes which were found by foreign investors to be substantially confiscatory. The reservation of a Crown interest of 25 percent on Canada land which was made applicable to all existing interest, however acquired, is perhaps the most intrusive of these changes.²⁴³ A strategy to challenge the back-in provision by way of declaratory action based on the law of contract, primarily, and on other grounds is considered in this heading.

Most firms prejudiced by the back-in have acquired their rights under the old regime established by the Canada Oil and Gas Regulations²⁴⁴ made pursuant to the Public Lands Grants Act²⁴⁵ and the Territorial Lands Act.²⁴⁶ The provisions of the Regulations made a grant to petroleum companies rights and interests with respect to natural resources controlled by the Federal Crown, or contained within lands belonging to the Federal Crown. These rights and interests included options that it could obtain oil and gas leases for the lands concerned, and rights to carry out exploratory work, including rights to enter and use such lands, and to extract substances from those lands.²⁴⁷ These rights exist under permits (which include special renewal permits) as provided for in the Regulations, and under any agreements which might have been negotiated between a firm and the Minister pursuant to the provisions of the Regulations. The rights obtained under the permits granted pursuant to the Regulations are not exclusively conferred by statute or Regulations; they are, at least in part, derived from a contract made between the Crown and the firm, within the statutory framework provided by the statute and Regulations. Further, the license issued to the foreign firms have

²⁴¹ ENERGY, MINES AND RESOURCES CANADA, NATIONAL ENERGY PROGRAM (1980).

²⁴² *Id.* at 19.

²⁴³ Canada Oil and Gas Act, Can. Stat., ch. 81, § 27 (1980-81).

²⁴⁴ Canada Oil and Gas Land Regulations, Con. Reg. Can., ch. 1518 (1978).

²⁴⁵ CAN. REV. STAT., ch. P-29 (1970).

²⁴⁶ Can. Stat., ch. 47, § 45 (1981), originally at CAN. REV. STAT., ch T-6 (1970).

²⁴⁷ Canada Oil and Gas Land Regulations, Con. Reg. Can., ch. 1518, at 23.

created property rights and interests.²⁴⁸

The Canada Oil and Gas Act affected the rights and interests acquired under the old regime. Section 61(1) of the Act is perhaps the most significant provision. It states: "Subject to subsections 62(2) and 64(5), the interests provided for under this Act replace all oil or gas rights or prospects thereof acquired or vested in relation to Canada lands prior to the coming into force of this Act."²⁴⁹

This general provision terminates "all oil and gas rights or prospects" and the only interests that would exist under the Act are the "interests provided for under this Act."²⁵⁰

There is a ground to challenge in court the position taken by the Government of Canada in negotiating an exploration agreement with firms that acquired interest under the old regime. The Government of Canada has taken the position that aside from a 25 percent that most firms have granted to Petro Canada in acquiring special renewal permits, it was entitled to another 25 percent as a result of the back-in provisions.

The construction placed by the government, it could be argued, cannot be adopted for it collides with the provisions of section 62(2) which state that "all interests provided by the former regulations that are in force when this Act comes into force continue in force subject to sections 63 to 73."²⁵¹ The Act (and the Regulations) make a distinction between a "right" acquired and an "interest" acquired under the Regulations.²⁵² Section 61(1) replaced "all oil and gas rights or prospects thereof" with the interest provided under the Act such that under the Act "rights and prospects" no longer exist.²⁵³ On the other hand, "interests" that are provided by the Regulations continue, subject only to the negotiation and application requirement of sections 63 to 73. This distinction between "right" and "interest" is fundamental to the Act. Both the Regulations and the Act, therefore, when they speak of "interest," refer to the arrangement under which a firm is conducting its activities on the lands, or more accurately, the cluster of rights represented by such arrangement. For purposes of the Act, those interests continue and the document establishing them governs the relationship to the Crown and the firm. For this reason, section 61(1), read in relation to section 62(2), would automatically replace only those "oil or gas rights or prospects thereof acquired or vested in relation to Canada lands"²⁵⁴ that flow from the Regulations and are not included, expressly or by implication, in the permits

²⁴⁸ See *Bulmer v. The Queen*, 3 Can. Exch. 184 (1893), *aff'd*, 23 S.C.R. 488; *Confederation Broadcasting (Ottawa) Ltd. v. C.R.T.C.*, 1971 S.C.R. 906; and *Roncarelli v. Duplessis*, 1959 S.C.R. 121.

²⁴⁹ Can. Stat., ch. 81, § 61(1) (1980-81).

²⁵⁰ *Id.*

²⁵¹ *Id.* § 62(2).

²⁵² Canada Oil and Gas Act, Can. Stat., ch. 81, § 30 (1980-81).

²⁵³ *Id.* § 61(1).

²⁵⁴ Canada Oil and Gas Land Regulations, Con. Reg. Can., ch. 1518 (1978).

themselves. In other words, only purely statutory rights, rather than contractual rights flowing from the instruments, are replaced. Insofar as rights or interests are derived from contract, these rights and interests are subject to the negotiation and application scheme established by the new Act from sections 63 to 73.

Two provisions of the Act that relate to the back-in scheme affecting the rights and interests acquired pursuant to the old regime are contained in sections 27 and 29. These provisions state:

[Section 27.]

(1) "Crown Share" means the share reserved to Her Majesty in right of Canada under subsections (2) and (3).

(2) Subject to subsection 62(5), there is hereby reserved to Her Majesty in right of Canada, and the Minister of Energy, Mines and Resources on Her behalf shall hold, a twenty-five percent share

(a) in an interest provided under this Act in respect of Canada lands that were Crown reserve lands immediately prior to the creation of the interest; and

(b) in the first interest provided in respect of the relevant Canada lands under any Sections 63, 64 and 66.

(3) Subject to being disposed of pursuant to section 32, the share of Her Majesty in right of Canada under subsection (2) is reserved out of any interest that succeeds the interest out of which it was previously reserved.²⁵⁵

[Section 29.]

(1) Where a Crown share is reserved in any interest, the share that would, but for any such reservation, be held in that interest by each interest holding other than the Minister on behalf of Her Majesty in right of Canada shall be reduced by the product of the Crown share so reserved and the percentage equivalent of the quotient obtained by dividing the share of each such other interest holding by the aggregate of all such shares.

(2) Subject to subsections (3) and (4), where a Crown share is reserved in an eligible interest, each other interest holder shall be paid an amount equal to twenty-five per cent of the pre-1981 eligible investment of that other interest holder.²⁵⁶

Again, as a matter of statutory construction, there is an argument to be made that this provision does not apply to the existing rights acquired under the old Regulations and that it is contemplated that the actual position of the Crown in relation to those rights can be negotiated with the Minister pursuant to section 63 of the Act.

If the courts construe the Act to make a confiscatory taking of a firm's rights and interests, as opposed to the rigid position being taken by the Minister, then the Act itself may be challenged as an attempt by the Crown to impose unilateral contractual change upon the firm. Aided by

²⁵⁵ Can. Stat., ch. 81, § 27 (1980-81).

²⁵⁶ *Id.* § 29.

section 61(2) which bars "any right to claim or receive any compensation, damages, indemnity or other form of relief . . . for any acquired, vested or future right or entitlement or any prospect thereof that is replaced or otherwise affected by this Act, or for any duty or liability imposed on that party by this Act,"²⁵⁷ the Act precludes Crown liability for such breach. These provisions would then constitute a unilateral change of the terms of the contract between the firm and the Crown.²⁵⁸ Under general principles of contract law, a firm would have a cause of action to recover damages for a breach of contract. In this case, the Act itself, particularly sections 61(1), 27 and 29 as provisions effecting unilateral changes, would constitute the breach of contract.

