File No. 36167

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

JESSICA ERNST

Appellant
(Appellant)

and

ALBERTA ENERGY REGULATOR

Respondent
(Respondent)

and

ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL FOR SASKATCHEWAN, ATTORNEY GENERAL OF QUEBEC, CANADIAN CIVIL LIBERTIES ASSOCIATION, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION and DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

Interveners

INTERVENER'S BOOK OF AUTHORITIES
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, INTERVENER
(Rule 44 of the Rules of the Supreme Court of Canada)

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stitutional validity and the operation of the *Indian Act* and the Manitoba Courts had jurisdiction to adjudicate upon this issue as well as upon appellants' counterclaim. The Courts of Manitoba could not on the other hand hear an appeal from the Minister's decision or otherwise review it.

The Federal Court, as the successor to the Exchequer Court of Canada which was first established by Parliament in 1875, was established pursuant to the authority of s. 101 of the *Constitution Act* which provides "for the Establishment of any additional Courts for the better Administration of the Laws of Canada". The expression "laws of Canada" has been settled as meaning the laws enacted by the Parliament of Canada, at least for the purposes of this appeal: *Thomas Fuller*, *supra*, *per* Pigeon J. at p. 707. It is difficult to see how an argument can be advanced that a statute adopted by Parliament for the establishment of a court for the better administration of the laws of Canada can at the same time include a provision that the provincial superior courts may no longer declare a statute enacted by Parliament to be beyond the constitutional authority of Parliament. Sections 17 and 18 of the *Federal Court Act* must, in the view of the appellants, be so construed. In my view Parliament lacks the constitutional authority to so provide. To do so would strip the basic constitutional concepts of judicature of this country, namely the superior courts of the provinces, of a judicial power fundamental to a federal system as described in the *Constitution Act*. At the same time it would leave the provincially-organized superior courts with the invidious task of execution of federal and provincial laws, to paraphrase the *Valin* case, *supra*, while being unable to discriminate between valid and invalid federal statutes so as to refuse to "execute" the invalid statutes. For this second and more fundamental reason I conclude that the British Columbia courts have the requisite jurisdiction to entertain the claims for declarations herein made. Moreover, it would amount to an attempt by Parliament to grant exclusive jurisdiction to the Federal Court to administer the "laws of Canada" while the validity of those laws remained unknown. Any jurisdiction

l'intimée contestait la constitutionnalité et l'application de la *Loi sur les Indiens* et que les tribunaux du Manitoba ont juridiction pour disposer de cette question aussi bien que de la demande reconventionnelle des appelants. En revanche, les tribunaux du Manitoba ne pouvaient pas entendre un appel à l'encontre d'une décision du Ministre ni examiner celle-ci de quelque façon.

La Cour fédérale, successeur de la Cour de l'Échiquier que le Parlement avait constituée en 1875, a été établie en vertu de l'art. 101 de la *Loi constitutionnelle* qui prévoit «l'établissement d'autres tribunaux pour la meilleure exécution des lois du Canada». Aux fins du présent pourvoi du moins, on a établi que l'expression «lois du Canada» désigne les lois adoptées par le Parlement du Canada: voir l'arrêt *Thomas Fuller*, précité, les motifs du juge Pigeon, à la p. 707. Il est difficile de comprendre comment on peut prétendre qu'une loi que le Parlement a adoptée en vue de l'établissement d'un tribunal pour la meilleure exécution des lois du Canada peut en même temps disposer que les cours supérieures des provinces ne peuvent plus déclarer qu'une loi adoptée par le Parlement outrepasse la compétence constitutionnelle de ce dernier. C'est pourtant l'interprétation que, selon les appelants, il faut donner aux art. 17 et 18 de la *Loi sur la Cour fédérale*. A mon avis, la Constitution n'investit pas le Parlement du pouvoir d'adopter pareille disposition. S'il en était autrement, ces organismes judiciaires de base qu'a établis la Constitution de ce pays, notamment les cours supérieures des provinces, seraient dépouillés d'un pouvoir judiciaire fondamental dans un régime fédéral comme celui décrit dans la *Loi constitutionnelle*. De plus, ces cours supérieures constituées par les provinces se verraient chargées de la tâche peu enviable d'appliquer les lois fédérales et provinciales, pour paraphraser l'arrêt *Valin*, précité, tout en se trouvant dans l'impossibilité de faire la distinction entre les lois fédérales valides et celles qui sont invalides, de manière à pouvoir refuser d'appliquer ces dernières. Pour cette seconde raison plus fondamentale, je conclus que les cours de la Colombie-Britannique ont la compétence requise pour entendre les demandes de déclaration faites en l'espèce. Cela équivaudrait en outre à une tentative de la part du Parlement

BUTZ ET AL. v. ECONOMOU ET AL.

No. 76-709

SUPREME COURT OF THE UNITED STATES

438 U.S. 478; 98 S. Ct. 2894; 57 L. Ed. 2d 895; 1978 U.S. LEXIS 132

November 7, 1977, Argued
June 29, 1978, Decided

SUBSEQUENT HISTORY: On remand at Economou v. Butz, 466 F. Supp. 1351, 1979 U.S. Dist. LEXIS 13821 (S.D.N.Y., 1979)

PRIOR HISTORY: CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.
Economou v. United States Dep't of Agriculture, 535 F.2d 688, 1976 U.S. App. LEXIS 11636 (2d Cir. N.Y., 1976)

DISPOSITION: 535 F.2d 688, vacated and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Certiorari was granted to the United States Court of Appeals for the Second Circuit, which held that petitioner federal officials were entitled only to the qualified immunity available to their counterparts in state government in respondents' action claiming petitioners had instituted an investigation and an administrative proceeding in retaliation for criticism of that agency.

OVERVIEW: Respondent filed suit against officials in the Department of Agriculture claiming that they instituted an investigation against him in retaliation for his criticism of that agency. The district court dismissed on the basis that petitioners as federal officials were entitled to absolute immunity. The court of appeals reversed and held that petitioners were only entitled to the qualified immunity available to their counterparts in state government. On appeal to the Court, the Court rejected petitioners' argument that all federal officials were absolutely immune from any damages liability even if, while enforcing the statutes, they infringed constitutional rights and even if the violation was knowing and deliberate. Federal officials generally were entitled only to qualified immunity. By contrast, persons performing adjudicatory functions within a federal agency and those responsible for the decision to initiate or continue a proceeding were entitled to absolute immunity

from damages liability. Agency officials performing prosecutorial functions should be able to claim absolute immunity.

OUTCOME: The Court, in the application of the principles of the opinion, vacated the judgment of the court of appeals and remanded to that court with instructions to remand to the district court for further proceedings consistent with the opinion.

CORE TERMS: immunity, absolute immunity, prosecutor, qualified immunity, state officials, immune, constitutional rights, causes of action, common-law, hearing examiner, executive branch, administrative proceeding, federal officers, press release, malicious, constitutional claims, postmasters, accorded, malice, federal law, executive officers, commodity, seizure, state law, state government, public interest, discretionary, maliciously, manifestly, outer

LexisNexis(R) Headnotes

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Federal Questions > General Overview
Governments > Federal Government > Claims By & Against
[HN1] Compensable injury to a constitutionally protected interest can be vindicated by a suit for damages invoking the general federal-question jurisdiction of the federal courts.

Governments > Federal Government > Employees & Officials
Torts > Procedure > Settlements > Releases > General Overview
Torts > Public Entity Liability > Immunity > Absolute Immunity
[HN2] An official who has not only committed a wrong under local law, but also violated those fundamental principles of fairness embodied in the Constitution is not protected. Whatever level of protection from state interference is appropriate for federal officials executing their duties under federal law, it cannot be doubted that these officials, even when acting pursuant to congressional authorization, are subject to the restraints imposed by the federal Constitution.

Constitutional Law > The Presidency > Immunity
Governments > Federal Government > Claims By & Against
[HN3] In varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

Environmental Law > Zoning & Land Use > Constitutional Limits
Governments > Federal Government > Employees & Officials
Governments > State & Territorial Governments > General Overview
[HN4] In the absence of congressional direction to the contrary, there is no basis for according to

federal officials a higher degree of immunity from liability when sued for a constitutional infringement as authorized by Bivens than is accorded state officials when sued for the identical violation under 42 U.S.C.S. § 1983. The constitutional injuries made actionable by § 1983 are of no greater magnitude than those for which federal officials may be responsible. The pressures and uncertainties facing decisionmakers in state government are little if at all different from those affecting federal officials. Surely, federal officials should enjoy no greater zone of protection when they violate federal constitutional rules than do state officers.

Civil Rights Law > Section 1983 Actions > Scope
[HN5] See 17 Stat. 13.

Civil Procedure > Remedies > Damages > Monetary Damages
Governments > Federal Government > Claims By & Against
Governments > Federal Government > Employees & Officials
[HN6] A citizen suffering a compensable injury to a constitutionally protected interest can invoke the general federal-question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official. The barrier of sovereign immunity is frequently impenetrable. Injunctive or declaratory relief is useless to a person who has already been injured.

Administrative Law > Sovereign Immunity
Governments > Federal Government > Employees & Officials
Torts > Public Entity Liability > Liability > Federal Tort Claims Act > Exclusions From Liability > Discretionary Functions
[HN7] The Federal Tort Claims Act, 28 U.S.C.S. § 2680, prohibits recovery for injuries stemming from discretionary acts, even when that discretion has been abused.

Administrative Law > Sovereign Immunity
Governments > Federal Government > Claims By & Against
Torts > Public Entity Liability > Liability > Federal Tort Claims Act > General Overview
[HN8] Pursuant to 28 U.S.C.S. § 2680, the government is immune from (a) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved is abused.

Administrative Law > Sovereign Immunity
Governments > Federal Government > Claims By & Against
Governments > Federal Government > Employees & Officials
[HN9] All individuals, whatever their position in government, are subject to federal law: no man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government are creatures of the law, and are bound to obey it. Federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope. This is not

to say that considerations of public policy fail to support a limited immunity for federal executive officials. A court considers the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority. It is not unfair to hold liable the official who knows or should know he is acting outside the law, and that insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment.

Civil Rights Law > Immunity From Liability > Local Officials > Customs & Policies
Governments > Federal Government > Claims By & Against
Governments > Federal Government > Employees & Officials
[HN10] In a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to qualified immunity, subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business.

Civil Rights Law > Immunity From Liability > Local Officials > Customs & Policies
Governments > Federal Government > Claims By & Against
Governments > Federal Government > Employees & Officials
[HN11] Federal officials will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law. But there is no substantial basis for holding that executive officers generally may with impunity discharge their duties in a way that is known to them to violate the United States Constitution or in a manner that they should know transgresses a clearly established constitutional rule. The principle should prove as workable in suits against federal officials as it has in the context of suits against state officials. Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the federal constitution, it should not survive a motion to dismiss. Damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity.

Administrative Law > Agency Adjudication > General Overview
Administrative Law > Agency Rulemaking > Formal Rulemaking
Governments > Federal Government > Claims By & Against
[HN12] Adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages. The conflicts which federal hearing examiners seek to resolve are every bit as fractious as those which come to court. Federal administrative law requires that agency adjudication contain many of the same safeguards as are available in the judicial process. The proceedings are adversary in nature. They are conducted before a trier of fact insulated from political influence. A party is entitled to present his case by oral or documentary evidence under 5 U.S.C.S. § 556(d), and the transcript of testimony and exhibits together with the pleadings constitute the exclusive record for decision under § 556(e). The parties are entitled to know the findings and conclusions on all of the issues of fact, law, or discretion presented on the record under § 557(c).

Administrative Law > Agency Adjudication > Impartiality > Participation in Prosecution
Administrative Law > Agency Adjudication > Presiding Officers > Administrative Law Judges
Administrative Law > Agency Adjudication > Presiding Officers > Duties & Powers
[HN13] The Administrative Procedure Act (APA) contains a number of provisions designed to guarantee the independence of hearing examiners. They may not perform duties inconsistent with their duties as hearing examiners under 5 U.S.C.S. § 3105 (1976). When conducting a hearing under § 5 of the APA, 5 U.S.C.S. § 554(d)(2), a hearing examiner is not responsible to, or subject to the supervision or direction of, employees or agents engaged in the performance of investigative or prosecution functions for the agency. Nor may a hearing examiner consult any person or party, including other agency officials, concerning a fact at issue in the hearing, unless on notice and opportunity for all parties to participate under § 554 (d)(1). Hearing examiners must be assigned to cases in rotation so far as is practicable under § 3105. They may be removed only for good cause established and determined by the Civil Service Commission after a hearing on the record under § 7521. Their pay is also controlled by the Civil Service Commission.

Governments > Courts > Judicial Immunity
Governments > Federal Government > Claims By & Against
Torts > Public Entity Liability > Immunity > Judicial Immunity
[HN14] The risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women. Persons subject to these restraints and performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts. Those who complain of error in such proceedings must seek agency or judicial review.

Administrative Law > Sovereign Immunity
Governments > Agriculture & Food > Commodity Exchange Act
Securities Law > U.S. Commodities Futures Trading Commission > Sanctions
[HN15] Agency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts. The decision to initiate administrative proceedings against an individual or corporation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution. An agency official, like a prosecutor, may have broad discretion in deciding whether a proceeding should be brought and what sanctions should be sought.

Administrative Law > Sovereign Immunity
[HN16] Agency officials must make the decision to move forward with an administrative proceeding free from intimidation or harassment. Because the legal remedies already available to the defendant in such a proceeding provide sufficient checks on agency zeal, those officials who are responsible for the decision to initiate or continue a proceeding subject to agency adjudication are entitled to absolute immunity from damages liability for their parts in that decision.

Administrative Law > Agency Adjudication > Hearings > Evidence > General Overview

Administrative Law > Sovereign Immunity
Evidence > Testimony > Credibility > Impeachment > Bias, Motive & Prejudice
[HN17] There is no substantial difference between the function of an agency attorney in presenting evidence in an agency hearing and the function of a prosecutor who brings evidence before a court. In either case, the evidence will be subject to attack through cross-examination, rebuttal, or reinterpretation by opposing counsel. Evidence that is false or unpersuasive should be rejected upon analysis by an impartial trier of fact. Administrative agencies can act in the public interest only if they can adjudicate on the basis of a complete record. An agency attorney who arranges for the presentation of evidence on the record in the course of an adjudication is absolutely immune from suits based on the introduction of such evidence.

SUMMARY: This case concerned the personal immunity of federal officials in the executive branch from claims for damages arising from their violations of citizens' constitutional rights. The question arose, after a Department of Agriculture proceeding to revoke or suspend a registration as a commodity futures commission merchant, in a suit filed by the individual controlling the company which was registered as a futures merchant against, among others, various officials of the Department (including the Secretary and Assistant Secretary of Agriculture, the Judicial Officer, and the Chief Hearing Examiner), alleging that by instituting unauthorized proceedings against him, they had violated various of his constitutional rights. The United States District Court for the Southern District of New York dismissed the complaint against the individual defendants, holding that they were entitled to absolute immunity since they had shown that their alleged unconstitutional acts were both within the scope of their authority and discretionary. On appeal, the United States Court of Appeals for the Second Circuit reversed, holding that the federal officials were only entitled to the same qualified immunity, based on good faith and reasonable grounds, as was applicable to state officials sued pursuant to 42 USCS 1983 (535 F2d 688).

On certiorari, the United States Supreme Court vacated the Court of Appeals' judgment and remanded the case. In an opinion by White, J., joined by Brennan, Marshall, Blackmun, and Powell, JJ., it was held that (1) in a suit for damages arising from unconstitutional action, federal executive officials exercising discretion were entitled only to qualified immunity, subject to those exceptional situations where it was demonstrated that absolute immunity was essential for the conduct of public business, (2) under the principle of only qualified immunity for constitutional violations, federal officials would not be liable for mere mistakes in judgment, whether the mistake was one of fact or law, and (3) federal hearing examiners or administrative law judges, agency officials responsible for initiating or continuing a proceeding subject to agency adjudication, and agency attorneys who arranged for the presentation of evidence on the record were absolutely immune from suits.

Rehnquist, J., joined by Burger, Ch. J., and Stewart and Stevens, JJ., concurred in part and dissented in part, agreeing that the several identified officials were entitled to absolute immunity, but expressing the view that high-ranking executive officials acting within the outer limits of their

authority were also absolutely immune from suit.

LAWYERS' EDITION HEADNOTES:

STATES §107

suits against federal officials -- constitutional violations -- qualified immunity --

Headnote:[1A][1B][1C]

In a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to qualified immunity, subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business; under this principle of only qualified immunity for constitutional violations, federal officials will not be liable for mere mistakes in judgment, whether the mistake is one of fact or law. (Rehnquist, J., Burger, Ch. J., Stewart, J., and Stevens, J., dissented from this holding).

STATES §87

federal officers -- execution of duties --

Headnote:[2]

Whatever level of protection from state interference is appropriate for federal officials executing their duties under federal law, these officials, even when acting pursuant to congressional authorization, are subject to the restraints imposed by the Federal Constitution.

RIGHTS §12.5

STATES §92

STATES §107

federal and state officials -- constitutional violations -- immunity from suit --

Headnote:[3]

In the absence of congressional direction to the contrary, a higher degree of immunity from liability is not to be accorded to federal officials when sued for a constitutional violation than is accorded to state officials when sued for the identical violation under 42 USCS 1983.

STATES §107

federal officials -- immunity from suit --

Headnote:[4A][4B]

The absence of a statute pertaining to federal officials similar to 42 USCS 1983, pertaining to state officials, is not a basis for an inference about the immunity level appropriate to federal officials.

STATES §107

federal officials -- immunity from suit -- competency of federal courts --

Headnote:[5]

The federal courts are competent to determine the appropriate level of immunity where a suit is a direct claim under the Federal Constitution against a federal officer.

STATES §107

suits against federal officials -- immunity --

Headnote:[6]

The presence or absence of congressional authorization for suits against federal officials is relevant to the question whether to infer a right of action for damages for a particular violation of the Federal Constitution, but not to the question of immunity for federal officials.

RIGHTS §12.5

STATES §92

STATES §107

immunity from suit -- state officials -- federal officials --

Headnote:[7]

It is untenable to draw a distinction for purposes of immunity law between suits brought against state officials under 42 USCS 1983 and suits brought directly under the Federal Constitution against federal officials.

OFFICERS §43

duties -- obeying the law --

Headnote:[8]

All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

ATTORNEYS §1

JUDGES §14

WITNESSES §1

immunity from suit --

Headnote:[9]

Absolute immunity from damages liability is necessary to assure that judges, prosecutors, and witnesses can perform their respective functions without harassment or intimidation.

STATES §107

federal hearing examiner -- immunity from suit --

Headnote:[10]

In light of the safeguards provided to guarantee the independence of federal hearing examiners, the risk of an unconstitutional act by those presiding at agency hearings is outweighed by the importance of preserving their independent judgment, so that persons subject to such restraints in performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts.

STATES §107

agency officials responsible for adjudication -- immunity from suit --

Headnote:[11]

Those federal officials who are responsible for the decision to initiate or continue a proceeding subject to agency adjudication are entitled to absolute immunity from damages liability for their

parts in that decision, because the legal remedies already available to the defendant in such a proceeding provide sufficient checks on agency zeal.

STATES §107

federal agency attorneys functioning as prosecutors -- immunity from suit --

Headnote:[12]

A federal agency attorney who arranges for the presentation of evidence on the record in the course of an adjudication is absolutely immune from suits based on the introduction of such evidence, since there is no substantial difference between the function of the agency attorney in presenting evidence in the agency hearing and the function of a prosecutor who brings evidence before a court.

SYLLABUS

After an unsuccessful Department of Agriculture proceeding to revoke or suspend the registration of respondent's commodity futures commission company, respondent filed an action for damages in District Court against petitioner officials (including the Secretary and Assistant Secretary of Agriculture, the Judicial Officer, the Chief Hearing Examiner who had recommended sustaining the administrative complaint, and the Department attorney who had prosecuted the enforcement proceeding), alleging, *inter alia*, that by instituting unauthorized proceedings against him they had violated various of his constitutional rights. The District Court dismissed the action on the ground that the individual defendants, as federal officials, were entitled to absolute immunity for all discretionary acts within the scope of their authority. The Court of Appeals reversed, holding that the defendants were entitled only to the qualified immunity available to their counterparts in state government. *Held*:

1. Neither *Barr* v. *Matteo*, 360 U.S. 564, nor *Spalding* v. *Vilas*, 161 U.S. 483, supports petitioners' contention that all of the federal officials sued in this case are absolutely immune from any liability for damages even if in the course of enforcing the relevant statutes they infringed respondent's constitutional rights and even if the violation was knowing and deliberate. Nor did either of those cases purport to abolish the liability of federal officers for actions manifestly beyond their line of duty; if they are accountable when they stray beyond the plain limits of their statutory authority, it would be incongruous to hold that they may nevertheless willfully or knowingly violate constitutional rights without fear of liability. Pp. 485-496.

2. Without congressional directions to the contrary, it would be untenable to draw a distinction for purposes of immunity law between suits brought against state officials under 42 U. S. C. § 1983, *Scheuer* v. *Rhodes*, 416 U.S. 232, and suits brought directly under the Constitution against federal officials, *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388. *Federal* officials should enjoy no greater zone of protection when they violate *federal* constitutional rules than do *state*

officers. Pp. 496-504.

3. In a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to the qualified immunity specified in *Scheuer* v. *Rhodes, supra,* subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business. While federal officials will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law, there is no substantial basis for holding that executive officers generally may with impunity discharge their duties in a way that is known to them to violate the Constitution or in a manner that they should know transgresses a clearly established constitutional rule. Pp. 504-508.

4. Although a qualified immunity from damages liability should be the general rule for executive officials charged with constitutional violations, there are some officials whose special functions require a full exemption from liability. Pp. 508-517.

(a) In light of the safeguards provided in agency adjudication to assure that the hearing examiner or administrative law judge exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency, the risk of an unconstitutional act by one presiding at the agency hearing is clearly outweighed by the importance of preserving such independent judgment. Therefore, persons subject to these restraints and performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts. Pp. 508-514.

(b) Agency officials who perform functions analogous to those of a prosecutor must make the decision to move forward with an administrative proceeding free from intimidation or harassment. Because the legal remedies already available to the defendant in such a proceeding provide sufficient checks on agency zeal, those officials who are responsible for the decision to initiate or continue a proceeding subject to agency adjudication are entitled to absolute immunity from damages liability for their parts in that decision. Pp. 515-516.

(c) There is no substantial difference between the function of an agency attorney in presenting evidence in an agency hearing and the function of the prosecutor who brings evidence before a court, and since administrative agencies can act in the public interest only if they can adjudicate on the basis of a complete record, an agency attorney who arranges for the presentation of evidence on the record in the course of an adjudication is absolutely immune from suits based on the introduction of such evidence. Pp. 516-517.

5. The case is remanded for application of the foregoing principles to the claims against the particular petitioner-defendants involved. P. 517.

COUNSEL: Deputy Solicitor General Friedman argued the cause for petitioners. With him on the briefs were Solicitor General McCree, Assistant Attorney General Babcock, Robert E. Kopp, and Barbara L. Herwig.

David C. Buxbaum argued the cause and filed a brief for respondents.

JUDGES: WHITE, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and POWELL, JJ., joined. REHNQUIST, J., filed an opinion, concurring in part and dissenting in part, in which BURGER, C. J., and STEWART and STEVENS, JJ., joined, post, p. 517.

OPINION BY: WHITE

OPINION

[*480] [*899] [**2897]** MR. JUSTICE WHITE delivered the opinion of the Court.

[*LEdHR1A]** [1A]This case concerns the personal immunity of federal officials in the Executive Branch from claims for damages arising from their violations of citizens' constitutional rights. Respondent [1] filed suit against a number of officials in the Department of Agriculture claiming that they had instituted an investigation and an administrative proceeding against him in retaliation for his criticism of that agency. The District Court dismissed the action on the ground that the individual defendants, as federal officials, were entitled to absolute immunity for all discretionary acts within the scope of their authority. The Court of Appeals reversed, holding that the defendants were entitled only to the qualified immunity available to their counterparts in state government. *Economou* v. *U.S. Department of Agriculture*, 535 F.2d 688 (1976). Because of **[*481]** the importance of immunity doctrine to both the vindication of constitutional guarantees and the effective functioning of government, we granted certiorari. 429 U.S. 1089.

1 The individual Arthur N. Economou, his corporation Arthur N. Economou and Co., and another corporation which he heads, the American Board of Trade, Inc., were all plaintiffs in this action and are all respondents in this Court. For convenience, however, we refer to Arthur N. Economou and his interests in the singular, as "respondent."

I

Respondent controls Arthur N. Economou and Co., Inc., which was at one time registered with the Department of Agriculture as a commodity futures commission merchant. Most of respondent's factual allegations in this lawsuit focus on **[***900]** an earlier administrative proceeding in which the Department of Agriculture sought to revoke or suspend the company's registration. On February 19, 1970, following an audit, the Department of Agriculture issued an administrative complaint alleging that respondent, while a registered merchant, had willfully failed to maintain the minimum financial requirements prescribed by the Department. After another audit, an amended

"it would be 'incongruous and confusing, to say the least' to develop different standards of immunity for state officials sued under § 1983 and federal officers sued on similar grounds under causes of action founded directly on the Constitution." *Economou* v. *U.S. Dept. of Agriculture*, 535 F.2d, at 695 n. 7, quoting *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 456 F.2d 1339, 1346-1347 (CA2 1972) (on remand). [26]

The Court of Appeals for the Ninth Circuit has reasoned:

"[Defendants] offer no significant reason for distinguishing, as far as the immunity doctrine is concerned, between litigation under § 1983 against state officers and actions against federal officers alleging violation of constitutional rights under the general federal **[***912]** question statute. In contrast, the practical advantage of having just *one* federal **[*500]** immunity doctrine for suits arising under federal law is self-evident. Further, the rights at stake in a suit brought directly under the Bill of Rights are no less worthy of full protection than the constitutional and statutory rights protected by § 1983." *Mark* v. *Groff*, 521 F.2d 1376, 1380 (1975).

Other courts have reached similar conclusions. *E. g.*, *Apton* v. *Wilson*, 165 U. S. App. D. C. 22, 506 F.2d 83 (1974); *Brubaker* v. *King*, 505 F.2d 534 (CA7 1974); see *Weir* v. *Muller*, 527 F.2d 872 (CA5 1976); *Paton* v. *La Prade*, 524 F.2d 862 (CA3 1975); *Jones* v. *United States*, 536 F.2d 269 (CA8 1976); *G. M. Leasing Corp*. v. *United States*, 560 F.2d 1011 (CA10 1977). [27]

25 As early as 1971, Judge, now Attorney General, Bell, concurring specially in a judgment of the Court of Appeals for the Fifth Circuit, recorded his "continuing belief that all police and ancillary personnel in this nation, whether state or federal, should be subject to the same accountability under law for their conduct." *Anderson* v. *Nosser*, 438 F.2d 183, 205 (1971). He objected to the notion that there should be "one law for Athens and another for Rome." *Ibid*. It appears from a recent decision that the Fifth Circuit has abandoned the view he criticized. See *Weir* v. *Muller*, 527 F.2d 872 (1976).

26 Courts and judges have noted the "incongruity" that would arise if officials of the District of Columbia, who are not subject to § 1983, were given absolute immunity while their counterparts in state government received qualified immunity. *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 456 F.2d, at 1347; *Carter* v. *Carlson*, 144 U. S. App. D. C. 388, 401, 447 F.2d 358, 371 (1971) (Nichols, J., concurring), rev'd on other grounds *sub nom. District of Columbia* v. *Carter*, 409 U.S. 418 (1973).

27 The First and Sixth Circuits have recently accorded immunity to federal officials sued for common-law torts, without discussion of their views with respect to constitutional claims. *Berberian* v. *Gibney*, 514 F.2d 790 (CA1 1975); *Mandel* v. *Nouse*, 509 F.2d 1031 (CA6 1975).

[*LEdHR3]** [3]We agree with the perception of these courts that, [HN4] in the absence of congressional direction to the contrary, there is no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement as authorized by *Bivens* than is accorded state officials when sued for the identical violation under § 1983. The constitutional injuries made actionable by § 1983 are of no greater magnitude than those for which federal officials may be responsible. The pressures and uncertainties facing decisionmakers in state government are little if at all different from those affecting federal **[**2908]** officials. [28] We see no sense **[*501]** in holding a state governor liable but immunizing the head of a federal department; in holding the administrator of a federal hospital immune where the superintendent of a state hospital would be liable; in protecting the warden of a federal prison where the warden of a state prison would be vulnerable; or in distinguishing between state and federal police participating in the same investigation. Surely, *federal* officials should enjoy no greater zone of protection when they violate *federal* constitutional rules than do *state* officers.

28 In *Apton* v. *Wilson*, 165 U. S. App. D. C. 22, 32, 506 F.2d 83, 93 (1974), Judge Leventhal compared the Governor of a State with the highest officers of a federal executive department:

"The difference in office is relevant, for immunity depends in part upon 'scope of discretion and responsibilities of the office,' *Scheuer* v. *Rhodes*, *supra*, 416 U.S., at 247 . . . . But the difference is not conclusive in this case. Like the highest executive officer of a state, the head of a Federal executive department has broad discretionary authority. Each is called upon to act under circumstances where judgments are tentative and an unambiguously optimal course of action can be ascertained only in retrospect. Both officials have functions and responsibilities concerned with maintaining the public order; these may impel both officials to make decisions 'in an atmosphere of confusion, ambiguity, and swiftly moving events.' *Scheuer* v. *Rhodes*, *supra*, 416 U.S., at 247 . . . . Having a wider territorial responsibility than the head of a state government, a Federal cabinet officer may be entitled to consult fewer sources and expend less effort inquiring into the circumstances of a localized problem. But these considerations go to the showing an officer vested with a qualified immunity must make in support of 'good faith belief;' they do not make the qualified immunity itself inappropriate. The head of an executive department, no less than the chief executive of a state, is adequately protected by a qualified immunity."

The Government argues that the **[***913]** cases involving state officials are distinguishable because they reflect the need to preserve the effectiveness of the right of action authorized by § 1983. But as we discuss more fully below, the cause of action recognized in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), would similarly be "drained of meaning" if federal officials were entitled to absolute immunity for their constitutional transgressions. Cf. *Scheuer* v. *Rhodes*, 416 U.S., at 248.

[*LEdHR4A]** [4A] **[***LEdHR5]** [5]Moreover, the Government's analysis would place undue emphasis on the congressional origins of the cause of action in determining the level of immunity. It has been observed more than once that the law of privilege as a defense to damages actions against officers of Government has "in large **[*502]** part been of judicial making." *Barr* v. *Matteo*, 360 U.S., at 569; *Doe* v. *McMillan*, 412 U.S. 306, 318 (1973). Section 1 of the Civil Rights Act of 1871 [29] -- the predecessor of § 1983 -- said nothing about immunity for state officials. It mandated that any person who under color of state law subjected another to the deprivation of his constitutional rights would be liable to the injured party in an action at law. [30] **[**2909]** This **[*503]** Court nevertheless ascertained and announced what it deemed to be the appropriate type of immunity from § 1983 liability in a variety of contexts. *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Imbler* v. *Pachtman*, 424 U.S. 409 (1976); *Scheuer* v. *Rhodes, supra*. The federal courts are equally competent to determine the appropriate level of immunity where the suit is a direct claim under the Federal Constitution against a federal officer.

29 Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, provided in pertinent part:

[HN5] "[Any] person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law . . . ."

30

[*LEdHR4A]** [4B]The purpose of § 1 of the Civil Rights Act was not to abolish the immunities available at common law, see *Pierson* v. *Ray*, 386 U.S. 547, 554 (1967), but to insure that federal courts would have jurisdiction of constitutional claims against state officials. We explained in *District of Columbia* v. *Carter*, 409 U.S., at 427-428:

"At the time this Act was adopted, . . . there existed no general federal-question jurisdiction in the lower federal courts. Rather, Congress relied on the state courts to vindicate essential rights arising under the Constitution and federal laws.' *Zwickler* v. *Koota*, 389 U.S. 241, 245

(1967). With the growing awareness that this reliance had been misplaced, however, Congress recognized the need for original federal court jurisdiction as a means to provide at least indirect federal control over the unconstitutional actions of state officials." (Footnotes omitted.)

The situation with respect to federal officials was entirely different: They were already subject to judicial control through the state courts, which were not particularly sympathetic to federal officials, or through the removal jurisdiction of the federal courts. See generally *Willingham* v. *Morgan*, 395 U.S. 402 (1969); *Tennessee* v. *Davis*, 100 U.S. 257 (1880). Moreover, in 1875 Congress vested the circuit courts with general federal-question jurisdiction, which encompassed many suits against federal officials. 18 Stat. 470. Thus, the absence of a statute similar to § 1983 pertaining to federal officials cannot be the basis for an inference about the level of immunity appropriate to federal officials.

[*LEdHR6]** [6]The **[***914]** presence or absence of congressional authorization for suits against federal officials is, of course, relevant to the question whether to infer a right of action for damages for a particular violation of the Constitution. In *Bivens*, the Court noted the "absence of affirmative action by Congress" and therefore looked for "special factors counselling hesitation." 403 U.S., at 396. Absent congressional authorization, a court may also be impelled to think more carefully about whether the type of injury sustained by the plaintiff is normally compensable in damages, *id*., at 397, and whether the courts are qualified to handle the types of questions raised by the plaintiff's claim, see *id*., at 409 (Harlan, J., concurring in judgment).

But once this analysis is completed, there is no reason to return again to the absence of congressional authorization in resolving the question of immunity. Having determined that the plaintiff is entitled to a remedy in damages for a constitutional violation, the court then must address how best to reconcile the plaintiff's right to compensation with the need to protect the decisionmaking processes of an executive department. Since our decision in *Scheuer* was intended to guide the federal courts in resolving this tension in the myriad factual situations in which it might arise, we see no reason why it should not supply the governing principles for resolving this dilemma in the case of federal officials. The Court's opinion in *Scheuer* relied on precedents dealing with federal as well as state officials, analyzed the issue of executive immunity **[*504]** in terms of general policy considerations, and stated its conclusion, quoted *supra*, in the same universal terms. The analysis presented in that case cannot be limited to actions against state officials.

