No. 217586
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between

Action4Canada, Kimberly Woolman, The Estate of Jaqueline Woolman, Linda Morken, Gary Morken, Jane Doe #1, Brian Edgar, Amy Muranetz, Jane Doe #2, Ilona Zink, Federico Fuoco, Fire Productions Limited, F2 Productions Incorporated, Valerie Ann Foley, Pastor Randy Beatty, Michael Martinz, Makhan S. Parhar, North Delta Real Hot Yoga Limited, Melissa Anne Neubauer, Jane Doe #3

Plaintiffs

and

Her Majesty the Queen in right British Columbia, Prime Minister Justin Trudeau, Chief Public Health Officer Theresa Tam, Dr. Bonnie Henry, Premier John Horgan, Adrian Dix, Minister of Health, Jennifer Whiteside, Minister of Education, Mable Elmore, Parliamentary Secretary for Seniors' Services and Long-Term Care, Mike Farnworth, Minister of Public Safety and Solicitor General, British Columbia Ferry Services Inc. (operating as British Columbia Ferries), Omar Alghabra, Minister of Transport, Vancouver Island Health Authority, The Royal Canadian Mounted Police (RCMP), and the Attorney General of Canada, Brittney Sylvester, Peter Kwok, Providence Health Care, Canadian Broadcasting Corporation, TransLink (British Columbia)

Defendants

JOINT APPLICATION RECORD – VOLUME 3
Application to Strike Proceedings

Counsel for the Plaintiffs:
Rocco Galati

Rocco Galati Professional Law Corporation
1062 College Street, Lower Level
Toronto, ON M6H 1A9
Fax: 416-530-8129
Email: rocco@idirect.com

Counsel for Vancouver Island Health Authority and Providence Health Care ("Heathy Authority Defendants"):
Timothy J. Wedge

Carfa Lawton LLP
6th Floor – 395 Waterfront Crescent
Victoria, BC V8T 5K7
Fax: 250-381-7804
Email: twedge@carlaw.ca

--Continued Next Page--

Date, and Time of Hearing: May 31, 2022 at 10:00 am
Place of Hearing: Vancouver, British Columbia
Time Estimate: 1 day
Joint Application Record Prepared By:
Attorney General of British Columbia

Counsel for Her Majesty the Queen in Right of British Columbia, Prime Minister Justin Trudeau, Chief Public Health Officer Theresa Tam, Dr. Bonnie Henry, Premier John Horgan, Adrian Dix, Minister of Health, Jennifer Whiteside, Minister of Education, Mable Elmore, Parliamentary Secretary for Seniors' Services and Long-Term Care, and Mike Farnworth, Minister of Public Safety and Solicitor General ("Provincial Defendants"): **Mark Witten**	Ministry of Attorney General Legal Services Branch 1301-865 Hornby Street Vancouver, BC V6Z 2G3 Fax: 604-660-6797 Email: mark.witten@gov.bc.ca
Counsel for the Attorney General of Canada, Prime Minister Justin Trudeau, the Royal Canadian Mounted Police (RCMP), Chief Public Health Officer Dr. Theresa Tam, and Omar Alghabra Minister of Transport ("Canada") **Olivia French and Andrea Gatti**	Attorney General of Canada Department of Justice Canada British Columbia Regional Office 900-840 Howe Street Vancouver, BC C6Z 2S9 Fax: 604-666-1462 Email: olivia.french@justice.gc.ca Email: andrea.gatt@justice.gc.ca
Counsel for Peter Kwok and TransLink (British Columbia) (the "TransLink Defendants") **Timothy J. Delaney**	Lindsay Kenney LLP 1800-401 West Georgia Street Vancouver, BC V6B 5A1 Fax: 604-687-2347 Email: tdelaney@lklaw.ca
Counsel for British Columbia Ferry Services Inc ("BC Ferries") **Michael A. Feder, Q.C., and Connor Bildfell**	McCarthy Tetrault LLP 2400-745 Thurlow Street Vancouver, BC V6E 0C5 Fac: 604-643-7900 Email: mfeder@mccarthy.ca Email: cbildfell@mccarthy.ca

No. 217586
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between

Action4Canada, Kimberly Woolman, The Estate of Jaqueline Woolman, Linda Morken, Gary Morken, Jane Doe #1, Brian Edgar, Amy Muranetz, Jane Doe #2, Ilona Zink, Federico Fuoco, Fire Productions Limited, F2 Productions Incorporated, Valerie Ann Foley, Pastor Randy Beatty, Michael Martinz, Makhan S. Parhar, North Delta Real Hot Yoga Limited, Melissa Anne Neubauer, Jane Doe #3

Plaintiffs

and

Her Majesty the Queen in right British Columbia, Prime Minister Justin Trudeau, Chief Public Health Officer Theresa Tam, Dr. Bonnie Henry, Premier John Horgan, Adrian Dix, Minister of Health, Jennifer Whiteside, Minister of Education, Mable Elmore, Parliamentary Secretary for Seniors' Services and Long-Term Care, Mike Farnworth, Minister of Public Safety and Solicitor General, British Columbia Ferry Services Inc. (operating as British Columbia Ferries), Omar Alghabra, Minister of Transport, Vancouver Island Health Authority, The Royal Canadian Mounted Police (RCMP), and the Attorney General of Canada, Brittney Sylvester, Peter Kwok, Providence Health Care, Canadian Broadcasting Corporation, TransLink (British Columbia)

Defendants

JOINT APPLICATION RECORD INDEX

TAB **DOCUMENT**

VOLUME 1

Pleadings

Application to Strike – Provincial Defendants

5. Amended Application Response of the Plaintiffs filed May 18, 2022

6. Application Response of the Health Authority Defendants filed January 17, 2022

7. Application Response of BC Ferries filed January 19, 2022

8. Application Response of the TransLink Defendants filed April 14, 2022

Application to Strike – Canada

9. Notice of Application of Canada filed April 28, 2022

10. Amended Application Response of the Plaintiffs filed May 18, 2022 (see Tab 5)

11. Application Response of the Health Authority Defendants filed May 18, 2022

12. Application Response of the TransLink Defendants filed April 14, 2022

Application to Strike – Health Authority Defendants

13. Notice of Application of the Heath Authority Defendants filed January 17, 2022

14. Amended Application Response of the Plaintiffs filed May 18, 2022 (see Tab 5)

15. Application Response of the TransLink Defendants filed April 14, 2022

Application to Strike – TransLink Defendants

16. Notice of Application of TransLink filed April 14, 2022

17. Amended Application Response of the Plaintiffs filed May 18, 2022 (see Tab 5)

18. Application Response of the Health Authority Defendants filed May 18, 2022

Affidavits

19. Affidavit #2 of Rebecca Hill filed May 24, 2022

VOLUME 2

Case Law of the Defendants (Applicants)

20. *Borsato v. Basra*, [2000] B.C.J. No. 2855

21. *Camp Development Corp v. Greater Vancouver Transportation Authority,* 2009 BCSC 819

22. *Dixon v. Stork Craft Manufacturing Inc.* 2013 BCSC 1117

23. *Fowler v. Canada (Attorney General),* 2012 BCSC 367

24. *Gill v. Canada,* 2013 BCSC 1703

25. *Grosz v. Royal Trust Corporation of Canada,* 2020 BCSC 128

26. *Homalco Indian Band v. British Columbia*, [1998] B.C.J. No. 2703 (S.C.)

27. *Khodeir v. Canada (Attorney General),* 2022 FC 44

28. *Kuhn v. American Credit Indemnity Co.,* [1992] B.C.J. No. 953 (S.C.)

29. *Lang Michener Lash Johnson v. Fabian,* [1987] O.J. No. 355

30. *Li v. British Columbia,* 2021 BCCA 256

31. *Mercantile Office Systems Private Ltd. v. Worldwide Warranty Life Services Inc.,* 2021 BCCA 362

32. *Mousa v. The Institute of Electrical and Electronics Engineers, Incorporated,* 2014 BCCA 415

33. *Nevson Resources Ltd. v. Araya,* 2020 SCC 5

34. *R. v. Find,* 2001 SCC 32

35. *R. v. Imperial Tobacco Canada Ltd.,* 2011 SCC 42

36. *Sahyoun v. Ho,* 2013 BCSC 1143

37. *Simon v. Canada,* 2015 BCSC 924

38. *Strata Plan LMS3259 v. Sze Hang Holding Inc.,* 2009 BCSC 473

39. *Toronto (City) v. Canadian Union of Public Employees, Local 79 (C.U.P.E.*), [2003] 3 S.C.R. 77

40. *Toronto v. Ontario*, 2021 SCC 34

41. *Willow v. Chong*, 2013 BCSC 1083

42. *Young v. Borzoni,* 2007 BCCA 16

Legislation of the Defendants (Applicants)

43. *Supreme Court Civil Rules,* BC Reg 168/2009, Rules 3-1, 3-7, 9-5, 14

Case Law of the Plaintiffs (Application Respondents)

44. *592 U.S.* _____ (2020)

45. *A.G. Canada v. Inuit Tapirasat of Canada* [1980] 2 S.C.R. 735

46. *Adams-Smith v. Christian Horizons,* (1997) 14 C.P.C. (4th) 78 (Ont. Gen. Div.)

47. *Air Canada v. A.G.B.C.,* [1986] 2 S.C.R. 539 (SCC)

48. *Arsenault v. Canada,* 2009 FCA 242

49. *Canada v. Solosky,* [1980] 1 S.C.R. 821

50. *Canada (Prime Minister) v. Khadr,* [2010] 1 S.C.R. 44

51. *Canadian Society for the Advancement of Science in Public Policy v. Henry*, 2022 BCSC 724

52. *Carter v. Canada (Attorney General),* 2015 SCC 5

53. *Dalex Co. v. Schawartz Levitsky Feldman*, (1994) 19 O.R. (3d) 463 (Gen. Div.)

54. *Dumont v. Canada (Attorney General),* [1990] 1 S.C.R. 279

VOLUME 3

55. *Fleming v. Reid,* (1991) 48 O.A.C. 46 (CA)

56. *Grant v. Cormier – Grant, et al.,* (2001) 56 O.R. (3d) 215 (Ont. C.A.)

57. *Hanson v. Bank of Nova Scotia,* (1994) 19 O.R. (3d) 142 (C.A.)

58. *Hunt v. Carey Canada Inc.,* [1990] 2 S.C.R. 959

59. *J.N. v. C.G.,* 2022 ONSC 1198

60. *Jacob Puliyel v. Union of India & Ors.*

61. *M.A. v. De Villa,* 2021 ONSC 3828

62. *Manitoba Metis Federation Inc. v. Canada (Attorney General),* 2013 SCC 14

63. *Miller (Litigation Guardian of) v. Wiwchairyk,* (1997) 34 O.R. (3d) 640 (Ont. Gen. Div.)

64. *Nash v. Ontario,* (1995) 27 O.R. (3d) 1 (Ont. C.A.)

65. *Nelles v. Ontario,* (1989) 60 DLR (4th) 609 (SCC)

66. *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263

67. *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441

68. *R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd.* (1991) 5 O.R. (3d) 778 (C.A.)

69. *Reference re Secession of Quebec,* [1998] 2 S.C.R. 217

70. *Roncarelli v. Duplessis,* [1959] S.C.R. 121

71. *Sgt. Julie Evans v. AG Ontario*

72. *Singh v. Canada (Citizenship and Immigration),* 2010 FC 757

73. *TD Bank v. Delloitte Hoskins & Sells,* (1991) 5 O.R. (3d) 417 (Gen. Div.)

74. *Thorson v. AG of Canada,* 1975 1 S.C.R. 138

75. *Trendsetter Ltd. v. Ottawa Financial Corp.,* (1989) 32 O.A.C. 327 (C.A.)

76. *Vancouver (City) v. Ward,* 2010 SCC 27

Case Law – Additional Struck Claims

77. *Al Omani v. Canada,* 2017 FC 786

78. *Almacén v. Canada,* 2016 FC 300

79. *Almacén v. Canada,* 2016 FCA 296

80. *Cabral v. Canada (Minister of Citizenship and Immigration),* 2016 FC 1040

81. *Committee for Monetary and Economic Reform v. Canada,* 2015 FCA 20

82. *Committee for Monetary and Economic Reform v. Canada,* 2016 FC 147

83. *Committee for Monetary and Economic Reform v. Canada,* 2016 FCA 312

84. *Committee for Monetary and Economic Reform v. Canada,* [2017] S.C.C.A. No. 47

85. *Da Silva Campos v. Canada (Minister of Citizenship and Immigration),* 2015 FC 884

86. *Gill v. Maciver,* 2022 ONSC 1279

87. *Mancuso v. Canada (Minister of National Health and Welfare),* 2014 FC 708

88. *Mancuso v. Canada (Minister of National Health and Welfare),* 2015 FCA 227

89. *Mancuso v. Canada (National Health and Welfare),* [2016] S.C.C.A. No. 92

90. *Sivak v. Canada,* 2012 FC 272

91. *Wang v. Canada,* 2016 FC 1052

92. *Wang v. Canada,* 2018 FCA 46

93. *Wang v. Canada,* [2018] S.C.C.A. No. 368

Borsato v. Basra, [2000] B.C.J. No. 2855

British Columbia Judgments

British Columbia Supreme Court

Williams Lake, British Columbia

A.F. Wilson J.

Oral judgment: February 28, 2000.

Williams Lake Registry No. 9912697

[2000] B.C.J. No. 2855 | 2000 BCSC 1898 | 117 A.C.W.S. (3d) 52

Between Dennis Borsato, plaintiff, and Davinder Basra a.k.a. Bo Basra and N.A.K. Holdings Ltd., defendants

(14 paras.)

Case Summary

Practice — Pleadings — Striking out pleadings — Grounds, noncompliance with discovery rules — Courts — Masters — Jurisdiction.

Appeal by Basra from a Master's order striking out his statement of defence and requiring that a new statement of defence be filed. In his motion record, the plaintiff, Borsato, had claimed that the statement of defence should be struck on the basis that Basra had failed to deliver a proper list of documents and failed to reply to a demand for particulars. Basra defended the motion on that basis. The Master ruled that Borsato was not entitled to the particulars he demanded. However, the Master struck the statement of defence anyway, on the basis that it did not comply with Rule 19, and that it was frivolous or vexatious. Basra argued that the Master had erred and exceeded his jurisdiction by granting relief on the basis of Rules not pleaded by Borsato, so that Basra did not have notice of the case he had to meet on the motion.
HELD: Appeal allowed.

The Master had exceeded his jurisdiction. Borsato had not pleaded Rules 19(20), 19(21) and 19(24) in his motion record, and Basra had not been prepared to defend the motion in relation to those rules. Basra was entitled to notice of the case he had to meet. The order striking the statement of defence was set aside. The court noted that if the two counsel involved had shown each other normal courtesy in terms of timeliness and particulars, none of this would have had to come before the courts. The court refused to order costs on that basis.

Statutes, Regulations and Rules Cited:

British Columbia Supreme Court Rules, Rules 2(2)(d), 19(20), 19(21), 19(24), 52(11).

Counsel

P.L. Schmit, for The plaintiff. A. Czepil, for the defendants.

A.F. WILSON J. (orally)

1 This is an appeal from the decision of Master Baker pronounced January 10th, 2000, in which he ordered that the defendants' statement of defence filed September 14th, 1999 be struck, and that the defendants prepare, file and deliver an amended statement of defence. The Master further ordered that the Plaintiff recover its costs of the application in any event of the cause.

2 A number of errors have been alleged in the reasons of the Master. I have heard argument on only one of them, because of the time involved. That is expressed in the brief of argument filed on behalf of the appellant, that the Master erred in basing his decision on a ground not raised in the notice of motion, or alternatively, in finding that the plaintiff's notice of motion gave the defendants adequate notice of the nature of the application. So I am specifically not dealing with the issue of whether the statement of defence was proper under Rule 19(20), or if it was frivolous, vexations and embarrassing under Rule 19(24). What I am dealing with is, in essence, whether the defendants were given proper notice of the relief which was subsequently granted by the Master. That is a jurisdictional matter, in that Rule 52(11), which sets out the powers of the court in a chambers application, says that on an application the court may grant or refuse the relief claimed in whole or in part, or dispose of any question arising on the application. If the court goes beyond those powers (there are a number of other sub-rules, but they do not apply in this case), then it is acting in excess of its jurisdiction and the order is not valid.

3 Here, the notice of motion sought an order to strike out the statement of defence filed September 14th, 1999 and grant judgment pursuant to Rule 2(2)(d) of the Supreme Court Rules, and other relief relating to delivery of particulars, delivery of a list of documents, delivery of an affidavit verifying the defendants' list of documents and costs.

4 The application was made in the context of pleadings in a construction claim. The statement of claim and writ of summons was filed on August 25th, 1999, and served on the defendant on the same date. An appearance was filed on August 27th, and the statement of defence in question filed on September 14th. There was then a demand for discovery and production of documents and a demand for particulars delivered on October 5th. The list of documents had not been delivered by the time the notice of motion was issued. Counsel for the defendants had delivered a letter in which he said, in essence, that particulars were not appropriate. By the time of the application the list of documents had been delivered, so that part of the application was abandoned.

5 What I take from that is that a reasonable defendant would expect, on return of this application, to deal with the issue of whether the demand for particulars was a proper one, and if the failure to provide the particulars as demanded was the subject, or should be the subject, of sanctions. The Master held that the demand for particulars was not proper, and there is no issue with respect to that. So the issue before me is if a notice of motion applies for relief, relying on one rule, whether the Master can grant that relief, based on other rules of which the defendant has not been given notice. The answer to that may well be contextual. I would not go so far as to say that a Master cannot refer to rules in a ruling that are not set out in the notice of motion. But the essence of the matter, I think, has to be as set out by Mr. Justice Owen-Flood in the case of Braunizer v. Canadian Pacific Ltd. (1995), 10 B.C.L.R. (3d) 195, in which he said that the real test as to the validity of an interlocutory notice of motion is whether it give the legal entities to whom it is directed reasonable notice of the application against them, and what is being sought in that application.

6 I am satisfied that this notice of motion did not give the defendants reasonable notice of what was being sought against them. In particular, I do not agree with the Master that the defendants could be expected, because of their knowledge of the law, to defend the application based on Rule 19(20), Rule 19(21) and Rule 19(24) when those rules had not been pleaded. I am assisted by the decision of Mr. Justice Spencer in Back Halsey Stuart Shields Incorporated v. Charles et al (1982), 140 D.L.R. (3d) 378, in which he agreed with counsel's position that the qualifier, if I can call it that, in Rule 52(11)(a) relating to, "any question arising on the application" must have reference to questions raised by the specific form of the notice of motion, and cannot have reference to questions which go substantially beyond the motion. In that case Mr. Justice Spencer held that the judgment had been given without notice to the defendant and under circumstances where he was deprived of his right to be heard. The facts

are not particularly helpful in that case, but he did say that such a judgment is contrary to the rules of natural justice and capable of being declared a nullity for that reason, rather than merely being treated as an irregularity. Later on he went on to say that a defendant, particularly an unrepresented defendant, ought not to be left to guess at the relief which the plaintiff will seek. What you must have is attention drawn specifically to what it is that the chambers judge will be asked to do.

7 While here it is true that the defendant did have notice of what was being sought, to have the statement of defence struck out, the reasonable assumption to be drawn by the defendant and his counsel was that the basis for that was because of the failure to deliver the list of documents or to reply to the demand for particulars. I accept the submissions of counsel for the defendants that he was not prepared to deal with the issues of the adequacy of the pleadings under Rule 19, and that, in fact, he did not deal with a number of the issues dealt with by the Master in the reasons for judgment.

8 So, in essence, I find that the defendants did not have notice of the application, or did not have notice of the relief which was ultimately granted by the Master, and that the Master did exceed his jurisdiction in going beyond the relief claimed, or "dispos(ing) of any question arising on the application" as set out in Rule 52(11)(a). For that reason his order should be set aside. The appeal will thus be allowed.

9 I do want to make a comment, however, generally about this matter getting this far. It seems to me, as a matter of common courtesy between counsel, that where counsel files a statement of defence and asks for a reasonable time to get full instructions from his client, indicating that he will then file a further statement of defence dealing more specifically with the issues, and asks for a reasonable length of time to provide a complete list of documents, giving reasons why he is not able to comply within the time specified in the rules, that common courtesy of counsel should be to allow those periods of time, unless there is some serious prejudice. And I admit that I am making these comments without knowing whether there is serious prejudice. I am also well aware that the counsel who were involved are not the counsel heard by me today. But it does seem to me that this entire matter is one which should have been dealt with without the necessity of having to come to court, having the Master deal with the matter and having the matter dealt with on appeal. As I say, if what I consider to be common courtesy between counsel was followed in this case, then I do not think there would have been a need for any of these court proceedings.

10 So, in the result, the appeal is allowed and the order will be set aside.
(SUBMISSIONS BY COUNSEL)

11 MR. CZEPIL: Costs of the appeal, My Lord?

12 THE COURT: No, I am not going to award costs of the appeal, essentially on the basis which I have just set out. I really think that these entire court proceedings are unnecessary and should not have happened.

13 MR. CZEPIL: Well I agree with that, My Lord, but I didn't initiate it either, right? At least my client didn't.

14 THE COURT: Well, on the other hand, Mr. Czepil, you could have filed an amended statement of defence and avoided the problem that arose by the demand for particulars. As I say I haven't dealt with the merits of the issue on the particulars. The Master held that there was no entitlement to them and that's not in issue on the appeal. But it's pretty clear that what the plaintiff wanted was to know what the defence was, and this probably could have been avoided by filing an amended statement of defence fully setting out what the defence was. So I am not going to allow costs on the appeal.

A.F. WILSON J.

Camp Development Corp. v. Greater Vancouver Transportation Authority, [2009] B.C.J. No. 1223

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

J.E.D. Savage J. (In Chambers)

Heard: May 4 and 6, 2009.

Judgment: June 19, 2009.

Docket: S064157

Registry: Vancouver

[2009] B.C.J. No. 1223 | 2009 BCSC 819 | 84 R.P.R. (4th) 41 | 97 L.C.R. 143 | 2009 CarswellBC 1635 | 179 A.C.W.S. (3d) 370

Between Camp Development Corporation, Plaintiff, and Greater Vancouver Transportation Authority, Defendant

(108 paras.)