The scope of a breach of contract remedy against the Crown in Right of Canada under the Act can be elucidated by considering the possible defenses of the Crown against an action that may be brought by a firm. The Crown may argue that the objective of the Act cannot be defeated by an action based on a "breach" of contract. An answer to this argument is that the Act is not being sought to be defeated by an action for damages, and there is no inconsistency between liability for damages and the Act being given full force and effect. In *The Journal Publishing Co. v. The King*,²⁵⁹ an Order-in-Council that revoked an Order-in-Council authorizing the lease agreement was found to constitute a breach of the lease agreement. There is no valid distinction between an Order-in-Council authorized by a statute and a statute in this regard. Another possible and inter-related argument that the Crown can raise is that the Government of Canada cannot, through the permits under the old regime, "by contract hamper its freedom of action in matters which concern the welfare of the state."²⁶⁰ The Crown would rely on the judgment of the Privy Council in *Attorney General of British Columbia v. Esquimalt and Nanaimo Ry. Co.*²⁶¹ Although in that case the Court did not apply the proposition, it could be argued in reply that the decision was based on a finding of fact as to whether the section of the statute in question constituted an offer, rather than on a rule that the Crown is free in all cases to legislate itself out of its contracts. The Crown's freedom to exercise its discretionary powers for the public good is not hampered by a liability for damages on the basis of breach of contract; it is so hampered only in cases where the relief sought is specific performance. Accordingly, this privilege does not excuse a breach; all it deflects is the nature of the remedy (specific per-

²⁵⁷ *Id.* § 61(2).

²⁵⁸ Although the new Act should not be interpreted to prejudice acquired rights and interests, *Phillips v. Eyre*, 6 L.R.Q.B. 1, 23 (1870); *Upper Canada College v. Smith*, [1920] 61 S.C.R. 413, the assumption made and the language of § 61(2) leave no room for the application of this doctrine of construction.

²⁵⁹ 1930 Ex. C.R. 197.

²⁶⁰ *Rederiaktiebolaget Amphitrite v. The King*, [1921] 3 K.B. 500, 503.

²⁶¹ [1950] 1 D.L.R. 305.

formance) that can be made against the Crown.²⁶² In any event, this rule had been subjected to universal criticism, and it is doubtful that the courts in Canada will follow it today.²⁶³

Another argument for the Crown to deflect liability is to rely on section 61(2),²⁶⁴ quoted above, which denies any right to claim for damages. If the court finds that the Crown commits a breach of contract by making a unilateral change of its contract, it should follow that it would find it no less a breach if the Crown makes a unilateral change accompanied by a statutory bar to claim damages. Three arguments can be advanced under Canadian law. First, it could be argued that section 61(2) does not contemplate a "contractual" right, but only a "right, entitlement or prospect thereof" that the Act can unilaterally replace or affect.²⁶⁵ Section 61(2), being legislation that takes away rights, should be strictly construed.²⁶⁶ Accordingly, section 61(2) should be confined to those cases where a purely statutory right or entitlement is conferred. Second, it could be argued that section 61(2) speaks of "replacement" or "affecting"; accordingly, it does not include cases, as in the case of sections 27 and 29, where a "taking" by the Crown of an interest occurs.²⁶⁷ A "replacement" presupposes a substitution of one right for another, and "affecting" contemplates that the right remains undiminished, but its exercise by the rightholder may be limited as to time and place. Section 27 and 29, on the other hand, diminish the share of the firm, and do not only "affect" it. To the extent of the diminution and acquisition of the share by the Crown, there is a "taking" of property. The legislative history of the Act, the National Energy Program and various statements of the Minister of Energy, Mines and Resources, especially those made before the Senate Committee, amply establish that the objective of sections 27 and 29 is to give the Crown a share in the interest which it does not presently have, and not to replace or to affect rights of permit holders under the old regime. Third, the Supreme Court of Canada has established the rule which, though established in relation to an *ultra vires* statute, could be argued to apply to this case: the Crown may not legislate itself out of a liability.

Two decisions of the Supreme Court of Canada that considered this principle in constitutional law deserve to be considered. In *British Columbia Power Corp. v. British Columbia Electric Co.*,²⁶⁸ Chief Justice

²⁶² See S. WADDAMS, *THE LAW OF CONTRACT* 400 (1977).

²⁶³ For instance, the Supreme Court of Canada in *Esquimalt v. Nanaimo Ry.*, [1949] 3 D.L.R. 343, unanimously assumed that the statute removing the exemption can constitute a breach of the contract. In fact, even the Privy Council in this case assumed that the statute removing the exemption would constitute a breach.

²⁶⁴ Can. Stat., ch. 81, § 61(2) (1980-81).

²⁶⁵ *Id.*

²⁶⁶ See *Colet v. The Queen*, [1981] 1 S.C.R. 2, 10.

²⁶⁷ Can. Stat., ch. 81, §§ 27, 29 (1980-81).

²⁶⁸ 1962 S.C.R. 642.

Kerwin stated:

Counsel contends, however, that the Court has no jurisdiction to make a receivership order in order that the assets may be preserved pending the determination of those issues because, it is said, such an order cannot be made which would affect the property or interests of the Crown. In a federal system, where legislative authority is divided, as are also the prerogatives of the Crown, as between the Dominion and the Provinces, it is my view that it is not open to the Crown, either in right of Canada or of a Province, to claim a Crown immunity based upon an interest in certain property, where its very interest in that property depends completely and solely on the validity of the legislation which it has itself passes, if there is a reasonable doubt as to whether such legislation is constitutionally valid. To permit it to do so would be to enable it, by the assertion of right claimed under legislation which is beyond its powers, to achieve the same results as if the legislation were valid. In a federal system it appears to me that, in such circumstances, the Court has the same jurisdiction to preserve assets whose title is dependent on the validity of the legislation as it has to determine the validity of the legislation itself.²⁶⁹

In *Amax Potash Ltd. v. Saskatchewan*,²⁷⁰ the Government of Saskatchewan attempted to bar the recovery of taxes paid pursuant to a law whose constitutionality was under attack by invoking section 5(7) of the Saskatchewan Proceedings Against the Crown Act.²⁷¹ It argued that, pursuant to sections 92(13), (14) and (16) of the Constitution Act, 1867, the provincial legislature can expand or contract the scope of litigation against the Crown as it pleases and that section 5(7) of the Saskatchewan Act was dismissed by the Supreme Court of Canada. The Supreme Court held section 5(7) itself invalid. Justice Dickson stated:

Section 5(7) of The Proceedings against the Crown Act, in my opinion, has much broader implications than mere Crown immunity. In the present context, it directly concerns the right to tax. It affects, therefore, the division of powers under The British North America Act, 1867. It also brings into question the right of a Province, or the federal Parliament for that matter, to act in violation of the Canadian Constitution. Since it is manifest that if either the federal Parliament or a provincial Legislature can tax beyond the limit of its powers, and by prior or ex post facto legislation give itself immunity from such illegal act, it could readily place itself in the same position as if the act had been done within proper constitutional limits. To allow moneys collected under compulsion, pursuant to an ultra vires statute, to be retained would be tantamount to allowing the provincial Legislature to do indirectly what it could not do directly, and by covert means to impose illegal burdens.

The principle governing this appeal can be shortly and simply expressed in these terms: if a statute is found to be ultra vires the legisla-

²⁶⁹ *Id.* at 644-45.

²⁷⁰ [1977] 2 S.C.R. 576.

²⁷¹ SASK. REV. STAT., ch. 87 (1965).

ture which enacted it, legislation which would have the effect of attaching legal consequences to acts done pursuant to that invalid law must equally be *ultra vires* the legislature which enacted it, legislation which would have the effect of attaching legal consequences to acts done pursuant to that invalid law must equally be *ultra vires* because it relates to the same subject matter as that which was involved in the prior legislation. If a state cannot take by unconstitutional means it cannot retain by unconstitutional means. The same thought found expression in the headnote to the Antill case, *supra*, in these words:

[T]he immunity accorded by that Act (The Barring Act of 1954) to the unlawful exactions was as offensive to the Constitution as the unlawful exactions themselves.²⁷²

There is a constitutional, albeit weak, argument that could be mounted against section 61(2).²⁷³ It could be contended that matters of damages arising from contracts relate to the general law of contract, hence, a matter of civil rights and property that is properly within the competence of a provincial legislature. Section 61(2), insofar as it deprives the firm of a right to recover damages, is *ultra vires* the Parliament of Canada. The weakness of this argument is that the property right in issue relates to the offshore, an area which is not "within a province." Accordingly, section 92(13) of the Constitution Act, 1867, which confers upon the province the competence to legislate in relation to "Civil Rights and Property in a Province," does not apply so as to invalidate section 61(2). Further, it could be argued that if the matter of damages is indeed a matter of civil rights and property in a province, section 61(2) merely "incidentally" affects civil rights and property. In itself, it was validly enacted by Parliament as an exercise of its legislative competence in relation to offshore, in relation to interprovincial and extra-provincial undertakings, and in relation to the peace, order and good government of Canada.