[*LEdHR7]** [7]Accordingly, without congressional directions to the contrary, we deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials. The § 1983 action was provided to vindicate federal constitutional rights. That Congress decided,

[69] The application judge found that face-to-face communication is an "essential tool" in enhancing street prostitutes' safety (para. 432). Such communication, which the law prohibits, allows prostitutes to screen prospective clients for intoxication or propensity to violence, which can reduce the risks they face (paras. 301 and 421). This conclusion, based on the evidence before her, sufficed to engage security of the person under s. 7.

[70] The application judge also found that the communicating law has had the effect of displacing prostitutes from familiar areas, where they may be supported by friends and regular customers, to more isolated areas, thereby making them more vulnerable (paras. 331 and 502).

[71] On the evidence accepted by the application judge, the law prohibits communication that would allow street prostitutes to increase their safety. By prohibiting communicating in public for the purpose of prostitution, the law prevents prostitutes from screening clients and setting terms for the use of condoms or safe houses. In these ways, it significantly increases the risks they face.

[72] I conclude that the evidence supports the application judge's conclusion that s. 213(1)(*c*) impacts security of the person and engages s. 7.

(2) A Closer Look at Causation

[73] For the reasons discussed above, the application judge concluded — and I agree — that the impugned laws negatively impact and thus engage security of the person rights of prostitutes. However, the appellant Attorneys General contend that s. 7 is not engaged because there is an insufficient causal connection between the laws and the risks faced by prostitutes. First, they argue that the courts below erroneously measured causation by an attenuated standard. Second, they argue that it is the choice of the applicants to engage in prostitution, rather than

[69] La juge de première instance conclut que la communication entre les intéressés est [TRADUCTION] « essentielle » à l'accroissement de la sécurité des prostituées de la rue (par. 432). Cette communication, que la loi interdit, permet aux prostituées de jauger leurs clients éventuels afin d'écarter ceux qui sont intoxiqués et qui pourraient être enclins à la violence, ce qui serait de nature à réduire les risques auxquels elles s'exposent (par. 301 et 421). Cette conclusion fondée sur la preuve offerte suffit à mettre en jeu le droit à la sécurité de la personne garanti à l'art. 7.

[70] La juge estime en outre que l'interdiction de la communication a eu pour effet de faire migrer les prostituées vers des lieux isolés et peu familiers où elles ne peuvent compter sur l'appui de leurs amis et de leurs clients habituels, ce qui les a rendues plus vulnérables (par. 331 et 502).

[71] Suivant les éléments admis en preuve au procès, la loi interdit une communication qui permettrait aux prostituées de la rue d'accroître leur sécurité. En interdisant la communication en public à des fins de prostitution, la loi empêche les prostituées d'évaluer leurs clients éventuels, ainsi que de convenir de l'utilisation du condom ou d'un lieu sûr. Elle accroît ainsi sensiblement le risque couru.

[72] Je conclus que la preuve appuie la conclusion de la juge de première instance selon laquelle l'al. 213(1)*c*) a une incidence sur la sécurité de la personne et met en jeu l'art. 7.

(2) Examen approfondi du lien de causalité

[73] Pour les motifs examinés précédemment, la juge de première instance conclut — et je conviens avec elle — que les dispositions contestées ont un effet préjudiciable sur le droit à la sécurité des prostituées et mettent donc en jeu ce droit. Les procureurs généraux appelants soutiennent toutefois que l'art. 7 ne s'applique pas faute d'un lien de causalité suffisant entre les dispositions et les risques auxquels s'exposent les prostituées. D'abord, ils avancent que les juridictions inférieures ont eu tort de soumettre le lien de causalité à une norme

the law, that is the causal source of the harms they face. These arguments cannot succeed.

(a) *The Nature of the Required Causal Connection*

[74] Three possible standards for causation are raised for our consideration: (1) "sufficient causal connection", adopted by the application judge (paras. 287-88); (2) a general "impact" approach, adopted by the Court of Appeal (paras. 108-9); and (3) "active and foreseeable" and "direct" causal connection, urged by the appellant Attorneys General (A.G. of Canada factum, at paras. 64-68; A.G. of Ontario factum, at paras. 12-17).

[75] I conclude that the "sufficient causal connection" standard should prevail. This is a flexible standard, which allows the circumstances of each particular case to be taken into account. Adopted in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, and applied in a number of subsequent cases (see, e.g., *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3), it posits the need for "a sufficient causal connection between the state-caused [effect] and the prejudice suffered by the [claimant]" for s. 7 to be engaged (*Blencoe*, at para. 60 (emphasis added)).

[76] A sufficient causal connection standard does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant, and is satisfied by a reasonable inference, drawn on a balance of probabilities (*Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 21). A sufficient causal connection is sensitive to the context of the particular case and insists on a real, as opposed to a speculative, link. Understood in this way, a sufficient causal connection standard is consistent with the substance of the standard that the Court of Appeal applied in this case. While I

atténuée. Ils prétendent ensuite que le préjudice couru par les demanderesses tient à leur choix de se livrer à la prostitution et non à la loi. On ne saurait faire droit à ces prétentions.

a) *Nature du lien de causalité requis*

[74] Nous sommes appelés à considérer trois normes de causalité possibles : (1) celle fondée sur un « lien de causalité suffisant » retenue par la juge de première instance (par. 287-288), (2) celle, générale, fondée sur l'« effet » adoptée par la Cour d'appel (par. 108-109) et (3) celle fondée sur un lien de causalité « actif, prévisible et direct » préconisée par les procureurs généraux appelants (mémoire du p.g. du Canada, par. 65; mémoire du p.g. de l'Ontario, par. 14-15).

[75] Je suis d'avis que la norme du « lien de causalité suffisant » est celle qui convient. Sa souplesse permet l'adaptation aux circonstances propres à chaque espèce. Adoptée dans l'arrêt *Blencoe c. Colombie-Britannique (Human Rights Commission)*, 2000 CSC 44, [2000] 2 R.C.S. 307, et appliquée dans plusieurs affaires subséquentes (voir, p. ex., *États-Unis c. Burns*, 2001 CSC 7, [2001] 1 R.C.S. 283; *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2002 CSC 1, [2002] 1 R.C.S. 3), elle postule l'existence d'« un lien de causalité suffisant entre [l'effet] imputable à l'État et le préjudice subi par [le demandeur] » pour que l'art. 7 entre en jeu (*Blencoe*, par. 60 (je souligne)).

[76] La norme du lien de causalité suffisant n'exige pas que la mesure législative ou autre reprochée à l'État soit l'unique ou la principale cause du préjudice subi par le demandeur, et il y est satisfait par déduction raisonnable, suivant la prépondérance des probabilités (*Canada (Premier ministre) c. Khadr*, 2010 CSC 3, [2010] 1 R.C.S. 44, par. 21). L'exigence d'un lien de causalité suffisant tient compte du contexte et s'attache à l'existence d'un lien réel, et non hypothétique. Considérée sous cet angle, la norme du lien de causalité suffisant correspond essentiellement à celle qu'applique la Cour d'appel en l'espèce. Bien que je ne convienne

only determine some — but not all — elements of his monetary claims against the Crown.

[14] Moreover, the provincial superior court clearly has jurisdiction to hear Mr. McArthur's claim for compensation under s. 24(1) of the *Charter*. In *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, an argument was made on behalf of the federal Crown that because constitutional relief was sought against federal officials (including the Director of Investigation and Research under the federal *Combines Investigation Act*, R.S.C. 1970, c. C-23, now repealed), all of whom fell within the definition of "federal board, commission or other tribunal", the *Federal Courts Act* (at the time titled *Federal Court Act*) had successfully ousted the jurisdiction of the British Columbia Supreme Court. This Court concluded that Parliament could not, by giving exclusive jurisdiction to the Federal Court over federal officials, deny the provincial superior courts their traditional subject matter jurisdiction over constitutional issues. In my opinion, the *Federal Courts Act* equally cannot operate to prevent provincial superior court scrutiny of the constitutionality of the conduct of federal officials. Section 101 of the *Constitution Act, 1867*, authorizes the creation of "additional Courts for the better Administration of the Laws of Canada". The provincial superior courts retain their historic jurisdiction over the Constitution. This does not preclude concurrent jurisdiction over constitutional subject matters in the Federal Court, of course, but it is not and cannot be made exclusive. Accordingly, quite apart from s. 17 of the *Federal Courts Act*, the Ontario Superior Court had jurisdiction to deal with Mr. McArthur's *Charter* claim.

[15] Clearly, an issue before the Superior Court is whether the Crown defendants are covered by a defence of statutory authority, i.e., that the administrative segregation orders were lawfully made and

n'indique que les cours provinciales peuvent statuer sur certains éléments seulement — et non sur tous les éléments — de ses réclamations pécuniaires contre la Couronne.

[14] En outre, il ne fait aucun doute que la cour supérieure provinciale est compétente pour entendre la demande d'indemnisation de M. McArthur en vertu du par. 24(1) de la *Charte*. Dans *Procureur général du Canada c. Law Society of British Columbia*, [1982] 2 R.C.S. 307, on a fait valoir au nom de la Couronne fédérale que, comme une réparation constitutionnelle était demandée contre des fonctionnaires fédéraux (y compris le directeur des enquêtes et recherches en vertu de la *Loi relative aux enquêtes sur les coalitions*, S.R.C. 1970, ch. C-23, une loi fédérale maintenant abrogée) qui répondaient tous à la définition d'un « office fédéral », la *Loi sur les Cours fédérales* (alors intitulée *Loi sur la Cour fédérale*) avait effectivement écarté la compétence de la Cour suprême de la Colombie-Britannique. Notre Cour a conclu que le législateur ne pouvait pas, en accordant à la Cour fédérale compétence exclusive à l'égard des fonctionnaires fédéraux, priver les cours supérieures provinciales de leur compétence traditionnelle à l'égard des questions constitutionnelles. À mon avis, la *Loi sur les Cours fédérales* ne peut pas non plus avoir pour effet d'empêcher une cour supérieure provinciale de procéder à l'examen de la constitutionnalité de la conduite de fonctionnaires fédéraux. L'article 101 de la *Loi constitutionnelle de 1867* permet la création de « tribunaux additionnels pour la meilleure administration des lois du Canada ». Les cours supérieures provinciales conservent leur compétence historique à l'égard de la Constitution. Évidemment, cela n'écarte pas la compétence concurrente de la Cour fédérale sur les questions constitutionnelles, mais cette compétence n'est pas exclusive et elle ne peut le devenir. La Cour supérieure de justice de l'Ontario a donc compétence pour connaître de la demande de M. McArthur fondée sur la *Charte*, sans égard à l'art. 17 de la *Loi sur les Cours fédérales*.

[15] De toute évidence, la Cour supérieure de justice est saisie de la question de savoir si les défendeurs de la Couronne peuvent invoquer le moyen de défense de pouvoir d'origine législative, c.-à-d.

C. *Has the Minister's Decision Violated the Claimants' Section 7 Rights?*

[116] The main issue, as the appeal was argued, was the constitutionality of the *CDSA* itself. I have concluded that, properly interpreted, the statute is valid. This leaves the question of the Minister's decision to refuse an exemption. A preliminary issue arises whether the Court should consider this issue. In the special circumstances of this case, I conclude that it should. The claimants pleaded in the alternative that, if the *CDSA* were valid, the Minister's decision violated their *Charter* rights. The issue was raised at the hearing and the parties afforded an opportunity to address it. It is therefore properly before us and the Attorney General of Canada cannot complain that it would be unfair to deal with it. Most importantly, justice requires us to consider this issue. The claimants have established that their s. 7 rights are at stake. They should not be denied a remedy and sent back for another trial on this point simply because it is the Minister's decision and not the statute that causes the breach when the matter has been pleaded and no unfairness arises.

[117] The discretion vested in the Minister of Health is not absolute: as with all exercises of discretion, the Minister's decisions must conform to the *Charter*: *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3. If the Minister's decision results in an application of the *CDSA* that limits the s. 7 rights of individuals in a manner that is not in accordance with the *Charter*, then the Minister's discretion has been exercised unconstitutionally.

[118] I note that this case is different from *Parker*, where the Ontario Court of Appeal held that the general prohibition on possession of marihuana was not saved by the availability of an exemption for possession for medical purposes under s. 56. No decision of the Minister was at stake in *Parker*,

C. *La décision du ministre a-t-elle porté atteinte aux droits des demandeurs garantis par l'art. 7?*

[116] La principale question soulevée dans le pourvoi, tel qu'il a été plaidé, est celle de la validité constitutionnelle de la *Loi* même. J'ai conclu que la *Loi*, interprétée correctement, est valide. Reste donc la question de la décision du ministre de refuser une exemption. La Cour doit décider, à titre préliminaire, si elle devrait examiner cette question. Dans les circonstances particulières de l'espèce, je conclus qu'elle devrait le faire. Les demandeurs ont plaidé, à titre subsidiaire, au cas où la *Loi* serait valide, que la décision du ministre a porté atteinte à leurs droits protégés par la *Charte*. Cette question a été soulevée lors de l'audition et les parties ont eu l'occasion de présenter leur point de vue à cet égard. La Cour est donc dûment saisie de cette question et le procureur général du Canada ne peut prétendre qu'il serait injuste qu'elle la tranche. Mais surtout, la justice commande que la Cour l'examine. Les demandeurs ont établi que leurs droits garantis par l'art. 7 sont en jeu. Ils ne peuvent être privés d'un recours et contraints à la tenue d'un nouveau procès sur ce point, simplement parce que c'est la décision du ministre et non la *Loi* même qui a porté atteinte à leurs droits, alors que la question a été plaidée et que l'équité n'est pas compromise.

[117] La discrétion laissée au ministre de la Santé n'est pas absolue : comme c'est toujours le cas de l'exercice d'un pouvoir discrétionnaire, les décisions du ministre doivent respecter la *Charte* : *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2002 CSC 1, [2002] 1 R.C.S. 3. Si la décision du ministre fait en sorte que l'application de la *Loi* restreint les droits garantis par l'art. 7 d'une manière qui contrevient à la *Charte*, l'exercice du pouvoir discrétionnaire du ministre est inconstitutionnel.

[118] Je souligne que la présente affaire diffère de l'affaire *Parker*, dans laquelle la Cour d'appel de l'Ontario a conclu que l'interdiction générale de possession de marihuana n'était pas validée par la possibilité, prévue à l'art. 56, d'accorder une exemption relative à la possession pour raisons

ing jurisdiction. However, given that s. 96 is in the *British North America Act* and that it would make a mockery of it to treat it in non-functional formal terms as a mere appointing power, I can think of nothing that is more the hallmark of a superior court than the vesting of power in a provincial statutory tribunal to determine the limits of its jurisdiction without appeal or other review.

There has been academic concern with the permitted scope of privative clauses referable to determinations of provincial adjudicative agencies. Opinion has varied from a position that even errors of law cannot validly be immunized from review (see J. N. Lyon, "Comment" (1971), 49 Can. Bar Rev. 365), to a position that at least jurisdictional review is constitutionally guaranteed (see W. R. Lederman, "The Independence of the Judiciary" (1956), 34 Can. Bar Rev. 1139, at p. 1174) to a position that jurisdictional determinations may, constitutionally, also be denied judicial review (see P. W. Hogg, "Is Judicial Review of Administrative Action Guaranteed by the British North America Act?" (1976), 54 Can. Bar Rev. 716, and see also Dussault, *Le contrôle judiciaire de l'administration au Québec* (1969), esp. at pp. 110-13).

This Court has hitherto been content to look at privative clauses in terms of proper construction and, no doubt, with a disposition to read them narrowly against the long history of judicial review on questions of law and questions of jurisdiction. Where, however, questions of law have been specifically covered in a privative enactment, this Court, as in *Farrah*, has not hesitated to recognize this limitation on judicial review as serving the interests of an express legislative policy to protect decisions of adjudicative agencies from external correction. Thus, it has, in my opinion, balanced the competing interests of a provincial Legislature in its enactment of substantively valid legislation and of the courts as ultimate interpreters of the *British North America Act* and s. 96 thereof. The same considerations do not, however, apply to

judiciaire sur des questions de droit et, bien sûr, sur d'autres questions étrangères à la compétence. Toutefois, comme l'art. 96 fait partie de l'*Acte de l'Amérique du Nord britannique* et que ce serait le tourner en dérision que de l'interpréter comme un pouvoir de nomination simple et sans portée, je ne puis trouver de marque plus distinctive d'une cour supérieure que l'attribution à un tribunal provincial du pouvoir de délimiter sa compétence sans appel ni autre révision.

Différents auteurs se sont interrogés sur la portée que pouvaient avoir les clauses privatives à l'égard des décisions d'organismes judiciaires provinciaux. Les avis ont varié depuis celui selon lequel même les erreurs de droit ne peuvent être validement à l'abri du contrôle (voir J. N. Lyon, «Commentaire», (1971) 49 R. du B. Can. 365) jusqu'à celui selon lequel, au minimum, la révision des questions de compétence est garantie par la constitution (voir W. R. Lederman, «The Independence of the Judiciary», (1956) 34 R. du B. Can. 1139, à la p. 1174) et à celui que même les décisions sur des questions de compétence peuvent constitutionnellement échapper au contrôle judiciaire (voir P. W. Hogg, «Is Judicial Review of Administrative Action Guaranteed by the British North America Act?», (1976) 54 R. du B. Can. 716, ainsi que Dussault, *Le contrôle judiciaire de l'administration au Québec* (1969), en particulier aux pp. 110 à 113).

Cette Cour s'est limitée jusqu'ici à étudier les clauses privatives du point de vue de la bonne interprétation et, indubitablement, avec une tendance à leur donner une interprétation stricte en regard de la longue histoire du contrôle judiciaire des questions de droit et des questions de compétence. Toutefois, quand la disposition privative englobe spécifiquement les questions de droit, cette Cour n'a pas hésité, comme dans l'arrêt *Farrah*, à reconnaître que cette limitation du contrôle judiciaire favorise une politique législative explicite qui veut protéger les décisions des organismes judiciaires contre la rectification externe. La Cour a ainsi, à mon avis, maintenu l'équilibre entre les objectifs contradictoires du législateur provincial de voir confirmer la validité quant au fond des lois qu'il a adoptées et ceux des tribunaux d'être les interprè-

issues of jurisdiction which are not far removed from issues of constitutionality. It cannot be left to a provincial statutory tribunal, in the face of s. 96, to determine the limits of its own jurisdiction without appeal or review.

The third issue that emerges from the reasons of the Court of Appeal relates to the impact of the *Farrah* case. There, as here, the provincial Legislature established a statutory tribunal of appeal. The relevant statute, the Quebec *Transport Act*, confided to the Transport Tribunal, under s. 58(*a*) of the *Transport Act*, "jurisdiction, to the exclusion of any other court, to hear and dispose of in appeal, on any question of law, any decision of the [Quebec Transport] Commission which terminates a matter". This authority was reinforced by the privative provisions of ss. 24 and 72 which, respectively, precluded recourse under arts. 834 to 850 of the *Code of Civil Procedure* as against the Commission and as against the Transport Tribunal. The effect of the foregoing provisions, taken together, was to transfer the supervisory jurisdiction of the Quebec Superior Court, as it existed at Confederation and afterwards, to the Transport Tribunal, and this was beyond provincial competence. It was a supporting consideration that s. 58(*a*) put the Transport Tribunal in place of the Quebec Court of Appeal to which there was previously a right of appeal on questions of law and of jurisdiction.

In short, what the *Farrah* case decided was that to give a provincially-constituted statutory tribunal a jurisdiction in appeal on questions of law without limitation, and to reinforce this appellate authority by excluding any supervisory recourse to the Quebec Superior Court, was to create a s. 96 court. The present case is no different in principle, even though in ss. 162 and 175 of the *Professional Code*, dealing with the appellate authority of the Professions Tribunal, there is no mention of the word "law" or the word "jurisdiction". When regard is had to the privative terms of ss. 194 and 195, added to the fact that by s. 175 the Profes-

tes en dernier ressort de l'*Acte de l'Amérique du Nord britannique* et de son art. 96. Les mêmes considérations ne s'appliquent cependant pas aux questions de compétence qui ne sont pas très éloignées des questions de constitutionnalité. Il ne peut être accordé à un tribunal créé par une loi provinciale, à cause de l'art. 96, de définir les limites de sa propre compétence sans appel ni révision.

La troisième question que soulèvent les motifs de la Cour d'appel a trait à la portée de l'arrêt *Farrah*. Dans cette affaire-là, comme en l'espèce, le législateur provincial a institué un tribunal d'appel. La loi en cause, la *Loi des transports* du Québec, attribuait au tribunal des transports, en vertu de son al. 58*a*) «juridiction pour connaître et disposer, exclusivement à tout autre tribunal, en appel, sur toute question de droit, de toute décision de la Commission [des transports du Québec] qui termine une affaire». Ce pouvoir était renforcé par les dispositions privatives des art. 24 et 72 qui écartaient les recours prévus aux art. 834 à 850 du *Code de procédure civile* à l'encontre de la Commission et du tribunal des transports respectivement. Les dispositions précédentes, considérées ensemble, avaient pour effet de transférer au tribunal des transports le pouvoir de surveillance de la Cour supérieure du Québec qui existait au moment de la Confédération et depuis lors, ce qui excédait la compétence provinciale. Un des facteurs de la décision a été que l'al. 58*a*) substituait le tribunal des transports à la Cour d'appel du Québec auprès de laquelle il y avait antérieurement un droit d'appel sur des questions de droit et de compétence.

En bref, l'arrêt *Farrah* a établi qu'attribuer à un tribunal créé par une loi provinciale la compétence d'appel sur des questions de droit sans restriction et renforcer cette compétence d'appel par la suppression de tout pouvoir de surveillance de la Cour supérieure du Québec équivaut à créer une cour visée par l'art. 96. L'affaire en l'espèce n'est pas différente en principe, même si l'on ne trouve pas dans les art. 162 et 175 du *Code des professions*, lesquels traitent de la compétence d'appel du Tribunal des professions, le mot «droit» ni le mot «compétence». Si je considère les dispositions privatives des art. 194 et 195, et que j'ajoute le fait

ICLR: Appeal Cases/1993/DERBYSHIRE COUNTY COUNCIL APPELLANT AND TIMES NEWSPAPERS LTD. AND OTHERS RESPONDENTS - [1993] A.C. 534

[HOUSE OF LORDS]

DERBYSHIRE COUNTY COUNCIL APPELLANT AND TIMES NEWSPAPERS LTD. AND OTHERS RESPONDENTS

1992 Dec. 7, 8, 9, 10;

Lord Keith of Kinkel, Lord

1993 Feb. 18

Griffiths, Lord Goff of Chieveley, Lord Browne-Wilkinson and Lord Woolf

Defamation - Parties - Corporation - Publication relating to administration of local authority's superannuation fund - Publication insinuating maladministration of pension funds - Balance between public interest in freedom of speech and protection of authority's reputation - Whether local authority entitled to maintain action in defamation

The plaintiff, a local authority, brought an action for damages for libel against the defendants in respect of two newspaper articles which had questioned the propriety of investments made for its superannuation fund. On a preliminary issue as to whether the plaintiff had a cause of action against the defendants, the judge held that a local authority could sue for libel in respect of its governmental and administrative functions, and dismissed the defendants' application to strike out the statement of claim. On appeal by the defendants, the Court of Appeal held that the plaintiff could not bring the action for libel.

On appeal by the plaintiff:-

Held, dismissing the appeal, that since it was of the highest public importance that a democratically

elected governmental body should be open to uninhibited public criticism, and since the threat of civil actions for defamation would place an undesirable fetter on the freedom to express such criticism, it would be contrary to the public interest for institutions of central or local government to have any right at common law to maintain an action for damages for defamation; and that, accordingly, the plaintiff was not entitled to bring an action for libel against the defendants, and its statement of claim would be struck out (post, pp. **547E-F**, **549B**, **550D**, **551H-552E**).

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Manchester Corporation v. Williams [1891] 1 Q.B. 94, D.C. considered.

Bognor Regis Urban District Council v. Campion [1972] 2 Q.B. 169 overruled.

Decision of the Court of Appeal [1992] Q.B. 770; [1992] 3 W.L.R. 28; [1992] 3 All E.R. 65 affirmed on different grounds.

The following cases are referred to in the opinion of Lord Keith of Kinkel:

Attorney-General v. Guardian Newspapers Ltd. [1987] 1 W.L.R. 1248; [1987] 3 All E.R. 316, H.L.(E.)

Attorney-General v. Guardian Newspapers Ltd. (No. 2) [1990] 1 A.C. 109; [1988] 3 W.L.R. 776; [1988] 3 All E.R. 545, H.L.(E.)

Barthold v. Germany (1985) 7 E.H.R.R. 383

Bognor Regis Urban District Council v. Campion [1972] 2 Q.B. 169; [1972] 2 W.L.R. 983; [1972] 2 All E.R. 61

Chicago (City of) v. Tribune Co. (1923) 139 N.E. 86

Die Spoorbond v. South African Railways, 1946 A.D. 999

Hector v. Attorney-General for Antigua and Barbuda [1990] 2 A.C. 312; [1990] 2 W.L.R. 606; [1990] 2 All E.R. 103, P.C.

, and not, as here, of the chairman and councillors. I think that that

case is distinguishable from this on that ground, and also on the ground that in my view none of the statements in the leaflet in this case actually impute corruption. But I hope that the Court of Appeal will soon have occasion to consider the *Manchester Corporation case*."

It is to be observed that Browne J. did not give any consideration to the question whether a local authority, or any other body exercising governmental functions, might not be in a special position as regards the right to take proceedings for defamation. The authorities cited above clearly establish that a trading corporation is entitled to sue in respect of defamatory matters which can be seen as having a tendency to damage it in the way of its business. Examples are those that go to credit such as might deter banks from lending to it, or to the conditions experienced by its employees, which might impede the recruitment of the best qualified workers, or make people reluctant to deal with it. The *South Hetton Coal Co. case* [1894] 1 Q.B. 133 would appear to be an instance of the latter kind, and not, as suggested by Browne J., an authority for the view that a trading corporation can sue for something that does not affect it adversely in the way of its business. The trade union cases are understandable upon the view that defamatory matter may adversely affect the union's ability to keep its members or attract new ones or to maintain a convincing attitude towards employers. Likewise in the case of a charitable organisation the effect may be to discourage subscribers or otherwise impair its ability to carry on its charitable objects. Similar considerations can no doubt be advanced in connection with the position of a local authority. Defamatory statements might make it more difficult to borrow or to attract suitable staff and thus affect adversely the efficient carrying out of its functions.

There are, however, features of a local authority which may be regarded as distinguishing it from other types of corporation, whether trading or non-trading. The most important of these features is that it is a governmental body. Further, it is a democratically elected body, the electoral process nowadays being conducted almost exclusively on party political lines. It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech. In *City of Chicago v. Tribune Co*. (1923) 139 N.E. 86 the Supreme Court of Illinois held that the city could not maintain an action of damages for libel. Thompson C.J. said, at p. 90:

"The fundamental right of freedom of speech is involved in this litigation, and not merely the right of liberty of the press. If this action can be maintained against a newspaper it can be maintained against every private citizen who ventures to criticise the ministers who are temporarily conducting the affairs of his government. Where any person by speech or writing seeks to persuade others to violate existing law or to overthrow by force or other unlawful means the existing government, he may be punished ... but all other utterances or publications against the government must be considered absolutely

> privileged. While in the early history of the struggle for freedom of speech the restrictions were enforced by criminal prosecutions, it is clear that a civil action is as great, if not a greater, restriction than a criminal prosecution. If the right to criticise the government is a privilege which, with the exceptions above enumerated, cannot be restricted, then all civil as well as criminal actions are forbidden. A despotic or corrupt government can more easily stifle opposition by a series of civil actions than by criminal prosecutions..."

After giving a number of reasons for this, he said, at p. 90:

> "It follows, therefore, that every citizen has a right to criticise an inefficient or corrupt government without fear of civil as well as criminal prosecution. This absolute privilege is founded on the principle that it is advantageous for the public interest that the citizen should not be in any way fettered in his statements, and where the public service or due administration of justice is involved he shall have the right to speak his mind freely."

These propositions were endorsed by the Supreme Court of the United States in *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 277. While these decisions were related most directly to the provisions of the American Constitution concerned with securing freedom of speech, the public interest considerations which underlaid them are no less valid in this country. What has been described as "the chilling effect" induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available. This may prevent the publication of matters which it is very desirable to make public. In *Hector v. Attorney-General of Antigua and Barbuda* [1990] 2 A.C. 312 the Judicial Committee of the Privy Council held that a statutory provision which made the printing or distribution of any false statement likely to undermine public confidence in the conduct of public affairs a criminal offence contravened the provisions of the constitution protecting freedom of speech. Lord Bridge of Harwich said, at p. 318:

> "In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind. At the same time it is no less obvious that the very purpose of criticism levelled at those who have the conduct of public affairs by their political opponents is to undermine public confidence in their stewardship and to persuade the electorate that the opponents would make a better job of it than those presently holding office. In the light of these considerations their Lordships cannot help viewing a statutory provision which criminalises statements likely to undermine public confidence in the conduct of public affairs with the utmost suspicion."

It is of some significance to observe that a number of departments of central government in the United Kingdom are statutorily created corporations, including the Secretaries of State for Defence, Education

and Science, Energy, Environment and Social Services. If a local authority can sue for libel there would appear to be no reason in logic for holding that any of these departments (apart from two which are made corporations only for the purpose of holding land) was not also entitled to sue. But as is shown by the decision in *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C.

109, a case concerned with confidentiality, there are rights available to private citizens which institutions of central government are not in a position to exercise unless they can show that it is the public interest to do so. The same applies, in my opinion, to local authorities. In both cases I regard it as right for this House to lay down that not only is there no public interest favouring the right of organs of government, whether central or local, to sue for libel, but that it is contrary to the public interest that they should have it. It is contrary to the public interest because to admit such actions would place an undesirable fetter on freedom of speech. In *Die Spoorbond v. South African Railways*, 1946 A.D. 999 the Supreme Court of South Africa held that the South African Railways and Harbours, a governmental department of the Union of South Africa, was not entitled to maintain an action for defamation in respect of a publication alleged to have injured its reputation as the authority responsible for running the railways. Schreiner J.A. said, at pp. 1012-1013:

> "I am prepared to assume, for the purposes of the present argument, that the Crown may, at least in so far as it takes part in trading in competition with its subjects, enjoy a reputation, damage to which could be calculated in money. On that assumption there is certainly force in the contention that it would be unfair to deny to the Crown the weapon, an action for damages for defamation, which is most feared by calumniators. Nevertheless it seems to me that considerations of fairness and convenience are, on balance, distinctly against the recognition of a right in the Crown to sue the subject in a defamation action to protect that reputation. The normal means by which the Crown protects itself against attacks upon its management of the country's affairs is political action and not litigation, and it would, I think, be unfortunate if that practice were altered. At present certain kinds of criticism of those who manage the state's affairs may lead to criminal prosecutions, while if the criticism consists of defamatory utterances against individual servants of the state actions for defamation will lie at their suit. But subject to the risk of these sanctions and to the possible further risk, to which reference will presently be made, of being sued by the Crown for injurious falsehood, any subject is free to express his opinion upon the management of the country's affairs without fear of legal consequences. I have no doubt that it would involve a serious interference with the free expression of opinion hitherto enjoyed in this country if the wealth of the state, derived from the state's subjects, could be used to launch against those subjects actions for defamation because they have, falsely and unfairly it may be, criticised or condemned the management of the country. Such actions could not, I think, be confined to those brought by the railways administration for criticism of the running of the railways.

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Quite a number of government departments, as appeared in the course of the argument, indulge in some form of trading on a greater or a lesser scale. Moreover, the government, when it raises loans, is interested in the good or bad reputation that it may enjoy among possible subscribers to such loans. It would be difficult to assign any limits to the Crown's right to sue for defamation once its right in any case were recognised."

These observations may properly be regarded as no less applicable to a local authority than to a department of central government. In the same case Watermeyer C.J., at p. 1009, observed that the reputation of the Crown might fairly be regarded as distinct from that of the group of individuals temporarily responsible for the management of the railways on its behalf. In the case of a local authority temporarily under the control of one political party or another it is difficult to say that the local authority as such has any reputation of its own. Reputation in the eyes of the public is more likely to attach itself to the controlling political party, and with a change in that party the reputation itself will change. A publication attacking the activities of the authority will necessarily be an attack on the body of councillors which represents the controlling party, or on the executives who carry on the day to day management of its affairs. If the individual reputation of any of these is wrongly impaired by the publication any of these can himself bring proceedings for defamation. Further, it is

open to the controlling body to defend itself by public utterances and in debate in the council chamber.

The conclusion must be, in my opinion, that under the common law of England a local authority does not have the right to maintain an action of damages for defamation. That was the conclusion reached by the Court of Appeal, which did so principally by reference to article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969), to which the United Kingdom has adhered but which has not been enacted into domestic law. Article 10 is in these terms:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. . . . 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

As regards the words "necessary in a democratic society" in connection with the restrictions on the right to freedom of expression which may properly be prescribed by law, the jurisprudence of the European Court of Human Rights has established that "necessary" requires the existence of a pressing social need, and that the restrictions

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should be no more than is proportionate to the legitimate aim pursued. The domestic courts have "a margin of appreciation" based upon local knowledge of the needs of the society to which they belong: *Sunday Times v. United Kingdom* (1979) 2 E.H.R.R. 245; *Barthold v. Germany* (1985) 7 E.H.R.R. 383 and *Lingens v. Austria* (1986) 8 E.H.R.R. 407, 418. The Court of Appeal approached the matter upon the basis that the law of England was uncertain upon the issue lying at the heart of the case, having regard in particular to the conflicting decisions in *Manchester Corporation v. Williams* [1891] 1 Q.B. 94 and *Bognor Regis Urban District Council v. Campion* [1972] 2 Q.B. 169 and to the absence of any relevant decision in the Court of Appeal or in this House. In that situation it was appropriate to have regard to the Convention. Balcombe L.J. referred in this connection to *Reg. v. Secretary of State for the Home Department, Ex parte Brind* [1991] 1 A.C. 696; *Attorney-General v. Guardian Newspapers Ltd*. [1987] 1 W.L.R. 1248; *In re W. (A Minor) (Wardship: Restrictions on Publication)* [1992] 1 W.L.R. 100; and *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109. Having examined other authorities he concluded, having carried out the balancing exercise requisite for purposes of article 10 of the Convention, that there was no pressing social need that a corporate public authority should have the right to sue in defamation for the protection of its reputation. That must certainly be true considering that in the past hundred years there are only two known instances of a defamation action by a local authority. He considered that the right to sue for malicious falsehood gave such a body all the protection

which was necessary. Similar views were expressed by Ralph Gibson and Butler-Sloss L.JJ. [1992] Q.B. 770, 824, 834, who observed that the law of criminal libel might be available in suitable cases, to afford additional protection. All three Lords Justices also alluded to the consideration that the publication of defamatory matter concerning a local authority was likely to reflect also on individual councillors or officers, and that the prospect of actions for libel at their instance also afforded some protection to the local authority.

