

2004

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Citation Details

Robin Elliot, "British Columbia's Tobacco Litigation and the Rule of Law" in Patricia Hughes & Patrick A Molinari eds, *Participatory Justice In A Global Economy: The New Rule Of Law* (Montreal: Canadian Institute for the Administration of Justice, 2004) 459-472.

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British Columbia's Tobacco Litigation and the Rule of Law

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I think it appropriate to begin by telling you that I was invited to participate in this panel because of a concern on the part of the conference organizers that, since there are obviously two sides to the dispute between a number of major Canadian and foreign companies engaged in the manufacture of tobacco products and the Government of British Columbia about the constitutionality of British Columbia's *Tobacco Damages and Health Care Costs Recovery Act*,¹ it would be better for you to hear from representatives of both sides rather than just one. Ross Clark, counsel for one of the foreign companies, Philip Morris Inc., has succinctly summarized the position taken by his client on the issue with which it has been primarily concerned, which is whether the Act should be struck down because it offends the rule of law.² I have been involved on the Government's side of this dispute for a number of years now, in fact since the enactment of the current Act's predecessor in 1997, and can therefore appropriately be viewed today as the representative of that side. In that capacity, I will attempt to summarize equally succinctly the position the Government has taken in response to Philip Morris' submissions on that issue.

It is important at the outset to note, as Mr. Clark has done in his paper, that the rule of law is not the only basis upon which the tobacco manufacturers are attacking the constitutionality of British Columbia's legislation. They are also attacking it on the basis of the principle of judicial independence and federalism grounds, specifically in the latter regard on the ground that the Act exceeds the territorial limitations under which provincial legislatures are constitutionally permitted to legislate. While the manufacturers have so far not prevailed on their rule of law and judicial independence arguments, they have prevailed—in relation to both

¹ S.B.C. 2000, c. 30

² D.R. CLARK, "British Columbia Tobacco Litigation and the Rule of Law" in this volume.

the current statute and its predecessor—on their federalism argument.³ I am not going to speak today to the other grounds advanced by the manufacturers in their attack; I am going to limit myself, as Mr. Clark has done, to the rule of law ground. In respect of that ground, I should also note that Philip Morris' rule of law argument differs somewhat from the rule of law argument advanced by the Canadian companies involved in the litigation. While some of what I say has application to both lines of argument, I am going to limit myself to the line of argument advanced by Philip Morris, since it is that line of argument that Mr. Clark has summarized for you today.

I also want to alert you to the fact that, while I have a representative function to perform here today, I am not going to limit what I say to a statement of the Government's position on the issues raised by Mr. Clark. This is obviously not an appropriate forum for a dry run of part of the appeal that is scheduled to take place in late November in the British Columbia Court of Appeal.⁴ Moreover, it would be impossible in the short time available to me to do justice to the lengthy and multifaceted set of arguments that the Government will be making on that appeal on the rule of law issues that have been raised by Philip Morris.

While I am going to provide you with an outline of the Government's position on those issues, I am also going to make some general comments about what seems to me to be the most important and most interesting of the questions raised by the rule of law-based challenge to the validity of British Columbia's legislation, at least from an academic standpoint. That question is whether the so-called organizing and underlying principles of Canada's constitution—like the rule of law—can be used as independent bases to strike down otherwise valid federal and provincial legislation. While nothing I say in the course of making these comments will be inconsistent with the position the Government of British Columbia is taking on this question in our case, it is important to note that I make them not in my capacity as a representative of that government, but as a legal scholar who has for some time had and continues to have a genuine academic interest in the issue.

³ See *JTI—Macdonald v. B.C. (A.-G.)* (2000), 184 D.L.R. (4th) 335 (B.C.S.C.) and *HMTQ v. Imperial Tobacco Ltd.*, 2003 BCSC 877.

⁴ The Court heard the appeal in November 2003 and reserved judgment.

I. THE RULE OF LAW AND THE TOBACCO LITIGATION IN B.C.

I begin then, wearing my representative hat, with an outline of the position the Government of British Columbia has taken in response to the rule of law arguments that Philip Morris has been advancing in its attack on the *Tobacco Damages and Health Care Costs Recovery Act*. Those arguments have been summarized in some detail by Mr. Clark in his paper, and I do not propose to repeat that summary here, beyond noting that the arguments generally are to the effect that (a) the rule of law as a legal principle should be understood to mean certain things—for example, that legislation must be general in its application, that it must be prospective in its application, and that it must treat all subjects equally and provide for fair trials; (b) the Act fails to meet these requirements; and (c) for that reason, it should be declared unconstitutional and struck down.