As a corollary to the breach of contract approach, it could be argued that the back-in provisions of the *Canada Oil and Gas Act* constitute a "taking" which has been held by the courts in numerous cases to result to a liability by the Crown to compensation. In *Manitoba Fisheries Ltd. v. The Queen*,²⁷⁴ the Fresh Water Fish Marketing Act²⁷⁵ gave exclusive right to carry on business in the fish exporting industry in Manitoba, was unable to continue its business without a license, and no license had been issued. The Supreme Court of Canada held that the plaintiff was entitled to compensation. Justice Ritchie quoted with approval Lord Radcliffe's speech in *Belfast Corp. v. O.D. Cars Ltd.*:²⁷⁶

²⁷² [1977] 2 S.C.R. at 590.

²⁷³ Can. Stat., ch. 81, § 61(2) (1980-81).

²⁷⁴ 88 D.L.R.3d 462 (1978).

²⁷⁵ CAN. REV. STAT., ch. F-13 (1970), as amended by Can. Stat., ch. 10, § 50 (1976-77).

²⁷⁶ 1960 A.C. 490, as quoted in 88 D.L.R.3d 462, 468.

"On the one hand, there would be the general principle, accepted by the legislature and scrupulously defended by the courts, that the title to property or the enjoyment of its possession was not to be compulsorily acquired from a subject unless full compensation was afforded in its place. Acquisition of title or possession was 'taking.' Aspects of this principle are found in the rules of statutory interpretation devised by the courts, which required the presence of the most explicit words before an acquisition could be held to be sanctioned by an Act of Parliament without full compensation being provided, or imported an intention to give compensation and machinery for assessing it into any Act of Parliament that did not positively exclude it. This vigilance to see that the subject's rights to property were protected, so far as was consistent with the requirements of expropriation of what was previously enjoyed in specie, was regarded as an important guarantee of individual liberty. It would be a mistake to look on it as representing any conflict between the legislature and the courts. The principle was, generally speaking, common to both. . . . Once it is accepted that the loss of the goodwill of the appellant's business which was brought about by the Act and by the setting up of the Corporation was a loss of property and that the same goodwill was by statutory compulsion acquired by the federal authority, it seems to me to follow that the appellant was deprived of property which was acquired by the Crown."

In this case, it cannot, therefore, be seriously questioned that the firm, to the extent of the 25 percent share, is "deprived of property which was acquired by the Crown." The unilateral reduction of the firm's share constitutes the breach of the contract and attracts liability for damages.²⁷⁷

D. A Strategy to Challenge the Compulsory License to Import Under Section 41(4) of the Patent Act: Relief Under the Canadian Charter of Rights and Freedoms

Compulsory licensing to import food and medicine under section 41(4) of the Patent Act was introduced in Canada in 1969. This provision was introduced, after the publication of a report on the high cost of drugs in Canada, in order to reduce the drug prices. In practice, the effect of this provision has been to undermine the value of the property right of the inventor and the patentee. Canada has not been a vigorous innovator in terms of invention, and almost all patents in medicine have been obtained by foreign companies. Accordingly, the compulsory license to import has, in practice, operated to diminish the value of the properties of foreign inventors and patentees in Canada. In the manner in which it is being administered by the Commissioner of Patents today, compulsory licensing to import is accomplished by a contract between the Commissioner and the licensee that had the effect of disposing of the property right of the owner of the invention at a nominal rate of royalty. In its

²⁷⁷ *Id.* at 523, as quoted in 88 D.L.R.3d at 468.

essentials, compulsory licensing is a taking of property by the Government of Canada, acting through the Commissioner, not for the benefit of the public, but for the benefit of a private person, the licensee. The pharmaceutical industry has been the major victim of the provisions of section 41(4):

Where, in the case of any patent for an invention intended or capable of being used for medicine or for the preparation or production of medicine, an application is made by any person for a license to do one or more of the following things as specified in the application, namely:

(a) where the invention is a process, to use the invention for the preparation or production of medicine, import any medicine in the preparation or production of which the invention has been used or sell any medicine in the preparation or production of which the invention has been used, or

(b) where the invention is other than a process, to import, make, use or sell the invention for medicine or for the preparation or production of medicine,

the Commissioner shall grant to the applicant a license to do the things specified in the application except such, if any, of those things in respect of which he sees good reason not to grant such a license; and, in settling the terms of the license and fixing the amount of royalty or other considerations payable, the Commissioner shall have regard to the desirability of making the medicine available to the public at the lowest possible price consistent with giving to the patentee due reward for the research leading to the invention and for such other factors as may be prescribed.²⁷⁸

To challenge this provision based on the Charter, two preliminary issues arise: firstly, whether a person whose patent has been the subject matter of a compulsory license has any standing to challenge section 41(4); and, secondly, assuming that the challenge is successful, whether the compulsory license granted before April 17, 1982 could be nullified.

The Supreme Court of Canada has established in *Thorson v. Attorney General of Canada*,²⁷⁹ and *Nova Scotia Board of Censors v. McNeil*²⁸⁰ and *Borowski v. Minister of Justice of Canada*²⁸¹ that the standing to raise a constitutional question should not be tested by the principles that obtain in ordinary civil litigation. It was held that even a taxpayer, who may not be directly affected by the sanction under the statute, has standing to challenge the validity of a statute. Accordingly, a person whose interest is directly harmed by compulsory licensing, such as the shareholders of the company that owns the patent or its parent company, and the individual inventors have the standing to mount a challenge under the Charter. It is, of course, a wholly different question

²⁷⁸ CAN. REV. STAT., ch. P-4, § 41(4) (1970).

²⁷⁹ [1975] 1 S.C.R. 138.

²⁸⁰ [1976] 2 S.C.R. 265.

²⁸¹ 39 N.R. 331 (1982).

whether the particular provision enshrining the right or freedom could be invoked by the party invoking it. In this regard, it is necessary to note that the Charter recognizes certain rights and freedoms as belonging only to natural persons whereas other rights and freedoms are available to both corporations and natural persons.

One of the pressing issues is whether the compulsory license granted before April 17, 1982 could be nullified. Since 1969, many compulsory licenses under section 41(4) of the Patent Act have been granted by the Commissioner. It is, therefore, of immediate interest to the investor to be able to challenge existing compulsory licenses. The continuing existence of the compulsory license provides a basis for an argument to have it declared ineffective from April 17, 1982, the date when the Charter took effect. The courts could be urged not to *continue* to give effect to an existing statute, whose continuation constitutes a breach of the Charter. There is an analogy between a continuing detention which, though legal before April 17, 1982, has since then become illegal, for instance, because it violated the detention provisions of section 9 of the Charter. A distinction between a "retroactive," "retrospective" and "prospective" operation of a statute has been adopted in Canada, and the distinction can be applied to the analysis of the Charter. Although a retroactive relief in this case may not be granted in that the past transactions of the licensee relating to the compulsory license before April 17, 1982, can no longer be reversed, an order which denies to the licensee the ability to deal with the patent as of April 17, 1982, is simply attaching a new consequence to the compulsory license, and is retrospective in character.²⁸²

As to the kind of remedy that a challenging party should seek, an investor may urge the court to grant the remedy under section 24 of the Charter. Section 24 states: "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."²⁸³ It will be noted that in order for the Court to grant the remedy, a person has to prove that his rights or freedoms under the Charter were infringed or denied. The first question, therefore, is who may launch the action and claim that his Charter rights were infringed or denied by the compulsory license.

Not every person has the capacity to invoke the protection of the Charter. As earlier stated, some rights can only be invoked by natural persons, some by both natural and artificial persons, and others only by citizens and/or permanent residents of Canada. A corporate patentee cannot, for instance, invoke section 6 of the Charter protecting mobility rights. The person challenging the compulsory license has to consider, therefore, what specific provision of the Charter would be infringed by the continuation of the compulsory license. The most promising provision

²⁸² Compare *Nova v. Amoco Canada Petroleum Co.*, [1981] 2 S.C.R. 437.

