NOVA SCOTIA COURT OF APPEAL
Citation: ***Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)***, 2009 NSCA 44

Date: 20090508
Docket: CA 296232
Registry: Halifax

Between:

Cape Breton Regional Municipality

Appellant
Respondent on cross-appeal

v.

Attorney General of Nova Scotia

Respondent
Appellant on cross-appeal

Judges:	MacDonald, C.J.N.S.; Oland and Fichaud, JJ.A.
Appeal Heard:	February 2, 2009, in Halifax, Nova Scotia
Held:	Appeal and cross-appeal dismissed per reasons for judgment of MacDonald, C.J.N.S.; Oland and Fichaud, JJ.A. concurring.
Counsel:	Neil Finkelstein and Catherine Beagan Flood, for the appellant Alexander Cameron, for the respondent

Reasons for judgment:

[1] Few would contest the fact that the Cape Breton Regional Municipality ("CBRM") is economically depressed. In large measure, the CBRM faults the government of Nova Scotia for failing to take appropriate steps to alleviate this disparity. It is especially troubled because the province receives equalization funds from Ottawa for this very purpose. It claims therefore that the province has breached what the CBRM views as a constitutional commitment to properly distribute this federal funding. It sought a declaration to this effect from the Nova Scotia Supreme Court. However, its application was struck summarily by Justice John Murphy, in Chambers, as disclosing no reasonable cause of action. The decision is reported at 2008 NSSC 111, (2008), 267 N.S.R. (2d) 21 . The CBRM now appeals to this court.

[2] For reasons that I will develop, I would dismiss this appeal. Simply put, the CBRM's claim is not sustainable because it is premised on a purported constitutional obligation which, in this context, does not exist.

BACKGROUND

[3] On March 29, 1982, the *Canada Act, 1982*, (U.K.), 1982, c. 11, received royal assent. It provided for the repatriation of Canada's Constitution including the incorporation of Canada's new *Constitution Act, 1982*, being Schedule B to the *Canada Act,1982*, (U.K.), 1982, c. 11 (the *"Act*"), which in turn was proclaimed on April 17, 1982. Part III of the *Act* is entitled *Equalization and Regional Disparities*, and contains this single section (with relevant portions highlighted):

> Commitment to promote equal opportunities
>
> 36. (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and *the provincial governments, are committed to*
>
> *(a) promoting equal opportunities for the well-being of Canadians;*
>
> *(b) furthering economic development to reduce disparity in opportunities; and*
>
> *(c) providing essential public services of reasonable quality to all Canadians.*

> *Commitment respecting public services*
>
> (2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.
>
> [Emphasis added.]

[4] In the CBRM's submission, this provision represents a legally enforceable constitutional commitment, because after all, it reminds us that by *s. 52* of the same *Act*, "the Constitution of Canada is the supreme law of Canada".

[5] Citing its region's patent economic disparity and the provincial government's purported failure to appropriately respond, the CBRM brought its application specifically for a "declaration that the Government of Nova Scotia has breached its constitutional commitment in *s. 36* of the *Constitution Act, 1982*". While this application is brought against the Government of Nova Scotia, the Attorney General is the named respondent.

[6] Following the exchange of extensive pre-hearing disclosure, the Attorney General applied to strike the claim as disclosing no reasonable cause of action. Specifically, the application was brought under then Nova Scotia *Civil Procedure Rule* (1972) 14.25 (now Nova Scotia *Civil Procedure Rule* (2nd Edition) 13.03)):

> *14.25. (1) The court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that,*
>
> *(a) it discloses no reasonable cause of action or defence;*
>
> (b) it is false, scandalous, frivolous or vexatious;
>
> (c) it may prejudice, embarrass or delay the fair trial of the proceeding;
>
> (d) it is otherwise an abuse of the process of the court;
>
> and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.

> *(2) Unless the court otherwise orders, no evidence shall be admissible by affidavit or otherwise on an application under paragraph (1)(a).* [E. 18/19]
>
> [Emphasis added.]

[7] The Chambers judge ruled for the Attorney General, concluding that he had met the heavy burden required to summarily strike the claim. The judge concluded that, as framed, the claim was simply too vague:

> [58] In this case, without a challenge to legislation, CBRM's pleading does not raise a reasonable cause of action. The Municipality does not create a justiciable issue by referring in the claim to s.36 of the *Constitution Act*, when the commitments set out in that section do not alter the Nova Scotia Legislature's right to exercise legislative authority. A general attack on "government" action, alleging that the Nova Scotia regime is constitutionally deficient, is too vague a basis for a court to determine under s.52 of the *Constitution Act* that a law "is inconsistent with the provisions of the Constitution."...and "of no force or effect."

[8] We are now asked to reverse this decision.

[9] The Attorney General also filed a cross-appeal regarding one aspect of the judge's order. Specifically, the judge directed that should his decision to strike the claim be reversed on appeal, he would retain jurisdiction to decide additional procedural issues. He stated:

> [76] This Court recognizes that if CBRM successfully appeals the decision to strike out its claim, the conversion application could require determination. Accordingly, the Order granting the Province's motion to strike the proceeding will provide that, if an appeal from that decision is allowed, this Court will retain jurisdiction to decide whether the claim should be converted to an action. The submissions already made by the parties on the conversion issue can be considered by this Court in the context of any directive from the Court of Appeal.

The Attorney General asserts that by striking the claim, the judge retained no further jurisdiction over the matter.

DEVELOPING THE ISSUE

The Parties' Positions

[10] Unfortunately, the parties cannot agree on the issues in this appeal. I therefore will take some time to refine what in the end will be a very narrow question.

[11] The CBRM focuses on the justiciability of *s. 36*, asserting that it represents an actionable commitment. Its position is summarized in its factum:

> **B. Section 36 of the *Constitution Act, 1982* is Justiciable**
>
> **(i) *CBRM's Claim is a Legal Claim Properly within the Judicial Role***
>
> 34. Subsection 52(1) of the *Constitution Act, 1982* provides: "The Constitution of Canada is the supreme law of Canada ..." Subsection 52(2)(a) specifically defines the "Constitution of Canada" as including the *Constitution Act, 1982*, of which s. 36 is a part. Accordingly, when the commitments expressed in s. 36 were included in the text of the *Constitution Act, 1982*, they became legal - justiciable - issues as part of the supreme law of Canada. Indeed, even unwritten constitutional principles are justiciable.

[12] On the other hand, although asserting that *s. 36* is a mere statement of aspiration and therefore not justiciable, the Attorney General identifies a more fundamental issue. He focuses on the pleadings and asks whether the Chambers judge erred in striking the claim. Thus his factum submits:

> 20. The Attorney General Respectfully disagrees that the Appellant properly states the issue. The issue, rather, is whether the judge below erred in striking the Appellant's application for failure to disclose a reasonable cause of action. In other words, the issue first and foremost is the Appellant's pleadings. The alternative issue is the justiciability of s. 36.

[13] Of the two approaches, I believe that the Attorney General is closer to the mark. Let me elaborate.

[14] The thrust of CBRM's submission, both written and oral, is that, as opposed to a mere statement of aspiration, *s. 36* represents a justiciable commitment on the part of the federal government and the provinces, enforceable at the instance of the CBRM. The issue for the Chambers judge was whether, pursuant to *Civil*

Procedure Rule 14.25, CBRM's pleadings disclosed a reasonable cause of action. He concluded that they did not. The issue in the Court of Appeal is whether the Chambers judge committed an appealable error.

