NOTES

Note on the Nature of Legal Interest in Constitutional Litigation

by Stephen A. Scott *

Well known as a civil liberties decision, *Chabot* v. *Les Commissaires d'Ecoles de Lamorandière* and *A.-G. (Que.)*[1] is of significance also upon the nature of the Attorney-General's participation in litigation raising constitutional and other questions of *ultra vires* enactments. With a seemingly-innocent procedural point raising very far-reaching issues of substance, its lesson for the more jargon-minded *procédurier* is perhaps that rights *sui generis* created *uno flatu* with a procedural remedy ought cautiously to be construed *secundum subjectam materiam;* putting the matter somewhat differently, the academic, for his part, is likely to dwell on the dangers of allowing procedural texts such dominance as to obscure the principles of the substantive law.

Article 114 of the *Code of Procedure*[2]

'Art. 114. The unconstitutionality of any statute of the Province or of Canada, cannot be pleaded before the courts of original jurisdiction or of appeal unless the party pleading the same has, at least eight days before

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[1] [1957] B.R. 707. Judgment reversing the court below was given by Pratte J.; Casey, J.; Hyde J. dissenting in part; Rinfret J. dissenting; Martineau J. dissenting in part; Taschereau J.; and Owen J. dissenting in part. A majority found for plaintiff; all save Rinfret J. agreeing that children could not be forced in 'neutral' schools to receive Roman Catholic religious instruction against the wishes of their parents. Those justices dissenting in part would, instead of founding their order upon the true construction of the statute and regulations, have found the regulations *ultra vires* insofar as they infringed upon the stated principle.

[2] Art. 114 a. of the *Code of Procedure,* originating in 19 Geo. V. c. 80 s. 1 (*Que.*), as amended by 9 Geo. VI c. 68 (*Que.*), went further to provide that 'Whenever a party, in any proceeding, raises before the court the question of the unconstitutionality of a law or part of a law of the Province or of Canada, or the illegality or nullity of a proclamation of the Lieutenant-Governor or of a proclamation or order of the Lieutenant-Governor in Council, only the reasons or nullity can be invoked.' The amending act of 9 Geo. VI inserted the words extending the operation of Art. 114 a. to proclamations and orders, and similarly added the last paragraph of Art. 114; and see note 3 *infra.*

the day fixed for the hearing, given to the Attorney-General notice of the question which he intends to raise, with sufficient information to enable him to understand the nature of his pretensions.

'Upon such notice, the Attorney-General may intervene in the case on behalf of the Crown, and take issue in writing on such questions.

'The judgment of the court must mention such intervention and such conclusions, on which it renders judgment as if the Attorney-General were a party to the suit.

'A copy of such judgment is forwarded without delay to the said Attorney-General.

'The foregoing provisions apply when the illegality or nullity of a proclamation of the Lieutenant-Governor or of a proclamation or order of the Lieutenant-Governor in Council is raised before a court of original jurisdiction or of appeal.'

was born in 1882 in 'An Act to facilitate the intervention of the Crown in civil cases, in which the constitutionality of Federal or Provincial Acts is in question" [3], whose preamble, reciting that

'Whereas, since Confederation, there have arisen and still arise daily before the courts, in suits between private individuals, between corporations,

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[3] 45 Vict. c. 4 (*Que.*), assented to 27th May, 1882. It read as follows: '1. No question as to the constitutionality of any Act of the Province or of the Federal Parliament, shall be raised before the Courts of Original Jurisdiction or of Appeal, unless the party raising the same, shows to the Court that he has, at least eight days before the day fixed for the hearing, given notice to the Attorney-General of the question which he intends to raise, with sufficient information to enable him to understand the nature of his pretensions; upon such notice, the Attorney-General may intervene in the case, on behalf of the Crown, and take issue, in writing, on such questions, and the judgment of the Court, whether it grant or refuse his conclusions, shall mention such intervention and such conclusions, on which it shall render judgment, as if the Attorney-General, were a party to the suit; and a copy of such judgment shall be forwarded without delay to the Attorney-General. 2. This Act shall come into force on the day of its sanction.'

