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SNUFF ACTS AND THE RULE OF LAW

Ian Blue*

1. Introduction

In Canada, a troubling trend is developing in cases where a plaintiff has a government as a defendant. In three recent cases, plaintiffs have commenced actions against provincial governments only to find at some point prior to trial that the defendants had gone to their legislatures and effected the passing of statutes that dismissed the actions. Since such statutes are similar but not identical to the old acts of attainder, to avoid confusion this article will refer to these action-ending statutes as “*snuff acts*”. “*Snuff acts*”, because they extinguish the plaintiffs’ right of access to the court.

Litigators now need to be aware that governments might resort to *snuff* legislation. This possibility makes it difficult to advise clients who wish to sue the government. We already counsel them that suing the government is a risky and expensive process. How do we now tell them that, at any point in the process, the defendant may procure a *snuff act* that will remove any possibility of success? What should our advice be?

The possibility of *snuff acts* may be enough to create a litigation chill that ends lawsuits against governments. And yet, almost everyone agrees that Canadians should be able to sue their governments for a variety of good reasons.

While one Canadian court has upheld a *snuff act*,¹ the European Court of Human Rights (ECHR) has consistently held that they violate the rule of law. There is no principled reason why a Canadian court could not also use the Charter² to fashion a new *sui generis* principle for Canada holding that *snuff acts* are invalid. Such a principle would ensure Canadians’ right of access to the court, fundamental justice in civil proceedings, and would promote the juridical goal of ensuring that public officials act legally and constitutionally in discharging their statutory responsibilities.

* Q.C. A partner of Cassels Brock & Blackwell LLP; a senior commercial litigator and energy lawyer.

1. *Kingsway General Insurance Co. v. Alberta* (2005), 258 D.L.R. (4th) 507, [2006] 7 W.W.R. 290, 53 Alta. L.R. (4th) 147 (Q.B.).

2. *Constitution Act, 1982*, preamble.

This article urges the creation of a new *sui generis* principle to make *snuff* acts unconstitutional.

2. What is a Snuff Act?

As the term is used in this article, a *snuff* act is a statute enacted in the course of one or several lawsuits against a government alleging that some government activity is illegal. The *snuff* act purports to remedy the legal defect and declares that the government has no liability for it. The *snuff* act might go on to state that pending lawsuits in respect of which it was enacted are dismissed without costs.

The Supreme Court said in *British Columbia v. Imperial Tobacco Canada Ltd.*³ that there is no constitutional prohibition against retroactive or *ex post facto* laws.⁴ In *Kingstreet Investments Ltd. v. New Brunswick (Department of Finance)*,⁵ it added that Parliament or legislatures may enact such retroactive laws to limit or deny recovery of *ultra vires* taxes.⁶ This article does not dispute those principles.

What it seeks, however, is a narrow exception to them for plaintiffs in lawsuits that (1) prompted the *snuff* legislation and (2) are still in progress when it is enacted. It is only those actions that will be extinguished and for whose plaintiffs the statute is a *snuff* act. From their perspective, the *snuff* act changes the rules in the middle of the game and strong-arms them out of court. For other persons, the legislation in question would not be a *snuff* act but a valid law because they would not have challenged the government action and would not have been affected in the same way as plaintiffs in pending actions against the government.

When this article suggests that a *snuff* act should be held invalid under the rule of law, it means it should be held invalid only against plaintiffs in the actions in respect of which it is passed and that are still in progress when the statute is question was enacted, not against anyone else.

This paper does not try to resuscitate the view that the rule of law should be used as a basis to challenge any statutory provision at any time. Cases in which that argument has been tried and has failed include *Authorson v. Canada (Attorney General)*;⁷ *Singh v. Canada (Attorney General)*;⁸ *Bacon v. Saskatchewan Crop Insurance Corp.*⁹

3. [2005] 2 S.C.R. 473, 257 D.L.R. (4th) 193, [2006] 1 W.W.R. 201 (*BC Tobacco*).

4. *Ibid.*, at paras. 69-71.

5. [2007] 1 S.C.R. 3, 276 D.L.R. (4th) 342, 309 N.B.R. (2d) 225.

6. *Ibid.*, at para. 25.

7. [2003] 2 S.C.R. 40, 227 D.L.R. (4th) 385, 175 O.A.C. 363.

and the *BC Tobacco* case.¹⁰ *Snuff* acts, however, are a different matter because, unlike those cases, they take away access to the court from plaintiffs in lawsuits already in progress and will discourage Canadians from suing their governments.

3. Snuff Act Cases

In three recent cases, *snuff* acts have been resorted to by government-defendants. In *Kingsway General Insurance Co.*,¹¹ the Alberta legislature had enacted legislation that froze auto insurance premiums retroactively. As a consequence, Kingsway sued the government claiming damages for regulatory expropriation. After pleadings had closed, motions to quash the action were defeated, examinations for discovery had been completed, a pre-trial hearing had been held and both sides were ready for trial, the Alberta government effected from the Legislative Assembly of Alberta the enactment of s. 16.1 of the *Insurance Act*,¹² which stated:

Crown immunity

16.1(1) In this section,

- (a) "Crown" means the Crown in right of Alberta and includes a Minister of the Crown and agents and employees of the Crown;
- (b) "reform amendments" means the amendments made to this Act by the *Insurance Amendment Act, 2003 (No. 2)* and the *Insurance Amendment Act, 2005*, and any regulations, orders in council, ministerial orders or board orders made pursuant to or by virtue of those amendments.

(2) No liability attaches to the Crown for any loss or damages that have arisen or may arise in respect of the reform amendments.

(3) All existing and future causes of action in law or in equity against the Crown in respect of the reform amendments, including, without limitation, Alberta Court of Queen's Bench action number 0403-14323 and the claims made in that action, are extinguished without costs.

