
CANADA / JUDGMENT

Chrysler Canada Ltd. v. Canada (Competition Tribunal)

[1992] 2 SCR 394

COURT

Supreme Court of Canada

DECIDED

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Chrysler Canada Ltd. v. Canada (Competition Tribunal)

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Report

[1992] 2 SCR 394

Case number

22151, 22152

Judges

La Forest, Gérard V.; L'Heureux-Dubé, Claire; Sopinka, John; Gonthier, Charles Doherty; Cory, Peter deCarteret; McLachlin, Beverley; Stevenson, William

On appeal from

Federal Court of Appeal

Subjects

Courts

Notes

SCC Case Information: 22151, 22152

Decision Content

Chrysler Canada Ltd. v. Canada (Competition Tribunal), [1992] 2 S.C.R. 394

The Competition Tribunal Appellant

v.

Chrysler Canada Ltd. and

the Director of Investigation and Research Respondents

and between

The Director of Investigation and Research

and the Competition Tribunal Appellants

v.

Chrysler Canada Ltd. Respondent

Indexed as: Chrysler Canada Ltd. v. Canada (Competition Tribunal)

File Nos.: 22151, 22152.

1992: January 31; 1992: June 25.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Stevenson* JJ.

on appeal from the federal court of appeal

Contempt -- Competition Tribunal -- Jurisdiction -- Contempt ex facie curiae -- Whether Competition Tribunal has jurisdiction over civil contempt for breaches of its orders under Part VIII of Competition Act -- Meaning of "any matters related thereto" -- Competition Tribunal Act, R.S.C., 1985, c. 19 (2nd Supp.), s. 8.

The appellant Competition Tribunal issued an order against Chrysler Canada Ltd. under Part VIII of the Competition Act requiring it to resume the supply of automotive parts to one of its customers. The Director of Investigation and Research, having reason to believe that Chrysler was not complying with the order, filed a motion with the Tribunal for an order directing Chrysler to show cause why it should not be held in contempt of the Tribunal. At the hearing of the motion, Chrysler objected to the Tribunal's jurisdiction. The Tribunal ruled that it had jurisdiction to entertain proceedings for contempt of its orders. The Federal Court of Appeal reversed the decision.

Held (McLachlin J. dissenting): The appeals should be allowed.

Per La Forest, L'Heureux-Dubé, Sopinka, Gonthier and Cory JJ.: While at common law only superior courts have the power to punish for contempt ex facie curiae, clear and unambiguous statutory language can override the common law and confer ex facie contempt powers on an inferior tribunal. Enactments which deprive superior courts of their jurisdiction must be given a narrow construction, but barring constitutional considerations, if a statute, read in context and

given its ordinary meaning, clearly confers upon an inferior tribunal a jurisdiction that is enjoyed by the superior court at common law, while not depriving the superior court of its jurisdiction, it should be given effect. The Competition Tribunal, an inferior court of record, has jurisdiction over civil contempt for breaches of its orders under Part VIII of the Competition Act . Parliament intended the Tribunal to oversee Part VIII, the civil part, and was strongly concerned with long-term compliance with the Competition Act , in both its criminal and civil parts, but the Act itself does not make any provision for the enforcement of the Tribunal's orders through contempt or similar proceedings. Section 8(1) of the Competition Tribunal Act is the basis of the Tribunal's jurisdiction. It confers on the Tribunal jurisdiction "to hear and determine all applications made under Part VIII of the Competition Act and any matters related thereto". When the English and French versions are read together, it becomes apparent that the additional powers conferred by the phrase "any matters related thereto"/"toute question s'y rattachant" pertain to the applications, and not to the hearing and determination of the applications. The Tribunal's jurisdiction does not terminate upon the determination of an application, but may encompass other matters related to the application, such as the enforcement of an order made pursuant to the application. Since the Tribunal has jurisdiction to hear and determine Part VIII applications, the common law would have conferred upon it jurisdiction over incidental and ancillary matters arising in the course of the hearing and determination. No need would arise to add the phrase "and any matters related thereto". Since this phrase should be given some meaning, it should be taken as a grant of jurisdiction over matters related to Part VIII applications, but arising outside of the hearing and determination of these applications. These matters may include the enforcement of the orders made under Part VIII.

Section 8(2) of the Competition Tribunal Act confirms and consolidates the Tribunal's jurisdiction. It expressly confers on the Tribunal the powers of a superior court with respect to the enforcement of its orders, which include the power over contempt for breaches of its orders. This conclusion is further supported by s. 8(3) , which requires that the judicial member of the Tribunal concur in a finding of contempt and in the consequences attached to this contempt by the Tribunal. Inferior tribunals, whose members are seldom all lawyers or judges, may generally find persons in contempt in facie and punish them without the need for judicial endorsement. Section 8(3) , because of this unique requirement, is indicative of the intention of Parliament to give the Tribunal contempt powers going beyond those which an inferior tribunal would ordinarily exercise.

Even if s. 96 of the Constitution Act, 1867 limited the powers of Parliament in the same manner and to the same extent as it limits the powers of provincial legislatures, it would have been respected in this case. The Tribunal's powers should be characterized as jurisdiction over civil contempt for breaches of its orders for purposes of the historical inquiry; contempt over breaches of a tribunal's orders is a species of contempt *ex facie curiae*, and as such fell within the purview of s. 96 courts at the time of Confederation. The Tribunal also has a judicial function. With regard to institutional setting, effective enforcement of orders made under the Competition Act , particularly Part VIII, is essential, to avoid seeing these orders circumvented through elaborate relational arrangements which, although on the surface innocuous, effectively create

the same obstacles that the orders sought to remove. Only a specialized tribunal such as the Tribunal can properly ensure the enforcement of the orders it makes. Because of the institutional setting, the jurisdiction conferred by s. 8 of the Competition Tribunal Act upon the Tribunal with respect to civil contempt for breaches of its orders would not infringe s. 96 of the Constitution Act, 1867, in the event it should apply to Parliament.

Per McLachlin J. (dissenting): The Court of Appeal correctly concluded that Parliament did not confer jurisdiction over contempt *ex facie curiae* on the Competition Tribunal. At common law an "inferior court" is limited in its jurisdiction to the punishment of contempt *in facie curiae* absent clear and express statutory language to the contrary. By long tradition, exercise of the power to punish contempt outside the presence of the court has been confined to superior courts, and this restriction is sound, being grounded in significant policy considerations. Parliament can expressly legislate to confer a general contempt power on an inferior tribunal, subject to the constitutional issue. There is a presumption, however, in construing statutes conferring powers on inferior tribunals, that they will not be considered to possess the power of contempt outside the presence of the court unless the language of Parliament is clear and unequivocal. No such language is found in s. 8 of the Competition Tribunal Act. This presumption does not apply only in cases where the enactment extinguishes or diminishes the power of a superior court. Even if the presumption does not apply, ss. 8 and 9 of the Competition Tribunal Act, correctly construed, do not confer that power on the Tribunal. The Tribunal's primary role in the legislative scheme is that of dispute resolution; it has no general supervisory power, and the task of enforcement is left to others. The scheme provides for enforcement by a variety of other means; enforcement by contempt is unnecessary. The power of the Tribunal as set out in s. 8 is confined to the resolution of disputes and making of orders. The phrase in s. 8(1) "and any matters related thereto" is most naturally construed as referring to interlocutory matters arising in the course of an "application". Most of the powers referred to in s. 8(2) relate to the conduct of the hearing; the phrase "enforcement of its orders" can be entirely explained in the context of interlocutory orders made in the course of the hearing, and the general phrase "and other matters necessary or proper for the due exercise of its jurisdiction" refers back to whatever jurisdiction the Tribunal is granted by other provisions, primarily s. 8(1). As for s. 8(3), its requirement that the judicial member of the Tribunal concur in any finding of contempt is completely explicable by reference to the power of contempt in the face of the court conferred by s. 8(1) and (2) and the judicial member's exclusive jurisdiction over all questions of law. It is noted that clothing the Tribunal with the power to commit for *ex facie* contempt leads to difficult s. 96 issues.

Cases Cited

By Gonthier J.

Distinguished: *Canadian Broadcasting Corp. v. Quebec Police Commission*, [1979] 2 S.C.R. 618; referred to: *Chrysler Canada Ltd. v. Director of Investigation and Research*, Competition Act (1991), 129 N.R. 77; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220; *Canada (Director of Investigation and Research under the Combines Investigation Act) v. Newfoundland Telephone*

Co., [1987] 2 S.C.R. 466; Interprovincial Pipe Line Ltd. v. National Energy Board, [1978] 1 F.C. 601; Re Residential Tenancies Act, 1979, [1981] 1 S.C.R. 714; Sobeys Stores Ltd. v. Yeomans, [1989] 1 S.C.R. 238; Reference re Young Offenders Act (P.E.I.), [1991] 1 S.C.R. 252; Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police, [1979] 1 S.C.R. 311; American Airlines, Inc. v. Canada (Competition Tribunal), [1989] 2 F.C. 88, aff'd [1989] 1 S.C.R. 236.

By McLachlin J. (dissenting)

Canadian Broadcasting Corp. v. Quebec Police Commission, [1979] 2 S.C.R. 618; Vachliotis v. Exodus Link Corp. (1987), 23 C.P.C. (2d) 72; Re Residential Tenancies Act, 1979, [1981] 1 S.C.R. 714; Reference re Young Offenders Act (P.E.I.), [1991] 1 S.C.R. 252; McEvoy v. Attorney General for New Brunswick, [1983] 1 S.C.R. 704; Sobeys Stores Ltd. v. Yeomans, [1989] 1 S.C.R. 238.

Statutes and Regulations Cited

Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof, R.S.C., 1985, c. 19 (2nd Supp.).

Broadcasting Act, S.C. 1991, c. 11, ss. 13, 32.

Canadian International Trade Tribunal Act, R.S.C., 1985, c. 47 (4th Supp.), s. 16.

Combines Investigation Act, R.S.C. 1970, c. C-23, s. 17.