My Lords, I have reached my conclusion upon the common law of England without finding any need to rely upon the European Convention. My noble and learned friend, Lord Goff of Chieveley, in *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109, 283-284, expressed the opinion that in the field of freedom of speech there was no difference in principle between English law on the subject and article 10 of the Convention. I agree, and can only add that I find it satisfactory to be able to conclude that the common law of England is consistent with the obligations assumed by the Crown under the Treaty in this particular field.

For these reasons I would dismiss the appeal. It follows that *Bognor Regis Urban District Council v. Campion* [1972] 2 Q.B. 169 was wrongly decided and should be overruled.

LORD GRIFFITHS. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Keith of Kinkel, and for the reasons he gives, I, too, would dismiss the appeal.

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LORD GOFF OF CHIEVELEY. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Keith of Kinkel, and for the reasons he gives, I, too, would dismiss the appeal.

LORD BROWNE-WILKINSON. My Lords, I, too, would dismiss the appeal for the reasons given in the speech of my noble and learned friend, Lord Keith of Kinkel.

LORD WOOLF. My Lords, I, too, would dismiss the appeal for the reasons given in the speech of my noble and learned friend, Lord Keith of Kinkel.

Appeal dismissed with costs.

Solicitors: Kingsford Stacey for Solicitor, Derbyshire County Council; Biddle & Co.

C. T. B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Dixon v. Powell River (City),*** 2009 BCSC 406

Date: 20090326
Docket: S082905
Registry: Vancouver

Between:

John Dixon and
British Columbia Civil Liberties Association

Plaintiffs

And

The Corporation of the City of Powell River

Defendant

Before: The Honourable Madam Justice Garson

Reasons for Judgment

Counsel for the Plaintiffs: R.D. Holmes

Counsel for the Ministry of Attorney General of British Columbia: R. Butler

No one appearing on behalf of The Corporation of the City of Powell River

Date and Place of Hearing: January 5, 2009, February 12, 2009
Vancouver, B.C.

[31] I now turn to the issue of whether a government (as distinct from individuals associated with the government) can be defamed with respect to its governing reputation.

[32] In ***City of Prince George v. British Columbia Television System Ltd.***, 95 D.L.R. (3d) 577, [1975] B.C.J. No. 2071, the Court was asked to decide two questions of law under R. 34 of the ***Supreme Court Rules***. The judgment does not disclose the underlying facts. The two questions were: whether the statement of claim disclosed a cause of action for actionable defamation; and whether the municipality could sue in its corporate capacity for the libel or defamation asserted. Bull J.A., in concurring reasons, relied on the ***Interpretation Act***, 1974 (B.C.), c. 42, which defines "corporation" and delineates that an enactment establishing a corporation shall be construed to vest that corporation with power to sue in its corporate name. He held that every incorporated municipality has all the rights and liabilities of a corporation and because a corporation clearly has a right of action in defamation, a municipal corporation has the same right.

[33] In the same case, Aikins J.A. noted at para. 14 that:

> … the power to sue for libel would unduly encroach upon the right of the public at large to speak freely concerning municipal affairs.

[34] At para. 32 he held:

> … The short answer to counsel's submission, founded on freedom of speech, is simply that that right, under our law, must be exercised subject to the law of defamation which affords everyone protection against injury to reputation by untrue imputation. Moreover, as counsel for the respondent pointed out, in my view correctly, the law of

> defamation makes adequate provision by the principle adopted in respect of fair comment to protect those who make legitimate critical comments on matters of public interest. In my view the appellant's argument founded on free speech is without merit.

[35] Aikins J.A. and Bull J.A. agreed in deciding that a municipal corporation's governing reputation could be defamed and that it could sue for defamation.

[36] In the case at bar, both counsel submit that ***Prince George*** is not binding authority on this Court because, although defamation is a common law cause of action, the Supreme Court of Canada has held that the law of defamation is informed by the principles of free speech enshrined in the ***Charter***. In other words, common law defamation cases should be decided in ways that are consistent with the ***Charter*** principles of free speech. Because ***Prince George*** was decided before the ***Charter*** became Canadian law, counsel say it is not binding on this Court so as to compel me to find that a municipal government may maintain an action for defamation.

[37] In ***Hill v. Church of Scientology of Toronto***, [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129, a prosecutor sued the Church of Scientology for alleged defamatory statements made by representatives of the defendant at a press conference. The defendant argued that the ***Charter*** rights of free speech protected the statements made by it about the prosecutor. The Supreme Court of Canada held, per Cory J., that the common law of defamation must be interpreted in a manner that is consistent with ***Charter*** principles. Although in ***Hill*** the Court found no reason to depart from the common law principles of defamation applicable to that case, the Court said at para. 85:

> In *R. v. Salituro*, *supra*, the Crown called the accused's estranged wife as a witness. The common law rule prohibiting spouses from testifying against each other was found to be inconsistent with developing social values and with the values enshrined in the Charter. At page 670, Iacobucci J., writing for the Court, held:
>
> > Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless, there are significant constraints on the power of the judiciary to change the law. As McLachlin J. indicated in Watkins, supra, in a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform; and for any changes to the law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature. The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.
>
> Further, at p. 675 this Court held:
>
> > Where the principles underlying a common law rule are out of step with the values enshrined in the Charter, the courts should scrutinize the rule closely. If it is possible to change the common law rule so as to make it consistent with Charter values, without upsetting the proper balance between judicial and legislative action that I have referred to above, then the rule ought to be changed.

[38] In ***Halton Hills (Town) v. Kerouac*** (2006), 270 D.L.R. (4th) 479, 80 O.R. (3d) 577, an internet newspaper was sued by the Town of Halton Hills in defamation because the publication asserted the municipality was corrupt. The defendant argued that a government could not sue in defamation.

[39] Corbett J. declined to follow ***Prince George***, noting that the case was decided before the ***Charter***, and held at para. 62:

I conclude as follows:

(1) Section 2(b) of the *Charter* guarantees freedom of expression;

(2) expression about public affairs in general, and government in particular, lies at the core of freedom of expression;

(3) any legal restriction on freedom of expression about public affairs has a chilling effect on freedom of expression generally, and infringes the Section 2(b) guarantee;

(4) infringements of the Section 2(b) guarantee may be justified pursuant to Section 1 of the *Charter*. Laws against sedition, for example, may be justified, since society may guard against its own violent overthrow. Laws against hate speech may be justified to protect the victims of hate speech. The common law tort of defamation may be justified on the basis that private persons (including public servants) are entitled to protect their personal reputations;

(5) there is no counterveiling justification to permit governments to sue in defamation. Governments have other, better ways to protect their reputations;

(6) any restriction on the freedom of expression about government must be in the form of laws or regulations enacted or authorized by the legislature; the common law position, in the absence of such legislation, is that absolute privilege attaches to statements made about government;

(7) "Government" includes democratically elected local governments.

[40] In ***Montague (Township) v. Page*** (2006), 79 O.R. (3d) 515, 139 C.R.R. (2d) 82, the defendant and the Canadian Civil Liberties Association (as a friend of the Court) raised the question of whether it was consistent with s. 2(b) of the ***Charter*** for a government entity to sue a private citizen for defamation. The defendants were alleged to have defamed the municipal government in published letters critical of the government's conduct concerning a fatal fire. Pedlar J. held that the municipal government could not maintain an action in defamation. At para. 29 he held:

> In a free and democratic system, every citizen must be guaranteed the right to freedom of expression about issues relating to government as an absolute privilege, without threat of a civil action for defamation being initiated against them by that government. It is the very essence of a democracy to engage many voices in the process, not just those who are positive and supportive. By its very nature, the democratic process is complex, cumbersome, difficult, messy and at times frustrating, but always worthwhile, with a broad based participation absolutely essential. A democracy cannot exist without freedom of expression, within the law, permeating all of its institutions. If governments were entitled to sue citizens who are critical, only those with the means to defend civil actions would be able to criticize government entities. As noted above, governments also have other means of protecting their reputations through the political process to respond to criticisms.

[41] ***Cusson v. Quan***, 2007 ONCA 771, 286 D.L.R. (4th) 196, was a case concerning an Ontario police officer who had on his own initiative travelled to New York City following September 11, 2001, to assist in rescue efforts. His employer was criticized in the media for ordering Cusson to return to his duties. In the public controversy that followed, the defendant newspaper published articles critical of Cusson and suggested that his conduct was less than heroic – as had been claimed by some media. Cusson sued the newspaper in libel.

[42] The issue before the Ontario Court of Appeal concerned the question of qualified privilege and, in resolving that issue, it was necessary for the Court to grapple with the question of whether the law of defamation should be developed in a manner consistent with the ***Charter*** or whether the Courts were bound by pre-***Charter*** common law defamation judgments. Sharpe J.A. held at para. 130 that the law of defamation was not "…frozen…in a permanent state of hostility to any and all change…." and at para. 133, he stated:

> Our task, it seems to me, is to interpret and apply the earlier decisions in light of the *Charter* values at issue and in light of the evolving body of jurisprudence that is plainly moving steadily towards broadening common law defamation defences to give appropriate weight to the public interest in the free flow of information.

[43] Is ***Prince George*** binding and therefore determinative of the issue in this case?

[44] In the seminal case on *stare decisis*, ***Re Hansard Spruce Mills Ltd.***, [1954] 4 D.L.R. 590, 13 W.W.R. 285, Wilson J. described the circumstances in which a trial judge may depart from what would otherwise be binding authority as follows at para. 4:

> Therefore, to epitomize what I have already written in the *Cairney* case, I say this: I will only go against a judgment of another judge of this Court if:
>
> (a) Subsequent decisions have affected the validity of the impugned judgment;
>
> (b) It is demonstrated that some binding authority in case law, or some relevant statute was not considered;
>
> (c) The judgment was unconsidered, a *nisi prius* judgment given in circumstances familiar to all trial judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.

[45] In this case I conclude that I am not bound to follow the judgment in ***Prince George*** because a relevant statute, the ***Canadian Charter of Rights and Freedoms***, came into force after the judgment in that case and the arguments concerning freedom of speech obviously did not consider that law. Given the authorities I have cited, I conclude that the rejection of the right to free speech argument by the Court in ***Prince George*** is inconsistent with the current law

enshrined in the ***Charter*** and therefore, as per ***Spruce Mills*** it follows that I do not consider ***Prince George*** to be binding on me.

[46] It seems clear to me on the basis of ***Hill***, that common law causes of action must be applied in a manner that is consistent with the ***Charter***. It is evident that the law of defamation and the constitutional law of freedom of speech ought not to develop in two separate streams incorporating different values. Rather, the two should accommodate each other. In this case, I agree with the judgments in the ***Halton Hills*** and ***Montague*** cases in which the justices decided that governments cannot sue for defamation for damage to their governing reputations. The ***Charter*** enshrined value of freedom of expression is paramount and local governments have resort to other means to protect their reputations from citizens who publish critical commentary about the government itself. In ***Prince George***, Aikins J.A. considered and rejected the freedom of speech argument advanced by the plaintiffs, and held that a local government could sue for defamation on the same basis as any corporation. That reasoning cannot withstand ***Charter*** scrutiny. As Sharpe J.A. said in ***Cusson*** at para. 125:

> It is hardly necessary to repeat here the importance of the rights protected by s. 2(b) of the *Charter*, namely "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication". These rights are an inherent aspect of our system of government and have been generously interpreted by the courts. Democracy depends upon the free and open debate of public issues and the freedom to criticize the rich, the powerful and those, such as police officers, who exercise power and authority in our society. Freedom of expression extends beyond political debate to embrace the "core values" of "self-fulfilment", "the communal exchange of ideas", "human dignity and the right to think and reflect freely on one's circumstances and condition": *R.W.D.S.U. v. Pepsi-Cola*, [2002] 1 S.C.R. 156 at para. 32. Debate on matters of public interest will

> often be heated and criticism will often carry a sting and yet open discussion is the lifeblood of our democracy. This court recognized in *R. v. Kopyto* (1987), 62 O.R. (2d) 449 at 462 that "[i]f these exchanges are stifled, democratic government itself is threatened."

[47] The passage just quoted is equally applicable to this case. It is antithetical to the notion of freedom of speech and a citizen's rights to criticize his or her government concerning its governing functions, that such criticism should be chilled by the threat of a suit in defamation.

[48] I now return to the question of whether to grant relief under s. 24. I am satisfied that Mr. Dixon's right to receive communications concerning his local government were infringed by the defamation threat letters. That threat has not been withdrawn in a manner that removes the chilling effect it had on the electorates' freedom of speech.

[49] I would therefore grant the declaratory relief sought by the plaintiff Dixon in the terms set out above. The precise terms of the order sought, are as follows:

> The defendant City of Powell River lacks any legal basis or right to bring civil proceedings for defamation of its governing reputation, or bring other proceedings of similar purpose or effect, or to threaten to do so, including in the manner contained in the three letters dated March 6, 2008, sent by the solicitors of the defendant, City of Powell River, to Patricia Aldworth, Winslow Brown and Noel Hopkins, described in the Amended Statement of Claim herein as the "Defamation Suit Threat Letters" copies of which are attached hereto.

[50] Is the plaintiff Dixon entitled to an injunction enjoining the defendant from repeating the conduct complained of?

[51] The order sought by the plaintiff Dixon is as follows:

application of section 2.03 of the *Code of ethics*. The sanction is significant (suspension of the right to practice for twenty-one days). It also involves the stigma attached to disciplinary guilt. It is not, however, unreasonable. In my view, it is a measured sanction of a lawyer who has been found guilty of a serious ethical offence. [para. 47]

It concluded by finding that the effects of the decision were proportionate to its objectives.

Analysis

[22] Mr. Doré's argument rests on his assertion that the finding of a breach of the *Code of ethics* violates the expressive rights protected by s. 2(*b*) of the *Charter*. Because the 21-day suspension had already been served when he was before the Court of Appeal, he did not appeal the penalty. The reasonableness of its length, therefore, is not before us.

[23] It is clear from the decisions of the Tribunal and the reviewing courts in this case that there is some confusion about the appropriate framework to be applied in reviewing administrative decisions for compliance with *Charter* values. Some courts have used the same s. 1 *Oakes* analysis used for determining whether a law complies with the *Charter*; others have used a classic judicial review approach.

[24] It goes without saying that administrative decision-makers must act consistently with the values underlying the grant of discretion, including *Charter* values (see *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710, at para. 71; *Pinet v. St. Thomas Psychiatric Hospital*, 2004 SCC 21, [2004] 1 S.C.R. 528, at paras. 19-23; and *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, at paras. 62-75). The question then is what framework should be used to scrutinize how those values were applied?

[25] In *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, Lamer J., in his concurring

d[u] *Code de déontologie*. La sanction est importante (suspension du droit de pratique durant 21 jours). Elle comporte également le stigmate attaché à la culpabilité disciplinaire. Elle n'est toutefois pas déraisonnable. Elle m'apparaît empreinte de retenue à l'égard d'un avocat qui a commis une faute déontologique grave. [par. 47]

La Cour d'appel a conclu que la décision avait des effets proportionnels aux objectifs qu'elle visait.

Analyse

[22] M^e^ Doré fonde sa thèse sur sa prétention que le fait de conclure à une violation du *Code de déontologie* enfreint la liberté d'expression protégée par l'al. 2*b*) de la *Charte*. Puisque la radiation avait déjà pris fin lorsqu'il a été entendu par la Cour d'appel, M^e^ Doré n'a pas interjeté appel de la sanction. Nous n'avons donc pas à nous prononcer sur le caractère raisonnable de sa durée.

[23] Il ressort clairement des décisions du Tribunal et des cours qui ont procédé à la révision judiciaire en l'espèce qu'une certaine confusion entoure la question du cadre d'analyse applicable pour examiner la conformité des décisions administratives aux valeurs consacrées par la *Charte*. Certaines cours de justice ont eu recours au cadre d'analyse fondé sur l'article premier élaboré dans *Oakes*, qui sert à juger de la conformité des lois à la *Charte*, tandis que d'autres ont appliqué l'approche classique de la révision judiciaire.

[24] Il va sans dire que les décideurs administratifs doivent agir de manière compatible avec les valeurs sous-jacentes à l'octroi d'un pouvoir discrétionnaire, y compris les valeurs consacrées par la *Charte* (voir *Chamberlain c. Surrey School District No. 36*, 2002 CSC 86, [2002] 4 R.C.S. 710, par. 71; *Pinet c. St. Thomas Psychiatric Hospital*, 2004 CSC 21, [2004] 1 R.C.S. 528, par. 19-23; et *Ontario (Sûreté et Sécurité publique) c. Criminal Lawyers' Association*, 2010 CSC 23, [2010] 1 R.C.S. 815, par. 62-75). La question est donc celle de savoir quel cadre d'analyse il faut utiliser pour examiner l'application de ces valeurs.

[25] Dans l'arrêt *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038, le juge Lamer a

reasons, said that the *Charter* applied to a labour adjudicator's decision and used the s. 1 framework developed in *R. v. Oakes*, [1986] 1 S.C.R. 103, to determine if the decision complied with the *Charter.* Writing for the majority, Dickson C.J. agreed with Lamer J. that the *Charter* applied to administrative decision-making. But while he applied the *Oakes* framework, he notably and presciently observed that "[t]he precise relationship between the traditional standard of administrative law review of patent unreasonableness and the new constitutional standard of review will be worked out in future cases" (p. 1049 (emphasis added)).

[26] Yet the approach taken in *Slaight* can only be properly understood in its context. Importantly, when Lamer J. held that discretionary administrative decisions implicating *Charter* values should be reviewed under the *Oakes* analysis, he did so in the context of the perceived inability of administrative law to deal with *Charter* infringements in the exercise of discretion. This concern permeates the reasons in *Slaight*. As Prof. Geneviève Cartier has noted:

> . . . while Lamer J thought the administrative law standard was ill-suited to *Charter* challenges because of its inability to inquire into the substance of discretionary decisions, Dickson CJ thought it was ill-suited because of its inability to properly unravel the value inquiries involved in any *Charter* litigation.

("The *Baker* Effect: A New Interface Between the *Canadian Charter of Rights and Freedoms* and Administrative Law — The Case of Discretion", in David Dyzenhaus, ed., *The Unity of Public Law* (2004), 61, at p. 68)

[27] The approach taken in *Slaight* attracted academic concern from administrative law scholars.

affirmé, dans des motifs concordants, que la décision rendue par un arbitre du travail était assujettie à la *Charte*. Il s'est, en outre, servi du cadre d'analyse fondé sur l'article premier élaboré dans *Oakes* pour apprécier la conformité à la *Charte* de la sentence arbitrale en cause dans cette affaire. Au nom des juges majoritaires de la Cour, le juge en chef Dickson a jugé, comme le juge Lamer, que les décisions administratives étaient assujetties à la *Charte*. Cela étant dit, tout en recourant au cadre d'analyse établi dans *Oakes*, il a notamment souligné, faisant en cela preuve de prescience, que « [l]e rapport précis entre la norme traditionnelle de contrôle, en droit administratif, du caractère déraisonnable manifeste et la nouvelle norme constitutionnelle de contrôle va se dégager de la jurisprudence à venir » (p. 1049 (je souligne)).

[26] Or, l'approche adoptée dans *Slaight* ne peut être correctement interprétée que dans son contexte. Fait important, c'est devant ce qui semblait être l'incapacité du droit administratif de traiter des violations de la *Charte* dans l'exercice d'un pouvoir discrétionnaire que le juge Lamer a jugé que les décisions administratives de nature discrétionnaire, mettant en cause les valeurs consacrées par la *Charte*, devraient être révisées en appliquant le cadre d'analyse élaboré dans *Oakes*. Cette conclusion imprègne l'ensemble des motifs formulés dans *Slaight*. Comme la professeure Geneviève Cartier l'a souligné :

> [TRADUCTION] . . . bien que, selon le juge Lamer, la norme de droit administratif ne soit pas adaptée aux contestations fondées sur la *Charte*, parce qu'elle ne permet pas d'examiner à fond les décisions de nature discrétionnaire, le juge en chef Dickson a estimé qu'elle n'est pas adaptée parce qu'elle ne permet pas de décortiquer adéquatement l'examen des valeurs que comportent les litiges intéressant la *Charte*.

(« The *Baker* Effect : A New Interface Between the *Canadian Charter of Rights and Freedoms* and Administrative Law — The Case of Discretion », dans David Dyzenhaus, dir., *The Unity of Public Law* (2004), 61, p. 68)

[27] L'approche adoptée dans l'arrêt *Slaight* a suscité des préoccupations chez les universitaires

Prof. John Evans argued that if courts were too quick to bypass administrative law in favour of the *Charter*, "a rich source of thought and experience about law and government will be overlooked or lost altogether" ("The Principles of Fundamental Justice: The Constitution and the Common Law" (1991), 29 *Osgoode Hall L.J.* 51, at p. 73). Similarly, Prof. Cartier suggested that the *Slaight* approach reduced the role of administrative law to the "formal determination of jurisdiction on the basis of statutory interpretation", which prevented the control of discretion with reference to "values" and presented "an impoverished picture of administrative law" (pp. 68-69).

[28] The scope of the review of discretionary administrative decisions that provided the backdrop for the decision in *Slaight* was altered by this Court's decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 65. In that case, L'Heureux-Dubé J. concluded that administrative decision-makers were required to take into account fundamental Canadian values, including those in the *Charter*, when exercising their discretion (*Baker*, at paras. 53-56).

[29] Building on the decision in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 ("*C.U.P.E.*"), *Baker* represented a further shift away from Diceyan principles. By recognizing that administrative decision-makers are both bound by fundamental values and empowered to adjudicate them, *Baker* ceded interpretive authority on those issues to those decision-makers (David Dyzenhaus and Evan Fox-Decent, "Rethinking the Process/Substance Distinction: *Baker* v. *Canada*" (2001), 51 *U.T.L.J.* 193, at p. 240). This allows the *Charter* to "nurture" administrative law, by emphasizing that *Charter* values infuse the inquiry (Cartier, at pp. 75 and 86; see also Mary Liston, "Governments in Miniature: The Rule of Law in the Administrative

spécialisés en droit administratif. Le professeur John Evans a soutenu que si les tribunaux étaient trop prompts à esquiver le droit administratif au profit d'analyses fondées sur la *Charte*, [TRADUCTION] « une source précieuse de connaissances et d'expériences en matière de droit et de gouvernance ne sera pas prise en compte ou sera complètement perdue » (« The Principles of Fundamental Justice : The Constitution and the Common Law » (1991), 29 *Osgoode Hall L.J.* 51, p. 73). Dans le même ordre d'idées, la professeure Cartier a affirmé que l'approche préconisée dans *Slaight* réduisait le rôle du droit administratif à [TRADUCTION] « déterminer la compétence de façon formelle en fonction de l'interprétation des lois », et que cela empêche la révision de l'exercice du pouvoir discrétionnaire en ce qui concerne les « valeurs » et donne « une image appauvrie du droit administratif » (p. 68-69).

[28] La portée de la révision des décisions administratives de nature discrétionnaire qui a servi de toile de fond à la décision rendue dans *Slaight* a été modifiée par la décision de la Cour dans l'affaire *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817, par. 65. Dans cet arrêt, la juge L'Heureux-Dubé a conclu que les décideurs administratifs devaient tenir compte des valeurs canadiennes fondamentales, notamment celles consacrées par la *Charte*, lorsqu'ils exercent leur pouvoir discrétionnaire (*Baker*, par. 53-56).

[29] Fort de la décision rendue dans *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227 (« *S.C.F.P.* »), l'arrêt *Baker* s'est davantage écarté des principes énoncés par Dicey. En reconnaissant que les décideurs administratifs sont à la fois liés par des valeurs fondamentales et habilités à statuer sur elles, *Baker* leur a cédé le pouvoir d'interprétation quant à ces questions (David Dyzenhaus et Evan Fox-Decent, « Rethinking the Process/Substance Distinction : *Baker* v. *Canada* » (2001), 51 *U.T.L.J.* 193, p. 240). La *Charte* peut ainsi [TRADUCTION] « favoriser le développement » du droit administratif en mettant l'accent pour que les valeurs qu'elle consacre infusent l'enquête (Cartier, p. 75 et 86;

State", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (2008), 77, at p. 100; Susan L. Gratton and Lorne Sossin, "In Search of Coherence: The *Charter* and Administrative Law under the McLachlin Court", in David A. Wright and Adam M. Dodek, eds., *Public Law at the McLachlin Court: The First Decade* (2011), 145, at pp. 157-58).

[30] When this is weighed together with this Court's subsequent decisions, we see a completely revised relationship between the *Charter*, the courts, and administrative law than the one first encountered in *Slaight*. In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Court held that judicial review should be guided by a policy of deference, justified on the basis of legislative intent, respect for the specialized expertise of administrative decision-makers, and recognition that courts do not have a monopoly on adjudication in the administrative state (para. 49). And in *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, at paras. 78-82, building on the development of the jurisprudence, the Court found that administrative tribunals with the power to decide questions of law have the authority to apply the *Charter* and grant *Charter* remedies that are linked to matters properly before them.

[31] But, as predicted by Chief Justice Dickson, this Court has explored different ways to review the constitutionality of administrative decisions, vacillating between the values-based approach in *Baker* and the more formalistic template in *Slaight*. The s. 1 *Oakes* approach suggested by Lamer J., was followed in *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120; *United States*

voir également Mary Liston, « Governments in Miniature : The Rule of Law in the Administrative State », dans Colleen M. Flood et Lorne Sossin, dir., *Administrative Law in Context* (2008), 77, p. 100; Susan L. Gratton et Lorne Sossin, « In Search of Coherence : The *Charter* and Administrative Law under the McLachlin Court », dans David A. Wright et Adam M. Dodek, dir., *Public Law at the McLachlin Court : The First Decade* (2011), 145, p. 157-58).

[30] Lorsque l'affirmation qui précède est appréciée au regard des décisions ultérieures de la Cour, nous entrevoyons une relation entre la *Charte*, les tribunaux et le droit administratif complètement différente de celle dont il a été question pour la première fois dans *Slaight*. Dans *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, la Cour a conclu que la révision judiciaire doit être orientée par une politique de retenue justifiée par le respect de la volonté du législateur, le respect de l'expertise spécialisée que possèdent les décideurs administratifs et la reconnaissance que les cours de justice n'ont pas le pouvoir exclusif de statuer sur toutes les questions dans le domaine administratif (par. 49). Dans *R. c. Conway*, 2010 CSC 22, [2010] 1 R.C.S. 765, par. 78-82, s'appuyant sur l'évolution de la jurisprudence, la Cour a conclu que les tribunaux administratifs dotés du pouvoir de trancher des questions de droit ont le pouvoir d'appliquer la *Charte* et d'accorder les réparations qu'autorise cette dernière dans les affaires dont ils sont régulièrement saisis.

[31] Cela étant dit, depuis, comme l'avait prédit le juge en chef Dickson, notre Cour a exploré différentes méthodes d'examen de la constitutionnalité des décisions administratives. Elle a oscillé entre, d'une part, l'approche fondée sur les valeurs préconisées dans *Baker* et, d'autre part, le modèle plus formaliste préconisé dans *Slaight*. L'approche proposée par le juge Lamer dans *Oakes* et fondée sur l'article premier a été suivie dans *Stoffman c. Vancouver General Hospital*, [1990] 3 R.C.S. 483, *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835, *Ross c. Conseil scolaire du district nº 15 du Nouveau-Brunswick*, [1996] 1 R.C.S. 825, *Eldridge c. Colombie-Britannique (Procureur général)*,

v. Burns, 2001 SCC 7, [2001] 1 S.C.R. 283; and *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442.

[32] Other cases, and particularly recently, have instead applied an administrative law/judicial review analysis in assessing whether the decision-maker took sufficient account of *Charter* values. This approach is seen in *Baker*; *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772; *Chamberlain*; *Ahani v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 2, [2002] 1 S.C.R. 72; *Pinet*; *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44; *Criminal Lawyers' Association*; and *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281.

[33] The last decision of this Court to use the full s. 1 *Oakes* approach to determine whether the exercise of statutory discretion complied with the *Charter* was *Multani*. The academic commentary that followed was consistently critical. In brief, it generally argued that the use of a strict s. 1 analysis reduced administrative law to having a formal role in controlling the exercise of discretion (see Gratton and Sossin, at p. 157; David Mullan, "Administrative Tribunals and Judicial Review of *Charter* Issues after *Multani*" (2006), 21 *N.J.C.L.* 127; Stéphane Bernatchez, "Les rapports entre le droit administratif et les droits et libertés: la révision judiciaire ou le contrôle constitutionnel?" (2010), 55 *McGill L.J.* 641).

[34] Since then, and largely as a result of the revised administrative law template found in *Dunsmuir*, this Court appears to have moved away from *Multani*, leading to the suggestion that it may have "decided to start from ground zero in building coherence in public law" (Gratton and Sossin,

[1997] 3 R.C.S. 624, *Little Sisters Book and Art Emporium c. Canada (Ministre de la Justice)*, 2000 CSC 69, [2000] 2 R.C.S. 1120, *États-Unis c. Burns*, 2001 CSC 7, [2001] 1 R.C.S. 283 et *R. c. Mentuck*, 2001 CSC 76, [2001] 3 R.C.S. 442.

[32] Dans d'autres affaires, plus particulièrement des affaires récentes, c'est plutôt l'analyse droit administratif/révision judiciaire qui a été effectuée pour déterminer si le décideur a pris suffisamment compte des valeurs consacrées par la *Charte*. C'est cette approche qui a été privilégiée dans *Baker*, *Université Trinity Western c. British Columbia College of Teachers*, 2001 CSC 31, [2001] 1 R.C.S. 772, *Chamberlain*; *Ahani c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2002 CSC 2, [2002] 1 R.C.S. 72, *Pinet*; *Lake c. Canada (Ministre de la Justice)*, 2008 CSC 23, [2008] 1 R.C.S. 761, *Canada (Premier ministre) c. Khadr*, 2010 CSC 3, [2010] 1 R.C.S. 44, *Criminal Lawyers' Association*, et *Németh c. Canada (Justice)*, 2010 CSC 56, [2010] 3 R.C.S. 281.

[33] C'est dans *Multani* que notre Cour a utilisé pour la dernière fois l'analyse intégrale fondée sur l'article premier élaborée dans *Oakes* pour juger de la conformité à la *Charte* de l'exercice d'un pouvoir discrétionnaire conféré par la loi. La doctrine qui a suivi a été uniformément critique. En somme, les auteurs, pour la plupart, ont fait valoir que le recours à une analyse fondée strictement sur l'art. 1 réduisait le droit administratif à un rôle formel dans le contexte de la révision de l'exercice du pouvoir discrétionnaire (voir Gratton et Sossin, p. 157; David Mullan, « Administrative Tribunals and Judicial Review of *Charter* Issues after *Multani* » (2006), 21 *R.N.D.C.* 127; Stéphane Bernatchez, « Les rapports entre le droit administratif et les droits et libertés : la révision judiciaire ou le contrôle constitutionnel? » (2010), 55 *R.D. McGill* 641).

[34] Depuis le prononcé de cet arrêt, et en grande partie à cause de la révision du modèle d'analyse des décisions administratives opérée par *Dunsmuir*, notre Cour semble s'être écartée de *Multani*, ce qui laisse croire qu'elle a peut-être [TRADUCTION] « décidé de faire table rase avant d'établir une

at p. 161). Today, the Court has two options for reviewing discretionary administrative decisions that implicate *Charter* values. The first is to adopt the *Oakes* framework, developed for reviewing laws for compliance with the Constitution. This undoubtedly protects *Charter* rights, but it does so at the risk of undermining a more robust conception of administrative law. In the words of Prof. Evans, if administrative law is bypassed for the *Charter*, "a rich source of thought and experience about law and government will be overlooked" (p. 73).

nouvelle cohérence en droit public » (Gratton et Sossin, p. 161). Aujourd'hui, la Cour a deux options quant à la révision des décisions administratives de nature discrétionnaire qui soulèvent des questions relatives aux valeurs consacrées par la *Charte*. La première consiste à adopter le cadre d'analyse décrit dans *Oakes* et élaboré pour examiner la constitutionnalité des lois. Cette approche protège indéniablement les droits visés par la *Charte*, mais elle le fait au détriment d'une conception plus riche du droit administratif. Comme l'exprime le professeur Evans, si les tribunaux étaient trop prompts à esquiver le droit administratif au profit de la *Charte*, [TRADUCTION] « une source précieuse de connaissances et d'expériences en matière de droit et de gouvernance ne sera pas prise en compte ou sera complètement perdue » (p. 73).

[35] The alternative is for the Court to embrace a richer conception of administrative law, under which discretion is exercised "in light of constitutional guarantees and the values they reflect" (*Multani*, at para. 152, *per* LeBel J.). Under this approach, it is unnecessary to retreat to a s. 1 *Oakes* analysis in order to protect *Charter* values. Rather, administrative decisions are *always* required to consider fundamental values. The *Charter* simply acts as "a reminder that some values are clearly fundamental and . . . cannot be violated lightly" (Cartier, at p. 86). The administrative law approach also recognizes the legitimacy that this Court has given to administrative decision-making in cases such as *Dunsmuir* and *Conway*. These cases emphasize that administrative bodies are empowered, and indeed required, to consider *Charter* values within their scope of expertise. Integrating *Charter* values into the administrative approach, and recognizing the expertise of these decision-makers, opens "an institutional dialogue about the appropriate use and control of discretion, rather than the older command-and-control relationship" (Liston, at p. 100).

[35] En choisissant plutôt la seconde option, la Cour donnerait son aval à cette conception plus riche du droit administratif en vertu de laquelle le pouvoir discrétionnaire est exercé « à l'aune des garanties constitutionnelles et des valeurs que comportent celles-ci » (*Multani*, par. 152, le juge LeBel). Cette approche n'exige pas de se rabattre sur l'analyse requise par l'article premier telle qu'elle a été établie dans *Oakes* pour protéger les valeurs consacrées par la *Charte*; elle suppose plutôt que les décisions administratives prennent *toujours* en considération les valeurs fondamentales. La *Charte* n'agit alors que comme [TRADUCTION] « un rappel que certaines valeurs sont manifestement fondamentales et [. . .] ne peuvent être violées à la légère » (Cartier, p. 86). L'approche du droit administratif reconnaît, en outre, la légitimité que la Cour a donnée à la prise de décisions administratives dans des arrêts tels *Dunsmuir* et *Conway*. Ces derniers soulignent que les organismes administratifs ont le pouvoir, et même le devoir, de tenir compte des valeurs consacrées par la *Charte* dans leur domaine d'expertise. Intégrer ces valeurs dans l'approche qui préconise l'application des règles de droit administratif et reconnaître l'expertise des décideurs administratifs instaure [TRADUCTION] « un dialogue institutionnel quant à l'utilisation qui doit être faite du pouvoir discrétionnaire et quant à la révision appropriée de son exercice plutôt que de faire appel à la relation plus ancienne d'autorité et de contrôle » (Liston, p. 100).

