Court File No. 34908

SUPREME COURT OF CANADA
(ON APPEAL FROM THE BRITISH COLUMBIACOURT OF APPEAL)

B E T W E E N:

CONSEIL SCOLAIRE FRANCOPHONE DE LA COLOMBIE-BRITANNIQUE, FÉDÉRATION DES PARENTS FRANCOPHONES DE COLOMBIE-BRITANNIQUE, HÉLÈNE REID, PAUL ROSTAGNO, ANNETTE AZAR-DIEHL, PIERRE MASSICOTTED, LINE BEAUCHEMIN, ALAIN MILOT, MÉLANIE BOUCHER, VALÉRIE WALTERS, CAROLINE BÉDARD, LISE BUITENDYK, ISABELLE CHENAIL, KIM GERRY, LOUISE BALDO, NICOLE LEBLANC, GUY BOURBEAU, SUZANNE MARTIN, LISE SÉGUIN, KIM WILSON, STÉPHANE PERRON, MARIE-NICOLE DUBOIS, BRUNO CALVIGNAC, CARINE HUTCHINSON, JACKIE PALLARD, KATHLEEN BAYZAND, GUY CHAMPOUX, RACHEL CHIRICO, CATE KORINTH, ANN QUARTERMAN, AND CAROLINE ROUSSELLE

Appellants
(Appellants)

- and -

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA AND THE MINISTER OF EDUCATION OF THE PROVINCE OF BRITISH COLUMBIA

Respondents
(Respondents)

- and -

ATTORNEY GENERAL OF ONTARIO, COMMISSIONER OF OFFICIAL LANGUAGES OF CANADA, AND ASSOCIATION DES JURISTES D'EXPRESSION FRANÇAISE DE LA COLOMBIE-BRITANNIQUE

Interveners

MEMORANDUM OF ARGUMENT OF THE INTERVENER, THE ATTORNEY GENERAL OF ONTARIO

(Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND FACTS

A. Overview

1. Since the very first Act passed by the Legislative Assembly of Upper Canada 220 years ago, the legislatures of Ontario and its predecessors have based their statutes on the principle that ***all*** of the laws of England relating to property and civil rights in force on October 15, 1792 were received into Ontario law except those that were inapplicable to local circumstances ***at that time***.

2. The Appellants ask this Court to overturn the well-settled principles that govern the reception of English law and adopt a new test that only those historic English laws which a court believes are applicable and necessary to ***current*** circumstances should continue to be received.

3. Adopting that test would undermine the clear intent of Ontario's legislature in incorporating English law by statute in 1792 and revising the body of received law in 1902. It would replace a rule which provides certainty and finality with one that would lead to a constantly shifting body of received English law. And it would deprive the legislature of its proper role of deciding when and if laws should be amended in light of changing conditions. The Appellant's invitation to change the rules of reception should therefore be declined.

B. Facts

4. Ontario accepts the facts as set out in British Columbia's Factum.

5. The French colony of Canada (which included much of the territory that now comprises Ontario) was ceded to Great Britain by the Treaty of Paris on February 10, 1763. Civil government in the ceded Province of Québec was established by Royal Proclamation on October 7, 1763. Québec's government was put on a statutory footing in 1774.

Treaty of Paris, 10 February 1763, Art. 4

George III, Proclamation, 7 October 1763 (3 Geo. III) ("Royal Proclamation of 1763")

Québec Act, 1774 (UK), 14 Geo. III, c. 83, ss. 1 and 12

6. On December 26, 1791, the Province of Québec was divided into the Provinces of Lower Canada and Upper Canada. Upper Canada and Lower Canada were reunited into a united Province of Canada on February 10, 1841 but retained their separate legal systems. At Confederation, the portion of the united Province of Canada that had previously been Upper Canada became the Province of Ontario.