Competition Act, R.S.C., 1985, c. C-34 [am. c. 19 (2nd Supp.)], ss. 1.1, 10, 33, 34, 36, 67, 73, 74, 75, 86, 99, 106.

Competition Tribunal Act, R.S.C., 1985, c. 19 (2nd Supp.), ss. 8, 9(1), 13.

Constitution Act, 1867, ss. 96 to 101.

Federal Court Rules, C.R.C. 1978, c. 663, r. 1716.

Interpretation Act, R.S.C., 1985, c. I-21, ss. 12, 31.

Official Languages Act, R.S.C. 1970, c. O-2, s. 8(2) (c).

Oil and Gas Production and Conservation Act, R.S.C., 1985, c. O-7, ss. 13, 62.

Ontario Supreme Court Rules Respecting Criminal Proceedings -- Part I, SI/85-152, r. 2.

Public Inquiry Commission Act, R.S.Q. 1964, c. 11, ss. 7, 11, 12.

Rules of Civil Procedure, O. Reg. 560/84, rr. 13.01, 13.02.

Authors Cited

Beaupré, Michael. Interpreting Bilingual Legislation, 2nd ed. Toronto: Carswell, 1986.

Canada. Economic Council of Canada. Interim Report on Competition Policy. Ottawa: Queen's Printer, 1969.

Côté, Pierre-André. *The Interpretation of Legislation in Canada*, 2nd ed. Cowansville: Éditions Yvon Blais Inc., 1992.

Halsbury's Laws of England, vol. 44, 4th ed. London: Butterworths, 1983.

APPEALS from a judgment of the Federal Court of Appeal, [1990] 2 F.C. 565, 111 N.R. 368, 31 C.P.R. (3d) 510, 48 B.L.R. 125, reversing a decision of the chairman of the Competition Tribunal dismissing an objection to jurisdiction. Appeals allowed, McLachlin J. dissenting.

C. Christopher Johnston, Q.C., and Jane Graham, for the appellant Competition Tribunal.

Rory R. Edge and William J. Miller, for the appellant Director of Investigation and Research.

Thomas A. McDougall, Q.C., and Richard A. Wagner, for the respondent Chrysler Canada Ltd.

//Gonthier J.//

The judgment of La Forest, L'Heureux-Dubé, Sopinka, Gonthier and Cory JJ. was delivered by

Gonthier J. -- These appeals are concerned with the jurisdiction of the Competition Tribunal (hereinafter the Tribunal) to entertain proceedings for civil contempt of its orders under Part VIII of the Competition Act, R.S.C., 1985, c. C-34, as amended by R.S.C., 1985, c. 19 (2nd Supp.) (hereinafter CA).

I -- Facts and Proceedings

On October 13, 1989, the Tribunal issued an order against the respondent under s. 75 CA, requiring it to resume the supply of Chrysler automotive parts to one Richard Brunet. This order was upheld by the Federal Court of Appeal on September 19, 1991: 129 N.R. 77.

On February 19, 1990, the Director of Investigation and Research (hereinafter "the Director"), having reason to believe that the respondent was not complying with the order, filed a motion with the Tribunal for an order directing the respondent and others to appear before the Tribunal to show cause why they should not be held in contempt of the Tribunal. At the hearing of the motion, on February 20, 1990, the respondent objected to the jurisdiction of the Tribunal. On the same day, the Tribunal ruled that it had jurisdiction to entertain contempt proceedings. The respondent appealed from that decision. On July 10, 1990, the Federal Court of Appeal unanimously reversed and denied the jurisdiction of the Tribunal, for the reasons of Iacobucci C.J. (as he then was). This Court granted leave to appeal this judgment on May 2, 1991.

II -- Relevant Statutory Dispositions

Competition Tribunal Act, R.S.C., 1985, c. 19 (2nd Supp.), s. 8 (hereinafter CTA):

8. (1) The Tribunal has jurisdiction to hear and determine all applications made under Part VIII of the Competition Act and any matters related thereto.

- (2) The Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.
- (3) No person shall be punished for contempt of the Tribunal unless a judicial member is of the opinion that the finding of contempt and the punishment are appropriate in the circumstances.

III -- Judgments Below

Competition Tribunal

Reed J. stated that inferior tribunals do not have the power to punish for contempt committed outside of their presence (*contempt ex facie curiae*), unless a statute confers such a power on them. She found that s. 8 CTA did grant such jurisdiction to the Tribunal, a conclusion that was further buttressed by the nature of the competition scheme, especially the separation of investigative and adjudicative powers between the Director and the Tribunal respectively.

Federal Court of Appeal, [1990] 2 F.C. 565

Iacobucci C.J. began with the same premise as Reed J., referring to Dickson J. (as he then was) in *Canadian Broadcasting Corp. v. Quebec Police Commission*, [1979] 2 S.C.R. 618 (hereinafter *CBC*), for the proposition that the statutory grant must be clear and unambiguous. He examined the three subsections of s. 8 CTA. He found that the words "hear and determine" in s. 8(1) limited the jurisdiction of the Tribunal to the issuance of the order determining the application under Part VIII CA. The phrase "enforcement of its orders" in s. 8(2) was qualified by the phrase "necessary or proper for the due exercise of its jurisdiction" and therefore could not give the Tribunal a greater jurisdiction than s. 8(1) outlines. Finally, s. 8(3) does not indicate that it applies to anything more than contempt in the presence of the Tribunal (*in facie curiae*). He concluded that the Tribunal did not have any jurisdiction over contempt proceedings for breaches of its orders under Part VIII CA.

IV -- Issue

As stated at the outset of these reasons, the sole issue before the Court is whether the Tribunal has jurisdiction over civil contempt for breaches of its orders under Part VIII CA. The parties made numerous references to contempt *ex facie curiae* in general, and I wish to underscore that the powers of the Tribunal over contempt *ex facie curiae* as such are not at issue here. This Court is only concerned with one species of *ex facie* contempt, failure to comply with an order of the Tribunal.

V -- Analysis

It is not contested by the parties, and the Court agrees, that the Tribunal is an inferior court of record, as stated in s. 9(1) CTA.

A. The Common Law

This Court reviewed the common law with respect to the contempt powers of inferior tribunals in CBC, supra. There, the CBC had broadcast a photograph of a witness before the Quebec Police Commission (hereinafter "the Commission"), despite a publication ban from the Commission. The Commission ordered the CBC to appear before it and show cause why it should not be held in contempt. The CBC challenged the jurisdiction of the Commission. Various legislative grounds had been advanced in support of the jurisdiction of the Commission, including ss. 7, 11 and 12 of the Public Inquiry Commission Act, R.S.Q. 1964, c. 11:

7. A majority of the commissioners must attend and preside at the hearing of witnesses, and they, or a majority of them, shall have, with respect to the proceedings upon the hearing, all the powers of a judge of the Superior Court in term.
11. Any person refusing to be sworn when duly required, or omitting or refusing, without just cause, sufficiently to answer any question that may be lawfully put to him, or to render any testimony in virtue of this act, shall be deemed to be in contempt of court and shall be punished accordingly.
- ...
12. If any person refuse to produce, before the commissioners, any paper, book, deed or writing in his possession or under his control which they deem necessary to be produced, or if any person be guilty of contempt of the commissioners or of their office, the commissioners may proceed for such contempt in the same manner as any court or judge under like circumstances.

Articles 46 (general powers of courts and judges) and 49 to 54 (contempt of court) of the Code of Civil Procedure were also invoked.

For the majority of the Court, Beetz J. first reviewed the common law. He concluded at p. 638:

... the Anglo-Canadian authorities on the power to punish for contempt committed *ex facie curiae* have been firmly established for more than two hundred years. According to these authorities, this power is enjoyed exclusively by the superior courts.

Such a rule is moreover justified in principle by the following considerations. The power to punish for contempt committed *ex facie* is liable to result in inquiries which may well involve a lower court in areas which are practically impossible to define in terms of jurisdiction and completely foreign to its own area of jurisdiction, which by definition is limited. Such an obstacle does not arise in the case of a court like the Superior Court, which is a court of original general jurisdiction (art. 31 C.C.P.) with *a priori* jurisdiction, or courts sitting in appeal from decisions of the Superior Court, which may in general render the decisions which the latter would have

rendered. Moreover, the power to punish a contempt committed *ex facie* is necessarily bound up with the superintending and controlling power which only a superior court may exercise over inferior courts. This controlling power could become illusory if, in the case of a contempt committed *ex facie*, an inferior court had the right to go beyond its own particular field. There would also be the danger of conflict between the superior and inferior courts, of the kind that formerly existed in England between the common law and equity courts. Finally, the inferior courts are not without any means of ensuring that their lawful orders are observed ... the superior courts may come to their aid ...

Beetz J. went on to examine whether any of the above enactments conferred a power over contempt *ex facie curiae* on the Commission. He held that s. 7 of the Public Inquiry Commission Act was limited to the examination of witnesses, and therefore could not give the Commission more than the *in facie* contempt power it already had. Similarly, ss. 11 and 12 could be read as concerning contempt *in facie curiae* only. As for the articles of the Code of Civil Procedure, art. 46 was suppletive in nature and arts. 49 to 54 merely codified the common law of contempt. In adopting this interpretation, Beetz J. was guided by the principle of constitutionality of statutes: in deciding as to the appropriate interpretation of a statute, one should prefer a construction that conforms with the Constitution.

Beetz J. did not enunciate any formal requirement with respect to the wording of a statutory grant of *ex facie* contempt powers to an inferior court. In his analysis of the Code of Civil Procedure, though, he wrote that "[w]hen the legislator wishes to amend the common law, he does so by express provision" (p. 644), referring to art. 51 C.C.P., which reduced the discretion formerly enjoyed by courts of law as to punishment. Dickson J., writing for himself and Martland J., held that statutory language must be clear and unambiguous to override the common law and confer *ex facie* contempt powers on an inferior tribunal. I fail to see much difference between "express" and "clear and unambiguous". Both opinions adopt in substance the same interpretation principle. The common law may be modified through express statutory language, such as the grant of a power in terms different from the common law.