Becoming s. 20 a. of the *Code of Procedure* of 1867 by virtue of R.S.Q. 1888, Art. 5856, this provision appeared with slight modifications as Art. 109 in the draft of the *Code of Procedure* of 1897, as contained in the *Fourth Report of the Commission for the Revision of the Code of Civil Procedure* (Québec, 1896). It attracted the attentions of the legislative committee created to scrutinize the *Report*, who resolved '7. That article 109 be amended by substituting, for the words: "No question as to the constitutionality of any statute of the Province or of Canada can be raised before the courts of original jurisdiction or of appeal, unless", in the first three lines, the following: "The unconstitutionality of any statute of the Province or of Canada can be raised before the courts of original jurisdiction or of appeal, only whenever"'. (*Journals of Leg. Ass'y.* December 22, 1896; committee's report approved. See 31 *Journals of the Legislative Assembly* at p. 213; Appendix No. 1 at p. 381.)

In the version brought into force by Proclamation of the Lieutenant-Governor of 19th May, 1897, the provision appeared as Art. 114, with the textual

> or between corporations and private individuals, questions of legislative conflict between the Federal Parliament and Provincial Legislatures, and more especially that of this Province, without there being any legal means of permitting the Government to intervene and defend the legislative prerogatives and rights of the Province, thus constituting an omission which is prejudicial to the public interest'

bears reproduction *in extenso* to emphasize that the 'intervention' provided for is of a highly peculiar and exceptional character, heretofore unknown: it creates in the Crown an interest of some sort in the *determination of a point of law.*

In principle, no one, it would seem, not even the Crown, can have an interest in a point of *law* as such, but only in legal *rights* which, in consequence of *facts,* arise *under* the law; such is its interest under Art. 114 b. in the beds of rivers, which it is allowed to assert even in disputes between third parties *inter se.* The principle that there is no interest in a point of law as such suffices, as the author has emphasized elsewhere,[4] to support the result in *Saumur* v. *A.-G. for Quebec,*[5] where the appellant sought a declaration that a provincial statute was *ultra vires,* he having however no other interest than his feeling that the statute was enacted specifically to threaten his civil liberties. But the question of the validity of an enactment is the question whether or not the contents of that enactment form part of the *corpus* of the law. Such a question is purely and simply a question of law — and this has certain important consequences.

First, no one can obtain advisory opinions from the Courts except in pursuance of special statutory arrangements — though the *dicta* in the *Saumur Case*[6] condemning the declaratory judgment (which, lacking any interest, the appellant could not have obtained anyway) by supposed association with the advisory opinion, were, the author has submitted,[7] gratuitous and wrong.

Second, the invalidity of the enactment, being matter of law and not of fact, need not be — indeed ought not to be — pleaded. Indeed, this provision, from its origin in 1882 until the Codifiers' *Fourth* (and final) *Report* of November 7, 1896, spoke in terms not of *pleading* such questions, but of *raising* them; and the old termino-

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adjustments proposed by the Joint Committee, and with further alterations by which the words 'unconstitutionality... can be raised... only whenever... the party raising' became instead 'unconstitutionality... cannot be pleaded... unless the party pleading'. The very material significance of the change of the term *raise* to the term *plead,* is discussed below.

[4] *Comment* in (1965) 11 *McGill L. J.* 88.

[5] [1964] S.C.R. 252.

[6] *Supra* notes 4 and 5.