[36] As explained by Chief Justice McLachlin in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, the approach used when reviewing the constitutionality of a law should be distinguished from the approach used for reviewing an administrative decision that is said to violate the rights of a particular individual (see also Bernatchez). When *Charter* values are applied to an individual administrative decision, they are being applied in relation to a particular set of facts. *Dunsmuir* tells us this should attract deference (para. 53; see also *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 39). When a particular "law" is being assessed for *Charter* compliance, on the other hand, we are dealing with principles of general application.

[37] The more flexible administrative approach to balancing *Charter* values is also more consistent with the nature of discretionary decision-making. Some of the aspects of the *Oakes* test are, in any event, poorly suited to the review of discretionary decisions, whether of judges or administrative decision-makers. For instance, the requirement under s. 1 that a limit be "prescribed by law" has been held by this Court to apply to norms where "their adoption is authorized by statute, they are binding rules of general application, and they are sufficiently accessible and precise to those to whom they apply" (*Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295, at para. 53).

[38] Moreover, when exercising discretion under a provision or statutory scheme whose constitutionality is not impugned, it is conceptually difficult to see what the "pressing and substantial" objective of a decision is, or who would have the burden of defining and defending it.

[36] Comme la juge en chef McLachlin l'a expliqué dans *Alberta c. Hutterian Brethren of Wilson Colony*, 2009 CSC 37, [2009] 2 R.C.S. 567, l'examen de la constitutionnalité d'une loi doit être différent de la révision d'une décision administrative qui est contestée parce qu'elle porterait atteinte aux droits d'un individu en particulier (voir également Bernatchez). Lorsque les valeurs consacrées par la *Charte* sont appliquées à une décision administrative particulière, elles sont appliquées relativement à un ensemble précis de faits. *Dunsmuir* nous dit que la retenue s'impose dans un tel cas (par. 53; voir aussi *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2002 CSC 1, [2002] 1 R.C.S. 3, par. 39). Par contre, lorsqu'on vérifie si une « loi » particulière respecte la *Charte*, il est question de principes d'application générale.

[37] L'approche plus souple du droit administratif pour mettre en balance les valeurs consacrées par la *Charte* est également plus compatible avec la nature de la prise de décision qui découle de l'exercice d'un pouvoir discrétionnaire. Quoi qu'il en soit, certains aspects du test élaboré dans *Oakes* conviennent peu à la révision des décisions prises à la suite de l'exercice d'un pouvoir discrétionnaire, qu'elles aient été prises par des juges ou par des décideurs administratifs. Par exemple, la Cour a jugé que l'exigence de l'article premier selon laquelle la restriction doit découler de l'application d'une « règle de droit » s'applique à des normes dont l'« adoption est autorisée par une loi, [des normes, en outre,] obligatoires et d'application générale et [. . .] suffisamment accessibles et précis[es] pour ceux qui y sont assujettis. » (*Greater Vancouver Transportation Authority c. Fédération canadienne des étudiantes et étudiants — Section Colombie-Britannique*, 2009 CSC 31, [2009] 2 R.C.S. 295, par. 53).

[38] En outre, lorsqu'un décideur exerce le pouvoir discrétionnaire que lui confère une disposition législative ou un régime légal dont la constitutionnalité n'est pas contestée, il est difficile, d'un point de vue conceptuel, d'imaginer ce qui pourrait constituer l'objectif « urgent et réel » d'une décision ou de savoir qui devrait assumer le fardeau de le définir et de le défendre.

[39] This Court has already recognized the difficulty of applying the *Oakes* framework beyond the context of reviewing a law or other rule of general application. This has been the case in applying *Charter* values to the common law, "where there is no specific enactment that can be examined in terms of objective, rational connection, least drastic means and proportionate effect" (Peter W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 2, at section 38.15). In *R. v. Daviault*, [1994] 3 S.C.R. 63, for example, in assessing the common law rule relating to establishing intent under extreme intoxication, the Court held that no *Oakes* analysis was required when reviewing a common law rule for compliance with *Charter* values:

> If a new common law rule could be enunciated which would not interfere with an accused person's right to have control over the conduct of his or her defence, I can see no conceptual problem with the Court's simply enunciating such a rule to take the place of the old rule, without considering whether the old rule could nonetheless be upheld under s. 1 of the *Charter.* Given that the common law rule was fashioned by judges and not by Parliament or a legislature, judicial deference to elected bodies is not an issue. If it is possible to reformulate a common law rule so that it will not conflict with the principles of fundamental justice, such a reformulation should be undertaken. [pp. 93-94, citing *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 978.]

[40] In *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, this Court explicitly rejected the use of the s. 1 *Oakes* framework in developing the common law of defamation for two reasons. First, when interpreting a common law rule, there is no violation of a *Charter* right, but a conflict between principles, so "the balancing must be more flexible than the traditional s. 1 analysis", with *Charter* values providing the guidelines for any modification to the common law (para. 97). Second, the Court noted that "the division of onus which normally operates in a *Charter* challenge" was not appropriate for private litigation under the common law, as the party seeking to change the

[39] La Cour a déjà reconnu la difficulté que pose l'application du cadre d'analyse formulé dans *Oakes* au-delà du contexte de la révision d'une loi ou d'un autre type de règles de droit d'application générale. Le défi s'est posé lorsqu'il s'est agi d'appliquer les valeurs protégées par la *Charte* à la common law [TRADUCTION] « qui ne recèle aucun texte réglementaire qui puisse être examiné en terme d'objectif, de lien rationnel, d'atteinte minimale et d'effet proportionnel » (Peter W. Hogg, *Constitutional Law of Canada* (5e éd. suppl.), vol. 2, par. 38.15). Dans *R. c. Daviault*, [1994] 3 R.C.S. 63, par exemple, la Cour devait évaluer la règle de common law relative à l'établissement de l'existence de l'intention dans le cas d'une intoxication extrême. Elle a conclu qu'il n'était pas nécessaire de procéder à l'analyse prescrite par *Oakes* dans le contexte de la révision d'une règle de common law pour s'assurer de sa conformité aux valeurs consacrées par la *Charte* :

> S'il est possible d'énoncer une nouvelle règle de common law qui ne contrevienne pas au droit de l'accusé de contrôler la conduite de sa défense, je n'ai aucune difficulté à imaginer que la Cour puisse simplement la formuler, en remplacement de l'ancienne, sans chercher à savoir si l'ancienne règle pourrait néanmoins être maintenue en vertu de l'article premier de la *Charte*. Vu que la règle de common law a été créée par des juges et non par le législateur, l'égard que les tribunaux doivent avoir envers les organismes élus n'est pas en cause. S'il est possible de reformuler une règle de common law de façon qu'elle ne s'oppose pas aux principes de justice fondamentale, il faudrait le faire. [p. 93-94, citant *R. c. Swain*, [1991] 1 R.C.S. 933, p. 978.]

[40] Dans *Hill c. Église de scientologie de Toronto*, [1995] 2 R.C.S. 1130, la Cour a explicitement rejeté, pour deux raisons, l'utilisation du cadre d'analyse formulé dans *Oakes* lorsqu'il s'est agi d'élaborer la common law en matière de diffamation. Premièrement, quand il est question d'interpréter une règle de common law, il n'y a pas de violation d'un droit visé par la *Charte*, mais plutôt un conflit entre deux principes, de sorte que, d'une part, « la pondération doit être plus souple que l'analyse traditionnelle effectuée en vertu de l'article premier » et que, d'autre part, les valeurs consacrées par la *Charte* offrent alors des lignes directrices quant à toute modification de la common law

common law should not be allowed to benefit from a reverse onus (para. 98). As a result, the Court went on to "consider the common law of defamation in light of the values underlying the *Charter*" (para. 99). And in *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, the Court relied on *Charter* values in introducing the new defence of responsible communication on matters of public interest to the law of defamation, without engaging in an *Oakes* analysis.

[41] A further example is found in *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156, where the Court dealt with the common law of secondary picketing. After concluding that freedom of expression was engaged, the Court did not embark on an *Oakes* analysis. Instead, it found that the appropriate question was "which approach [to regulating secondary picketing] best balances the interests at stake in a way that conforms to the fundamental values reflected in the *Charter*?" (para. 65).

[42] Though each of these cases engaged *Charter* values, the Court did not see the *Oakes* test as the vehicle for balancing whether those values were taken into sufficient account. The same is true, it seems to me, in the administrative law context, where decision-makers are called upon to exercise their statutory discretion in accordance with *Charter* protections.

[43] What is the impact of this approach on the standard of review that applies when assessing the compliance of an administrative decision with *Charter* values? There is no doubt that when a tribunal is determining the constitutionality of a law,

(par. 97). Deuxièmement, la Cour a souligné que « le partage habituel du fardeau dans [une] contestation [. . .] fondée sur la *Charte* » ne convenait pas pour un litige privé en common law puisque la partie qui cherche à faire modifier la common law ne devrait pas pouvoir profiter d'un renversement du fardeau de la preuve (par. 98). La Cour a donc examiné « la common law de la diffamation à la lumière des valeurs de la *Charte* » (par. 99). De plus, dans *Grant c. Torstar Corp.*, 2009 CSC 61, [2009] 3 R.C.S. 640, la Cour s'est fondée sur les valeurs consacrées par la *Charte* pour introduire dans le droit relatif à la diffamation le nouveau moyen de défense de communication responsable concernant des questions d'intérêt public, et ce, sans faire intervenir l'analyse élaborée dans *Oakes*.

[41] L'arrêt *S.D.G.M.R., section locale 558 c. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 CSC 8, [2002] 1 R.C.S. 156, est un autre exemple de décision allant en ce sens. Il s'agit de l'affaire où la Cour a traité de la notion de common law de piquetage secondaire. Or, après avoir conclu que la liberté d'expression était en jeu, elle n'a pas procédé à l'analyse décrite dans *Oakes*. Elle a plutôt conclu que la question qu'il fallait se poser était celle de savoir quelle est « l'approche [pour régir le piquetage secondaire] qui pondère le mieux les intérêts en jeu, d'une façon conforme aux valeurs fondamentales reflétées dans la *Charte* » (par. 65).

[42] Ainsi, même si toutes ces causes mettaient en jeu des valeurs consacrées par la *Charte*, la Cour n'a pas jugé bon d'utiliser le test élaboré dans *Oakes* pour décider si ces valeurs avaient été suffisamment prises en compte. Il en va de même, à mon avis, dans le contexte du droit administratif, où les décideurs sont appelés à exercer le pouvoir discrétionnaire que leur confère la loi en s'assurant de protéger les droits visés par la *Charte*.

[43] Quel est l'effet de cette approche sur la norme de révision applicable à l'appréciation de la conformité d'une décision administrative aux valeurs consacrées par la *Charte*? Il ne fait aucun doute que la décision d'un tribunal administratif au sujet

the standard of review is correctness (*Dunsmuir*, at para. 58). It is not at all clear to me, however, based on this Court's jurisprudence, that correctness should be used to determine whether an administrative decision-maker has taken sufficient account of *Charter* values in making a discretionary decision.

[44] This Court elaborated on the applicable standard of review to legal disciplinary panels in the pre-*Dunsmuir* decision of *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, where Iacobucci J. adopted a reasonableness standard in reviewing a sanction imposed for professional misconduct:

> Although there is a statutory appeal from decisions of the Discipline Committee, the expertise of the Committee, the purpose of its enabling statute, and the nature of the question in dispute all suggest a more deferential standard of review than correctness. These factors suggest that the legislator intended that the Discipline Committee of the self-regulating Law Society should be a specialized body with the primary responsibility to promote the objectives of the Act by overseeing professional discipline and, where necessary, selecting appropriate sanctions. In looking at all the factors as discussed in the foregoing analysis, I conclude that the appropriate standard is reasonableness *simpliciter*. Thus, on the question of the appropriate sanction for professional misconduct, the Court of Appeal should not substitute its own view of the "correct" answer but may intervene only if the decision is shown to be unreasonable. [Emphasis added; para. 42.]

[45] It seems to me that applying the *Dunsmuir* principles results in reasonableness remaining the applicable review standard for disciplinary panels. The issue then is whether this standard should be different when what is assessed is the disciplinary body's application of *Charter* protections in the exercise of its discretion. In my view, the fact that *Charter* interests are implicated does not argue for a different standard.

de la constitutionnalité d'une loi s'examine suivant la norme de la décision correcte (*Dunsmuir*, par. 58). Cela étant dit, compte tenu de la jurisprudence de la Cour, il n'est pas du tout clair, selon moi, que c'est cette norme qu'il faut appliquer pour déterminer si un décideur administratif a suffisamment tenu compte des valeurs consacrées par la *Charte* en rendant une décision à la suite de l'exercice d'un pouvoir discrétionnaire.

[44] La Cour a approfondi la question de la norme de contrôle applicable aux décisions d'organismes disciplinaires dans l'arrêt *Barreau du Nouveau-Brunswick c. Ryan*, 2003 CSC 20, [2003] 1 R.C.S. 247, antérieur à *Dunsmuir*, et le juge Iacobucci y a retenu la norme de la décision raisonnable pour l'examen de la sanction infligée à l'égard d'une faute professionnelle :

> Bien que la loi prévoie un droit d'appel des décisions du comité de discipline, l'expertise du comité, l'objet de sa loi habilitante et la nature de la question en litige militent tous en faveur d'un degré plus élevé de déférence que la norme de la décision correcte. Ces facteurs indiquent que le législateur voulait que le comité de discipline du barreau autonome soit un organisme spécialisé ayant comme responsabilité primordiale la promotion des objectifs de la Loi par la surveillance disciplinaire de la profession et, au besoin, le choix de sanctions appropriées. Compte tenu de l'ensemble des facteurs pris en compte dans l'analyse qui précède, je conclus que la norme appropriée est celle de la décision raisonnable *simpliciter*. Par conséquent, sur la question de la sanction appropriée pour le manquement professionnel, la Cour d'appel ne devrait pas substituer sa propre opinion quant à la réponse « correcte » et ne peut intervenir que s'il est démontré que la décision est déraisonnable. [Je souligne; par. 42.]

[45] Je suis d'avis que, si on applique les principes établis dans *Dunsmuir*, la norme de la décision raisonnable reste celle à laquelle il faut recourir pour réviser les décisions des comités de discipline. Il s'agit donc de se demander si c'est une norme différente dont les tribunaux doivent se servir lorsque l'analyse porte sur l'application par l'organisme disciplinaire des garanties visées par la *Charte* dans l'exercice du pouvoir discrétionnaire qui lui est conféré. À mon avis, il n'y a pas lieu d'appliquer une norme différente du fait que la *Charte* est en cause.

[46] The starting point is the expertise of the tribunals in connection with their home statutes. Citing Prof. David Mullan, *Dunsmuir* confirmed the importance of recognizing that

> those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime . . . .

(para. 49, citing "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93.)

And, as Prof. Evans has noted, the "reasons for judicial restraint in reviewing agencies' decisions on matters in which their expertise is relevant do not lose their cogency simply because the question in issue also has a constitutional dimension" (p. 81).

[47] An administrative decision-maker exercising a discretionary power under his or her home statute, has, by virtue of expertise and specialization, particular familiarity with the competing considerations at play in weighing *Charter* values. As the Court explained in *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, adopting the observations of Prof. Danielle Pinard:

> [TRANSLATION] . . . administrative tribunals have the skills, expertise and knowledge in a particular area which can with advantage be used to ensure the primacy of the Constitution. Their privileged situation as regards the appreciation of the relevant facts enables them to develop a functional approach to rights and freedoms as well as to general constitutional precepts.

(p. 605, citing "Le pouvoir des tribunaux administratifs québécois de refuser de donner effet à des textes qu'ils jugent inconstitutionnels" (1987-88), *McGill L.J.* 170, at pp. 173-74.)

[48] This case, among others, reflected the increasing recognition by this Court of the distinct advantage that administrative bodies have in applying the *Charter* to a specific set of facts and in the

[46] Le premier point à considérer est l'expertise des tribunaux administratifs concernant leur loi constitutive. L'arrêt *Dunsmuir*, citant le professeur David Mullan, a confirmé qu'il importait de reconnaître que

> [TRADUCTION] les personnes qui se consacrent quotidiennement à l'application de régimes administratifs souvent complexes possèdent ou acquièrent une grande connaissance ou sensibilité à l'égard des impératifs et des subtilités des régimes législatifs en cause . . .

(par. 49, citant « Establishing the Standard of Review: The Struggle for Complexity? » (2004), 17 *C.J.A.L.P.* 59, p. 93.)

Comme le professeur Evans l'a souligné, les [TRADUCTION] « motifs invoqués pour faire montre de retenue dans le cadre de l'examen des décisions d'organismes relatives à leur champ d'expertise ne perdent pas leur bien-fondé du seul fait que la question en litige comporte également une dimension constitutionnelle » (p. 81).

[47] Le décideur administratif exerçant un pouvoir discrétionnaire en vertu de sa loi constitutive est, de par son expertise et sa spécialisation, particulièrement au fait des considérations opposées en jeu dans la mise en balance des valeurs consacrées par la *Charte*. Comme la Cour l'a expliqué en faisant siens les commentaires de la professeure Danielle Pinard dans *Douglas/Kwantlen Faculty Assn. c. Douglas College*, [1990] 3 R.C.S. 570 :

> . . . les tribunaux administratifs possèdent une compétence, une expertise et une connaissance d'un milieu particulier qu'ils pourraient avantageusement mettre au service de la mise en œuvre de la primauté de la Constitution. Leur position privilégiée quant à l'appréhension des faits pertinents leur permet d'élaborer une approche fonctionnelle des droits et libertés tout comme des préceptes constitutionnels généraux.

(p. 605, citant « Le pouvoir des tribunaux administratifs québécois de refuser de donner effet à des textes qu'ils jugent inconstitutionnels » (1987-88), *R.D. McGill* 170, p. 173-74.)

[48] Cette cause, entre autres, a illustré que la Cour reconnaît de plus en plus la position privilégiée qu'occupent les tribunaux administratifs en matière d'application de la *Charte* à un ensemble

context of their enabling legislation (see *Conway*, at paras. 79-80). As Major J. noted in dissent in *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75, tailoring the *Charter* to a specific situation "is more suited to a tribunal's special role in determining rights on a case by case basis in the tribunal's area of expertise" (para. 64; see also *C.U.P.E.*, at pp. 235-36).

[49] These principles led the Court to apply a reasonableness standard in *Chamberlain*, where McLachlin C.J. found that a school board had acted unreasonably in refusing to approve the use of books depicting same-sex parented families. She held that the board had failed to respect the "values of accommodation, tolerance and respect for diversity" which were incorporated into its enabling legislation and "reflected in our Constitution's commitment to equality and minority rights" (para. 21). Similarly, in *Pinet*, Binnie J. used a reasonableness standard to review, for compliance with s. 7 of the *Charter*, a decision of the Ontario Review Board to return the appellant to a maximum security hospital, observing that a reasonableness review best reflected "the expertise of the members appointed to Review Boards" (para. 22). The purpose of the exercise was to determine whether the decision was "the least onerous and least restrictive" of the liberty interests of the appellant while considering "public safety, the mental condition and other needs of the individual concerned, and his or her potential reintegration into society" (paras. 19 and 23). In *Pinet*, the test was laid out in the statute, but Binnie J. made it clear that the emphasis on the least infringing decision was a constitutional requirement.

[50] In *Lake*, where the Court was reviewing the Minister's decision to surrender a Canadian citizen for extradition, implicating ss. 6(1) and 7 of the *Charter*, the Court again applied a reasonableness standard. LeBel J. held that deference is owed to the Minister's decision, as the Minister is closer

particulier de faits dans le contexte de leur loi habilitante (voir *Conway*, par. 79-80). Comme le juge Major l'a signalé dans les motifs dissidents qu'il a signés dans *Mooring c. Canada (Commission nationale des libérations conditionnelles)*, [1996] 1 R.C.S. 75, leur « fonction particulière de détermination des droits au cas par cas dans leur domaine de spécialisation placerait même plutôt les tribunaux administratifs en meilleure position » pour appliquer la *Charte* à une situation donnée (par. 64; voir aussi *S.C.F.P.*, p. 235-236).

[49] Ces principes ont amené la Cour à appliquer la norme de la décision raisonnable dans *Chamberlain*, où la juge en chef McLachlin a conclu que le refus d'un conseil scolaire d'approuver l'utilisation de manuels présentant des familles homoparentales était déraisonnable. Elle a jugé que le conseil n'avait pas respecté les « valeurs d'accommodement, de tolérance et de respect de la diversité » qui sont incorporées dans sa loi habilitante et qui « se traduisent par la protection constitutionnelle du droit à l'égalité et des droits des minorités » (par. 21). De même, dans *Pinet*, le juge Binnie a appliqué la norme de la décision raisonnable à l'examen de la conformité à l'art. 7 de la *Charte* de la décision de la Commission ontarienne d'examen de renvoyer l'appelant dans un hôpital à sécurité maximum, en signalant que c'est cette norme qui tient le mieux compte de « l'expertise des membres des commissions d'examen » (par. 22). Il s'agissait de juger si la décision était « [la] moins sévèr[e] et [la] moins privativ[e] » pour la liberté de l'appelant tout en tenant compte de « la sécurité du public, de l'état mental de l'individu en cause et de ses besoins, notamment sa réinsertion sociale éventuelle » (par. 19 et 23). Dans cette affaire, le critère était énoncé dans la loi, mais le juge Binnie a exposé clairement que la recherche de la décision la moins attentatoire était une exigence constitutionnelle.

[50] L'affaire *Lake* portait sur la révision d'une décision ministérielle d'extradition visant un citoyen canadien et faisant intervenir le par. 6(1) et l'art. 7 de la *Charte*. Là encore, la Cour a appliqué la norme de la décision raisonnable. Le juge LeBel a déclaré qu'il y a lieu, en raison de l'expertise du

to the relevant facts required to balance competing considerations and benefits from expertise:

> This Court has repeatedly affirmed that deference is owed to the Minister's decision whether to order surrender once a fugitive has been committed for extradition. The issue in the case at bar concerns the standard to be applied in reviewing the Minister's assessment of a fugitive's *Charter* rights. Reasonableness is the appropriate standard of review for the Minister's decision, regardless of whether the fugitive argues that extradition would infringe his or her rights under the *Charter*. As is evident from this Court's jurisprudence, to ensure compliance with the *Charter* in the extradition context, the Minister must balance competing considerations, and where many such considerations are concerned, the Minister has superior expertise. The assertion that interference with the Minister's decision will be limited to exceptional cases of "real substance" reflects the breadth of the Minister's discretion; the decision should not be interfered with unless it is unreasonable (*Schmidt* [*Canada v. Schmidt*, [1987] 1 S.C.R. 500]) (for comments on the standards of correctness and reasonableness, see *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9). [Emphasis added; para. 34.]

[51] The alternative — adopting a correctness review in every case that implicates *Charter* values — will, as Prof. Mullan noted, essentially lead to courts "retrying" a range of administrative decisions that would otherwise be subjected to a reasonableness standard:

> If correctness review becomes the order of the day in all *Charter* contexts, including the determination of factual issues and the application of the law to those facts, then what in effect can occur is that the courts will perforce assume the role of a *de novo* appellate body from all tribunals the task of which is to make decisions that of necessity have an impact on *Charter* rights and freedoms: Review Boards, Parole Boards, prison disciplinary tribunals, child welfare authorities, and the like. Whether that kind of judicial micro-managing of aspects of the administrative process should take place is a highly problematic question. [Emphasis added; p. 145.]

ministre et de sa proximité avec les faits pertinents, de déférer aux décisions de ce dernier pour la mise en balance des considérations opposées en jeu :

> Notre Cour a confirmé à maintes reprises que la déférence s'imposait à l'endroit de la décision du ministre de prendre ou non un arrêté d'extradition une fois le fugitif incarcéré. Elle doit aujourd'hui déterminer quelle norme de contrôle judiciaire s'applique à l'appréciation ministérielle des droits constitutionnels du fugitif. Cette norme demeure celle de la raisonnabilité, même lorsque le fugitif fait valoir que l'extradition porterait atteinte à ses droits constitutionnels. Il ressort de la jurisprudence de notre Cour que pour assurer le respect de la *Charte* dans le contexte d'une demande d'extradition, le ministre doit tenir compte de considérations opposées et possède à l'égard de bon nombre de celles-ci une plus grande expertise. L'affirmation selon laquelle les tribunaux n'interviendront que dans les cas exceptionnels où cela « s'impose réellement » traduit bien la portée du pouvoir discrétionnaire du ministre. La décision ne doit en effet être modifiée que si elle est déraisonnable (*Schmidt* [*Canada c. Schmidt*, [1987] 1 R.C.S. 500]) (voir l'analyse de la norme de la décision correcte et de la norme de la décision raisonnable dans l'arrêt *Dunsmuir c. Nouveau-Brunswick*, [2008] 1 R.C.S. 190, 2008 CSC 9. [Je souligne; par. 34.]

[51] Comme le signale le professeur Mullan, l'autre solution — soit celle qui consiste à appliquer la norme de la décision correcte chaque fois que des valeurs consacrées par la *Charte* sont en cause — aurait essentiellement pour effet que des décisions administratives qui auraient autrement été révisées suivant la norme de la décision raisonnable seraient « jugées à nouveau » :

> [TRADUCTION] Si tous les contextes relatifs à la *Charte* devaient commander l'examen de la justesse de la décision, même en ce qui concerne les questions de fait et l'application du droit aux conclusions de fait, cela pourrait avoir pour effet de conférer aux tribunaux judiciaires le rôle de cours d'appel *de novo* à l'égard de tous les tribunaux administratifs appelés à rendre des décisions qui toucheront immanquablement des droits ou libertés garantis par la *Charte*, tels les commissions de révision ou de libération conditionnelle, les comités de discipline de pénitenciers, les autorités de protection de l'enfance, etc. L'opportunité d'un tel interventionnisme judiciaire dans ces divers aspects du processus administratif est une question très délicate. [Je souligne; p. 145.]

[52] So our choice is between saying that every time a party argues that *Charter* values are implicated on judicial review, a reasonableness review is transformed into a correctness one, or saying that while both tribunals and courts can interpret the *Charter*, the administrative decision-maker has the necessary specialized expertise and discretionary power in the area where the *Charter* values are being balanced.

[53] The decisions of legal disciplinary bodies offer a good example of the problem of applying a correctness review whenever *Charter* values are implicated. Most breaches of art. 2.03 of the *Code of ethics* calling for "objectivity, moderation and dignity", necessarily engage the expressive rights of lawyers. That would mean that most exercises of disciplinary discretion under this provision would be transformed from the usual reasonableness review to one for correctness.

[54] Nevertheless, as McLachlin C.J. noted in *Catalyst*, "reasonableness must be assessed in the context of the particular type of decision making involved and all relevant factors. It is an essentially contextual inquiry" (para. 18). Deference is still justified on the basis of the decision-maker's expertise and its proximity to the facts of the case. Even where *Charter* values are involved, the administrative decision-maker will generally be in the best position to consider the impact of the relevant *Charter* values *on the specific facts of the case*. But both decision-makers and reviewing courts must remain conscious of the fundamental importance of *Charter* values in the analysis.

[52] Donc, nous avons le choix entre, d'une part, affirmer que, chaque fois qu'une partie prétend que des valeurs consacrées par la *Charte* sont en cause dans le cadre d'une révision judiciaire, un examen suivant la norme de la décision correcte doit se substituer à celui suivant la norme de la décision raisonnable ou, d'autre part, affirmer que, bien que les tribunaux et les cours de justice puissent interpréter la *Charte*, le décideur administratif possède l'expertise particulière exigée et le pouvoir discrétionnaire voulu dans le domaine où les valeurs consacrées par la *Charte* sont mises en balance.

[53] Les décisions d'organismes disciplinaires qui œuvrent relativement aux professions juridiques fournissent un bon exemple des problèmes que pose la révision judiciaire suivant la norme de la décision correcte dès lors que des valeurs consacrées par la *Charte* sont en cause. Le droit à la liberté d'expression des avocats est nécessairement en jeu dans la plupart des contraventions à l'art. 2.03 du *Code de déontologie*, qui exige que les avocats aient une conduite empreinte « d'objectivité, de modération et de dignité ». Il s'ensuit que la révision du caractère raisonnable normalement effectuée à l'égard de la plupart des décisions disciplinaires discrétionnaires fondées sur cette disposition deviendrait un contrôle de la justesse.

[54] Quoi qu'il en soit, comme la juge en chef McLachlin l'a souligné dans *Catalyst*, « le caractère raisonnable de la décision s'apprécie dans le contexte du type particulier de processus décisionnel en cause et de l'ensemble des facteurs pertinents. Il s'agit essentiellement d'une analyse contextuelle » (par. 18). Il continue donc à être justifié de faire preuve de déférence à l'endroit du décideur administratif compte tenu de son expertise et de sa proximité aux faits de la cause puisque, même quand les valeurs consacrées par la *Charte* sont en jeu, il sera généralement le mieux placé pour juger de l'incidence des valeurs pertinentes de ce type *au regard des faits précis de l'affaire*. Cela étant dit, tant les décideurs que les tribunaux qui procèdent à la révision de leurs décisions doivent analyser les questions qui leur sont soumises en gardant à l'esprit l'importance fondamentale des valeurs consacrées par la *Charte*.

[55] How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives. In *Lake*, for instance, the importance of Canada's international obligations, its relationships with foreign governments, and the investigation, prosecution and suppression of international crime justified the *prima facie* infringement of mobility rights under s. 6(1) (para. 27). In *Pinet*, the twin goals of public safety and fair treatment grounded the assessment of whether an infringement of an individual's liberty interest was justified (para. 19).

[56] Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives. This is where the role of judicial review for reasonableness aligns with the one applied in the *Oakes* context. As this Court recognized in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160, "courts must accord some leeway to the legislator" in the *Charter* balancing exercise, and the proportionality test will be satisfied if the measure "falls within a range of reasonable alternatives". The same is true in the context of a review of an administrative decision for reasonableness, where decision-makers are entitled to a measure of deference so long as the decision, in the words of *Dunsmuir*, "falls within a range of possible, acceptable outcomes" (para. 47).

[57] On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the

[55] Comment un décideur administratif applique-t-il donc les valeurs consacrées par la *Charte* dans l'exercice d'un pouvoir discrétionnaire que lui confère la loi? Il ou elle met en balance ces valeurs et les objectifs de la loi. Lorsqu'il procède à cette mise en balance, le décideur doit d'abord se pencher sur les objectifs en question. Dans *Lake*, par exemple, l'importance des obligations internationales du Canada, ses relations avec les gouvernements étrangers ainsi que l'enquête, la poursuite et la répression du crime à l'échelle internationale justifiait, *prima facie*, la violation de la liberté de circulation visée au par. 6(1) (par. 27). Dans *Pinet*, c'est le double objectif de protection de la sécurité du public et de traitement équitable qui a fondé l'évaluation de la violation du droit à la liberté pour déterminer si elle était justifiée (par. 19).

[56] Ensuite, le décideur doit se demander comment protéger au mieux la valeur en jeu consacrée par la *Charte* compte tenu des objectifs visés par la loi. Cette réflexion constitue l'essence même de l'analyse de la proportionnalité et exige que le décideur mette en balance la gravité de l'atteinte à la valeur protégée par la *Charte*, d'une part, et les objectifs que vise la loi, d'autre part. C'est à cette étape que le rôle de la révision judiciaire visant à juger du caractère raisonnable de la décision s'apparente à celui de l'analyse effectuée dans le contexte de l'application du test de l'arrêt *Oakes*. Comme la Cour l'a reconnu dans *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199, par. 160, « les tribunaux doivent accorder une certaine latitude au législateur » lorsqu'ils procèdent à une mise en balance au regard de la *Charte* et il sera satisfait au test de proportionnalité si la mesure « se situe à l'intérieur d'une gamme de mesures raisonnables ». Il en est de même dans le contexte de la révision d'une décision administrative pour en évaluer le caractère raisonnable où il convient de faire preuve d'une certaine déférence à l'endroit des décideurs à condition que la décision, comme l'affirme la Cour dans *Dunsmuir*, « [appartienne] aux issues possibles acceptables » (par. 47).

[57] Dans le contexte d'une révision judiciaire, il s'agit donc de déterminer si — en évaluant l'incidence de la protection pertinente offerte par la

decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play. As LeBel J. noted in *Multani*, when a court is faced with reviewing an administrative decision that implicates *Charter* rights, "[t]he issue becomes one of proportionality" (para. 155), and calls for integrating the spirit of s. 1 into judicial review. Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate giving a "margin of appreciation", or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives.

Charter et compte tenu de la nature de la décision et des contextes légal et factuel — la décision est le fruit d'une mise en balance proportionnée des droits en cause protégés par la *Charte*. Comme le juge LeBel l'a souligné dans *Multani*, lorsqu'une cour est appelée à réviser une décision administrative qui met en jeu les droits protégés par la *Charte*, « [l]a question se réduit à un problème de proportionnalité » (par. 155) et requiert d'intégrer l'esprit de l'article premier dans la révision judiciaire. Même si cette révision judiciaire est menée selon le cadre d'analyse du droit administratif, il existe néanmoins une harmonie conceptuelle entre l'examen du caractère raisonnable et le cadre d'analyse préconisé dans *Oakes* puisque les deux démarches supposent de donner une « marge d'appréciation » aux organes administratifs ou législatifs ou de faire preuve de déférence à leur égard lors de la mise en balance des valeurs consacrées par la *Charte*, d'une part, et les objectifs plus larges, d'autre part.

[58] If, in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable.

[58] Si, en exerçant son pouvoir discrétionnaire, le décideur a correctement mis en balance la valeur pertinente consacrée par la *Charte* et les objectifs visés par la loi, sa décision sera jugée raisonnable.

Application

Application

[59] The *Charter* value at issue in this appeal is expression, and, specifically, how it should be applied in the context of a lawyer's professional duties.