²⁸³ Charter, § 24(1).

is undoubtedly section 7 of the Charter. Section 7 of the Charter, which protects the right to life, liberty and security of the person, confers the protection to "everyone."²⁸⁴ The term "everyone" has been held to include corporations as well.²⁸⁵ Any shareholders, whether directly or indirectly holding an interest in the corporation, who are Canadian citizens or residents also have the capacity to invoke the relevant provisions of the Charter. Accordingly, the corporation and the Canadian citizens and residents, who have direct and indirect economic interest in the corporation have the capacity to invoke the relevant provisions of the Charter.

It must be noted that unlike the United States Constitution, the Charter does not *expressly* protect the right and security of property. At the writing of the Charter, the protection of economic and property rights was deleted at the instance of the New Democratic Party. The question, therefore, is whether this right is nonetheless protected in spite of the absence of express language to this effect. It could be argued that the absence of an express protection of a property right is without significance since the right to property is included in the broader concepts of "life" and "liberty" in section 7.²⁸⁶ The distinction between personal rights and property rights which underlies the contrary view is erroneous. Property does not have rights; only people have rights. The position of Justice Stewart in *Lynch v. Household Finance Corp.*²⁸⁷ could be adopted in the construction of section 7 of the charter:

[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less the right to speak or the right to travel, is, in truth, a "personal" right, whether the "property" in question be a welfare check, a home or savings account. In fact, a fundamental interdependence exists between the right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.²⁸⁸

This position is supported by section 6 of the Charter: "[E]very citizen of Canada and every person who has the status of permanent resident of Canada has the right²⁸⁹ . . . to pursue the gaining of a livelihood in any province."²⁹⁰ The above provision implies clearly that the right "to gain a livelihood"²⁹¹ is protected by the Charter. By enshrining the right to mo-

²⁸⁴ *Id.* § 7.

²⁸⁵ See *Re Balderstone v. The Queen*, 143 D.L.R.3d 671, 678 (1982), and *Southam Inc. v. Hunter*, 136 D.L.R.3d 133 (Alta. Sup. Ct. 1982), *aff'd sub. nom.* *Southam Inc. v. Director of Investigation*, [1983] 3 W.W.R. 385 (Alta. Ct. App.).

²⁸⁶ Charter, § 7.

²⁸⁷ 405 U.S. 538 (1972).

²⁸⁸ *Id.* at 552.

²⁸⁹ Charter, § 6(2).

²⁹⁰ *Id.* § 6(2)(b).

²⁹¹ *Id.*

bility in the pursuit of the gaining of a livelihood, the Charter must be assumed to have protected the pursuit of the gaining of a livelihood itself, of which the right to mobility is but a means. Section 7 is the appropriate provision in which the right to the gaining of livelihood is enshrined. For this reason, the right to life and liberty guaranteed by section 7 cannot be taken to mean simply physical "life" and "liberty." The deprivation of the right to exercise a profession, to employ one's income and to pursue cultural or social values are as much deprivation of life as the summary execution of a person. "Life" in the Charter must be taken to include cultural, economic, social and political, as well as physical, life. To take the contrary view is to confine the Charter to very narrow limits, thus making it virtually useless. Several cases have recognized that section 7 can apply to property rights.²⁹²

One difficulty that the party challenging the compulsory license would encounter is to demonstrate that the continuation of the compulsory license is *in fact* a deprivation of life and liberty. This difficulty could be met by considering what section 41(4),²⁹³ effectively accomplishes. As earlier stated, the compulsory license under section 41(4) is, in effect, a contract entered into by the Commissioner with the licensee and subsequently imposed by the patentee. A license is a contractual grant of a right, and it is compulsory in that it is made against the objection, or without the consent, of the patentee. In this case, therefore, the liberty of the patentee to deal with his property is exercised by the Commissioner under terms that the Commissioner decides. The effect of section 41(4) is to deny the patentee the freedom of contract that the patentee possesses as a result of his ownership of the patent. The compulsory license could also be argued as a deprivation on the ground that the royalty fixed by the statute and normally established by the Commissioner is clearly inadequate. Section 41(4) authorizes compensation that relates only to a reimbursement of the cost of research, but not for a reasonable return on this cost and related expense of the patentee that could, in its totality, be considered as the patentee's investment. It is now well-established that the right to a fair and reasonable compensation for one's investment is a common law right.²⁹⁴

One question in relation to the use of section 7 of the Charter in this case is a question that has been encountered in the United States: Is the due process clause a substantive or merely a procedural concept? In other words, could section 7 of the Charter invalidate a statute such as section

²⁹² See *The Queen in Right of New Brunswick v. Fisherman's Wharf*, 135 D.L.R.3d 307, 315 (N.B.Q.B. 1982), *aff'd*, 144 D.L.R.3d 21 (1983); *Re Seaway Trust Co. v. The Queen in Right of Ontario*, 143 D.L.R.3d 623, 630 (Ont. High Ct. 1983); *R. v. Carriere*, 32 C.R.3d 117 (Ont. Prov. Ct. 1983).

²⁹³ CAN. REV. STAT., ch. P-4, § 41(4) (1970).

²⁹⁴ *British Columbia Electric Ry. v. Public Utilities Comm'n*, 1960 S.C.R. 837; *Fisherman's Wharf Ltd.*, 135 D.L.R.3d at 316, *aff'd*, 144 D.L.R.3d 21.

41(4) of the Patent Act or is it effective only in relation to procedural matters. The distinction between *substantive* and *procedural* due process has not been considered by the Supreme Court of Canada, and it is, at this time, difficult to state how the Court will construe its mandate. Some indication may be gathered from the judgment of Chief Justice Laskin in *Curr v. The Queen*²⁹⁵ which considered the due process clause in the Canadian Bill of Rights.²⁹⁶ He stated:

Insofar as § 223 may be regarded, in the light of § 223(2), as having specific substantive effect in itself, § 1(a) does not make it inoperative. Assuming that "except by due process of law" provides a means of controlling substantive federal legislation, compelling reasons ought to be advanced to justify the Court in this case to employ a statutory, as contrasted with a constitutional, jurisdiction to deny operative effect to a substantive measure duly enacted by Parliament. Those reasons must relate to objective and manageable standards by which a Court should be guided. Neither reasons for underlying standards were offered here. The very large words of § 1(a), tempered by a phrase ("except by due process of Law") whose original English meaning has been overlaid by American constitutional imperatives, signal extreme caution to me when asked to apply them in negation of substantive legislation validly enacted by a Parliament in which the major role is played by elected representatives of the people. Certainly, in the present case, a holding that the enactment of § 223 has infringed the appellant's right to the security of his person without due process of law must be grounded on more than a substitution of a personal judgment for that of Parliament. There is nothing in the record, by way of evidence or admissible extrinsic material, upon which such a holding could be supported. I am, moreover, of the opinion that it is within the scope of judicial notice to recognize that Parliament has acted in a matter that is of great social concern, that is the human and economic cost of highway accidents arising from drunk driving, in enacting § 223 and related provisions of the Criminal Code. Even where this Court is asked to pass on the constitutional validity of legislation, it knows that it must resist making the wisdom of impugned legislation the test of its constitutionality. A fortiori is this so where it is measuring legislation by a statutory standard, the result of which may make federal enactments inoperative.²⁹⁷

With the standard provided by section 7 of the Charter, the Court could be more willing to determine whether section 41(4) of the Patent Act is fair or unfair and thus decide its validity. Sections 32 and 52 of the Charter clearly imply that even Parliament is subject to the test of fundamental justice and that laws that breach fundamental justice are invalid. Section 32 states that the Charter applies to "the Parliament and government of Canada" in respect to "all matters within the authority of Parlia-

²⁹⁵ 1972 S.C.R. 889.

²⁹⁶ Can. Stat., ch. 44 (1960).