[7] *Loc. cit.*

logy survived even the *Report of the Joint Committee* of both Houses, concurred in by the Assembly. The variation in the *Code* as proclaimed would thus seem a clear violation of s. 4 of the enabling statute (60 Vict. c. 48 *(Que.)*, which provides that 'The commission may make the necessary alterations in the said roll which shall not alter the substance thereof . . .' ; consequently, it may with great force be argued that *plead* must be construed in the sense of *raise* unless the variation is to be *ultra vires*. It is indeed remarkable that when Art. 114 a. was added in 1929 [8] the term used (despite its disappearance from Art. 114) was *raise;* and the 1945 amendments [9] to both those articles, increasing their scope to cover Proclamations and Orders, again used the term *raise*, which therefore appears side by side with *plead* in Art. 114.[10]

Third, if the invalidity of an enactment should not be *pleaded*, still less ought a pronouncement of such invalidity to be *concluded for* by way of *relief;* for no more than a pronouncement upon any other pure question of law can it constitute relief *stricto sensu*. And, *fourth*, by way of corollary of the foregoing, a pronouncement of invalidity is not a direct but a collateral attack upon the enactment, and does not operate to 'quash' it — rather, the judge, in applying fact to law, merely refuses to recognise it as part of the law.[11]

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[8] 19 Geo. V. c. 80 s. 1 *(Que.);* assented to 22 February, 1929; note 2 *infra.*

[9] 9 Geo. VI c. 68 *(Que.);* assented to 1st June, 1945; note 2 *infra.*

[10] A comprehensive term covering both *raise* and *plead* is *invoke;* see *e.g.* Tait J. in *McCaffrey* v. *Ball* (1889) 34 L.C.J. 91 at p. 98.

[11] In *Ministre de la Voirie* v. *Melear Inc.* [1964] B.R. 191, Tremblay C. J. for the Court refrained at p. 195 from considering a constitutional question not raised by the parties. It is of course common for courts to refrain from opening questions of law not broached by the parties; that does not constitute a ruling that they may not do so. In *Eliosoff* v. *Comité Paritaire du Camionnage* [1964] C.S. 483 Lamarre J. on *certiorari* against the Court of Sessions ruled upon the validity of an order in council though the question had not been raised below, and appeared to assume that compliance with Art. 114 was necessary for him to do so.

The Magistrates Court appears to be strongly under the influence of a doctrine to the effect that it cannot consider constitutional questions *at all* even when such questions arise upon matters *prima facie* with their jurisdiction. More especially have the Magistrates refused to consider such questions when a finding of unconstitutionality would compel them to decline jurisdiction, a position which must be contrasted with their apparent readiness in other respects to construe the law relating to their jurisdiction — subject always of course to the supervision of the Superior Courts of Justice. Their doctrine on constitutional questions would seem justified only upon the hypothesis that they lack any jurisdiction to rule — even subject to superior courts' correction — upon any question of law as to their jurisdiction, whether such ruling be affirmative or negative. See *inter alia Bertrand* v. *Buissières* [1962] C.S. 480,

Accordingly, the pronouncement of the court, whether for or against its validity, will, like *any other* pronouncement on a question of law, have force for the future in exactly that degree — no more and no less — that the courts abide by their precedents; though, obviously, *stare decisis* may be either more or less stringent in constitutional matter than in others.[12]

Fifth, the concept of *res judicata* applies to determinations of rights, not to determinations of rules of law (whose authority, it has

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[1962] R. P. 208; and also *Vaillancourt* v. *Gagné* [1963] C.S. 77, where a circular argument is used, and the conclusion is reached that the Magistrate's Court is bound by a provision giving it jurisdiction until that provision is *declared* unconstitutional. In effect, the result of such practice is to *give an affirmative ruling* upon the validity of the imprugned enactments, not to *refrain from such a ruling.* It is perfectly true, as the Magistrates are concerned to stress, that application may be made to the Superior Courts to control the activities of the Magistrates carried on in pursuance of invalid enactments, especially when the invalid enactment is determinative of the Magistrates' jurisdiction. But it is a *non sequitur* to suppose that the Magistrates are therefore bound to take rather than to decline a jurisdiction based upon an impugned enactment. Still more is it a *non sequitur* to suppose that they must apply an impugned enactment to matters in respect of which their jurisdiction is unchallenged.