Standard of Review

[15] Let me now review the standard upon which we should review the judge's decision. This is a constitutional issue, involving the interpretation of *s.* 36 of the *Act*. The facts were not significantly in issue on the application to the Chambers judge or on this appeal. The normal standard on an application to strike is whether the judge erred in law leading to an injustice: **Purdy Estate v. Frank**, [1995] N.S.J. No. 243 (Q.L.) (C.A.), at para. 10. If the Chambers judge erred in law by striking the CBRM's claim, clearly that would be an injustice. So our effective standard of review is correctness – whether the chambers judge erred in law in striking the CBRM's claim.

[16] To further refine the issue, I will next consider the applicable legal principles surrounding applications to strike and, in this regard, the heavy burden faced by the Attorney General, as an applicant for an order to strike.

Rule 14.25- The Applicable Legal Principles

[17] *Rule* 14.25 offers a drastic remedy. It provides for an action to be dismissed summarily, thus denying litigants their "day in court". Understandably, therefore, any defendant seeking such relief bears a heavy burden. The Chambers judge would have to consider this claim at its highest, by assuming all allegations to be true without the need to call any evidence. Then even with this assumption, it must still remain "plain and obvious" that the pleadings disclose no reasonable cause of action. In **Hunt v. Carey Canada Inc.**, [1990] 2 S.C.R. 959 at p. 980, the Supreme Court of Canada, when considering the corresponding British Columbia provision:

> Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia *Rules of Court* is the same as the one that governs an application under R.S.C. O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff

> should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia *Rules of Court* should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

[18] In following **Hunt**, our court has recently confirmed that in order to strike pleadings under Rule 14.25 (1)(a), they must appear to be either "certain to fail" (**Sable Offshore Energy Inc. v. Ameron International Corp.**, 2007 NSCA 70 at para. 13) or "absolutely unsustainable" (**CGU Insurance Co. of Canada v. Noble**, 2003 NSCA 102 at para. 13).

[19] In this appeal, the Chambers judge fully recognized this heavy burden facing the Attorney General:

> [13] CBRM's position that a defendant must satisfy a very high onus in an application to strike a claim under *Rule 14.25(1)(a)* was not contested by the Province, and is correct. In **Operation Dismantle v. The Queen**, [1985] 1 S.C.R. 441, the Supreme Court noted that proceedings challenged on the basis of a failure to disclose a reasonable cause of action should be dismissed only in "plain and obvious cases." (para.73)
>
> [14] The threshold that a moving party must meet on an application to strike is very high. Such a motion can only succeed in the clearest of cases, where it is plain and obvious or beyond reasonable doubt that there is no reasonable cause of action. ...

[20] Furthermore, in the face of this burden, the CBRM reminds us that the justiciability of *s. 36* represents an important issue of law that has yet to be judicially considered. It adds that courts should therefore be hesitant to summarily strike such claims. I agree and, in fact, note the comments of Roscoe, J.A. in **Sable**, *supra*:

> [12] When a statement of claim reveals a "difficult and important point of law", it is generally desirable to allow the case to proceed to trial so that "the common law ... will continue to evolve to meet the legal challenges that arise in our modern industrial society.": **Hunt v. Carey Canada Inc., supra** at 990-991. As Wilson J. put it in **Hunt** at 977: "The fact that the case the plaintiff wishes to

> present may involve complex issues of fact and law or may raise a novel legal proposition should not prevent a plaintiff from proceeding with his action."

[21] The novel issue of law at play in this appeal involves the proper interpretation of *s. 36* and, specifically, whether this provision represents an enforceable commitment by the Attorney General to the CBRM. Therefore, it explores the true meaning and purpose of *s. 36* and, of course, on this the parties present conflicting theories. As noted, to the CBRM it represents an actionable commitment at the instance of the CBRM. To the Attorney General, it represents a statement of aspiration that is unenforceable by a municipal unit such as the CBRM. When considering these opposing positions, I must remember that this appeal involves an order that struck the CBRM's claim without a hearing on its merits. Thus, at this early stage, it would not be enough for us to simply compare and then choose the proposed interpretation that we would prefer. That would be the wrong test in an application to strike. Instead we must stick to the "plain and obvious" test set out in **Hunt** by deciding whether the CBRM's proposed interpretation has any chance of success, or whether it is at least worthy of consideration. If so, it should not be dismissed summarily. This was the approach taken by the Federal Court of Appeal in **Laboratoires Servier v. Apotex Inc.**, 2007 FCA 350, and it is one that I endorse. Specifically, Nadon, J.A., facing this same type of issue, concluded :

> 34 At paragraph 39 of its written submissions, Apotex submits, rightly in my view, that "if the responding party has put a conflicting interpretation 'worth considering', it is not plain and obvious that the claim will not succeed". Although it is clear the Motion Judge correctly understood the "plain and obvious" test enunciated in *Hunt, supra*, she did not answer the question of whether or not Apotex's proposed interpretation was "worth considering" or whether it had any chance of success. Rather, she reached her own conclusion on the disputed point of statutory interpretation. That, in my view, constitutes an error on her part. I therefore turn to the issue of whether or not Apotex's proposed interpretation has any chance of success.

[22] Our ultimate task then is to decide whether the CBRM's proposed interpretation of *s. 36* has any chance of success. To this end, in my analysis that follows I will initially examine the pleadings with a view to determining the exact nature of the relief sought. Then, with that backdrop, I will address the true meaning and purpose of *s. 36*.

ANALYSIS

The Pleadings

[23] Let me begin therefore with the details of the claim.

[24] As noted, in its Notice of Application before the Supreme Court, the CBRM seeks:

> a declaration that the Government of Nova Scotia has breached its constitutional commitment in s. 36 of the *Constitution Act, 1982*.

[25] Highlighting what it views as the government's dismal track record in distributing federal equalization payments, it further pleads:

> (e) CBRM has a low fiscal capacity compared to other Nova Scotia municipalities;
>
> (f) residents of CBRM receive levels of public services that are significantly lower than the standard for Nova Scotia municipalities as a whole and for regional municipalities and towns in particular;
>
> (g) despite these lower levels of service, CBRM's residential and commercial tax rates are significantly higher than the provincial average and the average for other regional municipalities and towns;
>
> (h) Nova Scotia's chosen means of distributing federal equalization monies across municipalities therefore falls well short of providing CBRM with sufficient fiscal capacity to provide a comparable level of public services for a comparable tax burden;
>
> (i) the Government of Nova Scotia has failed to fulfil its commitment to further economic development to reduce the disparity in opportunities between citizens of CBRM and of other Nova Scotia communities;
>
> (j) Nova Scotia is in breach of its constitutional commitments in s. 36 of the *Constitution Act, 1982*;

[26] Recognizing the perils of asking a court to tell an elected government how to spend its revenue, the CBRM expressly seeks no more than a declaration:

> (k) a declaration that the Government of Nova Scotia has breached its constitutional commitment in s. 36 of the *Constitution Act, 1982* is an appropriate remedy that does not require that the court dictate to the provincial government how it should remedy the constitutional breach; the manner of compliance would appropriately be left to the provincial government.