(4) Nothing in this section acknowledges, admits, validates or recognizes a cause of action referred to in subsection (3).

8. [2000] 3 F.C. 185, 183 D.L.R. (4th) 458 *sub nom. Westergard-Thorpe v. Canada (Attorney General)*, 20 Admin. L.R. (3d) 168 (F.C.A.), leave to appeal to S.C.C. refused 188 D.L.R. (4th) vi.

9. [1991] 11 W.W.R. 51, 205 W.A.C. 20, 180 Sask. R. 20 (C.A.), leave to appeal to S.C.C. refused 240 W.A.C. 109n.

10. *Supra*, footnote 3.

11. *Supra*, footnote 1.

12. R.S.A. 2000, c. I-3.

On behalf of Kingsway, the author of this article argued, *inter alia*, that s. 16.1 was contrary to the rule of law and therefore unconstitutional. The court disagreed:¹³

Arguably, s. 16.1 goes further than does any of the legislation impugned in the foregoing case law. Section 16.1 is both retroactive and retrospective in its effect and singles out the Current Action before indicating that it applies to all similar lawsuits. Notwithstanding this, and notwithstanding that *Bacon* is not binding upon me, I find the reasoning set out therein, persuasive. As pointed out in *Babcock* . . . I must have regard, as well, to the principle of parliamentary sovereignty and balance that principle against the fact that s. 16.1 has retroactive and retrospective effect and that it specifically names the Current Action and, to that extent, lacks general effect. Having conducted this balancing process, however, I conclude, however, that if the legislation is within the competence of the legislature, it does not offend the rule of law.

In the *Kingstreet* case,¹⁴ the Supreme Court of Canada held that a user charge imposed on bars and clubs when they bought liquor from the New Brunswick Liquor Corporation's retail stores was an unconstitutional indirect tax. It also fashioned a new restitution remedy and held that it could be used to recover the unconstitutional taxes from the Crown, a welcome ruling for all plaintiffs who face government shakedowns. The Supreme Court said that this new remedy was warranted in order to ensure respect for constitutional principles.¹⁵ But then it added (helpfully to governments) that it would be open to Parliament and the legislatures to enact new valid taxes and apply them retroactively so as to limit or deny recovery of *ultra vires* taxes.¹⁶ It did not, however, suggest that the legislature could take away the right of the plaintiff to collect its judgment in the very case in which it had fashioned this new remedy.

The New Brunswick government obviously read the Supreme Court's *Kingstreet* judgment because it caused the Legislative Assembly of New Brunswick to enact Part III.1 of the *Liquor Control Act*, which converted the illegal indirect tax into a constitutional retroactive direct tax on consumers, deemed it paid, and went on to provide that:¹⁷

131.3(7) Where, at any time after February 28, 1998, and before February 27, 2004, money was collected or purported to have been collected as user charges pursuant to New Brunswick Regulation 89-167

13. *Supra*, footnote 1, at para. 77.

14. *Supra*, footnote 5.

15. *Ibid.*, at para. 14.

16. *Ibid.*, at para. 25.

17. *Liquor Control Act*, R.S.N.B. 1973, c. L-10, Part III.1.

under this Act, the money shall by this section be conclusively deemed to have been collected and retained by the Province, without compensation, as payment for the tax notwithstanding any judgment obtained by any person for recovery of any of the money, whether the judgment is obtained before, on or after the enactment of this section.

This was a *snuff* act which would have denied the plaintiff in the *Kingstreet* case the new restitutionary remedy it had just received from the Supreme Court.

The New Brunswick government may have thought that it would raise too many judicial eyebrows if it were to defeat the plaintiff's use of the Supreme Court's new restitution remedy, since it repaid the *Kingstreet* plaintiff the unconstitutional taxes it had collected. However, the New Brunswick government has refused to pay the claims for unconstitutional taxes of plaintiffs in similar actions that were in play when the Supreme Court delivered the *Kingstreet* decision and Part III.1 was enacted.¹⁸ At the time of writing, the constitutional validity of Part III.1 is being challenged in the New Brunswick Court of Queen's Bench by those plaintiffs using arguments similar to those advanced in the *Kingsway* case and in this paper.

In *Sundance Saloon Ltd. v. Newfoundland and Labrador (Minister of Finance)*,¹⁹ the plaintiffs commenced an action for a declaration that a levy on liquor licensees was an indirect tax and *ultra vires* the provincial legislature and, on the basis of the *Kingstreet* case, sought the new restitution remedy. While the action was proceeding, the Newfoundland government procured from the House of Assembly of Newfoundland and Labrador new s. 56.1 of the *Liquor Control Act*,²⁰ similar in form and content to Part III.1 of the New Brunswick *Liquor Control Act* just discussed. Subsections (7), (8) and (9) of s. 56.1 read as follows:

(7) Where, at any time after January 31, 2001 and before March 31, 2006, money was collected or purported to have been collected as a licensee levy, the money shall by this section be conclusively considered to have been collected and retained by the Crown, without compensation as payment for the tax.

(8) An action or proceeding does not lie or shall not be instituted or continued against the Crown or a minister, employee or agent of the Crown based on a cause of action arising from, resulting from or

18. Information from Eugene Mockler, Q.C., counsel for those plaintiffs.

19. (2008), 859 A.P.R. 224, 280 Nfld. & P.E.I.R. 224 (T.D.).

20. *An Act to Amend the Liquor Control Act Respecting a Licensee Levy*, S.N.L. 2008, c. 14.

incidental to money collected or purported to have been collected as a licensee levy.

(9) A cause of action against the Crown or a minister, employee or agent of the Crown based on a cause of action arising from, resulting from or incidental to money collected or purported to have been collected as a licensee levy is extinguished.