Furthermore, when dealing with common law rules on the jurisdiction of superior courts, it is important to distinguish between enactments which deprive superior courts of their jurisdiction, or privative clauses, and enactments which convey part of the jurisdiction of superior courts to another tribunal, while not extinguishing the jurisdiction of superior courts. In the former case, courts have insisted on a narrow construction, since the citizen may be deprived of a recourse to the superior court (see the line of cases culminating in *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, where the rule of strict interpretation is given constitutional significance). In the latter case, I would think that there is little point in insisting upon precise formulae to the extent that the intention of Parliament may be thwarted (see P.-A. Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1992), at pp. 420-21). Barring constitutional considerations, if a statute, read in context and given its ordinary meaning, clearly confers upon an inferior tribunal a jurisdiction that is enjoyed by the superior court at common law, while not depriving the superior court of its jurisdiction, it should be given effect.

B. The Functions of the Competition Tribunal

The Tribunal was created in 1986, in the wake of "Stage II" of competition law reform. Part I of An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof, R.S.C., 1985, c. 19 (2nd Supp.) (hereinafter the 1986 Act), became the CTA, and Part II made in-depth amendments to the CA.

The 1986 Act completed the broad division of the CA into two substantive parts, one criminal (Part VI) and one civil/administrative in nature (Part VIII), in accordance with proposals put forward as early as in 1969 by the Economic Council of Canada in its Interim Report on Competition Policy. Jurisdiction over the criminal part lies with the courts ordinarily dealing with criminal cases, as well as the Federal Court, Trial Division (ss. 67, 73 CA). As for the civil part, Part VIII, as its heading indicates, lists the matters reviewable by the Tribunal. Section 8(1) CTA confirms the jurisdiction of the Tribunal over Part VIII. The civil part of the CA therefore falls entirely under the Tribunal's jurisdiction. It is readily apparent from the CA and the CTA that Parliament created the Tribunal as a specialized body to deal solely and exclusively with Part VIII CA, since it involves complex issues of competition law, such as abuses of dominant position and mergers.

Moreover, the 1986 reform also concentrated the administration of the CA in the hands of the Director of Investigation and Research. The Director is responsible for the conduct of inquiries under the CA (s. 10 CA), and he holds a number of powers in this respect. He may request the Attorney General of Canada to consider a prosecution under Part VI CA. For all intents and purposes, since competition matters generally require extensive inquiry, prosecution will rarely be instigated without a request from the Director. Hence, the Director has a substantial amount of control over prosecutions under the CA. He has even more control over proceedings under Part VIII CA since, aside from exceptions of limited scope in ss. 86, 99 and 106 CA, only the Director may bring a matter before the Tribunal.

Coming to the core of this case, when one considers the criminal part of the CA, it becomes clear that Parliament had definite concerns about enforcement when enacting the CA. For instance, in Part IV, entitled "Special Remedies", at ss. 33 and 34, superior courts of criminal jurisdiction are given powers to issue interim injunctions (the Federal Court is also given this power) and prohibition orders to prevent violations of Part VI CA. These powers are exceptional in the criminal law context. Given the nature of competition law offences, which often involve continuous or continuing business practices, it is quite understandable that Parliament may have wanted to expand the criminal part of the CA beyond retribution in order to ensure the benefits of free competition in the longer term.

The same concern for the proper long-term functioning of the free market lay at the very heart of the enactment of Part VIII in 1986. Civil remedies can be more finely attuned and stand a better chance of leading to lasting compliance with the CA than criminal convictions. Parliament, in order to provide for the supervision of the orders of the Tribunal, has given the Tribunal at s. 106 CA a power to rescind or vary its orders upon request from the Director or a person against

whom the order has been made. Yet Parliament has not included in the CA itself a mechanism to ensure compliance with the orders of the Tribunal.

The respondent argues that s. 74 CA, which makes it an offence to contravene or fail to comply with an order of the Tribunal, is functionally equivalent to a contempt power for breaches of orders under Part VIII. I disagree. First of all, s. 74 CA, unlike ss. 33(7) and 34(6) CA for interim injunctions and prohibition orders, aims at punishment of breaches, and not at securing compliance. It provides for definite fine and prison terms, and does not allow for the kind of flexibility available in contempt proceedings. It is in essence retrospective, and not prospective. Furthermore, a charge under s. 74 CA will be tried before a criminal court, and not before the Tribunal. The expertise of the Tribunal is lost in proceedings under s. 74 CA. If it is only possible to prove a breach of an order through a process comparable in complexity to the issuance of the order, as is often the case, some violations may well escape scrutiny and remedial action, if the expertise of the Tribunal is not available at the enforcement stage. Given the complexity of orders under Part VIII, monitoring their application could not be made a completely separate process, before a court of general or criminal jurisdiction, without a corresponding loss of effectiveness.

Moreover, a duality of criminal and civil remedies against a breach of an order is found in other areas, where criminal provisions similar to s. 74 CA protect the orders of an inferior tribunal created by Parliament. Yet Parliament, in these other areas, has also provided for the filing of their orders with the Federal Court to ensure compliance (see the Broadcasting Act, S.C. 1991, c. 11, ss. 13 and 32, and the Oil and Gas Production and Conservation Act, R.S.C., 1985, c. O-7, ss. 13 and 62). Section 74 CA is not an adequate substitute for contempt proceedings for breaches of orders of the Tribunal.

This cursory examination of the CA shows that Parliament intended the Tribunal to oversee Part VIII and that Parliament was strongly concerned with long-term compliance with the CA, in both its criminal and civil parts. The CA itself, however, does not make any provision for the enforcement of the orders of the Tribunal through contempt or similar proceedings.

C. Section 8 of the Competition Tribunal Act

Section 8 CTA complements the CA. The attention of this Court has been drawn to other federal statutes which contain provisions similar in wording to parts of s. 8 CTA, in particular to s. 8(2) CTA. None of these provisions, however, is similar to the three subsections of s. 8 CTA taken as a whole. Moreover, all of the statutes in which these provisions are found offer schemes different from that of the CA and CTA, inasmuch as the issue of enforcement through contempt proceedings does not arise in any of them. Either they provide for a particular enforcement mechanism, through filing of the Tribunal's order with the Federal Court, or the relief granted by the Tribunal is self-executory in nature. In other cases, the Tribunal only has powers of recommendation. Section 8 CTA is thus unique, and it must be interpreted in light of its wording and its context.

1. Section 8(1)

Section 8(1) CTA, the basis of the Tribunal's jurisdiction, reads as follows:

8. (1) The Tribunal has jurisdiction to hear and determine all applications made under Part VIII of the Competition Act and any matters related thereto.
8. (1) Le Tribunal entend les demandes qui lui sont présentées en application de la partie VIII de la Loi sur la concurrence de même que toute question s'y rattachant.

The core of the Tribunal's jurisdiction is the hearing and determination of Part VIII applications. When both versions are read together, it becomes apparent that the additional powers conferred by the phrase "any matters related thereto"/"toute question s'y rattachant" pertain to the applications, and not to the hearing and determination of the applications. In English, the phrase "any matters related thereto" may refer to the applications or to their hearing and determination, though, to my mind, the latter reading is constrained and does not reflect the natural meaning of the words, namely: "... hear and determine all applications made under Part VIII of the Competition Act and hear and determine all matters related to the applications". In French, "s'y rattachant" can only refer to the noun "demandes", and not to the verb "entend", or otherwise the clause would read "toute question se rattachant aux auditions". Section 8(1) CTA therefore confers on the Tribunal jurisdiction not only over the hearing and determination of applications, but also over related matters. The jurisdiction of the Tribunal does not terminate upon the determination of an application, as the respondent argues, but it may encompass other matters related to the application, such as the enforcement of an order made pursuant to the application.

Beyond the natural grammatical construction of s. 8(1) CTA, this interpretation is also supported by other considerations. The respondent claimed that the phrase "any matters related thereto" essentially added to the Tribunal's jurisdiction various ancillary matters that may arise in the course of the hearing of an application. Such an interpretation would, in my opinion, fail to give its full meaning to s. 8(1) CTA. It is an established principle of common law, codified to a certain extent in s. 31 of the Interpretation Act, R.S.C., 1985, c. I-21, that "[t]he powers conferred by an enabling statute include not only such as are expressly granted but also, by implication, all powers which are reasonably necessary for the accomplishment of the object intended to be secured" (Halsbury's Laws of England, vol. 44, 4th ed., para. 934, p. 586; see also P.-A. Côté, *supra*, at pp. 76-77). This principle has been recently applied in Canada (Director of Investigation and Research under the Combines Investigation Act) v. Newfoundland Telephone Co., [1987] 2 S.C.R. 466, and in a line of cases from the Federal Court of Appeal, starting with Interprovincial Pipe Line Ltd. v. National Energy Board, [1978] 1 F.C. 601 (C.A.). Since the Tribunal has jurisdiction to hear and determine Part VIII applications, the common law would have conferred upon it jurisdiction over incidental and ancillary matters arising in the course of the hearing and determination. No need would arise to add the phrase "and any matters related thereto". Since this phrase should be given some meaning, it should be taken as a grant of jurisdiction over matters related to Part VIII applications, but arising outside of the hearing and determination of these applications. These matters may include for instance the enforcement of the orders made under Part VIII.

2. Section 8(2)

While s. 8(1) CTA extends the jurisdiction of the Tribunal to all matters related to applications under Part VIII CA and gives jurisdictional foundation to the power of the Tribunal over contempt for breaches of its orders, s. 8(2) CTA expressly confers upon it the powers of a superior court with respect to the enforcement of its orders. Section 8(2) CTA displaces the common law presumption. It reads as follows:

8. ...

(2) The Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.

8. ...

(2) Le Tribunal a, pour la comparution, la prestation de serment et l'interrogatoire des témoins, ainsi que pour la production et l'examen des pièces, l'exécution de ses ordonnances et toutes autres questions relevant de sa compétence, les attributions d'une cour supérieure d'archives.