[12] Compare *e.g.* Viscount Simon's observations for their Lordships' Board in *A.-G. (Ont.) v. Canada Temperance Federation* [1946] A.C. 193 at p. 206: 'Their Lordships do not doubt that in tendering humble advice to His Majesty they are not absolutely bound by previous decisions of the Board, as is the House of Lords by its own judgments... But on constitutional questions it must be seldom indeed that the Board would depart from a previous decision which it may be assumed will have been acted on by both governments and subjects' with the dicta in the opinion of Reed J. for the United States Supreme Court in *Smith* v. *Allwright:* '...we are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day...' (1944) 321 U.S. 649 at p. 665; and the remarks of Chief Justice Taney in the same Court in *Smith* v. *Turner* ('*Passenger Cases*') (1849) 7 Howard 283 at p. 470: 'After such opinions, judicially delivered, I had supposed that question to be settled, so far as any question upon the construction of the Constitution ought to be regarded as closed by the decision of this court. I do not, however, object to the revision of it, and am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported.' It would appear that the Privy Council judgment expresses greater reluctance to disturb constitutional decisions than others; the U.S. Supreme Court decisions, less.

been observed, rests only upon the distinct principles of *stare decisis*). A may secure against B — or against the whole world — a decree to the effect that he has a right of property, an immunity from taxation, a power of appointment, a right to exact payment of a certain sum of money from someone, and so forth, and that decree may bind the parties, or the whole world (as certain decrees *in rem* do) once the judgment becomes final and unappellable. But even at the risk of being so brazen as to suppose anything to be impossible for the Attorney-General, will anyone imagine that A (even if he be Attorney-General) may obtain as against B a decree, with the binding force of *res judicata* — that the law is X or Y or Z ? An enactment evidently cannot be law as between A and B and not law as between A and C; the law is the same for all, and does not differ between sets of parties; and anyone who seeks refuge in the argument that a pronouncement of validity or invalidity (though given in litigation between A and B) sustains or quashes the enactment as against the *whole world,* will find this comfort cold when called upon to explain whether default by the Attorney-General to appear or to plead, or to appeal within the time limit, or his consent, will produce a decree (in *e.g.* the Superior Court) binding the Legislature — so as to prevent, for instance, any reconsideration of the question in a higher court in any future case. The self-evident absurdity in such suggestions is derived partly from identifying the personality of the Attorney-General with that of the Legislature — which, for that matter, probably has none. But even as regards the exercise of delegated legislative powers by proclamation or order in council, where the absurdity it less apparent than where a statute is impugned as *ultra vires* of the Legislature, who would contend that a default by the Attorney-General to contest at first instance or to appeal in time, would work a quashing of regulations forever ? And, indeed, in Chabot's case, no distinction was suggested between the application of Art. 114 to regulations and its application to statutes. It is submitted, indeed, that so far is the gulf qualitative and not quantitative between *stare decisis* and *res judicata* that a regulation remains a legislative enactment howsoever specific it may be.[13]

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[13] Thus, even if in litigation between A and the Crown A challenges the validity of a Crown regulation specifically prohibiting A by name from selling liquor on January 1st, 1966, at a certain street address, still the decree should not purport to invalidate or declare invalid the regulation itself, but rather to declare that A has the liberty to do the specified thing; or, at most, that no right title or interest will arise in the Crown to any fine or penalty in consequence of doing the thing purported to be prohibited. This, it is submitted, is not a quibble, but an application of a clear principle systematically to the extreme case.