[27] In defending its quest for a declaration, the CBRM elaborates in its factum:

> 71. The courts can issue a declaration that a provincial government has failed to meet its constitutional obligations without altering the province's legislative authority or rights with respect to that authority. Thus, in *Mahe v. Alberta*, the Supreme Court of Canada held that the province had failed to provide the parents of minority language students with sufficient representation on school boards to satisfy the requirements of s. 23 of the *Charter*. However, the Court refused to strike down the relevant statute, holding:
>
> > ... the right which the appellants possess under s. 23 is not a right to any particular legislative scheme, it is a right to a certain type of educational system. What is significant under s. 23 is that the appellants receive the appropriate services and powers; how they receive these services and powers is not directly at issue in determining if the appellants have been accorded their s. 23 rights. ...
> >
> > For these reasons I think it best if the Court restricts itself in this appeal to making a declaration in respect of the concrete rights which are due to the minority language parents in Edmonton under s. 23. Such a declaration will ensure that the appellants' rights are realized while, at the same time, leaving the government with the flexibility necessary to fashion a response which is suited to the circumstances. ...
>
> 72. Similarly, the commitment in s. 36 is to provide reasonably comparable levels of services, not to provide them in a specific manner. Accordingly, the legal issue for the Court to determine is whether the Province's equalization regime, taken as a whole, is sufficient to meet the "reasonably comparable" benchmark established by s. 36 of the Constitution. ...

[28] Armed with such a declaration, the CBRM therefore feels that it could then negotiate an appropriate settlement with the province. For example, Professor

Kent Roach in **Constitutional Remedies in Canada**, (Aurora: Canada Law Book, 2006) highlights the merits of such a strategy at pp. 15-28:

> Declarations concerning the general nature of constitutional rights allow the parties the flexibility to apply general constitutional principles to local circumstances. In *Mahe v. Alberta*, the Supreme Court of Canada recognized that declarations of general constitutional rights were appropriate in dealing with minority language rights which, like aboriginal rights, require a fact-specific, community-by-community determination of their precise scope and content. Declarations of aboriginal rights, like declarations of minority language rights, may require positive governmental action such as the provision of enabling legislation and resources. Negotiations between governments and the communities intended to benefit from the rights will often be necessary to determine the best means to implement the general principles of the declarations. In *Reference re: Public Schools Act (Man.)*, Lamer C.J. stated that "[t]he participation of minority language parents or their representatives in the assessment of educational needs and the setting-up of structures and services which best respond to them is most important". The purpose of aboriginal rights also supports consultation and negotiation about how to implement declarations of constitutional rights.

[29] At this juncture, I should note that the CBRM does not challenge any specific legislative provisions. Nor does it challenge any specific executive action. Without either, the Attorney General asserts that the claim is destined to fail. Therefore, he argues forcefully in his factum:

> 35. Provincial statutes control and direct the economic spending and economic policies of the Province. Yet none of these statutes are challenged by the Appellant. They are, accordingly, valid and presumptively constitutional provincial laws: *Nova Scotia (Board of Censors) v. MacNeil*, [1978] 2 S.C.R. 662, Hogg, **Constitutional Law of Canada**, Vol. 1, p. 15-23; Vol. II, p. 38-39. Pursuant to those laws spending and economic development policy is lawfully carried out. After all, taxation and expenditure are constitutionally the authority of the legislature. But, the Appellant seeks a declaration that "the Government" has violated s. 36. With respect, one cannot, in the same breath, accept the legality of the legislation which dictates economic development policy, yet seek to declare that 'Government' is acting unlawfully in applying the such legislatively-authorized policy. To challenge that policy requires a challenge to the legislation. Absent such a challenge, there is no justiciable issue. CBRM has not raised a cause of action.

> 36. This is not to say that government action cannot be challenged constitutionally. Government action involves the exercise of a discretionary statutory power, and the exercise of that statutory discretion can be alleged to be unconstitutional. The Supreme Court of Canada in *Eldridge v. British Columbia*, [1997] 3 S.C.R. 624 confirmed, in a *Charter* case, that the *Charter* could be infringed, "not by the legislation itself, but by the actions of a delegated decision-maker in applying it" (paras. 20, 21). Importantly, the Court's discussion of constitutional infringement by delegated statutory authority was tied explicitly to the legislation pursuant to which the delegated authority was exercised. But, the Appellant's complaints respecting Departmental expenditures and public service employment reference nothing of the kind. There is no challenge to legislated funding. There is no challenge to a particular statutory discretion. Rather, there is simply a generalized complaint against "the Government" despite ample opportunities to particularize the pleading. This is, with respect, fatal. No law has been put in issue in respect of which a justiciable claim is raised. No statutory discretion is identified in respect of which it is pleaded that it has not been properly exercised in CBRM's favour. In the result, then CBRM's proceeding must be struck. Neither the laws governing Departmental spending and public service employment have been challenged, nor have specific statutory discretions under these laws been impugned. No justiciable claim is raised. No cognizable cause of action is pleaded. The "claim" advanced is merely a generalized expression of dissatisfaction respecting policies.

[30] In summary, what then is the nature of the relief sought? In my view, the CBRM's proposed declaratory relief contains these three elements:

a. That *s. 36* represents a justiciable commitment on the part of the province (as opposed to being merely an unenforceable statement of aspiration).

b. That this justiciable commitment is owed to and enforceable by the CBRM.

c. That this commitment has been breached.

[31] In my view, it is the second element – a justiciable commitment to and enforceable by the CBRM - that is the key to resolving this appeal. Let me elaborate.

[32] In advancing its position, the CBRM concentrated almost exclusively on the first element – whether *s. 36* was justiciable *per se*. Respectfully, this misses the mark. As I will detail below, *s. 36* may indeed be justiciable in certain contexts. However, the more challenging question for the CBRM involves the second element - whether any such commitment would extend to the CBRM.

[33] As for the third element – the breach – this would be assumed in the context of an application to strike. In other words, if *s. 36* represents an actionable commitment to the CBRM, we would, for the purpose of this application to strike, assume all pleadings to be true and therefore assume that the commitment had been breached.

[34] Therefore the key to this appeal is not whether *s. 36* is justiciable *per se,* or even whether the CBRM's allegations against the government have merit. The key is whether *s. 36* represents a justiciable commitment to the CBRM.

[35] Having identified the exact nature of the claim, I now turn to the proper interpretation of *s. 36.*

Interpreting Section 36

[36] The Supreme Court of Canada had endorsed the "modern approach" to statutory interpretation as expounded by Elmer Driedger, **Construction of Statutes**, 2nd ed. (Toronto: Butterworths, 1983) at p. 87:

> ... the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See **Re Rizzo and Rizzo Shoes Ltd.**, [1998] 1 S.C.R. 27 at 41; **Canada (House of Commons) v. Vaid**, 2005 SCC 30, [2005] 1 S.C.R. 667; and **Imperial Oil Ltd. v. Canada; Inco Ltd. v. Canada**, 2006 SCC 46, [2006] 2 S.C.R. 447.

[37] It is suggested by some that this approach is no more than an amalgam of the three classic rules of interpretation: the *Mischief Rule* dealing with the object of the enactment; the *Literal Rule* dealing with grammatical and ordinary meaning of the words used; and, the *Golden Rule* which superimposes context. See Stéphane Beaulac & Pierre-Andre Côté in **Driedger's "Modern Principle" at the Supreme**

Court of Canada: Interpretation, Justification, Legitimation (2006), 40 Thémis 131-72 at p. 142.