The position the Government has taken in response to these arguments varies somewhat, of course, as one moves from one of the proposed meanings of the rule of law to another. For example, the Government has responded to the equality and fair trial branches of the argument on their merits—that is, by contending that the fact that the Act deals only with claims against the tobacco industry can be easily explained and justified, and that any trial of the aggregate cause of action for which the Act provides satisfies the fair trial standard. However, the Government’s position does incorporate a number of general propositions, and for the purposes of this paper, I am going to limit myself to them.

Those general propositions can be summarized as follows:

(1) The Supreme Court of Canada, in cases like the *Manitoba Language Rights Reference*,⁵ has defined the rule of law for legal purposes (and apart from the related but distinct principle of constitutionalism) in terms that suggest it has three and only three elements, namely

(a) a requirement “that the law [be] supreme over the acts of both government and private persons”⁶—or, in terms that express this principle more broadly, that the law applies equally to all those to whom by its terms it applies;

⁵ [1985] 1 S.C.R. 721. See also *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

⁶ *Reference re Secession of Quebec*, *ibid.* at 258.

(b) a guarantee “to the citizens and residents of the country [of] a stable, predictable and ordered society in which to conduct their affairs,”⁷ reflecting what in the *Manitoba Language Rights Reference* the Court referred to as “the more general principle of normative order”;⁸ and

(c) the need for a basis in law for any action on the part of the state or its officials which limits individual liberty, or the requirement that “the relationship between the state and the individual must be regulated by law,”⁹

none of which elements, properly understood, is engaged in this case.

- (2) While it may be the case, as Mr. Clark contends, that there is considerable support in the scholarly writings of political, social and legal theorists for an expanded understanding of the rule of law—one that might well sustain some if not all of the interpretations of it advanced by Philip Morris—and some support for such an understanding in the jurisprudence of other nations,¹⁰ there is very little if any meaningful support for such an expanded understanding in our own jurisprudence.
- (3) If accepted as valid, and given the effect contended for, most of the extended meanings of the rule of law advanced by Philip Morris—notably those grounded in concerns about the right to equality, the right not to be subjected to retrospective laws and the right to a fair trial—would render superfluous provisions of the *Charter* that provide explicit textual recognition of such rights.
- (4) At the same time, these extended meanings, if accepted and given the effect contended for, would provide constitutional protection to interests that the drafters of the *Charter* for the most part very deliberately chose not to protect—the economic interests of corporations.

⁷ *Ibid.* at 257.

⁸ *Supra* note 5 at 749.

⁹ *Reference re Secession of Quebec*, *supra* note 5 at 257.

¹⁰ Mr. Clark’s contentions in this regard are summarized in his paper.

- (5) Not only would the acceptance of these arguments render a number of *Charter* provisions redundant and provide constitutional protection to interests deliberately left unprotected by the drafters of the *Charter*, it would—because of the “higher standard of justification” aspect of these arguments—produce the anomalous result that the “unwritten” rights contended for would receive a higher level of protection than the rights spelled out in the *Charter* are entitled to receive.
- (6) Even if the rule of law can be understood in the broad terms advanced by Philip Morris, our constitutional jurisprudence overwhelmingly supports the proposition that the rule of law cannot be used as an independent basis upon which to attack the validity of federal or provincial legislation.¹¹

Most of these propositions are, I hope, self-explanatory. However, two of them, I acknowledge, are not, and I would like to add a gloss to the mere statement of them to make their meaning clearer. One is the first, which sets forth the Government’s position with respect to the content and scope of the rule of law as a legal principle under Canada’s constitution. That position is that the content and scope have been authoritatively determined to include three distinct elements. The first of these elements, which was featured prominently in Professor Dicey’s classic 19th century formulation of the rule of law,¹² is that the law must be applied equally to all those to whom *by its terms* it applies. The equality with which this element of the rule of law is concerned, important as it is, is limited to the manner in which laws are *applied*. It does not reach the *content* of the laws—that is, it does not provide a standard against which the content of the laws can be measured, and, if found wanting, struck down. Putting it slightly differently, this conception of equality takes the content of the law as given. It is for this reason that the Government is asserting that this conception of equality—and hence this element of the rule of law—can be of no assistance to Philip Morris and the other tobacco manufacturers in