The position of the phrase "other matters necessary or proper for the due exercise of its jurisdiction"/"toutes autres questions relevant de sa compétence" in this paragraph leads to the conclusion that the enumerated powers come within the jurisdiction of the Tribunal as well. Section 8(2) confirms and consolidates the jurisdiction of the Tribunal. In the context of s. 8(2), the words "enforcement of its orders" coupled with the phrase "necessary or proper for the due exercise of its jurisdiction" cannot be read otherwise than as a grant to the Tribunal of the powers of a superior court of record with respect to the enforcement of its orders, which includes the power over contempt for breaches of its orders.

3. Section 8(3)

This conclusion is further supported by s. 8(3) CTA, which requires that the judicial member of the Tribunal concur in a finding of contempt and in the consequences attached to this contempt by the Tribunal. While s. 8(3) CTA makes express reference to contempt, this reference as such is not indicative of the powers of the Tribunal, since all inferior courts have power over contempt *in facie*. Section 8(3), though, is unique to the CTA. No other federal statute contains a similar provision. Inferior tribunals, whose members are seldom all lawyers or judges, may generally find persons in contempt *in facie* and punish them without the need for judicial endorsement (this is implicit in *CBC*, *supra*). It would seem somewhat incongruous that the Tribunal be subject to such a unique requirement if it only had power over contempt *in facie*, like others. Section 8(3), because of this unique requirement, is indicative of the intention of Parliament to give the Tribunal contempt powers going beyond those which an inferior tribunal would ordinarily exercise.

D. Conclusions on the Interpretation of the CA and CTA

In summary, I find that s. 8 CTA, when given its normal meaning in the context of the CA and CTA, gives the Tribunal power over contempt for breaches of its orders. No issue arises in this case nor was raised as to criminal contempt. The governing statutes in this case distinguish it from CBC, *supra*. There s. 12 of the Public Inquiry Commission Act, the statutory provision purportedly conferring *ex facie* contempt powers upon the Quebec Police Commission, only contained one phrase that could extend to contempt *ex facie* ("contempt of the commissioners or of their office"), and it was among a list of cases of contempt *in facie*. Beetz J. concluded that this phrase did not extend to contempt *ex facie*. Here, the issue is narrower: only the power over civil contempt for breaches of orders is at stake. Moreover, the CA and CTA show that Parliament directed its mind to the enforcement of the orders made under the CA. Section 8 does not differentiate between types of orders, and neither does it limit the meaning of "order" in the same fashion as former s. 17 of the Combines Investigation Act, R.S.C. 1970, c. C-23. Rather, "order" is used by Parliament throughout Part VIII CA to designate the decisions of the Competition Tribunal pursuant to applications under that part. It is in my view incorrect and inappropriate to ignore the meaning given by Parliament to "orders" of the Tribunal in the overall scheme of the CA and CTA. The legislative scheme creates a need for the Tribunal to address the enforcement of its orders. Section 8 CTA, as was expounded above, sets out the jurisdiction and powers of the Tribunal in general terms, and its normal meaning is broad and clear. It is an express statement that the powers of the Tribunal include the contempt powers of a superior court for the enforcement of its orders. These include orders under Part VIII CA, which are central to its mandate.

On the level of principle, while Beetz J. in CBC legitimately feared that the Quebec Police Commission through a power over contempt *ex facie* might get involved "in areas which are practically impossible to define in terms of jurisdiction and completely foreign to its own area of jurisdiction" (p. 638) and encroach upon the jurisdiction of superior courts, these obstacles do not arise here. The power at issue here is narrower, and it can safely be left to the Tribunal to deal with breaches of its dispositive orders, since they involve the examination of issues analogous to those arising when the order was first issued, and are similarly circumscribed. In terms of expertise, the Tribunal is in fact better suited than a superior court to decide these matters. In comparison, the Commission in CBC only enjoyed powers of inquiry. For the Commission to rule on a contempt for breach of a non-publication order would have involved, first of all, a decision as opposed to a recommendation, and secondly, consideration of matters extraneous to the inquiry itself, i.e., the publication of a photograph of a witness (see CBC, at pp. 640-41). The Commission would have been outside of both its function and its field of expertise.

Furthermore, while the Commission's inquiry resulted from a particular mandate limited in time and scope, here the Tribunal is given a broad role in the continuous operation of the CA. The Tribunal has already made and will make numerous orders under Part VIII CA. It is integrated within the federal court system, and its decisions are subject to appeal as if they emanated from the Federal Court, Trial Division (s. 13 CTA). It is not set apart or its decisions protected by any

privative clause. Even if the Tribunal exercises powers that at common law belong to a superior court, it is still subject to full review by the Federal Court of Appeal. The Tribunal has none of the characteristics that would inspire fear for the integrity of the powers of superior courts.

E. Constitutional Considerations

Until it came to this Court, this case had centred on interpretation. At the end of its factum, the respondent briefly raises the constitutionality of s. 8 CTA, should it purport to confer upon the Tribunal power over contempt for breaches of its orders. Both parties addressed the issue more thoroughly in oral argument.

At the outset, the applicability to Parliament of the case law of this Court regarding s. 96 of the Constitution Act, 1867 comes into question. I will not rule on this point, since I am of the opinion that, even if s. 96 of the Constitution Act, 1867 limited the powers of Parliament in the same manner and to the same extent as it limits the powers of provincial legislatures, it would have been respected in this case.

Re Residential Tenancies Act, 1979, [1981] 1 S.C.R. 714 (hereinafter *Residential Tenancies*), has established a three-step analytic approach to s. 96 of the Constitution Act, 1867 problems. This approach was further developed and refined in *Sobeys Stores Ltd. v. Yeomans*, [1989] 1 S.C.R. 238 (hereinafter *Sobeys*), and in *Reference re Young Offenders Act (P.E.I.)*, [1991] 1 S.C.R. 252. In *CBC*, *supra*, although the three-step analytic framework of *Residential Tenancies* had not yet been articulated, this Court made in substance the same inquiry. For the majority, Beetz J. held that the National Assembly could not validly confer upon the Quebec Police Commission power over contempt *ex facie curiae*, since this came within the jurisdiction of superior courts in 1867, and these powers were not an integral part of the mandate of the Commission (at pp. 639-41).

1. Historical Inquiry

The parties have advanced two different characterizations of the powers of the Tribunal for the purposes of the historical inquiry. The appellants have characterized them as powers in relation to competition law, while the respondent has narrowed them to powers over contempt *ex facie curiae*. This type of conflict between a broader and a narrower characterization is not atypical in s. 96 of the Constitution Act, 1867 cases. Wilson J. discussed it in *Sobeys*, *supra*, at p. 254:

Viewed against this background the first step of the *Residential Tenancies* test, which is drawn from the "inferior court" cases, represents a kind of threshold test, a method of deciding whether, in a formal sense, s. 96 has been violated at all. The second and third steps serve to validate some legislative schemes despite the fact that they trench on the traditional jurisdiction of s. 96 courts. The purposes of s. 96 require a strict, that is to say a narrow, approach to characterization at the first stage. Given what I have to say below on concurrent superior/inferior court jurisdiction at Confederation, any other approach would potentially open the door to large accretions of jurisdiction and thereby defeat the purposes of the constitutional provision. [Emphasis in original.]

Wilson J. then defined the jurisdiction given to the Nova Scotia Labour Standards Tribunal by s. 67A of the Labour Standards Code, S.N.S. 1972, c. 10, as jurisdiction over unjust dismissal, as opposed to employer/employee relations or labour standards.

I will follow this approach. I am not unmindful that, in *CBC*, supra, Beetz J. faced the same problem to a certain extent. He could proceed to his analysis on the basis either of the Commission's power to prohibit publication or of its power over contempt *ex facie curiae*. He chose the latter at p. 640, since it was more consistent with the crux of the case. Similarly, here, a characterization of the impugned powers as pertaining to competition law would mask in its generality the essence of the case. Should the appellants' proposed characterization be retained, the inquiry would really bear on the overall jurisdiction conferred upon the Tribunal through Part VIII CA and s. 8 CTA. The jurisdiction of the Tribunal over civil contempt for breaches of its orders, and not its overall jurisdiction over Part VIII CA, is at issue here.

The appellants have also submitted that such a characterization would place too much emphasis on the remedial aspects of the Tribunal's jurisdiction over its substantive aspects, contrary to the judgment of Wilson J. in *Sobeys*, supra, at p. 267. The appellants may be right, had the characterization been "jurisdiction over imprisonment" or "jurisdiction over fines". These focus unduly on the remedy ordered by the Court and neglect the substantive grounds for ordering it. As Wilson J. put it in *Sobeys*, supra, at p. 255, to retain them "would be to freeze the jurisdiction of [s. 96] courts at 1867 by a technical analysis of remedies". Characterization as "jurisdiction over civil contempt for breaches of the tribunal's orders" corresponds to the actual debate in this case while not falling into the trap of technical, remedy-oriented analysis.

Contempt over breaches of a tribunal's orders is a species of contempt *ex facie curiae*, and as such, following *CBC*, supra, it fell within the purview of s. 96 courts at the time of Confederation. I will therefore proceed to the second and third stages of the inquiry.

2. Judicial Function

In *Residential Tenancies*, Dickson J., at p. 743, outlined the distinguishing features of a judicial function:

... the hallmark of a judicial power is a lis between parties in which a tribunal is called upon to apply a recognized body of rules in a manner consistent with fairness and impartiality. The adjudication deals primarily with the rights of the parties to the dispute, rather than considerations of the collective good of the community as a whole.

The appellants relied on this passage in their submission that the Tribunal does not fulfil an adjudicative function, as it really seeks to mediate the interests of the collectivity, in ensuring the proper functioning of the economy according to a competitive model, with the rights of the individual parties. Indeed the Director does not represent before the Tribunal the interests of any particular party, but rather the interests of the general public in the application of the CA and in the furtherance of its policy objectives.

The Tribunal, however, disposes of the applications under Part VIII CA in a judicial manner. One should beware of trying to pigeonhole the role of the Tribunal within a "judicial" or "administrative" model. This Court has since long warned of the dangers of relying on too tight a dichotomy between these models of decision (*Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, at p. 325). Nevertheless the decisions of the Tribunal, if anything, come much closer to a judicial model than to any other model. The Tribunal is presented with evidence in an adversarial fashion, and it must decide in favour of the Director or in favour of the defendant. The structure of the CA and CTA bears some similarities to the structure of labour standards adjudication in Nova Scotia, examined in *Sobeys*, supra, where Wilson J., at pp. 274-75, observed a separation of "administrative" and "judicial" functions between a director and a tribunal, respectively.