[38] In any event, as Professor Ruth Sullivan explains in **Sullivan on the Construction of Statutes**, 5th ed. (Markham: LexisNexis Canada Inc., 2008) beginning at p. 1, this modern approach involves an analysis of: (a) the statute's textual meaning; (b) the legislative intent; and (c) the entire context including the consideration of established legal norms:

> The chief significance of the modern principle is its insistence on the complex, multi-dimensional character of statutory interpretation. The first dimension emphasized is textual meaning. ...
>
> A second dimension endorsed by the modern principle is legislative intent. All texts, indeed all utterances, are made for a reason. Authors want to communicate their thoughts and they may further want their readers to adopt different views or adjust their conduct as a result of the communication. In the case of legislation, the law-maker wants to communicate the law that it intended to enact because that law, as set out in the provisions of a statute or regulation, is the means chosen by the law-maker to achieve a set of desired goals. Law-abiding readers (including those who administer or enforce the legislation and those who resolve disputes) try to identify the intended goals of the legislation and the means devised to achieve those goals, so that they can act accordingly. This aspect of interpretation is captured in Driedger's reference to the scheme and object of the Act and the intention of Parliament.
>
> A third dimension of interpretation referred to in the modern principle is compliance with established legal norms. These norms are part of the "entire context" in which the words of an Act must be read. ...

[39] That said, applying these dimensions is often easier said than done. Professor Sullivan elaborates at p. 3:

> The modern principle says that the words of a legislative text must be read in their ordinary sense *harmoniously* with the scheme and objects of the Act and the intention of the legislature. In an easy case, textual meaning, legislative intent and relevant norms all support a single interpretation. In hard cases, however, these dimensions are vague, obscure or point in different directions. In the hardest cases, the textual meaning seems plain, but cogent evidence of legislative intent (actual or presumed) makes the plain meaning unacceptable. If the modern

> principle has a weakness, it is its failure to acknowledge and address the dilemma created by hard cases. [Emphasis by author]

[40] Thus in considering whether *s. 36* applies to the facts of this case, Professor Sullivan would invite us to answer three questions:

> Under the modern principle, an interpreter who wants to determine whether a provision applies to particular facts must address the following questions:
>
> > what is the meaning of the legislative text?
> >
> > what did the legislature intend? That is, when the text was enacted, what law did the legislature intend to adopt? What purposes did it hope to achieve? What specific intentions (if any) did it have regarding facts such as these?
> >
> > what are the consequences of adopting a proposed interpretation? Are they consistent with the norms that the legislature is presumed to respect?

[41] Finally, in developing our answers to these three questions, Professor Sullivan invites us to apply the various "rules" of statutory interpretation:

> In answering these questions, interpreters are guided by the so-called "rules" of statutory interpretation. They describe the evidence relied on and the techniques used by courts to arrive at a legally sound result. The rules associated with textual analysis, such as implied exclusion or the same-words-same-meaning rule, assist interpreters to determine the meaning of the legislative text. The rules governing the use of extrinsic aids indicate what interpreters may look at, apart from the text, to determine legislative intent. Strict and liberal construction and the presumptions of legislative intent help interpreters infer purpose and test the acceptability of outcomes against accepted legal norms.

[42] Let me therefore now attempt to answer each of Professor Sullivan's three questions with a view to determining whether the CBRM's proposed interpretation of *s. 36* has any chance of success?

What is the Meaning of the Legislative Text?

[43] I will start with the full text. Here again is the English version:

EQUALIZATION AND REGIONAL DISPARITIES

Commitment to promote equal opportunities

36. (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

(a) promoting equal opportunities for the well-being of Canadians;

(b) furthering economic development to reduce disparity in opportunities; and

(c) providing essential public services of reasonable quality to all Canadians.

Commitment respecting public services

(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

[44] Section 36, of course, should be read as a coherent whole. But if, as CBRM submits, *s. 36* affords a commitment that is legally enforcable by CBRM in an action against the Province of Nova Scotia, the ultimate source of that actionable commitment can only be s. *36(1)*. I will explain.

[45] By its plain language, subsection *(2)* deals exclusively with commitments by Parliament and the government of Canada. Therefore, in my view, no measure of creative interpretation could possibly transform this provision into an obligation on the part of the provinces. I agree that should subsection *(1)* be seen to support a claim against the provinces, then subsection *(2)* might inform that analysis. However, any such claim would have to be rooted in subsection *(1)* and, therefore, my analysis will focus only on that subsection.

[46] Returning then to the text of subsection *(1)*, the key word, in my view, is "committed". This is an obvious indication of some responsibility on the part of Nova Scotia's government and legislature. But what is the nature of that responsibility?

[47] There are two elements to this question that I will address separately. They are: (a) whether *s. 36* is justiciable per se; and (b) if so, whether the commitment is owed to, and enforceable by, the CBRM.

Is s. 36 Justiciable Per Se?

[48] Does “committed” merely connote a statement of aspiration (i.e., to use one's best efforts) or does it mean something more as the CBRM asserts? Considered in isolation and applying ordinary parlance, both appear plausible.

[49] For example, *The Oxford English Dictionary* succinctly identifies both options:

> **committed**
>
> **1** having a strong dedication to a cause or belief...
>
> **2** obliged (to take a certain action).
>
> *The Oxford English Dictionary*, 2d ed., (2004) s.v. "committed"

[50] Thus, by its plain meaning "committed" could, in appropriate circumstances, connote a justiciable obligation.

[51] That deals with the English version. Let me now turn to the French version which by virtue of *s. 57* of the *Act* is equally authoritative

[52] The equivalent key word used in the French version is the third person plural for the verb “s’engager”. Here is the full text:

> PÉRÉQUATION ET INÉGALITÉS RÉGIONALES
>
> Engagements relatifs à l'égalité des chances
>
> 36. (1) Sous réserve des compétences législatives du Parlement et des législatures et de leur droit de les exercer, le Parlement et les législatures, ainsi que les gouvernements fédéral et provinciaux, *s'engagent* à

> a) promouvoir l'égalité des chances de tous les Canadiens dans la recherche de leur bien-être;
>
> b) favoriser le développement économique pour réduire l'inégalité des chances;
>
> c) fournir à tous les Canadiens, à un niveau de qualité acceptable, les services publics essentiels.
> [Emphasis added.]

[53] Like its English equivalent, the verb "s'engager" may also connote a justiciable obligation as well as a mere statement of aspiration. Here is the definition from the *Grand Usuel Larousse* with the two relevant options highlighted:

> **s'engager** v. pr., être engagé v. pass.
>
> 1. Se loger dans un lieu étroit, qui retient: *Le tenon s'engage dans la mortaise.*
>
> 2. Entrer, avancer, pénétrer, se trouver dans une voie, un passage: *Le train s'engage dans le tunnel.*
>
> 3. Entreprendre une action, y participer; se lancer: *S'engager dans des négociations difficiles.*
>
> 4. S'inscrire à une compétition: *Vingt coureurs sont déjà engagés dans la course.*
>
> 5. Se mettre dans une situation où on aura à faire des dépenses, des frais.
>
> 6. En parlant d'une action, commencer: *L'affaire est mal engagée.*
>
> **7. Prendre nettement position, en partic. sur des problèmes politiques, sociaux, économiques (to clearly take a position, in particular on political, social or economic problems)**.
>
> 8. Choisir telle voie, commencer à entre-prendre telles études, etc.
>
> **9. Contracter un engagement; (To contract a commitment)**.