The only issue decided in the *Sundance* case to date has been whether, under the above subsections, the plaintiffs were even entitled to be in court to argue that the *snuff* act violated the rule of law. The court held that the plaintiffs could not be denied access to the court because a province cannot, by legislation, insulate itself from a judicial review of the constitutionality of its actions.²¹

As things stand now, therefore, only one *snuff* act has been found to be valid. Decisions on whether the other two are constitutional are still pending.

The resort to *snuff* acts is a worrisome example of governments interfering in the judicial process and is a misuse of political power. In the *Kingsway* case, for example, the back story was that Premier Klein had announced an insurance rate freeze without first discussing it with his officials; officials then had to scramble to implement it, not taking the time to think about possible lawsuits. When *Kingsway* sued, the Minister and officials were surprised, worried and angry with *Kingsway* for suing. This group obtained s. 16.1 of the *Alberta Insurance Act* to spare themselves and Premier Klein embarrassment should *Kingsway's* action have been successful. No public interest was served by s. 16.1.²²

The legal community should be deeply concerned about such government interference in the judicial process. Such actions will create a chill on challenging government and here is why: Litigation against a government is always challenging. In a typical case, a plaintiff usually has suffered loss or damage due to acts or omissions of public servants or officials. The plaintiff then has to make the difficult and risky decision to sue. The government defends using its full and considerable resources. Government lawyers usually engage in what tank warfare experts call a "hull-down" defence. The action usually lasts for two to three years and is always expensive. The plaintiff finally is about to get to trial or has been successful at trial and received either an award of damages or a constitutional restitution order. Imagine then that the government defendant procures a *snuff* act to deprive the plaintiff of either its action or judgment. Because procuring the act is not usually attention-getting

21. *Ibid.*, at paras. 20 and 21.

22. Information obtained by *Kingsway* during the lawsuit.

or newsworthy, everyone in government, including the Minister and public servants, is happy. But the successful plaintiff, to use Binnie J.'s word, becomes "roadkill",²³ deprived of its right to procedural fairness in the middle of the action. That cannot be right! If *snuff* acts can be used to remove the possibility of winning and to crush plaintiffs, Canadians will stop suing governments.

It is necessary that Canadians be able to sue their governments in order to ensure that governments stay within the law and take no more than Parliament or the legislatures have authorized.

4. The Rule of Law

One solution to what may be termed an abuse of power would be for the courts to create a new *sui generis* principle to stop it. The "rule of law" reference in the opening words of the Charter could be used to hold *snuff* acts unconstitutional.

The Charter opens as follows:

Canadian Charter of Rights and Freedoms

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Section 52(1) and (2) of the *Constitution Act, 1982* state that²⁴

52(1) 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.

- (2) The Constitution of Canada includes
- (a) the *Canada Act 1982*, including this Act;
 - (b) the Acts and orders referred to in the schedule; and
 - (c) any amendment to any Act or order referred to in paragraph (a) or (b).

The rule of law therefore is part of the Constitution of Canada. As such, it must be given a purposive interpretation²⁵ and have more than an ephemeral role.

The Supreme Court of Canada's decision in the *BC Tobacco* case is its most recent statement on the rule of law. In that case, Imperial Tobacco challenged B.C.'s *Tobacco Damages and Health Care Recovery Act*,²⁶ arguing that its provisions on evidence and procedure for cost recovery actions violated the rule of law. This

23. Quoted by Kirk Makin, *The Globe and Mail*, February 19, 2009.

24. *Supra*, footnote 2.

25. *R. v. Kapp*, [2008] S.C.J. No. 42 (QL) at para. 82, 294 D.L.R. (4th) 1, [2008] 2 S.C.R. 483.

26. S.B.C. 1997, c. 41.

was an attack on the act using the rule of law as the basis to challenge it. The Supreme Court held that the B.C. act was valid. It said:²⁷

C. Rule of Law

The rule of law is “a fundamental postulate of our constitutional structure” (*Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 142) that lies “at the root of our system of government” (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 70). It is expressly acknowledged by the preamble to the *Constitution Act, 1982*, and implicitly recognized in the preamble to the *Constitution Act, 1867*: see *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at p. 750.

This Court has described the rule of law as embracing three principles. The first recognizes that “the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power”: *Reference re Manitoba Language Rights*, at p. 748. The second “requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order”: *Reference re Manitoba Language Rights*, at p. 749. The third requires that “the relationship between the state and the individual . . . be regulated by law”: *Reference re Secession of Quebec*, at para. 71.

So understood, it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation such as the Act based on its content. That is because none of the principles that the rule of law embraces speak directly to the terms of legislation. The first principle requires that legislation be applied to all those, including government officials, to whom it, by its terms, applies. The second principle means that legislation must exist. And the third principle, which overlaps somewhat with the first and second, requires that state officials’ actions be legally founded. See R. Elliot, “References, Structural Argumentation and the Organizing Principles of Canada’s Constitution” (2001), 80 *Can. Bar Rev.* 67, at pp. 114-15.

This does not mean that the rule of law as described by this Court has no normative force. As McLachlin C.J. stated in *Babcock*, at para. 54, “unwritten constitutional principles”, including the rule of law, “are capable of limiting government actions”. See also *Reference re Secession of Quebec*, at para. 54. But the government action constrained by the rule of law as understood in *Reference re Manitoba Language Rights* and *Reference re Secession of Quebec* is, by definition, usually that of the executive and judicial branches. Actions of the legislative branch are constrained too, but only in the sense that they must comply with legislated requirements as to manner and form (i.e., the procedures by which legislation is to be enacted, amended and repealed).