Case Summary

Civil litigation — Civil procedure — Pleadings — Amendment of — Statement of claim — Adding new cause of action — To alter or add to claim for relief — Plaintiff's application to amend its statement of claim allowed in part — Challenges to the validity of an expropriation were required prior to vesting, which had taken place nearly four years ago — The GVTA did not require all of the expropriated land for a bridge development and transferred the surplus lands to a third party — The plaintiff argued the defendant was under a duty to offer to sell the excess land back to it — The basic limitation period of six years for pure economic loss, which applied to the alleged torts, had not expired — Expropriation Act, s. 21, s. 51 — Limitation Act, s. 3(2)(a) — Supreme Court Rules, Rule 19(7), Rule 19(24).

Municipal law — Powers of municipality — Expropriation — Compensation — Plaintiff's application to amend its statement of claim allowed in part — Challenges to the validity of an expropriation were required prior to vesting, which had taken place nearly four years ago — The GVTA did not require all of the expropriated land for a bridge development and transferred the surplus lands to a third party — The plaintiff argued the defendant was under a duty to offer to sell the excess land back to it — The basic limitation period of six years for pure economic loss, which applied to the alleged torts, had not expired — Expropriation Act, s. 21, s. 51 — Limitation Act, s. 3(2)(a) — Supreme Court Rules, Rule 19(7), Rule 19(24).

The plaintiff Campo Development Corp. applied to amend its statement of claim in relation to an expropriation action. The plaintiff sought to question the validity of the expropriation and to seek additional relief in the nature of a return of part of the lands, arguing that there had been an improper disposal to third parties. The Greater Vancouver Transportation Authority (GVTA) expropriated approximately 89 acres of land for use in a linear development of a bridge. The GVTA did not require all of the expropriated land for the bridge development and transferred the surplus lands to a third party. The plaintiff took the position the defendant was under a duty to offer to sell the excess land back to it and was liable to suffer some remedy as a result. The original statement of claim was filed almost three years prior to the plaintiff's application. GTVA opposed the making of the amendments, arguing that they were a challenge to the validity of the expropriation almost four years after it occurred.
HELD: Application allowed in part.

The amendments seeking to challenge the validity of the expropriation were disallowed but those amendments seeking a remedy arising from section 21 of the Expropriation Act were allowed. Section 51 of the Expropriation Act restricted challenges to the validity of an expropriation to the time prior to vesting, which had taken place nearly four years ago. The basic limitation period of six years for pure economic loss, which applied to the alleged torts, had not expired.

Statutes, Regulations and Rules Cited:

Expropriation Act, RSBC 1996, CHAPTER 125, s. 4, s. 5, s. 11, s. 12, s. 13, s. 14, s. 15, s. 16, s. 17, s. 18, s. 21, s. 23, s. 24, s. 29, s. 48, s. 45, s. 46, s. 47, s. 51

Expropriation Act, S.B.C. 1987, c. 23,

Expropriation Amendment Act, 2004, SBC 2004, CHAPTER 61, 97/ 2005,

Judicial Review Procedure Act, RSBC 1996, CHAPTER 241, s. 8

Land Clauses Act (U.K.),

Limitation Act, RSBC 1996, CHAPTER 266, s. 3(2)(a)

Supreme Court Rules, Rule 19(1), Rule 19(7), Rule 19(24)

Counsel

Counsel for the Plaintiff: J.L. Carpick, M.F. Robson, H. Shapray, Q.C.

Counsel for the Defendant: E. Hanman, L.J. Alexander.

Reasons for Judgment

Table of Contents

J.E.D. SAVAGE J.

I. Introduction

1 This expropriation action was scheduled for trial commencing April 20, 2009 but the trial was adjourned in part because the plaintiff who is the applicant seeks to amend its statement of claim. There are two sets of amendments that are at issue. One set of amendments questions the validity of the expropriation. A second set of amendments seeks return of a part of the lands, arguing that there has been an improper disposal to third parties.

2 The background to this action and application is briefly as follows.

3 In June 2005, the Greater Vancouver Transportation Authority ("GVTA"), an expropriating authority under the *Expropriation Act*, R.S.B.C. 1996, c. 125 (the "*Act*"), expropriated approximately 89 acres of land in Maple Ridge (the "Property") owned by Camp Development Corporation ("Camp") (the "Expropriation"). The Expropriation was stated to be for use in a linear development of the Golden Ears Bridge across the Fraser River.

4 On June 21, 2005, the GVTA registered an expropriation notice on the subject lands and a vesting notice was registered on June 29, 2005, transferring title of the subject lands into the name of the GVTA.

5 On June 29, 2005, the GVTA made an advance payment totalling $7,650,000 and subsequently made an additional payment bringing the total paid, to date, to approximately $9 million.

6 On June 27, 2006, Camp filed a Writ of Summons and Statement of Claim said to be "subject to the compensation action procedure rule". The following relief was sought in the Statement of Claim:

> (a) The difference between the market value of the Property and the Advance Payment plus disturbance damages.
>
> (b) Interest pursuant to sections 46 and 47 of the Expropriation Act.
>
> (c) Costs pursuant to section 45 of the Expropriation Act.
>
> (d) Damages caused by making a totally inadequate advance payment.
>
> *Filed Writ of Summons and Statement of Claim, Chambers Record, Tab 11*

7 Nowhere in the original Statement of Claim is there a claim challenging the validity of the Expropriation or seeking return of a portion of the Property.

8 Camp accepted all of the advance payments made by the GVTA to date, and commenced this proceeding on the basis that the land had been lawfully expropriated. As noted, Camp took the position that the advance payment was "totally inadequate".

9 Camp, almost three years after it filed the Statement of Claim now seeks leave to amend the Statement of Claim to include the following causes of action and/or relief:

(a) Damages resulting from Excessive Expropriation;

(b) Unlawful disposition of Surplus Land because of the defendant's failure to comply with section 21 of the Act;

(c) The GVTA convey to the Camp the Surplus Land;

(d) The GVTA is a trespasser on some of the land of the Camp and is liable to the Camp in damages;

(e) Damages as a result of the failure to comply with section 21 of the Act;

(f) Waiver of Tort, and more specifically, that the Camp may waive its claim for damages and elect to claim, instead, disgorgement by the GVTA and payment to the Camp of all of the benefits gained by the GVTA as a result of the misconduct;

(g) The GVTA obtained a benefit of taking land it wrongfully expropriated which benefit would have accrued to the Camp;

(h) The GVTA was unjustly enriched by the Excessive Expropriation, and is liable to the Camp; and

(i) By carrying out an Excessive Expropriation, the GVTA acted in bad faith.

Draft Amended Statement of Claim, Chambers Record, Tab 3

10 In its application Camp summarily describes its position thus:

1. Camp seeks to advance the following claims to which the Authority objects

   (a) The Authority expropriated more land than it actually required for its purposes. This made the expropriation void, or entitles Camp to damages.

   (b) The authority breached section 21 of the *Expropriation Act* by failing to offer to sell the excess land back to Camp.

   (c) By causing Maple Ridge to delay Camp's rezoning application, the Authority unlawfully interfered with Camp's economic interests.

   (d) The Authority acted in bad faith. In particular, the Authority unlawfully expropriated an excessive amount of land.

2. Camp also seeks a remedy on the basis of a plea of "waiver of tort", that is, disgorgement by the Authority of the gain it made, not simply compensatory damages.

3. Regarding the proposed amended pleading, Camp's allegation about the Authority taking more land than it needed, and acting in bad faith, is that any compensation Camp may be entitled to receive under the Expropriation Act based purely on a "market value" opinion is significantly less than its true loss as a result of the expropriation ("loss" in this sense being the economic position Camp would be in but for the expropriation, even taking into account all proper adjustments). Camp assert that tort based compensation or alternatively the "waiver of tort" provides a more just indemnity than the Expropriation Act alone.

4. For example, Camp contends that because its cost base of the land was so low (it purchased the land in 1993) it was in a unique position that no current buyer could exploit If the Property had not been expropriated, Camp would have developed it by constructing industrial warehouses, leased them, and earned an income stream having a much more significant value than is reflected by the compensation stipulated to be as market value Camp is entitled to receive under the Expropriation Act.

5. Also, had Camp been further along in this process than it was allowed to get by reason of the alleged tortious conduct of the Authority, it might have had a better case for establishing a higher market value of the expropriated property.

6. In part, Camp's complaint is due to the fact that the definition of market value in the Expropriation Act stipulates a price determined on the basis that the land owner is a willing seller. That was not true in Camp's situation because - being on the cusp of developing, but not yet having developed the property - if it had sold the property, Camp would have had to accept a price lower than the amount at which it valued the land if Camp retained it because any profit to be realized by development would not have been paid to Camp by a willing buyer.

11 The crux of one set of proposed amendments is at its most fundamental, a challenge to the validity of the Expropriation. Camp alleges that all, or a portion of the taking was invalid because of the GVTA's alleged unlawful or "bad faith" actions in carrying out the Expropriation. Based on these allegedly unlawful actions Camp is seeking to have the Property or a portion thereof conveyed back.

12 At this time there is a bridge on the lands. As explained to me, Camp does not actually seek a return of all of the lands, but if the Expropriation is invalid, the GVTA would have to expropriate anew, with a different valuation date, and there is benefit to Camp in that.

13 The second set of proposed amendments relates to the obligations of GVTA if not all of the expropriated land is required for purpose of the expropriation. Camp says that the GVTA breached its obligations under section 21 of the Act.

14 The reason for the proposed amendments is Camp's view that "... any compensation Camp may be entitled to receive under the *Expropriation Act* based purely on a 'market value' opinion is significantly less than its true loss as a result of the expropriation ('loss' in this sense being the economic position Camp would be in but for the expropriation, even taking into account all property adjustments)".

15 It is Camp's view that tort based compensation or alternatively waiver of tort provides a more just indemnity than the *Expropriation Act* remedies.

16 The GVTA opposes most of the amendments. The basis of their objections are that (1) Section 51 of the Act, and section 8 of the *Judicial Review Procedure Act*, is a bar to the relief claimed; (2) that Section 21 of the Act is a bar to the relief claimed; (3) that the *Limitation Act* is a bar to the relief claimed, (4) that the proposed amendments are inconsistent with the original relief claimed, and there is an estoppel based on conduct.

17 Camp asserts opposing positions based on its interpretation of the statutes and caselaw, and argues further, that the court should not adjudicate these issues without a trial in an application to amend the pleadings.

II. Pleading Amendments Generally

A. Plain and Obvious Standard

18 In deciding whether to dismiss an action or to allow an amendment to pleadings generally, the remedy of striking a pleading and dismissing a claim is limited to situations in which it is plain and obvious that the claim cannot succeed because it does not raise a triable issue. The fact that the matter is obscure, either by reason of fact or law, is not, by itself, a basis upon which to strike a pleading and dismiss a claim.

19 Striking a pleading and dismissing a claim is restricted to situations in which redrafting an amendment would be fruitless because the proposed claim, regardless of how it is drafted, is without legal foundation: *Extra Gift Exchange Inc. v. Ernest & Twins Ventures (PP) Ltd.*, 2007 BCSC 426 at para. 22.

20 In *Extra Gift Exchange Inc.*, the pleadings as they stood were so prolix and confusing that it was difficult, if not impossible, for the defendants to know the claims they were to meet. The pleadings were struck and the claims were dismissed where it was plain and obvious that they would fail; and amendments were permitted where it was not plain and obvious they would fail.

21 The main subrules at issue in this application are RR. 19(1), (7), and (24) of the *Supreme Court Rules*, B.C. Reg. 221/90.

22 Rule 19, as far as is relevant, states as follows:

> Contents
>
> (1) A pleading shall be as brief as the nature of the case will permit and must contain a statement in summary form of the material facts on which the party relies, but not the evidence by which the facts are to be proved.
>
> Inconsistent allegations
>
> (7) A party shall not plead an allegation of fact or a new ground or claim inconsistent with the party's previous pleading.
>
> Alternative allegations
>
> (8) Subrule (7) does not affect the right of a party to make allegations in the alternative or to amend or apply for leave to amend a pleading.
>
> Scandalous, frivolous or vexatious matters
>
> (24) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing or the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

B. Material Facts

23 Rule 19(1) states that, "[a] pleading ... shall contain a statement in summary form of the material facts on which the party relies, but not the evidence by which the facts are to be proved".

24 The requirement to plead material facts and not evidence is, on occasion, troublesome. The problem is that a party must plead all material facts on which he intends to rely at trial, omitting no averment essential to success (see *Wyman and Moscrop Realty Ltd. v. Vancouver Real Estate Board* (1957), 8 D.L.R. (2d) 724 (B.C.C.A.)) without violating the stricture against pleading evidence.

25 As Frederick Irvine, *McLachlin & Taylor: British Columbia Practice*, looseleaf, 3d ed. (Markham: Lexis Nexis Canada Inc., 2006) [*British Columbia Practice*], points out at 19-3(2):

> The distinction between material facts and evidence is essentially one of degree. A material fact is a fact that of itself is necessary to establish a legal proposition and without which the cause of action is incomplete: *Bruce v. Odhams Press Ltd.,* [1936] 1 All E.R. 287, [1936] 1 K.B. 697 (C.A.). Evidence includes those facts necessary to establish the material facts: *Phillips v. Phillips* (1878), 4 Q.B.D. 127 (C.A.). It is a safe practice, if in doubt, to plead a matter as the risk of having an order go to strike out a portion of one's pleading as being evidence is remote, and the consequences of such an order are slight (costs), while the consequences of having omitted to plead a material fact might be to have one's pleading struck out or claim dismissed for failure to state a cause of action or defence.

26 In *Reid v. British Columbia (Egg Marketing Board)* (2002), 23 C.P.C. (5th) 127 at para. 13 (B.C.S.C.), the

chambers judge cited with approval the following passage from Fraser & Horn, *The Conduct of Civil Litigation in British Columbia*, Vol. 1 (Vancouver: Butterworths, 1995) at 265-66:

> Any affirmative pleading should be complete enough as a narrative that the real story of what occurred between the parties may be understood by anyone reading it. This will occasionally lead the pleader to include information which, strictly speaking, is not necessary or entirely proper ... So long as the (technically) superfluous information contributes to the comprehensibility of the narrative and is not scandalous, prejudicial or embarrassing to the meaning of Rule 19(24) it seems permissible and even desirable to stretch the Rules of pleading somewhat.

27 That said, the standard elucidated in *Homalco Indian Band v. British Columbia* (1998), 25 C.P.C. (4th) 107 (B.C.S.C.) at p. 110 (adopted in *Strauss v. Jarvis*, 2007 BCCA 605 at para. 15), is that material facts must be prepared in conventional form so that the defendant knows the case he has to meet. Pleadings that fail to identify the cause of action, that contain irrelevant material, or that are intended to confuse, are prejudicial and will be struck.

C. Inconsistent Pleadings

28 Rule 19(7) states, "[a] party shall not plead an allegation of fact or a new ground or claim inconsistent with the party's previous pleading". The effect of this rule is to prevent a party from setting up a claim in a subsequent pleading, which is inconsistent with an earlier pleading.

29 *British Columbia Practice* discusses the traditional interpretation of R. 19(7) as follows:

> R. 19(7) was given its conventional interpretation in *Business Depot Ltd. v. Lehndorff Management Ltd.*, [1996] B.C.J. No. 1961, 48 B.C.L.R. (3d) 326, at paras. 23-25 (C.A.), where the court (without reference to other authorities) described R. 19(7) as the rule against what is commonly known as "departure" and found the departure in several respects: (1) the reply alleged an oral contract different from the contract alleged in the statement of claim; (2) the reply asserted a collateral oral contract; and (3) the reply claimed rectification of the contract. Those were all different causes of action from those pleaded in the statement of claim, in which the plaintiff had sought specific performance. The court held that the plaintiff was bound by the statement of claim and that the remedy of rectification was therefore not available to it.

30 In *Bratsch Inc. v. LeBrooy* (1991), 3 C.P.C. (3d) 192 (B.C.S.C.), the court asserts the order of pleadings does not make a difference and a party cannot plead an allegation of fact or a new ground or claim inconsistent with the party's previous pleading. However, in *Gabbs v. Bouwhuis*, 2005 BCSC 1782, Bennett J. (as she then was) observed that *Bratsch* had been "... criticized by legal writers for interpreting 'previous pleading' as including the same document", citing *British Columbia Practice* in that context.

31 Madam Justice Bennett declined to follow *Bratsch*, because it did not refer to the significant body of case law on that point, and therefore was not binding authority. The court concluded at para. 24 that a party may plead inconsistent claims in the statement of claim and defence but cannot make an alternative claim that is inconsistent in reply or in a defence to a counterclaim.

32 As plaintiff's counsel note in their *Reply to Defendant's Outline*, R. 19(7) is not intended to restrict a party's right to plead in the alternative: R. 19(8).

D. Rule 19(24) Scandalous, frivolous, or vexatious matters

33 The basic issue to be determined on an application under R. 19(24) is whether there is a question to be tried, regardless of the complexity or novelty of that question. That issue must be decided on the basis of the pleadings as they stand or as they might be amended: *Kripps v. Touche Ross & Co.* (1992), 69 B.C.L.R. (2d) 62 (C.A.).

34 The court's role in such an application is to decide whether the claimant has a plausible argument that ought to be heard at trial. The procedure under R. 19(24) is only to be relied on in "plain and obvious cases": *Hunt v. T&N plc*, [1990] 2 S.C.R. 959, 49 B.C.L.R. (2d) 273.

35 In *Dempsey v. Envision Credit Union*, 2006 BCSC 750 at paras. 6-17, Madam Justice Garson summarizes the law on R. 19(24) and extracts five general propositions from the authorities concerning the circumstances under which pleadings will be struck. It is worth noting that in the instant case the defendant states at para. 21 of its *Chambers Brief of the Defendant Re: Amendment of Statement of Claim*, that only RR. 19(24)(a), (b), and (d), are at issue in the application. Thus, the portions of *Dempsey* relating to R. 19(24)(c) are not relevant.

36 Paras. 6-17 of *Dempsey* state as follows:

LEGAL TEST TO STRIKE PLEADINGS OR ACTIONS PURSUANT TO R. 19(24)

[6] R. 19(24) of the *Rules of Court* provides as follows:

> (24) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing or the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.
>
> (27) No evidence is admissible on an application under sub rule (24) (a).

[7] The question of whether a pleading discloses no reasonable claim under R. 19(24)(a) is to be determined on the basis that the facts as pleaded are true. Where it is "plain and obvious" that the claims, as pleaded, or as they might be amended, disclose no reasonable claim, the court has the discretion to dismiss the claim. Any doubt is to be resolved in favour of allowing the pleadings to stand (see *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 at p. 980; *Citizens of Foreign Aid Reform Inc. v. Canadian Jewish Congress* (1999), 36 C.P.C. (4th) 266 (B.C.S.C.) at p. 276, para. 3.

RULE 19(24)(b) (c) and (d)

[8] In *Citizens for Foreign Aid Relief Inc.* the court set out a useful summary of the jurisprudence respecting R. 19(24)(b) and (c) as follows at para. 47:

> Irrelevancy and embarrassment are both established when pleadings are so confusing that it is difficult to understand what is being pleaded: *Gittings v. Caneco Audio-Publishers Inc*. (1987), 17 B.C.L.R. (2d) 38 (B.C.S.C.) ... A pleading is "unnecessary" or "vexatious" if it does not go to establishing the plaintiff's cause of action or does not advance any claim known in law: *Strauts v. Harrigan*, [1992] B.C.J. No. 86 (December 2, 1991), Doc. Vancouver C9136131 (B.C.S.C.) ... A pleading is "frivolous" if it is obviously unsustainable, not in the sense that it lacks an evidentiary basis, but because of the doctrine of estoppel: *Chrisgian v. B.C. Rail Ltd.*, [1992] B.C.J. No. 1567 (July 3, 1992), Doc. Prince George 20714 (B.C. Master). (see also *Borsato v. Basra*, 2000 BCSC 28)

[9] Pleadings will be struck out if they abuse the process of the court. Abuse of process is a flexible doctrine that allows the court to prevent a claim from proceeding where it "violates such principles as judicial economy, consistency, finality and the integrity of the administration of justice". (see *Toronto (City) v. Canadian Union of Public Employees (CUPE) Local 79*, [2003] 3 S.C.R. 77 at para. 37).

[10] One way in which these principles are violated is where parties make allegations in subsequent proceedings that are *res judicata*. Parties may not bring forward in a subsequent action, points related to the subject matter of previous litigation that the parties, exercising reasonable diligence, might have been able to bring forward. (*Johnson v. Gore Wood & Co.*, 2002 2 A.C.1 at 23 English Court of Appeal and *Samos Investments Inc. v. Pattison*, [2004] B.C.J. No. 705).

[11] In *Henderson v. Henderson*, 3 Hare 100, 114 to 115, cited in *Samos*, the plea of *res judicata* was discussed.

> In trying this question, I believe I state the rule of court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

[12] In *Babavic v. Babowech*, [1993] B.C.J. No. 1802 (S.C.) at para. 18 it was held that R. 19(24)(d) gives the court the discretion to dismiss actions on the basis of abuse of process, that is, where the court process is being used for an improper purpose:

> The categories of abuse of process are open. Abuse of process may be found where proceedings involve a deception on the court or constitute a mere sham; where the process of the court is not being fairly or honestly used, or is employed for some ulterior or improper purpose; proceeding which are without foundation or serve no useful purpose and multiple or successive readings which cause or are likely to cause vexation or oppression.

[13] In *Babavic,* Baker J. cited with approval the statement from I.H. Jacob, in "The Inherent Jurisdiction of the Court" as follows at page 9:

> [The principle of abuse of process] connotes that the process of the court must be used properly, honestly and in good faith, and must not be abused. It means that the court will not allow its function as a court of law to be misused, and it will summarily prevent its machinery from being used as a means of vexation or oppression in the process of litigation. Unless the court had power to intervene summarily to prevent the misuse of legal machinery, the nature and function of the court would be transformed from a court dispensing justice into an instrument of injustice.
>
> It follows that where an abuse of process has taken place, the intervention of the court by stay or even dismissal of proceedings may often be required by the very essence of justice to be done, and so to prevent parties being harassed and put to expense by frivolous, vexatious or groundless litigation.