¹¹ See e.g. *Bacon v. Saskatchewan Crop Insurance Corp.*, [1999] 11 W.W.R. 51 (Sask. C.A.) (leave to appeal to S.C.C. dismissed June 1st, 2000); *Johnson v. B.C. (Securities Commission)* (1999), 67 B.C.L.R. (3d) 145 (S.C.); *Westergard-Thorpe v. Canada (A.-G.)* (2000), 183 D.L.R. (4th) 453 (F.C.A.D.); *JTI-Macdonald Corp. v. B.C. (A.-G.)*, *supra* note 3; *Samson Indian Nation and Band v. Canada*, [2003] F.C.J. No. 1238.

¹² A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London Macmillan, 1897) at 85ff.

our case. Their complaint is not with the manner in which British Columbia's legislation is being or might be applied, but with the content of that legislation.

The second of the elements of the rule of law said by the Government to form part of the meaning of that principle—the need for a “normative order”—is of even more limited scope than the first. It was endorsed by the Supreme Court of Canada in a case in which the Court had concluded that every statute that the legislature of Manitoba had enacted since the early 1890s—including statutes relating to the constitution, maintenance and operation of the legislative, executive and judicial branches of government—was unconstitutional because it had been enacted in English only. The Court recognized that, were it to issue a simple declaration to that effect, most if not all of the institutions of government in that province would disappear and a state of legal chaos would result. Not surprisingly, that was not a result that appealed to the Court, which decided instead to suspend its declaration of invalidity for a “reasonable period of time” to give the government of Manitoba time to translate its legislation into French. In support of taking this remedial route, which guaranteed the people of Manitoba the continuing existence of their institutions of government and kept the existing statutory law in place for at least a while, the Court invoked the rule of law, and in particular the notion that the rule of law required a basic level of “normative order”. It is clear—and I do not think the tobacco manufacturers are contesting this—that this understanding of the rule of law cannot provide them with any assistance in their attack on British Columbia's legislation. The enactment of that legislation can hardly be said to put at risk the existence of a basic level of normative order in that province. If anything, the situation they confront is one of too much, not too little, normative order.

The last of the three elements of the rule of law that the Government contends comprises the accepted scope and content of that principle in Canada is the requirement that the state be able to provide a basis in law for any action its agents and officials take that threatens individual liberty. In the Government's submission, it is clear that the tobacco manufacturers can derive no assistance from this element either. Their complaint is not that there is no basis in law for the Government's action against them—the bringing of the special kind of lawsuit for which the Act provides—but that they do not like the law that provides the Government with its basis for taking that action.

The second proposition from the above list that requires some elaboration is the third, that relating to the implications of Philip Morris' rule of law arguments for some of the provisions of the *Charter*, notably sections 7 and 15. I limit myself here to the implications of the equality branch of Philip Morris' arguments for the latter of these provisions. Section 15 of the *Charter* has been interpreted by the Supreme Court of Canada to provide a very limited form of protection to the right to equality. Under the analytical framework established in 1999 in *Law v. Canada*, the governing authority on section 15, claimants invoking that provision have to establish (a) that the impugned legislation results in differential treatment either because by its terms it creates a formal distinction or because it has a disparate impact on a disadvantaged group; (b) that that differential treatment is based on one or more of the grounds enumerated in section 15 (*e.g.* sex, race, age, etc.) or a ground analogous thereto; and (c) that that differential treatment constitutes discrimination, in the sense that it offends human dignity.¹³ The courts have also held—and this is implicit within the *Law* framework—that section 15 can only be relied upon by natural persons.

In essence, the Government's position is that, if the much broader conception of the right to equality advanced by Philip Morris were to be accepted, the limitations on that right as it is expressed in section 15 would be easily circumvented. Under that conception, corporations would be entitled to impugn the validity of legislation, they would be able to do so regardless of the ground on which the differential treatment complained of was based, and without any need to establish that that differential treatment offended human dignity. In fact, section 15 would very quickly become redundant. A conception of equality that would have this effect hardly seems plausible, let alone appealing.