[59] En l'espèce, la valeur en jeu consacrée par la *Charte* est la liberté d'expression et la question à trancher est, plus précisément, celle de savoir comment cette liberté devrait pouvoir s'exercer dans le contexte des obligations professionnelles de l'avocat.

[60] At the relevant time, art. 2.03 of the *Code of ethics* (now modified as art. 2.00.01, O.C. 351-2004, (2004) 136 G.O. II, 1272) stated that "[t]he conduct of an advocate must bear the stamp of objectivity, moderation and dignity". This provision, whose constitutionality is not impugned before us, sets out a series of broad standards that are open to a wide range of interpretations. The determination of whether the actions of a lawyer violate art. 2.03 in a given case is left entirely to the Disciplinary Council's discretion.

[60] Au moment des faits, l'art. 2.03 du *Code de déontologie* (maintenant l'art. 2.00.01, décret 351-2004, (2004) 136 G.O. II, 1840) portait que « [l]a conduite de l'avocat doit être empreinte d'objectivité, de modération et de dignité ». Cette disposition, dont la constitutionnalité n'est pas attaquée devant nous, établit un ensemble de normes générales se prêtant à une multitude d'interprétations. La question de savoir si, dans un cas donné, la conduite d'un avocat contrevient à l'art. 2.03, est entièrement laissée à l'appréciation discrétionnaire du Comité de discipline.

[26] The two types of judicial review, on the merits and on the process, are therefore engaged in this case. Our review of the system will therefore be comprehensive, which is preferable since a holistic approach is needed when considering fundamental principles.

III. Issue 1: Review of the Adjudicator's Statutory Interpretation Determination

A. *Judicial Review*

[27] As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.

[28] By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

[29] Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority,

[26] Le présent pourvoi met donc en jeu les deux types de contrôle judiciaire, l'un sur le fond, l'autre sur le plan de la procédure. Notre révision portera donc sur le mécanisme dans son ensemble, ce qui est préférable, car l'examen de principes fondamentaux commande une démarche globale.

III. Premier volet : Contrôle de l'interprétation de la loi par l'arbitre

A. *Le contrôle judiciaire*

[27] Sur le plan constitutionnel, le contrôle judiciaire est intimement lié au maintien de la primauté du droit. C'est essentiellement cette assise constitutionnelle qui explique sa raison d'être et oriente sa fonction et son application. Le contrôle judiciaire s'intéresse à la tension sous-jacente à la relation entre la primauté du droit et le principe démocratique fondamental, qui se traduit par la prise de mesures législatives pour créer divers organismes administratifs et les investir de larges pouvoirs. Lorsqu'elles s'acquittent de leurs fonctions constitutionnelles de contrôle judiciaire, les cours de justice doivent tenir compte de la nécessité non seulement de maintenir la primauté du droit, mais également d'éviter toute immixtion injustifiée dans l'exercice de fonctions administratives en certaines matières déterminées par le législateur.

[28] La primauté du droit veut que tout exercice de l'autorité publique procède de la loi. Tout pouvoir décisionnel est légalement circonscrit par la loi habilitante, la common law, le droit civil ou la Constitution. Le contrôle judiciaire permet aux cours de justice de s'assurer que les pouvoirs légaux sont exercés dans les limites fixées par le législateur. Il vise à assurer la légalité, la rationalité et l'équité du processus administratif et de la décision rendue.

[29] Les décideurs administratifs exercent leurs pouvoirs dans le cadre de régimes législatifs qui sont eux-mêmes délimités. Ils ne peuvent exercer de pouvoirs qui ne leur sont pas expressément conférés. S'ils agissent sans autorisation légale,

the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers: *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at p. 234; also *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 21.

[30] In addition to the role judicial review plays in upholding the rule of law, it also performs an important constitutional function in maintaining legislative supremacy. As noted by Justice Thomas Cromwell, "the rule of law is affirmed by assuring that the courts have the final say on the jurisdictional limits of a tribunal's authority; second, legislative supremacy is affirmed by adopting the principle that the concept of jurisdiction should be narrowly circumscribed and defined according to the intent of the legislature in a contextual and purposeful way; third, legislative supremacy is affirmed and the court-centric conception of the rule of law is reined in by acknowledging that the courts do not have a monopoly on deciding all questions of law" ("Appellate Review: Policy and Pragmatism", in *2006 Isaac Pitblado Lectures*, *Appellate Courts: Policy, Law and Practice*, V-1, at p. V-12). In essence, the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent.

[31] The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect (*Executors of the Woodward Estate v. Minister of Finance*, [1973] S.C.R. 120, at

ils portent atteinte au principe de la primauté du droit. C'est pourquoi lorsque la cour de révision se penche sur l'étendue d'un pouvoir décisionnel ou de la compétence accordée par la loi, l'analyse relative à la norme de contrôle vise à déterminer quel pouvoir le législateur a voulu donner à l'organisme en la matière. Elle le fait dans le contexte de son obligation constitutionnelle de veiller à la légalité de l'action administrative : *Crevier c. Procureur général du Québec*, [1981] 2 R.C.S. 220, p. 234; également, *Dr Q c. College of Physicians and Surgeons of British Columbia*, [2003] 1 R.C.S. 226, 2003 CSC 19, par. 21.

[30] Non seulement le contrôle judiciaire contribue au respect de la primauté du droit, mais il joue un rôle constitutionnel important en assurant la suprématie législative. Comme l'a fait observer le juge Thomas Cromwell, [TRADUCTION] « la primauté du droit est consacrée par le pouvoir d'une cour de justice de statuer en dernier ressort sur l'étendue de la compétence d'un tribunal administratif, par l'application du principe selon lequel il convient de bien délimiter la compétence et de bien la définir, en fonction de l'intention du législateur, d'une manière à la fois contextuelle et téléologique, ainsi que par la reconnaissance du fait que les cours de justice n'ont pas le pouvoir exclusif de statuer sur toutes les questions de droit, ce qui tempère la conception judiciarisée de la primauté du droit » (« Appellate Review : Policy and Pragmatism », dans *2006 Isaac Pitblado Lectures, Appellate Courts : Policy, Law and Practice*, V-1, p. V-12). Essentiellement, la primauté du droit est assurée par le dernier mot qu'ont les cours de justice en matière de compétence, et la suprématie législative, par la détermination de la norme de contrôle applicable en fonction de l'intention du législateur.

[31] L'organe législatif du gouvernement ne peut supprimer le pouvoir judiciaire de s'assurer que les actes et les décisions d'un organisme administratif sont conformes aux pouvoirs constitutionnels du gouvernement. Même si elle est révélatrice de l'intention du législateur, la clause privative ne saurait être décisive à cet égard (*Succession Woodward c. Ministre des Finances*, [1973] R.C.S. 120, p. 127).

p. 127). The inherent power of superior courts to review administrative action and ensure that it does not exceed its jurisdiction stems from the judicature provisions in ss. 96 to 101 of the *Constitution Act, 1867*: *Crevier.* As noted by Beetz J. in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1090, "[t]he role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection". In short, judicial review is constitutionally guaranteed in Canada, particularly with regard to the definition and enforcement of jurisdictional limits. As Laskin C.J. explained in *Crevier*:

> Where . . . questions of law have been specifically covered in a privative enactment, this Court, as in *Farrah*, has not hesitated to recognize this limitation on judicial review as serving the interests of an express legislative policy to protect decisions of adjudicative agencies from external correction. Thus, it has, in my opinion, balanced the competing interests of a provincial Legislature in its enactment of substantively valid legislation and of the courts as ultimate interpreters of the *British North America Act* and s. 96 thereof. The same considerations do not, however, apply to issues of jurisdiction which are not far removed from issues of constitutionality. It cannot be left to a provincial statutory tribunal, in the face of s. 96, to determine the limits of its own jurisdiction without appeal or review. [pp. 237-38]

See also D. J. Mullan, *Administrative Law* (2001), at p. 50.

[32] Despite the clear, stable constitutional foundations of the system of judicial review, the operation of judicial review in Canada has been in a constant state of evolution over the years, as courts have attempted to devise approaches to judicial review that are both theoretically sound and effective in practice. Despite efforts to refine and clarify it, the present system has proven to be difficult to implement. The time has arrived to re-examine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable.

Le pourvoir inhérent d'une cour supérieure de contrôler les actes de l'Administration et de s'assurer que celle-ci n'outrepasse pas les limites de sa compétence tire sa source des art. 96 à 101 de la *Loi constitutionnelle de 1867* portant sur la magistrature : arrêt *Crevier.* Comme l'a dit le juge Beetz dans l'arrêt *U.E.S., Local 298 c. Bibeault*, [1988] 2 R.C.S. 1048, p. 1090, « [l]e rôle des cours supérieures dans le maintien de la légalité est si important qu'il bénéficie d'une protection constitutionnelle ». En résumé, le contrôle judiciaire bénéficie de la protection constitutionnelle au Canada, surtout lorsqu'il s'agit de définir les limites de la compétence et de les faire respecter. Le juge en chef Laskin l'a expliqué dans l'arrêt *Crevier* :

> [Q]uand la disposition privative englobe spécifiquement les questions de droit, cette Cour n'a pas hésité, comme dans l'arrêt *Farrah*, à reconnaître que cette limitation du contrôle judiciaire favorise une politique législative explicite qui veut protéger les décisions des organismes judiciaires contre la rectification externe. La Cour a ainsi, à mon avis, maintenu l'équilibre entre les objectifs contradictoires du législateur provincial de voir confirmer la validité quant au fond des lois qu'il a adoptées et ceux des tribunaux d'être les interprètes en dernier ressort de l'*Acte de l'Amérique du Nord britannique* et de son art. 96. Les mêmes considérations ne s'appliquent cependant pas aux questions de compétence qui ne sont pas très éloignées des questions de constitutionnalité. Il ne peut être accordé à un tribunal créé par une loi provinciale, à cause de l'art. 96, de définir les limites de sa propre compétence sans appel ni révision. [p. 237-238]

Voir aussi D. J. Mullan, *Administrative Law* (2001), p. 50.

[32] Ses assises constitutionnelles claires et stables n'ont pas empêché le contrôle judiciaire de connaître une évolution constante au Canada, les cours de justice s'efforçant au fil des ans de concevoir une démarche tout autant valable sur le plan théorique qu'efficace en pratique. Malgré les efforts pour l'améliorer et le clarifier, le mécanisme actuel s'est révélé difficile à appliquer. Le temps est venu de revoir le contrôle judiciaire des décisions administratives au Canada et d'établir un cadre d'analyse rationnel qui soit plus cohérent et fonctionnel.

Case Name:

Duplessis v. Canada

Between
Peter Duplessis, plaintiff, and
Her Majesty the Queen, defendant

[2004] F.C.J. No. 226

[2004] A.C.F. no 226

2004 FC 154

2004 CF 154

129 A.C.W.S. (3d) 92

Docket T-294-00

Federal Court
Ottawa, Ontario

Hugessen J.

Heard: January 29, 2004.
Oral judgment: January 29, 2004.

(14 paras.)

Counsel:

Barbara McIsaac, Helen Gray and Christopher Edwards, for the plaintiff.
Michael Roach, for the defendant.

REASONS FOR ORDER AND ORDER

1 **HUGESSEN J.**:-- The plaintiff is a 24 year veteran with the Canadian Armed Forces.

2 In the early 1990s, he was sent on peacekeeping duties to the former Yugoslavia. As a result of his witnessing horrific scenes while on that mission, he has developed post-traumatic stress disorder (PTSD) and he manifests all the symptoms normally associated with that disorder.

3 He was released from the Canadian Armed Forces in 1998. He maintains that he should not have been released. He receives both a service pension and a disability pension.

4 By his suit, he claims damages for the Crown's alleged failure to recognize and timely treat his condition. The action alleges general systemic and policy failure by the Armed Forces to prepare for, recognize, guard against, treat, and deal with PTSD and to take proper account of the fact that it may and does occur in the absence of physical injury. While there is no doubt that the claim sounds in part in negligence, and names and numbers of individual servants and agents of the Crown whose acts the Crown is alleged to be vicariously liable for, it also, as I have said, asserts systemic and policy failures.

5 It also alleges breaches of fiduciary obligation and Charter violations which are said to have damaged the plaintiff.

6 The material facts alleged in support of all these different grounds of claim are, in my view, inextricably intertwined and I find it impossible in any practical way to deal with them separately on a motion such as this.

7 The Crown now moves for summary judgment dismissing the action as statute barred by section 269 of the National Defence Act of which I now set out the text:

> 269. (1) No action, prosecution or other proceeding lies against any person for an act done in pursuance or execution or intended execution of this Act or any regulations or military or departmental duty or authority, or in respect of any alleged neglect or default in the execution of this Act, regulations or any such duty or authority, unless it is commenced within six months after the act, neglect or default complained of or, in the case of continuance of injury or damage, within six months after the ceasing thereof.
>
> * * *
>
> 269. (1) Les actions pour un acte accompli en exécution - ou en vue de l'application - de la présente loi, de ses règlements, ou de toute fonction ou autorité militaire ou ministérielle, ou pour une prétendue négligence ou faute à cet égard, se prescrivent par six mois à compter de l'acte, la négligence ou la faute en question ou, dans le cas d'un préjudice ou dommage, par six mois à compter de sa cessation.

Section 24 of the Crown Liability and Proceedings Act is also relevant:

> 24. In any proceedings against the Crown, the Crown may raise
>
> (a) any defence that would be available if the proceedings were a suit or an action between persons in a competent court; and
> (b) any defence that would be available if the proceedings were by way of statement of claim in the Federal Court.
>
> * * *
>
> 24. Dans des poursuites exercées contre lui, l'État peut faire valoir tout moyen de défense qui pourrait être invoqué:
>
> a) devant un tribunal compétent dans une instance entre personnes;
> b) devant la Cour fédérale dans le cadre d'une demande introductive.

8 I am going to dismiss the motion.

9 First on a simple reading of the statement of claim, it seems to me that it can be read as alleging a continuing failure on the part of the Crown to carry out its alleged duties to the plaintiff. Some of the alleged failures are posterior to the date which is six months before the action was taken and are said, in some cases, to continue even to this day.

10 Second, given the fact that the alleged failures are said to be systemic, operational and policy based, it seems to me that the principles laid down in cases such as White v. Canada (Attorney General), [2002] B.C.J. No. 1821 (S.C.) (QL), aff'd [2003] B.C.J. No. 442 (C.A.) and Swinamer v. Nova Scotia (Attorney General), [1994] 1 S.C.R. 445 should be applied to prevent the Crown from invoking a short prescriptive period in order to defeat the claim before trial. This is not obviously to state that the claim has merit or will succeed, but simply that it must be tried.

11 Third, to the extent that the claim is based on alleged breach of fiduciary duty, it seems to me that it does not sound in tort and results in direct and not vicarious liability on the part of the Crown. By its very terms section 269 applies to and protect only "person(s)" and therefore excludes the Crown from the ambit of its protection. Again, I am not called upon at this stage to say that the claim is well founded but I think that it does deserve to be tried.

12 Finally, while there is no doubt in my mind that generally applicable periods of prescription apply to a Charter based claim, I refer here amongst others to my own judgment in the case of St-Onge v. Canada [1999] F.C.J. No. 1842 (T.D.) (QL), aff'd [2000] F.C.J. No. 1523 (C.A.), leave to appeal to S.C.C. denied, [2001] C.S.C.R. No. 638, I have very serious doubt that the government

can insulate itself from such claims by adopting legislation which is applicable only to its servants, and I note parenthetically that section 269 cannot apply to anyone else, and creating short draconian prescriptive periods which are a mere fraction of what would apply to any other claim. I refer here as well to the decision of the Court of Appeal in Prete v. Ontario (1993), 16 O.R. (3d) 161 (C.A.), leave to appeal to the S.C.C. denied, [1994] S.C.C.A. No. 46. At a minimum, it would seem to me that such legislation would require to be justified under section 1. Since by definition such justification would necessitate a trial. The question cannot be dealt with on a summary judgment motion such as this.

13 I will accordingly, as I said, dismissed the motion for summary judgment.

14 On the matter of costs, plaintiff has asked for costs on a solicitor-client basis on the grounds that the same prescriptive period was originally invoked in an earlier motion to strike brought by the Crown and was then abandoned just before the hearing. I do not think that this is a proper ground for imposing solicitor-client costs. However, the plaintiff is entitled to his costs on the ordinary scale to be assessed and I would in the circumstances, because I do not think this motion should have been brought, order that such costs be payable forthwith and in any event of the cause.

ORDER

Defendant's motion for summary judgment is dismissed. Plaintiff is entitled to his costs on the ordinary scale to be assessed. Costs are payable forthwith and in any event of the cause.

HUGESSEN J.

cp/e/qw/qlhbb

and, at the same time, being so dependent on your father for his love, his money, his shelter, his food, so you can't defy him even if you choose to.

This represents but a sampling of the various psychological and emotional harms that immediately beset the victim of incest. However, much of the damage is latent, only manifesting later in adulthood.

The victim's feelings of guilt, helplessness, isolation and betrayal are reinforced when her attempts at disclosure to persons in authority are met with scepticism, incredulity and anger; see Summit, *supra*, at p. 178, and Finkelhor and Browne, *supra*, at p. 532. With respect to the long-term damages that can normally be expected, the most commonly observed effects are thus summarized by Handler in "Civil Claims of Adults Molested as Children: Maturation of Harm and the Statute of Limitations Hurdle" (1987), 15 *Fordham Urb. L.J.* 709, at pp. 716-17:

The most commonly reported long-term effects suffered by adult victims of incest abuse include depression, self-mutilation and suicidal behavior, eating disorders and sleep disturbances, drug or alcohol abuse, sexual dysfunction, inability to form intimate relationships, tendencies towards promiscuity and prostitution and a vulnerability towards revictimization.

Dr. Langevin, the psychiatrist called by the respondent, conceded that the appellant's clinical pathology might be attributable to incestuous abuse. Her symptoms included depression, hysterical anxiety, family disturbance, suspiciousness, confusion and withdrawal from other people. In short, there is ample evidence that the psychological *sequelae* from incestuous abuse can be, and in the present case have been, extremely debilitating.

The Limitations Act and Reasonable Discoverability

The appellant argues that her cause of action did not accrue until she went through a form of therapy, because her psychological injuries were

qui, en même temps, dépend tellement de son père du côté amour, argent, hébergement, nourriture, que vous ne pouvez le défier même si vous le voulez.

Ceci n'est qu'un échantillon des divers troubles psychologiques et émotifs qu'éprouve immédiatement la victime d'inceste. Toutefois, la majeure partie du préjudice est latente et ne se manifeste qu'à l'âge adulte.

Les sentiments de culpabilité, d'impuissance, d'isolement et de trahison qu'éprouve la victime s'accentuent lorsque les personnes en autorité à qui elle tente de divulguer le problème demeurent sceptiques ou incrédules ou entrent en colère; voir Summit, *loc. cit.*, à la p. 178, et Finkelhor et Browne, *loc. cit.*, à la p. 532. En ce qui concerne les préjudices qui peuvent normalement s'ensuivre à long terme, Handler résume ainsi les effets qu'on observe le plus souvent, dans «Civil Claims of Adults Molested as Children: Maturation of Harm and the Statute of Limitations Hurdle» (1987), 15 *Fordham Urb. L.J.* 709, aux pp. 716 et 717:

[TRADUCTION] Parmi les effets à long terme qui, rapporte-t-on, se font sentir le plus souvent chez les adultes qui ont été victimes d'inceste pendant leur enfance, il y a la dépression, l'automutilation, le comportement suicidaire, les désordres alimentaires et les troubles du sommeil, la toxicomanie ou l'alcoolisme, le dysfonctionnement sexuel, l'incapacité d'établir des relations intimes, les tendances à la promiscuité, à la prostitution et à la revictimisation.

Le Dr Langevin, le psychiatre appelé à témoigner par l'intimé, a reconnu que l'état pathologique clinique de l'appelante pouvait être attribuable à une agression incestueuse. Ses symptômes sont notamment les suivants: dépression, angoisse hystérique, troubles familiaux, méfiance, confusion et repli sur soi. Bref, il existe suffisamment d'éléments de preuve que les séquelles psychologiques de l'agression incestueuse peuvent être extrêmement débilitantes, ce qui est le cas en l'espèce.

La Loi sur la prescription des actions et la possibilité raisonnable de découvrir le préjudice subi

L'appelante soutient que sa cause d'action n'a pris naissance qu'au moment où elle a suivi une forme de thérapie parce que ses troubles psycholo-

largely imperceptible until later in her adult life and thus not reasonably discoverable until she was able to confront her past with the assistance of therapy. During the hearing, counsel for the respondent conceded that the doctrine of reasonable discoverability had application to an action grounded in assault and battery for incest. He submitted, however, that the appellant was aware of her cause of action no later than when she reached the age of majority. In order to determine the time of accrual of the cause of action in a manner consistent with the purposes of the *Limitations Act*, I believe it is helpful to first examine its underlying rationales. There are three, and they may be described as the certainty, evidentiary, and diligence rationales; see Rosenfeld, "The Statute of Limitations Barrier in Childhood Sexual Abuse Cases: The Equitable Estoppel Remedy" (1989), 12 *Harv. Women's L.J.* 206, at p. 211.

Statutes of limitations have long been said to be statutes of repose; see *Doe on the demise of Count Duroure v. Jones* (1791), 4 T.R. 301, 100 E.R. 1031, and *A'Court v. Cross* (1825), 3 Bing. 329, 130 E.R. 540. The reasoning is straightforward enough. There comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations. In my view this is a singularly unpersuasive ground for a strict application of the statute of limitations in this context. While there are instances where the public interest is served by granting repose to certain classes of defendants, for example the cost of professional services if practitioners are exposed to unlimited liability, there is absolutely no corresponding public benefit in protecting individuals who perpetrate incest from the consequences of their wrongful actions. The patent inequity of allowing these individuals to go on with their life without liability, while the victim continues to suffer the consequences, clearly militates against any guarantee of repose.

giques ne sont en grande partie devenus perceptibles que plus tard au cours de sa vie adulte et ne pouvaient donc être raisonnablement découverts avant qu'elle soit en mesure de faire face à son passé au moyen d'une thérapie. Au cours de l'audience, l'avocat de l'intimé a reconnu que la règle de la possibilité raisonnable de découvrir le préjudice subi s'appliquait à une action pour inceste fondée sur des voies de fait. Toutefois, il a prétendu que l'appelante était consciente de la cause d'action dès qu'elle avait atteint l'âge de majorité. Afin de déterminer quand sa cause d'action a pris naissance d'une façon compatible avec les objets de la *Loi sur la prescription des actions*, j'estime utile d'en examiner d'abord les justifications sous-jacentes. Il y en a trois et elles peuvent être décrites comme la certitude, la preuve et la diligence; voir Rosenfeld, «The Statute of Limitations Barrier in Childhood Sexual Abuse Cases: The Equitable Estoppel Remedy» (1989), 12 *Harv. Women's L.J.* 206, à la p. 211.

On affirme depuis longtemps que les lois sur la prescription des actions sont des lois destinées à assurer la tranquillité d'esprit; voir *Doe on the demise of Count Duroure v. Jones* (1791), 4 T.R. 301, 100 E.R. 1031, et *A'Court c. Cross* (1825), 3 Bing. 329, 130 E.R. 540. Le raisonnement est assez simple. Il arrive un moment, dit-on, où un éventuel défendeur devrait être raisonnablement certain qu'il ne sera plus redevable de ses anciennes obligations. À mon avis, il s'agit là d'un motif particulièrement non convaincant d'appliquer strictement la loi sur la prescription des actions dans le présent contexte. Bien qu'il puisse y avoir des cas où il est dans l'intérêt public d'assurer la tranquillité d'esprit à certaines catégories de défendeurs (par exemple, on peut se demander quel serait le coût des services professionnels si les médecins étaient assujettis à une responsabilité illimitée), il n'existe absolument aucun motif d'intérêt public correspondant de protéger les auteurs d'inceste contre les conséquences de leurs actes répréhensibles. L'iniquité manifeste que créerait le fait de permettre à ces individus d'échapper à toute responsabilité, alors que la victime continue de subir les conséquences, milite nettement contre toute garantie de tranquillité d'esprit.

The second rationale is evidentiary and concerns the desire to foreclose claims based on stale evidence. Once the limitation period has lapsed, the potential defendant should no longer be concerned about the preservation of evidence relevant to the claim; see *Dundee Harbour Trustees v. Dougall* (1852), 1 Macq. 317 (H.L.), and *Deaville v. Boegeman* (1984), 48 O.R. (2d) 725 (C.A.). However, it should be borne in mind that in childhood incest cases the relevant evidence will often be "stale" under the most expedient trial process. It may be ten or more years before the plaintiff is no longer under a legal disability by virtue of age, and is thus entitled to sue in her own name; see *Tyson v. Tyson*, 727 P.2d 226 (Wash. 1986), at p. 232, *per* Pearson J. (dissenting). In any event, I am not convinced that in this type of case evidence is automatically made stale merely by the passage of time. Moreover, the loss of corroborative evidence over time will not normally be a concern in incest cases, since the typical case will involve direct evidence solely from the parties themselves.

Finally, plaintiffs are expected to act diligently and not "sleep on their rights"; statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion. This rationale again finds expression in several cases of some antiquity. For example in *Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1, 37 E.R. 527, the Master of the Rolls had this to say in connection with limitation periods for real property actions, at p. 140 and p. 577, respectively:

> The statute is founded upon the wisest policy, and is consonant to the municipal law of every country. It stands upon the general principle of public utility. *Interest reipublicæ ut sit finis litium*, is a favorite and universal maxim. The public have a great interest, in having a known limit fixed by law to litigation, for the quiet of the community, and that there may be a certain fixed period, after which the possessor may know that his title and right cannot be called in question. It is better that the negligent owner, who has omitted to assert his right within the prescribed period, should lose his right, than

La deuxième justification se rattache à la preuve et concerne la volonté d'empêcher les réclamations fondées sur des éléments de preuve périmés. Une fois écoulé le délai de prescription, le défendeur éventuel ne devrait plus avoir à conserver des éléments de preuve se rapportant à la réclamation; voir *Dundee Harbour Trustees c. Dougall* (1852), 1 Macq. 317 (H.L.), et *Deaville c. Boegeman* (1984), 48 O.R. (2d) 725 (C.A.). Toutefois, il y a lieu de se rappeler que, dans le cas de personnes qui ont été victimes d'inceste pendant leur enfance, les éléments de preuve pertinents sont souvent «périmés» même dans le cas de poursuites intentées avec la plus grande célérité. En effet, il peut s'écouler dix ans ou plus avant que la partie demanderesse cesse d'être frappée d'une incapacité juridique fondée sur l'âge et qu'elle ait ainsi le droit d'intenter une action en son propre nom; voir *Tyson c. Tyson*, 727 P.2d 226 (Wash. 1986), à la p. 232, le juge Pearson (dissident). Quoi qu'il en soit, je ne suis pas convaincu que, dans ce type de cas, les éléments de preuve deviennent automatiquement périmés simplement en raison du temps écoulé. Par ailleurs, la perte de preuve corroborante ne constitue pas habituellement une préoccupation dans les cas d'inceste puisque normalement seules les parties elles-mêmes témoignent.

Enfin, on s'attend à ce que les demandeurs agissent avec diligence et ne «tardent pas à faire valoir leurs droits»; la prescription incite les demandeurs à intenter leurs poursuites en temps opportun. Cette justification est également mentionnée dans plusieurs arrêts assez anciens. Par exemple, dans *Cholmondeley c. Clinton* (1820), 2 Jac. & W. 1, 37 E.R. 527, le maître des rôles a dit ceci au sujet des délais de prescription applicables aux actions immobilières, aux pp. 140 et 577 respectivement:

> [TRADUCTION] La prescription est fondée sur le principe le plus judicieux et est conforme au droit municipal de tout pays. Elle repose sur le principe général de l'intérêt public. *Interest reipublicæ ut sit finis litium* est une maxime favorite et universelle. Le public a grandement intérêt, pour la tranquillité de la collectivité, à ce qu'il existe un délai légal de prescription des poursuites et à ce qu'il existe un certain délai au bout duquel le possesseur sait que son titre et son droit ne peuvent être mis en question . Il vaut mieux que le propriétaire négligent, qui n'a pas fait valoir son droit dans le délai prescrit,

that an opening should be given to interminable litigation, exposing parties to be harassed by stale demands, after the witnesses of the facts are dead, and the evidence of the title lost. The individual hardship will, upon the whole, be less, by withholding from one who has slept upon his right . . . . [Emphasis added.]

There are, however, several reasons why this rationale for a rigorous application of the statute of limitations is particularly inapposite for incest actions.

As I mentioned earlier, many, if not most, of the damages flowing from incestuous abuse remain latent until the victim is well into adulthood. Secondly, and I shall elaborate on this further, when the damages begin to become apparent, the causal connection between the incestuous activity and present psychological injuries is often unknown to the victim; see DeRose, "Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long-Term Damages" (1985), 25 *Santa Clara L. Rev.* 191, at p. 196. This Court has already taken cognizance of the role that the perpetrator plays in delaying the reporting of incest; see *R. v. L. (W.K.)*, [1991] 1 S.C.R. 1091. That case concerned a stay of criminal proceedings, arising out of alleged childhood sexual abuse, commenced after a lengthy delay. Stevenson J., speaking for the Court, observed, at p. 1101:

For victims of sexual abuse to complain would take courage and emotional strength in revealing those personal secrets, in opening old wounds. If proceedings were to be stayed based solely on the passage of time between the abuse and the charge, victims would be required to report incidents before they were psychologically prepared for the consequences of that reporting.

That delay in reporting sexual abuse is a common and expected consequence of that abuse has been recognized in other contexts. In the United States, many states have enacted legislation modifying or extending the limitation period for the prosecution of sexual abuse cases, in recognition of the fact that sexual abuse often goes unreported, and even undiscovered by the complainant, for years. . . . Establishing a judicial statute of limitations

perde ce droit, que de laisser la porte ouverte à des poursuites interminables exposant les parties à être harcelées par des demandes périmées lorsque les témoins sont décédés et que la preuve du titre a été perdue. Le préjudice individuel sera, dans l'ensemble, moindre si l'on refuse tout recours à celui qui a tardé à faire valoir son droit . . . [Je souligne.]

Il existe toutefois plusieurs raisons pour lesquelles il ne convient pas particulièrement d'appliquer rigoureusement la loi sur la prescription aux actions pour inceste.

Comme je l'ai déjà mentionné, un bon nombre, sinon la plupart, des préjudices découlant de l'agression incestueuse demeurent latents chez la victime bien après qu'elle a atteint l'âge adulte. Deuxièmement, et j'examinerai davantage ce point plus loin, lorsque les préjudices se manifestent, la victime ignore souvent le lien de causalité qui existe entre l'activité incestueuse et ses troubles psychologiques actuels; voir DeRose, «Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long-Term Damages» (1985), 25 *Santa Clara L. Rev.* 191, à la p. 196. Notre Cour a déjà pris connaissance du rôle que joue l'agresseur dans le retard à dénoncer l'inceste; voir *R. c. L. (W.K.)*, [1991] 1 R.C.S. 1091. Cette affaire portait sur un arrêt des procédures criminelles intentées longtemps après la perpétration des agressions sexuelles dont la plaignante aurait été victime pendant son enfance. Le juge Stevenson, s'exprimant au nom de notre Cour, fait remarquer à la p. 1101:

Il faut beaucoup de courage et de force de caractère aux victimes d'abus sexuels pour révéler ces secrets personnels et ouvrir d'anciennes blessures. Si les procédures devaient être arrêtées en raison du seul temps écoulé entre les mauvais traitements et la mise en accusation, les victimes seraient tenues de dénoncer ces incidents avant d'être psychologiquement prêtes à assumer les conséquences de leur dénonciation.

Il a été reconnu dans d'autres contextes que le retard à dénoncer les abus sexuels est une conséquence commune et prévisible dans ces cas. Aux États-Unis, de nombreux États ont adopté des dispositions législatives modifiant ou prorogeant la prescription applicable aux poursuites pour abus sexuels, parce qu'ils sont conscients du fait que souvent ces mauvais traitements ne sont pas dénoncés, et même ne sont pas reconnus par la

General of Quebec, [1981] 2 S.C.R. 220, the Court considered whether the provincial legislature could grant the power to make final decisions on questions of jurisdiction to an appeal tribunal under Quebec's *Professional Code*. Writing for the Court, Laskin C.J. stated (at pp. 236-37):

It is true that this is the first time that this Court has declared unequivocally that a provincially-constituted statutory tribunal cannot constitutionally be immunized from review of decisions on questions of jurisdiction. In my opinion, this limitation, arising by virtue of s. 96, stands on the same footing as the well-accepted limitation on the power of provincial statutory tribunals to make unreviewable determinations of constitutionality. There may be differences of opinion as to what are questions of jurisdiction but, in my lexicon, they rise above and are different from errors of law, whether involving statutory construction or evidentiary matters or other matters. . . . [G]iven that s. 96 is in the *British North America Act* and that it would make a mockery of it to treat it in non-functional formal terms as a mere appointing power, I can think of nothing that is more the hallmark of a superior court than the vesting of power in a provincial statutory tribunal to determine the limits of its jurisdiction without appeal or other review. [Emphasis added.]

This decision establishes, therefore, that powers which are 'hallmarks of superior courts' cannot be removed from those courts.

36 In *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, the Court considered whether the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, ousted the jurisdiction of provincial superior courts to consider the constitutional validity of federal statutes. Estey J., writing for the Court, described the superior courts as follows (at pp. 326-27):

The provincial superior courts have always occupied a position of prime importance in the constitutional pattern of this country. They are the descendants of the Royal Courts of Justice as courts of general jurisdiction. They cross the dividing line, as it were, in the federal-provincial scheme of division of jurisdiction . . . .