Courts which have addressed this issue have found that the Tribunal proceeds judicially (see Iacobucci C.J. (as he then was) in *American Airlines, Inc. v. Canada (Competition Tribunal)*, [1989] 2 F.C. 88 (C.A.), at pp. 97-98, aff'd [1989] 1 S.C.R. 236). I agree, and my conclusion is further strengthened by the particular nature of contempt proceedings, where of all matters within the Tribunal's jurisdiction the debate will likely be the most adversarial.

3. Institutional Setting

A substantial portion of these reasons has already been devoted to showing how the Tribunal is an integral part of the framework created by the CA and CTA. Within this framework, the Tribunal is the judicial authority in charge of the civil parts of the CA. Furthermore, the CA and CTA show how Parliament specifically provided for the enforcement of orders made under the CA. In the context of competition law, particularly of Part VIII CA, where the subject-matter lies largely in the realm of contractual relationships, effective enforcement of orders is essential, for fear of seeing these orders circumvented through elaborate relational arrangements which, although on the surface innocuous, effectively create the same obstacles that the orders sought to remove. Only a specialized tribunal such as the Tribunal can properly ensure the enforcement of the orders it makes. Because of the institutional setting, the jurisdiction conferred by s. 8 CTA upon the Tribunal with respect to civil contempt for breaches of its orders would not infringe s. 96 of the Constitution Act, 1867, in the event it should apply to Parliament.

VI -- Conclusion

I would allow both appeals. The matter is referred back to the Tribunal for disposition on the merits.

//McLachlin J.//

The following are the reasons delivered by

McLachlin J. (dissenting) --

Introduction

Having read the reasons of my colleague Justice Gonthier, I find myself in respectful disagreement. My review of the authorities leads me to the conclusion that the Court below correctly concluded that Parliament did not confer jurisdiction over contempt *ex facie curiae* on the Competition Tribunal.

These appeals are a simple exercise in statutory interpretation; they are subject to and determined by the principles governing the construction of federal statutes. The issue is not whether the Court is of the opinion that the Competition Tribunal should be given the power to punish as contempt a violation of a final order under Part VIII of the Competition Act, R.S.C., 1985, c. C-34, nor whether extending this power to the Tribunal would seriously undermine the exclusive jurisdiction accorded superior courts by the common law. The issue is rather whether Parliament, in constituting the Competition Tribunal an inferior court, has clearly and expressly conferred on the Tribunal the power to punish contempt not only *in facie* (in the face of the court) but *ex facie curiae* (outside the presence of the court), a power traditionally reserved to the superior courts of record.

I dissent from the judgment of my colleague Gonthier J. for three fundamental reasons. First, I see no justification for departing from the common law presumption that inferior courts, absent clear and express legislation to the contrary, are strictly limited in their jurisdiction to the punishment of contempt in the face of the court. Application of this presumption to ambiguous legislation leads to the conclusion that Parliament did not intend to confer upon the Tribunal the power to punish for contempt outside the presence of the court, and indeed that Parliament may have relied upon the presumption in drafting s. 8 of the Competition Tribunal Act, R.S.C., 1985, c. 19 (2nd Supp.) (hereinafter the "Act").

Second, and in the alternative, my reading of the text of s. 8 of the Act leads me to conclude that, quite apart from the presumption, the proper construction of the legislation is that no general contempt power nor a specific power to enforce final orders via contempt was conferred, as the court below held (per Iacobucci C.J., as he then was).

Finally, adoption of Gonthier J.'s reasons makes it necessary, in my view, to consider the constitutional question of whether Parliament can confer on an inferior tribunal a power which the Constitution arguably reserves to courts created under s. 96 of the Constitution Act, 1867 -- a question on which the parties provided only cursory written and oral submissions.

I proceed below to enunciate more fully the basis of these three positions.

Analysis

A. The Governing Presumption

As Gonthier J. acknowledges in his judgment, the common law is the source of the law of contempt in every province of Canada; it therefore governs our determination of these appeals. At common law an "inferior court" such as the Competition Tribunal is limited in its jurisdiction to the punishment of contempt *in facie curiae* absent clear and express statutory language to the contrary. The appellants bear the burden of establishing that the Act runs contrary to the common law. To succeed, the appellants must rebut this common law presumption, not an easy task in any context.

By long tradition, exercise of the power to punish for contempt of court has been confined to superior courts. This Court visited this question in *Canadian Broadcasting Corp. v. Quebec Police Commission*, [1979] 2 S.C.R. 618 (hereinafter *CBC*). In a comprehensive and thorough judgment, Beetz J. for the majority reviewed the history and policy of the rule which distinguished contempt in the face of the court from contempt outside the presence of the court, confining the latter to superior courts. From an historical perspective, he pronounced that at common law, the power to conduct an inquiry into a contempt committed *ex facie curiae* and to punish it "is enjoyed exclusively by the superior courts". He elaborated (at pp. 627-28):

This proposition derives from the apparently unanimous, longstanding and consistent opinion of a great many judges and commentators. The opinions of the judges are for the most part *obiter*, but the reason for this is that in English and Canadian decisions of the last two hundred years, of which there have been a great many concerning contempt of court, there is so far as I know virtually no precedent in which a court of inferior jurisdiction has claimed the power to punish for contempt committed *ex facie*, and I have found none in which such a court has exercised it with the approval of a superior court. Superior courts, on the other hand, have always claimed and exercised this power, as an inherent power enjoyed by them exclusively. This consistency in usage is more than just significant; it is decisive. Moreover, when the legislator dealt with the question, he did so in terms which indicate that he recognized this usage and intended to sanction it, or at least in terms that in no way indicated his intention to alter it. Finally, the rule of exclusive jurisdiction of the superior courts is justifiable in principle.

From the perspective of policy, Beetz J. concluded (at p. 638):

Such a rule is moreover justified in principle by the following considerations. The power to punish for contempt committed *ex facie* is liable to result in inquiries which may well involve a lower court in areas which are practically impossible to define in terms of jurisdiction and completely foreign to its own area of jurisdiction, which by definition is limited. Such an obstacle does not arise in the case of a court like the Superior Court, which is a court of original general jurisdiction (art. 31 C.C.P.) with *a priori* jurisdiction, or courts sitting in appeal from decisions of the Superior Court, which may in general render the decisions which the latter would have rendered. Moreover, the power to punish a contempt committed *ex facie* is necessarily bound up

with the superintending and controlling power which only a superior court may exercise over inferior courts. This controlling power could become illusory if, in the case of a contempt committed *ex facie*, an inferior court had the right to go beyond its own particular field. There would also be the danger of conflict between the superior and inferior courts, of the kind that formerly existed in England between the common law and equity courts. Finally, the inferior courts are not without any means of ensuring that their lawful orders are observed: as Dorion C.J. notes in *Denis*, the superior courts may come to their aid; see also *R. v. Davies* (*supra*) and *Re Regina and Monette*.

We arrive then at this conclusion. At common law the power to inquire into and punish contempt outside the presence of the court has been confined to superior courts. The restriction is sound, grounded in significant policy considerations. Parliament can expressly legislate to confer a general contempt power on an inferior tribunal, subject to the constitutional issue which I will consider later. But there is a presumption, in construing statutes conferring powers on inferior tribunals, that they will not be considered to possess the power of contempt outside the presence of the court unless the language of Parliament is clear and unequivocal. Dickson J., in *CBC*, *supra*, put it this way (at pp. 647-48):

It is sufficient ... to state that the powers conferred upon the Police Commission, given the general limitation at common law upon the contempt powers of an inferior tribunal, must be strictly interpreted, and a strict interpretation in this case leads inevitably to the conclusion that such power was not invested in the Commission. There can be no doubt that the common law draws a sharp line between the power to punish for contempt committed outside the presence of the court, and the power to punish where the contempt is committed in the face of the court. In the discussion following his fourth proposition, Mr. Justice Beetz demonstrates that it is possible to read the relevant statutory provisions affecting the Police Commission's contempt powers in a manner which maintains the common law distinction. In the absence of clear statutory language expressing an intention to confer broader contempt powers upon the Commission, it must be presumed that the Legislature granted to the Commission only those contempt powers ordinarily exercised by an inferior tribunal. [Emphasis added.]

In short, it is not enough that it is possible or even desirable that the inferior tribunal have the power to punish for contempt outside the presence of the court. The language must be clear. The courts must assume that Parliament was aware of the well-recognized history of the presumption in drafting the provisions empowering the inferior tribunal and accordingly, that if Parliament failed to use language clearly conferring the general contempt power, it did not intend to confer it. To presume otherwise invites mischievous interference by the courts in the legislative function and heightens the potential for corruption of Parliament's intent.

Viewed thus, these appeals reduce to a single question: does the language in the legislation empowering the Competition Tribunal clearly confer on the Tribunal the power to condemn and punish contempt outside the Tribunal proceedings? The answer to this question is negative, in my view. Indeed, I do not take my colleague Gonthier J. to suggest that his interpretation of the legislation is the only interpretation, but rather that it is the better interpretation. The Act

contains no phrase expressly conferring on the Tribunal the power to find and punish contempt for acts outside the hearing process, and the language used is entirely consistent with the Tribunal's contempt power being confined to contempt in the context of Competition Tribunal hearings. One searches in vain for the clear and unequivocal language required on the principles enunciated in *CBC*, *supra*, to defeat the presumption against the conferral on an inferior tribunal of the power to condemn and punish for contempt outside the presence of the court.