The Government of British Columbia's position in relation to Philip Morris' rule of law based attack was, as Mr. Clark has acknowledged, accepted by Justice Holmes, the trial judge in both of the constitutional actions that they have launched against the 1997 and the 2000 versions of the legislation. By the time this article is published, we will know whether the Court of Appeal of British Columbia has also accepted it. At least to this point, however, the Government's position has prevailed.

¹³ [1999] 1 S.C.R. 497 at para. 88.

II. THE LARGER ISSUE

Having set out in summary form the Government's position on the rule of law arguments advanced by Philip Morris, let me turn now, wearing my academic hat, to a consideration of the larger issue that those arguments raise: whether or not one can use the organizing or underlying principles of our Constitution as independent bases to impugn the validity of federal and provincial legislation. That issue is, of course, raised in a very direct way by Philip Morris' rule of law arguments and I have explained in proposition (6) above, the manner in which the Government has dealt with it in that specific context—essentially on the basis of the existing jurisprudence. I now wish to address it in a more general way—general both in the sense of being concerned about not just one of these principles but all of them, and in the sense of discussing the issue at a level of some abstraction. This issue is obviously a complex one, and one which cannot be dealt with fully in the time remaining to me this morning. But I can, I think, set out in summary form my own views with respect to it.

That summary begins with the observation that, in thinking about this issue, it is important to remember that the list of these organizing principles is a long one. According to recent pronouncements by the Supreme Court of Canada in cases like *Reference re Remuneration of Provincial Court Judges*¹⁴ and the *Quebec Secession Reference*, it includes, at the very least—and in addition to the rule of law—judicial independence, democracy, federalism, protection of minorities, separation of powers, interprovincial comity, and freedom of political expression. That list may become even longer with the passage of time. In fact, as I pointed out in an article I wrote on this issue a few years ago,¹⁵ support can already be said to exist within the body of our constitutional jurisprudence for a number of other principles being included as well, notably the special role of our superior courts and the integrity of the nation state. To ask whether the organizing principles of our constitution can be used as independent bases for striking down legislation is not, therefore, to ask whether one or two or even three such principles can be so used. It is to ask whether a relatively large number of them—at least ten by my count already—can be so used. For that reason alone, the issue

¹⁴ [1997] 3 S.C.R. 3.

¹⁵ R.M. Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2004) 80 Can. Bar Rev. 67.

must be seen to be one not of minor but of major proportions, and to warrant very careful consideration.

The issue of whether these organizing principles of our constitution can be used to strike down legislation must be said to raise issues of fundamental theoretical importance, issues that go to the heart of both our system of democratic self-government and the principle of constitutionalism. One of the features of that system that is clearly engaged by this question is the legitimacy under our constitution of judicial review—that is, the legitimacy of the use by our courts of the power to hold of no force or effect legislation that has been enacted by our democratically elected representatives at either the federal or provincial level of government. As traditionally understood, and as traditionally defended, the legitimacy of judicial review in this country has been grounded in, and seen to be dependent on, a reliance by the courts on some part of the text of what I like to call our capital “C” Constitution—what is now made up of the *Constitution Acts, 1867-1982* and a few other enactments of special constitutional significance such as the *Statute of Westminster, 1931* (such grounding, it is worth noting, being a necessary but not sufficient condition of the legitimacy of judicial review in particular contexts). For the courts to use this power without being able to rely on some textual provision of the Constitution must, on a traditional understanding, be said to be illegitimate, or at least to require a new justification. Such a new justification, I should note, I have not yet seen, either in the growing body of jurisprudence surrounding these organizing principles, or in the academic literature commenting thereon.

It might be thought that this traditional approach to the legitimacy of judicial review would lead inexorably to the conclusion that it is illegitimate for the courts to strike down legislation on the ground that it offends one or more of the organizing or underlying constitutional principles. Such a view would be based on the assumption—a not unreasonable assumption, I might add, at least at first blush—that these principles are derived from sources external to the text of the Constitution. Is that assumption valid? I do not believe that it is. In my view, there is good reason to believe that *some at least of these principles can be grounded, not in considerations that lie completely outside the text of the Constitution, but in that text*. I would give as an example of such a principle that of judicial independence, at least within the superior courts of this country. In my view, so confined, that principle can be said to be implicit in the combined effect of sections 99 and 100 of the *Constitution Act, 1867*, particularly when those provisions are read in light of the

admonition in the preamble of that instrument that Canada is to have “a Constitution similar in Principle to that of the United Kingdom”. Read in that light, sections 99 and 100, protecting, as they do, two of the “core elements” of judicial independence, 16 can and should be seen to constitute an attempt by the drafters of the *Constitution Act, 1867* to entrench that principle within our Constitution. (Such a reading of those provisions would make it possible for someone to challenge on the basis of that principle legislation that, for example, required superior court judges to get the approval of a government official before releasing their reasons for judgment in civil cases involving the government. Neither section 99 nor section 100 could be said to speak directly to the obvious problems with such legislation. Nor, for that matter, could sections 7 and 11(d) of the *Charter*.)