²⁹⁷ *Curr*, 1972 S.C.R. at 890-91.

ment.”²⁹⁸ Nowhere in the Charter is there a provision that states that section 7 does not apply to Parliament. Section 52 states, “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”²⁹⁹ Clearly section 41(4) of the Patent Act is a “law” within the meaning of section 52 and section 7 of the Charter is a part of the Constitution of Canada. It would require a very strained reading of sections 32 and 52 of the Charter to reach a conclusion that Parliament is not subject to the test of fundamental justice and that a statute cannot breach section 7. Such a position creates a radical exception from the language of the Charter. Accordingly, an abrogation of the fundamental justice in this case probably would not be implied; the Court is likely to insist that it must be based on clear and emphatic language in the Charter.³⁰⁰

In our view, Section 7 of the Charter contains two rights: a substantive right directed against the making of statutes or regulations, and a procedural right which guarantees that any action relating to these rights could only be pursued in accordance with the principles of fundamental justice. In our view, any doubt that has arisen in American constitutional law in relation to the due process clause of the Fourteenth Amendment does not have any bearing on the construction of section 7 of the Charter. The difference in the wording between the due process clause of the Fourteenth Amendment of the U.S. Constitution and section 7 of the Canadian Charter is clear. The Fourteenth Amendment states: “[N]or shall any State deprive any person of life, liberty or property without due process of law.”³⁰¹ It is clear from this clause that the object of the guarantee is not itself “life, liberty or property” but the due process of law. The Canadian Charter, on the other hand, states: “Everyone has the right to life, liberty and security of the person *and* the right not to be deprived thereof except in accordance with the principles of fundamental justice.”³⁰² This provision clearly protects life, liberty and the security of the person independently of the method of deprivation and does not simply ensure the compliance with fundamental justice. For this reason, a statute or regulation made by or under the authority of Parliament insofar as it infringes or denies the right of life, liberty and security of the person would yield to the sanction under section 24 of the Charter. In this case, to sustain the statute or regulation, it must be shown, pursuant to section 1 of the Charter, that the limitation imposed is reasonable and demonstrably justified in a free and democratic society.

²⁹⁸ Charter, § 32(1)(a).

²⁹⁹ *Id.* § 52(1).

³⁰⁰ Compare *Tomko v. Nova Scotia Labour Relations Bd.*, 9 N.S.R.2d 277, 300 (1974), *aff'd*, 7 N.R. 317 (Can. 1975).

³⁰¹ U.S. CONST. amend. XIV.

³⁰² Charter, § 7.

The last question arising from the challenge to section 41(4) of the Patent Act³⁰³ that invites consideration is whether this provision could be sustained nonetheless on the ground that (a) the deprivation is in accordance with the principles of fundamental justice as provided in section 7; or, (b) it is a reasonable limitation supported by section 1 of the Charter. In Canada, it is likely that the courts will consider the rights and freedoms under the Charter as not absolute.³⁰⁴ The Charter expressly recognizes that these rights and freedoms yield to certain limitations.³⁰⁵ With respect to section 7, the Charter recognizes that a deprivation of life, liberty and security of person may be made provided it is made in accordance with the principles of fundamental justice. Accordingly, the question is as follows: Is the deprivation of the freedom to deal with the invention as property and of the property itself (arising from the inadequate royalty normally paid pursuant to the compulsory license) in accordance with the principles of fundamental justice?

What is meant by the concept "fundamental justice" in the Charter is not clear. In the field of administrative law, this term has been taken as synonymous with the concept of "natural justice."³⁰⁶ This position is correct only if one accepts the view that section 7 provides only a guarantee against procedural unfairness. As shown above, this position cannot be supported. In our opinion, respect for a common law right, such as the freedom of contract and to full compensation, could be argued as aspects of fundamental justice. If freedom is to be denied, it must at least be in response to an abuse of that freedom or a significant social objective. In this case, unlike the compulsory licensing provided in section 67 of the Patent Act³⁰⁷ and section 29 of the Combines Investigation Act,³⁰⁸ compulsory licensing could issue even in the absence of abuse of the patent. Further, there is evidence today to indicate that compulsory licensing does not achieve the social objective of maximizing competition between the originator and the generic house. On the contrary, the adverse effect of compulsory licensing to the manufacturing and research of drugs in Canada, and to employment and the pursuit of science has extended the burden of compulsory licensing far beyond its stated objective. As to compensation, it is clear that section 41(4) of the Patent Act attempts to take the property of the patentee and then transfers it to the licensee at inadequate compensation. It is now well established that full compensation is a maxim of fundamental justice.³⁰⁹

There is an argument to be made that the limitation imposed by sec-

³⁰³ CAN. REV. STAT., ch. P-4, § 41(4) (1970).

³⁰⁴ Compare *Robertson v. The Queen*, 1963 S.C.R. 651.

³⁰⁵ Charter, § 1.

³⁰⁶ See W. TARNOPOLSKY, *THE CANADIAN BILL OF RIGHTS* 264 (1975).

³⁰⁷ CAN. REV. STAT., ch. P-4, § 67 (1970).

³⁰⁸ Can Stat., ch. 28, § 9 (1976-77). Original version at CAN. REV. STAT., ch. C-23 (1970).

³⁰⁹ See *Belfast Corp.*, 1960 A.C. at 523, quoted with approval by the Supreme Court of Canada in *Manitoba Fisheries Ltd. v. The Queen*, 88 D.L.R.3d 462 (1978).

tion 41(4) also fails to comply with the permissible limitation provided in section 1 of the Charter. Section 1 states: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."³¹⁰

It must be noted that the burden of showing whether section 41(4) of the Patent Act complies with section 1 of the Charter lies with the Crown, and has been held to be a "significant burden."³¹¹ To sustain the validity of section 41(4) of the Patent Act, the Government of Canada must demonstrate: (a) that the denial of the freedom of contract and the deprivation of the property with inadequate compensation is reasonable, and (b) that it is demonstrably justified in a free and democratic society. With respect to the first requirement, the discussion on fundamental justice above shows that this limitation goes far beyond what can be supported by any social objective. Furthermore, the absence of adequate compensation, which could have been easily provided consistently with the achievement of the social objective, removes this provision from the realm of reasonableness. A limitation can only be reasonable if it qualifies no further than necessarily required to realized the legitimate purposes of the statute. Furthermore, the Charter requires that any measure within the power of government to adopt to minimize the negative impact of the statute must be adopted. In this case, the measure takes the property on another person who then becomes a competitor of the patentee. The measure, in effect, destroys the basic equality of persons and seeks to intervene in the functioning of the free market, not to benefit any particular disadvantaged group, but a competitor.

With respect to the second requirement, it is clear that the security of the property and entitlement to just compensation are basic maxims of a free and democratic society. For instance, the Universal Declaration of Human Rights, Article 17, states that "[e]veryone has the right to own property alone as well as in association with others" and that "[n]o one shall be arbitrarily deprived of his property."³¹² The Fifth Amendment and the Fourteenth Amendment of the U.S. Constitution protect the property from deprivation without due process of law.³¹³ Article 14 of the Basic Law of the Federal Republic of Germany guarantees the right of property and that "compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected."³¹⁴ The Canadian Bill of Rights itself, section 1(a) recognizes the "right of individuals [here the stockholders] to life, liberty . . . and en-

³¹⁰ Charter, § 1.

³¹¹ See *Re Federal Republic of Germany v. Rauca*, 41 Ont. 2d 225, 241, 246 (Ct. App. 1983).

³¹² G.A. Res. 217A, U.N. Doc. A/810, at 710 (1948).

³¹³ U.S. CONST. amends. V, XIV.

³¹⁴ Basic Law of the Federal Republic of Germany, art. 14(3) (1971).

joyment of property" and not to be deprived thereof except by due process of law.³¹⁵

Accordingly, the free and democratic societies have recognized that property can only be taken with fair compensation, whether that property is owned by a national or a foreigner. The European Convention for the Protection of Human Rights and Fundamental Freedoms,³¹⁶ the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights,³¹⁷ and various international decisions such as the *Anglo-Iranian Co.*³¹⁸ case, and *Rights of Nationals of the United States of America in Morocco*³¹⁹ establish this principle as a general principle in every civilized legal system. There is, therefore, a strong case to be made to show that section 41(4) of the Patent Act cannot be justified under section 1 of the Charter.

E. A Strategy to Challenge Government Interference in International Trade under the Import and Export Permits Act: Relief Under Tort Law

As stated earlier, section 3(1) of the Crown Liability Act³²⁰ provides that the Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable. In this section, the use of the rules of tort liability to attack a wrongful exercise of Government power under the Export and Import Permits Act³²¹ to interfere with international trade will be explored. While the discussion below centers on controls of imports into Canada, the same principles apply to exports from Canada.