Constitutional Act, 1791 (UK), 31 Geo. III, c. 31, ss. 1-2 and 48

George III, Proclamation 18 November 1791 (32 Geo. III)

Act of Union 1840 (UK), 3&4 Vict., c. 35, ss. 1-3 and 46-47

Victoria, Proclamation, 5 February 1841 (4 Vict.)

Constitution Act, 1867 (UK), 29&30 Vict., c. 3, ss. 5-6 and 129

PART II – QUESTIONS IN ISSUE

7. Ontario's position is that the reception of English laws took place once and for all on the date of reception in each of the colonies that eventually became part of Canada. All English statutes in force on the date of reception were received into colonial (and thus subsequently into Canadian) law unless they were specifically excluded by statute or were inapplicable to the conditions of the receiving colony ***on the date of reception***.

8. Ontario takes no position on whether the 1731 English Act at issue in this appeal (the "*1731 Act*") was in fact received into British Columbia law, whether it has subsequently been repealed or modified by the British Columbia legislature, or whether it governs the language in which documents filed in court in British Columbia may be written. To the degree legislative provisions do govern the language of court proceedings, however, the courts' inherent jurisdiction cannot be used to allow evidence to be submitted in other languages.

9. Ontario submits that the Appellants should not be allowed to raise constitutional issues for the first time in this Court, particularly where a motion to state constitutional questions was

dismissed. Allowing the Appellants to do so would prejudice the federal, provincial, and territorial Attorneys General, including Ontario. In any event, the revised test for the reception of English statutes proposed by the Appellants undermines, rather than promotes, the unwritten principles incorporated by the Preamble of the *Constitution Act, 1867*.

PART III – ARGUMENT

A. The Applicability of Received English Law to Colonial Conditions Should Be Determined Once and For All As of the Date of Reception

10. At common law, settled colonies like British Columbia received the entire body of English statute law in force on the date of reception, except for those statutes inapplicable to "their own situation and the condition of an ***infant*** colony."

> 1 Bl. Comm. 107 [Emphasis added]
>
> BH McPherson CBE, *The Reception of English Law Abroad* (Brisbane: Supreme Court of Queensland Library, 2007) at 15, 234-55, 305-14, and 363-71

11. Ceded colonies like the Province of Québec kept their pre-existing law until it was changed by Royal prerogative, Imperial legislation, or local legislation. English law was introduced into Québec by the Royal Proclamation of 1763 but the pre-cession French private law was restored by the *Quebec Act, 1774*. The English criminal law, however, was retained.

> McPherson, *supra* at 13-14 and 262-77
>
> Royal Proclamation of 1763
>
> *Quebec Act, 1774*, *supra*, ss. 4, 8, and 11

12. After Québec was divided into Upper Canada and Lower Canada in 1791, the first Act of the Upper Canada legislature repealed the French law restored by the *Quebec Act, 1774* and introduced "the laws of England as the rule for the decision" of "all matters of controversy relative to property and civil rights" as well as the English law of evidence. The 1859

consolidated version of the Act made it clear that the date of reception in Upper Canada was October 15, 1792, the date the Act was given Royal Assent. The Act remains in force today.

> *An Act to repeal certain parts of an Act passed in the Fourteenth Year of His Majesty's Reign, entitled "An Act for making more effectual Provision for the Government of the province of Quebec, in North America, and to introduce the English Law, as the Rule of Decision in all Matters of Controversy relative to Property and Civil Rights*, S.U.C. 1792, c. 1, ss. 1, 3, and 5-6
>
> *An Act respecting Property and Civil Rights*, C.S.U.C. 1859, c. 9, s. 1
>
> *Property and Civil Rights Act*, R.S.O. 1990, c. P.29, s. 1

13. The *Property and Civil Rights Act* has been interpreted, like the common law rule in settled colonies, to not incorporate English statutes "inapplicable to the condition of the colony."