[14] In *Toronto v. CUPE,* Arbour, J. stated at para. 35;

> Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice". (*R. v. Power,* [1994] 1 S.C.R. 601, at page 616), and as "oppressive treatment" (*R. v. Connelly*, [1989] 1 S.C.R. 1659, at page 1667).

[15] In *Toronto v. CUPE*, Arbour J. cited with approval Madam Justice McLachlin's statement concerning the doctrine of abuse of process in *R. v. Scott* [1990] 3 S.C.R. 979 as follows at para. 35;

> Abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underlying the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

[16] In *Borsato v. Basra,* [2000] B.C.J. No. 84 (S.C.), reversed on other grounds, [2000] B.C.J. No. 2855) Master Baker said at para. 24:

> The plaintiff also attacks the statement of defence under Rule 19(24). A pleading is frivolous if it is without substance, is groundless, fanciful, "trifles with the court" or wastes time. This statement of

> defence does, in my view, waste time and verges on the fanciful. There may, somewhere in the general traverse, be grounds, but as pleaded it lacks substance. It is therefore frivolous.
>
> A pleading is vexatious if it is without bona fides, is "hopelessly oppressive" or causes the other party anxiety, trouble or expense. This statement of defence cannot be said to be oppressive and possibly not without bona fides, but is almost certain to cause the plaintiff (and indeed has already caused) anxiety, trouble and expense. It is therefore vexatious.
>
> A pleading, to avoid being embarrassing, must not be concealing or evasive. It must state the real issue in an intelligible form. It must, in short, be a part, even in a minimally articulated form, of that constructive conversation to which I have alluded. This statement of defence does not meet that standard. It is therefore embarrassing.

[17] In summary, a pleading will be struck out if:

(a) the pleadings are unintelligible, confusing and difficult to understand (Citizens for Foreign aid Reform, supra);

(b) the pleadings do not establish a cause of action and do not advance a claim known in law (*Citizens for Foreign aid Reform, supra*);

(c) the pleadings are without substance in that they are groundless, fanciful and trifle with the Court's time (*Borsato v. Basra*);

(d) the pleadings are not bona fides, are oppressive and are designed to cause the Defendants anxiety, trouble and expense (*Borsato v. Basra, supra*);

(e) the action is brought for an improper purpose, particularly the harassment and oppression of the defendants (*Ebrahim v. Ebrahim,* 2002 BCSC 466.

37 In the recent case of *Greater Vancouver Regional District v. British Columbia (Attorney General)*, 2009 BCSC 577 at para. 31, Madam Justice Garson revisited R. 19(24)(a) and added to the above discussion the proposition that, "... difficult questions of law, even if they are complex or novel, may well be decided under this rule if on a proper analysis of the law it is plain and obvious that the claim cannot succeed".

38 The test on an application under RR. 19(24)(b), (c), or (d) is the same as that under R. 19(24)(a), that is, the applicant must show that it is "plain and obvious" that the pleading offends the subrule in question: *Hunt*.

III. The Scheme of the *Expropriation Act*

39 Prior to the Act, various statutes provided that local government and various other provincially created authorities, had expropriation powers and used procedures that were set out in those respective statutes. The new *Expropriation Act*, S.B.C. 1987, c. 23 established uniform procedures.

40 Previously, the procedures were different, and if an enactment contained no procedure, reliance was to be had on the old *Land Clauses Act* renamed the *Expropriation Act* by the statute revision commissioner in 1979, but founded in U.K. enactments in the mid 1800's.

41 This state of the law prompted Lambert J.A., in *Tenner* (1982) 34 B.C.L.R. 285 to opine that it is "... a commentary on the state of the law in the field of expropriation in British Columbia that the plaintiff's rights to compensation in this cased are determined by such an ancient and imperfect enactment. ..."

42 New legislation was not precipitously enacted.

43 On January 27, 1961 the Clyne Royal Commission was established to review the state of the law in B.C. Following the Clyne Royal Commission and the 1968 Ontario Royal Commission inquiring into civil rights (the McRuer commission) there was the 1971 Law Reform Commission Report. A draft of the proposed legislation was

circulated by British Columbia in a "green paper" in 1982. On April 28, 1987 the Attorney General introduced Bill 22, the *Expropriation Act*, which received Royal Assent June 26, 1987. See *The Law of Expropriation and Compensation in Canada*, Todd, Eric C.E., 2nd Edition, Carswell, 1992.

44 The current Act, like Bill 22, provides for a pre-expropriation inquiry (s. 11-18), approval processes (s. 4, 5, 18), notice of expropriation (s. 6), acquisition procedures, registration (s. 23, 24), advance payment (s. 20), compensation (s. 29-48) and costs (s. 48). Under Bill 22 the Expropriation Compensation Board was created which had original jurisdiction to deal with compensation claims. In 2005, the Expropriation Compensation Board was abolished and originating jurisdiction in expropriation actions conferred on this court: *Expropriation Amendment Act, 2004*, S.B.C. 2004, c. 61, 97/2005: Expropriation Compensation Board Transitional Regulation.

IV. Section 51

45 Amendments to paragraphs 8A-8F plead excessive expropriation and that the expropriation is *ultra vires* and void. These are related to the amendments to paragraphs 39-47, paragraphs 60-61 and some of the amendments to the prayer for relief.

A. GVTA Argument

46 GVTA opposes the making of the amendments. GVTA argues that the crux of the amendments is fundamentally a challenge to the validity of the Expropriation almost four years after the Expropriation. The proposed amendments allege that all or a portion of the taking is invalid because of GVTA's unlawful or bad faith actions in carrying out the expropriation. Thus, based on these allegedly unlawful actions Camp seeks to have the property and/or a portion thereof conveyed back.

47 GVTA says that the validity of the Expropriation can only be challenged in limited circumstances. Section 51 of the Act, it says, constitutes a code and severely limits proceedings to challenge the validity of a taking. Section 51 reads as follows:

> 51 (1) Legal proceedings to challenge the validity of an expropriation must not be brought after land vests under section 23.
>
> (2) Subject to subsection (1), an application under the *Judicial Review Procedure Act* must be brought within 30 days after the order or determination subject to review is made.

48 In this case the expropriation notice was filed at the land title office on June 21, 2005, and on June 23, 2005 copies of the expropriation notice, and the certificate of approval of expropriation, were delivered to Camp. On June 28, 2005 GVTA delivered to Camp an advance payment of $7,650,000. Title to the land vested in the GVTA on filing of the vesting notice, on or about June 29, 2005. Later the advance payment was increased to approximately $9,000,000. This proceeding was commenced in 2006, claiming compensation for the Expropriation.

49 The Expropriation followed months of correspondence and discussion between the parties and their solicitors regarding whether there should be a whole or partial taking. Evidence regarding the discussions between GVTA and Camp regarding the lands at issue, and the amount of the proposed expropriation, is contained at pages 13-62 of the Affidavit of Rick Bosa, sworn February 19, 2009.

50 The GVTA relies on *Rella v. Village of Montrose*, 2006 BCSC 1383 at para. 52, 54-55, *Seaside Acres Ltd. v. Pacific Coast Energy Corporation et al.*, [1994] B.C.J. No. 217, 1994 CanLII 2503 (B.C.C.A.), *Roadmaster Auto Centre Ltd. v. Burnaby (District)* [1992] B.C.J. No. 2959.

51 Camp says that because the notice of expropriation was erroneous, the expropriation is a nullity, relying on the

decision of the Court of Appeal in *Gray v. Langley (Township)* (1986) 9 B.C.L.R. (2d) 1, [1987] 2 W.W.R. 157, 34 M.P.L.R. 183, 34 D.L.R. (4th) 270.

52 Section 51(1) provides that legal proceedings to challenge the "validity" of an expropriation "must" not be brought after the land vests. The section, then, is directed at proceedings that challenge the validity of an expropriation. The provision is mandatory on its face. It says that such proceedings must not be brought after vesting. GVTA says that the plain meaning of this provision is that the amendments proposed by GVTA, alleging that the Expropriation is invalid, cannot be brought for the first time now, some 4 years after the vesting, as they raise an issue bound to fail.

53 In *Rella v. Village of Montrose* 2006 BCSC 1383 the petitioners sought relief pursuant to the *Judicial Review Procedures Act*, R.S.B.C. 1996, c. 241 for the expropriation of a portion of their residential property. It was alleged that there were various failings of the expropriating authority including failing to post a notice of expropriation, defective publication of the notice, failing to hold an inquiry, a mis-description in the purpose of the expropriation, too much land was taken, and the respondent was acting in bad faith. None of those allegations were made out, however, Holmes J. found that since the land had vested legal proceedings could not be brought:

> [55] The authorities are clear and consistent to the effect that the limitation in s. 51(2) of the *Act* is made expressly subject to s. 51(1) which governs. I therefore find the present proceeding statute barred by operation of s. 51(1) of the *Act*. [*Seaside Acres Ltd. v. Pacific Coast Energy Corp.*, [1992] B.C.J. No. 2923 (S.C.), aff'd (1994), 87 B.C.L.R. (2d) 229 (C.A.); *Roadmaster Auto Centre Ltd. v. Burnaby (District)*, [1992] B.C.J. No. 2959 (S.C.); *Erickson v. Kamloops (City)*, [1993] B.C.J. No. 1239 (S.C.); *White v. Prince George (City)* (1993), 50 L.C.R. 260 (B.C.E.C.B.); *Cejka v. Cariboo (Regional District)* (1995), 56 L.C.R. 131 (B.C.E.C.B.); *Whitechapel Estates Ltd. v. British Columbia (Ministry of Transportation and Highways)* (1998), 57 B.C.L.R. (3d) 130 (C.A.)]

54 The GVTA also relies on the decision of the Court of Appeal in *Seaside Acres Ltd. v. Pacific Coast Energy Corporation et al.*, 1994 CanLII 2503 (B.C.C.A.), [1994] B.C.J. No. 217 (B.C.C.A.). In that case, however, it was not disputed that if the process called for by the Act had been validly complied with, *Seaside's* petition was out of time (para 26).

55 In *Roadmaster Auto Centre Ltd. v. Burnaby (District)* [1992] B.C.J. No. 2959, a tenant sought a declaration that it held a valid and subsisting lease, seeking to set aside a vesting order. Blair J. dismissed the application:

> 17. I find that the application for relief made by the petitioner under the *Expropriation Act* was brought after the Vesting Notice was filed and hence, was out of time pursuant to s. 50(1) [now s. 51(1)] of the *Expropriation Act*. Similarly I find that the application for relief under the *Judicial Review Procedure Act* was brought more than thirty days after the 26 May 1992 decision and hence, was out of time pursuant to Section 50(2) [now s. 51(2)] of the same *Expropriation Act*.
>
> 18. As noted, the petitioner also seeks declaratory relief pursuant to Supreme Court Rule 10 outside the scope of both the *Expropriation* and *Judicial Review Procedure Acts*. I deny that application; to grant it would be to ignore the provisions of the *Expropriation Act* and the *Judicial Review Procedure Act* which are clearly applicable in the instant case.

56 The GVTA also argues that Camp's challenge is not permitted under the Act or *Supreme Court Rules*, in that the question of whether an expropriating authority's powers has been exercised in accordance with statutory requirements is not justiciable: see *B. Johnson & Co. (Builders), Ltd. v. Minister of Health*, [1947] 2 All E.R. 395, followed in *Pacific Forest Products Limited v. British Columbia (Minister of Transportation and Highways)* (1994), 53 L.C.R. 198 at p. 7-8.

B. Camp Argument

57 Camp argues that since the proposed amended pleading alleges that the notice is a nullity, there has been no expropriation. In places the arguments suggests that if the taking was not nullity in total there is partial invalidity. It is

a nullity due to a material misrepresentation by the GVTA as to the true purpose of the expropriation. Thus the approval certificate and the vesting notice are also nullities:

> Additionally, the invalidity of the Notice results in the approval certificate and the vesting notice being nullities. The Property did not lawfully vest in the Authority's name and legal title to the Property must be returned to Camp.

58 This is of importance because:

131. Camp alleges that the Notice misstated the true purpose of the Expropriation and the Authority knowingly expropriated more land than it actually required for the stated purpose of the Expropriation. In particular:

    (i) The Authority's true purpose for the Expropriation included using and developing other works and facilities on the Property in addition to the Bridge.

    (ii) The other works and facilities did not comprise a "linear development" under the Expropriation Act.

    (iii) The Authority did not require all of the land it expropriated for the purpose of constructing the Bridge.

132. The *true* purpose of the expropriation must be stated on the expropriation notice or sections 4 and 6 of the *Expropriation Act* have not been complied with and purported any expropriation based an invalid expropriation notice is void because:

    (i) Service of a valid and truthful expropriation notice is a condition precedent to a valid expropriation (per VanKam).

    (ii) An expropriation can only be approved by an approving authority if it has the correct, actual information to base its decision to approve the expropriation.

    (iii) If a valid approval certificate cannot be given (because the expropriation notice the decision was purportedly made on was invalid) then there can be no valid vesting notice.

    (iv) If there is no valid vesting notice then the Property was not properly vested in the name of the Authority.

    (v) Additionally, if sections 4 and/or 6 have not been complied with, then the Authority has not expropriated in accordance with the provisions of the Expropriation Act, which means that it was not properly empowered to expropriate at all pursuant to the South Coast British Columbia Transportation Authority Act.

59 In arguing that the expropriation is a nullity, Camp relies on such cases as *Thorcon Enterprises Ltd. v. West Vancouver (District)*, [1988] B.C.J. No. 323 (S.C.), where it was held that expropriation notice must show on its face sufficient and accurate detail to allow the owner to decide whether an inquiry should be sought.

60 Additionally, Camp says there must be strict compliance with enabling legislation based on *Costello v. Calgary (City)* [1983] S.C.J. No. 4, *Van Kam Freightways Ltd. v. Kelowna (City)*, 2007 BCCA 287, [2007] B.C.J. No. 1026 (C.A.) and the failure to state exact purposes as in *Purchase v. Terrace (City)*, [1995] B.C.J. No. 247 (S.C.), can give rise to a finding that such an expropriation is *void ab initio*: *Gray v. Langley (Township)* [1986] B.C.J. No. 1215 (C.A.), *Rose v. Grand Bank (Town)* [1990] N.J. No. 121 (SCN-TD), 49 M.P.L.R. 232.

61 Camp argues further that as the taking is a nullity Camp, the actions of GVTA are tortuous and it is entitled to various remedies in tort for the wrongful conduct of the GVTA, including reconveyance of the property, damages, disgorgement, an accounting of the benefits received by the GVTA etc.

C. Analysis

1. Section 51 a Bar

62 The error that Camp asserts is that the Notice of Expropriation does not state the true purpose of the taking. The Notice of Expropriation is reproduced in the chambers brief at Exhibit A to the Affidavit of R. Bosa sworn February 19, 2009. The notice contains the following:

1. Greater Vancouver Transportation Authority, 1600-4720 Kingsway, Burnaby, British Columbia V5H 4N2, Telephone Number: (604) 453-4500 (the "Expropriating Authority") intends to expropriate land or interest in land with respect of which Camp Developments Corporation is the registered owner, the particulars of which are a full taking in fee simple over:

Parcel Identifier:	005-905-851
Legal Description:	Parcel "H" (Plan with fee deposited 15901F) District Lot 280, Group I, New Westminster District
Civic Address:	None
Parcel identifier:	004-346-327
Legal Description:	Parcel "D" (Plan in absolute fees parcels book volume 12, folio 752 No. 6903F) District Lot 281, Group 1, Except: Firstly: that portion shown coloured red on plan with fee deposited 14957F.

Secondly Parcel "B" (Reference Plan 1963)

Thirdly: Two portions 4.06 acres and 2.85 acres more or less as shown on reference plan 1963, New Westminster District.

Civic Address:	10951 Hazelwood Street, Maple Ridge, B.C.
Parcel Identifier:	000-508-926

Legal Description: Parcel "C" (Plan in Fee deposited 15901F),

Except: part subdivided by plan 35482, District Lot 281, Group 1, New Westminster District.

Civic Address: 19967 Wharf Street, Maple Ridge, B.C.

2. The nature of the interest in the land intended to be expropriated is a fee simple, full taking.
3. The purpose for which the interest in the land is required is the Golden Ears Bridge. Project Transportation system, which constitutes a linear development.
4. The Approving Authority with respect to this expropriation is the Greater Vancouver Transportation Authority pursuant to Section 1(1) of the *Expropriation Act* which is charged with the administration of the *Greater Vancouver Transportation Act* under which the Expropriating Authority is empowered to expropriate.
5. Where an owner is eligible under Section 10 of the *Expropriation Act* to request an inquiry, the Minister of Transportation and the Expropriating Authority must be served with a Notice of Request for Inquiry (Form 2), a copy of which is attached hereto, within thirty (30) days after the date this Expropriation Notice is served on the owner. The owner is NOT entitled to request an inquiry.
6. Permitted encumbrances are as set out in the letter to the Registrar of Land Titles.

63 Camp says the Expropriation is a nullity because the notice does not disclose the true purpose as only part of the lands was required for the Golden Ears Bridge Project Transportation System. It is acknowledged that the bridge is now built on the lands subject to the Expropriation, although there are excess lands.

64 In *Thorcon Enterprises*, Spencer J. held that in order for an inquiry officer to be able to hold an informative hearing it is necessary that the purpose of the expropriation be known. In that case no expropriation had taken place, as there was no notice of expropriation. The stated purpose of the bylaw was said only to be "or pleasure, recreation, or community use of the public". Although the title of the bylaw also referred to the "Argyle acquisition policy" the court could not give content to that phrase in the title to the bylaw. The court found that the bylaw, enacted a few days before the new *Expropriation Act* came into force, had not expropriated land in accordance with the *Expropriation Act*, and that the bylaw was too vague and uncertain. This is a case of first impression referencing the new Act.

65 Camp relies on *Costello* for the distinction between void and voidable bylaws, specifically that a statute enacting a formality attached to the exercise of a grant of authority by by-law must be examined in each instance to determine whether it is mandatory or directory. In general, where legislation interferes with private rights, conditions precedent to the exercise of statutory powers must be strictly complied with. While *Costello* stands for this general proposition, it specifically dealt with a matter where the claimant was not given notice of the expropriation.

66 *Van Kam* is another expropriation case relating to a failure to give notice, this time to an unrecorded leaseholder who was held to be an owner within the meaning of the Act. *Van Kam* follows *Costello*, however, Madam Justice Huddart, speaking for the Court, analyses the legislation and finds that "... the only conditions precedent to an expropriation are set down in s. 4 ..." which are service of an expropriation notice and approval of the approving authority. Service of an expropriation notice by section 6(1)(a) is restricted to an owner whose land is expropriated, and an owner whose interest is recorded in the land title office. Thus, although the unrecorded leaseholder had no notice of the expropriation, the expropriation was valid as the only condition precedents were met.

67 In *Purchase,* the owner sought a declaration that the actions of the city had effected an expropriation, and sought to mandamus the respondent to expropriate its lands. The petition was dismissed, but during the course of her decision Madam Justice Dorgan stated that there "... are no common law principles in the law of expropriation ..." approving the statement of Lord Pearson in *Rugby Water Board v. Shaw Fox*, [1972] 2 W.L.R. 757 at 763 that "... compulsory acquisition and compensation are entirely creatures of statute". Although in passing she stated an expropriation bylaw "... must be found to give proper and clear notice of what is to be expropriated, and must state its exact purposes", that statement is *obiter dicta* as for other reasons she found mandamus should be refused.

68 The parties argued at length the meaning of the various judgments in *Gray*, with differing positions on who was in the majority. Camp relied on the case for the proposition that the absence of notice of a tax sale is fatal, entitling the owner to set aside the sale, relying on the decision of Anderson J.A. GVTA on the other hand relied on the statement of McLachlin J.A., as she then was, who distinguished between statutes that made no provision regarding validity or finality, and those which did. She said:

> 72 Where the statute does not contain provisions indicating that a sale is to be valid or conclusive notwithstanding failure to follow the prescribed steps, the rule is that the sale which follows such failure is a nullity: *O'Brien v. Cogswell* (1889), 17 S.C.R. 420 at 424 [N.S.]; see also *Deverill v. Coe* (1886), 11 O.R. 222 (C.A.); *Dalziel v. Mallory* (1888), 17 O.R. 80; *Toronto Gen. Trusts Corp. v. Maryfield*, [1945] 3 W.W.R. 625 (Sask. C.A.).
>
> 73 On the other hand, where the statute contains provisions which indicate that the title obtained by the tax purchaser will remain valid notwithstanding a failure to comply with requirements of the Act, the sale will not be declared a nullity. Such provisions may take different forms. Some may be curative provisions. Some, like s. 473, may set out particular situations where the taxpayer may ask to have the sale set aside. And some, like s. 475, establish limitations on when an action can be brought. The important point is that the presence of such provisions indicates the intention of the legislature that, in certain circumstances, the title of the tax purchaser shall be final notwithstanding defects of procedure. Where the statute discloses this intention, it is not open to the former landowner to say that there has been no valid sale and hence that such provisions do not apply. The very purpose of such provisions is to ensure that the sale stands notwithstanding omissions which might otherwise affect its validity.
>
> 74 An example of such a statute is found in *Langdon v. Holytrex Gold Mines Ltd.*, [1937] S.C.R. 334, [1937] 2 D.L.R. 364. In that case, as in this, the municipality had failed to give the landowner the notice required by statute, and the land had been sold. In that case, too, as in this, the statute provided that after the expiry of the redemption period actions to recover the land were barred. The question, as in this case, was whether the sale or purported sale fell within the curative and limitation provisions of the Act. The Supreme Court of Canada held that they did, with the result that the taxpayer's action was barred by statute.