Nonetheless, considerable debate surrounds the question of what *additional* principles, if any, the rule of law might embrace, and the

27. *Supra*, footnote 3, at paras. 57-61, 54 and 66-67.

extent to which *they* might mandate the invalidation of legislation based on its content. P. W. Hogg and C. F. Zwibel write in "The Rule of Law in the Supreme Court of Canada" (2005), 55 *U.T.L.J.* 715, at pp. 717-18:

Many authors have tried to define the rule of law and to explain its significance, or lack thereof. Their views spread across a wide spectrum. . . . T.R.S. Allan, for example, claims that laws that fail to respect the equality and human dignity of individuals are contrary to the rule of law. Luc Tremblay asserts that the rule of law includes the liberal principle, the democratic principle, the constitutional principle, and the federal principle. For Allan and Tremblay, the rule of law demands not merely that positive law be obeyed but that it embody a particular vision of social justice. Another strong version comes from David Beatty, who argues that the 'ultimate rule of law' is a principle of 'proportionality' to which all laws must conform on pain of invalidity (enforced by judicial review). In the middle of the spectrum are those who, like Joseph Raz, accept that the rule of law is an ideal of constitutional legality, involving open, stable, clear, and general rules, even-handed enforcement of those laws, the independence of the judiciary, and judicial review of administrative action. Raz acknowledges that conformity to the rule of law is often a matter of degree, and that breaches of the rule of law do not lead to invalidity.

See also W. J. Newman, "The Principles of the Rule of Law and Parliamentary Sovereignty in Constitutional Theory and Litigation" (2005), 16 *N.J.C.L.* 175, at pp. 177-80.

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None of this is to say that legislation, being law, can never unconstitutionally interfere with courts' adjudicative role. But more is required than an allegation that the content of the legislation required to be applied by that adjudicative role is irrational or unfair, or prescribes rules different from those developed at common law. The legislation must interfere, or be reasonably seen to interfere, with the courts' adjudicative role, or with the essential conditions of judicial independence. As McLachlin C.J. stated in *Babcock*, at para. 57:

It is well within the power of the legislature to enact laws, even laws which some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and the other branches of government.

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[T]he appellants' arguments overlook the fact that several constitutional principles other than the rule of law that have been recognized by this Court — most notably democracy and constitutionalism — very

strongly favour upholding the validity of legislation that conforms to the express terms of the Constitution (and to the requirements, such as judicial independence, that flow by necessary implication from those terms). Put differently, the appellants' arguments fail to recognize that in a constitutional democracy such as ours, protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box. See *Bacon v. Saskatchewan Crop Insurance Corp.* (1999), 180 Sask. R. 20 (C.A.), at para. 30; Elliot, at pp. 141-42; Hogg and Zwibel, at p. 718; and Newman, at p. 187.

The rule of law is not an invitation to trivialize or supplant the Constitution's written terms. Nor is it a tool by which to avoid legislative initiatives of which one is not in favour. On the contrary, it requires that courts give effect to the Constitution's text, and apply, by whatever its terms, legislation that conforms to that text.

What is notable about this exegesis is that the Supreme Court said enough to support any desired interpretation of the rule of law. Its view is expressed so comprehensively that any judge could, with a clear conscience, use the rule of law to declare a *snuff* act unconstitutional. For example, the statement that the law is supreme over officials of the government as well as private individuals and therefore preclusive of the influence of arbitrary power is powerful. Because the Supreme Court admits considerable debate surrounding the question of what additional principles, if any, the rule of law might embrace, and the extent to which they mandate the invalidation of legislation based on its content, it leaves this question noticeably open. Because the constitutional principles of democracy and constitutionalism only "very strongly favour" rather than "require" upholding the validity of legislation that conforms to the express terms of the constitution, the court also leaves open the question of when the rule of law can result in not upholding legislation. Because it said that that legislation can unconstitutionally interfere with the courts' role, it also leaves open the question of when the court will declare invalid statutes that interfere with legitimate claims and causes of action, which provides an additional ground for using the rule of law to invalidate legislation that interferes with access to the court.

Certainly, the Supreme Court said nothing in the *BC Tobacco* case that would preclude a new *sui generis* principle that the rule-of-law makes a *snuff* act unconstitutional.

If one looks at cases prior to the *BC Tobacco* case, it is apparent that Canadian courts have used the rule of law to hold certain laws unconstitutional because they prevented access to the courts.

In *BCGEU v. British Columbia (Attorney General)*,²⁸ the Supreme Court held that legal picketing at courthouses in British Columbia, which prevented access to the courts, was unconstitutional, because the rule of law entitled all citizens access to the court. Dickson C.J.C. said as follows:²⁹

I wish to highlight certain sections of the *Charter* which, it seems to me, are a complete answer to anyone seeking to delay or deny or hinder access to the courts of justice in this country. Let us look first at the preamble to the *Charter*. It reads: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law". So we see that the rule of law is the very foundation of the *Charter*. Let us turn then to s. 52(1) of the *Constitution Act, 1982* which states that 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. . . . To paraphrase the European Court of Human Rights in *Golder v. United Kingdom* (1975), 1 E.H.R.R. 524, at p. 536, it would be inconceivable that Parliament and the provinces should describe in such detail the rights and freedoms guaranteed by the *Charter* and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. As the Court of Human Rights truly stated: "The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings". And so it is in the present case. Of what value are the rights and freedoms guaranteed by the *Charter* if a person is denied or delayed access to a court of competent jurisdiction in order to vindicate them? How can the courts independently maintain the rule of law and effectively discharge the duties imposed by the *Charter* if court access is hindered, impeded or denied? The *Charter* protections would become merely illusory, the entire *Charter* undermined.

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I would adopt the following passage from the judgment of the British Columbia Court of Appeal (at p. 406):

We have no doubt that the right to access to the courts is under the rule of law one of the foundational pillars protecting the rights and freedoms of our citizens. It is the preservation of that right with which we are concerned in this case. Any action that interferes with such access by any person or groups of persons will rally the court's powers to ensure the citizen of his or her day in court. Here, the action causing interference happens to be picketing. As we have already indicated, *interference from whatever source falls in the same category.*

28. [1988] 2 S.C.R. 214, 53 D.L.R. (4th) 1, [1988] 6 W.W.R. 577.