These considerations do not, however, appear to have been present to the mind of Rinfret J. in delivering his dissenting opinion in *Chabot's Case* [14] in the Court of Queen's Bench holding that a failure by the appellant (in invoking the nullity of certain regulations allegedly infringing religious liberties in education,) to appeal against a successful intervention in the Court below by the Attorney-General in defence of those regulations, precluded the appellant from raising the question anew in the appeal he had taken against the school commissioners with regard to his application for *mandamus;* and concluding that the result of the intervention being final, the requirements of Art. 114 could not be satisfied by a new notice of eight days in the Court of Appeal. His Lordship observed: [15]

'...la situation était la suivante: un jugement avait été rendu, par une Cour compétente pour entendre la cause, tant sur la demande de *mandamus* que sur la déclaration d'inconstitutionnalité; un pourvoi en appel avait été formé dans les délais légaux contre les défendeurs sur la question de *mandamus*, mais aucun appel n'avait été enregistré contre l'intervenant à l'encontre de la déclaration d'inconstitutionnalité. Cette question avait été plaidée et vidée; aucun appel n'ayant été formé dans les délais légaux, le droit d'appel s'était éteint le 28 octobre 1955.

'Devant cette situation, le demandeur a donné, le 16 janvier 1956, un nouvel avis au procureur général, en se basant sur l'art. 114 C.P., et cette fois devant la Cour d'appel.

'Quelle est la valeur de cet avis ? Le délai d'appel est de rigueur; l'on ne peut pas, par une autre procédure, circonvenir l'art. 1209 C.P. Le droit d'appel étant perdu, on ne peut pas le faire revivre. Ce serait, à mon avis, à l'encontre de l'ordre public que de permettre à un plaideur d'utiliser l'art. 114 C.P. pour faire échec aux prescriptions de rigueur de l'art. 1209 C.P. Je ne vois pas que la situation en soit changée du fait que l'une des parties en cause soit le procureur général et que la question en jeu en soit une de constitutionnalité.

'L'article 114 C.P. dit bien que l'inconstitutionnalité d'une loi de la Province ne peut être plaidée à moins que la partie qui la plaide n'ait donné l'avis requis, et ce, devant les tribunaux tant de première instance que d'appel; mais il dit également que le procureur général, s'il intervient, doit être considéré comme s'il était partie au litige. Les dispositions de l'art. 1209 C.P. s'appliquent dans son cas comme dans tous les autres, en sa faveur ou contre lui.

'L'article 114 C.P. doit s'interpréter de façon à ne pas entrer en conflit avec l'art. 1209 C.P., et cette interprétation est, je le soumets, la suivante: l'avis du procureur général ne peut être donné devant le tribunal d'appel que lorsque la question d'inconstitutionnalité y est soulevée et plaidée pour la première fois, sans avoir été présentée au tribunal de première instance et sans que jugement soit intervenu pour trancher le litige déjà engagé.

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[14] *Supra, note 1;* [1957] B.R. 707 at p. 743-4.
[15] *Ibid.*

'Lorsque la question d'inconstitutionnalité a été soumise en première instance, qu'elle a été vidée par un tribunal compétent, que le procureur général par son intervention est devenu partie au litige, le seul recours ouvert au plaideur non satisfait est celui de l'appel du jugement rendu; faute par la partie intéressée de s'en prévaloir, elle perd le droit de soulever cette question de nouveau devant le tribunal d'appel.

'Le second avis ne rencontre donc pas les exigences de l'art. 114 C.P.; il doit être rejeté.'

It is quite evident in the foregoing remarks that his Lordship wishes to interpret the section so as to make rulings of law part of the object of the judicial decree; and his Lordship does not scruple expressly to invoke *res judicata:* [16]

'L'un des moyens allégués par le procureur général au soutien de ses conclusions est précisément la question de chose jugée...

'...il y a opposé la présomption *juris et de jure* qui découle de l'autorité de la chose jugée; il a soutenu que se rencontrent ici les conditions de la chose jugée: identité d'objet, de cause, de parties et de choses.

'Il n'a pas fait valoir (à mon avis, il l'aurait pu) l'*estoppel by record* du droit britannique.