The critical point from the standpoint of constitutional theory is that, if the existence of a particular principle can, applying generally accepted principles of constitutional interpretation, be said to be implied by, or implicit within, one or more provisions of the text of the Constitution, then the invocation of that principle as a basis for striking down legislation is legitimate because it is ultimately the text of the Constitution that is being relied upon. By contrast, however, if an organizing or underlying principle cannot be said to be implied by, or implicit within, one or more provisions of the text of the Constitution—as would be true in my view of a principle that is solely derived from the preamble to the *Constitution Act, 1867*—then it cannot be legitimate for the courts to rely upon it, and it alone, to strike down legislation (although it may well be legitimate for the courts to rely upon it for a number of other purposes, including shedding light on the manner in which provisions of the text of the Constitution should be interpreted).

One of the important implications of this way of approaching this question—some elements of which, I should note, can be found in Justice La Forest’s reasons for judgment in the *Provincial Court Judges* case¹⁷—is that it obliges us to ask, not whether any and all of the organizing or underlying principles can be used as distinct bases upon which legislation can be struck down, but whether a *particular* such principle can be so used. In fact, under this approach it is not only unhelpful but confusing and potentially misleading to ask the more generally worded question.

¹⁶ S. 99 protects security of tenure and s. 100 financial security.

¹⁷ *Supra* note 14.

So much for the theory. What about the practice? Based on the jurisprudence to this point, I think it is clear that our courts—and I would include here the Supreme Court of Canada—are still struggling to come to grips with the question of how the organizing principles of our constitution are to be used. I attribute much of the difficulty they are having to the fact that there is an unfortunate tendency on the part of some of them when they discuss this question to lump all, or at least several, of the principles together, on the apparent assumption that the answer must be the same in respect of all of them. The Supreme Court did this in both the *Reference re Remuneration of Provincial Court Judges* and the *Quebec Secession Reference* (and, I am obliged to confess, in both it asserted, or at least implied, that they could all be used to strike down legislation). But part of the difficulty must be attributed to the fact that there is also an equally unfortunate reluctance to acknowledge and confront the legitimacy issue that the use of these principles to strike down legislation raises. That reluctance, it must be said, is also in evidence in those two references. Only La Forest J., in his minority reasons in the *Reference re Remuneration of Provincial Court Judges*, addresses the issue, and he adopts the same position as I have taken in this paper—that judicial review is only legitimate if it is based on the text of the Constitution. I cannot help but think that, if that issue were addressed more often, the erroneous nature of the assumption that the principles are all of a kind would become apparent, and the jurisprudential picture would become, both for the courts and for us, a good deal clearer.

Fortunately, at least from my standpoint, we now have a growing body of jurisprudence dealing with the use to which *particular* principles can be put. Such a body of jurisprudence exists, for example, with respect to the use to which the rule of law can be put (with the answer generally being, as I noted above, that it *cannot* be used to strike down legislation), another with respect to the use to which judicial independence can be put (with the answer generally—perhaps even consistently—being that it *can* be so used, even when the courts in question are not superior courts).¹⁸ In my view, it is in the process of dealing with claims based on particular principles—as the courts in British Columbia are now doing in the case brought by the tobacco manufacturers against the *Tobacco Damages and Health Care Costs Recovery Act*—that progress is going to be made. And the fact that the courts to this point have shown themselves willing to treat

¹⁸ See e.g. *Mackin v. New Brunswick (Min. of Finance)*, [2002] 1 S.C.R. 405 and *Ell v. Alberta*, [2003] S.C.C. 35, online: QL (SCC).

two of these principles—the rule of law and judicial independence—very differently means that we might well end up with an approach to this issue that bears at least some resemblance to the one for which I have argued here today.