Crevier c. Procureur général du Québec, [1981] 2 R.C.S. 220, notre Cour a examiné si une législature provinciale pouvait accorder à un tribunal d'appel, constitué en vertu du *Code des professions* du Québec, le pouvoir de rendre des décisions finales sur des questions de compétence. Le juge en chef Laskin affirme, au nom de notre Cour (aux pp. 236 et 237):

C'est la première fois, il est vrai, que cette Cour déclare sans équivoque qu'un tribunal créé par une loi provinciale ne peut être constitutionnellement à l'abri du contrôle de ses décisions sur des questions de compétence. À mon avis, cette limitation, qui découle de l'art. 96, repose sur le même fondement que la limitation reconnue du pouvoir des tribunaux créés par des lois provinciales de rendre des décisions sans appel sur des questions constitutionnelles. Il peut y avoir des divergences de vues sur ce que sont des questions de compétence, mais, dans mon vocabulaire, elles dépassent les erreurs de droit, dont elles diffèrent, que celles-ci tiennent à l'interprétation des lois, à des questions de preuve ou à d'autres questions. [. . .] [C]omme l'art. 96 fait partie de l'*Acte de l'Amérique du Nord britannique* et que ce serait le tourner en dérision que de l'interpréter comme un pouvoir de nomination simple et sans portée, je ne puis trouver de marque plus distinctive d'une cour supérieure que l'attribution à un tribunal provincial du pouvoir de délimiter sa compétence sans appel ni autre révision. [Je souligne.]

En conséquence, cet arrêt établit qu'un pouvoir qui constitue une «marque [. . .] distinctive d'une cour supérieure» ne peut être retiré à ce tribunal.

Dans l'arrêt *Procureur général du Canada c. Law Society of British Columbia*, [1982] 2 R.C.S. 307, notre Cour a examiné si la *Loi sur la Cour fédérale*, S.R.C. 1970 (2e suppl.), ch. 10, écartait la compétence des cours supérieures provinciales pour examiner la constitutionnalité des lois fédérales. Le juge Estey, s'exprimant au nom de notre Cour, donne la description suivante des cours supérieures (aux pp. 326 et 327):

Les cours supérieures des provinces ont toujours occupé une position de premier plan à l'intérieur du régime constitutionnel de ce pays. Ces cours de compétence générale sont les descendantes des cours royales de justice. [. . .] [E]lles franchissent, pour ainsi dire, la ligne de partage des compétences fédérale et provinciale.

Finding that Parliament lacked the authority to remove the power of superior courts to rule on the validity of federal statutes, he stated (at p. 328) that:

> To do so would strip the basic constitutional concepts of judicature of this country, namely the superior courts of the provinces, of a judicial power fundamental to a federal system as described in the *Constitution Act*.

This decision emphasizes the centrality of the superior courts to our constitutional and judicial system. In order for the superior courts to fulfil that central role, they must have the powers which are part of their essence as superior courts.

Commenting on the constitutional jurisprudence regarding courts, Cromwell, *supra*, concludes (at p. 1032):

> Thus, through generous interpretation of the constitutional provisions governing appointment and independence of provincial superior court judges and a restrictive reading of the constitutional limits of jurisdiction on the Federal Court, the primacy of the provincial superior courts in constitutional judicial review has been maintained. The basic proposition is that the Canadian conception of constitutional judicial review is deeply committed to the supervisory role of the provincial superior courts, that is, the general jurisdiction trial courts in each province.

In the constitutional arrangements passed on to us by the British and recognized by the preamble to the *Constitution Act, 1867*, the provincial superior courts are the foundation of the rule of law itself. Governance by rule of law requires a judicial system that can ensure its orders are enforced and its process respected. In Canada, the provincial superior court is the only court of general jurisdiction and as such is the centre of the judicial system. None of our statutory courts has the same core jurisdiction as the superior court and therefore none is as crucial to the rule of law. To remove the power to punish contempt *ex facie* by youths would maim the institution which is at the heart of our judicial system. Destroying part of the core jurisdiction would be tantamount to abolishing the

En concluant que le Parlement n'a pas le pouvoir de retirer aux cours supérieures le pouvoir de statuer sur la validité de lois fédérales, le juge Estey affirme (à la p. 328):

> S'il en était autrement, ces organismes judiciaires de base qu'a établis la Constitution de ce pays, notamment les cours supérieures des provinces, seraient dépouillés d'un pouvoir judiciaire fondamental dans un régime fédéral comme celui décrit dans la *Loi constitutionnelle*.

Cet arrêt fait ressortir le rôle crucial que les cours supérieures jouent à l'intérieur de notre régime constitutionnel et de notre système judiciaire. Pour qu'elles puissent s'acquitter de ce rôle crucial, les cours supérieures doivent avoir les pouvoirs qui constituent leur essence même.

Commentant la jurisprudence constitutionnelle relative aux tribunaux, Cromwell, *loc. cit.*, conclut (à la p. 1032):

> [TRADUCTION] Ainsi, grâce à une interprétation libérale des dispositions constitutionnelles régissant la nomination et l'indépendance des juges des cours supérieures provinciales, et à une interprétation restrictive des limites de la compétence de la Cour fédérale sur le plan constitutionnel, on a maintenu la primauté des cours supérieures provinciales en matière de contrôle judiciaire fondé sur la Constitution. Fondamentalement, la conception canadienne du contrôle judiciaire fondé sur la Constitution accorde une importance considérable au rôle de surveillance des cours supérieures provinciales, c'est-à-dire les tribunaux de première instance de juridiction générale dans chaque province.

Selon les ententes constitutionnelles qui nous ont été transmises par l'Angleterre et qui sont reconnues dans le préambule de la *Loi constitutionnelle de 1867*, les cours supérieures provinciales constituent le fondement de la primauté du droit. Pour assurer le maintien de la primauté du droit à l'intérieur du système de gestion publique, il doit exister un système judiciaire qui peut garantir l'exécution de ses ordonnances ainsi que le respect de sa procédure. Au Canada, la cour supérieure provinciale est la seule cour de juridiction générale et est de ce fait au cœur du système judiciaire. Aucune de nos cours créées par la loi ne possède la même compétence fondamentale que la cour supérieure et, en conséquence, aucune d'elles n'est aussi importante pour le maintien de la primauté du droit. Retirer le

superior courts of general jurisdiction, which is impermissible without constitutional amendment.

38 The core jurisdiction of the provincial superior courts comprises those powers which are essential to the administration of justice and the maintenance of the rule of law. It is unnecessary in this case to enumerate the precise powers which compose inherent jurisdiction, as the power to punish for contempt *ex facie* is obviously within that jurisdiction. The power to punish for all forms of contempt is one of the defining features of superior courts. The *in facie* contempt power is not more vital to the court's authority than the *ex facie* contempt power. The superior court must not be put in a position of relying on either the provincial attorney general or an inferior court acting at its own instance to enforce its orders. Furthermore, *ex facie* contempt is not limited to the enforcement of orders. It can include activities such as threatening witnesses or refusing to attend a proceeding (see *R. v. Vermette*, [1987] 1 S.C.R. 577). In addition, the distinction between *in facie* and *ex facie* contempt is not always easily drawn (see *B.C.G.E.U.*, *supra*), increasing the difficulty of saying one is more essential to the court's process than the other.

39 Borrie and Lowe, *supra*, state that "[t]he power that courts of record enjoy to punish contempts is part of their *inherent* jurisdiction" (p. 314 (emphasis in original)). After referring to Jacob's work, which I have discussed earlier, they continue:

pouvoir de punir des adolescents pour outrage commis en dehors des audiences d'un tribunal mutilerait l'institution qui est au cœur de notre système judiciaire. Détruire une partie de la compétence fondamentale reviendrait à abolir les cours supérieures de juridiction générale, ce qui est inacceptable en l'absence d'une modification de la Constitution.

La compétence fondamentale des cours supérieures provinciales comprend les pouvoirs qui sont essentiels à l'administration de la justice et au maintien de la primauté du droit. Il est inutile en l'espèce d'énumérer les pouvoirs précis qui composent cette compétence inhérente, puisque le pouvoir de punir l'outrage commis en dehors des audiences du tribunal en fait partie de toute évidence. Le pouvoir de punir toutes les formes d'outrage est l'une des caractéristiques essentielles des cours supérieures. Le pouvoir de punir l'outrage commis au cours des audiences du tribunal n'est pas plus indispensable à l'autorité de la cour que celui de punir l'outrage commis en dehors des audiences. La cour supérieure ne doit pas avoir à s'en remettre au procureur général de la province ou à un tribunal inférieur, agissant de sa propre initiative, pour ce qui est d'exécuter ses ordonnances. De plus, l'outrage commis en dehors des audiences du tribunal ne se limite pas à l'exécution d'ordonnances. Il peut consister notamment à menacer des témoins ou à refuser de se présenter à une audience (voir *R. c. Vermette*, [1987] 1 R.C.S. 577). En outre, il n'est pas toujours facile de distinguer l'outrage commis en dehors des audiences du tribunal, de celui commis au cours de ses audiences (voir *B.C.G.E.U.*, précité), ce qui rend encore plus difficile de dire si l'un est plus essentiel que l'autre à la procédure de la cour.

Borrie et Lowe, *op. cit.*, affirment que [TRADUCTION] «[l]e pouvoir de punir l'outrage que les cours d'archives possèdent fait partie de leur compétence *inhérente*» (p. 314 (en italique dans l'original)). Après avoir mentionné l'article de Jacob, que j'ai déjà analysé, les auteurs poursuivent en disant:

Case Name:

Pearson v. Canada

Between
Edwin Pearson, Plaintiff, and
Her Majesty the Queen, Defendant

[2006] F.C.J. No. 1175

[2006] A.C.F. no 1175

2006 FC 931

2006 CF 931

297 F.T.R. 121

150 A.C.W.S. (3d) 107

Docket T-290-99

Federal Court
Toronto, Ontario and Montréal, Quebec

de Montigny J.

Heard: October 24-26 and November 17-25, 2005.
Judgment: July 29, 2006.

(93 paras.)

Constitutional law -- Canadian Charter of Rights and Freedoms -- Legal rights -- Life, liberty and security of person -- Procedural rights -- Fair hearing -- Remedies for denial of rights -- Specific remedies -- Damages -- Action for damages against the Crown for breach of Charter rights dismissed -- Action was barred by the expiration of a limitation period -- Even if action was not barred there was no basis for damages because the Quebec courts acted appropriately and justly -- Plaintiff also failed to establish his claim for damages.

Government law -- Crown -- Actions by and against Crown -- Crown liability for acts employees --

Action for damages against the Crown for wilful abuse of process and breach of Charter rights dismissed -- Action was barred by the expiration of a limitation period -- Even if action was not barred there was no basis for damages because the Quebec courts acted appropriately and justly -- Plaintiff also failed to establish his claim for damages.

Limitation of actions -- General principles -- Legislation -- Canadian Charter of Rights and Freedoms -- General -- Life, liberty and security of the person (s. 7) -- Action for damages against the Crown for breach of Charter rights dismissed -- Action was barred by the expiration of a limitation period.

Limitation of actions -- Expiry of limitation periods -- Effect of -- Action for damages against the Crown for breach of Charter rights dismissed -- Action was barred by the expiration of a limitation period.

Limitation of actions -- Civil procedure -- Actions against the Crown -- Damages -- Injury to person or property -- Injury to person -- Action for damages against the Crown for breach of Charter rights dismissed -- Action was barred by the expiration of a limitation period.

Tort law -- Abuse of legal procedure -- Abuse of process -- Action for damages against the Crown for wilful abuse of process dismissed -- There was no basis for damages because the Quebec courts acted appropriately and justly -- Plaintiff also failed to establish his claim for damages.

Trial of the action of Pearson against the defendant Crown for damages of $13 million -- Basis of the claim was the alleged known and wilful abuse of process and malicious violations of Pearson's rights to a fair trial and to the liberty and security of his person under the Canadian Charter of Rights and Freedoms by the Crown and her officers, servants and agents in his criminal prosecution in the Quebec courts -- Pearson was charged in Quebec with five counts of trafficking in narcotics for transactions that occurred in 1989 -- Jury in 1991 convicted Pearson on the first four counts of the indictment -- Trial judge denied Pearson's motion for a stay of proceedings on the basis of entrapment and entered convictions for the four offences -- Appeal was allowed because the Crown failed to disclose information that could have been useful for Pearson's entrapment defence -- Court of Appeal also found that Pearson's guilt was a legal consequence of the undisputed and admitted actual facts and that no properly instructed jury, acting reasonably, could have returned different verdicts -- New trial was therefore ordered on the issue of whether Pearson was entitled to a stay of proceedings on the ground of abuse of process by reason of entrapment -- Pearson appealed this decision to the Supreme Court of Canada on the basis that the Court of Appeal could not order a new trial limited to the issue of entrapment -- Supreme Court rejected that appeal -- Entrapment defence was rejected at the second hearing which occurred in November 1994 and convictions were entered for the offences for which Pearson had been previously convicted -- Appeal of this decision was denied -- Pearson then commenced this action in 1999 -- HELD: Action dismissed -- Pearson's claim for damages was based on the Charter and had to be treated as a civil claim -- Quebec law as to prescription applied since the cause of action arose in that province -- Action to enforce this

personal right was prescribed by three years -- Limitation period commenced to run in November 1994 and the action was long prescribed when Pearson commenced this action in 1999 -- This was sufficient to bar Pearson's action -- However, because there was uncertainty regarding the whole issue of prescription in relation to Charter-based claims, the court addressed the other issues -- Decisions of the Quebec courts precluded the Federal Court from looking into Pearson's claim -- Damages could only be awarded if the Crown, through her agents, not only infringed Pearson's right to a fair trial but that these violations caused him to be convicted and imprisoned -- Court was not prepared to reach these conclusions because this would cause it to have to second guess the Quebec Court of Appeal in its findings -- Quebec Court of Appeal acted appropriately and justly when it ordered a new hearing on the issue of entrapment -- There was no basis for it to stay the proceeding or to order a new trial where Pearson's guilt would be re-examined -- Federal Court therefore had to reject the claim for damages -- Pearson's action was an abuse of process since it was an attempt to relitigate a claim that was already determined by the courts -- Even if the Federal Court agreed with Pearson that it was not precluded from adjudicating his claim by the previous decisions it still could not find in his favour because he did not establish his claim for damages.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 7, s. 11, s. 11(d), s. 24, s. 24(1), s. 24(2)

Charter of human rights and freedoms, R.S.Q., c. C-12, s. 49

Civil Code of Lower Canada, s. 1053, Article 2261

Civil Code of Quebec, S.Q. 1991, c. 64, Article 2877, Article 2880, Article 2925

Criminal Code, s. 686(8)

Crown Liability and Proceedings Act, R.S. 1985, c. C-50, s. 32

Federal Courts Act, R.S.C. 1985, c. F-7, s. 39, s. 39(2)

Federal Courts Rules, Rule 55

Narcotic Control Act, R.S.C. 1985, c. N-1, s. 2, s. 4(3)

Public Authorities Protection Act, R.S.O. 1980, c. 393,

Counsel:

Edwin Pearson, by himself, for the Plaintiff.

Jacques Savary and David Lucas, for the Defendant.

- If not, has Mr. Pearson been successful in establishing his claim, on the basis of the evidence (documentary and through witnesses) submitted to this Court?
- Has Mr. Pearson's claim lapsed as a result of time limitations found in the *Civil Code of Québec*?

ANALYSIS

1) Is the plaintiff's claim prescribed?

44 I shall deal first with the last of the issues outlined above, as a finding that Mr. Pearson's claim is prescribed would effectively put an end to his action against the defendant. Relying on *Béliveau St-Jacques* v. *Fédération des employées et employés de services publics Inc.*, [1996] 2 S.C.R. 345, counsel for the defendant argued that a claim for damages based on section 24 of the *Canadian Charter of Rights and Freedoms* is to be assimilated and treated as a civil claim. As a result, the Quebec law relating to prescription should govern, since the cause of action arose in the province of Quebec. Section 2925 of the *Civil Code of Québec*, S.Q. 1991, c. 64 provides that an action to enforce a personal right is prescribed by three years; even assuming that Mr. Pearson was not aware of the facts that could have given rise to the beginning of the limitation period before the 16th of November 1994, during the second entrapment hearing (in the course of which he discovered material that he pretends to prove his claim), his action was long prescribed when commenced in this Court in 1999.

45 Mr. Pearson, on the other hand, has several prongs to his argument on this issue. First, he alleges that provincial time limitations (or, for that matter, time limitations found in federal statutes) cannot apply to bar his claim as it is grounded in the Charter. He also argued, alternatively, that the breach of his rights is ongoing and that the continuing disclosure of documents prevents the limitation period from commencing. Finally, he claims that his cause of action does not arise only in one province and should therefore be prescribed by six years, pursuant to s. 39(2) of the *Federal Courts Act*.

46 There has been much debate around this issue as to whether limitation periods found in provincial statutes apply to Charter-based claims, both among academics and in the various courts of the country. My colleague Prothonotary Aronovitch has thoroughly canvassed the case law on this question in her reasons for denying the motion to strike brought by the defendant ([2003] F.C.J. No. 1329, 2003 FC 1058). And the Supreme Court of Canada has not yet ruled explicitly on this question.

47 The starting point of a discussion around this issue has to be the decision of the Supreme Court of Canada in *R.* v. *Mills*, [1986] 1 S.C.R. 863. In that case, the Court determined that, in appropriate circumstances, damages could be an appropriate remedy. Commenting on what constitutes a court of competent jurisdiction for the purposes of section 24(1) of the *Charter*, Justices Lamer (in dissent), La Forest and McIntyre (for the majority) agreed that the Charter was

not adopted in a vacuum, and "was not intended to turn the Canadian legal system upside down", to use the words of Justice McIntyre (at para. 263). As Justice La Forest aptly put it:

> ...I am sympathetic to the view that Charter remedies should, in general, be accorded within the normal procedural context in which an issue arises. I do not believe s. 24 of the Charter requires the wholesale invention of a parallel system for the administration of Charter rights over and above the machinery already available for the administration of justice.
>
> (Para. 294. See also, to the same effect, Justice McIntyre at para. 268)

48 It is also well established that the award of damages, both compensatory and punitive, is a remedy available to an individual whose rights have been infringed by the state. Justice Lamer hinted at this possibility for the first time in his dissent in *R.* v. *Mills*, above (at para. 242). He came back to this issue in *Nelles* v. *Ontario*, [1989] 2 S.C.R. 170; in that case, Justice Lamer explicitly recognized the possibility of awarding damages in discussing the alternative remedies that might be available to a victim of malicious prosecution. If there were any remaining doubts on this issue, they were finally put to rest in *MacDonald Inc.* v. *Canada (A.G.)*, [1994] 1 S.C.R. 311. Writing for a unanimous court, Justices Sopinka and Cory stated at p. 342 that "[t]his Court has on several occasions accepted the principle that damages may be awarded for a breach of Charter rights".

49 Despite this clear pronouncement to the effect that damages can be a remedy for a Charter breach, there have been very few cases where such damages have been awarded. As a result, it is not yet entirely clear on what legal basis such damages rest. In most cases where damages have been awarded, there has been no real discussion of the underlying principles. For example, there has been much debate as to whether section 24(1) of the Canadian Charter creates a separate and independent right to damages, or whether the infringement of a guaranteed right must be equated to the wrongful behaviour requirement allowing the victim to claim damages according to the general legal regime of civil liability. Similarly, there has been disagreement about the need for bad faith on the part of the government actor before damages can be awarded. I shall revert to these issues later on in these reasons.

50 But whatever the answer to these questions, there is a clear consensus that an award of damages contingent on a Charter violation must take place within the general legal regime of the province where the cause of action (or the alleged violation of a fundamental right) has taken place. This is to say that the rules governing evidence, procedure and jurisdiction related to this field of the law must generally find application, since the Charter itself does not provide a parallel architecture to that found in the various provincial and federal statutory schemes.

51 This is indeed the position followed by most courts of the country with respect to time limitations related to claims for damages resulting from a violation of a Charter right: *McGillivary* v. *New Brunswick*,(1994), 111 D.L.R.(4th) 483 (N.B. C.A.); *Nagy* v. *Phillips* (1996), 137

D.L.R.(4th) 715 (Alta C.A.); *Gauthier* v. *Lac Brome (Ville)*, [1995] A.Q. no 762 (QL); *Gauthier* v. *Lambert*, [1988] R.D.J. 14 (Qué. C.A.); [1988] A.Q. no 56 (QL), application for leave to appeal to the Supreme Court denied on May 26, 1988, [1988] S.C.C.A. No. 138. In this last quoted decision, the Court endorsed the reasoning of the Superior Court judge, who was quite explicit as to the application of time limitation in the context of a claim for damages arising from a most vicious violation of the plaintiff's rights:

> La Charte constitutionnelle de 1982 n'a pas fait disparaître toutes les dispositions limitatives des droits des individus, non plus que les notions de prescription. Les recours exercés en vertu de l'article 1053 du code civil qui couvrait déjà, avant l'avènement de la Charte constitutionnelle, la majeure partie de l'éventail des recours possibles par les victimes de préjudice de quelque nature qu'ils soient, mais impliquant la notion de faute, continuent d'être astreints aux courtes prescriptions des articles 2260 et suivants du Code civil et de la Charte n'a rien fait pour modifier ces dispositions du Code civil qui empêchent l'exercice d'un recours après un an, deux ans, trois ans ou cinq ans, lesdits recours étant éteints par le seul écoulement du temps et cette prescription étant opposable d'office, tel que le stipule la loi.
>
> S'il fallait en croire le demandeur, la Charte constitutionnelle aurait ni plus ni moins aboli ces prescriptions sans pour autant en imposer de nouvelles.
>
> La Cour ne peut souscrire à ces vues et, conséquemment, doit appliquer telles qu'elles existent les dispositions de l'article 586 de la Loi sur les cités et villes.

52 The Federal Court of Appeal followed the same logic in *St-Onge* v. *Canada*, [2000] F.C.J. No. 1523 (QL). In endorsing the decision reached by Justice Hugessen at trial, it must be taken to accept his views that "a prescription deadline which generally applies to all actions of the same nature and does not in any way discriminate against certain groups of litigants does not in any way contravene the Charter" ([1999] F.C.J. No. 1842 (QL), at para. 5). Indeed, the only discordant note was sounded by the Ontario Court of Appeal in *Prete* v. *Ontario*, (1993) 16 O.R.(3d) 161. Much concerned by the possibility for the state to insulate itself from Charter claims, thereby emasculating the remedy section of the Charter, the Court came to the conclusion that statutes granting immunity and those imposing limitation periods had much in common. It therefore found that a limitation period of six months should be read as not applying to relief claimed under s. 24(1) of the Charter. Relying on comments made by Justice Lamer, in *Nelles*, above, to the effect that Crown attorneys cannot benefit from an absolute immunity as this would be a threat to the individual rights of citizens who have been wrongly and maliciously prosecuted, Justice Carthy spelled out in the following paragraph what appears to be the rationale for allowing the plaintiff to sue the government for relief despite the expiry of the six month limitation period found in the *Public*

Authorities Protection Act, R.S.O. 1980, c. 393:

> In *M.(K.)* v. *M.(H.)* [...], [1992] 3 S.C.R. 6, La Forest J. describes the historic purposes of limitation periods as providing a time when prospective defendants can be secure that they will not be held to account for ancient obligations, foreclosing claims based on stale evidence, permitting destruction of documents, and assuring that plaintiffs do not sleep on their rights. Those purposes are best served, when Charter remedies are sought, by the court refusing relief on the basis of laches, in appropriate cases. The purpose of the Charter, in so far as it controls excesses by governments, is not at all served by permitting those same governments to decide when they would like to be free of those controls and put their houses in order without further threat of complaint.

53 Even if that decision has not been followed, it is fair to say that the concerns as to the possibility for a government to immunize itself from the Charter have been echoed in subsequent cases. Referring explicitly to that decision, Justice Hugessen stated in *Duplessis* v. *The Queen* [2004] F.C.J. No. 226, 2004 FC 154 that he had "serious doubt" that a government could insulate itself from a Charter based claim by adopting legislation that would be applicable only to its servants, and creating "short draconian prescriptive periods" that would be a mere fraction of what would apply to any other claim (see also, in the same vein, *Ravndahl* v. *Saskatchewan*,2004 SKQB 260 [2004] S.J. No. 374 (Sask. Q.B.)).

54 I believe this flexible approach is not without merit, as it balances out the need to ensure that Charter rights will not be emptied through lack of proper means of enforcement with the acknowledgement that the absence of procedural provisions and rules governing prescriptions must be taken to signal that the civil remedies fashioned by the courts must ordinarily be fitted within the existing systems of civil law. As a result, it will be for the person seeking damages under section 24(1) of the Charter to prove that a particular time limitation deprives him or her of an appropriate and just remedy; only then will the burden shift on the government to justify the limitation on the right to sue the state for damages as a result of its actions. In other words, prescriptions found in provincial and federal statutes are not, in and of themselves, antithetical to section 24(1) of the Charter. The purposes of limitation periods are as valid in the context of a Charter claim as they are for any other type of claims; a claimant should not be entitled to sue the Crown indefinitely just because the basis of his complaint is the violation of a constitutional right. As long as the government is not trying to do indirectly what it could not do directly, I see no reason not to apply a limitation period.

55 In this particular case, the plaintiff has not even attempted to show that the applicable limitation period is objectionable and tantamount to a deprivation of his right to obtain an appropriate and just remedy. Nor do I think such an argument could have succeeded. Section 32 of the *Crown Liability and Proceedings Act*, R.S. 1985, c. C-50, reads as follows:

> 32. Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.

56 A similar referential provision appears in the *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 39. The cause of action having arisen in Montréal, we must therefore turn to Book Eight of the Quebec *Civil Code*, which deals with prescription. Article 2877 states clearly that the State is governed by the same rules of prescription as any other person. In the case of an action to enforce a personal right (which is clearly the case here), the prescriptive period is set by article 2925 at three years. On the face of it, this time limitation does not appear to be objectionable. Not only is the time period not overly short, but it does not put the state on a more favorable footing than the ordinary citizen. And the same could be said, incidentally, of the prescription regime that predated the Quebec *Civil Code* and that is found in the *Civil Code of Lower Canada*. Article 2261, which was in force at the time the alleged violations took place, held that an action for damages resulting from offences and quasi-offences was prescribed by two years.

57 In the absence of any argument or evidence to the contrary, I am unable to conclude that these limitation periods should be held inapplicable to a claim based on section 24(1) of the Charter. They bear none of the deficiencies that brought the Court of Appeal of Ontario to hold in *Prete* that a limitation period should not apply.

58 As for Mr. Pearson's other arguments with respect to prescription, I do not think that they have much merit. Article 2880 of the Quebec Civil Code states that "the day on which the right of action arises fixes the beginning of the period of extinctive prescription", thus taking care of his submission relating to the continuing nature of the alleged offence committed by the defendant. The same goes as regards his submission that the prescription period should be six years since his cause of action arose otherwise than in a province, pursuant to s. 39(2) of the *Federal Courts Act*. The fact that some police officers came from Ottawa in the course of the investigation that lead to his arrest, that the head office of the R.C.M.P. is similarly situated in Ottawa or that many of the documents that he requested were kept in Ottawa is immaterial to the *situs* of the cause of action. The transactions for which Mr. Pearson was found guilty, as well as the alleged misbehaviors of Crown attorneys and police officers, all took place in Montréal. These are the grounds for his claim, or the causes of action; everything else is purely incidental and of no import in the application of s. 39 of the *Federal Courts Act*.

59 Even if I were prepared to hold that the prescription period began to run on November 1994, as the defendant was prepared to concede, it is obvious that the plaintiff was foreclosed from filing this action in 1999. The prescriptive period ended, at the latest, in November 1997. I could therefore dispose of this claim for damages on that sole ground. But in light of the uncertainty surrounding

Accordingly, in the case at the bar, I find that the decisions in the *Northway* line of cases ought to be applied and the appeal from the decision of Master Ferron should be dismissed.

An order will issue declaring that the proof of claim of GMAC against the estate of Fitz-Herbert Anthony Rose with respect to a 1989 Pontiac Sunbird motor vehicle, as filed, is a valid and subsisting claim and that GMAC's interest in the said motor vehicle has priority to the interest of the trustee in bankruptcy.

Counsel have agreed that there ought to be no order as to costs of this appeal.

Appeal dismissed.

Prete v. The Queen in right of Ontario et al.

[Indexed as: Prete v. Ontario (Attorney-General)]

Court File No. C9963

Ontario Court of Appeal, McKinlay, Carthy and Weiler JJ.A.
November 25, 1993.

Constitutional law — Charter of Rights — Enforcement of rights — Statutory limitation on liability — Plaintiff acquitted of murder seeking to sue Attorney-General, Crown counsel and police for damages as remedy under Charter — Allegation that plaintiff's right to fundamental justice infringed — Provincial legislation enacting six months limitation period for actions against persons acting in pursuance of public duty — Legislation also providing that no proceeding lies against the Crown for anything done in discharge of responsibilities of judicial nature or in execution of judicial process — Statutory limitation on actions against public officials not applicable where action based upon infringement of Charter right — Canadian Charter of Rights and Freedoms, ss. 7, 24 — Public Authorities Protection Act, R.S.O. 1980, c. 406, s. 11 — Proceedings Against the Crown Act, R.S.O. 1990, c. P.27, s. 5.

Criminal law — Prosecutor — Duty on Crown counsel — Plaintiff bringing action against Crown under Charter of Rights for damages following acquittal on charge of murder — Plaintiff originally discharged following preliminary inquiry — Prosecution proceeding following preferring of direct indictment — Plaintiff alleging in statement of claim that preferring of direct indictment arbitrary and without reasonable and probable grounds — Plaintiff alleging subsequent prosecution of direct indictment conducted maliciously and without reasonable and probable cause — Application by defendants to dismiss plaintiff's action as frivolous and vexatious dismissed — Statement of claim disclosing reasonable cause of action — Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rules 21, 25.

The plaintiff brought an action for damages as a remedy under s. 24(1) of the *Canadian Charter of Rights and Freedoms* for an infringement of his rights under s. 7 of the Charter. The plaintiff and another man had been charged with first degree murder of a person whom the plaintiff believed was having an affair

with his wife. Following a preliminary hearing the plaintiff was discharged. However, the Attorney-General preferred a direct indictment and the plaintiff was held in custody pending the trial. Approximately 18 months after the acquittal the plaintiff brought the civil action against the Attorney-General, the assistant Crown attorneys who conducted the prosecution and the police officers involved in the case. The defendants brought an application to dismiss the plaintiff's action as being limitation-barred, as statute-barred on the basis of Crown immunity, and as being frivolous and vexatious. This application was granted.

On appeal by the plaintiff, **held**, Weiler J.A. dissenting, the appeal should be allowed and the motions to dismiss the action dismissed.

Per Carthy J.A., McKinlay J.A. concurring: While s. 5(1) of the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27, makes the Crown liable in tort, s. 5(6) provides that no proceeding lies against the Crown under that section in respect of anything done by a person while discharging responsibilities of a judicial nature or responsibilities that the person has in connection with the execution of judicial process. This kind of statutory enactment cannot stand in the way of a constitutional entitlement. The remedies section of the Charter would be emasculated if the provincial government could declare itself immune. Accordingly, s. 5(6) must be construed as limited to the causes of action that are permitted against the Crown under s. 5(1) of the Act and cannot infringe upon a s. 24(1) Charter remedy. Similarly, s. 11 of the *Public Authorities Protection Act*, R.S.O. 1980, c. 406, which enacts a six-month limitation period for actions against any person for an act done in pursuance of a public duty should be read as not applying to relief claimed under s. 24(1) of the Charter. The fact that an action based upon malicious prosecution would be barred by the limitation period does not prevent the plaintiff from pursuing an alternative basis for his claim under the Charter. Finally, the plaintiff's action should not be struck out at this stage of the proceedings under Rules 21 or 25 of the Rules of Civil Procedure. The facts alleged in the statement of claim must be taken as true for the purpose of determining whether the claim discloses a reasonable cause of action. The allegation that the prosecution was conducted arbitrarily, capriciously, and without reasonable and probable grounds, may want for particulars, but if supported by evidence, clearly presents a triable issue. To the extent that the allegations rely on malice, the rules provide that malice may be alleged as a fact without pleading the circumstances from which it is to be inferred. Nor can the action be struck out as an abuse of process. It was not open to the court to strike out the action because it believes that it has no chance of success. That can only be done under Rule 20 which provides for summary judgment after delivery of the statement of defence and supported by affidavits of persons having knowledge of the contested facts. Particulars of the allegations should not be ordered.

Per Weiler J.A. dissenting: The plaintiff's action should be struck out as disclosing no cause of action and as being frivolous or vexatious or an abuse of process. In considering whether the statement of claim discloses a cause of action, no evidence is admissible. However, to succeed in this action the plaintiff would have to show lack of reasonable and probable cause to proceed against him. The mere preferring of a direct indictment against an accused, notwithstanding that he has been discharged following a preliminary inquiry, does not result in a deprivation of fundamental justice contrary to s. 7 of the Charter. Whether or not there was reasonable and probable cause for the laying of the charge or its prosecution is a question of law. No objection was taken to the original decision to prosecute on the basis of lack of reasonable and probable grounds. There was no allegation for example that following the preliminary inquiry the defendants

discovered exculpatory evidence which they withheld. Nor was it alleged that any such discovery was made at trial. No facts other than a conclusion of law was alleged with respect to a necessary element of the action. The statement of claim does not plead facts, which if true, would satisfy a necessary element of the cause of action.

Further, the action cannot possibly succeed and is, therefore, an abuse of process. For the purpose of considering this issue evidence is admissible. The evidence adduced at the preliminary inquiry disclosed reasonable and probable grounds for the charge of first degree murder. The evidence before the judge conducting the preliminary inquiry satisfied the test for committing the plaintiff for trial on the charge of murder and the judge presiding at the preliminary inquiry erred in discharging the plaintiff. It was reasonable for the Crown to prefer the direct indictment in order to protect the Crown witnesses and to avoid delay. Full disclosure of the Crown's case had been made at the preliminary inquiry. The prosecution and trial followed as a result of the direct indictment and no facts were alleged as to why this should not have been the case. In the result, any action could not possibly succeed. An appropriate remedy in the circumstance is to dismiss the action. This was not a proper case for the court to grant leave to amend the statement of claim. The plaintiff had not brought any application at the murder trial based on s. 7 of the Charter. No explanation for his failure to do so was offered. Such circumstances go to the *bona fides* of the action and militate against the exercise of the court's discretion to grant leave to amend. Accordingly, the appeal should be dismissed.