Gonthier J. seeks to avoid this result by finding that the presumption relied on by this Court in *CBC*, *supra*, applies only in cases where the enactment extinguishes or diminishes the power of a superior court. He states at p. 000 of his reasons:

... when dealing with common law rules on the jurisdiction of superior courts, it is important to distinguish between enactments which deprive superior courts of their jurisdiction, or privative clauses, and enactments which convey part of the jurisdiction of superior courts to another tribunal, while not extinguishing the jurisdiction of superior courts. In the former case, courts have insisted on a narrow construction, since the citizen may be deprived of a recourse to the superior court (see the line of cases culminating in *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, where the rule of strict interpretation is given constitutional significance). In the latter case, I would think that there is little point in insisting upon precise formulae to the extent that the intention of Parliament may be thwarted (see P.-A. Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1992), at pp. 420-21). Barring constitutional considerations, if a statute, read in context and given its ordinary meaning, clearly confers upon an inferior tribunal a jurisdiction that is enjoyed by the superior court at common law, while not depriving the superior court of its jurisdiction, it should be given effect. [Emphasis added.]

The restriction of the presumption to legislation which deprives a superior tribunal of its powers runs counter to the authorities and to the clear and historical policy of the common law that quite apart from its effect on superior courts, the power of contempt outside the presence of the court is one of such importance to the liberty of the subject that it should be confined to superior courts, absent clear language to the contrary. Indeed, none of the cases reviewed in *CBC*, *supra*, involve taking away the power of a superior court. In *CBC* itself, no power was taken from the superior tribunal. The issue in such cases has never been the removal of powers of a superior court, but rather the conferring of such powers on an inferior court of record.

Gonthier J. also suggests that *CBC*, *supra*, can be distinguished and the presumption against conferring the power of contempt *ex facie curiae* avoided by reason of the fact that the power here at issue is the narrow power to enforce mandatory and prohibitive orders, made on a Part VIII hearing, by contempt. This proposition is based on the language of s. 8(2) referring to the "enforcement of orders". The argument is arguably at odds with the acknowledgement elsewhere in his reasons that the governing section is s. 8(1), given that s. 8(2) is confined to jurisdiction otherwise established; and with the broad interpretation he places on the power given to the Tribunal under s. 8(1). Be that as it may, the fact remains that even on the narrower interpretation of the power, what is at issue is the power of the Tribunal to punish contempt outside the presence of the court. In short, narrowing the issue does not avoid the presumption.

Having concluded that CBC is distinguishable, Gonthier J. goes on to construe s. 8 as though the presumption against an inferior tribunal possessing power to punish for contempt outside the presence of the court did not apply. He finds the section to be ambiguous, and goes on to choose the interpretation which best 'fits' the administrative framework within which the Tribunal functions, as he perceives that framework.

My reflections lead me to a different conclusion. Unable as I am to distinguish CBC from this case, I see no way to avoid applying the presumption against conferring on an inferior tribunal the power to punish contempt outside the presence of the court here. This presumption, combined with the absence of language in the Act clearly conferring such power on the Competition Tribunal, leads inescapably, as I see it, to the conclusion that Parliament cannot be taken to have intended to grant the Tribunal the power to enforce its final orders by punishing for contempt.

B. Interpretation of Section 8 , Competition Tribunal Act , Apart from the Presumption

Alternatively, if the presumption against conferring on an inferior tribunal the power of contempt outside the presence of the court did not apply, I would nevertheless conclude that ss. 8 and 9 of the Act , correctly construed, do not confer that power on the Competition Tribunal. I made the argument above that the interpretation adopted by Gonthier J. is not the only plausible interpretation and in the case of ambiguity, the common law presumption of inferior court jurisdiction must govern; here I argue that the interpretation adopted by the court below, per Iacobucci C.J., is to be preferred.

I turn first to the policy and purpose behind Part VIII of the Competition Act in the context of Parliament's scheme. Section 1.1 and Part VIII of the Competition Act , read with s. 8 of the Competition Tribunal Act , make it clear that the Tribunal's role is to act as an impartial adjudicative body. Its task is to determine the absence or presence of a party's compliance with the business norms set out in the Competition Act . Having found non-compliance, the Tribunal is empowered to remedy the situation by issuance of the mandatory and prohibitive orders authorized by Part VIII. At this point, as far as the express legislative scheme goes, the formal role of the Tribunal ends; the Tribunal has no general supervisory power. The task of enforcement is left to others. Part VIII expressly provides two different mechanisms by which the Tribunal's orders can be enforced: criminal prosecution under s. 74 at the behest of the Attorney General; and a private civil action for damages under s. 36 . Thus the primary role of the Tribunal in the scheme is seen as that of dispute resolution, and the most natural reading of its provisions is in this context.

Against this background, I turn to the language which is said to confer on the Tribunal the power to enforce its orders by the contempt outside the presence of the court. For ease of reference I set out ss. 8 and 9(1) of the Act in their entirety:

8. (1) The Tribunal has jurisdiction to hear and determine all applications made under Part VIII of the Competition Act and any matters related thereto.
 - (2) The Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.
 - (3) No person shall be punished for contempt of the Tribunal unless a judicial member is of the opinion that the finding of contempt and the punishment are appropriate in the circumstances.
9. (1) The Tribunal is a court of record and shall have an official seal which shall be judicially noticed.

The first thing to note is that the power of the Tribunal is confined to applications for the resolution of disputes under Part VIII of the Act , i.e. to the resolution of disputes and making of orders, as opposed to their enforcement. The appellant says that the phrase in s. 8(1) "and any matters related thereto" extends these powers to enforcement of final orders outside the presence of the court. But even if it were conceded that this is one way of reading that phrase, it is not the only way. The phrase can quite naturally be construed as relating to the application process, which goes no further than to support the Tribunal's power over contempt in the face of the court. Given the Tribunal's primary role of dispute resolution, the most natural construction of the phrase "and any matters related thereto" is that it refers to interlocutory matters arising in the course of an "application".

We come then to s. 8(2) , which gives the Tribunal the powers of a superior court with respect to certain matters. Most of the powers referred to here ("the attendance, swearing and examination of witnesses, the production and inspection of documents") relate to the conduct of the hearing -- i.e. to the subject matter of contempt in the face of the court. The appellant relies on the phrase "enforcement of its orders". But that phrase can be entirely explained in the context of interlocutory orders made in the course of the hearing. The appellant also relies on the general phrase that follows: "and other matters necessary or proper for the due exercise of its jurisdiction", suggesting that this confers on the Tribunal a power of contempt outside the presence of the court. But the words "necessary or proper for the due exercise of its jurisdiction" merely refer us back to whatever jurisdiction the Tribunal is granted by other provisions, primarily s. 8(1). These words do not create new jurisdiction. Thus we must ask, are there other provisions conferring a power to condemn and punish for contempt outside the face of the court? This brings us back to s. 8(1), which, as we have seen, does not, whether read contextually or literally, confer such powers.

As for s. 8(3), it does not purport to deal with the power or jurisdiction of the Tribunal. Its requirement that the judicial member of the Tribunal concur in any finding of contempt, relied on by Gonthier J. as an indicator of an intention to confer broad powers, is completely explicable by reference to the power of contempt in the face of the court conferred by s. 8(1) and (2) and the exclusive jurisdiction accorded judicial member(s) of a (Competition Tribunal) Panel over all questions of law, of which contempt is but one.

In the end, having regard to the role of the Tribunal in the scheme of the Act and the wording of s. 8, I find it impossible to fault the interpretation placed on the section by the court below, [1990] 2 F.C. 565, per Iacobucci C.J., at pp. 570-72, which I set out in full:

Proceedings instituted to punish a party for its failure to obey an order previously made by the Tribunal under Part VIII of the Competition Act are clearly not applications under Part VIII of the Competition Act. Nor are they, in my view, "matters related" to such applications or the hearing and determination of such applications. The enforcement of an order is certainly a matter related to that order; it is not, however, related to the application or its hearing and determination that culminated in the making of that order. Subsection 8(1) therefore does not define the jurisdiction of the Tribunal as including the power to punish for failure to comply with the orders made under Part VIII of the Competition Act.

Subsection 8(2), at first sight, seems to give that power to the Tribunal since it grants it all the powers that are vested in a superior court of record with respect to, inter alia, "the enforcement of its orders". However, these words must be read in their context. The phrase "the enforcement of its orders" in the subsection is part of an enumeration of matters that are said to be "necessary or proper for the due exercise of [the Tribunal's] jurisdiction". The enforcement of a final order made under Part VIII of the Competition Act cannot possibly be considered as necessary or proper for the exercise of the Tribunal's jurisdiction as described in subsection 8(1). The expression "enforcement of its orders" in subsection 8(2), therefore, refers only to the enforcement of the many orders that the Tribunal may make in order to ensure that the applications made under Part VIII of the Competition Act are disposed of in a fair and rational manner. The enforcement of these orders is certainly necessary or proper for the due exercise of the Tribunal's jurisdiction.

Finally, subsection 8(3) also does not help the respondent. Although it refers expressly to the powers of the Tribunal to entertain contempt proceedings, there is nothing in the subsection indicating that the extent of the contempt power is not restricted to contempt in *facie curiae*. The subsection shows, however, that the power to punish for contempt was clearly in the mind of the draftsman of section 8 so that the failure to confer expressly the power to punish for contempt *ex facie* cannot be attributed to an oversight. [Emphasis added.]

The remaining question is whether the arguments put forward by Gonthier J. prevail over this interpretation. With the greatest respect, I cannot agree that they do.

Gonthier J.'s first argument is based on the French version of s. 8(1). He argues that while the English version of s. 8(1) may not clearly confer the power to commit and punish for contempt outside the presence of the court, the French version does. It reads:

8. (1) Le Tribunal entend les demandes qui lui sont présentées en application de la partie VIII de la Loi sur la concurrence de même que toute question s'y rattachant.

Gonthier J. argues that, although "any matters related thereto" in the English text refers directly to the "hearing and determination" of Part VIII applications, the French equivalent, "toute question s'y rattachant", clearly pertains to the word "demandes" (applications) and not to the word "entend" (to hear). In essence, the French version of s. 8(1) states that the Tribunal is to hear all applications or "demandes" presented it under Part VIII, and any questions related to such applications. The English version, using a different (potentially characterized as more complex or legalistic) structure, sets out the Tribunal's jurisdiction as limited to hearing and determining Part VIII applications, and any matters related to this task.