69 In discussing the policy behind the provisions she noted the following:

> 76 I am satisfied upon consideration of s. 473 and s. 475 that the intention of the legislature was to make tax sales final notwithstanding defects in procedure save for the specified exceptions. There are two stages. During the redemption period, under s. 473, there is a fairly broad right of challenge. After the redemption period, however, claims are restricted to compensation or indemnity; no claims with respect to the land itself or title can be maintained.
>
> 77 I am confirmed in this view by other considerations. First, this reading of the *Municipal Act* is consistent with the land registry system in place in British Columbia. The keystone of that system is the conclusiveness and finality of title as an indication of ownership. The prospect of challenges to the title of the tax purchaser long after the redemption period has passed and after the purchaser may have in good faith expended money and work in improving what he thought was his land is not consistent with the goals of our land registry system. More particularly, s. 255 of the *Land Title Act* provides that:
>
> > 255. (1) ... where land is sold for taxes, rates, or assessments, the registration of the tax sale purchaser for an estate in fee simple purges and disencumbers the land of
> >
> > *(a)* all the right, title and interest of every previous owner, or of those claiming under him ...

> Clearly the legislature's intention was that a purchaser such as Mrs. Griffith, who obtains title pursuant to s. *272* of the *Municipal Act* at the end of the redemption period, should take title free from any claims of the previous owner.
>
> 78 Second, the history of the legislation confirms the increasing concern of the legislature with ensuring certain title on tax sales, within such limits as are necessary to protect the property owner. Before 1900, tax purchasers in British Columbia could only purchase *prima facie* title. Tax titles could always be impeached, and tax purchasers were never sure of their titles: *Johnson v. Kirk* (1900), 30 S.C.R. 344. In 1900 the legislature enacted s. 8 of the *Land Registry Amendment Act* to cure uncertain tax titles by estopping and debarring claims after the redemption period: see *Temple v. North Vancouver* (1914), 6 W.W.R. 70 at 103-105 (S.C.C.) [B.C.], per Duff J.; *Crumm v. Shepard*, [1928] S.C.R. 487 at 511-12, [1928] 3 D.L.R. 887 [Alta.]. In 1913 the legislature added an indemnity provision for persons who could not recover their land because of the operation of the *Land Registry Act*. Between 1914 and 1919 the legislation permitted actions to set aside tax sales if they were brought within a year of delivery of the deed to the tax purchaser, but not otherwise. In 1919 the legislature repealed the existing tax sale provisions and enacted the predecessors of the present ss. 472 and 475 of the *Municipal Act*. Finally, in 1978, s. 255 of the *Land Title Act* was enacted, providing that the tax purchaser obtains fee simple free of encumbrances.

70 As I read the several decisions, Anderson, J.A.'s reasons were not adopted by the other members of the court. Anderson was of the view there was no sale. His reasons were not concurred in by Seaton, J.A. who considered the issue was triable, and referred the matter back to be resolved at trial. Seaton agreed with McLachlin, J.A., and Southin, J. below [3 B.C.L.R. (2d) 335], that if there was a sale section 475 of the *Municipal Act* prevents setting it aside.

71 In my view the cases involving a failure to give notice of an expropriation or of a tax sale are not helpful to Camp. What could be more fundamental in either context than notice to the owner? In *Van Kam*, however, even that was held to be subordinated to the legislative conditions precedent that restricted required notice to those with recorded interests.

72 In this case there is no dispute that part of the lands was required for the construction of the Golden Ears bridge. The question of whether all or only part of the lands was required was vetted between Camp and GVTA prior to the Expropriation in an exchange of correspondence. The Notice of Expropriation states that it is for "the Golden Ears Bridge Project Transportation System, which constitutes a linear development". It is plain and obvious that an argument based on the *Costello* line of authorities cannot succeed. See, for example, *Gray v. City of Oshawa et al.* [1972] 2 O.R. 856, 27 D.L.R. (3d) 35 (Ont. C.A.).

73 In my opinion, section 51 of the Act is a complete answer to Camp's application to amend its pleadings to challenge the validity of the Expropriation. Section 51(1), on its face, was intended to make available only for a limited period challenges to the validity of an expropriation. The availability of a challenge is restricted to the time prior to vesting. Vesting took place nearly four years ago, so the time limit to challenge the validity of the Expropriation expired long ago.

74 In these circumstances it is inappropriate to allow an amendment to a pleading, to challenge the validity of an expropriation, asserting a new cause of action after the expiration of a limitation period: *City Construction Co. Ltd. v. Salmon's Transfer Ltd.*, [1973] 5 W.W.R. 378 (C.A.).

75 Various actions of the expropriating authority might also be subject to judicial review. Section 51(2) restricts judicial review to within 30 days after the order or determination. Section 51(2) however is subject to section 51(1) which entails that once there is a vesting order, judicial review is not available either.

76 Of course any limitation period it can be argued has a draconian aspect as it forecloses rights. In my view, however, the legislature imposed strict limitations on the time frame within which the validity of expropriation might be challenged in express terms. There are good policy reasons for this which are found in the various reports that

antedated passage of the modern *Expropriation Act*, i.e., the avoidance of confusion and delay in the creation of public works, especially linear ones which may involve years of planning and preparation.

77 To paraphrase what McLachlin J.A., said in *Gray*, the presence of these sections evinces an intention of the legislature that while there may be defects rendering an expropriation invalid, an expropriation must stand after vesting notwithstanding defects affecting validity. While in some respects that might appear draconian, that does not leave the expropriated person without redress. The expropriated person had the ability to challenge the expropriation albeit for a limited period. There is also other redress under the Act. The other redress is statutory compensation.

78 It follows that on my view, it would be inappropriate to allow the amendments which seek to challenge the validity of the Expropriation. That is because the proposed amendments raise an issue that is bound to fail. The GVTA raised other arguments opposing these amendments. It is appropriate to deal with those arguments.

2. Inconsistent Pleading & Substantive Law

79 Alternatively, GVTA takes issue with Camp amending its pleadings to allege the Expropriation is invalid, as this raises an inconsistency in the pleadings. There is no doubt that the original pleadings assert that there had been an expropriation and seeks statutory compensation.

80 The proposed pleading asserts that the expropriation is void or partially void and seeks to have what are described as excess lands returned. During the course of argument Camp suggested that it did not want the land returned that is being used for the Golden Ears bridge but that proving invalidity might require a new taking, requiring that compensation be at current values, not 2005 values.

81 GVTA argues that either the Expropriation was valid and Camp is entitled to statutory compensation, which is its original pleading, or the Expropriation is not valid, and Camp is entitled to some other remedy. Is this an additional concern regarding the proposed amendments?

82 GVTA relied on Rule 19(7) which provides that "A party shall not plead an allegation of fact or a new ground or claim inconsistent with the party's previous pleading".

83 There are cases that interpret Rule 19(7) in the way contended for by GVTA. For example, in *Bratsch Inc. v. LeBrooy* [1991] B.C.J. No. 3290, Melnick J. held that a claim for specific enforcement of a contract that a party has already pleaded is void and of no effect, even though stated to be in the alternative, is a plea of an inconsistent right. To like effect is the decision of this court in *Westerlee Development Ltd. v. Adanac Customs Brokers Ltd.* (1994), 31 C.P.C. (3d) 136 where it was held that it was inconsistent to plead affirmation of the contract and specific performance or damages and then to plead repudiation of the contract.

84 Camp seeks to distinguish *Bratsch* on the basis that it was a contract repudiation case and relied on there being full knowledge, before there is an election. It says whether Camp can be held to have irrevocably elected a right to compensation as opposed to a right to seek a remedy based on the claim that the Expropriation was void, based on contract repudiation cases, is to ignore the very different substantive law that affects consideration of these types of cases.

85 In contract repudiation cases, it is argued, an alternate claim is not possible "a party simply cannot have it both ways-cannot say, I elected to terminate the contract but if I didn't do that I affirmed it". On the other hand "It is perfectly consistent to say the Expropriation was void, but if that is found not to be so, then Camp is entitled to more compensation under the statute that (sic) the Authority has paid".

86 In this case Camp first pled that there was an expropriation, inadequate advance payment, and that Camp was entitled to compensation under the Act. It then sought to amend the pleadings to say the expropriation was not valid. An examination of the caselaw indicates, in my opinion, a similarity between the substantive law on the election of remedies in contract and the law of expropriation, not the difference alleged.

87 In *Molander v. Cranbrook (City)*, [1980] B.C.J. No. 633, 20 L.C.R. (B.C.C.A.), 1980 CarswellBC 650, the court held that the owner having actively engaged in negotiating with the expropriating authority on the subject of compensation, while large sums were expended on construction, could not then about face and argue the expropriation was void some two years later.

88 In *M.E.P.C. Canadian Properties Ltd. v. The Queen* (1974), 7 L.C.R. 31, 64 D.L.R. (3d) 707, Mahoney J., considered expropriation proceedings under the *Expropriation Act*, R.S.C. 1970 (1st Supp.), c. 16:

> 14 The general principle is that where a person chooses between mutually exclusive courses of action in relation to another person he cannot later, as against that person, take up any but the course of action chosen, Lord Atkin, in *United Australia, Ltd. v. Barclays Bank, Ltd.*, [1941] A.C. 1 at p. 30 put it:
>
> > ... if a man is entitled to one of two inconsistent rights it is fitting that when with full knowledge he has done an unequivocal act showing that he has chosen the one he cannot afterwards pursue the other, which after the first choice is by reason of the inconsistency no longer his to choose.
>
> 15 In this instance the plaintiff had a right to the property, if the expropriation were invalid as it contended, or it had a right to be paid if the expropriation were valid or if it withdrew or waived its contention. It did not have the right to both property and money. Its acceptance of the money was an unequivocal act made with full knowledge and constituted an election precluding it from thereafter seeking the property.

M.E.P.C. was followed by Lamperson J., in this court in *Erickson v. Kamloops (City)*, (1993), 50 L.C.R. 81, [1993] B.C.W.L.D. 1640.

89 In my opinion the proposed pleading seeks to assert rights inconsistent with the course of action taken by receiving the advance payment, issuing a writ claiming compensation, and standing by while the bridge was built . In this case Camp received notice of the expropriation, and notice of the vesting in 2005. It received compensation in the amount of $7,650,000 at the time of the expropriation and additional sums totalling $9,000,000. It challenged the amount of compensation as inadequate by commencing an action seeking additional compensation under the Act in 2006. Between then and now the Golden Ears bridge has been built on the lands. It is inconsistent to assert now that the Expropriation is invalid.

90 It raises an inconsistency in the pleadings to amend the pleadings now by asserting the Expropriation is invalid, having alleged in the original pleadings that the land was expropriated, there was inadequate compensation and sought additional compensation under the Act by issuance of the writ. The form of the proposed amendment indicates the inconsistency. The statement of claim originally asserts that on June 28, 2005 the authority expropriated the property. The proposed amendment says only that authority *purported* to exercise its power to expropriate.

91 I am mindful of the decision of Bennett J. (as she then was) in *Gabbs v. Bouwhuis*, 2005 BCSC 1782, a case not referred to by either party. In that case Bennett J. allowed amendments that provided alternate grounds for finding liability under a promissory note which the defendant had signed. The original averment alleged that the defendant was the guarantor under the note. The alternate grounds to be pleaded were that the defendant was the maker of the note or in the further alternative, an accommodation party to the note. The amendments were allowed. The amendment allowed were simply alternate theories seeking the same relief based on the same set of primary facts, the signing by the defendant of the note.

92 In the instant case the proposed amendments would assert rights inconsistent with those originally pleaded, and under which the action was originally commenced. In my view such pleadings are precluded by the substantive law of expropriation, not the *Supreme Court Rules*. The substantive law of expropriation, in that regard, is similar to contract election; i.e., having sought compensation under the Act in accordance with the time limits required by the Act, one cannot after vesting, receipt of the advance payment, after having triggered the right to seek enhanced compensation, and having stood by during construction, reverse course.

3. Limitation Argument

93 GVTA's third argument is based upon the *Limitation Act*. For the reasons given below I would not accede to that objection.

V. Bad Faith & Section 21

94 Camp also proposes to amend its statement of claim to allege that the GVTA exercised its statutory powers in bad faith in not complying with section 21 of the Act. The proposed amendments are contained in paragraphs 48-52.

95 Section 21 of the Act reads as follows:

> 21 (1) If, within 2 years after filing the vesting notice under section 23, the expropriating authority determines that the land is no longer required for its purposes, the authority must not, without the approval of the approving authority, dispose of the land without first offering it to the owner from whom the land was taken, or his or her successor.
>
> (2) If an owner referred to in subsection (1) wishes to re-acquire the land expropriated, but cannot agree with the expropriating authority on the purchase price, the court must summarily determine the market value of the land as at the time of making the summary determination, and that amount is the purchase price.
>
> (3) The costs of proceedings under this section must be borne by the parties, unless the court, in special circumstances, orders the expropriating authority or the owner to bear the costs of the other.
>
> (4) Part 7 of the *Land Title Act* applies to a re-acquisition under this section.

96 The proposed amended statement of claim says that the GVTA was under a duty to offer to sell the excess land back to Camp, breached that duty by disposing of the excess lands, and is liable to suffer some remedy in Camp's favour as a result. The breach is alleged to have occurred on or before June 28, 2007.

97 As I have said, paragraphs 48-61 allege bad faith in their being non-compliance with section 21 of the Act. GVTA argues in response that there is no cause of action revealed by these proposed amendments, and that a proceeding regarding bad faith is statute barred, or alternatively, there is a limitation defence.

1. Limitation Argument

98 GVTA argues that the amendments should not be permitted to allege these torts, if they are torts, because of the effluxion of the two year limitation period contained in the *Limitation Act*, R.S.B.C. 1996, c. 266. It says that a claim for damages whether based on contract, tort, or statutory duty has a two year limitation period.

99 Camp disagrees. The limitation period for pure economic loss is not "injury to property" within the meaning of section 3(2)(a) of the *Limitation Act*: see *Alberni District Credit Union v. Cambridge Properties Ltd.* (1985), 65 B.C.L.R. 297 (B.C.C.A.); *British Columbia (Workers' Compensation Board) v. Thompson Berwick Pratt & Partners* (1986), 24 B.C.L.R. (2d) 157 (B.C.C.A.).

100 The applicable limitation provision is therefore s. 3(5) which sets a basic limitation period of 6 years from the date the right to bring the action arose: see *Armstrong v. West Vancouver*, [2003] B.C.J. No. 303, 2003 CarswellBC 264 (B.C.C.A.), and *H.M.T.Q. for B.C., as represented by the Minister of Forests et al v. Tnasem Logging Ltd.*, 2006 BCCA 546.

2. No Cause of Action

101 GVTA argues that there is no cause of action alleged. Camp says that GVTA was in breach of its statutory duties under section 21. Section 21 also provides its own remedy.

3. Substantive Defences

102 GVTA says it has not disposed of the property, so that any obligation does not arise under section 21. Although title remains in the GVTA, Camp argues for an extended meaning to the term "disposed".

4. Analysis

103 With respect to the limitation defence in my opinion Camp is correct. The phrase "Injury to property" in section 3(2)(a) of the *Limitation* Act means physical harm caused by an external force: *410727 B.C. Ltd. Dayhu Investments Ltd.* 2004 BCCA 379 at paragraph 16. The limitation period for the torts alleged has not expired.

104 Whether it is necessary to plead a cause of action other than a failure to comply with section 21 is an arguable point, as is the question of whether a party is restricted to the remedy provided for by section 21. However, Camp pleads breach of statutory duty, which is a tort, and thus has pleaded a cause of action.

105 GVTA says it has not disposed of the property, so that any obligation does not arise under section 21. Camp argues for an extended meaning to the term "disposed". These are matters which can appropriately be dealt with in the pleadings.

106 In my opinion it is not plain and obvious at this stage that Camps arguments based on these or similar amendments must fail. In the circumstances, I would allow amendments similar to those currently contained in paragraphs 48-52. I say "similar to" because in light of my disallowance of some of the other amendments the wording of these proposed amendments might change.

VI. Summary

107 I disallow those amendments seeking to challenge the validity of the Expropriation as explained above. I allow those amendments seeking a remedy arising from s. 21 of the Act.

108 If there are any other matters arising the parties are at liberty to come back before the court. If the parties are unable to agree on costs, costs may be spoken to.

J.E.D. SAVAGE J.

Dixon v. Stork Craft Manufacturing Inc., [2013] B.C.J. No. 1344

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

G.R.J. Gaul J.

Heard: February 1, 2012.

Judgment: June 21, 2013.

Docket: 11-4482

Registry: Victoria

[2013] B.C.J. No. 1344 | 2013 BCSC 1117 | 3 C.C.L.T. (4th) 147 | 230 A.C.W.S. (3d) 369 | 2013 CarswellBC 1882

Between Jane Dixon, Dana Miller, Loretta McFadzean and Lisa Elliot, Respondents (Plaintiffs), and Stork Craft Manufacturing Inc., Fisher-Price Inc., Sears Canada Inc., Wal-Mart Canada Corporation, and Toys "R" Us (Canada) Ltd, Toys "R" Us (Canada) Ltee., Applicants (Defendants)

(74 paras.)

Case Summary

Civil litigation — Civil procedure — Parties — Class or representative actions — Procedure — Stay of action due to parallel proceeding — Disposition without trial — Stay of action — Another proceeding pending — Motion by defendants to stay action allowed — Plaintiffs launched proposed class action relating to negligent design, manufacture, distribution and sale of baby cribs in Canada — Action was subsequent to numerous other actions across Canada involving essentially same defendants and allegations — Action was improper attempt to re-litigate the issue of adding plaintiffs to existing class action and was a collateral attack on order made in existing class action — Action was improper attempt to add new causes of action to existing action, add new representative plaintiffs to existing action and toll limitation period.

Motion by the defendants to stay the plaintiffs' proposed class action. In November 2009, the defendant Stork Craft Manufacturing ("Stork Craft") issued a nation-wide recall of certain cribs it had manufactured between 1993 and 2009. Each of the plaintiffs, who were residents of British Columbia, Alberta, Saskatchewan and Ontario, owned a crib that was subject to the recall. On the same day that the recall was issued, Dodd, a resident of British Columbia launched a proposed class action against some of the defendants in this action relating to the negligent design, manufacture, distribution and sale of baby cribs in Canada. In addition, proposed class action lawsuits were launched in Ontario, Quebec, Saskatchewan, Alberta and Manitoba. The Alberta and Manitoba actions had been discontinued. While the parties had discussed the discontinuance of the Ontario action, it had not been discontinued as counsel for plaintiffs in that action realised there might be prejudice to the members of the Ontario class if the limitation period expired before the could opt into the Dodd action. In 2011, the plaintiff in the Dodd action had unsuccessfully applied to remove himself as representative plaintiff and to add some or all of the plaintiffs in this action as representative plaintiffs. Subsequently, in November 2011, the plaintiffs commenced this proposed class action and sought an order joining their action with the Dodd action. The actions were essentially the same except that this action named additional defendants, included plaintiffs that had previously applied to be added as plaintiffs to the Dodd action and included three additional causes of action including deceptive trade practices, breach of duty and negligent design and implementation of the recall. The defendants sought a stay of the action on the basis that it was vexatious and an abuse of process as it was an improper attempt to have

plaintiffs added to the Dodd action, was an impermissible collateral attack on the order refusing to add representative plaintiffs in the Dodd action, was commenced for an improper purpose The plaintiffs argued that all of the parties agreed that in return for the discontinuance of the Ontario, Alberta and Manitoba actions, the defendants in the Dodd Action agreed to proceed with a certification application in British Columbia with proposed representative plaintiffs for each of a resident class and a non-resident sub-class. They alleged that the defendants breached the settlement agreement by seeking a discontinuance of the Ontario Action while opposing the addition of non-resident plaintiffs in the Dodd Action and that their contradictory positions amounted to an abuse of the court's process justifying the dismissal of their application to stay the action.
HELD: Motion allowed.

This class action was an improper attempt to re-litigate the issue of adding plaintiffs to the Dodd action and was a collateral attack on the order refusing the addition of representative plaintiffs in the Dodd action. Furthermore, the action was an improper attempt to add new causes of action to the Dodd action, add new representative plaintiffs to the Dodd action and toll the limitation period. It was improper to secure amendments, which added new causes of action and new plaintiffs, by means of consolidating this action with the Dodd action. In addition, the consolidation of the two actions would result in the impermissible tolling of the limitation period. Finally, it was an abuse of process for a plaintiff to have multiple actions seeking the same relief against the same defendant. Although the plaintiffs in this and the Dodd action were nominally, different, they were clearly associated in that two of the plaintiffs in this action had already attempted to join the Dodd action and two other plaintiffs had an outstanding application to join the Dodd action.

Statutes, Regulations and Rules Cited:

Business Practices and Consumer Protection Act, SBC 2004, CHAPTER 2,

Supreme Court Civil Rules, Rule 6-1(1)(a), Rule 6-2(7), Rule 9-5, Rule 9-5(1)(b), Rule 9-5(1)(d)

Counsel

Counsel for Plaintiffs / Respondents: D. Williams, A. Sadaghianloo.

Counsel for Defendants / Applicants, Stork Craft Manufacturing Inc., Sears Canada Inc., Wal-Mart Canada Corporation and Toys "R" Us (Canada) Ltd., Toys "R" Us (Canada) Ltee.: A. Wilkinson, Q.C., P. Morrow.

Counsel for the Defendant, Fisher-Price Inc.: M. Brown.

Reasons for Judgment

G.R.J. GAUL J.

INTRODUCTION

1 This proposed class action litigation relates to the alleged negligent design, manufacture, distribution and sale of baby cribs in Canada.

2 The plaintiffs, represented by legal counsel with the Merchant Law Group ("MLG"), commenced their lawsuit on 4 November 2011. It comes subsequent to numerous other actions across Canada involving essentially the same defendants and allegations. For simplicity and clarity, I will refer to this action as the "*Dixon Action*".

3 The defendants, Stork Craft Manufacturing Inc. ("Stork Craft"), Sears Canada Inc. ("Sears"), Wal-Mart Canada Corporation ("Wal-Mart), and Toys "R" Us (Canada) Ltd., Toys "R" Us (Canada) Ltée. ("Toys "R" Us"), seek an

order pursuant to Rule 9-5 of the *Supreme Court Civil Rules* staying the *Dixon Action* or in the alternative striking the plaintiffs' claim on the basis that it is vexatious or an abuse of the court's process.