> *Doe Anderson v. Todd* (1845), 2 Q.B. 82 at 86-87 and 90-91

14. The legislature of Ontario and its predecessors have always proceeded on the basis that it was the conditions of Upper Canada in 1792, not the changing circumstances of the colony (and later the province), that determined whether English laws had been received. When local conditions changed, it is the legislature, not the courts, that change the body of received law.

15. In 1800, the legislature decided to move the reception date for criminal statutes forward from October 7, 1763 to September 17, 1792.

> *An Act for the further introduction of the criminal law of England in this province, and for the more effectual punishment of certain offenders*, S.U.C. 1800, c. 1, s. 1

16. After the court in *Doe Anderson v. Todd* determined that the English mortmain statutes had been received, the legislature consistently included exemptions from the received mortmain statutes in corporation acts it passed. The Courts deferred to this legislative recognition of the reception of the English statutes and did not judicially overturn the reception as conditions changed. Instead, it was the legislature that eventually repealed the received English statutes.

> *Whitby (Corporation of) v. Liscombe* (1875), 23 Gr. 1 at 17-18, 21, 27, 31, and 38 (U.C. Ct. of E. & A.)

Macdonell v. Purcell (1884), 23 S.C.R. 101 at 114-15 (Gwynne J. concurring)

Mortmain and Charitable Uses Act, 1902, R.S.O. 1897, c. 333, s. 14 and Sch.

17. That repeal was part of a larger legislative reform of received English law in Ontario. In 1902, the legislature directed the Statute Revision Commissioners to revise and consolidate the received English statutes. The Preamble of the authorizing Act made it clear that the legislature was proceeding on the basis that the reception of English law had been determined by its applicability to the past conditions of Upper Canada, not the current conditions of Ontario:

> WHEREAS under and by virtue of divers Acts of the Provinces of Upper Canada, Canada. and of this Province, certain Imperial Statutes became part of, and were incorporated into, the Statute Law of this Province so far as the same ***were*** applicable to the circumstances thereof; and whereas, ***since*** the incorporation of such Statutes some of the same have become ***obsolete***, or have in effect been superseded by subsequent legislation …
>
> *An Act respecting the Imperial Statutes relating to property and civil rights incorporated into the Statute Law of Ontario,* S.O. 1902, c. 13, Preamble [Emphasis added].

18. Received provisions which appeared to the Statute Revision Commissioners to be of continuing use were reenacted as Ontario law. The corresponding received English laws were then repealed. Eight received English Acts, together with all received Acts relating to marriage or ecclesiastical property, were left unrepealed, unrevised, and unconsolidated. There was no blanket repeal of all received English statutes that were not specifically allowed to remain in force. In Ontario, therefore, the ordinary reception rules continue to apply to received statutes that have not been expressly repealed (including those within federal jurisdiction that cannot be repealed by Ontario).

R.S.O. 1897, cc. 322-42, Schs. A and C, and Appendix

19. The legislature of Ontario has therefore made clear its intent that it, rather than the courts, should determine when received English statutes are no longer suitable to current local conditions. The Appellants, however, argue that the courts should no longer look to the

conditions of the receiving colony on the date of reception to determine whether historic English statutes were applicable to that colony's conditions at that time. Instead, they argue that the courts should only continue to apply historic English statutes if they are "necessary" and "applicable" to current circumstances in any particular province.

20. The weight of authority in the Commonwealth rejects the Appellant's proposed rule for reception of historic English statutes. In *Quan Yick,* the High Court of Australia rejected the suggestion that the application of received English statutes should be determined "by nice inquiries from time to time, as to the progress made by the Colony, in wealth or otherwise":

> Whatever exceptions the rule may or may not admit of, there seems no ground for holding that the question of applicability was to have reference to the future. On the contrary, the meaning seems to me plain; that those laws only should compulsorily be applied which then, at the passing of that Act [the Act establishing the date of reception], could be applied. For the future, as I conceive, a local legislature was created; by which, Statutes not then capable of application were to be introduced, either wholly or in part, as that body might determine.