29. *Ibid.*, at pp. 228-29 (emphasis added).

Note Dickson C.J.C.'s adoption of the passage from the Court of Appeal judgment, which shows that the prohibition against interfering with access to a court refers to "interference from whatever source". Does "whatever source" include legislation? In the *Kingsway* case, the court thought not, noting that the case was about interfering with physical access to the court.³⁰

With respect, saying that "interference from whatever source" means only physical, not legislative, access is a false distinction. It is like distinguishing two contract cases on the basis that in the one case the defendant's hair was red but in the other it was black.

If the rule of law blocks interference with access to the court from "whatever source", it must be wide enough to block interference by legislation where, as in *snuff* acts, no adequate alternative remedy is provided.

In Canada, courts have used the rule of law to hold regulations or other dispensations restricting access to the courts unconstitutional. These cases are compelling because, as readers know, the *Chemical Reference* case³¹ held that an *intra vires* regulation has exactly the same legal force as a statute.

In *Pleau v. Nova Scotia (Supreme Court, Prothonotary)*,³² MacAdam J. held that a regulation imposing a daily hearing fee for court time was contrary to the rule of law and unconstitutional because it "impeded, impaired and delayed access to the court".³³ In *Polewsky v. Home Hardware Store Ltd.*,³⁴ a regulation specified fees for Small Claims Court proceedings but gave no discretion to waive them. The Ontario Divisional Court read such a discretion into the regulation, holding that the rule of law required it to guarantee all citizens access to the court.³⁵

In *Cie de Construction et de développement cris ltée v. Société de développement de la Baie James*,³⁶ the Quebec Court of Appeal struck out a provincial call for tenders that excluded companies who were in litigation with the government. It did so because that requirement discouraged access to the courts and was therefore abusive and contrary to public order.

30. *Supra*, footnote 1, at paras. 71-72.

31. *Reference as to the Validity of the Regulations in Relation to Chemicals Enacted by Order in Council and of an Order of the Controller of Chemicals Made Pursuant Thereto*, [1943] S.C.R. 1 at pp. 17-18, [1943] 1 D.L.R. 248.

32. (1998), 43 C.P.C. (4th) 201, 186 N.S.R. (2d) 1 (S.C.).

33. *Ibid.*, at pp. 231 and 236.

34. (2003), 34 C.P.C. (5th) 334, 229 D.L.R. (4th) 308, 66 O.R. (3d) 600 (Ont. Div. Ct.).

35. *Ibid.*, at pp. 345-57.

36. (2001), 16 C.L.R. (3d) 26, [2001] R.J.Q. 1726 (Que. C.A.).

These three cases are examples of Canadian jurisprudence that supports the principle that the rule of law makes invalid statutory dispensations preventing access to a court.

This issue has been exhaustively considered in Europe, and the European Court of Human Rights (ECHR) has come down firmly against *snuff* acts, holding them to be in violation of the rule of law. In determining the scope of the rule of law in Canada, Canadian courts should be invited to examine those cases.

In *Baker v. Canada (Minister of Citizenship and Immigration)*,³⁷ the Supreme Court of Canada said as follows:³⁸

[T]he values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. As stated in R. Sullivan, Driedger on the Construction of Statutes (3rd ed. 1994), at p. 330:

[T]he legislature is presumed to respect the values and principles contained in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.

The important role of international human rights law as an aid in interpreting domestic law has also been emphasized in other common law countries: see, for example, Tavita v. Minister of Immigration, [1994] 2 N.Z.L.R. 257 (New Zealand C.A.) at p. 226; Vishaka v. Rajasthan, [1997] 3 L.R.C. 361 (S.C. India) at p. 367. It is also a critical influence on the interpretation of the scope of the rights included in the Charter: Slaight Communications, supra; R. v. Keegstra, [1990] 3 S.C.R. 697 (S.C.C.).

In *Harper v. Canada (Attorney General)*,³⁹ The Supreme Court cited international law relating to freedom of expression. McLachlin C.J.C. (dissenting in part) said as follows:⁴⁰

This is not a Canadian idiosyncrasy. The right to receive information is enshrined in both the Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), and the International Covenant on Civil and Political Rights, Can. T.S. 1976 No. 47. Canada is a signatory to both. American listeners enjoy the same right; see Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (U.S. D.C. 1969), at p. 390; Martin v. Struthers (City), 319 U.S. 141 (U.S. Ohio 1943), at p. 143.

37. [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193, 14 Admin. L.R. (3d) 173.

38. *Ibid.*, at p. 861.

39. [2004] 1 S.C.R. 827, 239 D.L.R. (4th) 193, [2004] 8 W.W.R. 1.

40. *Ibid.*, at para. 18.

She referred to, and relied upon, the *International Covenant on Civil and Political Rights* to which Canada is a signatory, as one of the sources of law to which a court may refer in determining the scope of similar rights in Canada. Presumably a Canadian court should also examine decisions by other courts relevant to those international sources of law.

The International Covenant relied upon in the *Harper* case addresses the right of access to the courts in Article 14(1):⁴¹

Article 14

1. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Article 6(1) of the Council of Europe's *Convention for the Protection of Human Rights and Fundamental Freedoms* (the European Convention) is similar to Article 14(1) of the International Convention:⁴²

Article 6 — Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Again, the European Court of Human Rights (ECHR) has used the rule of law to hold several statutes denying access to the courts invalid under Article 6(1). Those decisions have persuasive authority and constitute international law to which a Canadian court should refer in considering *snuff* acts and other legislation limiting access to Canadian courts.

In *Golder v. The United Kingdom*,⁴³ referred to by Dickson C.J.C. in the *BCGEU* case, the ECHR held that the rule of law requirement in Article 6(1) made British prison regulations which prevented Golder's access to the court invalid. The court said:⁴⁴

And in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts.