> *Grand Usuel Larousse: dictionnaire encyclopédique*, ed mise à jour (Paris: Larousse, 1997) s.v. "s'engager"
>
> (Emphasis added)

[54] Thus, in either the English or French version, the key verb "commit/s'engager" can grammatically support the CBRM's proposed interpretation that *s. 36* is generally justiciable, at least when that word is considered in isolation.

If there is a Justiciable Commitment, is it a commitment to the CBRM?

[55] To answer this, let me extend my analysis of the legislative text by considering how the verb "committed" fits first in the context of *s. 36* generally, and then in the context of the *Act* generally.

[56] Firstly, consider the nature of the three commitments contained in *s. 36(1)* - (a) promoting equal opportunities; (b) furthering economic development; and, (c) providing essential public services. These vague standards are inconsistent with the notion that an individual, or a municipal unit representing individuals, is accorded an enforcable cause of action. Rather, the wording supports the interpretation that *s. 36* represents the terms of an agreement among federal and provincial governments, and *s. 36(1)*'s standards establish the ambit of those terms of agreement. Later I will return to this interpretive approach. The same can be said for the French version.

[57] Furthermore, the heading under which a particular provision falls can be instructive. See **Law Society of Upper Canada v. Skapinker**, [1984] S.C.J. No. 18 (Q.L.). Here, *s. 36* falls under the heading "Part III - *Equalization and Regional Disparities*". If *s. 36* were meant to grant justiciable legal rights as the CBRM contends, would one not expect to find the word "rights" in the heading as was done in the two preceding headings: "Part I - *Canadian Charter of Rights and Freedoms*" and "Part II - *Rights of Aboriginal Peoples of Canada*" ("droits" in the French version)?

[58] If, as the CBRM submits, s. *36* granted an enforcable right, actionable by a municipality, one would expect *s. 36* to name the beneficiary who has that constitutional right. For instance, *s. 2* begins with "Everyone has the following

fundamental freedoms...". Section 6 begins "Every citizen of Canada has the right...". Sections 7-10 begin "Everyone has the right...". Section 11 says "Any person charged with an offence has the right...", and similar wording asserts the rights and names the beneficiaries in *ss. 12-14*. Section 15(1) opens "Every individual is equal before and under the law and has the right...". Sections 17, 19 and 20 expressly state their language rights and expressly identify the beneficiaries of those rights, as do the opening words of *ss. 23(1)* and *(2)* for minority language rights. Then *s. 24(1)* authorizes an actionable remedy to "[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied ...". Outside the *Charter*, *s. 35(1)* expressly affirms the existing "rights of the aboriginal peoples".

[59] When the *Act* intends to grant a constitutional right to be enforceable in an action by an individual or group of individuals, the constitutional document defines the principle, describes it as a right or freedom, and identifies the beneficiaries who could sue to enforce the right. Then we come to *s. 36*. There is no described or asserted right and no identification of a beneficiary of any right. There is no mention whatsoever of municipal units like the CBRM. There is only a statement that the commitments of provincial and federal governments are to promote opportunities, well-being and reasonable public services of "Canadians".

[60] The CBRM's submission necessarily assumes that *s. 36(1)*'s reference to "Canadians" means that any Canadian may sue under *s. 36* to enforce his or her right to opportunity, well-being and reasonable public service, and that the CBRM may sue as a representative of those Canadians from the CBRM. If this assumption held, then any Canadian in Halifax, Toronto, Calgary, or elsewhere equally could sue. Then a judge would undertake a microeconomic analysis of government spending and taxation fairness and, if the plaintiff's claim is established, order that the government upgrade the individual's well-being or opportunity or access to public services or, at least as requested in this application, declare that the government has breached its commitment.

[61] In my respectful view, nothing in *s. 36* supports the existence of such a constitutional cause of action. Even the expressly assigned rights in *ss. 7* and *15(1)* have been interpreted not to encompass a state guarantee of minimum and constitutionally enforceable standards of living: **Gosselin v. Quebec (Attorney General)**, [2002] 4 S.C.R. 429, at paras. 82-3, *per* McLachlin C.J.C. for the

majority; **Boulter v. Nova Scotia Power Corp.**, 2009 NSCA 17, at paras. 32-44 and cases there cited. Section 36, containing no expressly defined and assigned right, cannot reasonably be construed to establish such an enforceable right by implication.

[62] Rather, in my view, *s. 36* codifies an agreement among the federal and provincial governments respecting the principles of equalization and the redress of regional disparities. The standards in paras. *(a)*, *(b)* and *(c)* of *s. 36(1)*, including the references to opportunities, well-being and reasonable public services to Canadians, are the benchmarks of the commitments among the federal and provincial governments. Whether the federal or provincial governments could sue, or maintain a justiciable cause of action, *inter se* for a violation of these standards is not an issue in this appeal. So I express no view on that matter. The point that is relevant here is that the constitutional privity to the agreement that is codified in *s. 36* rests with the federal and provincial governments, not with individual Canadians or municipalities such as the CBRM.

[63] Then there is the important qualifying phrase at the outset of *s. 36*: *Without altering the legislative authority of Parliament or the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority ...* . This alone, says the Attorney General, would pre-empt any concept of justiciability. I refer again to his factum:

> 69. The introductory language of s. 36(1) is important. It contains two significant caveats. The commitments set out in para. (a), (b), and (c) **do not alter** two things:
>
> 1. The legislative authority of Parliament or of the legislatures.
>
> 2. The rights of any of them with respect to the exercise of their legislative authority.
>
> 70. The "legislative authority" of the legislatures is broad language. It encompasses the unwritten doctrines of constitutional law, discussed earlier, that are "major elements of the architecture of the constitution and...its lifeblood" (*Reference re Secession of* Quebec at para. 51). Those include the authority of the legislature to "make or unmake any law whatever",(subject to the s. 91/92 division of legislative authority), to authorize government expenditure, and to raise taxes. The "rights" of legislatures "with respect to the exercise of their

> legislative authority" is equally broad language. It encompasses the legislatures' right to make law. It encompasses the legislatures' right to approve or not approve expenditures, to tax or not to tax, and to craft any type of law including laws granting or delegating discretions. All of this is unaltered by the "commitment" described in s. 36(1)(a), (b), and (c). To alter is to change. So the authority and rights of the legislature before the inception of s. 36(1) are unchanged.
>
> 71. To put it simply, all laws, including those related to expenditure and taxation, have been removed from the "commitment" in s. 36(1). Since a justiciable issue is one that involves "the interpretation of law", a "legal component", there is nothing left in s. 36(1)for this Court to adjudicate. There is no justiciable issue, and absent a justiciable issue, there is no cause of action that attracts the jurisdiction of this Court.