4 The defendant Fisher-Price Inc. ("Fisher-Price") supports the application and the relief sought by the other defendants.

Facts

5 The plaintiff Jane Dixon is a resident of Victoria, British Columbia. The plaintiff Dana Miller is a resident of Edmonton, Alberta. The plaintiff Loretta McFadzean is a resident of Regina, Saskatchewan and the plaintiff Lisa Elliot is a resident of Toronto, Ontario.

6 The defendant Stork Craft is a company incorporated in British Columbia. Stork Craft's principle business is the design, manufacture and distribution of baby cribs. The remaining defendants are companies whose business includes the marketing and sale of Stork Craft baby cribs.

7 On 24 November 2009, Stork Craft issued a nation-wide recall of certain baby cribs it had manufactured between 1993 and 2009 (the "Recall"). Each plaintiff in the *Dixon Action* claims to own a Stork Craft crib that is the subject of the Recall.

8 On the same day the Recall was issued, Mr. Cedar Dodd, a resident of Victoria, British Columbia, represented by counsel with the MLG, launched a proposed class action lawsuit in the British Columbia Supreme Court against Stork Craft, Fisher-Price Canada Inc., Fisher-Price, Sears Holding Corporation, Sears, Wal-Mart Stores Inc., and Wal-Mart relating to the baby cribs in question (the "*Dodd Action*"). The proceedings against Fisher-Price Canada Inc., Sears Holding Corporation, and Wal-Mart Stores Inc. have been discontinued.

9 Other proposed class action lawsuits were launched on 24 and 25 November 2009 by plaintiffs in the following other Canadian jurisdictions, all of whom are represented by counsel with the MLG:

a) Ontario: *Duong, Singh and Woof v. Stork Craft Manufacturing Ltd. et al.*, Ontario Superior Court of Justice, No. 09-4962, (the "*Ontario Action*"), filed 25 November 2009;

b) Quebec: *Santella v. Stork Craft Manufacturing Ltd. et al.,* Québec Superior Court, action No. 500 06-000488-094, filed 25 November 2009 (the "*Québec Action*");

c) Saskatchewan: *Riel v. Stork Craft Manufacturing Ltd. et al.*, Court of Queen's Bench of Saskatchewan, action No. 1794, filed 25 November 2009 (the "*Saskatchewan Action*");

d) Alberta: *St. Pierre, Loubert, Kalcounis and McLaughlan v. Stork Craft Manufacturing Ltd. et al.*, Court of Queen's Bench of Alberta, filed 24 November 2009 (the "*Alberta Action*");

e) Manitoba: *Russell v. Stork Craft Manufacturing Ltd. et al.*, Court of Queen's Bench of Manitoba, No. C10901-63980, filed 25 November 2009 (the "*Manitoba Action*").

10 Stork Craft, as the lead defendant in all of the above-noted lawsuits, is represented by counsel with the law firm of McCarthy Tétrault.

11 Counsel for the parties in the *Dodd Action* appeared before me, as the assigned case management judge, on 30 September 2010. During the course of that hearing, counsel for the plaintiff informed the court that the plaintiffs in the *Alberta Action* and the *Manitoba Action* would be discontinuing their respective lawsuits and that the plaintiffs in the *Ontario Action* would be applying to the Ontario Superior Court of Justice, in compliance with practice in that province, for approval of the discontinuance of that action. At the conclusion of the hearing, I directed that a Case Planning Conference take place in the early 2011.

12 On 29 October 2010, counsel for the plaintiffs in the *Alberta Action* filed their Notice of Discontinuance. A similar notice was filed by counsel for the plaintiff in the *Manitoba Action* on 29 November 2010.

13 During the late fall and early winter of 2010, counsel for the plaintiffs and counsel for the defendants in the *Ontario Action* corresponded with respect to the terms of the proposed agreement to discontinue the action and the steps necessary to obtain the court's approval. By late 2010, counsel for the defendants in the *Ontario Action* believed an agreement had been reached. Although counsel for the plaintiffs had agreed to discontinue the *Ontario Action*, they did so without fully considering all of the implications of such a move and in particular its impact on potential limitation dates. At some point, counsel with the MLG realized that the limitation period in Ontario may not have been suspended by the commencement of the *Dodd Action* in British Columbia. More importantly they concluded there would be prejudice to the Ontario class members if the *Ontario Action* was discontinued and the limitation period expired before those plaintiffs could opt into the *Dodd Action*. Having realized this, counsel for the plaintiffs in the *Ontario Action* advised counsel for the defendants in that action, as well as counsel in the *Dodd Action,* that they no longer agreed to discontinue the *Ontario Action*. Counsel for the plaintiffs also informed counsel for the defendants that they would oppose any application to confirm the purported settlement agreement in the *Ontario Action*.

14 In early 2011, counsel for the defendants in the *Ontario Action* sought an order of the Ontario Superior Court of Justice to enforce the agreement to discontinue the action that they alleged existed between the parties. The defendants' motion was heard by Mr. Justice Smith on 8 February 2011, and at the conclusion of the hearing the court reserved its decision.

15 On 4 March 2011, counsel in the *Dodd Action* appeared before me at a Case Planning Conference. A number of issues were addressed at this conference, including the scheduling of the certification hearing. Counsel also addressed the issue of the plaintiff's desire to amend his pleadings. The only substantive order made at the Case Planning Conference related to the scheduling of the certification hearing. I also directed that another Case Planning Conference take place in July 2011.

16 On 7 March 2011, the plaintiff in the *Dodd Action* filed an Amended Notice of Civil Claim, amending his pleadings pursuant to Rule 6-1(1)(a). In doing so, the plaintiff purported to remove himself as the representative plaintiff in the *Dodd Action*. In his stead, the plaintiff substituted Ms. Dixon as the representative plaintiff for the British Columbia resident class and Ms. McFadzean, as the representative plaintiff for the out-of-province or non-resident class. I note parenthetically that Ms. Dixon and Ms. McFadzean are also two of the plaintiffs in the *Dixon Action*.

17 In reasons for judgment delivered on 21 April 2011 and amended on 12 May 2011, indexed as *Duong v. Stork Craft Manufacturing Inc.*, 2011 ONSC 2534, Mr. Justice Smith denied the defendants' application to discontinue the *Ontario Action*. In his reasons, Smith J. addressed two questions. The first was whether the parties had reached a settlement agreement to discontinue the action. The second question was whether a discontinuance should be judicially approved, without notice to class members. In response to the first question, Smith J. found that a settlement agreement had been reached between the parties. On the second question, Smith J. concluded the potential expiry of the Ontario class members' limitation period before they could opt in to the *Dodd Action* would be prejudicial to their interests, and for that reason he declined to approve the discontinuance of the *Ontario Action*.

18 On 20 May 2011, counsel for the defendants in the *Dodd Action* filed an application seeking an order striking the portions of the plaintiff's Amended Notice of Civil Claim that purported to substitute Ms. Dixon and Ms. McFadzean in place of Mr. Dodd as the representative plaintiffs. The defendants filed a second application that same day, seeking an order directing Mr. Dodd to make his baby crib available for inspection and examination by an expert retained by Stork Craft.

19 On 24 May 2011, counsel for the plaintiff in the *Dodd Action* filed an application seeking to have Mr. Dodd removed as the representative plaintiff and to have Ms. Dixon and Ms. McFadzean added as the plaintiffs in his place.

20 I heard all three applications on 6 June 2011, and in reasons delivered on 16 June 2011, I allowed the defendants' applications and denied the plaintiff's application.

21 On 14 July 2011, the plaintiff in the *Dodd Action* filed a notice seeking leave to appeal my order dismissing his application and my order granting the defendants' application to strike out portions of the Amended Notice of Civil Claim. That application for leave to appeal is still pending.

22 On 15 September 2011, the defendants' application for leave to appeal Smith J's decision in the *Ontario Action* was heard by Kealey J. of the Ontario Superior Court of Justice. On 7 October 2011 leave was denied: *Duong v. Stork Craft Manufacturing Inc.*, 2011 ONSC 5618.

23 On 12 October 2011, counsel in the *Dodd Action* appeared before me to settle the terms of my 16 June 2011 order. The order was settled on the following terms:

1. The Plaintiff's application pursuant to Rule 6-2(7) that Cedar Dodd cease to be a plaintiff in this action be and is hereby dismissed;
2. The Plaintiff's application pursuant to Rule 6-2(7) to add Jane Dixon and Loretta McFadzean as plaintiffs be and is hereby dismissed;
3. Paragraphs 1.1 and 1.2 of the Amended Notice of Civil Claim be and are hereby struck out.

24 On 25 October 2011, counsel for the plaintiff in the *Dodd Action* filed an application to amend the Notice of Civil Claim and to add Ms. Miller and Ms. Elliott as proposed representative plaintiffs in the action. Ms. Miller and Ms. Elliot are the other two plaintiffs in the *Dixon Action*. This application has not been set for hearing.

25 On 4 November 2011, the same counsel with the MLG who is acting for the plaintiff in the *Dodd Action*, filed the Notice of Civil Claim and Notice of Application for Certification in the *Dixon Action*. In their Notice of Application for Certification, the plaintiffs seek an order joining their action with the *Dodd Action* "for the purposes of certification and trial of the common issues".

26 A review of the Notices of Civil Claim in the *Dodd Action* and the *Dixon Action* discloses that the facts alleged and the claims being advanced are practically identical. The only noticeable differences between the two actions are:

a) Toys "R" Us (Canada) Ltd., Toys "R" Us (Canada) Ltée is a named defendant only in the *Dixon Action*;

b) Ms. Dixon and Ms. McFadzean, the two individuals who unsuccessfully sought to be added as plaintiffs in the *Dodd Action*, are named plaintiffs in the *Dixon Action*;

c) Ms. Miller and Ms. Elliot, the two individuals whose application to be added as plaintiffs in the *Dodd Action* remains outstanding, are named plaintiffs in the *Dixon Action*; and

d) there are three new causes of action pleaded in the *Dixon Action*:

   I. deceptive trade practices under the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2;

   II. breach of an alleged contractual duty and duty of care to protect the "peace of mind of class members"; and

   III. negligent design and implementation of the recall of the cribs in question.

27 On 23 November 2011, counsel for the defendants Stork Craft, Sears, Wal-Mart and Toys "R" Us filed the present application seeking a stay of the *Dixon Action* or in the alternative, an order striking out the entirety of the plaintiffs' pleadings in the action.

Issue

28 The question to be determined on this application is whether the *Dixon Action* is vexatious and or an abuse of the court's process.

The Law

29 The defendants rely upon Rule 9-5 and specifically sub-rules 9-5(1)(b) and (d) as the foundation for their application. Those two provisions read as follows:

> Rule 9-4 - Striking Pleadings
>
> (1) At any state of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> ...
>
> (b) it is unnecessary, scandalous, frivolous or vexatious;
>
> ...
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceedings to be stayed or dismissed and may order the costs of the application to be paid as special costs.

30 In *Re Lang Michener et al. v. Fabian et al*. (1987), 59 O.R. (2d) 353 (Ont. H.C.J.), Henry J. described the nature of a vexatious action at 358 - 359:

(a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;

(b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;

(c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;

(d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;

(e) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;

(f) the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious; and

(g) the respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings.

31 The above-noted observations from *Re Lang Michener* were referred to approvingly by the British Columbia Court of Appeal in *Dempsey v. Casey*, 2004 BCCA 395.

32 In *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, Arbour J. explained the concept of abuse of process as follows at para. 37:

> ... the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would...bring the administration of justice into disrepute" (*Canam Enterprises Inc.*

v. Coles (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, per Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:

> The doctrine of abuse of process engaged the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See House of Spring Gardens Ltd. v. Waite, [1990] 3 W.LR. 347 at p. 358, [1990] All E.R. 990 (C.A.).
>
> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis in the original.]

33 What little distinction exists between a vexatious action and one that is an abuse of process is often not clear as the two concepts have strikingly similar features. Macaulay J. noted this in *Freshway Specialty Foods v. Map Produce LLC, et al.*, 2005 BCSC 1485, at para. 52:

> [52] There is no bright line dividing a vexatious proceeding from one that is an abuse of the court's process. In my view, the factors that signal a vexatious proceeding also signals an abusive process. Abuse of process is a wide concept however and may extend beyond vexatious proceedings to capture any circumstance in which the court's process is used for an improper purpose. As pointed out by Baker J. in *Babavic* v. *Babowech*, [1993] B.C.J. No. 1802 (S.C.), a decision not referred to by counsel, the categories of abuse of process remain open and include, for example, "proceedings which are without foundation or serve no useful purpose and multiple or successive proceeding which cause or are likely to cause vexation or oppression" (para. 18).

Discussion

Preliminary Matter: The Settlement Agreement

34 The plaintiffs complain that the progress of this important class-action litigation has been unnecessarily complicated and protracted by the inconsistent positions the defendants have adopted and advanced in the *Dodd Action* and the *Ontario Action*. Counsel for the plaintiffs points to what he says was the settlement agreement between himself as counsel with the MLG representing Mr. Dodd and the plaintiffs in the Ontario, Alberta and Manitoba actions and counsel for the defendants in the *Dodd Action*, who is a member of the law firm representing the defendants in those other actions. Counsel for the plaintiffs claims all of the parties agreed that in return for the discontinuance of the Ontario, Alberta and Manitoba actions, the defendants in the *Dodd Action* would agree to proceed with a certification application in British Columbia with proposed representative plaintiffs for each of a resident class and a non-resident sub-class. Counsel for the plaintiffs further asserts that the defendants have breached the settlement agreement by seeking a discontinuance of the *Ontario Action* while at the same time opposing the addition of non-resident plaintiffs in the *Dodd Action*. Counsel for the plaintiffs says the defendants should not be permitted to have it both ways and that these contradictory positions amount to an abuse of the court's process justifying the dismissal of their application.

35 In his written submission, counsel for the plaintiffs explained the plaintiffs' position on the settlement agreement as follows:

> In reliance on the agreement with the Defendants, the plaintiffs in Manitoba and Alberta discontinued those actions. The B.C. action [the *Dodd Action*] was moved forward, with the expectation that non-residents would be able to opt-in, in reliance on the agreement and the Defendant's representations.
>
> ...
>
> While there are proposed class actions in three other jurisdictions (Saskatchewan, Ontario and Quebec), the actions are not going forward in those jurisdictions pursuant to the parties' agreement. Moreover, the Alberta and Manitoba actions (where court approval of discontinuance is not required) were discontinued pursuant to the agreement and class members resident in those provinces, such as Ms. Miller, do not have

> remedies in their own provinces. ... On the other hand, it has always been the Defendants' expectation that the B.C. action would proceed and proceed with non-resident claimants.

36 In support of the argument that there is an agreement between the parties and that it includes the defendants in the *Dodd Action* agreeing to have the action proceed with non-resident plaintiffs, counsel for the plaintiffs relies on the findings of Smith J. in *Duong, supra*, that the ability of Ontario class members to opt into the *Dodd Action* was an essential term of the parties' agreement to discontinue the *Ontario Action*.

37 The defendants maintain that the plaintiffs' position regarding the settlement agreement is incorrect on a number of fronts. First, the defendants point to the fact that the plaintiffs argued before Smith J. that the parties had been unable to agree on the terms of a settlement agreement and consequently no such agreement existed. According to the defendants, if any party has adopted inconsistent positions in the *Dodd Action* and the *Ontario Action* it is the plaintiffs and not the defendants. Second, the defendants submit there is no evidence before this court to support any finding that the parties have agreed not to go forward with the *Saskatchewan Action* or the *Québec Action*; that "it has always been the defendants' expectation that the B.C. action [the *Dodd Action*] would proceed and proceed with non-resident claimants"; or that the defendants have agreed that non-resident plaintiffs would be added to the *Dodd Action*.

38 On the issue of the existence of a settlement agreement, Smith J. explained his findings at paras. 35, 36 and 39 of his reasons in *Duong*:

> [35] In her reply of November 1, 2010, counsel for the plaintiffs agreed to amend her motion materials to remove the statement that the discontinuance was made "on consent" of Stork Craft. She also agreed to remove the statement that Stork Craft agreed that notice was not required and advised the defendants that she was preparing affidavits for the other two representative plaintiffs. Finally, she confirmed that the three representative plaintiffs were prepared to discontinue "with prejudice" to themselves only.
>
> [36] I find that at this point in time, viewed objectively, the parties had reached an agreement on all of the essential terms. Plaintiffs' counsel had agreed to the proposed amendments of counsel for the defendants. As a result, I find the parties reached an agreement on all of the essential terms of the discontinuance of the class proceeding in Ontario, provided the discontinuance was without costs and that notice was not ordered. This settlement agreement was an amendment to the original agreement between Mr. Williams, plaintiffs' counsel in British Columbia and counsel for the defendants wherein it was mutually agreed that the plaintiffs would proceed with the class action in British Columbia and discontinue in Alberta, Manitoba and Ontario.
>
> ...
>
> [39] For the above reasons, I find that a settlement agreement was reached between the parties on all of the essential terms to discontinue the class proceeding in Ontario and to proceed with the class proceeding in British Columbia, with prejudice to the three representative plaintiffs and provided notice was not given to Ontario class members. I also find that before the motion for discontinuance was brought, the plaintiffs' counsel became aware of the potential prejudice to Ontario class members as a result of the possible expiry of the limitation periods for the Ontario class members before the class in British Columbia was certified. The representative plaintiffs ultimately opposed the motion for discontinuance for this reason.

39 In reaching his conclusion about the parties' settlement agreement, Smith J. inferred that an "essential term" of the agreement was that the parties would proceed to a certification hearing in the *Dodd Action* and that the Ontario class members would have the opportunity to opt into the action if it was certified.

40 I do not know what evidence was before Smith J. that permitted him to find the defendants had agreed to allow a non-resident sub-class of plaintiffs from Ontario to opt into the *Dodd Action*. Neither side presented me with any evidence relating to such an agreement. In my view, if such an agreement did exist, it would have rendered the defendants' application of 20 May 2011 redundant. I am also puzzled by the fact that counsel for the plaintiff in the *Dodd Action* did not bring Mr. Justice Smith's reasons for judgment to my attention at the hearing in June 2011. The plaintiffs suggest they were unable to use Smith J.'s decision at that hearing because the defendants' application for

leave to appeal had not yet been determined. That submission is unconvincing. The reasons for judgment of Smith J. were delivered on 21 April 2011 and amended on 12 May 2011 and I see no valid reason why counsel for Mr. Dodd could not have brought Mr. Justice Smith's findings and judgment to my attention. Had counsel done so, he could have addressed the question of what evidence was before the court that led Mr. Justice Smith to infer that allowing the *Dodd Action* to proceed with non-resident sub-class plaintiffs was an essential term of the agreement.

41 Given the lack of evidence before me on this issue, an issue that may have had a critical impact on this application, I find myself unable to conclude that the defendants have agreed to allow a non-resident sub-class to join the *Dodd Action*. It would appear that Mr. Justice Smith had some evidence before him that allowed him to infer that fact. I do not and therein lies the dilemma. In my view I should be cautious about accepting the factual findings of an extra-provincial court unless the parties have squarely addressed before me the same issue. Given the parties' decision not to raise or argue the question of the settlement agreement when they appeared before me in June 2011, I say with the greatest of respect for my colleague in Ontario, that I cannot adopt the factual findings he made in the *Ontario Action*, and in particular I cannot not find either directly or inferentially that the defendants have agreed to proceed with the certification application in the *Dodd Action* with a non-resident sub-class represented.

42 I now turn to the principal issue before me. The defendants have advanced a number of arguments why the *Dixon Action* is vexatious and or an abuse of the court's process. I have reframed those arguments into questions and will deal with each of them in turn.

Does the *Dixon Action* re-litigate the issue of adding new representative plaintiffs to the *Dodd Action*?

43 The defendants assert that the *Dixon Action* is an improper second attempt to have Ms. Dixon and Ms. McFadzean added as plaintiffs in the *Dodd Action*, after their first attempt to do was dismissed by this court.

44 The plaintiffs deny that the *Dixon Action* is a re-litigation of the failed attempt to add Ms. Dixon and Ms. McFadzean as proposed representative plaintiffs in the *Dodd Action*. Counsel for the plaintiffs points to the fact that my order of 16 June 2011 denied the application to add the plaintiffs and did not address the possibility of consolidating the *Dodd Action* with another action. As the rules and tests for adding parties are different from those applicable to the consolidation of actions, the plaintiffs maintain that my order of June 2011 does not foreclose them from attempting to join their action with the *Dodd Action*.

45 The plaintiffs also point out that the defendants have always known of the plaintiffs' intention to have their claims joined with Mr. Dodd's claims and consequently there can be no suggestion that the defendants have been surprised or suffered any prejudice.

46 In my opinion, there is merit in the defendants' position on this question. The issue of Ms. Dixon's and Ms. McFadzean's participation as plaintiffs in the *Dodd Action* was addressed and determined in June 2011. Unless varied or overturned on appeal, I am of the view that my order resolves the issue. Ms. Dixon's and Ms. McFadzean's lawsuit is in my opinion a mirror image of the *Dodd Action*. To allow the *Dixon Action* to stand and be consolidated with the *Dodd Action* would unfairly and improperly allow Ms. Dixon and Ms. McFadzean to obtain the result they initially sought in the *Dodd Action* (i.e., becoming representative plaintiffs) without Mr. Dodd having to proceed with his appeal of my 16 June 2011 order.

47 The fact that the rules and tests applicable to an application to consolidate two actions may be different from those that govern an application to add plaintiffs to an action is, in my respectful view, of no consequence in the present instance. On the evidence before me it is clear that one of the purposes of the *Dixon Action* is to get Ms. Dixon and Ms. McFadzean added as representative plaintiffs in the *Dodd Action*. I agree with the defendants that this is an impermissible attempt to re-litigate an issue that has already been resolved.

Does the *Dixon Action* circumvent the appeal process in the *Dodd Action*?