I have difficulty seeing how this advances the matter. The reference in the French text of s. 8(1) to "demande", or application, is not necessarily broader than "hearing and determining". The argument begs the question of what is meant by "demande". If "demande" is read as referring to the dispute resolution procedure, as Iacobucci C.J. read it, the "application" process does not extend to the enforcement of the final order, with the result that the French wording, like the English, fails to support the intention to confer the power of contempt outside the presence of the court.

Moreover, when faced with an English version that clearly limits the Tribunal's jurisdiction to matters relating to the "hearing and determination" of an application and a French version that provides jurisdiction over all questions related to the "application", the principles of statutory interpretation demand that the Court accord the section an interpretation in which both versions are consistent or have a shared meaning. In his comprehensive treatise on statutory interpretation entitled *The Interpretation of Legislation in Canada* (2nd ed. 1992), Prof. P.-A. Côté sets out the governing rules for bilingual statutes at pp. 275-76):

According to the principle of internal coherence of the statute, its various parts are construed so as to eliminate contradictions. This applies particularly when two versions of the same enactment seem contradictory. The authorities are unequivocal in declaring that because the two versions are both official, reconciliation must be attempted:

In the case of ambiguity, where there is any possibility to reconcile the two, one must be interpreted by the other.

In practice, this involves finding a shared or common meaning in the two enactments. Three possibilities may arise. The versions may be irreconcilable, in which case other principles of interpretation are immediately brought to bear. In *Klippert v. The Queen*, the phrase "person who ... has shown a failure to control his sexual impulses" appeared in French as "personne ... qui ... a manifesté une impuissance à maîtriser ses impulsions sexuelles ...". The two versions

were manifestly irreconcilable; the court favoured the English one after studying the provision's history.

The second possibility involves one version that is itself ambiguous, while the other is plain and unequivocal. A priori, the latter is preferred. For example, in *Tupper v. The Queen*, section 295(1) of the Criminal Code referred, in English, to "any instrument for house-breaking". The expression was ambiguous, and could mean an instrument capable of being used as well as one intended to be used for house-breaking. If the second meaning were adopted, the prosecution would be required to prove not only that an instrument could be used but that in the circumstances it had been destined for that purpose. The Supreme Court of Canada resolved the issue by citing the French version, which it felt clarified the section: "un instrument pouvant servir aux effractions de maison". The wider meaning was chosen.

In such situations, the shared meaning is that of the version which is not ambiguous. There is a third possibility: one version may have a broader meaning than another, in which case the shared meaning is the more narrow of the two.

The French "tramway" was used to clarify the meaning of the more general English "railway" in *Toronto Railway Co. v. The Queen*. In *R. v. Dubois*, "chantier public" restricted the meaning of the more general term "public works". The adjective "mentioned" had its scope limited by "énumérés" in *Pollack Ltée v. Comité paritaire du commerce de détail*. And in *Pfizer v. Deputy Minister of National Revenue* and *Gravel v. City of St-Léonard*, Justice Pigeon preferred the more restrictive of the two meanings, which in both cases was derived from the French version.

In this case, we are faced on the one hand with an English version which by reference to "hearing and determining" the applications clearly and expressly limits the Tribunal's jurisdiction; and on the other hand with a French version which is at best ambiguous. To give the two versions a commonality of meaning and make them consistent, the Court must interpret the section as limiting the Tribunal's jurisdiction to any matters related to the hearing and determination of applications brought under Part VIII of the Competition Act

Reference may also be had to former s. 8(2)(c) of the Official Languages Act, R.S.C. 1970, c. O-2:

- (c) where a concept, matter or thing in its expression in one version of the enactment is incompatible with the legal system or institutions of a part of Canada in which the enactment is intended to apply but in its expression in the other version of the enactment is compatible therewith, a reference in the enactment to the concept, matter or thing shall, as the enactment applies to that part of Canada, be construed as a reference to the concept, matter or thing in its expression in that version of the enactment that it is compatible therewith;

Although repealed, the principle of statutory interpretation upon which this provision was based is maintained within the common law, providing some assistance to the Court in these appeals. The principle is simple: where one version of a provision accords with the accepted principles of the governing legal system, e.g. in a part of the country or in this case the whole country, and the

other version may be read either to contradict such principle(s) or to accord with such principle(s), the provision should be given an interpretation which best protects the continuing integrity of the principle(s) at issue. A strong presumption exists "that ambiguity should not be resolved in a manner that would substantially alter an institution or fundamental principle of the common law or *`droit commun`*": see M. Beaupré, *Interpreting Bilingual Legislation* (2nd ed. 1986), at p. 37. It follows that in so far as a discrepancy exists between the French and English versions of s. 8(1), it should be resolved in accordance with the time-honoured presumption in Canada that an inferior court lacks the jurisdiction to punish contempt *ex facie curiae*. As pointed out by Iacobucci C.J., where it is clear the legislature actually had in mind the contempt power and may be assumed to have knowledge of the limited jurisdiction of an inferior court of record, the Court is bound to construe the statute so that it is consistent with the governing legal system's fundamental principles.

Gonthier J. raises a second argument in support of his interpretation of s. 8(1). He argues that unless the phrase "and any matters related thereto"/"toute question s'y rattachant" is interpreted as conferring the power of contempt outside the presence of the court, it is redundant. With great respect, I cannot accept that it follows from the general rule that all parts of an enactment should if possible be given meaning (*Interpretation Act*, R.S.C., 1985, c. I-21, s. 31) that the courts are free to confer on an inferior tribunal a new power which Parliament has failed to mention. The precept that redundant interpretation should be avoided does not extend so as to give the courts a mandate to create new powers simply to avoid redundancy. Moreover, one must approach such general phrases against the background that they are commonly used in many statutes, not to confer unmentioned powers, but to ensure that the powers clearly given be exercised without undue restraint. It is true, as Gonthier J. points out, that ancillary powers can be inferred and need not be set out. Yet the reality is that statutes commonly do set them out, if only in the hope of avoiding arguments seeking to unduly restrict the effective exercise of expressly conferred powers. Many statutes conferring powers on inferior tribunals use such language. For example, the Canadian International Trade Tribunal ("CITT") by s. 16 of the *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.), is given jurisdiction to: "(c) hear, determine and deal with all appeals that, pursuant to any other Act of Parliament or regulations thereunder, may be made to the Tribunal, and all matters related thereto". Are we to infer in each case that Parliament intended to confer the historically anomalous power of contempt *ex facie curiae* on each of these tribunals in order to give some meaning to the statute? I think not. Given the relatively common use of phrases like "and all [or any] matters related thereto" in legislative drafting, I do not find this argument persuasive.

With respect to s. 8(2), Gonthier J. relies heavily on inclusion of the phrase "enforcement of [the Tribunal's] orders". However, as seen above, given the emphasis in s. 8(2) on the evidence-gathering powers of the Tribunal, it is equally if not more plausible to interpret this phrase as referring to interlocutory orders made in the course of the hearing, an interpretation which fits with the traditional distinction between the power of contempt in the face of the court, frequently accorded to inferior tribunals, and the quite different power to punish for contempt outside the presence of the court, seldom accorded to inferior tribunals.

With respect to s. 8(3), Gonthier J. acknowledges that taken alone, the reference to contempt is not indicative of the extent of the powers of the Tribunal. For him, the determinative factor is s. 8(3)'s requirement that a finding of contempt and choice of punishment be approved by a judicial member of the Panel. This requirement is said to evidence an intention to accord the Tribunal contempt powers going beyond those which an inferior tribunal would ordinarily exercise.

The short answer to this argument is that the approval by a judicial member of the Tribunal is equally compatible with the view that the Tribunal's contempt power is confined to contempt in the face of the court as with the view that it extends to contempt outside the presence of the court. The narrower interpretation, although less invasive than the broader, nevertheless involves questions of law which may affect the liberty of the subject. In these circumstances, it makes sense to require approval of the judicial member even on the narrower version, particularly where such judicial member(s) has been granted exclusive jurisdiction over all questions of law arising in a Part VIII application. I do not take my learned colleague to suggest that Parliament included judicial officers in the Tribunal primarily to supervise its exercise of a 'special' power over contempt *ex facie*. Thus, it is quite possible, indeed probable, that reference to such officers in s. 8(3) has no bearing on the question of Parliament's intention. The decision by Parliament to confer this power exclusively upon the "judicial" member(s) of a given Panel may reflect its concern with the danger of providing non-judicial personnel with the power to punish contempt in the face of the court where unnecessary.

Gonthier J. argues that the effective functioning of the legislative scheme requires that the Tribunal be accorded the power to condemn and punish, as contempt, the violation of its final orders outside the presence of the court. In his view, the regulatory scheme embodied in the Competition Act and the Competition Tribunal Act demands that the Tribunal have jurisdiction to enforce its orders via contempt in order to give effect to the legislation's objectives. In the words of s. 12 of the Interpretation Act, referred to by Gonthier J., the Court should accord the Act a remedial interpretation that "best ensures the attainment of its [the statute's] objects." Parliament, it is argued, must have intended that the Tribunal's Part VIII orders be effective.

The assumption is that absent a power in the Tribunal to punish contempt of its Part VIII orders, such orders are ineffective, i.e. there are no other means to secure compliance. In my opinion, this assumption is unwarranted. The Act provides a variety of remedies for the enforcement of the Tribunal's Part VIII orders.

Section 74 makes it an offence to fail to comply with the order of the Tribunal. The Attorney General of Canada is empowered, under ss. 73 and 74 of the Competition Act, to enforce the Tribunal's Part VIII orders; she may prosecute the violation of an order, seeking the imposition of sanctions (penal and monetary) in a provincial superior court, or she may seek such sanctions in the Federal Court, Trial Division, on consent.