Similarly, New Zealand's Supreme Court has held that reception dates are "starting points from which the new legal order can evolve from the snapshot of English law at the date nominated."

McPherson, *supra* at 372-82

Quan Yick v. Hinds (1905), 2 C.L.R. 345 at 356, 367-68, and 378 (H.C.A.)

Cadia Holdings Pty Ltd. v. New South Wales, [2010] HCA 27 at para. 23 (French C.J. concurring)

Chamberlains v. Lai, [2006] NZSC 70 at paras. 85-92

21. Australia and New Zealand also demonstrate how, if changes to the rules of reception are needed, legislatures are perfectly capable of making them. The legislatures of Victoria, New South Wales, Queensland, the Australian Capital Territory, and New Zealand have repealed all received English laws except those expressly declared to continue in operation. The fact that Canadian legislatures have not enacted their own Acts to repeal all received English laws except

those that are expressly retained should be taken as an indication that they are content with the existing rules of reception. Judicial modification of those rules is unnecessary and unwarranted.

Imperial Acts Application Act 1922, ss. 1-9 and Schs. 1-2 (Vic) (repealed)

Imperial Acts Application Act 1980, ss. 1-6 and Sch. (Vic)

Imperial Acts Application Act 1969, ss. 1-11 and Schs. 1-3 (NSW)

Imperial Acts Application Act 1984, ss. 1-7 and Schs. 1-3 (Qld)

Imperial Acts Application Act 1986, ss. 1-12 and Schs. 1-2 (ACT) (repealed)

Interpretation Act 1967, s. 7A and 65 and Sch. 1 (ACT) (repealed)

Legislation Act 2001, Part 1.3 and Sch. 1 (ACT)

Imperial Laws Application Act 1988, ss. 1-7 and Schs. 1-2 (NZ)

22. Adopting the test for reception proposed by the Appellants would lead to greater uncertainty as to which English laws have been received. Rather than a single ascertainable point in time, the "conditions of the province" would have to be assessed every time a new court case was brought. The adaptation of laws to changing local conditions is the proper role of the legislature, not the courts. This is particularly the case in ceded provinces like Ontario where the reception of English law was accomplished by statute rather than the common law and where the legislature has subsequently turned its mind to which received English laws should be repealed, which should be replaced by local legislation, and which should be allowed to continue in force.

Watkins v. Olafson, [1989] 2 S.C.R. 750 at 760-61

R. v. Salituro, [1991] 3 S.C.R. 654 at 670

A.Y.S.A. Amateur Youth Soccer Assn. v. Canada Revenue Agency, [2007] 3 S.C.R. 217, 2007 SCC 42 at para. 28

R. (Bancoult) v. Foreign Secretary (No. 2), [2009] 1 A.C. 453 at para. 80 (H.L.) (Lord Rodger of Earlsferry concurring)

B. The Courts' Inherent Jurisdiction to Manage the Court Process and Create Procedural Rule Is Subject to Expressly Conflicting Statutes and Rules

23. In Ontario, the *1731 Act* was received but repealed in 1902 and replaced with local legislation. Since 1978, the use of French in certain circumstances has been expressly authorized. Today, English and French are the official languages of the Ontario courts. Proceedings are to be in English unless a party who speaks French elects to have a bilingual English/French proceeding. In designated areas of the province, the parties to a bilingual proceeding may file pleadings and other documents written in French. In the rest of the province, they may do so only if the other parties consent. Documents written in any other language must be translated into English (or into French in a bilingual proceeding).

An Act respecting the Administration of Justice, R.S.O. 1897, c. 324, s. 1

Judicature Act, R.S.O. 1914, c. 56, s. 122

Judicature Act, R.S.O. 1970, c. 228, s. 127

Judicature Amendment Act, 1978, S.O. 1978, c. 26, s. 1

Courts of Justice Act, R.S.O. 1990, c. C.43, ss. 125-26 and Schs. 1-2

24. The Appellants argue that the British Columbia Supreme Court has the inherent jurisdiction to receive untranslated French documents into evidence. While superior courts do have the inherent jurisdiction to manage the court process and create procedural rules, that jurisdiction has always been recognized as being subject to expressly conflicting procedural statutes and court rules. Where the legislature has expressly determined the language of court proceedings and documents, the courts therefore should not purport to permit the filing of documents in other languages through the exercise of their inherent jurisdiction.