41. *International Covenant on Civil and Political Rights*, December 16, 1966, 999 U.N.T.S. 171.

42. *Convention for the Protection of Human Rights and Fundamental Freedoms*, November 4, 1950, 213 U.N.T.S. 221.

43. [1975] ECHR 1 (February 21, 1975), online: World Legal Information Institute <www.worldlii.org/eu/cases/ECHR/1975/1.htm>.

44. *Ibid.*, at p. 13, paras. 34-36.

.....

The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally "recognized" fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6 para. 1 (art. 6-1) must be read in the light of these principles.

.....

It would be inconceivable, in the opinion of the Court, that Article 6 para. 1 (art. 6-1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.

Taking all the preceding considerations together, it follows that the right of access constitutes an element which is inherent in the right stated by Article 6 para. 1 (art. 6-1).

In *Stran Greek Refineries and Stratis Andreadis v. Greece*,⁴⁵ the company was arbitrating a dispute about construction of an oil refinery with the government of Greece. While the arbitration was proceeding, the government had the Hellenic parliament enact a law that included the following provisions:⁴⁶

1. The true and lawful meaning of the provisions of section 2(1) of Act 141/1975 concerning the termination of contracts entered into between 21 April 1967 and 24 July 1974 is that, upon termination of these contracts, all of their terms, conditions and clauses, including the arbitration clause, are *ipso jure* repealed and the arbitration tribunal no longer has jurisdiction.
2. Arbitration awards covered by paragraph 1 shall no longer be valid or enforceable.
3. Any principal or ancillary claims against the Greek State, expressed either in foreign or local currency, which arise out of the contracts entered into between 21 April 1967 and 24 July 1974, ratified by statute and terminated by virtue of Statute 141/1975, are now proclaimed time-barred.
4. Any court proceedings at whatever level pending at the time of the enactment of this statute, in respect of claims within the meaning of the preceding paragraph, are declared void.

These provisions resemble the provisions in issue in the *Kingsway*,

45. (1994), 19 E.H.R.R. 293 (Eur. Ct. H.R.).

46. *Ibid.*, at p. 302.

Kingstreet and *Sundance* cases. The ECHR held them invalid and said:⁴⁷

The principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute. The wording of paragraphs 1 and 2 of section 12 taken together effectively excluded any meaningful examination of the case by the First Division of the Court of Cassation. Once the constitutionality of those paragraphs had been upheld by the Court of Cassation in plenary session, the First Division's decision became inevitable.

In conclusion, the State infringed the applicants' rights under Article 6(1) by intervening in a manner which was decisive to ensure that the — imminent — outcome of proceedings in which it was a party was favourable to it. There has therefore been a violation of that Article.

In *Pressos Compania Naviera S.A. and Others v. Belgium*,⁴⁸ the applicants sued the Belgian government and a Belgian pilotage company for negligence. While the case was in progress, the Belgian government had the Belgian Federal Parliament enact a law that read as follows:⁴⁹

Section 1. The organiser of the pilot service cannot be held directly or indirectly liable for damage sustained or caused by the ship under pilotage, where such damage is the result of the negligence of the organiser himself or one of his staff acting in the performance of his duties, irrespective of whether the negligence in question consists of an act or omission.

Nor can the organiser of a pilot service be held directly or indirectly liable for damage caused by a malfunction or defect in the equipment owned or used by the pilot service for the purpose of supplying information or instructions to the sea-going vessels.

The ECHR said as follows:⁵⁰

The Commission observes first of all that under Article 6(1) of the Convention, the right to a fair trial before an independent and impartial tribunal does not only require that the parties' arguments are heard by the tribunal in adversarial proceedings: it also guarantees the principle of the equality of arms. This provision therefore requires that the matter under litigation is decided by the courts on the basis of the relevant existing legislation and without interference by any of the parties or by any other State authority. [footnote omitted]

47. *Ibid.*, at p. 323.

48. (1995), 21 E.H.R.R. 301 (Eur. Ct. H.R.).

49. *Ibid.*, at p. 313.

50. *Ibid.*, at pp. 322-23.

In the *STRAN GREEK REFINERIES* case the Commission expressed the following opinion:

. . . where a court is dealing with a dispute between an individual and the State over civil rights and obligations, the legislator must not take action with a view to resolving that particular pending dispute. Were Article 6(1) to permit such action, a Contracting State could, without acting in breach of that text, prevent its courts from exercising in practise their jurisdiction to determine civil actions brought against the State. Such an assumption, indissociable from a danger of arbitrary power, would have serious consequences which are incompatible with the rule of law.

.

The Commission therefore considers that by adopting the Law of 30 August 1988 and by applying it to the applicants' cases, with the exception of the second and twelfth applicants, the Belgian authorities deprive them of the right to obtain a decision on the civil rights and obligations following a fair trial before a tribunal. The Commission considers that the retroactive effect of that law did not respect a reasonable relationship of proportionality between the means employed by the contested statute and the objectives which it sought to achieve.

In *Papageorgiou v. Greece*,⁵¹ employees of the state electricity company had successfully recovered salary deductions from the Greek government. The government appealed. While the appeal was pending, the government had the Hellenic Parliament enact a law extinguishing the applicants' claims:⁵²

(1) Employers' and employees' contributions in the insurance branches under the responsibility of the *OAED* . . . shall be deemed to be welfare deductions for the benefit of those bodies and shall be payable notwithstanding any entitlement of the insured to similar benefits from their employers or other institutions.

(2) No claims shall be made for repayment of contributions referred to in the preceding paragraph that have been paid to the *OAED* . . . before publication of this Law and any claim relating to such contributions shall be extinguished and any claim pending in any court for the repayment of such contributions shall be struck out.