'Il serait, je le répète, excessivement dangereux et contraire à l'ordre public d'interpréter l'art. 114 C.P. de façon à permettre la circonvention de l'art. 1209 C.P. et à faire en même temps tomber la présomption qui s'attache à la chose jugée.'

The answer to Rinfret J. is, evidently, that since Art. 114 purports to constitute an obstacle to raising an *argument of law* in a Court of Appeal — which in principle the Court should apply *proprio motu* — that article must not create obstacles beyond those needed to effectuate its purpose; which purpose is no more than an eight-day notice to the Attorney-General to allow him to argue the questions raised. Notice eight days prior to hearing satisfies this purpose every bit as effectually when grounds of *ultra vires* have been ruled on below as when they have not; and, moreover, on principle the ordinary rules relating to interventions are inapplicable insofar as those rules presuppose *res judicata,* seeing that matter of law is not the object of a judicial decree. And more especially must the Article be so understood when its literal terms not only admit of, but invite, that construction. The formal judgment of the Court merely refers to a second intervention by the Attorney-General on notice under Art. 114 C.P.; and, apart from a remark by Hyde J.[17] that appellant was entitled to his argument on prescribed notice, the majority in no way deals with the fundamental issues arising from the opinion of Rinfret J.

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[16] *Ibid.,* p. 745.

[17] *Loc. cit.* at p. 727.

Had Rinfret J.'s opinion prevailed, the implications of a *res judicata* in questions of constitutional law must ultimately have raised serious issues for the Supreme Court of Canada, far transcending the bounds of procedure. Even as it is, the article purports to impose an eight-day notice as condition precedent to invoking the nullity of various enactments [18] — a nullity which, as has been observed, is in principle applicable *proprio motu* by the Court, without plea or argument. To impose such a condition precedent to invoking nullity is to deprive the enactment of the consequences of its nullity — which, at least as regards impugned statutes, is of very doubtful constitutionality.[19] Can the Legislature competently protect its enactments from the consequences of their nullity ? So to hold is to hold that it may obliterate the difference between what is *intra vires* and what is *ultra vires,* and give all the same effect as if *intra vires.*

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[18] It has been assumed throughout that the proclamations and orders in council dealt with by Art. 114 are legislation. How far different considerations apply to executive acts in the form of proclamations and orders in council, is beyond the scope of the present note.

[19] See *e.g. Magistrates Privileges Act* R.S.Q. 1964, c. 25, s. 6: 'No action shall be brought against a judge of the sessions, district judge, justice of the peace, or any official whatsoever, by reason of any act done in virtue of a statutory provision of Canada or of the Province, for the reason that such provision is unconstitutional.' Even assuming that provincial legislation mitigating the consequences of error of law is valid as legislation in relation to property and civil rights in the province, it by no means follows that specific legislation, singling out unconstitutional legislation for this treatment, is also valid. A general elimination of the consequences of error of law might be legislation *in relation to* civil rights which would only *inter alia* deal with *ultra vires* legislation, incidentally *affecting* it. When *ultra vires* legislation is given special attention by a statute, that statute is legislating *in relation to ultra vires* legislaton. See *B. C. Power* v. *B. C. Electric* [1962] S.C.R. 642, where the Supreme Court of Canada held (Abbott J. dissenting) that the Crown could not invoke its immunity to withhold from receivership property, the object of litigation, which was taken under legislation whose constitutional validity was itself impugned. That is a very extreme ruling; one need not go nearly so far in order to concluded that the *Magistrates Privileges Act* purports invalidly to deprive unconstitutional legislation of the results of unconstitutionality. The *B. C. Power* decision goes much further, it means that had the Crown, in effect, taken possession by an unequivocal tort — a wanton outrage — its possession would have been secure; but the mere passage of a void statute renders its possession precarious. The *B. C. Power* decision says that not only must the Province submit to all the ordinary legal consequences of the invalidity of its enactments, but it must also suffer some extra ones for good measure.