The Export and Import Permits Act illustrates the creeping expansion of a broadly worded grant of discretionary power to the Governor in Council and the Minister of Industry, Trade and Commerce in response to pressure from a strong protectionist lobby of an inefficient and competitively moribund industry: the textile industry in Canada. The Export and Import Permits Act was originally enacted in 1947 to replace, on a temporary basis, what was then an established scheme of control under the provisions of the National Emergency Powers Act.³²² This statute, a response to the needs of the war effort in the course of World War II, controlled the trade in certain strategic materials during and following

³¹⁵ Can. Stat., ch. 44, § 1(a) (1960).

³¹⁶ Summary Records of the 1,496th Meeting, [1966] Y.B. Int'l L. Comm'n 419, U.N. Doc. A/6546/1966.

³¹⁷ Summary Records of the 1,496th Meeting, [1966] Y.B. Int'l L. Comm'n 423, U.N. Doc. A/6546/1966.

³¹⁸ 1952 I.C.J. 93.

³¹⁹ 1952 I.C.J. 176.

³²⁰ CAN. REV. STAT., ch. c-38 (1970).

³²¹ CAN. REV. STAT., ch. E-17 (1970).

³²² National Emergency Powers Act, 1945, 9 & 10 Geo. 6, ch. 49.

the war. Its original military and defense scheme changed into a protectionist weapon for import restraint when it was re-enacted in 1952 and has since then operated as a part of Canada's trading control barriers. From the short list of military or strategic materials that were subject to control, the discretionary power of the Governor in Council and the Minister has expanded the list to include textiles, chickens, shoes and a myriad of consumer goods. Today, this Act operates as the major measure for the imposition of quantitative restraint, often in breach of Canada's obligations under the General Agreement of Tariff and Trade and bilateral trade agreements.³²³

There is no general law prohibiting importation of articles into Canada. The Export and Import Permits Act³²⁴ does not create a general prohibition: it creates only a prohibition for goods specifically included in the import control list. Freedom of trade is a general principle of the common law and the common law has always guarded jealously against any interference with trade.³²⁵ The wrongful government action taken to limit or prohibit one's common law right to import into Canada constitutes one or all of the following torts:

- (a) Interference with the business of the Importer;
- (b) Interference with the execution by the Importer of its contracts with its customers;
- (c) Intimidation, namely, the threat to commit a tort, and, physically to prevent entry of the products to be imported; and
- (d) Negligent causing of harm.

For purposes of analysis, the administrative action of the Minister and his subordinate should be distinguished from the rule-making action of the Governor in Council. Any act of direct interference with imports where a permit is not required or the refusal to issue a permit where all the conditions for the issuance have been satisfied would constitute a tortious act. The making of an invalid Order-in-Council by the Governor in Council or enforcing an alleged international agreement that has not been implemented as part of Canadian law can also constitute a tort.

Unlawful administrative action would constitute an actionable tort if: (a) the servants of the Crown exceed their statutory authority; or, (b) the servants have done acts which they were not at liberty to commit. An authoritative statement of the rule regarding exceeding statutory authority in Canada was pronounced by Judge Sullivan in *Gershman v. Manitoba Vegetable Producers Marketing Board*.³²⁶

³²³ General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, art. VI(3), 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

³²⁴ CAN. REV. STAT., ch. E-17 (1970).

³²⁵ *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, 1894 A.C. 535, 565 (Lord Macnaughten); see also *Case of Monopolies*, 11 Co. Rep. 84b, 86b, 88a (1602). *R. v. Turnith*, 1 Burr. 2, 6 (1756) (Lord Mansfield); *R. v. Maddox*, 2 Salk. 613 (1706), which described 5 Eliz. 1, ch. 1 (1562-63), forbidding exercise of certain trades a "hard law."

³²⁶ [1976] 4 W.W.R. 406 (Man. Ct. App.).

The principle that public bodies must not use their powers for purposes incompatible with the purposes envisaged by the statute under which they derive such powers cannot be in doubt in Canada since the landmark case of *Roncarelli v. Duplessis*, [1959] S.C.R. 121, 16 D.L.R.2d 689. Since that case, it is clear that a citizen who suffers damage as a result of flagrant abuse of public power aimed at him has the right to an award of damages in a civil action in tort.³²⁷

In *Gershman*, the court considered the action by the board of blacklisting the Gershman family illegal and beyond the scope of its authority. It then found that the abuse of public power by the board was the "unlawful means" that form the basis of a tort:

In the case before us, the facts as found by the learned trial Judge and the evidence considered apart from such findings show that the defendant Board, without legal justification and for a wrongful purpose, cause the Stella Company and its shareholders to terminate their relationships with the plaintiff and caused knowingly substantial damage to the plaintiff in his business. The Board was not acting in the good faith exercises of any of its official powers.³²⁸

Excess of authority will also be found where there is an unfairness in the actions taken. For instance, in *Abbott v. Sullivan*,³²⁹ the question of damages resulting from denial of natural justice was considered. The Court stated:

Where some person or body of persons exercising judicial or quasi-judicial functions disregards any of the principles of natural justice which our courts recognize, the court will interfere to protect the party aggrieved. . . . [T]he court will, in my judgment, intervene, either by granting an injunction or by making a declaration if someone is being excluded from the group in defiance of the rules or of the principles often referred to as those of "natural justice."³³⁰

The acts of the servants of the Crown could also be considered unlawful if they were "not at liberty to commit" them. Lord Denning in *Torquay Hotel v. Cousins*³³¹ established this principle as follows: "I have always understood that if one person deliberately interferes with the trade or business of another, and *does so by unlawful means, that is, by an act which he is not at liberty to commit*, then he is acting unlawfully, even though he does not procure or induce any actual breach of contract. If the means are unlawful, that is enough."³³² In *Acrow Ltd. v. Rex*

³²⁷ *Id.* at 415.

³²⁸ *Id.* at 416.

³²⁹ [1952] 1 K.B. 189.

³³⁰ *Id.* at 216.

³³¹ [1969] 2 Ch. 106.

³³² *Id.* at 139.

Chainbelt,³³³ Lord Denning confirmed this rule stating:

I take the principle of law to be that which I stated in *Torquay Hotel Co. v. Cousins*, namely, that if one person, without just cause or excuse, deliberately interferes with the trade or business of another, and does so by unlawful means, that is, by an act which he is not at liberty to commit, then he is acting unlawfully. He is liable in damages; and, in a proper case, an injunction can be granted against him.³³⁴

This rule has been adopted in Canada.³³⁵ One may consider as an example *Central Canada Potash v. Saskatchewan*³³⁶ where the Supreme Court of Canada assumed that the enforcement of an invalid statute by a provincial deputy minister may give rise to a liability in tort. However, in that case, Justice Martland, for the Court, did not find the Crown in right of the province liable for the tort of intimidation on the ground that the evidence did not establish the element of intent.

To provide a factual framework in the application of this analysis it would be useful to take the facts in *Dantex v. The Queen*,³³⁷ a suit for damages in this regard. In *Dantex*, the plaintiff was engaged for a number of years in the business of importing suits from various countries and selling them to retailers-customers in Canada. In 1978, it entered into contracts with these retailer-customers to supply approximately 127,000 units of suits for delivery in 1979. It then entered into a contract with a Philippine manufacturer to produce the suits. The contracts for the purchase of the 127,000 suits were filed with the office within the Department of Industry, Trade and Commerce, charged with administering the Export and Import Permits Act³³⁸ pursuant to the notices provided by that office. Under a bilateral trade agreement between the Philippines and Canada, suits were not subject to quantitative restraint, although some other textile goods were subject to established restraint. After the filing of the contracts, Dantex, in communications with the Philippines and Canadian authorities, confirmed that there were no quantitative limits to the importation of the suits into Canada.

In early 1979, Dantex requested its supplier to forward a shipment of a portion of the suits, and, upon application for permits, the entry of suits as allowed. At the same time, the Crown servants attempted to persuade the Philippines to impose restrictions upon the export of the remaining quantity of suits since it considered the quantity of 127,000 excessive. The Philippine government refused. As a result, Canada established an import limit at 20,000 units of suits from the Philippines, allegedly under the authority of the Arrangement Regarding International Trade in Tex-

³³³ [1971] 3 All E.R. 1175.