The ECHR found that statute violated the rule of law and said:⁵³

The Court agrees with the Government that in principle the legislature is

51. [1997] ECHR 86 (October 22, 1997), online: World Legal Information Institute <www.worldlii.org/eu/cases/ECHR/1997/86.html>

52. *Ibid.*, at p. 6, para. 25.

53. *Ibid.*, at pp. 11-12, paras. 37-38.

not precluded from regulating by new provisions rights arising under laws previously in force.

However, in the *Stran Greek Refineries and Stratis Andreadis v. Greece* case (judgment of 9 December 1994, Series A no. 301-B) the Court held that the principle of the rule of law and the notion of fair trial enshrined in Article 6 precluded the interference by the Greek legislature with the administration of justice designed to influence the judicial determination of the dispute. It concluded that the State had infringed the applicants' rights under Article 6 by intervening in a manner which was decisive to ensure that the imminent outcome of proceedings in which it was a party was favourable to it. [citation omitted]

.....

In the circumstances of the present case the enactment of section 26 at such a crucial point in the proceedings resolved the substantive issues for practical purposes and made carrying on with the litigation pointless.

In *Zielinski and Others v. France*,⁵⁴ French public servants were seeking a multi-year adjustment to their "special difficulties allowance". A new hearing had been ordered to enable the plaintiffs to present evidence on the quantum owing them. Before that hearing could take place, the government had the Parliament of France enact a law limiting the amount of back allowance payable.

The ECHR held:⁵⁵

The Court reaffirms that while in principle the legislature is not precluded in civil matters from adopting new retrospective provisions to regulate rights arising under existing laws, the principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature — other than on compelling grounds of the general interest — with the administration of justice designed to influence the judicial determination of a dispute. [Footnote omitted.]

In the instant case, however, as in the above-mentioned cases, the Court cannot overlook the effect of the content of section 85 of the Act of 18 January 1994, taken together with the method and timing of its adoption. To begin with, while section 85 expressly excluded from its scope court decisions that had become final on the merits, it settled once and for all the terms of the dispute before the ordinary courts and did so retrospectively and "notwithstanding any provisions to the contrary in collective or individual agreements in force on the date of publication of this Act".

.....

The adoption of section 85 in reality determined the substance of the

54. (1999), 31 E.H.R.R. 532 (Eur. Ct. H.R.).

55. *Ibid.*, at pp. 551 and 553-54.

dispute. The application of it by the domestic courts, in particular the Court of Cassation in its judgments of 2 March 1995, made it pointless to continue the proceedings.

.....

The finding is, therefore, inescapable that the intervention of the legislature in the instant case took place at a time when legal proceedings to which the State was a party were pending. There has consequently been a violation of Article 6(1) in respect of the right to a fair trial.

In *Agoudimos and Cefallonian Sky Shipping Co. v. Greece*,⁵⁶ Sky Shipping had purchased a ship at a creditor's auction. Government agencies claimed it was liable for debts that had attached to the ship before it took ownership. While awaiting the appeal, the government had the Hellenic Parliament enact a law stating that anyone who purchased a ship in Greece was liable for payment of any past debts attached to it.

The ECHR held that the rule of law invalidated this statute. It said:⁵⁷

The Court reaffirms that while in principle the legislature is not precluded in civil matters from adopting new retrospective provisions to regulate rights arising under existing laws, the principle of the rule of law and the notion of fair trial enshrined in Art.6 preclude any interference by the legislature — other than on compelling grounds of the general interest — with the administration of justice designed to influence the judicial determination of a dispute.

In the instant case, as in the above-mentioned case, the Court cannot overlook the effect of s. 1 of Law No. 1711/1987, taken together with the method and timing of its enactment.

To begin with, while s. 1(13) expressly excluded from its scope court decisions that had become final, it settled once and for all the terms of the dispute before the ordinary courts and did so retrospectively.

Therefore, the adoption of Law No 1711/1987 while the proceedings were pending in reality determined the substance of the dispute. The application of it by the Court of Cassation in its judgment of April 16, 1997, made it pointless to carry on with the litigation.

.....

In conclusion, the State infringed the applicants' rights under Art. 6(1) by intervening in a manner which was decisive to ensure that the outcome of proceedings in which it was a party was favourable to it. There has therefore been a violation of that Article.

56. (2001), 36 E.H.R.R. 131 (Eur. Ct. H.R.).

57. *Ibid.*, at pp. 136-37.

These ECHR decisions are forceful precedents for holding that the rule of law makes a *snuff* act unconstitutional.

Given that questions about whether the rule of law can invalidate legislation were left open in the *BC Tobacco* case, that Canadian courts have used the rule of law to overrule statutory dispensations interfering with access to the courts and that the ECHR has used the rule-of-law to disallow *snuff* acts, Canadian courts have ample manoeuvring room to create a new *sui generis* principle that the rule of law makes a *snuff* act unconstitutional without violating the Constitution.

5. The New Sui Generis Principle Considered

How would such a new *sui generis* principle operate? First, the *snuff* law would be invalid only against the plaintiffs in litigation in process when it was first introduced in the legislature. It would be valid as against all other persons who had not yet commenced a formal proceeding.

Second, those “who had not yet commenced a formal proceeding” would include anyone who had not commenced proceedings on the date the bill was first introduced and given first reading because once that happens, everyone would have notice of the government’s intention, could govern their decision to commence an action accordingly, and could no longer accuse the government of acting unfairly.

Third, any retroactive provisions of the *snuff* act would not apply to the plaintiffs in the litigation. Such plaintiffs would be grandfathered.

Why should Canadian courts adopt such a new *sui generis* principle for invalidating *snuff* acts?

First, as the *BC Tobacco* case makes clear, the rule of law is part of our constitution. We must interpret it purposively. Since other free and democratic jurisdictions consider *snuff* acts as violating the rule of law in their constitutions, Canada should do so too. After all, the rule of law is the common heritage not only of Anglo-Canadian common law but of the whole western legal tradition.