I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) *Current Legal Problems* 23 at 24

Keith Mason, Q.C., "The Inherent Jurisdiction of the Court" (August 1983) 57 A.L.J. 449 at 449

R. v. Caron, [2011] 1 S.C.R. 78 at para. 32

Baxter Student Housing Ltd. v. College Housing Co-operative Ltd., [1976] 2 S.C.R. 475 at 480

Bojkovic v. Rentz Bros. Inc. (2010), 251 Man.R. (2d) 244, 2010 MBCA 17 at paras. 59-71

Leyson Holdings Inc. v. Newfoundland and Labrador (2008), 281 Nfld. & P.E.I.R. 41, 2008 NLCA 66 at paras. 23-27

25. Even where there is no directly conflicting statute or rule, the courts should leave major innovations in court procedure to the legislature and the rules committee rather than making such major changes through decisions in individual cases.

Al Rawi and others v. The Security Service and others, [2011] UKSC 34 at paras. 18-22, 48, 67-69, 72, 74, 78, 88, and 192

Martin Dockray, "The Inherent Jurisdiction to Regulate Civil Proceedings" (1997), 113 L.Q.R. 120 at 127-31

C. Constitutional Issues Should Not Be Raised For the First Time In This Court, Particularly Where a Motion to State Constitutional Questions Has Been Dismissed

26. Ontario agrees with British Columbia that the Appellants should not be allowed to raise constitutional issues regarding the unwritten principles incorporated into the Preamble to the *Constitution Act, 1867* for the first time on this appeal.

27. In addition to the reasons set out by British Columbia, the Appellants should not be allowed to rely on constitutional arguments after their motion to state constitutional questions was dismissed because doing so would prejudice the various Attorneys General. As a result of the dismissal of the Appellants' motion, the Attorneys General did not receive a notice of constitutional question and were not afforded the opportunity to intervene as of right.

Rules of the Supreme Court of Canada, SOR/2002-156, Rules 42(5)-(6), 61(4), and 71(5)(c)

28. Even were this Court to consider the Appellants' constitutional arguments, Ontario agrees with British Columbia that unwritten principles cannot be used to strike down legislation, including English statutes received into Canadian law. That principle is particularly relevant in Ontario where the rules of reception themselves are determined by statute, not the common law.

Factum of the Respondents, paras. 22-34

29. Nor would changing the existing rules of reception in the manner the Appellants request promote the unwritten principles that underlie Canada's Constitution. On the contrary, allowing courts to determine on a case-by-case basis which English laws are applicable to current Canadian circumstances would undermine the principles of federalism (by ignoring the provincial legislation adopting the English laws applicable to the circumstances of Upper Canada in 1792 and revising the body of received laws in 1902), democracy (by allowing courts rather than legislatures to decide whether received English laws remain applicable to changing circumstances), and constitutionalism and the rule of law (by creating greater uncertainty as to which English laws are in force at any given time).

Reference re Secession of Québec, [1998] 2 S.C.R. 252 at paras. 61-82

PART IV – SUBMISSIONS ON COSTS

30. As an intervener, Ontario submits that costs should not be awarded to or against it.

PART V – REQUEST FOR ORAL ARGUMENT

31. Ontario asks that it be allowed to present oral argument not exceeding 10 minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 20TH DAY OF MARCH, 2013

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Josh Hunter
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PART VI – TABLE OF AUTHORITIES

Paras.

CASES

LEGISLATION

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PART VII – STATUTES AND REGULATIONS

See Book of Authorities