³³⁴ *Id.* at 1181.

³³⁵ See *Volkswagen Canada Ltd. v. Spicer*, 91 D.L.R.3d 42 (N.S. Sup. Ct. 1978).

³³⁶ [1979] 1 S.C.R. 42.

³³⁷ *Dantex Woolen Co. v. Minister of Industry, Trade and Commerce*, [1979] 2 F.C. 585.

³³⁸ CAN. REV. STAT., ch. E-17 (1970).

tiles (International Textile Agreement).³³⁹

In Canada, Dantex was subjected to a number of delaying actions while the Crown was persuading the Philippine government to restrict Dantex's imports. The Crown servants rejected an application for permits for a particular shipment. Dantex sued the Department of Industry, Trade and Commerce in the Federal Court of Canada to enjoin the Crown servants from interfering with the free entry of the suits. The Crown defended that the suits, having been included in an import control list by Order-in-Council P.C. 1978-317, were subject to the discretion of the Minister as to whether or not to issue a permit. The Federal Court of Canada held that Order-in-Council 1978-317 was invalid and the suits might be imported into Canada freely. It accordingly granted the injunction.³⁴⁰

Since this decision also demonstrates an approach to judicial review of an Order-in-Council, it is worthwhile quoting some statements in the judgment of the Court:

There is, on the other hand, ample evidence that both these matters were left entirely and exclusively to the Minister or his administrative officers, among whom are the remainder of the respondents, to decide with regard to item 47 how many units should be let into the country at any time as well as from what countries of origin they should be allowed in. There is no evidence whatsoever as to period of the limitation, that is, the length of time during which it is anticipated that the goods in item 47 are to remain on the List or as to any term whatsoever imposed on the existence of those goods on the List.

It appears on the facts, and I so find, that the only thing which has been decided by the Governor in Council is that the goods mentioned in item 47 are to be on the Import Control List. All other decisions relevant to the limitation of their importation have been left to be taken by and

³³⁹ Arrangement Regarding International Trade in Textiles, Dec. 20, 1973, 25 U.S.T. 1001, T.I.A.S. No. 7340.

³⁴⁰ *Dantex Woolen Co.*, [1979] 2 F.C. at 589. The provision of § 5(2), upon which the Governor in Council relied, states:

(2) Where at any time it appears to the satisfaction of the Governor in Council on a report of the Minister made pursuant to

(a) an inquiry made by the Textile and Clothing Board with respect to the importation of any textile and clothing goods within the meaning of the Textile and Clothing Board Act, or

(b) an inquiry made under § 16.1 of the Anti-dumping Act by the Anti-dumping Tribunal in respect of any goods other than textile and clothing goods within the meaning of the Textile and Clothing Board Act

that goods of any kind are being imported or are likely to be imported into Canada at such prices, in such quantities and under such conditions as to cause or threaten serious injury to Canadian producers of like or directly competitive goods, any goods of the same kind may, by order of the Governor in Council, be included on the Import Control List in order to limit the importation of such goods to the extent and for the period that, in the opinion of the Governor in Council, is necessary to prevent or remedy the injury.

implemented by the Minister of industry, Trade and commerce and the other respondents.

Finally, where a statute restricts a basic rights recognized by common law and is capable of two interpretations, the strict interpretation, that is, an interpretation against the restriction and in favour of the citizen must be given the statute. Since such a rule of interpretation is used against legislative enactments of the Governor in Council, which complete restrictive legislation.

Orders in council issued pursuant to the Export and Import Permits Act are capable of greatly restricting and limiting the fundamental right of every citizen to fully engage in legitimate trade and business as he may deem fit. Its application in many cases might well remove from an importer, his sole means of livelihood or cause him very considerable losses.

Unlike some legislation such as customs and excise which is intended to provide a more permanent type of protection for local industries and producers, the Export and Import Permits Act, from its tenor, obviously appears to be legislation enacted to permit controls for a limited time and for specific and very limited purposes and by reason of the existence of certain special circumstances and conditions or international commitments or undertakings which outweigh the rights of certain citizens to trade as they wish. Notwithstanding its effect, which is potentially highly restrictive, Parliament has chosen to delegate to the Governor in Council power to legislate in this area by enacting section 5, because of the time ordinarily required to enact detailed regulatory legislation in both Houses of Parliament and because of constantly changing international arrangements and commitments and continually shifting conditions of the international market and of Canadian production and markets. Parliament, however, has also attempted to provide the strict limitations to which I have already referred, on the exercise of that power.

Any delegation by the Governor in Council to the Minister of the legislative power to decide for how long and to what extent importation of any goods must be restricted and subject to control, is *ultra vires* and of no effect. There is evidence on which one could conclude that there has been implicit if not explicit delegation, because of the complete silence of the Orders in Council as to the above-mentioned matters and of the actions and decisions of the Minister and the other respondents in those areas specifically reserved to the Governor in Council by the legislation. In any event, even if one is not to conclude that there was implicit delegation of that power, there is, on the part of the Governor in Council, a failure to properly include item 47 on the *Import Control List* in accordance with the intent, purpose and express direction of the enabling legislation. The item must therefore be considered as not having been validly put on the List. There is also on the part of the respondents, an improper assumption of the legislative authority which Parliament has delegated to the Governor in Council and which the latter is not authorized to delegate to any other authority.³⁴¹

³⁴¹ *Id.* at 593, 594-95.

The Crown appealed the judgment of the Federal Court, and, pending the appeal, the Governor in Council revoked Order-in-Council P.C. 1978-317 and substituted Order-in-Council P.C. 1979-1356. In order to assure to the Crown servants a maximum discretion which they could not otherwise exercise, they relied on another provision of the Export and Import Permits Act in making their recommendation for the issuance of Order-in-Council P.C. 1979-1356. This Provision states:

The Governor in Council may establish a list of goods, to be called an Import Control List, including therein any article the import of which he deems it necessary to control for any of the following purposes, namely:

. . . .

(c) to implement an intergovernmental arrangement or commitment and where any goods are included in the list for the purpose of ensuring supply or distribution of goods subject to allocation by intergovernmental arrangement or for the purpose of implementing an intergovernmental arrangement or commitment, a statement of the effect or a summary of the arrangement or commitment, if it has not previously been laid before Parliament, shall be laid before Parliament not later than fifteen days after the Order of the Governor in Council including those goods in the list as published in the Canada Gazette pursuant to the Statutory Instruments Act or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting.³⁴²

As a result, Dantex was effectively prevented from further importation, resulting in its bankruptcy. Dantex then sued the Crown for damages arising from its bankruptcy and for a declaration that Order-in-Council P.C. 1979-1356 was invalid.

An analysis of justification offered by the Crown for its action and for resisting the damage claim of Dantex demonstrates the interplay of the procedural and substantive rules in a tort action against the Crown. Essentially, the Crown argued as justification its power to interfere with the importation of the suits on the following grounds:

1. The power to restrain the import was a matter of discretion, and the Crown servants were applying a "Government Policy."
2. The International Textile Agreement conferred power upon the Crown to create the quantitative restraint and apply it in this case.
3. Order-in-Council P.C. 1979-1356 was a valid exercise of power to implement bilateral agreements with other countries.

In Canada, a government policy announced to the public, *a fortiori* a secret policy, has no legal or operative effect.³⁴³ It does not have the status of law or regulation but is only a guideline for the public and those who exercise statutory discretion.³⁴⁴ Accordingly, the policy in itself,

³⁴² CAN. REV. STAT., ch. E-17, § 5 (1970).

³⁴³ Demers v. Attorney General of Canada, 1974 F.C. 270, 274 (Jackett, C.J.).