48 The defendants argue that by initiating the *Dixon Action* and seeking to have it consolidated with the *Dodd Action*, the plaintiffs are enabling Mr. Dodd to avoid having to proceed with his appeal of my 16 June 2011 order. With the two actions consolidated, Ms. Dixon and Ms. McFadzean will become plaintiffs in the litigation,

notwithstanding my order of 16 June 2011. In short, the defendants argue that the *Dixon Action* results in an impermissible collateral attack on my order in the *Dodd Action*.

49 The plaintiffs maintain that one of the principal reasons they launched their action was because the appeal materials in the *Dodd Action* could not be prepared until the terms of my order of 16 June 2011 had been settled. That occurred on 13 October 2011. By that date, the plaintiffs say it was too late to schedule and have the appeal heard before the expiry of the non-resident plaintiff's limitation date of 23 November 2011. Consequently, in order to avoid any prejudice to members of a non-resident sub-class of plaintiffs, they started their action (i.e., the *Dixon Action*).

50 In his written submissions, counsel for the plaintiffs addresses the issue of the appeal in the *Dodd Action* as follows:

> It is not necessary for a party to go forward with an appeal simply because they at one time intended to appeal and under the doctrine of mootness, if an issue is moot the Court of Appeal will decline to hear the matter. If the plaintiffs' application to consolidate is successful, the appeal will be moot.

51 In my view, the plaintiffs' arguments are unpersuasive. I find the defendants are correct when they argue that consolidation of the *Dixon Action* with the *Dodd Action* would essentially permit the plaintiffs in both actions to evade the order I made on the issue of adding Ms. Dixon and Ms. McFadzean as non-residence representative plaintiffs in the *Dodd Action*. This, in my opinion, would amount to a collateral attack on my order of 16 June 2011 and an impermissible circumvention of the *Rules of Court*.

Was the Dixon Action commenced for an improper purpose?

52 The defendants say the purposes underlying the initiation of the *Dixon Action* are improper and consequently make the action an abuse of process. The defendants list three such improper purposes:

a) an improper attempt to add new causes of action to the *Dodd Action*;

b) an improper attempt to add new representative plaintiffs in the *Dodd Action*; and

c) an improper attempt to toll the limitation period applicable to the proposed new plaintiffs.

53 In his written submissions, counsel for the plaintiffs explains the purpose of the *Dixon Action* as follows:

> The Dixon action was necessitated by the Defendants'' failure to honour their agreement that the actions in Alberta, Manitoba and Ontario would be discontinued in favour of the class action in British Columbia, which included a non-resident class, proceeding to the hearing of the certification application and by their decision to argue that the limitation period for the non-resident class has not been preserved.
>
> ...
>
> The Dixon action was filed out of caution to preserve the rights of Ms. Miller and Ms. Elliot on behalf of other non-resident plaintiffs as part of an active litigation plan (that from the outset included consolidating the Dixon action with the Dodd action and moving it to certification), not to simply "toll" the limitation period and have the action sit.
>
> ...
>
> It was never intended that the Dixon action and the Dodd action would co-exist.

54 The plaintiffs assert that they could not have proceeded with the application filed on 24 October 2011 to add Ms. Miller and Ms. Elliot to the *Dodd Action* prior to the expiry of the November 2011 limitation date. Counsel for the plaintiffs explains this position in his written submissions as follows:

> there is ample evidence that Mr. Dodd and Ms. Miller and Ms. Elliot ... filed and served application on 25 October 2011 under Rule 6-2(7) to add Ms. Miller and Ms. Elliot to the Dodd action, but this application could not be heard before the November 23, 2011 potential limitation date, so the Dixon action was filed with Ms. Miller and Ms. Elliot as plaintiffs as a precautionary measure.

55 As already noted in these reasons, the *Dixon Action* includes new allegations of deceptive trade practices, breach of a contractual duty and duty of care and negligent design and implementation of the Recall. The defendants submit that if the *Dixon Action* is allowed to stand and is consolidated with the *Dodd Action*, then these new claims will be incorporated into the *Dodd Action* without Mr. Dodd having had to make the necessary application to amend his pleadings. In his affidavit sworn 10 November 2011, Mr. Dodd explains that his counsel inadvertently omitted to include unjust enrichment from the common issues for which certification is being sought in the *Dodd Action*. Mr. Dodd explains at para. 23 of his affidavit:

> These are the same proposed common issues that I would seek to have certified in the amended Application for Certification that was prepared for this action, with the exception that the Dixon Application for Certification seeks to certify as a common issue whether the Defendants were unjustly enriched. Unjust enrichment is a cause of action pled in this action, though I am advised by my counsel it was inadvertently left out of the Amended Application for Certification in this action.

56 I agree with the defendants that if the plaintiff in the *Dodd Action* wishes to amend his pleadings then he should seek the defendants' consent to do so or obtain a court order permitting it. It is improper in my view to secure these amendments, by means of a consolidation of the *Dodd Action* with the *Dixon Action*. The same can be said about the fact that a consolidation of the *Dixon Action* with the *Dodd Action* would result in Ms. Dixon and Ms. McFadzean joining this class action litigation notwithstanding the fact that I denied their application to join the *Dodd Action*.

57 The defendants also claim that the initiation of the *Dixon Action* was for the purpose of tolling the applicable limitation period. In support of this contention, the defendants point to the affidavit of Mr. Dodd sworn 10 November 2011 and filed in both the *Dodd Action* and the *Dixon Action*, wherein Mr. Dodd swears the following, at paras. 18 and 19:

> [18] On or about November 3, 2011 Stork Craft advised my counsel that they would oppose the addition of the non-resident representative plaintiffs in this, the Dodd action. I was concerned that the application to add these non-resident representative plaintiffs [Ms. Miller and Ms. Elliot] would not be heard before the limitation period governing their right to commence an action in B.C. expired on November 23, 2011. I am aware that the plaintiffs proposed to be added to this action as non-resident representative plaintiffs commenced a similar action on November 4, 2011 in order to preserve the rights of non-resident claimants in B.C. This new action is the Dixon action.
>
> [19] I have reviewed the Notice of Civil Claim in the Dixon Action ... and it is my conclusion that the claim asserts the same type of claims, regarding the same cribs, over the same time period, as made in the proposed Amended Notice of Civil Claim in my case. I have also reviewed the affidavits of Jane Dixon (sworn November 6, 2011), Dana Miller (sworn November 9, 2011), Lisa Elliott (sworn November 8, 2011), and Loretta McFadzean (sworn November 7, 2011). I conclude the complaints set out in those affidavits are very similar to my complaints.

58 As a general response, the plaintiffs maintain that the *Dixon Action* was not designed for the improper purpose of tolling any limitation period. In his written submission, counsel for the plaintiff explains:

> Regarding the allegation that the Dixon action is an abuse as effort (sic) to 'retroactively toll the limitation period', the plaintiffs submit that commencing the Dixon action was a legitimate precautionary measure in response to the Applicants maintaining their right to a limitation defence, while simultaneously refusing to consent to addition of a non-resident representative claimant.
>
> Moreover, the Dixon action was not commenced as a lone notice of civil claim, as one might imagine a party to do if the objective was simply to toll the limitation period. Rather, the Dixon action was filed and served with an application (and supporting affidavits) seeking, firstly, immediate joinder with the Dodd action, and secondly certification with the joined Dodd action.

59 In his written submissions counsel for the plaintiffs explains:

> There is ample evidence that Mr. Dodd and Ms. Miller and Ms. Elliot (and not Ms. Dixon or Ms. McFadzean) filed an served applications on October 25, 2011 under Rule 6-2(7 to add Ms. Miller and Ms. Elliot to the

Dodd action, but this application could not be heard before the November 23, 2011 potential limitation date, so the Dixon action was filed with Ms. Miller and Ms. Elliot as plaintiffs as a precautionary measure.

60 In my view, the consolidation of the *Dixon Action* with the *Dodd Action* necessarily will result in the impermissible tolling of the limitation period. Moreover, while it may have been challenging to schedule a hearing and have the application to add Ms. Miller and Ms. Elliot to the *Dodd Action* resolved before 23 November 2011, I find it was possible had counsel truly wanted to do so. My limited availability to hear the application before the November deadline was one reason counsel for the plaintiffs cites for not proceeding with the application. As far as I can determine, no serious effort was made to have the application scheduled before the November deadline. If it had turned out that I was not available to hear the matter in the time required, then counsel could have requested that another judge hear and decide the application in my place; however, no such request was made. While the issue of adding Ms. Miller and Ms. Elliot to the *Dodd Action* was made more complicated by the dispute that arose between counsel regarding the terms of the settlement agreement in the *Ontario Action*, I still remain of the opinion that the application could have been addressed prior to 23 November deadline had counsel wanted to pursue the issue.

Is it an abuse of process to have both the *Dodd Action* and *Dixon Action* active at the same time?

61 It is an abuse of process for a plaintiff to have multiple actions seeking the same relief outstanding against the same defendant: *Boehringer Ingelheim (Canada) Ltd. v. Englund et al.*, 2007 SKCA 62. To a similar effect, in *Balm v. BHC Securities Inc*., 2003 ABQB 773, the court concluded that two actions brought by the same plaintiff against the same defendant seeking essentially the same relief constituted an abuse of process. A similar conclusion was reached in *Marandola v. General Motors du Canada Ltée*, [2004] Q.J. No. 9795 (S.C.), where three actions were commenced against the same defendants and there was no attempt on the part of the plaintiffs to seek consolidation of the cases.

62 The *Dodd Action* was commenced on 24 November 2009. The *Dixon Action* was commenced on 4 November 2011. Clearly two actions have been commenced in British Columbia for essentially the same relief against the same defendants. Mr. Dodd acknowledges this fact at para. 19 in his affidavit sworn 10 November 2011.

63 Although the plaintiffs in each of the actions are nominally different, in my view they are clearly associated in that two of the *Dixon Action* plaintiffs have already attempted to join the *Dodd Action* and the other two plaintiffs have an application to join that action pending. Moreover, they are represented by the same legal counsel.

64 Counsel for the plaintiffs distinguishes the cases the defendants cite in support of their argument by highlighting the fact that at the same time as the *Dixon Action* was filed, an application seeking an order consolidating it with the *Dodd Action* was filed. This, says counsel for the plaintiffs, addresses the concerns expressed in the jurisprudence about the multiplicity of proceedings against the same defendant for essentially the same relief being an abuse of process.

65 Counsel for the plaintiffs also argues that the expectation that the *Dixon Action* will be successfully consolidated with the *Dodd Action* is a reasonable one. In support of this position, the plaintiffs rely upon a number of case authorities including: *Iverson v. Canada (Fisheries and Oceans)*, 2011 BCSC 1619; *Heron v. Guidant Corp.*, [2007] O.J. No. 3823 (S.C.), leave to appeal refused [2008] O.J. No. 48; *Logan v. Canada (Minster of Health),* [2003] O.J. No. 418 (S.C.), aff'd [2004] O.J. No. 2769 (C.A.); *Birrell v. Providence Health Care Society*, 2007 BCSC 668, aff'd 2009 BCCA 109; *Gregg v. Freightliner Ltd. et al.*, 2003 BCSC 241; *Goodridge v. Pfizer Canada Inc.*, 2010 ONSC 1095; and *Haddad v. The Kaitlin Group Ltd.*, [2008] O.J. No. 5127 (S.C.).

66 In my opinion, the case authorities cited by the plaintiff are of limited assistance as they fail to address a situation such as the one presently before me where the initiation of a second parallel action with an accompanying application to consolidate it with the first action results in the tolling of an applicable limitation period. All of the above-noted cases relate to the substitution of proposed representative plaintiffs or the addition of proposed representative plaintiffs for reasons much different than those in the present action.

Decision

67 For the defendants to be successful on this application, I must be satisfied that the *Dixon Action* is plainly and obviously vexatious or an abuse of process: *Freshway, supra*.; *Shushwap Lake Utilities Ltd. v. Mattison*, 2008 BCCA 176.

68 On the evidence before me, I find the claims being advanced in the *Dixon Action* are practically a mirror image of the *Dodd Action* in that they essentially repeat and expand upon the claims made in the *Dodd Action*. The facts alleged in both actions are essentially the same as are the principal defendants. While the plaintiffs in each action are nominally different, I find they are clearly associated and working in concert to advance overlapping claims in this jurisdiction.

69 The stated intention of the plaintiffs in the *Dixon Action* and the plaintiff in the *Dodd Action* is to have both actions consolidated. In my opinion, consolidation of these two actions would impermissibly and improperly permit the plaintiffs to circumvent the rules governing the adding of parties to an action and the amendment of pleadings. The same concern applies to the appeal process that the plaintiff in the *Dodd Action* has initiated. If the two actions are permitted to be consolidated, then the plaintiff in the *Dodd Action* will have obtained what he initially sought and therefore there would be no need for him to pursue his appeal. Finally, I find the joining of the *Dixon Action* to the *Dodd Action* would improperly toll a limitation period and this on its own creates a measurable prejudice for the defendants.

70 Counsel for the plaintiffs explained the plaintiff's view of the consequences that will result if the defendants' application is granted as follows:

> If the Dixon [Action] is struck or stayed and not consolidated with the *Dodd Action*, non-resident class members will face an unfair and lengthy delay, which will cause prejudice. They will have to await the outcome of the B.C. certification application and then wait for the process to start anew in one of the other provinces that allows a national class. On the other hand, it has always been the Defendants' expectation that the B.C. action would proceed and proceed with non-resident claimants.

71 Counsel for the plaintiffs urges the court not forget or dismiss the interests of the class of plaintiffs Ms. Dixon, Ms. Miller, Ms. McFadzean and Ms. Elliot wish to represent in this litigation. I agree those interests need to be assessed on this application; however, having considered all of the evidence presented, I do not agree that any delay resulting from the granting of the defendants' application will result in undue prejudice or harm to any of the plaintiffs. Moreover, as I have already noted, there is no evidence before me that supports the assertion that the defendants expected to have the *Dodd Action* proceed with non-resident plaintiffs.

72 In my view, the position taken by the defendants on this application is the correct one. The *Dixon Action* attempts to re-litigate an issue that has already been adjudicated upon; it evades the appeal process that the plaintiff in the *Dodd Action* has initiated; it circumvents the rules of court that govern the adding of parties to an action and the amendment of pleadings; and it results in the improper tolling of a limitation period. For all of these reasons, I find the *Dixon Action* is vexatious and an abuse of the court's process.

Order

73 The defendants' application is granted and the plaintiffs' action is hereby stayed.

74 The defendants are entitled to their costs.

G.R.J. GAUL J.

Fowler v. Canada (Attorney General), [2012] B.C.J. No. 508

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

A.F. Cullen A.C.J.S.C.

Heard: February 7, 2012.

Judgment: March 14, 2012.

Docket: S113212

Registry: Vancouver

[2012] B.C.J. No. 508 | 2012 BCSC 367

Between William Fowler, Plaintiff, and The Attorney General of Canada, Defendant

(62 paras.)

Case Summary

Civil litigation — Civil procedure — Pleadings — Striking out pleadings or allegations — Grounds — Failure to disclose a cause of action or defence — False, frivolous, vexatious or abuse of process — Material facts — Application by Attorney General for an order striking plaintiff's pleadings as disclosing no reasonable cause of action and being unnecessary, scandalous, frivolous or vexatious, allowed — Plaintiff was incarcerated at Mountain Institution — Plaintiff attempted to assert claims in negligence, defamation and harassment — However, no coherent cause of action could be discerned from pleadings, as they were so prolix, over-broad and reliant on irrelevant recitations of evidence or narrative as to be impossible to have responded to in any meaningful way — Harassment and defamation claims struck without leave to amend — Negligence claim struck with leave to amend — Supreme Court Civil Rules, Rule 9-5.

Tort law — Practice and procedure — Pleadings — Amendment — Adding or striking out claim — Application by Attorney General for an order striking plaintiff's pleadings as disclosing no reasonable cause of action and being unnecessary, scandalous, frivolous or vexatious, allowed — Plaintiff was incarcerated at Mountain Institution — Plaintiff attempted to assert claims in negligence, defamation and harassment — However, no coherent cause of action could be discerned from pleadings, as they were so prolix, over-broad and reliant on irrelevant recitations of evidence or narrative as to be impossible to have responded to in any meaningful way — Harassment and defamation claims struck without leave to amend — Negligence claim struck with leave to amend — Supreme Court Civil Rules, Rule 9-5.

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B,

Limitation Act, RSBC 1996, CHAPTER 266, s. 3

Supreme Court Civil Rules, Rule 9-5, Rule 9-5(1), Rule 9-5(1) (a), Rule 9-5(1)(b)

Counsel

The Plaintiff: Appeared by video, on his own behalf.

Counsel for the Defendant: S.D. Norris.

Reasons for Judgment

A.F. CULLEN A.C.J.S.C.

1 This application brought under Rule 9-5 of the *Supreme Court Civil Rules* seeks an order striking the pleadings in the Notice of Civil Claim as (1) disclosing no reasonable claim, and (2) being unnecessary, scandalous, frivolous or vexatious. The action at issue was launched by a Notice of Civil Claim filed on May 16, 2011. The plaintiff, William Fowler, is a prisoner presently incarcerated at the Mountain Institution in Agassiz, British Columbia, serving a sentence of life imprisonment following his conviction for second degree murder. The defendant Attorney General of Canada is sued in his representative capacity.

2 The statement of civil claim is relatively brief. In Part I under Statement of Facts, it asserts the AG Canada represents "Correctional Service of Canada (CSC) Treasury Board of Canada, and the Ministry for Public Safety of Canada - all being part of this civil claim."

3 It asserts the "defendants have subjected the plaintiff to harassment for the use of the inmate grievance procedure, resulting in negative consequences of the same." The claim goes on to allege that CSC and/or its employees "have initiated an attack on the plaintiff by submitting false and derogatory comments in their written reports, cross-contaminating file information with other inmates' files" while in effect denying and covering up the alleged frauds causing "undue delay for release on a structured day parole"; recklessness that could unnecessarily result in serious harm or death; loss of family and community support and undue physical and psychological harm".

4 The Notice of Civil Claim refers to "rampant computer abuse" since November 8, 2006. It alleges discrimination in 2010 because of allegations that the inmate was unwilling to take responsibility for his crime and thus was unsuitable for any sort of release. The plaintiff asserts that discrimination was the cause or motive for the inaccurate information in his file.

5 The Notice of Civil Claim asserts a duty of care and a failure to meet "the expected reasonable standard of care".

6 Part I concludes:

> The cause of action is a valid reason to start a lawsuit and the facts that give the plaintiff this right.

7 And in Part II, Relief Sought, paragraphs 1 and 2, the Notice of Civil Claim reads as follows:

1. A criminal investigation into the alleged illegal activities of the following named persons or government agencies that have been involved in either writing false reports, adjoining different inmates' file information or attempting to remove evidence of the infractions through breaching the security of the electronic data processing system of Correctional Service Canada.
2. Treasury Board President, formally Minister for Public Safety, the Honourable Stockwell Day has had the opportunity to end the iniquitous actions of Correctional Service Canada, but arbitrarily has failed to do so.

8 In paragraph 3 of Part II, the pre-amble reads:

> The plaintiff seeks the listed monetary damages from, but not limited to the following parties and/or Harper Government of Canada Agencies:"

9 The Notice of Civil Claim then lists 30 people by name and/or position each with a separate monetary claim or sum referred to which in the aggregate amounts to $3,333,333. The Notice seeks the same amount from the CSC for a total of $6,666,666.

10 In its response to the plaintiff's Notice of Civil Claim, the defendant pleaded in part as follows:

Division 2 - Defendant's Version of Facts

1. The Notice of Civil Claim pleads no material facts disclosing a reasonable claim, is scandalous, frivolous or vexatious and is otherwise an abuse of process of this Court.
2. In the absence of further and better particulars, the Defendant is unable to discern the basis of the claim and therefore unable to provide a version of the facts.

Division 3- Additional Facts

1. The Notice of Civil Claim pleads no material facts disclosing a reasonable claim, is scandalous, frivolous or vexatious and is otherwise an abuse of process of this Court.
2. In the absence of further and better particulars, the Defendant is unable to discern the basis of the claim and therefore unable to provide additional facts.

LEGAL BASIS

1. The Notice of Civil Claim pleads no material facts disclosing a reasonable claim, is scandalous, frivolous or vexatious and is otherwise an abuse of process of this Court,
2. In the absence of further and better particulars, the Defendant is unable to discern the legal basis of the claim and therefore unable to respond to it.

11 On July 11, 2011, the defendant filed and served a demand for further and better particulars in relation to the plaintiff's Notice of Civil Claim. The plaintiff filed his response on August 11, 2011. It consisted of 50 pages detailing a broad variety of interactions between the plaintiff and various CSC employees, referring to various CSC reports and portions of the contents of those reports and providing a running commentary or narrative of the plaintiff's views of the various interactions and reports referred to. The narrative set out in the initial response to the demand for particulars refers to events occurring between 2006 and 2010.

12 The plaintiff subsequently filed two amended responses to the defendant's demand for particulars: the first was filed on August 29, 2011 amending the initial response by asserting "the duty of care referred to in the claim is not to be subjected to cruel and unusual treatment or punishment ..." It went on to refer to a CSC Bulletin dated 2007-05-07 noting conduct of a CSC staff member is subject to the *Charter*. It then went on to refer to the Neighbour Principle from *Donoghue v. Stevenson*, [1932] A.C. 562.

13 The second amendment was filed on October 7, 2011 and purported to add names to the Notice of Civil Claim arising from matters that post-dated the Notice of Civil Claim. It also referred to the contents of certain reports alleging they were "inaccurate, out of date and incomplete" and amount to "acts of defamatory liable". The amended response also made reference to the plaintiff's dealings with other CSC employees respecting access to information, a letter from the Privacy Commissioner, assertions that "Mountain Institution has deliberately and deceitfully withheld the requested access to personal or other information".

14 The second amended response also referred to assertions that two CSC employees had been dismissed from employment at another institution "for not supporting the institution's decision to involuntary transfer an inmate to higher security because of his use of the inmate complaint/grievance procedure". The plaintiff asserts affidavits of those circumstances "will be introduced as similarity evidence for the facts".