[64] Yet on this last point, the CBRM offers a plausible counter point. It asserts that this qualifying introductory phrase may simply be an acknowledgment of the division of legislative powers set out in *ss. 91* and *92* of the **British North America Act**, 1867, *Constitution Act, 1867,* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 ("*BNA Act*"). In other words, nothing in *s. 36(1)* can be seen to limit the power of the federal government under *s. 91* of the *BNA Act* nor the power of the provincial governments under *s. 92*. Further, the CBRM submits that "the rights of any of them with respect to the exercise of their legislative authority" in the prefix of *s. 36(1)* refers to legislative process and immunities, and does not protect the content of legislation. If the CBRM is correct on these points then it would be equally correct to submit that the verb "committed" must mean something more. In fact, as the CBRM correctly urges, all words in a statute are presumed to be there for a specific purpose. Professor Sullivan calls this the presumption against tautology:

> ***Governing principle.*** It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose. ...
>
> ...every word and provision found in a statute is supposed to have a meaning and a function. For this reason courts should avoid, as much as possible, adopting interpretations that would render any portion of a statute meaningless or pointless or redundant.

[65] All this said, I come back to my initial observation that the word "committed" may indeed, in appropriate circumstances, represent an actionable obligation among the parties to the agreement that is being codified in *s. 36*, i.e., the federal and provincial governments, including, of course, the Province of Nova Scotia. In other words, such an interpretation is *worthy of consideration*. So I would not strike the claim on the basis of injusticiability *per se*. As I have stated earlier, and will reiterate, the claim should be struck because it is not a cause of action belonging to the CBRM.

[66] That deals with the meaning of the legislative text. Let me now turn to Professor Sullivan's remaining questions - the law-makers' intention and the consequences should we endorse the Attorney General's proposed interpretation.

What did the Law-makers Intend?

[67] What then was the legislative intent of *s. 36*? An examination of the *Act* generally produces little guidance. It contains no objects clause. There is only one preamble and that is limited to "Part I - *The Charter of Rights and Freedoms*" and it is very general, referencing only *the supremacy of God and the rule of law*.

[68] One thing is very obvious about the *Act*'s legislative history. It was the product of longstanding and comprehensive negotiations between the federal government and the provinces. With *s. 36* being no exception, I would therefore assume that the commitments set out in *s. 36(1)* were the product of compromise. In other words, they would have been offered by the two negotiating bodies (federal v. provincial governments) for each other's benefit and in any event certainly not for the benefit of municipalities. This is in fact borne out by the authorities cited by the CBRM.

Authorities cited by the CBRM

[69] The limited evidence of legislative history that was summarized in the record for this appeal does not disclose any intent that the principles of *s. 36* be actionable by individuals or municipalities. Rather, this evidence points to the view, discussed earlier, that *s. 36* represented an agreement among the federal and provincial governments establishing the principles to govern the systems of

equalization and redress of regional disparities. The justiciable rights, if any, belong to those governments, not to individuals or municipalities.

[70] For example, the CBRM refers to a work by Mr. Aymen Nadar, "*Providing Essential Services: Canada's Constitutional Commitment under S. 36*" (1997), 19 Dal. L.J. 306. He summarizes the history of *s. 36* as the product of numerous federal-provincial constitution conferences:

> *c. History of s. 36* (1972-1982)
>
> Articles 46 and 47 of the Victoria Charter were redrafted five times (1975, 1978, 1979, 1980 and 1981) before their final version appeared as s. 36 of the *Constitution Act, 1982*. In substance, the provision remained the same from 1971 to 1982, with two significant exceptions: the addition, in 1979, of the precursor to the present subsection 36(2), and the abandonment of the 'non-compellability' clause. ...

Then Nadar explains how the decade-long process culminated in an agreement on equalization payments that would become embodied in *s. 36*:

> In the midst and as a result of, the existing atmosphere of tension, uncertainty and distrust between Ottawa and the provinces over federal transfer payments, subsection (2) of the provision on regional disparities was included for the first time for discussion at the Federal-Provincial First Ministers' Conference, on February 5 - 6, 1979. This subsection reads:
>
> > (2) Parliament and the Government of Canada are further committed to the principle of making equalization payments to the provinces that are unable to provide essential public services of reasonable quality without imposing an undue burden of taxation, or to the principle of making arrangements equivalent to equalization payments to meet the commitment specified in Section 96(1)(c).
>
> . . .
>
> This pressure was redoubled in other fora on the Constitution. The provinces were determined to gain, inasmuch as possible, their guarantee for federal equalization payments. Finally, in the final months of negotiation, the federal government came as close to the province's position as they would go. Speaking to the Special Joint Committee of the Senate and the House of Commons on the

> Constitution of Canada on January 12, 1981, then Minister of Justice, Jean Chrétien assented to the use of the term "equalization payments":
>
> > Both the Premiers Hatfield and Blakeney and many members of this Committee have made representations to the effect that Section 31(1) should state clearly that equalization payments must be made to provincial governments. I am prepared to accept wording somewhat along the following lines:
> >
> > 31(2) Parliament and the government of Canada are further committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.
>
> The new provision was acceptable; and the amendment passed on January 30, 1981. It would remain virtually unchanged and become subsection 36(2) of the *Constitution Act, 1982*.
>
> Of importance in the history of s. 36 is the fact that subsection (2) did not belong to the provision until 1979, eight years after the original formulation of the section in the Victoria Charter. Nor had there been reason for the provinces to insist on it initially. Only after time had passed and economic pressures on the federal government had resulted in a squeeze on provincial treasuries did the provinces become concerned. Numerous unilateral actions by the federal government to control the costs of open-ended programmes, and at least one attempt to restructure unconditional grants altogether, had led to an atmosphere of tension and distrust between the provinces and the federal government. Finally, the provinces had fought for an assurance, at the constitutional level, that equalization payments would continue. The present subsection 36(2) is the fruit of their combined efforts.

[71] Furthermore, other constitutional scholars who have studied the legislative history of *s. 36* offer no consensus on its intent. Some feel that the commitments may be generally justiciable while others say that they are not. However, none suggest that they represent justiciable commitments to outside players such as municipalities.

[72] For example, Professor Peter W. Hogg in **Constitutional Law of Canada**, 5th ed. (looseleaf) (Toronto: Carswell, 2007) at p. 6-10, sees *s. 36* as no more than a statement of aspiration and likely not enforceable by anyone in a court of law:

> The constitutional obligation to make adequate equalization payments to the poorer provinces is probably too vague, and too political, to be justiciable. It is like the "directive principles of state policy"in the Constitution of India, which are statements of economic and social goals that ought to guide governments but which are not enforceable in court. ...

[73] Now the CBRM asserts that certain scholars take an opposite view and contend that a commitment is just that – a binding obligation. For example, in its factum, the CBRM in addition to Aymen Nadar, *supra*, refers to the works of Professor Lorne Sossin, **Boundaries of Judicial Review: The Law of Justiciability in Canada**, (Thomson Canada Limited, 1999):

> 52. Numerous constitutional experts have also reached the conclusion that s. 36 is justiciable. In his text on justiciability, Professor Sossin stated:
>
> > The argument that s. 36 was intended to create justiciable obligations on the federal and provincial governments is reinforced by the inclusion of the term "commitment" to describe the protections contained therein. A commitment suggests the creation of an enforceable obligation, at least to employ one's best efforts in securing that to which one is committed. However, it falls short of creating any mandatory obligation to provide a particular level of funding or type of benefit.
> >
> > There is further support for this position if one views the treatment of constitutional convention, discussed above, as analogous to how the Supreme Court would approach s. 36. The *Patriation Reference* [in which the Supreme Court of Canada decided that it was appropriate to answer a reference question regarding constitutional convention, even though such conventions are not enforceable by the courts] is authority for the proposition that political disputes [sic] may nonetheless be justiciable if they possess a "constitutional feature". It simply does not make sense that unwritten, judge-made constitutional doctrines such as conventions possess this "constitutional feature," while written provisions of the *Constitution Act, 1982* do not.
>
> 53. In an earlier law review article, Professor Sossin concluded that while s. 36 "may not be enforceable in terms of requiring the government to penalize provinces whose welfare policies failed to meet certain standards, it could

> appropriately be the subject of a declaration by the Court regarding the proper action by the government in the circumstances."
>
> 54. In another law review article, Aymen Nader concluded,
>
> > Sufficient jurisprudence exists to suggest that if the issue put to a court has a constitutional feature or a sufficient legal component then, in spite of its more open texture of political dimensions, the court will take cognizance of it ... Although a coercive remedy may or may not be available in an action based on this section [s. 36], considerable authority exists to suggest that the courts have the power to make "binding declarations of right, whether or not any consequential relief is or could be claimed." A statement by the courts that a government is acting in violation of the Constitution without further judicial requirement that its actions be rectified remains a viable remedy.