Gonthier J. argues that this provision differs from enforcement by means of the *ex facie* contempt power, in that it provides for definite fines and prison terms and lacks the flexibility of the power of contempt outside the court. Be that as it may, it does not support the assumption

that without the power of contempt outside the court, the Tribunal will be disadvantaged. In fact it has at its disposal statutory quasi-criminal remedies remarkably similar to, although perhaps more restricted than, the contempt power traditionally confined to superior courts. It does not follow from the fact that Parliament has chosen to circumscribe the means of criminal enforcement at the Tribunal's disposal that the Tribunal should be accorded the broader common law power of contempt *ex facie*. On the contrary, I would think the inference should be the opposite, namely that Parliament considered the matter, and gave the Tribunal the means to ensure, in a quasi-criminal context, the power of enforcement of its final orders that Parliament thought it should possess. I do not share Gonthier J.'s view that these provisions are directed at punishment rather than "securing compliance" (p. 000), nor understand how, if this were the case, it would distinguish the quasi-criminal remedies of the Act from contempt outside the presence of the court. In either case, enforcement and punishment are inextricably intertwined.

In addition to these quasi-criminal remedies, the Act provides that a private party may sue the offending party for damages suffered as a result of the violation of the Tribunal's order, pursuant to s. 36 of the Competition Act . Indeed, s. 36(2) provides that a finding of non-compliance in another proceeding, e.g. brought by the Attorney General of Canada under s. 74 , is sufficient proof of the defendant's non-compliance with the Tribunal's order; thus, only the complainant's damages remain to be assessed.

In extending the power to punish the violation of a Part VIII order to the Tribunal as well as in answer to the above options, Gonthier J. relies, *inter alia*, on the absence of an express provision for the enforcement of these orders by the Federal Court, a provision present in other Acts to which he refers us (see p. 000). I fail to see how the absence of an express provision for filing the Tribunal's Part VIII orders with the Federal Court, or any other superior court, is either determinative or relevant to the question under consideration. First, Parliament may be assumed to know of the residual jurisdiction of the superior courts, which arguably permits enforcement through the courts by way of contempt: CBC, *supra*, at pp. 636 and 638, per Beetz J. Second, it is equally persuasive to argue that this so-called "lacuna" in the legislation indicates Parliament's intention that the Tribunal's orders be enforced only through the means provided in ss. 73 and 74 and s. 36 of the Competition Act . Such a lacuna does not, in my respectful opinion, evidence an intent to confer upon the Tribunal jurisdiction over contempt *ex facie*.

I note, in addition, that express provision for filing appears in a number of regulatory schemes but does not appear in others. A comparative examination of the tribunals (and their enabling legislation) expressly directed to a superior court for the enforcement of their orders with those tribunals which are not so directed evidences no pattern of subject matter (e.g. degree of national importance) nor adjudicative structure which would lend support to the argument that Parliament intended that some tribunals have resort to superior courts to enforce their orders while others are empowered to enforce their orders via a power over contempt *ex facie*. Absent convincing evidence that the failure to expressly include this common law right (to seek enforcement from a superior court) indicates a legislative intent to accord a tribunal certain special powers, I am of the opinion that Parliament did not intend that the Competition Tribunal

exercise jurisdiction over contempt *ex facie*.

Gonthier J. also argues that, given the complexity inherent in monitoring and enforcing Part VIII orders, the methods expressly chosen by Parliament to enforce its policies (criminal and civil enforcement, outlined above) lead to a "corresponding loss of effectiveness", i.e. the expertise of the Tribunal is lost. I make three points in response.

First, if the methods of enforcement which Parliament has chosen are defective, it is for Parliament and not the courts to rectify them.

Second, no evidence was placed before the Court which established either the complexity or non-complexity of orders typically made by the Tribunal under Part VIII, or the alleged "loss of effectiveness" of the Tribunal. The actual order at issue in this case was simple and easily enforced: Chrysler Canada Ltd. was ordered to sell its parts to Mr. Richard Brunet on trade terms 'usual and customary' to its relationship with Mr. Brunet. The Tribunal, in its determination of the application, may define such "terms"; quick reference could be had to such definition by a superior court seeking to enforce the Tribunal's order. There is no suggestion that the particular expertise of the Tribunal was required for its enforcement, nor any evidence that the powers of enforcement expressly set out in the Act were inadequate to the task.

Third, the Act, while not (theoretically) conferring on the Tribunal the power to initiate proceedings for the enforcement of its final orders, permits access to the Tribunal's expertise in the process of enforcement. In a criminal proceeding under s. 74, the prosecutorial arm of the government may utilize the Tribunal's expertise to assist the court. In a contempt proceeding before a superior court, if it is the Director who is seeking enforcement of a Part VIII order, the Director may, as the Attorney General of Canada may with s. 74, use the Tribunal's expertise. If the Tribunal brings the contempt motion, the Tribunal itself may provide assistance to the court as a party. Finally, the Tribunal may be able to seek and obtain the status of an intervener in the criminal proceedings under s. 74 (by application, for example, of r. 2 of the Ontario Supreme Court Rules Respecting Criminal Proceedings -- Part I, SI/85-152); on a motion for contempt to a superior court; or on a civil action under s. 36. For example, if the prosecution, action or motion is before the Ontario Court, General Division, a motion for leave to intervene *simpliciter* may be made under r. 13.01 or the Tribunal may seek leave to intervene as a "friend of the court" under r. 13.02, Rules of Civil Procedure, O. Reg. 560/84. See, for example, *Vachliotis v. Exodus Link Corp.* (1987), 23 C.P.C. (2d) 72 (Ont. Master) in which the city of Toronto was granted intervener status where the interpretation of one of its zoning by-laws was at issue. Similarly, leave to intervene in the Federal Court may be available to a party such as the Tribunal under r. 1716 of the Federal Court Rules, C.R.C. 1978, c. 663. Given these options, it is clear that the Tribunal's expertise would not necessarily 'go to waste' in the absence of power to directly enforce its final orders via a power over contempt *ex facie*.

In summary, I remain unpersuaded that the arguments advanced in support of the proposition that s. 8 confers on the Tribunal the power to convict and punish for contempt outside the presence of the Tribunal establish that the interpretation of the Court below was wrong. On the contrary, the wording of s. 8 and the role of the Tribunal in the statutory scheme support the conclusion that Parliament did not intend to confer on the Tribunal the power to enforce its final orders by the general power to find and punish contempt outside its presence.

C. Section 96 of the Constitution Act, 1867

The respondent correctly noted in its factum that the Court, should it choose to allow the appeals, would be called upon to determine whether Parliament is constitutionally empowered to enact s. 8 of the Competition Act . In other words, the Court must ensure that Parliament has the competence, under ss. 96 to 101 of the Constitution Act, 1867 , to confer superior court powers upon administrative appointees.

Neither of the appellants addressed this question in their written materials; the respondent makes only cursory reference to it in its factum. Nor did the Trial Division or the Court of Appeal below address this issue. This Court heard only brief and generalized oral submissions on it. The dearth of materials before the Court on such an important constitutional issue, coupled with the conclusion at which I have arrived on the main issue in these appeals, dictate a cautious approach, following the lead of Dickson J. in *CBC*, *supra*. My remarks are accordingly brief.

Gonthier J. avoids the difficult s. 96 issue by using a more generous application of the third branch of the test set out by this Court in *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714, than I would be inclined to adopt. In that case this Court held that s. 96 constitutes no bar to vesting s. 96 judicial powers in an inferior tribunal provided three tests were met: (1) the power in question is broadly conformable to the powers of s. 96 courts at the time of Confederation; (2) the power is a "judicial power"; and (3) the power is "necessarily incidental" to the achievement of a broader policy objective by the government: see *Reference re Young Offenders Act (P.E.I.)*, [1991] 1 S.C.R. 252, at pp. 276-77. In essence, provinces are empowered to vest ancillary judicial powers formerly exercised by s. 96 courts (exclusively) so long as the judicial or quasi-judicial function bestowed is a necessary part of an otherwise valid administrative structure. Accepting, as my learned colleague does, that the power to punish for contempt outside the presence of the court is a s. 96 judicial power, the question is whether the grant of the power is "necessarily incidental" or "essential" to the functioning of the Tribunal. Gonthier J. so finds, concluding that "[o]nly a specialized tribunal such as the Tribunal can properly ensure the enforcement of the orders it makes" (p. 000).

In my view, the record does not support such a broad and categorical conclusion. As already noted, the Act provides a variety of methods of enforcing the final orders of the Tribunal: see *supra* at pp. 000-00. There is no evidence before us supporting the proposition that these methods are inadequate, much less that supplementing them with the power to punish for contempt outside the presence of the court is essential or necessarily incidental to the Tribunal's functioning. Nor has Parliament clearly said the power is necessary; the language relied on for

the power is at best ambiguous and stands in sharp contrast to the express language in which the other methods of enforcement envisaged by Parliament are set out.

If the case cannot be brought within the Residential Tenancies analysis, the s. 96 question of whether empowering federally appointed members of the Competition Tribunal with jurisdiction to punish contempt outside the presence of the court must be met directly. This casts us into new waters, for the most part uncharted.

None of the governing authorities are particularly helpful. Neither *Re Residential Tenancies Act*, 1979, *supra*; *McEvoy v. Attorney General for New Brunswick*, [1983] 1 S.C.R. 704; *Sobeys Stores Ltd. v. Yeomans*, [1989] 1 S.C.R. 238, nor *Reference re Young Offenders Act (P.E.I.)*, *supra*, assess whether the focus of ss. 96 to 101 is the protection of the federal executive's exclusive right to control and supervise persons exercising the "core jurisdiction" of a superior court of record, or whether the focus of ss. 96 to 101 is the broader principle that statutory bodies, both provincial and federal, should not be allowed to usurp the "judicial" function reserved to those (special) bodies accorded the general jurisdiction of a superior court of record. The absence of a focused argument, coupled with the absence of judicial consideration of this issue in the courts below as well as in the authorities cited *supra*, militates against any pronouncement by the Court on this question of fundamental constitutional significance. Fortunately, my conclusion on the primary ground of appeal herein provides me with the option of waiting for another day to address this important issue. In the circumstances, I believe it wise to exercise this option.

Disposition

I would dismiss the appeals and affirm the decision of the Court below.

Appeals allowed, McLachlin J. dissenting.

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* Stevenson J. took no part in the judgment.

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