15 The plaintiff also indicated he "will ask the ... court to consider criminal charges of obstruction of justice."

16 The applicant's argument in support of his application to strike the pleadings is based on Rule 9-5(1) (a) and (b) which read as follows:

> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious, ...

17 It is clear from the context of Rule 9-5(1) as a whole that subsections (a) and (b) are disjunctive. Satisfying either test merits striking the pleading.

18 The applicant concedes that on a motion to strike the pleadings the court assumes the truth of the facts pleaded, and that there is no requirement to refer to a particular cause of action, although where as here, there appear to be a number of causes of action the plaintiff must relate the material facts asserted to the cause of action relied on. In support of those submissions, the applicant relied on *Hunt v. Carey Canada*, [1990] 2 S.C.R. 959 and *Stoneman v. Denman Island Local Trust Committee*, 2010 BCSC 636 at para. 27.

19 The applicant emphasizes that the purpose of pleadings is to clearly define the issues of fact and law not to be determined by the court citing *Homalco Indian Band v. British Columbia* (1988), 25 C.P.C. (4th) 107 (B.C.S.C.) and *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42.

20 The applicant submits that the purpose of particulars is to require a party to clarify the issues raised by the pleadings so that the opposite party may be able to respond properly and to prepare for discovery and for trial. The applicant relies on *Yewdale v. ICBC*, [1994] B.C.J. No. 1892 (S.C.) at para. 68.

21 The applicant contends that in the present case the particulars provided by the plaintiff, rather than clarifying the issues, exacerbates the difficulty in understanding them because the responses are so "prolix and confusing". The applicant submits that in that way, this case is similar to the *Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.*, 2009 BCSC 473.

22 The applicant says it is impossible to respond to the pleadings; they do not identify or disclose a reasonable claim.

23 In the alternative, the applicant submits that even if on "a generous reading of the pleadings" a claim in negligence, in defamation and/or harassment, can be discerned, the pleadings nonetheless establish no cause of action in support of those claims.

24 So far as negligence is concerned, the applicant notes the necessary elements which must be established are (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of the duty of care by a failure to exercise the standard of care of a reasonable and careful person in the circumstances, and (3) that the plaintiff suffered damages thereby. The applicant cites *Micka v. Oliver & District Community Economic Development Society*, 2008 BCSC 1623.

25 The applicant notes the Notice of Civil Claim "appears to suggest a civil claim in negligence" in the following passage:

> The Correctional Service of Canada has a duty of care owed to a convicted prisoner. The defendants have failed to meet the expected reasonable standard of care of a person.

26 The applicant submits that the plaintiff's failure to plead facts in support of his assertion of a duty of care or to establish the circumstances in which it was owed are deficiencies in his pleadings as is his failure to specify who owed him a duty of care.

27 The defendant also submits that the plaintiff's failure to plead facts to support his allegation that the defendant failed to meet the standard of care, or that the person alleged to have done so was a servant of the Crown acting within the course of his employment, deprive the pleadings of a viable cause of action.

28 The applicant also refers to the plaintiff's failure to plead any material facts in support of any actionable damages. The applicant notes that while referring to physical and psychological damage in his Notice of Civil Claim the plaintiff "has not particularized any physical damage nor ... psychological injury" in any way sufficient to establish liability.

29 The applicant similarly submits the plaintiff has failed to plead sufficient facts to establish a claim in defamation referring to his pleading that "the CSC or its employees have initiated an attack against the plaintiff of this action by promoting false and derogatory comments in their written reports, cross-contaminating file information with other inmates' files ..."

30 The applicant says pleadings in defamation "are in a special category and must be prepared with great skill and scrutiny ..." fully and precisely setting out the words used.

31 The applicant also submits on the basis of *Grant v. Torstar Corp.*, 2009 SCC 61 that the elements of defamation that must be pleaded are that: "(a) the impugned words were defamatory in the sense that they tend to lower the plaintiff's reputation in the eyes of a reasonable person; (b) the words in fact referred to the plaintiff; and (c) that the words were published, meaning that they were communicated to at least one person other than the plaintiff" (para. 28).

32 The applicant further submits that if liability for re-publication is claimed, the plaintiff must set out the exceptions to the general rule that the defendant is not liable for re-publication by others citing *Cooper v. Hennan*, 2005 ABQB 709.

33 The applicant further submits that none of the required details for a defamation claim have been set out in the plaintiff's Notice of Civil Claim and in his particulars, while setting out facts which he relates to harassment, it is difficult to discern whether those allegations also "speak to defamation allegations".

34 At any rate, the defendant submits the response to its request for particulars fails to set out the precise words alleged as defamatory, makes it unclear whether some of the alleged statements refer to the plaintiff, makes it unclear to whom and how the statements at issue were published, and makes it unclear how some of the statements are defamatory.

35 The applicant also submits that to the extent that the allegations related to harassment and false statements if defamatory occurred between December 2005 and November 2007, they are barred by s. 3 of the *Limitation Act*, R.S.B.C. 1996, c. 266.

36 As to the allegation of harassment, the applicant submits that in Canadian law there is no tort of harassment and further submits the claim insofar as it is based on harassment must be struck as disclosing no cause of action in law.

37 The applicant relies on *Total Credit Recovery (B.C.) Ltd. v. Roach*, 2007 BCSC 530 at para. 45 and *Prince George (City) v. Riemer*, 2010 BCSC 118 at paras. 58-60.

38 The applicant acknowledged that acts of harassment have been held to form the conduct required for the tort of intentional infliction of mental suffering, but submits that the plaintiff has pleaded no facts in support of such a cause of action citing the need "to plead facts establishing actual harm resulting in the form of a visible and provable illness, or behaviour calculated to produce that effect." The applicant relies on *Prinzo v. Bay West Centre for Geriatric Care* (2002), 60 O.R. (3d) 474 (C.A.) at para. 48 for that proposition.

39 The applicant says even if I am unwilling to strike the pleadings on the basis of there being no tort of harassment, the pleadings do not satisfy the elements of the hypothetical tort of harassment referred to by Sinclair

Prowse J. in *Mainland Sawmills Ltd. et al v. IWA-Canada et al*, 2006 BCSC 1195 at para. 17 where she held as follows:

> To determine the issues raised in this application, I decided rather than addressing the issues of whether the tort of harassment is a recognized cause of action in Canada or, if not, whether the law has developed to the point wherein it should be recognized at the outset, to first address whether the evidence of these Plaintiffs established the tort of harassment, the elements of that tort being as the Plaintiffs claimed. That is, I began my analysis of the issues raised in this application by assuming the tort of harassment does or should exist in Canada and that the elements of this tort are outrageous conduct by the defendant, the defendant's intention of causing or reckless disregard of causing emotional distress, the plaintiff's suffering of severe or extreme emotional distress, and the actual and proximate causation of the emotional distress by the defendant's outrageous conduct.

40 Finally, the applicant submits the pleadings should be struck as unnecessary, scandalous, frivolous or vexatious, relying on definitions of those terms in the case law. The applicant refers to a definition of frivolous in *Jerry Rose Jr. v. The University of British Columbia*, 2008 BCSC 1661 at para. 9 quoting from *McNutt v. A.G. Canada et al*, 2004 BCSC 1113 at para. 40 as "without substance, groundless, fanciful, trifles with the court or wastes time". The applicant also refers to a definition of vexatious as not going "to establish the plaintiff's cause of action or does not disclose a claim known to law, relying on *Citizens for Foreign Aid Reform v. Canadian Jewish Congress* (1999), 36 C.P.C. (4th) 266 (B.C.S.C. Chambers). The applicant also refers to a definition of scandalous as "so irrelevant that it will involve the parties in useless expense and will prejudice the trial of the action by involving the parties in a dispute apart from the issues." The applicant relied on *Citizens for Foreign Aid Reform v. Canadian Jewish Congress*, *supra*, at para. 47 in that connection.

41 The applicant submits in the case at bar there are numerous irrelevant pleadings which will draw the parties into unproductive, expensive litigation and the plaintiff has asked for relief against a large number of parties whom he has not named and made allegations in his particular responses that are clearly outside the Notice of Civil Claim and further confuse the issues.

42 The plaintiff respondent relies on his Notice of Civil Claim and his responses to the demand for further and better particulars. In his response to the defendant's application, he reviewed and relied on his allegations made in those documents as an answer to the defendant's application and referred to references therein to specific individuals involved in the alleged wrongdoing. He also referred to portions of his initial response to the demand for further and better particulars in which he referred to the "dramatic effect" of the defendant's allegedly defamatory information on him.

43 The plaintiff also made reference to a package of materials he sent to be filed in support of a default judgment and questioned why it was not responded to except by an application to strike his pleadings. He maintained in his argument that he has complied with the defendant's demand for further and better particulars and submits that for him to list "all the individuals listed as co-defendants would be unnecessary and too expensive for the plaintiff". He maintains "the defamation written against the plaintiff into the information stored by and is available for use by the Correctional Service of Canada was done by the persons mentioned in the plaintiff's response to the demand for further and better particulars". He also made reference to his reliance on evidence from another institution in relation to another inmate. The plaintiff maintains his responses to the defendant's demand for further and better particulars enable the defendant to respond with a pleading and that this application should be dismissed.

44 In his oral submissions, the plaintiff further submitted that one of the main reasons for his Notice of Civil Claim was a psychological assessment dated October 17, 2007 in which it was noted he was assessed for risk of future sexual offending and found to be "a moderate-high risk of re-offence". He asserted in his response to the demand for further and better particulars that that assessment endangered his life and his psychological well-being. In oral argument, he asserted that he was not a sexual offender. In his response to the demand for particulars, his objection to the psychological assessment appeared to be that his level of risk was assessed on the basis of some wrong information the psychologist had about his medical condition, and her corresponding assessment of the realism of his plans and job goals for the future.

45 In his authorities, the plaintiff included a decision of the Federal Court Trial Division, *Spidel v. Her Majesty the Queen*, 2011 FC 1448. In that case, the plaintiff, an inmate at Ferndale Institution, a minimum security penitentiary, alleged a cause of action arising from a decision of the Warden to reject his nomination to run for election for the inmate committee and for his subsequent transfer out of Ferndale. The defendants brought an application to have the statement of claim struck in its entirety or alternatively, to dismiss the action as against the individuals named as defendants and to strike out the claim for aggravated and punitive damages. In the result, the application was granted in part only, striking the style of cause and dismissing the action against the individual defendants. The balance of the application was dismissed.

46 In that case, the statement of claim alleged a breach of the plaintiff's *Charter* rights and other causes of action. He alleged his freedom of assembly rights were violated and that he suffered "domestic hardship, humiliation, shame, dishonour, embarrassment, degradation and injury to his self respect and esteem". He alleged the decision to prevent him from running for office was "allegedly maliciously false and misleading and intended to and did cause correctional setbacks, loss of reputation, mental suffering and other damage".

47 That case involved parallel proceedings also brought by the plaintiff by way of judicial review in which findings adverse to the institution were made.

48 In declining to strike the pleadings, the learned Federal Court Judge held that in his opinion "If substantiated there is a real possibility a cause of action exists which extends to special damages."

49 He concluded as to the *Charter* breaches alleged at paras. 15 and 16:

> It is far too early to determine how the matter will develop, and at what stage, if any, Mr. Spidel may have to elect between private law damages and *Charter* damages.
>
> If there is chance that the plaintiff might succeed then he should not be driven from the judgment seat as per *Hunt* above.

50 The case cited by the plaintiff is not of much assistance in the present case; it simply illustrates the application of broad principles to circumstances that are different from the present case and not wholly discernible from the Reasons for Judgment.

51 The present case in my view represents the circumstance in which no coherent cause of action can be discerned from the pleadings or responses to the demand for further and better particulars and, in any event, those documents are so prolix, over-broad, and reliant on irrelevant recitations of evidence or narrative as to be impossible to respond to in any meaningful way. In the result, I conclude that the plaintiff's pleadings fall afoul of Rule 9-5(1)(a) and (b).

52 While it appears that the plaintiff is seeking to make claims of negligence, harassment and/or defamation, even assuming the tort of harassment, or the conduct said to constitute it can amount to a cause of action in British Columbia, as the applicant notes, the plaintiff has not pleaded material facts which would in any event establish any such cause of action whether framed as harassment or as the intentional infliction of mental suffering.

53 As to the prospect of the defamation claim being successful, I agree with the applicant's submissions that the plaintiff's pleadings and responses simply do not reach the standard of particularity, clarity or care necessary to establish such a cause of action or even enable a reasonable response.

54 The apparent claim in negligence is similarly compromised as it relies on the plaintiff's lengthy narrative-like response to demand for particulars in which it is impossible to separate the material from the immaterial, the fabric of one potential cause of action or claim from that of another, and the conjecture and opinion from the asserted fact.

55 In short, the plaintiff's pleadings and responses simply do not meet any standard which enables or requires

them to be responded to. They fall far short of their requirement in set out in *Pellikaan v. Canada*, 2002 FCT 221, which quoted from the judgment of McKay J. in *Kelly Lake Cree Nation v. Canada*, [1998] 2 F.C. 270 (TD):

> The rules governing pleadings establish the fundamental rule that a plaintiff is under an obligation to plead material facts that disclose a reasonable cause of action. This very basic rule of pleadings involves four separate elements. One, every pleading must state facts and not merely conclusions of law; two, it must include material facts; three, it must state facts and not the evidence by which they are to be proved; and, four, it must state facts concisely in a summary form.

56 In my view, this is a case similar to that faced by K. Smith J. (as he then was) in *Homalco Indian Band v. British Columbia* (1998), 25 C.P.C. (4th) 107 (B.C.S.C.), in which he characterized the pleadings as "prolix and convoluted" (para. 4) requiring a "tortuous analysis of the document" to discern its nature and effect (para. 8). In the result Smith J. concluded as follows at para. 11:

> In my view, the statement of claim is an embarrassing pleading. It contains much that appears to be unnecessary. As well, it is constructed in a manner calculated to confuse the defendants and to make it extremely difficult, if not impossible, to answer. As a result, it is prejudicial. Any attempt to reform it by striking out portions and by amending other portions is likely to result in more confusion as to the real issues. In the interests of all parties, it must be set aside with leave to the plaintiffs to substitute a statement of claim prepared in accordance with the principles set out in these reasons: see *Gittings v. Caneco Audio-Publishers Inc.*, [1988] B.C.J. No. 532, *supra*, at 352-53.

57 In *Micka v. Oliver & District Community Economic Development Society*, *supra*, Ross J. held as follows as para. 23:

> The defendants submitted that the Statement of Claim does not contain any of the necessary elements to support a claim for damages for defamation. I agree with that submission; however, it does not appear to me from my review of the Statement of Claim that the plaintiff intended to allege that the defendants have defamed him. If I am wrong, then it is clear that the pleadings do not contain the defamatory words, the derogatory sense of the words alleged, or the material fact that the defamatory statement was published to a third party, see *LaPointe v. Summach*, [1999] B.C.J. No. 1459 (B.C. Master), *Gaskin v. Retail Credit Co.*, [1965] S.C.R. 297.

58 In my view, essentially the same reasoning prevails in the present case and I would order the pleadings struck with respect to defamation on the basis that they disclose no cause of action under Rule 9-5(1)(a).

59 I would similarly hold with respect to the plaintiff's apparent claim in harassment. Even if the tort of harassment or the conduct said to underlie it could be said to give rise to a cause of action, the plaintiff's pleadings fall short of alleging facts capable of establishing such a cause of action and I therefore strike the pleadings in that regard as showing no cause of action under Rule 9-5(1)(a).

60 Insofar as the claim apparently framed in negligence is concerned, it appears to rest on assertions of "contamination of [his] file with other inmates' information" and/or the insertion of inaccurate information in the plaintiff's file.

61 While on the pleadings as constituted, it is impossible to discern what the material facts underlying the alleged negligence are or what damages have flowed from it, I do not think it could be said that if amended the pleadings could not disclose a cause of action in negligence (assuming the facts to be true).

62 In the result, I will strike the plaintiff's pleadings insofar as they appear to claim in harassment or defamation as disclosing no cause of action, without leave to amend, but will strike the plaintiff's claim in negligence as being unnecessary, scandalous, frivolous or vexatious under Rule 9-5(1)(b) but with leave to amend. The proceedings will be stayed pending the filing of an amended statement of claim that comports with the *Rules* and principles of pleadings as discussed in these Reasons. If no adequately amended statement of claim has been filed within 60 days of this order, the applicant has liberty to reset its application to dismiss the plaintiff's action against it.

A.F. CULLEN A.C.J.S.C.

End of Document

Gill v. Canada, [2013] B.C.J. No. 2036

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

P. Rogers J.

Heard: August 30, 2013.

Judgment: September 16, 2013.

Docket: S116960

Registry: Vancouver

[2013] B.C.J. No. 2036 | 2013 BCSC 1703

Between Harjit Singh Gill, "Legal fiction", for Harjit Singh Gill, Man, Plaintiff, and Government of Canada, Attorney General of Canada, TSX Venture Exchange, Attorney General of British Columbia, City of Surrey, City of Delta, Rani Kaur Gill, Swinder Singh Gill, Harbans Senghera, Amarjit Mann, Eclipse Medical Inc., Rotary International, Rotary District 5040, Salvation Army, Royal Bank of Canada, Bank of Nova Scotia, AMS Homecare Inc. et al, Defendants

(23 paras.)

Case Summary

Civil litigation — Civil procedure — Pleadings — Striking out pleadings or allegations — Grounds — Failure to disclose a cause of action or defence — False, frivolous, vexatious or abuse of process — Application by defendants to strike plaintiff's pleadings on ground they were scandalous, frivolous, or vexatious allowed — Plaintiff's notice of civil claim was impenetrable as description of cause of action — No orders were made on applications for stay of proceedings or summary dismissal; pleadings did not permit proper understanding of claims and it was thus injudicious to dismiss on merits — Leave of court was required before plaintiff filed further pleadings against defendants.

Application by the defendants to strike the plaintiff's pleadings on the ground they were scandalous, frivolous, or vexatious. Application by the Attorney General of Canada for an order dismissing the proceeding against the RCMP and CSIS. Application by the defendant Salvation Army to stay the proceedings on the ground the plaintiff was an undischarged bankrupt. Application by the defendant Royal Bank of Canada for summary dismissal of the proceeding and to declare the plaintiff a vexatious litigant. The plaintiff had attempted to amend his original pleadings to add the RCMP and CSIS as defendants; the amended notice was ordered struck and an appeal was stayed. The plaintiff made various allegations against the defendants, seemingly involving a conspiracy against the plaintiff.

HELD: Applicant by defendants allowed.

Pleadings were struck. The plaintiff's notice of civil claim lacked discipline and structure, was prolix, was extremely difficult to follow and as a description of a cause of action was impenetrable. The plaintiff's notice of civil claim offended Rule 9-5(1)(a) and (b) and the pleadings were struck. The Attorney General's application to strike the proceeding against the RCMP and CSIS was superfluous as the amended notice of claim had been struck. No orders were made on the Salvation Army or Royal Bank's applications; the plaintiff's pleadings did not permit a proper understanding of his claims and it would thus be injudicious to dismiss the claim on the merits. The application to declare the plaintiff a vexatious litigant was premature as he had not demonstrated he would advance

facetious litigation. However, as there was a substantial risk of the plaintiff re-filing his claims, leave of the court was required before the plaintiff filed further pleadings against the defendants.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 71

Supreme Court Civil Rules, Rule 9-5(1), Rule 9-5(1)(a), Rule 9-5(1)(b), Rule 9-5(2)

Counsel

Appearing on his own behalf: H.S. Gill.

Counsel for the Defendant, Government of Canada: J.S. Basran, A.S. Sanghera.

Counsel for the Defendant, City of Delta: M. Van Nostrand.

Counsel for the Defendant, Salvation Army: J.A. Bastien.

Counsel for the Defendant, Royal Bank of Canada: M.D. Parrish.

No other appearances.

Reasons for Judgment

P. ROGERS J.

Introduction

1 The main thrust of the defendants' applications is to strike the plaintiff's pleadings on the ground that they offend Rule 9-5(1).

The Applications

2 The Attorney General of Canada, on behalf of the Government of Canada, the Royal Canadian Mounted Police and the Canadian Security Intelligence Service, the City of Delta, the Royal Bank of Canada, and the Salvation Army have all applied for an order that Mr. Gill's pleadings be struck because they do not disclose a reasonable claim against the defendants; they are unnecessary, scandalous, frivolous, or vexatious; and the pleadings are so badly drawn that they would prejudice, embarrass or delay a fair trial of the proceeding.

3 The Attorney General of Canada also applies for an order dismissing the proceeding against the RCMP and CSIS on the ground that they are not legal entities which can be sued.

4 In addition to an order striking Mr. Gill's pleadings, the Royal Bank of Canada seeks orders declaring that Mr. Gill is a vexatious litigant, that he be enjoined from amending his notice of civil claim or commencing further proceedings against the Royal Bank without the court's leave or, in the alternative, that the Royal Bank be granted summary judgment against Mr. Gill. The Royal Bank also seeks special costs of the application in any event of the cause.

5 The Salvation Army, in addition to its application to strike Mr. Gill's pleadings, seeks an order that Mr. Gill's action be stayed on the ground that Mr. Gill has no capacity to prosecute this proceeding owing to his status as an un-discharged bankrupt.

The Law

Striking Pleadings

6 Rule 9-5(1) of the *Rules of Court* governs an application to strike pleadings:

> **Scandalous, frivolous or vexatious matters**
>
> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

7 Rule 9-5(2) stipulates that no evidence is admissible in the context of an application under Rule 9-5(1)(a). Another way of putting this stipulation is that the court should assume that the facts plead or true as it considers whether those facts disclose a reasonable claim. A common sense exception to this stipulation exists when the pleadings assert some bizarre or impossible proposition. The purpose of Rule 9-5(1)(a) is to ensure that the parties and the court have a clear understanding of the nature of the claims advanced. A clear understanding of the claims will allow the parties to efficiently litigate the issues and will allow the court to make considered and judicious findings on those issues. Prolix, convoluted, and incomprehensible pleadings do not lend themselves to permit in the parties to achieve a clear understanding of the claims advanced. Further, a party pleading a particular type of claim must, at a minimum, plead assertions of fact which, if proven, would establish the essential elements of a successful claim.