[74] Let me address both of these references. Regarding Professor Sossin, it is interesting to note that earlier in his text, he acknowledges the ongoing debate surrounding the justiciability issue. He then credits Mr. Nadar for his thesis that it may be justiciable:

> Given the apparent non-binding nature of the protections contained in this section, some have argued that disputes arising between governments concerning fiscal transfers and other intergovernmental relations are not justiciable. This view, however, has been subject to persuasive challenge. For example, in "Providing Essential Services: Canada's Constitutional Commitment under Section 36," Aymen Nader argues that s. 36 imposes a constitutional obligation on governments with respect to how they discharge their spending powers. While this may not be enforceable in terms of compelling governments to change fiscal or social policies, it could appropriately be the subject of a declaration by the Court regarding the proper action by the government in the circumstances. According to Nader, s. 36 sets out obligations by which both federal and provincial governments must abide in relation to the CHST.

[75] Yet it is also interesting to note that Mr. Nadar, when making the case for justiciability, focussed only on the obligation of the federal government and its duty to see that the provinces meet their equalization obligations. In other words, Nadar sees the federal government (and not municipalities) as the gatekeeper:

... Thus, the provision of essential public services of “reasonable quality” to “all Canadians” will require the federal government to place, as a condition for the receipt of federal grant monies, the stipulation that provincial programmes meet a standard of comprehensiveness and intrinsic adequacy. This standard of comprehensiveness will be the minimum by which provinces must abide in order for them to meet their commitment of providing essential public services of “reasonable quality.”

... In order to meet its commitment under s. 36(1)(c), Parliament and the federal government must also place conditions on the use of federal grants to the provinces in order to ensure that “all Canadians” are provided with essential public services of “reasonable quality”.

Under the current division of powers, the role of the federal government in its commitment pursuant to s. 36(1)(c) is the use of conditional grants to ensure (i) the provision of essential public services which are (ii) of a “reasonable quality”, and (iii) are provided to “all Canadians”. Accordingly, the federal government is bound by its commitment to require that essential public services be comprehensive and adequate, thus ensuring their “reasonable quality”, and that they be made universal, accessible and free of a residency requirement, thus ensuring their availability to “all Canadians”. Only the federal government can effect such a commitment for the nation as a whole, and it can only do so through the device of conditional grants. If the federal government were to fail (i) to meet standards of reasonable quality, or (ii) to serve all Canadians, then the national government would have reneged on its commitment pursuant to s. 36(1)(c). Since the spending power is the basis of federal action under this section, and because conditional grants are the means by which that power can be used to effect standards in public services nationwide, the federal government is constitutionally obligated by its commitment to maintain national standards at least in the areas of health and welfare, pursuant to s. 36(1)(c). Those standards, of course, must be of a reasonable quality.

Although a failure on the part of the federal government as described above may or may not lead to a coercive remedy, the Courts have the power to issue declaratory relief. With a declaration from the Court that the federal government has failed to meet its commitment pursuant to *s. 36(1)(c)*, the government will be found to be have been acting unconstitutionally. Such a declaration in the context of *s. 36(1)(c)* is fitting. This provision is ultimately about Canada’s commitment to maintaining national standards for individual social and economic protection — “essential public services”. ...

[76] Nadar then goes on to identify the merits of a court declaration. Note, however, that he sees it being issued not against the province, but against the federal government:

> As earlier stated, this is ultimately a political decision, one which must be made by the body politic itself. If the federal government should wish to deviate from its present constitutional commitment, then the question would have to be decided by the people of Canada. Accordingly, a declaration of unconstitutionality would be most appropriate, as the Court itself would not be attempting to balance difficult political issues with respect to the spending power by seeking to coerce a solution. This is not to say that the courts do not have a role to play in this process. The courts are well situated in access, or declare, whether federal legislation complies with the constitutional requirements in s. 36(1)(c). If the federal government wants to restructure the country by amending the Constitution through the political process, however, then that is what it should set about doing but, in the meantime, it is bound by the Constitution. By not compelling the federal government to rectify a legislative action in violation of s. 36(1)(c), while declaring that action unconstitutional pursuant to s. 36(1), the Court will effectively be returning the matter to the political arena. This would force the federal government, unless it is willing to remain in violation of the Constitution, either to fix the offending legislation by amending it to comply with constitutional norms, or to seek an amendment to its commitment under s. 36(1). The process of amending the Constitution is that political process by which a new public resolution may be made about Canada's continued commitment to national standards in essential public services. In a democracy such as Canada, a declaration of unconstitutionality by the Courts would thus be most fitting.

[77] In this light, in my respectful view neither the Nadar nor the Sossin thesis supports the CBRM.

[78] Yet, the CBRM also relies on two appeal court decisions to support its position that *s. 36* is justiciable. In its factum it observes:

> 44. In relation to s. 36 of the *Constitution Act, 1982* specifically, both the Manitoba and British Columbia Courts of Appeal have stated that the provision may be justiciable.
>
> 45. In *Manitoba Keewatinowi Okimakanak*, the appellant relied in part on s. 36(1)(c) to challenge a Hydro general rate increase that had been approved by Manitoba's Hydro-Electric Board. The Manitoba Court of Appeal held that there was no nexus between rate-setting and s. 36(1)(c), because the Board lacked jurisdiction to order Manitoba Hydro to improve the level or quality of service in

any region. However, in *obiter*, the Manitoba Court of Appeal did comment on the meaning of s. 36(1)(c) as follows:

> There have been no cases dealing with the interpretation of s. 36(1)(c) of the *Constitution Act, 1982*. There is considerable academic debate as to whether the section in fact creates enforceable rights and, if so, whether they are not in any event - by virtue of the preamble of the section - subordinate to the ordinary acts of Parliament and the provincial legislatures. Suffice it to say I am satisfied that in the general sense a reasonable argument might be advanced that the section could possibly have been intended to create enforceable rights. However, it is not necessary to decide this point in light of the disposition I am about to make.

46. In the recent *Canadian Bar Association* case, the British Columbia Court of Appeal rejected a statement by Chief Justice Brenner of the B.C. Supreme Court that section 36 of the *Constitution Act, 1982* "cannot form the basis of a claim since it only contains a statement of 'commitment'." The Court of Appeal instead adopted the Manitoba Court of Appeal's holding that section 36 may be enforceable, stating:"I accept that "a reasonable argument might be advanced that the section could possibly have been intended to create enforceable rights" (*Manitoba Keewatinow Okimakanak* at para. 10)."