Second, *snuff* acts prevent access to the courts by Canadians who have grievances against the government, but provide no adequate alternative remedy. The Supreme Court has already held that the rule of law prevents interference with access to the court from “whatever source”.

Third, *snuff* acts are always arbitrary. If the first principle of the

rule of law is intended to prevent arbitrary government action, then *snuff* acts should not be allowed to stand.

Fourth, *snuff* acts are fundamentally unfair. In *Symes v. Canada*,⁵⁸ the Supreme Court said that Charter values must be at the forefront of statutory interpretation. Applying Charter values to *snuff* laws requires legislation to be fundamentally fair, and *snuff* acts are not.

Fifth, courts must recognize the principle of constitutionalism. Under the responsible government aspect of constitutionalism, it must be acknowledged that since the 1840s governments in Canada have controlled Parliament and the legislatures. Courts are the constitutional determiners of the respective rights of Canadians and their governments and presumably courts want to engage a fair process in doing so. It is fundamentally unfair to allow a government defendant to use its control of the legislature to unilaterally terminate its opponent's access to the court. It diminishes respect for the constitutional status of courts in the public eye for courts to say that they have to let *snuff* acts go by.

Finally, as mentioned, the court's central concern must be to guarantee respect for constitutional principles and the law. If *snuff* acts continue to be upheld merely because they meet the twin standards of being *intra vires* legislation and not resulting in any existing Charter violation, the result will be a litigation chill on actions against the government. How then will government negligence, breach of duty and unconstitutional actions be controlled?

The main objection to a new *sui generis* principle using the rule of law to invalidate a *snuff* act would appear to be the one stated in the *Bacon, Singh* and *Kingsway* cases, which is summarized as follows in the *Kingsway* case:⁵⁹

Kingsway argued that the interpretation of the "rule of law" found in the preamble to the Charter should be informed by the European case law on Article 6(1). However, in my view, to rely on the European case law to the extent advocated by Kingsway would be to import guarantees into the Canadian constitutional framework which were excluded by the framers. I find nothing in the case law cited by Kingsway which would support such a drastic departure from the state of the law as reflected in the cases cited above.

So the objection is that to establish a new *sui generis* principle would be to import guarantees into the constitutional framework that were excluded by the framers. What guarantees are we talking about?

58. [1993] 4 S.C.R. 693 at para. 190, 110 D.L.R. (4th) 470, 19 C.R.R. (2d) 1.

59. *Supra*, footnote 1, at para. 91.

Undoubtedly, property rights. To hold that the rule of law can invalidate a *snuff* law would be to hold that a property right, the right to pursue an action for damages, a thing in action,⁶⁰ is constitutionally protected when the framers did not include a right to property in the Charter. Until 2007, this may have been a persuasive argument.

In 2007, however, in *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*,⁶¹ the Supreme Court crossed that constitutional Rubicon by providing constitutional protection to restrictions on contracting out, lay-offs and bumping and successor rights,⁶² also things in action and property,⁶³ obtained by collective bargaining. Presumably, constitutional protection also extends to salary and pension rights obtained by collective bargaining, additional things in action. Explaining the scope of constitutional protection afforded to rights obtained through collective bargaining, Deschamps J. said:⁶⁴

Thus, legislation that alters terms of a collective agreement bearing on significant workplace issues, or that precludes negotiations on significant workplace issues that would normally be negotiable, will interfere with the collective bargaining process. Such legislative measures nullify negotiations that have already taken place or prevent future negotiations on the topics they cover.

In Canada today, therefore, no statute can take away the things in action that are property rights obtained by collective bargaining.

There appears to be no difference in principle between a statute that takes away property rights obtained through the collective bargaining process and a *snuff* act that takes away property rights obtained through the court process. Both take away things in action that are property rights. They are commensurable paradigms. Any offered difference in principle would be hair-splitting. The basis for holding as unconstitutional legislation interfering with collective agreements is s. 2(d) of the Charter. The bases for holding *snuff* acts unconstitutional would be the reference to the rule of law in the opening words of the Charter. Using the rule of law to make a *snuff* act unconstitutional would go no further than the Supreme Court has already gone in the *Health Services* case. Past reluctance to strike

60. See for example, the definition of "property" in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended.

61. [2007] 2 S.C.R. 391, 283 D.L.R. (4th) 40, [2007] 7 W.W.R. 191 (*Health Services* case).

62. *Ibid.*, at paras. 124-28 and 136.

63. J. Crossley Vaines, *Personal Property*, 4th ed. (1967), at p. 11.

64. *Supra*, footnote 61, at para. 182.

down a *snuff* act on the basis that it would give constitutional protection to property rights, therefore, should no longer be a bar to a new *sui generis* principle.

6. Conclusion

The rule of law means that the law is supreme over officials of the government, and therefore preclusive of the influence of arbitrary power. What is more arbitrary than a *snuff* act?

Canadian courts must recognize that in our parliamentary systems, the same governments who are litigants also control Parliament and the legislatures. To allow a government defendant to use its control of the legislature to end a lawsuit unilaterally is fundamentally unfair. To look the other way and say that a *snuff* act is valid merely because it is *intra vires* and does not offend the Charter would be a judicial evasion of responsibility to ensure fair access to the courts. Access to the courts is a right protected both in Canada and by the ECHR and a right that Canadian courts should jealously guard.

Finally, there is the Supreme Court's stated principle that the court's central concern must be to guarantee respect for constitutional and legal principles. Let's hope that judges will make those constitutional and legal principles effective by standing up to *snuff* acts!

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CANADA LAW BOOK
A Division of The Cartwright Group Ltd.
240 Edward Street
Aurora, Ontario
Canada L4G 3S9

Telephone: (905) 841-6472
1-800-263-3269

Facsimile: (905) 841-5085

e-mail: sales@canadalawbook.ca

Website: www.canadalawbook.ca