German v. Major (1985), 20 D.L.R. (4th) 703, 34 C.C.L.T. 257, 39 Alta. L.R. (2d) 270, 62 A.R. 2, 32 A.C.W.S. (2d) 360, **distd**

Nelles v. Ontario (1989), 60 D.L.R. (4th) 609, [1989] 2 S.C.R. 170, 41 Admin. L.R. 1, 49 C.C.L.T. 217, 37 C.P.C. (2d) 1, 71 C.R. (3d) 358, 42 C.R.R. 1, 35 O.A.C. 161, 98 N.R. 321, 69 O.R. (2d) 448*n*, 16 A.C.W.S. (3d) 318; *M. (K.) v. M. (H.)* (1992), 96 D.L.R. (4th) 289, [1992] 3 S.C.R. 6, 14 C.C.L.T. (2d) 1, 57 O.A.C. 321, 142 N.R. 321, 36 A.C.W.S. (3d) 466, **consd**

Other cases referred to

R. v. Mills (1986), 26 C.C.C. (3d) 481, 29 D.L.R. (4th) 161, [1986] 1 S.C.R. 863, 52 C.R. (3d) 1, 21 C.R.R. 76, 67 N.R. 241, 58 O.R. (2d) 543*n*; *Foy v. Foy* (1978), 88 D.L.R. (3d) 761, 9 C.P.C. 141, 3 R.F.L. (2d) 286, 20 O.R. (2d) 747; *Savarin Ltd. v. Fasken & Calvin* (1990), 19 A.C.W.S. (3d) 1378; affd 38 A.C.W.S. (3d) 1013; leave to appeal to S.C.C. refused 67 O.A.C. 160*n*, 160 N.R. 320*n*; *Zurich Investments Ltd. v. Excelsior Life Insurance Co.* (1988), 28 C.P.C. (2d) 264, 59 Alta. L.R. (2d) 209, 89 A.R. 14, 10 A.C.W.S. (3d) 161; *R. v. Ertel* (1987), 35 C.C.C. (3d) 398, 58 C.R. (3d) 252, 30 C.R.R. 209 [leave to appeal to S.C.C. refused 36 C.C.C. (3d) vii, 86 N.R. 266*n*]; *Williams v. Webb* (1961), 130 C.C.C. 25, 27 D.L.R. (2d) 465, [1961] O.R. 353; *Caterpillar Tractor Co. v. Babcock Allatt Ltd.* (1982), 67 C.P.R. (2d) 135, [1983] 1 F.C. 487; affd 72 C.P.R. (2d) 286*n*; *Temilini v. Ontario Provincial Police (Commissioner)* (1990), 73 O.R. (2d) 664, 38 O.A.C. 271, 21 A.C.W.S. (3d) 348; *Garton v. Whelan* (1984), 14 C.C.C. (3d) 449, 47 O.R. (2d) 672, 12 W.C.B. 436; *United States of America v. Shephard* (1976), 30 C.C.C. (2d) 424, 70 D.L.R. (3d) 136, [1977] 2 S.C.R. 1067, 34 C.R.N.S. 207, 9 N.R. 215; *R. v. Paul* (1975), 27 C.C.C. (2d) 1, 64 D.L.R. (3d) 491, [1977] 1 S.C.R. 181, 33 C.R.N.S. 328, 4 N.R. 435; *R. v. Monteleone* (1987), 35 C.C.C. (3d) 193, 41 D.L.R. (4th) 746, [1987] 2 S.C.R. 154, 59 C.R. (3d) 97, 78 N.R. 379, 61 O.R. (2d) 654*n*, 3 W.C.B. (2d) 68; *R. v. Jewitt* (1985), 21 C.C.C. (3d) 7, 20 D.L.R. (4th) 651, [1985] 2 S.C.R. 128, 47 C.R. (3d) 193, [1985] 6 W.W.R. 127, 61 N.R. 159; *R. v. Scott* (1990), 61

C.C.C. (3d) 300, [1990] 3 S.C.R. 979, 2 C.R. (4th) 153, 1 C.R.R. (2d) 82, 43 O.A.C. 277, 116 N.R. 361, 11 W.C.B. (2d) 358; *R. v. Keyowski* (1988), 40 C.C.C. (3d) 481, [1988] 1 S.C.R. 657, 62 C.R. (3d) 349, 32 C.R.R. 269, [1988] 4 W.W.R. 97, 65 Sask. R. 122, 83 N.R. 296, 4 W.C.B. (2d) 129; *R. v. Potvin* (1993), 83 C.C.C. (3d) 97, 105 D.L.R. (4th) 214, [1993] 2 S.C.R. 880, 23 C.R. (4th) 10, 16 C.R.R. (2d) 260, 155 N.R. 241, 20 W.C.B. (2d) 196; *Hodge's Case* (1838), 2 Lewin 227, 168 E.R. 1136

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 7, 15, 24(1), 32(1)(*b*)

Proceedings Against the Crown Act, R.S.O. 1980, c. 393, s. 5(1), (6) — now R.S.O. 1990, c. P.27

Public Authorities Protection Act, R.S.O. 1980, c. 406, s. 11 — now R.S.O. 1990, c. P.38, s. 7

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rules 20, 21, 21.01, 25, 25.06, 25.11

APPEAL by the plaintiff from a judgment of Carruthers J., 47 C.R.R. 307, 19 A.C.W.S. (3d) 666, dismissing his action for damages under s. 24(1) of the *Canadian Charter of Rights and Freedoms*.

P.C. Wardle and *A.K. Lokan*, for appellant, Antonio Prete.

T.C. Marshall, Q.C., and *R.E. Charney*, for respondents, The Queen in right of Ontario, Attorney-General of Ontario, Eric Libman and David Fisher.

G.S. Monteith, for respondents, William McCormack, Robert Clarke, James Crowley and Robert Montrose.

MCKINLAY J.A. concurs with CARTHY J.A.

CARTHY J.A.:—This appeal has its origins in motions by the defendants to dismiss the appellant's action as being limitation-barred, as statute-barred on the basis of Crown immunity, and as being frivolous and vexatious. Alternatively, particulars were sought. The appellant was found not guilty of first degree murder by a jury and 18 months later commenced this action for damages as a remedy under s. 24(1) of the *Canadian Charter of Rights and Freedoms* for an infringement of the appellant's rights under s. 7 of the Charter. In particular, the appellant alleges that the Attorney-General of Ontario arbitrarily, capriciously and without reasonable grounds preferred a direct indictment of a charge of murder against him, that the defendants Libman and Fisher, as Crown attorneys, advised and recommended this action, and that they were assisted and encouraged by the police officer defendants Clarke, Crowley and Montrose. Police Chief McCormack is named a defendant as the person responsible for the conduct of the police officers. The statement of claim also complains that the prosecution

of the indictment was conducted maliciously, breaching the appellant's rights under s. 7 of the Charter and that the appellant was discriminated against on the basis of his ethnic origin contrary to s. 15 of the Charter.

After hearing argument on all points, Carruthers J. found it necessary to deal with only one, and dismissed the action as statute-barred by s. 11 of the *Public Authorities Protection Act*, R.S.O. 1980, c. 406, now R.S.O. 1990, c. P.38, s. 7(1).

Section 11(1) reads:

> 11(1) No action, prosecution or other proceeding lies or shall be instituted against any person for an act done in pursuance or execution or intended execution of any statutory or other public duty or authority, or in respect of any alleged neglect or default in the execution of any such duty or authority, unless it commenced within six months next after the cause of action arose, or, in case of continuance of injury or damage, within six months after the ceasing thereof.

A short excerpt from the reasons of Carruthers J., released February 21, 1990 [47 C.R.R. 307, 19 A.C.W.S. (3d) 666], indicates the basis of his decision. At p. 6 [p. 311 C.R.R.] he says:

> For present purposes, it is my view that there is no difference between what the plaintiff describes his cause of action to be, that is, a breach of provisions of the *Charter*, and one for malicious prosecution. And, in any event, regardless of how one labels the cause of action, it is, as counsel for the plaintiff concedes, based upon "an act done in pursuance or execution or intended execution of any statutory or other public duty or authority" on the part of each and every defendant.
>
> It has been recognized by the Supreme Court of Canada that in dealing with the *Charter* the existing framework within which justice is to be administered, whether predominantly provincial in nature, is to be recognized. In the absence of some constitutionally valid provision, either in the *Charter* or elsewhere, I cannot accept that a remedy sought under s. 24(1) of the *Charter* can be pursued on a timeless basis.

The comprehensive issue before this court is whether s. 11 of the *Public Authorities Protection Act* has any application to an action in which a remedy under s. 24(1) of the Charter is sought. If s. 11 does not stand in the way of the action, the court must consider whether the Crown is protected from suit by s. 5(6) of the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27. For reasons which will become clear as the discussion develops I will deal first with the *Proceedings Against the Crown Act*. Section 5(1) and (6) of that Act read as follows:

> 5(1) Except as otherwise provided in this Act, and despite section 11 of the *Interpretation Act*, the Crown is subject to all liabilities in tort to which, if it were a person of full age and capacity, it would be subject,
>
> (*a*) in respect of a tort committed by any of its servants or agents;

(*b*) in respect of a breach of the duties that one owes to one's servants or agents by reason of being their employer;

(*c*) in respect of any breach of the duties attaching to the ownership, occupation, possession or control of property; and

(*d*) under any statute, or under any regulation or by-law made or passed under the authority of any statute.

. . . . .

(6) No proceeding lies against the Crown under this section in respect of anything done or omitted to be done by a person while discharging or purporting to discharge responsibilities of a judicial nature vested in the person or responsibilities that the person has in connection with the execution of judicial process.

My analysis commences with the reasons in *Nelles v. Ontario* (1989), 60 D.L.R. (4th) 609, [1989] 2 S.C.R. 170, 41 Admin. L.R. 1 (S.C.C.). In that case the plaintiff claimed damages from the Crown, the Attorney-General, and some police officers for the common law tort of malicious prosecution with respect to murder charges. The incident pre-dated the Charter and the issue before the court was whether the Crown and the Attorney-General had immunity from suit. It was held that the Crown does enjoy immunity by reason of s. 5(6) of the *Proceedings Against the Crown Act*, R.S.O. 1980, c. 393, now R.S.O. 1990, c. P.27, but the court was careful to observe that the constitutionality of that section remained "an open question" (see *per* Lamer J. at p. 628). A majority of the court held that the Attorney-General was not protected by that section and enjoyed no immunity at common law.

The importance of *Nelles*, *supra*, to the present consideration of statutory limitations to be imposed on a Charter remedy is that Lamer J., writing for three of the six judges who participated in the judgment, placed heavy emphasis upon the availability of Charter remedies in his analysis of whether there is immunity from a common law cause of action. He states at pp. 641-2:

> As I have stated earlier, the plaintiff in a malicious prosecution suit bears a formidable burden of proof and in those cases where a case can be made out, the plaintiff's Charter rights may have been infringed as well. Granting an absolute immunity to prosecutors is akin to granting a license to subvert individual rights. Not only does absolute immunity negate a private right of action, but in addition, it seems to me, it may be that it would effectively bar the seeking of a remedy pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms*. It seems clear that in using his office to maliciously prosecute an accused, the prosecutor would be depriving an individual of the right to liberty and security of the person in a manner that does not accord with the principles of fundamental justice. Such an individual would normally have the right under s. 24(1) of the Charter to apply to a court of competent jurisdiction to obtain a remedy that the court considers appropriate and just if he can establish that one of his Charter rights has been infringed. The

> question arises then, whether s. 24(1) of the Charter confers a right to an individual to seek a remedy from a competent court. In my view it does. When a person can demonstrate that one of his Charter rights has been infringed, access to a court of competent jurisdiction to seek a remedy is essential for the vindication of a constitutional wrong. To create a right without a remedy is antithetical to one of the purposes of the Charter which surely is to allow courts to fashion remedies when constitutional infringements occur. Whether or not a common law or statutory rule can constitutionally have the effect of excluding the courts from granting the just and appropriate remedy, their most meaningful function under the Charter, does not have to be decided in this appeal. It is, in any case, clear that such a result is undesirable and provides a compelling underlying reason for finding that the common law itself does not mandate absolute immunity.

and at pp. 643-4:

> And as has already been noted, it is quite discomforting to realize that the existence of absolute immunity may bar a person whose Charter rights have been infringed from applying to a competent court for a just and appropriate remedy in the form of damages.
>
> III. CONCLUSION
>
> A review of the authorities on the issue of prosecutorial immunity reveals that the matter ultimately boils down to a question of policy. For the reasons I have stated above I am of the view that absolute immunity for the Attorney-General and his agents, the Crown Attorneys, is not justified in the interests of public policy. We must be mindful that an absolute immunity has the effect of negating a private right of action and in some cases may bar a remedy under the Charter. As such, the existence of absolute immunity is threat to the individual rights of citizens who have been wrongly and maliciously prosecuted.

The reasons of Lamer J., standing alone, are strongly persuasive that a statutory enactment cannot stand in the way of a constitutional entitlement. Section 32(1)(*b*) of the Charter provides that the Charter applies to the legislature and government of each province. The remedy section of the Charter would be emasculated if the provincial government, as one of the very powers the Charter seeks to control, could declare itself immune.

Therefore, s. 5(6) of the *Proceedings Against the Crown Act*, must be construed as limited to the causes of action that are permitted against the Crown under s. 5(1) of that Act, and cannot infringe upon a s. 24(1) Charter remedy.

This discussion of the application of s. 5(6) of the *Proceedings Against the Crown Act* to the Charter may appear to have been a digression from a consideration of the findings of Carruthers J. as to the statutory limitation period, but it is really a step along the way. The next issue to consider is, if absolute immunity from Charter relief cannot be afforded by less than constitutional enactments, can immunity be imposed after a period of time as set out in s. 11 of the *Public Authorities Protection Act*?

It is argued that the absence of a limitation period in the Charter implies that, in actions seeking a Charter remedy, the provincial and federal limitation statutes would be applied along with the network of procedural rules governing all actions. In *R. v. Mills* (1986), 26 C.C.C. (3d) 481 at p. 492, 29 D.L.R. (4th) 161 at p. 172, [1986] 1 S.C.R. 863 (S.C.C.), McIntyre J. said:

> The task of the court will simply be to fit the application into the existing jurisdictional scheme of the courts in an effort to provide a direct remedy, as contemplated in s. 24(1). It is important, in my view, that this be borne in mind. The absence of jurisdictional provisions and directions in the Charter confirms the view that the Charter was not intended to turn the Canadian legal system upside down. What is required rather is that it be fitted into the existing scheme of Canadian legal procedure. There is no need for special procedures and rules to give it full and adequate effect.

The argument of the respondents proceeds to point out that many of our rules of practice permit the court to dismiss a claim for failure to comply with time requirements and the effect of a limitation period is simply a statutory provision to the same effect. It is true that in conflict of law jurisprudence, limitation periods have been considered procedural rather than substantive. However, in the context of the Charter, limitation periods are very different from the rules of procedure which effect a dismissal for failure to meet time requirements. First and foremost, the rules are subject to the discretion of the court, whereas the statute is not. In practice, a meritorious claim will be permitted to proceed, perhaps on terms, despite a breach of the rules. In the few cases where relief is denied, it is being denied by a court of competent jurisdiction to deal with s. 24(1) relief. The court is simply saying that in the circumstances presented this is not a case for a hearing and s. 24(1) relief is denied.

In *M.(K.) v. M.(H.)* (1992), 96 D.L.R. (4th) 289 at pp. 301-2, [1992] 3 S.C.R. 6, 14 C.C.L.T. (2d) 1 (S.C.C.), La Forest J. describes the historic purposes of limitation periods as providing a time when prospective defendants can be secure that they will not be held to account for ancient obligations, foreclosing claims based on stale evidence, permitting destruction of documents, and assuring that plaintiffs do not sleep on their rights. Those purposes are best served, when Charter remedies are sought, by the court refusing relief on the basis of laches, in appropriate cases. The purpose of the Charter, in so far as it controls excesses by governments, is not at all served by permitting those same governments to decide when they would like to be free of those controls and put their houses in order without further threat of complaint.

Put in this Charter context, I see no valid comparison between procedural rules of court and statutory limitation periods. I do see identity between statutes granting immunity and those imposing limitation periods after the time when the limitation arises. Having found that immunity is not available under the *Proceedings Against the Crown Act* from a claim for Charter remedy, it, therefore, follows that, in my opinion, s. 11 of the *Public Authorities Protection Act* should be read as not applying to relief claimed under s. 24(1) of the Charter.

Nor does it avail the respondents to argue that the claim asserted is one for the tort of malicious prosecution hidden in the clothing of the Charter. *M.(K.) v. M.(H.)*, *supra*, is clear authority for the appellant's right to pursue a claim for relief which is not limitation barred despite the fact that an alternative head for the same claim is statute barred.

It is now necessary to deal with the alternative argument of the respondents that the statement of claim should be struck under Rule 21 or Rule 25 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194. The factual information and judicial decisions in the earlier criminal proceedings have been fully canvassed in the reasons of Weiler J.A. and I will not repeat them herein. I do not agree with her disposition of this issue because, in my view, at this stage of the proceedings, the facts alleged in the statement of claim should be taken as true for the purpose of determining whether the claim discloses a reasonable cause of action. To do otherwise is to effectively conduct a summary judgment proceeding under Rule 20 without having the sworn evidence of the parties to this litigation as a basis for determining whether there is a genuine issue for trial.

The core paragraphs in the statement of claim read:

> 17. At material times the prosecution of the direct indictment against the plaintiff was conducted by the defendants Libman and Fisher, assisted and encouraged by the defendants Clarke, Crowley and Montrose.
>
> 18. The preferral of the direct indictment was made arbitrarily, capriciously and without reasonable and probable grounds and therefore constituted an abuse of process and an infringement of the plaintiff's rights under Section 7 of the *Canadian Charter of Rights and Freedoms.*
>
> 19. The subsequent prosecution of the direct indictment was conducted maliciously and without reasonable and probable cause and therefore also breached the plaintiff's rights under Section 7 of the *Charter*.
>
> 20. Furthermore, in preferring the indictment and subsequently prosecuting the plaintiff the defendants discriminated against the plaintiff on the basis of his ethnic origin and therefore breached his rights under Section 15 of the *Charter*.

Not much attention was paid to para. 20 in the argument and, for my purposes, it can be ignored. One of the arguments put by the respondents is that the earlier judicial determinations in the criminal proceedings represent *res judicata* against the appellant of the issues raised in paras. 17 to 19 and that, as such, they can be looked at to determine if it is plain and obvious that the action cannot succeed. There is more than one reason that this argument cannot prevail. For one, *res judicata* is an appropriate pleading by way of defence but is not a basis for striking out a pleading which otherwise describes a proper cause of action. More fundamentally, the earlier determinations involved very different questions than that presented in this statement of claim. In one instance it was bail pending trial which involves much more than the likelihood of success in the prosecution of the charge. In the other, it was a question of whether the evidence against the co-accused at trial was sufficient to be put to the jury for a verdict. The fact that the appellant stood by and did not make such an application on his own behalf may be very telling evidence against him at a trial of the present action, but is not an issue estoppel as to all of the elements of the allegations in paras. 17 to 19 of the statement of claim. To the extent that these allegations may be likened to a claim of malicious prosecution, they must be treated as involving both subjective and objective elements (see *Nelles*, *supra*, *per* Lamer J. at p. 639). If the respondents knew that the appellant was not guilty and withheld evidence that was exculpatory, the fact that they presented evidence giving the appearance of reasonable and probable grounds for the prosecution would not assist them in this action.

In *Nelles*, *supra*, Lamer J. emphasized the difficulty facing a plaintiff seeking to meet the burden of establishing, in effect, that the Attorney-General or Crown Attorney perpetrated a fraud on the process of criminal justice. Lamer J. put aside concerns expressed by other courts that such actions have an intimidating effect upon those who administer justice, observing that there are safeguards in the rules for the early disposition of spurious claims. It is easy to infer from these comments that the court should, at the earliest stage of an action of this type, assess the reality of success and eliminate those cases that lack promise of success. In the present case, I have no hesitation in concluding that, on the basis of the entire record presented to us, the action is not likely to succeed. In fact, there is nothing to indicate that it will succeed, except the allegations in the pleading. But that is a very significant exception, and we should not depart from the rule that the

pleadings must be taken as factually true simply because the allegations are serious and the case appears hopeless.

Do the pleadings disclose a reasonable cause of action? To the extent that the allegations rely on malice, rule 25.06(8) provides that this may be alleged as a fact without pleading the circumstances from which it is to be inferred. This means that a court cannot treat this as a bald allegation and must assume that there is substance behind the allegation for purposes of testing the pleading. The allegation that the prosecution was conducted arbitrarily, capriciously, and without reasonable and probable grounds, may want for particulars, but if supported by evidence, clearly presents a triable issue. I would, therefore, not strike this pleading under Rule 21.

Weiler J.A. has concluded that rule 25.11(*c*) which provides for striking out a pleading which is "an abuse of the process of the court" permits the court to look beyond the pleading and determine if the action has any chance of success. She finds support for that approach in *German v. Major* (1985), 20 D.L.R. (4th) 703, 34 C.C.L.T. 257, 39 Alta. L.R. (2d) 270 (Alta. C.A.). It is my opinion that you cannot escape Rule 21 in this case by looking at rule 25.11(*c*) because if you consider this statement of claim to be an abuse of the process of the court it can only be because it discloses no reasonable cause of action. If that is the true complaint then it must be tested under the specific language of rule 21.01(1)(*b*) and, as stipulated in that same rule, no evidence is admissible on the motion.

Further, the rules were different in Alberta when *German v. Major*, *supra*, was decided, as noted by Kerans J.A. at p. 706 of the reasons:

> There are few reported decisions where hopeless-fact cases are struck. A plaintiff could and perhaps should move for summary judgment if faced with such a defence; in Alberta, however, defendant cannot. He must rely on Rule 129.

In Ontario we have Rule 20 providing for summary judgment after delivery of the statement of defence and supported by affidavits of persons having knowledge of the contested facts. Judgment may be granted against the plaintiff if it is demonstrated that there is no genuine issue for trial. There is no difference that I can see between the Rule 20 test of no genuine issue for trial and the test suggested by Weiler J.A. of "no chance of success" or "plain and obvious that the action cannot succeed". Applying those tests under Rule 21 to a pleading undermines the purpose of Rule 20, and also avoids the safeguards under Rule 20 of having sworn testimony from both sides to assure the court that there truly is no

issue for trial. In the present case that would include testimony from the defence to demonstrate that the defendants had no knowledge which could constitute a basis for an allegation that they improperly advanced the prosecution. I would, therefore, permit the pleading to stand.

The respondents asked that if the pleading is to stand, that particulars be ordered of the allegations in paras. 17 to 20. As stated earlier, rule 25.06(8) provides that malice, intent or knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred. That being so, the pleading as it stands can be taken as embracing the circumstance of the Crown holding back exculpatory evidence, which would feed the other allegations. Particulars of para. 20 have been given and it is my view that the rule permits the other two paragraphs to stand. In any event, there would not be much purpose in an order for particulars because if there is any substance in the appellant's claim it will come from production and discovery as to the subjective knowledge of the respondents and is thus not available to the appellant at this time.

I would, therefore, set aside the two orders of Carruthers J. of February 21, 1990, and in their place order that the two motions before Carruthers J. be dismissed without costs. Carruthers J. made no order as to costs in dismissing the action and reciprocal disposition seems appropriate. The appellant shall have his costs of the appeal.

WEILER J.A. (dissenting):—

I BACKGROUND

Approximately 16 months after the appellant and his co-accused Turchiaro were acquitted of the charge of first degree murder by a jury, the appellant gave notice of his claim for damages for the alleged violation of his rights pursuant to ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*. The respondents, who are alleged to have violated the appellant's rights, are William McCormack, Chief of Police of the Metropolitan Toronto Police Force, Crowley, Montrose and Clarke, police officers with the Metropolitan Toronto Police Force (the "police defendants") and Libman and Fisher, assistant Crown attorneys appointed by the Lieutenant-Governor in Council (the "prosecutors"). In addition, Her Majesty the Queen in right of Ontario and the Attorney-General of Ontario have been named as defendants.

Carruthers J. struck the appellant's statement of claim as being statute barred due to the application of s. 7 of the *Public Authorities Protection Act*, R.S.O. 1990, c. P.38 (the "Act"), which

has a six-month limitation period [47 C.R.R. 307, 19 A.C.W.S. (3d) 666]. For the reasons given by Carthy J.A., I agree that the respondent is not barred from proceeding with a claim for a Charter remedy.

II THE SECOND ISSUE

In view of his conclusions that the action was statute barred, Carruthers J. did not deal with the second issue raised by the respondents, namely, that the statement of claim should be struck: (a) because it disclosed no reasonable cause of action, and (b) because it is plain and obvious that the action cannot succeed. In the alternative, the respondents requested particulars of the allegations in paras. 18, 19 and 20 of the statement of claim.

III RELEVANT PORTIONS OF STATEMENT OF CLAIM

The relevant portions of the statement of claim are as follows:

> 18. The preferral of the direct indictment was made arbitrarily, capriciously and *without reasonable and probable grounds* and therefore constituted an abuse of process and an infringement of the plaintiff's rights under section 7 of the *Canadian Charter of Rights and Freedoms.*
>
> 19. The subsequent prosecution of the direct indictment was conducted maliciously and *without reasonable and probable cause* and therefore also breached the plaintiff's rights under Section 7 of the *Charter*.
>
> 20. Furthermore, in preferring the indictment and subsequently prosecuting the plaintiff the defendants discriminated against the plaintiff on the basis of his ethnic origin and therefore breached his rights under Section 15 of the *Charter*.
>
> 21. By reason of the preferral and prosecution of the direct indictment, the plaintiff was imprisoned for a period of approximately 13 months, was unable to work or to support his family, suffered mental and bodily pain and anguish, and was also greatly injured in his credit, character and reputation, and has thereby suffered damage. [Emphasis mine.]

IV RELEVANT PORTIONS OF RULES AND COMMENTARY

For ease of reference, the relevant portions of rules 21.01 and 25.11 are reproduced below:

> 21.01(1) A party may move before a judge,
>
> . . . . .
>
> (*b*) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,
>
> and the judge may make an order or grant judgment accordingly.
>
> (2) No evidence is admissible on a motion,
>
> . . . . .
>
> (*b*) under clause (1)(*b*).
>
> (3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,
>
> . . . . .

(*d*) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

and the judge may make an order or grant judgment accordingly.

. . . . . .

25.11 The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

(*a*) may prejudice or delay the fair trial of the action;

(*b*) is scandalous, frivolous or vexatious; or

(*c*) is an abuse of the process of the court.

In a motion to strike out a pleading on the basis that it discloses no reasonable cause of action, no evidence is admissible, since the only issue is the sufficiency in law of the pleading attacked. The facts alleged in the statement of claim must be taken as proved. The transcripts of the prior proceedings are therefore irrelevant and cannot be relied upon by the respondents in support of the relief sought under this part of the rule. The test pursuant to rule 21.01(1)(*b*) is, assuming that the facts alleged in the claim are true, do they disclose a cause of action known to law?

In a motion for judgment by the defence to dismiss the action or have it stayed, or to strike the pleadings as being frivolous, vexatious or an abuse of process, evidence is admissible. Here, the test is, is it plain and obvious that the action cannot succeed?

Frequently, both aspects of the rule are considered together, without differentiation. In such circumstances, no evidence is considered and the facts pleaded are taken as true. It has happened, however, that a court has proceeded to consider the matter solely on the basis that the action could not possibly succeed and is, therefore, an abuse of process. After considering the evidence, it has struck the claim: see, for example, *Foy v. Foy* (1978), 88 D.L.R. (3d) 761, 9 C.P.C. 141, 20 O.R. (2d) 747 (Ont. C.A.); *German v. Major* (1985), 20 D.L.R. (4th) 703, 34 C.C.L.T. 257, 39 Alta. L.R. (2d) 270 (Alta. C.A.); *Savarin Ltd. v. Fasken & Calvin* (Ont. Ct. (Gen. Div.)), March 21, 1990 [summarized 19 A.C.W.S. (3d) 1378]; affirmed (Ont. C.A.), March 1, 1993 (unreported) [summarized 38 A.C.W.S. (3d) 1013]; leave to appeal to the Supreme Court dismissed October, 1993, No. 23571 [reported 67 O.A.C. 160*n*, 160 N.R. 320*n*].

The distinction between the two branches of the rules has been succinctly set forth by Côté J.A. in *Zurich Investments Ltd. v. Excelsior Life Insurance Co.* (1988), 28 C.P.C. (2d) 264 at pp. 266-7, 59 Alta. L.R. (2d) 209, 89 A.R. 14 (Alta. C.A.):

> The Alberta Court of Appeal in *German v. Major* stressed that where the defendant suggests that there is no such cause of action known to the law, i.e., that the plaintiff's lawsuit is bad in law or the defendant has a clear legal

> defence, then the Court must assume the truth of the facts in the statement of claim. But the Court of Appeal said it was different where the defendants contend that the lawsuit is hopeless factually, and thus frivolous and vexatious. The test is whether it is "plain and obvious that the action cannot succeed" . . .

The decision in *German v. Major, supra*, was approved by the Supreme Court in *Nelles v. Ontario* (1989), 60 D.L.R. (4th) 609, [1989] 2 S.C.R. 170, 41 Admin. L.R. 1 (S.C.C.).

Accordingly, I will first deal with the question of whether the action should be struck as disclosing no cause of action, having regard only to the pleadings. Secondly, I will consider whether the defence is entitled to judgment or to have the statement of claim struck in whole or in part on the basis that the action is frivolous, vexatious or an abuse of process, having regard to the transcripts of judgments in other proceedings that have been filed.

V DOES THE STATEMENT OF CLAIM DISCLOSE A CAUSE OF ACTION?

(a) *Elements required for this cause of action: No reasonable and probable cause to proceed against the appellant*

The four necessary elements which must be proved for a plaintiff to succeed in an action for malicious prosecution, as recognized by the Supreme Court in *Nelles v. Ontario, supra, per* Lamer J. at p. 639 are:

(a) the proceedings must have been initiated by the defendant;

(b) the proceedings must have terminated in favour of the plaintiff;

(c) the absence of reasonable and probable cause;

(d) malice, or a primary purpose other than that of carrying the law into effect.

Lamer J. stated at pp. 639-40 that:

> The existence of reasonable and probable cause is a matter for the judge to decide as opposed to the jury.
>
> . . . . .
>
> To succeed in an action for malicious prosecution against the Attorney-General or Crown Attorney, the plaintiff would have to prove both the absence of reasonable and probable cause in commencing the prosecution, *and* malice in the form of a deliberate and improper use of the office of the Attorney-General or Crown Attorney . . .

Section 7 of the Charter states:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

It is not necessary for me to decide whether all four of the requirements of an action for malicious prosecution must be met in

order to bring an action for civil damages under s. 7 of the Charter. Suffice it to say that, having regard to the manner in which this action has been pleaded, lack of reasonable and probable cause to proceed against the appellant is an essential element of the cause of action.

It is helpful to recall the definition of reasonable and probable cause articulated by Lamer J. in *Nelles*, *supra*, at p. 639:

> Reasonable and probable cause has been defined as "an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed": *Hicks v. Faulkner* (1881), 8 Q.B.D. 167 at p. 171, *per* Hawkins J.
>
> This test contains both a subjective and objective element. There must be both actual belief on the part of the prosecutor and that belief must be reasonable in the circumstances.

(b) *Does the statement of claim plead the necessary facts?*

After indicating who the parties are, all that is stated in the statement of claim, prior to para. 18, is that the respondent was charged with murder; a preliminary inquiry was held; the respondent was discharged; a direct indictment was preferred; the respondent was rearrested and held in custody until acquitted. The prosecution was conducted by the prosecutors assisted by the police defendants.

There is no allegation of misconduct by the police defendants of a breach of Charter rights for any act prior to the preferral of the direct indictment. It is not alleged that the police officers embarked on the investigation of the appellant without reasonable grounds, continued the investigation of the appellant when they knew it was without merit and disclosed no evidence of criminal conduct on his part, or that, when the original information charging the appellant with murder was sworn, those doing so knew it was without merit.

The respondent asserts, in para. 18, that "the preferral of the direct indictment was made arbitrarily, capriciously and *without reasonable and probable grounds*, and therefore constituted an abuse of process and an infringement of the the plaintiff's rights under s. 7 of the *Canadian Charter of Rights and Freedoms*". No malice is alleged in this paragraph.

The mere preferment of a direct indictment against an accused, notwithstanding that he has been discharged following a preliminary inquiry, does not result in a deprivation of fundamental justice contrary to s. 7 of the Charter: *R. v. Ertel* (1987), 35 C.C.C. (3d) 398, 58 C.R. (3d) 252, 30 C.R.R. 209 (Ont. C.A.).

Paragraph 19 states that: "The subsequent prosecution of the direct indictment was conducted maliciously and *without reasonable and probable cause* and therefore also breached the plaintiff's rights under s. 7 of the *Charter*."

Whether or not there was reasonable or probable cause for the laying of the charge or its prosecution is a question of law. The malice alleged in para. 19 is a question of fact and no particulars need be pleaded. Even in deciding the question of malice, however, a jury is not at liberty to decide for themselves that there is a want of reasonable and probable cause; they must take the judge's ruling upon that issue: *Williams v. Webb* (1961), 130 C.C.C. 25 at pp. 34-5, 27 D.L.R. (2d) 465 at pp. 473-5, [1961] O.R. 353 (Ont. C.A.).

Paragraphs 18 and 19 merely repeat, rephrase, or restate part of the law relating to the tort. No other portion of the statement of claim touches upon the substance of these paragraphs.

Rule 25.06(1) and (2) states:

> 25.06(1) Every pleading shall contain a concise statement of the material facts on which the party relies for his or her claim or defence, but not the evidence by which those facts are to be proved.
>
> (2) A party may raise any point of law in a pleading, but conclusions of law may be pleaded only if the material facts supporting them are pleaded.

Subrule (2) makes it clear that stating a conclusion of law is not acceptable as a substitute for a statement of material facts. The paragraphs quoted above contain positive assertions which must be affirmatively proven by the respondent. In *Caterpillar Tractor Co. v. Babcock Allatt Ltd.* (1982), 67 C.P.R. (2d) 135, [1983] 1 F.C. 487 (F.C.T.D.); appeal to the Federal Court of Appeal dismissed 72 C.P.R. (2d) 286*n*, Addy J. stated at pp. 138-9:

> Rule 419 [of the *Federal Court Rules*] specifically provides that the court may "at any stage of an action order any pleading or anything in any pleading to be struck out" on, among other grounds, the grounds that it is frivolous or vexatious or may prejudice or embarrass a fair trial or may otherwise constitute an abuse of the court. If a party has no grounds for making an allegation in a pleading, then, there is no basis for maintaining the allegation. It is not an answer to an application to strike out, for the party to say that, if he had unrestricted discovery of his opponent, he might then be in a position to sustain the allegation.
>
> . . . . .
>
> A court proceeding is not a speculative exercise and actions are not to be launched or continued nor are defences to be allowed to stand where it is clear that the person making the allegation has no evidence to support it and where the onus of proof rests on that person.