47. Ultimately, the B.C. Court of Appeal concluded that the CBA had not raised a reasonable claim, but on the basis that a broad-based systemic claim that legal aid in British Columbia is inadequate is not a constitutionally cognizable claim at all, including pursuant to s. 36. In light of the Supreme Court's binding precedents on this point, the Court of Appeal held that "the broadly-directed pleadings of a systemic problem violating unwritten constitutional principles do not raise a reasonable claim.

[79] Respectfully, neither of these cases is persuasive in the context of this appeal. First of all, in each case, the reference to justiciability is pure *obiter*. Secondly, they are hardly ringing endorsements for justiciability; using words like "might" or "could possibly". Finally, as I have already acknowledged, *s. 36* might be justiciable in certain circumstances. Again, that is not the issue in this case. Instead, the issue comes down to the merits of the pleadings and whether in this context, *s. 36(1)* involves a justiciable commitment to the CBRM. These cases do nothing to support such a proposition.

[80] Thus, when it comes to legislative intent, it appears that *s. 36* represents a legislative compromise with commitments by and for only the negotiating parties - namely the federal government and the provinces. It offers no support for the concept of a commitment to municipalities.

The Consequences of the Attorney General's Proposed Interpretation

[81] Let me therefore now turn to Professor Sullivan's final question – the consequences should we endorse the Attorney General's proposed interpretation that *s. 36* cannot possibly represent a commitment enforceable at the hands of municipalities such as the CBRM. In response to this, the CBRM warns of serious negative consequences. For example, it asserts that such an interpretation would render the Province of Nova Scotia immune from judicial review of what the CBRM views as a clear constitutional commitment. It also cautions that, by this approach, the Court would be abdicating its responsibility as the last line of defence for Canadian citizens. Specifically, in its factum, the CBRM offers this overview of its case.

> **A. Overview**
>
> 1. The federal and provincial governments and legislatures have constitutionally committed pursuant to s. 36 of the *Constitution Act, 1982* to provide Canadians with comparable levels of public services for comparable levels of taxation wherever in Canada they reside. If Justice Murphy's decision is upheld, the government and legislature of Nova Scotia (collectively, the "Province" or "Nova Scotia") will be immune from judicial review of this legal, constitutional commitment.
>
> 2. It is submitted that the issue of whether Nova Scotia is in compliance with its constitutional commitment under s. 36 of the *Constitution Act, 1982* must be justiciable. Section 52(1) of the *Constitution Act, 1982* provides: "The Constitution of Canada [including s. 36] is the supreme law of Canada." Section 36 accordingly sets out legal commitments to payment (by the federal government) and use (by the provinces) of equalization and regional disparity payments for purposes of providing all Canadian citizens with reasonably comparable levels of public services at reasonably comparable levels of taxation. Whether Nova Scotia has complied with that commitment is thus a question of law, and as such is justiciable.

> 3. Indeed, the Supreme Court of Canada has held that courts cannot "abdicate their responsibility" to determine whether a government's choice falls within constitutional limitations. This is the case even when the constitutional question is controversial or has political implications. In *Chaoulli*, which dealt with the highly political issue of whether a prohibition against taking out insurance to obtain private sector health care services violates the Constitution, Justices Binnie and LeBel stated: "There is nothing in our constitutional arrangement to exclude 'political questions' from judicial review where the Constitution itself is alleged to be violated.
>
> 4. Pleadings should only be struck out if there is settled law making it plain and obvious that the claim is certain to fail. Here, both the Manitoba and British Columbia Courts of Appeal have stated that s. 36 of the *Constitution Act, 1982* may be justiciable. Courts should be especially reluctant to strike out a case, like this application, that raises novel constitutional arguments.
>
> 5. The Cape Breton Regional Municipality ("CBRM") stands almost apart in Canada as an urban region experiencing severe localized disparities. There has been no effective government intervention pursuant to s. 36. The situation is comparable to *Chaoulli*, in which Justice Deschamps said of public health care waiting times: "it seems that governments have lost sight of the urgency of taking concrete action. The courts are therefore the last line of defence for citizens." [Underlining by author]

[82] Respectfully, this submission misses the mark. As I have said, *s. 36* may indeed be justiciable. My point is that this provision is simply not justiciable at the hands of the CBRM. Therefore, to track the CBRM's language in its factum, I am not at all suggesting that the Province of Nova Scotia is *immune* from *s. 36*. As I have said, *s. 36* embodies an agreement among the federal and provincial governments. Thus, the Government of Nova Scotia, in an appropriate case, might well be held to account – but only to one of these parties. This is not that case.

[83] Nor, by this interpretation, would the court be abdicating its responsibility. This is not a matter of a court being reluctant to hear a case because it involves a "constitutional question that is controversial or has political implications". Courts should never shy away from protecting the Constitution simply because issues of public policy may be involved. In fact, I endorse the CBRM's reference to **Chaoulli v. Quebec (Attorney General)**, 2005 SCC 35, [2005] 1 S.C.R. 791. There, the Supreme Court of Canada considered the constitutionality of legislation that prohibited private health insurance that would prevent excessive hospital wait

times. Specifically, I refer to Deschamps, J.'s justification for her Court's involvement in those circumstances:

> 89 The courts have a duty to rise above political debate. They leave it to the legislatures to develop social policy. But when such social policies infringe rights that are protected by the charters, the courts cannot shy away from considering them. ...

[84] As well, the Supreme Court of Canada in **Newfoundland (Treasury Board) v. N.A.P.E.**, 2004 SCC 66, [2004] 3 S.C.R. 381, considered the appeal of female hospital workers who claimed that legislation reneging on a pay equity agreement violated their equality rights under *s. 15* of the *Charter of Rights and Freedoms*. There, Binnie, J. concluded:

> 111 The "political branches" of government are the legislature and the executive. Everything that they do by way of legislation and executive action could properly be called "policy initiatives". If the "political branches" are to be the "final arbitrator" of compliance with the *Charter* of their "policy initiatives", it would seem the enactment of the *Charter* affords no real protection at all to the rightsholders the *Charter*, according to its text, was intended to benefit. *Charter* rights and freedoms, on this reading, would offer rights without a remedy.

See also **Boulter**, *supra* at para. 43.

[85] The simple reality is that this is not a matter for the courts because *s. 36* cannot be reasonably interpreted as bestowing a constitutional right on municipalities such as the CBRM.

Interpreting s. 36 – Conclusion

[86] The cumulative effect of answering Professor Sullivan's three questions is inevitably as follows. In an appropriate context, *s. 36* might represent a justiciable commitment, but only among the federal and provincial governments who were privy to the agreement that is represented by *s. 36*. It is not actionable by an individual or municipality such as CBRM. Yet this is something the CBRM would have to establish if this matter were to proceed further. Therefore, this proposed interpretation respectfully offers no chance of success.

[87] The Chambers judge committed no error of law because it remains "plain and obvious" that these pleadings disclose no reasonable cause of action. Respectfully they are "certain to fail" and "absolutely unsustainable".

DISPOSITION

[88] I would dismiss this appeal but, as agreed to by the parties, without costs. In the circumstances, I need not consider the Attorney General's cross-appeal.

MacDonald, C.J.N.S.

Concurred in:

Oland, J.A.

Fichaud, J.A.