³⁴⁴ Capital Cities Communications Inc. v. C.R.T.C., 81 D.L.R.3d 609, 628-29 (1978).

apart from its statutory basis, cannot be invoked to prejudice the common-law right of Dantex.³⁴⁵

The Crown's defense based on the International Textile Agreement³⁴⁶ faces a formidable difficulty on a principle of constitutional law which will be found unusual by American lawyers. In Canada, if an international agreement has not been incorporated into the laws of Canada by appropriate implementing legislation, it cannot affect the common law right of any person. Under our system of government, and as a part of the Law and Custom of the Constitution,³⁴⁷ the power to make and ratify an international agreement lies exclusively with the executive, or, in other words, the Crown.³⁴⁸ The Crown, however, has no power to change the rights of persons; only Parliament or a legislature has that power by exercising its legislative authority. For this reason, if the international agreement alters the law of Canada or affects the private rights of individuals, the agreement is ineffective unless Parliament enacts legislation to implement the treaty or to authorize the Crown to enforce this specific international agreement. Implementation, accordingly, is exclusively within the competence of Parliament.³⁴⁹ In addition, the power of Parliament to implement an international agreement is not an all embracing power. Under current doctrine developed by the Supreme Court of Canada, it can implement a treaty only if the subject matter of the treaty comes within its legislative competence.³⁵⁰

The basic right of a person to import into Canada goods of any kind is recognized by common law. If this right is to be limited by an international agreement, it can only be limited by legislation implementing the international agreement, not by the international agreement *simpliciter*.

Implementation of an international agreement has been held to require legislation *specific* to the agreement: General legislation is not enough. In *MacDonald v. Vapour Canada Ltd.*,³⁵¹ the Supreme Court of Canada considered the requirements of implementing legislation. The Chief Justice found that in spite of the similarity in language between article 10 *bis* of the International Convention of the Protection of Industrial Property of March 20, 1883,³⁵² and section 7(e) of the Trade Marks

³⁴⁵ See also *Richardson v. Mellish*, 2 Bing. 229, 252 (1824) (Burrough J.); *John Mildmay*, 1938 A.C.L. 38, [1937] 3 All E.R. 402, 424 (Lord Wright).

³⁴⁶ Arrangement Regarding International Trade in Textiles, *supra* note 339.

³⁴⁷ See W. ANSON, *LAW AND CUSTOM OF THE CONSTITUTION* 109 (3d ed. 1908).

³⁴⁸ 2 W. ANSON, *LAW AND CUSTOM OF THE CONSTITUTION* 131 (4th ed. 1935).

³⁴⁹ *Parlement Belge*, 4 P.D. 126, 152 (1879). See the statement of Lord Atkin in *Attorney General of Canada v. Attorney General of Ontario*, 1937 A.C. 326, 347-48.

³⁵⁰ This position may not be as solidly established today. See *MacDonald v. Vapour Canada Ltd.*, [1977] 2 S.C.R. 134.

³⁵¹ *Id.*

³⁵² Convention for International Protection of Industrial Property, Mar. 20, 1883, reprinted in 2 *TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE U.S. AND OTHER POWERS, 1776-1909*, at 1935 (Malloy ed. 1910).

Act,³⁵³ and reference to the Convention in the interpretation section of the Trade Marks Act, the Trade Marks Act cannot be considered adequate implementing legislation. In the course of his opinion, he stated:

In my opinion, assuming Parliament has power to pass legislation implementing a treaty or convention . . . the exercise of that power must be manifested in the implementing legislation and not left to inference. The Courts should be able to say, on the basis of the expression of the legislation, that it is implementing legislation. Of course, even so, a question may arise whether the legislation does or does not go beyond the obligations of the treaty or convention.

Express reference existed in the various pieces of legislation which were the subject of the decision of this Court and of the Privy Council

In the absence of an express declaration in the Trade Marks Act that the Act as a whole, including section 7, or itself was enacted in implementation of the obligations of the Convention, above referred to, I would not hold that there has been a valid exercise in this case of the federal treaty or convention implementing power, assuming such a power exists in the present case.³⁵⁴

For this reason, the International Textile Agreement,³⁵⁵ in itself, cannot provide authority on the Crown servants to interfere with the importation of suits in issue in *Dantex*.

The reliance on Order-in-Council P.C. 1979-1356 would also fail. The alleged intergovernmental arrangements to confer upon the Governor in Council the authority to issue this Order-in-Council were themselves not implemented by legislation. Hence, they yield to the same analytical difficulty as the International Textile Agreement. The Governor in Council has no power to make laws, and an Order-in-Council does not have the status of a statute. Accordingly, an Order-in-Council passed by the Governor in Council would not constitute implementing legislation, and the Governor in Council has no power to bind citizens where it so acts without the support of a statute. The Chief Justice made this clear in the *Anti-Inflation Act Reference*³⁵⁶ as follows:

Rather what is at issue is the right of the Crown, although duly protected by an order in council, to bind its subjects in the Province to laws not enacted by the legislature nor made applicable to such subjects by adoption under authorizing legislation. There is no principle in this country, as there is not in Great Britain, that the Crown may legislate by proclamation or order in council to bind citizens where it so acts without the support of the Legislature: see Dicey, *Law of the Constitution* (10th ed.

³⁵³ Can. Stat., ch. 47, § 46 (1981), *original version at* CAN. REV. STAT., ch. T-10 (1970).

³⁵⁴ *Vapour Canada Ltd.*, [1977] 2 S.C.R. at 171-72. See also *Pan American World Airways v. The Queen*, 41 N.R. 230 (1981).

³⁵⁵ Arrangement Regarding International Trade in Textiles, *supra* note 339.

³⁵⁶ [1976] 2 S.C.R. at 373.

1959), pp. 50-54.³⁵⁷

Neither could section 5(c) of the Export and Import Permits Act be interpreted as a statute authorizing the Governor in Council to implement the alleged bilateral agreements. There is nothing in this provision which satisfies the specificity requirement stated by Chief Justice Laskin in *Vapour Canada Ltd.*³⁵⁸ In addition, a statute which purports to authorize the Governor in Council generally to make regulations implementing an unspecified international agreement would also be invalid since it would constitute a complete abdication to the Governor in Council of a legislative power which Parliament alone can exercise, that is, the right to implement an international agreement. The federal legislative scheme of the Constitution Act, 1867 contemplates legislation by Parliament, not by the Governor in Council. To abdicate the power to implement a treaty to the Governor in Council is a significant alteration of this legislative scheme.³⁵⁹

The enforcement of an international agreement without statutory implementation in *Dantex* could be challenged as an actionable tort. One authority for such position is *Walker v. Baird*,³⁶⁰ where Lord Herschell, speaking for the Privy Council, stated:

In their Lordships' opinion this judgment was clearly right, unless the defendant's acts can be justified on the ground that they were done by the authority of the Crown for the purpose of enforcing obedience to a treaty or agreement entered into between Her Majesty and a foreign power. The suggestion that they can be justified as acts of State, or that the Court is not competent to inquire into a matter involving the construction of treaties and other acts of State, is wholly untenable.

The learned Attorney-General, who argued the case before their Lordships on behalf of the appellant, conceded that he could not maintain the proposition that the Crown could sanction an invasion by its officers of the rights of private individuals whenever it was necessary in order to compel obedience to the provisions of a treaty.³⁶¹

V. CONCLUSION

The Canadian legal system provides ample protection against wrongful federal government statutory and regulatory action. The procedural mechanism is provided by the Federal Court Act and it includes the traditional proceedings for the judicial review of administrative action, declaratory proceedings and an ordinary civil action. The decisions of the

³⁵⁷ *Id.* at 433.

³⁵⁸ *Vapour Canada Ltd.*, [1977] 2 S.C.R. at 134.

³⁵⁹ *Re Gray*, 57 S.C.R. 150 (1918) (Fitzpatrick, C.J.); *In re Initiative and Referendum Act*, 1919 A.C. 935 (Lord Haldane).

³⁶⁰ 1892 A.C. 491.

³⁶¹ *Id.* at 496-97.

Federal Court may be appealed to the Supreme Court of Canada. The substantive rules that may be invoked to safeguard the property rights of investors are broadly articulated in the Constitution of Canada, especially in the Canadian Charter of Rights and Freedoms, in statutes of general or special application and in the common law. The common law rules include not only those relating to grounds for challenging administrative action but also rules in the law of contract and the law of tort. The availability of these procedures and substantive guarantees should be considered to put in perspective the concern of the American investor which often is largely inspired by overly-dramatized discussions of recent government measures relating to foreign investment, the energy industry, industrial property and United States-Canada trade relations generally.