Addy J. then proceeded to strike the impugned paragraphs on the basis that they were frivolous and vexatious and constituted an abuse of process of the court.

Inasmuch as no objection is taken to the original decision to prosecute on the basis of lack of reasonable and probable grounds, a statement of fact as to why the subsequent decision to prosecute by direct indictment is without reasonable and probable grounds, is required. It is not, for example, alleged that, after the preliminary inquiry, the respondents discovered exculpatory evidence which they withheld. Nor is it alleged that any such discovery was made at trial.

This case is readily distinguished from *Temilini v. Ontario Provincial Police (Commissioner)* (1990), 73 O.R. (2d) 664, 38 O.A.C. 271, 21 A.C.W.S. (3d) 348 (Ont. C.A.), a case relied on by the appellants. In that case, Grange J.A. found that facts were alleged which, if proved, might result in the action for malicious prosecution and conspiracy succeeding. Here, no facts other than a conclusion in law is alleged with respect to a necessary element of the action.

Paragraph 20 of the statement of claim alleges that the defendants discriminated against Mr. Prete on the basis of his ethnic origin. No separate argument was addressed in respect of this pleading. Discrimination is also a conclusion. No facts in support of the conclusion have been pleaded.

In the result, the statement of claim does not plead facts which, if true, would satisfy a necessary element of the cause of action.

VI Is the Action Frivolous, Vexatious or an Abuse of Process?

For the purposes of my decision on this aspect of the rule, I will assess the evidence before the court to determine, as a matter of law, whether preferment of the indictment and the subsequent prosecution were justified. If so, the action by the appellant is doomed to failure and cannot possibly succeed.

(a) *The evidence at the preliminary inquiry*

A summary of some of the evidence at the preliminary hearing contained in the evidence before the court is as follows.

The deceased, Aldo Citton, was shot twice in the head at close range on a dead-end street, Reading Court, in the area of the Skyline Hotel in Toronto on July 19, 1985. On the body were found expensive jewellery and $400 in cash. Near the body, on the road, the police found two .22 calibre CCI make spent cases. A car leased

by the deceased was found near Lloyd Manor Plaza. There is no dispute that a crime was committed. Nor is there any dispute that the homicide squad of the Metropolitan Toronto Police Force was the appropriate police force to investigate the crime.

The deceased, Citton, had been acting as an intermediary between the appellant and his wife, Franca Prete, when they were having matrimonial difficulties. The appellant suspected that his wife was having an affair with a man named Rizzo. It was the Crown's position that, while acting as the trusted intermediary, Citton had started an affair with Franca Prete.

On May 18, 1985, Franca Prete left the matrimonial home, leaving the appellant and their two teen-aged children at that address. At a meeting at Citton's house she told him and Frank Emmanuel, her employer's husband, of the affair with Rizzo. Emmanuel went back and told the appellant of the affair. About this time, Franca Prete hired Stanley Sherr as her matrimonial lawyer and the appellant hired Antoni Graci as his matrimonial lawyer. The appellant's position with respect to the division of the matrimonial assets was that he should keep everything and that Franca Prete was to get nothing.

On May 25, 1985, the appellant, his brother-in-law, Turchiaro, and his father-in-law, surrounded Rizzo at the Lloyd Manor Plaza and accused him of breaking up the Prete household. They said that Rizzo should pay half of the value of Prete's house, namely, $50,000. Rizzo denied the affair with Prete's wife.

Rizzo told Harrison, his superior at work, that he had been taken to a dead-end street and that he had denied the affair with Franca Prete, but had pointed to a wealthy businessman. At the preliminary hearing, Harrison testified that Rizzo told him that he, Rizzo, had pointed to Aldo Citton as the wealthy businessman who was having an affair with Franca Prete.

About two months prior to the May meeting, Citton's wife had left him. Mrs. Citton testified at the preliminary hearing that she left her husband because she suspected that he and Franca Prete were having an affair.

Howard "Mugsy" Dean testified at the preliminary inquiry that the appellant had approached him in May or June, 1985, and that he wanted Dean to kill Rizzo. Franca Prete was to be beaten if she was found with Rizzo. Then, a few weeks later, the appellant returned and told him, "I've got the wrong guy. I will look after it myself."

Mr. Sherr, the matrimonial lawyer for Franca Prete, testified at the preliminary hearing that on July 19, 1985, the day of the killing, he had a telephone conversation with the accused's matri-

monial lawyer Graci, in which Graci told him that he and his client, the appellant, believed that Citton was having an affair with
a Franca Prete. Graci was also reported to have told Sherr that the appellant Prete believed that Citton needed money and that the reason Franca Prete wanted a lump sum property settlement was so that she could hand over the money to Citton. At the preliminary hearing, Graci denied ever having had such a conversation
b with Sherr.

In the early evening of July 19th, Citton and Franca Prete were at a restaurant, after which they each apparently went to their respective residences. Graci went to the home of the appellant.

In a written statement to police on July 21, 1985, the appellant
c said that, after Graci left, Citton came to his home and was at his home as late as 10:30-11:00 p.m. on July 19th. The appellant said that they talked and drank wine and that Citton had to leave because he had an appointment with a German man with regard to clocks. (Citton's partner was a German man who had a clock
d company. This man said that Citton had been told not to do any business until he returned from Germany and that was not until three days after the murder.) The appellant said that, after Citton left his house, he telephoned his cousin and was invited over to his cousin's place and had gone there. The cousin testified that Prete
e arrived unexpectedly at 11:15 p.m. that night, but that there had been no prior telephone call.

On the same day that he spoke with the police, the appellant Prete attended upon the widow Citton, brought her flowers, expressed condolences and said that he had not seen the deceased
f since Thursday night, that is, the night before his death.

The appellant Prete was subject to police surveillance and intercepts by wiretap both before and after his arrest. After his arrest on January 15, 1986, the appellant Prete is alleged to have said to the police in response to a question by Montrose:

g

> Montrose: Tony, Franca your wife has told us about little bullets you had around the house.
>
> Prete: You can search the house. I got no .22 bullets, no .22 rifle, no .22 nothing, never.

h A search warrant was executed and a .22 calibre, long rifle, CCI manufactured bullet was found in the garage; in the house of the accused, a partial box of .22 calibre CCI make bullets was found on top of the water heater. It will be recalled that, at the scene when the body was found, two .22 long rifle, CCI manufactured spent cartridges were found on the road. No .22 rifle was found.

Angela Prete, the daughter of the appellant, gave several statements to the police. In the first interview on July 22, 1985, she said that the last time she saw Aldo Citton was on the night of the murder, at her residence. After the interviewing officers returned to their office, they received a telephone call from Angela Prete changing her evidence, to say an earlier date was really the last time that she saw Aldo Citton. On April 30th, she acknowledged that, when initially interviewed, she had told the police that on the night of the murder she saw Aldo Citton in a car with a man whom she thought was her father. Later, she changed her mind and said that she did not think the person was her father because her father did not have "shocking" white hair like the person in the car, and also because her father would not have driven off when she went towards the car, but would have spoken to her.

The Crown also had intercepted conversations which it contended showed, on the part of the appellant, guilty knowledge of the crime. The position of the defence was that a different interpretation should be put on these intercepts and that they were taken out of context.

(b) *The decision to discharge the appellant*

Judge Clendenning concluded that:

> . . . the evidence of the excerpted segments of the intercepts could lead to two inferences: a positive and a negative. Applying the logic embraced within the rule in Hodge's case, but not applying that rule *per se*, at best, when taken in context, the evidence could only be capable of supporting a neutral inference. A jury would have to be so instructed. I intend to go no further in any analysis of the intercepted communications.

Judge Clendenning was aware of *Garton v. Whelan* (1984), 14 C.C.C. (3d) 449, 47 O.R. (2d) 672, 12 W.C.B. 436 (Ont. H.C.J.), in which Evans C.J.H.C. had held that Judge Clendenning had erred in law in applying the rule in *Hodge's Case* (1838), 2 Lewin 227, 168 E.R. 1136, to a preliminary inquiry. Whether or not there is sufficient evidence to bind an accused over for trial following a preliminary inquiry is a question of law. The test to be applied by the judge presiding over the preliminary inquiry is as set out in *United States of America v. Shephard* (1976), 30 C.C.C. (2d) 424 at p. 427, 70 D.L.R. (3d) 136 at p. 139, [1977] 2 S.C.R. 1067 (S.C.C.). It is whether or not there is any evidence upon which a reasonable jury, properly instructed, could return a verdict of guilty. Although Judge Clendenning correctly stated the *Shephard* test and purported to follow it, in effect he did not do so. In concluding that he was entitled to "assess" the evidence and to apply the logic in the rule in *Hodge's Case*, namely, that in a case of

circumstantial evidence the guilt of the accused must be the only rational conclusion, and in finding that the positive and negative inferences balanced each other and created a neutral inference, Judge Clendenning erred in law. Even in circumstantial cases, the law now is that any determination as to compliance with the rule in *Hodge's Case* is to be left to the jury: see *R. v. Paul* (1975), 27 C.C.C. (2d) 1, 64 D.L.R. (3d) 491, [1977] 1 S.C.R. 181 (S.C.C.); *R. v. Monteleone* (1987), 35 C.C.C. (3d) 193 at p. 198, 41 D.L.R. (4th) 746 at p. 751, [1987] 2 S.C.R. 154 (S.C.C.). Based on my review of Judge Clendenning's reasons and the summary of the evidence at the preliminary inquiry, I believe that I am entitled to take judicial notice that his dismissal of the indictment against the appellant was not related to the evidence tendered at the preliminary inquiry. It was a stubborn refusal to follow the injunction of this court that he must not engage in weighing the evidence. The Attorney-General chose not to appeal Judge Clendenning's decision. A direct indictment was preferred.

(c) *Judicial notice may be taken of reasons for preferring a direct indictment*

In *R. v. Ertel, supra*, Lacourcière J.A. observed at pp. 422-3:

> There are many reasons why direct indictments can be justified for the necessary protection of society. In Del Buono, *Criminal Procedure in Canada* (1982), p. 323, Bruce MacFarlane and Judith Webster give the following reasons as justification for direct indictments:
>
> (1) circumstances may be such that the security of the Crown's witnesses or the preservation of the Crown's case requires that the matter be brought to trial forthwith; the alleged offence may be so controversial or notorious that, in the interests of the public, the matter must be heard and determined as soon as possible;
>
> (2) the preferring of a direct indictment may be the only way to remedy an unconscionable delay in bringing the matter to trial, and
>
> (3) the holding of a second preliminary inquiry (even if it was permissible) might cause unnecessary and unjustifiable delay and expense. For example, when a committal for trial is quashed on technical grounds not related to the evidence tendered at the preliminary inquiry; . . .
>
> *In my view, the court can take judicial notice of the above reasons*, which are not an exhaustive list of the reasons that may justify a direct indictment . . . It certainly cannot be said in considering its constitutionality, that the direct indictment permitted . . . in circumstances which may have been rationally contemplated by Parliament, is fundamentally unfair.

(Emphasis mine.)

(d) *Judicial notice of reasons for preferring a direct indictment in this case*

(i) At the bail hearing following the appellant's arrest after the direct indictment was preferred, there was evidence before O'Driscoll J., which he accepted as credible, that the appellant had threatened at least one of the Crown's witnesses after his original arrest. In the circumstances, judicial notice may be taken that the security of the Crown's witnesses required the matter to be brought to trial forthwith.

(ii) Almost two years had elapsed between the date when Citton was killed and the end of the preliminary inquiry. Preferment of the direct indictment avoided the delay inherent in appealing Judge Clendenning's decision — an appeal which was certain to succeed.

(iii) There had already been a full and complete preliminary inquiry. Preferment of the direct indictment avoided the unnecessary delay and expense of holding a second preliminary inquiry.

As a matter of law, therefore, preferment of the indictment was justified.

By way of summary:

(a) It is not alleged that there was a lack of reasonable and probable cause to initiate the original proceedings. Indeed, my review of the evidence led at the preliminary inquiry confirms that there was reasonable and probable cause.

(b) There was evidence before the judge conducting the preliminary inquiry which met the *Shephard* test and the judge erred in discharging the appellant.

(c) Judicial notice may be taken that it was reasonable for the Crown to prefer the direct indictment in order to protect the Crown's witnesses and to avoid the delay inherent in an appeal which was certain to succeed. Full disclosure of the Crown's case had been made at the previous preliminary inquiry and there was no suggestion that the Crown's case was not the same.

(d) The prosecution and trial followed as a result of the direct indictment and there are no facts alleged as to why this should not have been the case.

VII STRIKING VERSUS GRANTING JUDGMENT

I have already found that the statement of claim discloses no facts with respect to an essential element of the cause of action and, as well, that any action could not possibly succeed. Should the court grant leave to amend or should it grant judgment in favour of the respondent and dismiss the action?

In his criminal trial, Mr. Prete did not bring a motion to quash the direct indictment on the basis of any alleged prosecutorial misconduct being a violation of his rights under s. 7, nor for abuse of process, despite the fact that he was detained in custody, and that, if successful, such a motion would have afforded a complete defence to the charge: see *R. v. Jewitt* (1985), 21 C.C.C. (3d) 7, 20 D.L.R. (4th) 651, 47 C.R. (3d) 193 (S.C.C.); *R. v. Scott* (1990), 61 C.C.C. (3d) 300, [1990] 3 S.C.R. 979, 2 C.R. (4th) 153 (S.C.C.); *R. v. Keyowski* (1988), 40 C.C.C. (3d) 481, [1988] 1 S.C.R. 657, 62 C.R. (3d) 349 (S.C.C.), and *R. v. Potvin* (1993), 83 C.C.C. (3d) 97, 105 D.L.R. (4th) 214, [1993] 2 S.C.R. 880 (S.C.C.).

The sole reason that the s. 7 issue before this court was not determined in the criminal proceeding is that the appellant did not raise it during his trial. No explanation was proffered as to why this was so. This is a circumstance which goes to the *bona fides* of the action and militates against the exercise of the court's discretion to grant leave to amend. I would accordingly dismiss the action against the respondents.

Carruthers J. made no order as to costs in dismissing the action. I would also propose that there be no order as to costs.

Appeal allowed.

Ashworth v. Conarroe

Court File No. Q.B. 382/93 J.C. M.J.

Saskatchewan Court of Queen's Bench, Halvorson J. *December 15, 1993.*

Family law — Support — Enforcement — Reciprocal enforcement — Provisional orders — Procedure — Oral hearing — Oral hearing not required on application for provisional order — Legislation permitting hearing either by affidavit or oral testimony — Hearing by way of affidavit evidence generally more expedient — Family Maintenance Act, S.S. 1990-91, c. F-6.1, s. 23(1) — Reciprocal Enforcement of Maintenance Orders Act, 1983, S.S. 1983, c. R-4.1, s. 4.

Statutes referred to

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), s. 18(3)(*b*)
Enforcement of Maintenance Orders Act, S.S. 1984-85-86, c. E-9.2
Family Maintenance Act, S.S. 1990-91, c. F-6.1, s. 23
Reciprocal Enforcement of Maintenance Orders Act, 1983, S.S. 1983, c. R-4.1, s. 4 [am. 1986, c. 18, s. 3]

Rules and regulations referred to

Enforcement of Maintenance Orders Regulations, c. E-9.2, Reg. 1, Form H
Queen's Bench Rules (Sask.), Rules 586, 632, 633(2)(*a*), (*b*), Form 67

to — materially enhance the abilities of terrorist groups is not grossly disproportionate nor overbroad in relation to the objective of prosecuting and, in particular, of preventing terrorism.

[64] For the foregoing reasons, I conclude that s. 83.18 does not violate s. 7 of the *Charter.*

2. Does the Law, Specifically Section 83.01(1)(*b*)(i)(A), Infringe Section 2 of the *Charter*?

(a) *Does the Purpose of the Law Violate Freedom of Expression?*

[65] The appellants in the companion appeals argue that Part II.1 of the *Criminal Code* criminalizes expressive activity and therefore infringes the s. 2 guarantees of freedom of expression, freedom of religion and freedom of association. A law may limit, or infringe, a right either by its purpose or by its effect. The appellants contend that the terrorism legislation, by its very purpose, limits the rights guaranteed by s. 2 of the *Charter.*

[66] The critical right at issue is freedom of expression, because the s. 2(*b*) argument as framed is the broadest of the *Charter* infringement claims. If freedom of expression is not infringed, on the facts of this case there is no basis to contend that freedom of religion and association are infringed, as the Court of Appeal observed in this appeal (para. 96).

[67] The activities targeted by the legislation — committing a terrorist activity, assisting in the commission of a terrorist activity, enhancing the ability of others to commit a terrorist activity and instructing others in the commission of a terrorist activity — are in a sense expressive activities. However, violent activities are not protected by s. 2(*b*): *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927. The Crown argues that this extends to all the conduct caught by the terrorism provisions of the *Criminal Code* and that consequently, s. 2(*b*)

la capacité d'un groupe terroriste de se livrer à une activité terroriste ou de la faciliter, et qui visent pareil accroissement, n'est pas totalement disproportionnée à l'objectif de réprimer le terrorisme et, en particulier, de le prévenir, et sa portée n'est pas excessive eu égard à cet objectif.

[64] Pour les motifs qui précèdent, je suis d'avis que l'art. 83.18 ne porte pas atteinte au droit garanti à l'art. 7 de la *Charte*.

2. La Loi, à savoir la div. 83.01(1)*b*)(i)(A), porte-t-elle atteinte aux droits garantis à l'art. 2 de la *Charte*?

a) *L'objectif de la Loi va-t-il à l'encontre de la liberté d'expression?*

[65] Dans les pourvois connexes, les appelants prétendent que la partie II.1 du *Code criminel* criminalise l'activité expressive et, de ce fait, viole les libertés d'expression, de religion et d'association garanties à l'art. 2. Selon eux, l'objectif ou l'effet d'une loi peut restreindre un droit ou y porter atteinte. Ils ajoutent que les dispositions sur le terrorisme, à cause de leur objectif même, restreignent les droits garantis à l'art. 2 de la *Charte*.

[66] Le principal droit en jeu est celui à la liberté d'expression, car la thèse fondée sur l'al. 2*b*) est celle dont la portée est la plus étendue parmi les allégations de violation de droits constitutionnels. Comme le fait observer la Cour d'appel dans la présente affaire, s'il n'y a pas d'atteinte à la liberté d'expression, on ne saurait soutenir, au vu des faits de l'espèce, qu'il y a violation des libertés de religion et d'association (par. 96).

[67] Les actes visés par la Loi — se livrer à une activité terroriste, aider à sa poursuite, accroître la capacité d'autrui de s'y livrer et charger quiconque de s'y livrer — sont en quelque sorte des activités expressives. Or, l'activité violente n'est pas protégée par l'al. 2*b*) : *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927. Le ministère public prétend que ce principe vaut pour tout acte que répriment les dispositions sur le terrorisme du *Code criminel*, de sorte que les garanties conférées à l'al. 2*b*) ne s'appliquent pas

[32] The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. The resolution of these disputes and resulting determination of issues of private and public law, viewed in the institutional context of the Canadian justice system, are central to what the superior courts do. Indeed, it is their very book of business. To prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the *Constitution Act, 1867*. As a result, hearing fees that deny people access to the courts infringe the core jurisdiction of the superior courts.

[33] The jurisprudence under s. 96 supports this conclusion. The cases decided under s. 96 have been concerned either with legislation that purports to transfer an aspect of the core jurisdiction of the superior court to another decision-making body or with privative clauses that would bar judicial review: *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714; *MacMillan Bloedel*; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220. The thread throughout these cases is that laws may impinge on the core jurisdiction of the superior courts by denying access to the powers traditionally exercised by those courts.

[34] In *Residential Tenancies*, the law at issue unconstitutionally denied access to the superior courts by requiring that a certain class of cases be decided by an administrative tribunal. In *Crevier*, the law at issue unconstitutionally denied access to the superior courts by imposing a privative clause excluding the supervisory jurisdiction of the superior courts. In *MacMillan Bloedel*, the legislation at issue unconstitutionally barred access to the superior courts for a segment of society — young persons — by conferring an exclusive power on youth courts to try youths for contempt in the face of superior courts. This Court, *per* Lamer C.J., relied on *Crevier*,

[32] Les cours supérieures ont toujours eu pour tâche de résoudre des différends opposant des particuliers et de trancher des questions de droit privé et de droit public. Des mesures qui empêchent des gens de s'adresser à cette fin aux tribunaux vont à l'encontre de cette fonction fondamentale des cours de justice. Considérées dans le contexte institutionnel du système de justice canadien, la résolution de ces différends et les décisions qui en résultent en matière de droit privé et de droit public sont des aspects centraux des activités des cours supérieures. De fait, les plaideurs constituent l'« achalandage » de ces tribunaux. Empêcher l'exercice de ces activités attaque le cœur même de la compétence des cours supérieures que protège l'art. 96 de la *Loi constitutionnelle de 1867*. Par conséquent, des frais d'audience qui ont pour effet de nier à des gens l'accès aux tribunaux portent atteinte à la compétence fondamentale des cours supérieures.

[33] La jurisprudence relative à l'art. 96 étaye cette conclusion. Ces décisions portaient soit sur des textes de loi censés confier un aspect de la compétence fondamentale de la cour supérieure à un autre organisme décisionnel, soit sur des clauses privatives visant à empêcher le contrôle judiciaire : *Renvoi relatif à la Loi de 1979 sur la location résidentielle*, [1981] 1 R.C.S. 714; *MacMillan Bloedel*; *Crevier c. Procureur général du Québec*, [1981] 2 R.C.S. 220. Le dénominateur commun à toutes ces décisions est la possibilité que des lois portent atteinte à la compétence fondamentale des cours supérieures en empêchant certaines personnes de faire appel à elles et aux pouvoirs qu'elles exercent depuis toujours.

[34] Dans l'arrêt *Location résidentielle*, la loi litigieuse niait de manière inconstitutionnelle l'accès aux cours supérieures en exigeant qu'une certaine catégorie d'affaires soient décidées par un tribunal administratif. Dans *Crevier*, la loi contestée niait, encore une fois inconstitutionnellement, l'accès aux cours supérieures en imposant une clause privative qui écartait le pouvoir de surveillance de ces tribunaux. Dans *MacMillan Bloedel*, le texte de loi litigieux refusait inconstitutionnellement à une partie de la population, les jeunes, l'accès aux cours supérieures en conférant aux tribunaux pour adolescents le pouvoir exclusif de juger les

CONSTITUTIONAL DAMAGES WORLDWIDE

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position taken by the Supreme Court of Canada in *Ward*.[20] It was held that "private law thresholds and defences may offer guidance." Although the threshold for liability must be "distinct and autonomous" from private law, "the existing causes of action against state actors embody a certain amount of 'practical wisdom' concerning the type of situation in which it is or is not appropriate to make an award of damages against the state."[21] In the end, absent a relevant constitutional qualification, the question will be whether it is appropriate to nullify or qualify the government's *prima facie* liability.

In jurisdictions which conceptualize constitutional damages claims as a public law remedy,[22] rather than as a species of tort, there is much less need for the immunity doctrine. Indeed, the issue of immunity of judges provided the context for the foundational decision of the Privy Council in *Maharaj v. Trinidad and Tobago (Attorney General) (No. 2)*.[23] The effect of the conceptualization was to immunize a judge from personal liability for an unconstitutional contempt order but retain state liability. This is the approach taken in most jurisdictions, including actions brought in the United Kingdom under the *Human Rights Act*.[24] It is also the accepted position in New Zealand following *Dunlea v. Attorney-General*.[25] The same solution has now been adopted in Canada.[26] Indeed, in *Sugrue (P.F.) Ltd. v. Attorney-General*,[27] the point was made that American immunity doctrine was inapplicable to claims under the New Zealand *Bill of Rights* because "there is no question of *personal liability*". However, where liability attaches to the state itself rather than state actors, immunity doctrine may still serve to limit its scope.[28] On the other hand, immunity doctrine does not find a place in European Community law. It was held in *Brasserie du Pecheur S.A. v. Germany (C-46/93)*; *R. v. Secretary of State for Transport Ex p. Factortame*[29] that "the obligation to make good damage caused to individuals by breaches of Community law cannot depend on domestic rules as to the division of powers between constitutional authorities."

Where immunity doctrine *is* applicable, it has the potential of creating a three-tiered structure of liability. It may be that:

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20 *Supra* note 4 at para. 43. For earlier treatment in Canada, see *Nelles v. Ontario*, [1989] 2 S.C.R. 170 (S.C.C.) [*Nelles*] at 243.

21 On the analogous question of the liability of Crown prosecutors in the tort of negligence, see, e.g., *German v. Major* (1985), 34 C.C.L.T. 257 (Alta. C.A.) at 272-73.

22 Chapter 1: Nature of Constitutional Damages Claims.

23 [1978] 2 All E.R. 670 (Trinidad & Tobago P.C.) [*Maharaj*].

24 But see for judicial immunity, s. 9(3)(4). See also, e.g., the Constitution of St. Vincent and the Grenadines, Art. 3(6).

25 [2000] 3 N.Z.L.R. 136 (New Zealand C.A.) [*Dunlea*] at para. 81. But see now, *Attorney-General v. Chapman*, [2011] NZSC 110, deciding in favour of judicial immunity.

26 *Ward*, *supra* note 4 at para. 22: Quoting Thomas J. in *Dunlea*, *supra* note 25, the action is "[a distinct] public law action directly against the state for which the state is primarily liable".

27 [2004] 1 N.Z.L.R. 207 (New Zealand C.A.) [*Sugrue*], *per* Chisholm J. at trial, para. 163.

28 In Canada, Government acting under legislation subsequently struck down enjoys a qualified immunity or "claim of right" defence, considered below.

29 [1996] 1 All E.R. (EC) 301 (European Ct. Just.) [*Factortame*] at para. 33.

1. a discrete group of government defendants, such as judges, legislators, and/or central executive officials, enjoy absolute immunity;
2. a wider group of officials exercising broad policy or discretionary decisions, such as municipal councils, members of quasi-judicial tribunals, and prosecutors, enjoy qualified immunity, involving very restricted liability; and
3. other government officials, such as government inspectors, social service workers and police officers, are held liable on a more exacting threshold for liability.

An underpinning for constitutional damages which makes reference to "good governance" can support such a structure. As was stated by McLachlin C.J.C. in *Ward*:[30]

> Another consideration that may negate the appropriateness of [constitutional] damages is concern for effective governance. Good governance concerns may take different forms. At one extreme, it may be argued that any award ... will always have a chilling effect on government conduct, and hence will impact negatively on good governance. The logical conclusion of this argument is that [constitutional] damages would never be appropriate. Clearly, this is not what the Constitution intends. Moreover, insofar as [constitutional] damages deter ... breaches, they promote good governance. Compliance with [constitutional] standards is a foundational principle of good governance.
>
> In some situations, however, the state may establish that an award of constitutional damages would interfere with good governance such that damages should not be awarded unless the state conduct meets a minimum threshold of gravity.

As a result, it may be appropriate to apply different standards to different classes of government defendants, as was the view expressed in *Ward*,[31] and this can be achieved through immunity doctrine.

3. Absolute Immunity

(a) Constitutional Provisions

Absolute immunity is provided for in a number of the world's constitutions. For example, the Constitution of Belize qualifies its protection from unlawful arrest or detention by the proviso that "no person shall be liable for any act done in the performance of a judicial function for which he would not be liable apart from this subsection."[32] The Constitution of Papua New Guinea gives protection to members of parliament for conduct during parliamentary or committee

30 *Supra* note 4 at paras. 38-39, referring to damages under s. 24(1) of the Canadian *Charter*.
31 *Ibid.* at para. 43.
32 Art. 5(6).

CONSTITUTIONAL REMEDIES IN CANADA

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government's revenues guarantees recovery should a damage award be made and the government or agency may be in the best position to take steps to prevent Charter violations in the future. In the context of providing remedies under the human rights codes for sexual harassment, the Supreme Court of Canada has already recognized that imposing liability on a governmental employer, as opposed to the individual at fault, is useful because "only an employer can provide the most important remedy — a healthy work environment".[141] Peter Schuck has constructed a persuasive case that holding governments or agencies liable for constitutional violations allows them to use their expertise to make the organizational changes which are often necessary to prevent violations in the future, while avoiding the harmful effects of overdeterring individual officials from the vigourous pursuit of their duties.[142]

11.510 Unlike in the United States where the immunity of State governments is entrenched,[143] there is no reason why Canadian courts cannot impose direct liability on governments for constitutional violations. In *Maharaj v. Attorney-General Trinidad and Tobago (No. 2)*,[144] the Privy Council interpreted a remedial provision in s. 6(1) of the Constitution of Trinidad and Tobago allowing a person alleging a constitutional violation to "apply to the High Court for redress" to authorize the court to hold the State directly liable for an unconstitutional deprivation of liberty. Lord Diplock stated:

> . . . an order for payment of compensation when a right protected under s. 1 "has been" contravened is clearly a form of "redress" which a person is entitled to claim under s. 6(1) and may well be the only practicable form of redress; as by now it is in the instant case . . . The claim for redress under s. 6(1) for what has been done by a judge is a claim against the state for what has been in the

See *Glover v. Magark* (1999), 87 A.C.W.S. (3d) 602 (B.C.S.C.), affd 2001 BCCA 390 (in a Charter damage claim arising from a police shooting, the proper defendant was the Crown and not the individual officer).

141 *Robichaud v. Canada (Treasury Board)* (1987), 40 D.L.R. (4th) 577 at p. 584, [1987] 2 S.C.R. 84, La Forest J. concluded that the *Canadian Human Rights Act* provided statutory liability on employers for the acts of their employees as a means of "placing responsibility for an organization on those who control it and are in a position to take effective remedial action to remove undesirable conditions".

142 Peter Schuck, *Suing Government* (New Haven: Yale University Press, 1983), Ch. 3 and 6. See ¶3.650 for further discussion of Professor Shuck's proposals. See also Sandra McCallum, "Personal Liability of Public Servants: An Anachronism" (1984), 27 Canadian Public Administration 611; Jon Newman, "Suing the Lawbreakers" (1978), 88 Yale L.J. 447. For an early and insightful criticism of State immunity and defence of governmental liability see Edwin Borchard, "Government Liability in Tort" (1934), 34 Yale L.J. 1; (1936), 36 Yale L.J. 1. David Mullan has, however, noted that fears of overdeterring individual officials are "undercut completely in many instances by personal statutory immunities and the extent to which such officials are indemnified as a matter of legal obligation or an *ex gratia* basis when found civilly liable by the courts": "Damages for Violation of Constitutional Rights — A False Spring?" (1996), 6 N.J.C.L. 105 at p. 124.

143 The Eleventh Amendment has been interpreted as rendering the states immune from suits for constitutional violations in the federal courts: see Laurence Tribe, *American Constitutional Law*, 2nd ed. (Mineola: Foundation Press, 1988), at pp. 173*ff*.

144 [1979] A.C. 385 (P.C.).

> exercise of the judicial power of the state. This is not vicarious liability; it is a liability of the state itself. It is not a liability in tort at all; it is a liability in the public law of the state, not of the judge himself, which has been newly created by s. 6(1) and (2) of the Constitution.[145]

This case has received some support in Canadian cases,[146] but it unfortunately has not yet been approved by the Supreme Court of Canada.

11.520 In my view, adoption of *Maharaj* would have several beneficial consequences. It would do away with most of the harmful effects of holding individuals liable in damages for Charter violations, or as an alternative, allowing their good faith or lack of malice to be a defence to a Charter damage claim. It would recognize that s. 24(1) of the Charter has superior status to various Crown liability acts that restrict the State's liability and it would give s. 24(1) of the Charter substantive content in a way that advances the purposes of Charter, including s. 32 which binds governments to the Charter, and s. 24(1), which contemplates unfettered remedial discretion. Most importantly, *Maharaj* makes clear that damages should serve the purposes of constitutional, not tort, law.

11.530 Despite the advantages of direct governmental liability, many cases continue to be formulated in reliance on the liability of individual officials. The existence of statutory and common law immunities on claims against the Crown may encourage suits against individual officials. Similarly, liability rules shaped around individual fault may also dissuade litigants from suing the Crown directly. If, as in *Nelles* or *Jane Doe*, plaintiffs are required to show a subjective state of mind such as malice or conscious discrimination as a precondition to receiving damages, they may well be inclined to sue the officials whose minds are in issue, particularly if the government has agreed to stand behind these individuals.[147]

11.540 An alternative to the personal liability of officials and the direct liability of the State is to hold the State vicariously liable for the actions of its officials.

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145 *Supra*, at p. 399.

146 Most notably in *R. v. Germain* (1984), 53 A.R. 264, 10 C.R.R. 232 (Q.B.). The Ontario Divisional Court also rejected Crown immunity on the basis of s. 32 of the Charter in *Moore v. Ontario (Ministry of Attorney General)* (1990), 20 A.C.W.S. (3d) 630 (Ont. Dist. Ct.). See also *R. v. Crossman* (1984), 9 D.L.R. (4th) 588, 12 C.C.C. (3d) 547 (F.C.T.D.); *R. v. Oag* (1985), 23 C.C.C. (3d) 20, [1986] 1 F.C. 472 (T.D.), revd in part 33 C.C.C. (3d) 430, [1987] 2 F.C. 511 *sub nom. Oag v. Canada* (C.A.); *R. v. McGillivary* (1990), 56 C.C.C. (3d) 304, 107 N.B.R. (2d) 361 (C.A.); *R. v. F. (R.G.)* (1991), 90 Nfld. & P.E.I.R. 113, 5 C.R.R. (2d) 62 (Nfld. S.C.); *Blouin v. Canada* (1991), 51 F.T.R. 194; *R. v. Kenny* (1992), 99 Nfld. & P.E.I.R. 107, 11 C.R.R. (2d) 82 (Nfld. S.C.) (all implicitly recognizing liability of the Crown for damages with respect to Charter violations). In *McGillivary v. New Brunswick* (1994), 116 D.L.R. (4th) 104 at p. 107, 92 C.C.C. (3d) 187 (N.B.C.A.), Ryan J.A. similarly invoked s. 32 of the Charter to conclude: "Claimants are not restricted to suing government officials when the government itself is responsible for the constitutional infringement."

147 But see Ghislain Otis, "Personal Liability of Public Officials for Constitutional Wrongdoing: A Neglected Issue of Charter Application" (1996), 24 Man. L.J. 23, on the need to establish that individuals sued for Charter damages were acting as part of the government under s. 32 of the Charter.