8 A pleading is frivolous if it is without substance, is groundless or is fanciful. A pleading is vexatious if it is irrelevant to the plaintiff's cause of action (whatever that cause of action may be) or if it does not disclose a claim known to law.

9 The pleading is scandalous if it is so badly drawn that to litigate upon the pleading would require the parties to undertake useless expense or cause them to litigate matters irrelevant to the claim itself.

Bankruptcy

10 Upon making an assignment into bankruptcy, the bankrupt party transfers all of his property, including choses in action, to the trustee in bankruptcy: *Bankruptcy and Insolvency* Act. R.S.C. 1985, c. B-3, s. 71. However, the bankrupt may nevertheless retain the right to prosecute an action where the claim is personal in nature. Examples of claims that are personal in nature include claims for personal injury, defamation, or wrongful arrest. A claim for recovery of money owing to a breach of contract is not personal in nature.

The Pleadings

11 Mr. Gill commenced this proceeding on October 17, 2011. He attempted to amend his pleadings on October 15, 2012. The amendments asserted claims against a number of parties Mr. Gill wished to become the defendants. Those parties included the RCMP and CSIS. Mr. Gill did not seek or obtain the courts leave to amend or add parties to the proceeding. On October 30, 2012, Mr. Justice Savage ordered that the amended notice of civil claim be struck. Mr. Gill appealed that order. The Court of Appeal ordered that Mr. Gill's appeal be stayed pending his posting of security for costs. Mr. Gill has not posted security for costs. In the result, the appeal has not proceeded;

Justice Savage's order remains extent; the amended notice of civil claim is defunct; the RCMP and CSIS are not parties to the proceeding; and the only pleading to which the defendant's applications relate is the original October 2011 notice of civil claim.

12 I have reviewed Mr. Gill's original notice of civil claim. I note that at para. 1 of his notice, Mr. Gill pleads that Harjit Singh Gill is a legal fiction. At para. 2, Mr. Gill alleges that:

> 2. The defendants over the course of 40 plus years orchestrated events on the Plaintiff for the purpose to deceive and to harm, deceiving the Plaintiff for the purpose of monetary gain and to test Truths, tortured the plaintiff, mentally and physically, alienated the plaintiff's children from the plaintiff, robbed from the plaintiff, caused financial ruin, and held the plaintiff hostage.

13 The notice of claim contains 59 paragraphs. Paragraphs 16 and 40 are reasonably representative of the quality of Mr. Gill's drafting:

> 16. In 2003 -- Bank of Nova Scotia who had provided line of credit to the company pulls line of credit suddenly and no Bank would provide the line of credit during crucial spring season buying. The Plaintiff obtains funding privately (loan to the Plaintiff Mr. Gill) from third parties and gives funds to Rani Gill who deposited them into company at below the cost to the Plaintiff as TSX Venture would not approve a higher interest loan to company, the TSX Venture saying interest being paid to Rani Gill was too much even though it was less than the Plaintiff's cost of obtaining the funds. Hence the debt burden to the Plaintiff and too Rani Gill continued to climb and the risk grew as the Plaintiff had provided the personal guarantees. The funds injection enabled the company to obtain a line of credit from the Royal Bank of Canada. The Plaintiff then had to fund the interest on interest as Royal Bank who agreed to provide a line of credit demanded that the funds not be withdrawn at any time. The company grew nationally aggressively, resulting in more need for capital to meet the need of ordering more product. The Plaintiff began to realize that there was a continued conspiracy taking place and that the financial institutions and private lenders would not permit the Plaintiff to reduce the personal and company debt levels as funds were provided both through the financial institutions and privately to the Plaintiff but only enough to fund the ongoing interest on interest which continued to climb as more debt was required to fund the ongoing growth but not for repayment of the debt. I advised legal counsel of the growing conspiracy but had no way of stopping it. The cycle of debt and interest was maintained and created by the defendants
>
> ...
>
> 40. After the Plaintiff terminates all the Rotarians of the club in July 2009, the Plaintiff still continued to manage the rotary websites for sometime. The Plaintiff attempted to stay in touch with Rotarians but the terminated Rotarians wanted to continue to deceive everyone and ultimately the Plaintiff focused on attempting to uncover more truths and to improve his health. By August 2009 the Plaintiff had learned how to swim and had trained at the downtown Vancouver Steve Nash gym while the Plaintiff worked in construction, minimum wage, and was ready for IRONMAN Penticton, which he had registered for the previous year. The Plaintiff went to Penticton on little funds in his pocket. Still living homeless in Vancouver Shelters. The defendants continued creating more problems for the Plaintiff, the buses would not drive me -- greyhound were full they claimed and so the Plaintiff rode to Hope on his bike, and then when he realized it would take too long to get there by bike he took a taxi the rest of the way -- expensive and that's how the defendants wanted it to be -- they wanted the Plaintiff to drain his funds. IRONMAN Penticton starts at a park funded by PENTICTON Rotary. Hence Rotarians control and influence the city and the race to a large degree. The plaintiff completed the swim portion and was eight minutes after the cutoff on the bike portion of the IRONMAN and was not permitted to do the marathon (I had already completed two marathons by now). My bike was sabotaged during the race. My tire was half flat and the brakes rubbed against the tire as I rode. This was not the case the night before. In addition the Plaintiff believes that since the Plaintiff appeared to be the first after the cutoff that they lengthened the race as there was no one after or before the Plaintiff for miles. The Rotarians or conspirators could

> not afford that the Plaintiff would be successful in the IRONMAN. How could the defendants justify that an IRONMAN was not worthy. Hence the Plaintiff's suffering would continue. They had successfully sabotaged the Plaintiff's IRONMAN 2009 race, another victory for them.

Discussion

14 The examples reproduced above demonstrate that Mr. Gill's notice of civil claim lacks discipline and structure. It is prolix. As a history, the notice of civil claim it is extremely difficult to follow. As a description of a cause of action against any particular defendant, it is impenetrable.

15 It is clear that when he drafted the notice of civil claim, Mr. Gill was either unaware of the principles of proper legal pleading or, being aware of those principles, he ignored them. There is, in my view, no question that Mr. Gill's notice of civil claim offends Rule 9-5(1)(a) and (b) and that his pleadings must be struck. An order will go to that effect.

16 The Attorney General for Canada's application to strike the proceeding against the RCMP and CSIS is superfluous. That is because those entities were taken out of the action by operation of Justice Savage's October 2012 order.

17 I will make no order concerning the Salvation Army's application to stay the proceedings on the ground that Mr. Gill is an undischarged bankrupt. I have come to that conclusion because Mr. Gill's pleadings do not permit me to come to a proper understanding of the true nature of his claims. They may be personal in nature, in which case the claim may still accrue to Mr. Gill despite his bankruptcy, or they may be non-personal, in which case they ought to be stayed pursuant to the *Act*.

18 For substantially the same reason, I will make no order with respect to the Royal Bank of Canada's application for summary dismissal of Mr. Gill's proceeding. The pleadings do not reveal what it is that Mr. Gill is complaining of -- it would be injudicious to dismiss the claim on the merits without first knowing what the claim is about.

19 The Royal Bank of Canada has asked for an order that Mr. Gill be declared a vexatious litigant and that he be enjoined from filing further pleadings without leave of the court. In my view, the Royal Bank of Canada's application is premature -- Mr. Gill has not yet demonstrated that he will, against all odds and contrary to common sense, advance facetious litigation.

20 That said, Mr. Gill has demonstrated that he is incapable of composing a proper notice of civil claim. Given Mr. Gill's assertion in the course of the hearing of these applications -- he promised that if his pleadings are struck he will simply re-file them and press on with his claims -- I find that there is a substantial risk that if the order following these applications does nothing more than strike the pleadings, these defendants will be back in the same position they are at present and that this entire exercise will have to be repeated. Therefore, relying upon the court's inherent jurisdiction to control its process, an order will go enjoining Mr. Gill from filing further pleadings in this proceeding or in any other proceeding against the defendants named in the original and the defunct amended notice of civil claim without first obtaining leave of the court to do so. On an application for such leave, the question for the court to decide will be whether Mr. Gill's pleadings offend Rule 9-5.

Conclusion

21 The pleadings contained in the notice of civil claim filed October 17, 2011, are struck. Mr. Gill will be enjoined from filing further pleadings in this or any other proceeding against the defendants named in the original and the amended notice of civil claim without first obtaining leave from the court to file those pleadings.

22 It will not be necessary for Mr. Gill to approve the form of order.

23 The application defendants have been generally successful on their applications. Subject to a determination of

whether Mr. Gill's claims are personal and therefore survive his bankruptcy, the application defendants shall be entitled to their costs on Scale B in any event of the cause.

P. ROGERS J.

Grosz v. Royal Trust Corp. of Canada, [2020] B.C.J. No. 161

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

C.L. Forth J.

Heard: December 3-4, 2019.

Judgment: February 4, 2020.

Docket: S199755

Registry: Vancouver

[2020] B.C.J. No. 161 | 2020 BCSC 128

Between Robert W.G. Grosz, J.D., Plaintiff, and Royal Trust Corporation of Canada, West Coast Realty Ltd., Seasons Real Estate Services Corporation, Catherine Elliott, Ronald Elliott, Estate of Eleanor Elizabeth Bird (Deceased) Also Known As Elizabeth Eleanor Bird (Deceased) Also Known As Elizabeth Bird (Deceased), Michael Van Der Kooy, Jacqueline Eddy, Pauline Savoy, Boughton Law Corporation, James D. Baird, James Baird Law Corporation, Heather D. Craig, Heather Craig Law Corporation, Gregg E. Rafter, Gregg Rafter Law Corporation, Marcia C. Pedersen, The Owners, Strata Plan LMS 2002, City of Surrey, Tammy Esther Jones, Defendants

(127 paras.)

Case Summary

Civil litigation — Civil procedure — Pleadings — Striking out pleadings or allegations — Grounds — Failure to disclose a cause of action or defence — False, frivolous, vexatious or abuse of process — Judgments and orders — Summary judgments — No triable issue — To dismiss action — Application by all defendants, except Jones, to dismiss plaintiff's second claim against them allowed — In 2014, plaintiff commenced first action against same defendants alleging fraud and conspiracy regarding sale of property — First action was struck for want of prosecution — Plaintiff commenced second action in 2019 that expressly incorporated pleadings from first action and added new allegations and 19 new parties — Plaintiff discovered his claims against defendants on or before August 2014 — Under s. 6(2) of Limitation Act, limitation period expired well before second action was commenced — Supreme Court Civil Rules, Rule 9-6(5)(a).

Civil litigation — Limitation of actions — Time — Discoverability — Application by all defendants, except Jones, to dismiss plaintiff's second claim against them allowed — In 2014, plaintiff commenced first action against same defendants alleging fraud and conspiracy regarding sale of property — First action was struck for want of prosecution — Plaintiff commenced second action in 2019 that expressly incorporated pleadings from first action and added new allegations and 19 new parties — Plaintiff discovered his claims against defendants on or before August 2014 — Under s. 6(2) of Limitation Act, limitation period expired well before second action was commenced — Supreme Court Civil Rules, Rule 9-6(5)(a).

Real property law — Proceedings — Practice and procedure — Pleadings — Limitation periods — Application by all defendants, except Jones, to dismiss plaintiff's second claim against them allowed — In 2014, plaintiff commenced first action against same defendants alleging fraud and conspiracy regarding sale of property — First action was struck for want of prosecution — Plaintiff commenced second action in 2019 that expressly incorporated pleadings from first action and added new allegations and 19 new parties

— Plaintiff discovered his claims against defendants on or before August 2014 — Under s. 6(2) of Limitation Act, limitation period expired well before second action was commenced — Supreme Court Civil Rules, Rule 9-6(5)(a).

Tort law — Practice and procedure — Pleadings — Amendment — Adding or striking out claim — Application by all defendants, except Jones, to dismiss plaintiff's second claim against them allowed — In 2014, plaintiff commenced first action against same defendants alleging fraud and conspiracy regarding sale of property — First action was struck for want of prosecution — Plaintiff commenced second action in 2019 that expressly incorporated pleadings from first action and added new allegations and 19 new parties — Plaintiff discovered his claims against defendants on or before August 2014 — Under s. 6(2) of Limitation Act, limitation period expired well before second action was commenced — Supreme Court Civil Rules, Rule 9-6(5)(a).

Application by all defendants, except Jones, to dismiss the self-represented plaintiff's second claim against them. In 2014, the plaintiff entered into a contract of purchase and sale with the defendant Royal Trust, as executor of Bird's estate, to purchase a unit in a condominium complex in Surrey. After learning Bird had died in the unit, the plaintiff refused to waive or declare fulfilled the subject conditions. Jones subsequently purchased the unit. In his first action commenced in June 2014, the plaintiff alleged the defendants concealed the fact Bird had died in the property and fraudulently misrepresented the condition of the property. In 2019, the plaintiff commenced a second action that expressly incorporated the pleadings from the first action. In the second action, the plaintiff sought the same relief as the first action but added new allegations and claimed against 19 new parties. The first action was dismissed in 2019 for want of prosecution.
HELD: Application allowed.

The plaintiff discovered his claims against the defendants on or before August 2014. Under s. 6(2) of the Limitation Act, the limitation period expired well before the second action was commenced. There was no genuine issue for trial. In the alternative, it was plain and obvious that the claim disclosed no reasonable cause of action, was vexatious and was an abuse of process. The plaintiff had advanced wildly speculative theories against the defendants that were clearly embarrassing, scandalous and vexatious. Allowing the plaintiff to amend his pleadings would not cure the defects.

Statutes, Regulations and Rules Cited:

Business Corporations Act, S.B.C. 2002, c. 57, s. 46(5)

Law and Equity Act, R.S.B.C. 1996, c. 253, s. 10

Limitation Act, S.B.C. 2012, c. 13, s. 6(1), s. 8, s. 12(2)

Real Estate Services Act, S.B.C. 2004, c. 42, s. 35(1)(c)

Realtor's Code of Ethics,

Supreme Court Civil Rules, B.C. Reg. 168/2009, Rule 3-7(1), Rule 8-1(9), Rule 9-5, Rule 9-5(1), Rule 9-5(1)(a), Rule 9-5(1) (b), Rule 9-5(1)(c), Rule 9-5(1)(d), Rule 9-5(2), Rule 9-6, Rule 9-6(5)(a)

Trustee Act, R.S.B.C. 1996, c. 464, s. 87(2)

Wills, Estates and Succession Act, S.B.C. 2009, c. 13,

Counsel

Plaintiff appearing in person: R. Grosz.

Counsel for the Defendants, Royal Trust Corporation of Canada, Estate of Eleanor Elizabeth Bird, also known as Elizabeth Eleanor Bird (Deceased), also known as Elizabeth Bird (Deceased), Jacqueline Eddy, Michael Van Der Kooy, and Pauline Savoy (the "Royal Trust defendants"): N. Safarik.

Counsel for the Defendants, Boughton Law Corporation, James D. Baird, James Baird Law Corporation, Heather D. Craig, Heather Craig Law Corporation, Gregg E. Rafter, Gregg Rafter Law Corporation, and Marcia C. Pederson (the "Boughton defendants"): P. Arvisais.

Counsel for the Defendants, West Coast Realty Ltd, Seasons Real Estate Services Corporation, Catherine Elliott and Ronald Elliott (the "Realtor defendants"): N. Kamoosi.

Counsel for the Defendant, City of Surrey (the "Surrey defendant"): B. Lee.

Counsel for the Defendant, The Owners, Strata Plan LMS 2002 (the "Strata defendant"): M. Holmes.

Table of Contents

Reasons for Judgment

C.L. FORTH J.

Introduction

1 These are the reasons for judgment on applications brought by the defendants in this action, with the exception of the defendant, Tammy Esther Jones ("applicant defendants"), to have the claims against them dismissed under R. 9-5 or 9-6 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*SCCR*]. The plaintiff, Robert W.G. Grosz, is self-represented.

2 I will begin by outlining the factual background and the history of the proceedings. I will then outline the specific applications brought by each of the applicant defendants. With respect to these, I will first address the applications to have the claims dismissed under R. 9-6(5). I will end with a consideration of the applications to have the pleadings struck and the proceeding dismissed under R. 9-5(1) and costs.

Factual Background

3 On June 19, 2014, the plaintiff, Mr. Grosz, through his company, The Matryx Corporation ("Matryx"), entered into a contract of purchase and sale (the "Contract") with the defendant, Royal Trust Corporation of Canada ("Royal Trust").

4 The Contract was for the purchase of a unit in a condominium complex in Surrey, BC (the "Property") which had been owned by Ms. Eleanor Bird prior to her death in July of 2013. Ms. Bird had no living relatives in Canada, and Royal Trust was named as the executor of her estate ("Ms. Bird's Estate"). It was in this capacity that Royal Trust entered into the Contract to sell the Property to Matryx. Matryx has since assigned its rights under the Contract to Mr. Grosz.

5 When Mr. Grosz entered into the Contract, he had recently returned to Canada after having obtained a law degree from a school in California. He and his partner were looking to purchase a property, and he arranged to view the Property through Catherine Elliott, a realtor with West Coast Realty Ltd., who was the listing agent.

6 Mr. Grosz first viewed the Property on June 18, 2014. Ms. Elliott did not attend the viewing, but her husband, Ronald Elliott, who is a realtor with Seasons Real Estate Services Corporation, attended in her place.

7 Mr. Grosz alleges that Mr. Elliott told him that Ms. Bird did not die in the Property and made other representations as to the condition of the Property, which Mr. Elliott denies.

8 The Contract was entered into the following day with a purchase price of $133,000. The Contract included a clause that "This Property is an estate sale", and the sale was "as is", without any legal warranties and/or representations from the seller.

9 The Contract also included subject conditions, which were for the sole benefit of the buyer and which were required under the Contract to be removed by July 4, 2014 (the "Subject Removal Date"). Some of the conditions included:

a) the buyer was to receive and approve certain documents with respect to information that could reasonably adversely affect the use or value of the Property;

b) the buyer would arrange and approve satisfactory financing;

c) the buyer would obtain, approve, or waive an inspection report against defects which might adversely affect the Property's use or value;

d) the buyer would search and approve title to the Property against the presence of any charge or other feature, registered or not, that might reasonably adversely affect the Property's use or value;

e) the seller would not unreasonably withhold its consent to a request from the buyer for an extension of a few days in order to complete property inspections and/or draft and file documents required to complete the sale; and

f) the buyer was aware that it had "no agency" and was advised to seek legal representation prior to removing subjects.

10 The Contract provided that it would be terminated on the Subject Removal Date unless the subject conditions were waived or declared fulfilled by written notice given by the buyer on or before that date.

11 A few days after entering into the Contract, on June 24, 2014, Mr. Grosz learned that Ms. Bird had died in the Property. Because her body was not immediately discovered, some decay was present which created defects to the Property requiring remediation. The remedial work was carried out in the summer and fall of 2013. No building permits were obtained from the City of Surrey.

12 On June 26, 2014, Mr. Grosz demanded documents relating to any engineering or remediation of the Property, the adjoining units, and the common property. He also demanded copies of all pleadings and orders relating to the probate of Ms. Bird's will and an unrelated personal injury action against the Strata Corporation. The following day, Ms. Elliott provided some, but not all, of the requested documents.

13 On June 30, 2014, Mr. Grosz commenced an action in the BC Supreme Court against Royal Trust, West Coast Realty Ltd., Seasons Real Estate Services Corporation, Catherine and Ronald Elliott, and the Estate of Eleanor Elizabeth Bird (the "First Action"). In it, he alleges that:

a) Royal Trust and Mr. and Ms. Elliott knew that Ms. Bird had died in the Property and that they conspired to conceal these facts from him and misrepresented the condition of the Property in order to maximize the sale price;

b) Ms. Bird's will was fraudulently created by Royal Trust and Mr. and Ms. Elliott in order to share the proceeds from the sale of the Property; and

c) Royal Trust and Ms. Elliott were in breach of the Contract for failing to provide relevant documents.

14 Mr. Grosz sought the following relief in the First Action:

a) consolidation of the action with the probate petition regarding Ms. Bird's Estate;

b) an injunction to prevent Royal Trust from further sales of Ms. Bird's real or personal property;

c) an injunction to compel Royal Trust to further remediate the Property;

d) an adjustment of the sale price in the Contract;

e) a declaration that Royal Trust, West Coast Realty Ltd., and Ms. Elliott are in breach of the Contract for refusing to produce relevant documents;

f) a declaration that Matryx has no duty to perform under the Contract until the documents are produced;

g) a declaration under s. 87(2) of the *Trustee Act*, R.S.B.C. 1996, c. 464 for fraud, wilful concealment, or misrepresentation against Royal Trust for its misrepresentations with respect to the Property;

h) a declaration under s. 35(1)(c) of the *Real Estate Services Act*, S.B.C. 2004, c. 42 that Mr. and Ms. Elliott engaged in professional misconduct and deceptive dealing by failing to disclose Ms. Bird's death in the Property and failing to produce documents;

i) a declaration under the Rules of the Real Estate Council of B.C. against Mr. and Ms. Elliott for failing to disclose latent defects, among other things;

j) a declaration that Mr. and Ms. Elliott were in breach of the *B.C. Realtor Code of Ethics* for failing to disclose information, intentionally misleading Mr. Grosz about matters pertaining to the Property, failing to discover facts to avoid an error or misrepresentation, being party to an agreement to conceal facts pertaining to the Property, and other allegations;

k) a revocation of the grant of administration of Ms. Bird's Estate to Royal Trust and a grant of the administration of the Estate to Mr. Grosz;

l) rectification or variation of Ms. Bird's will under Divisions 5 and 6 of the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13.

m) restitution from each of the defendants for services to Ms. Bird's Estate;

n) general, special, actual, compensatory, consequential, and incidental damages in tort from each of the defendants; and

o) punitive damages from each of the defendants for fraud, wilful concealment, or misrepresentation.

15 On July 4, 2014, the Subject Removal Date was extended to July 14, 2014, at Mr. Grosz's request. Royal Trust refused Mr. Grosz's further request to extend the Subject Removal Date, taking the position that it had "more than met" its disclosure obligations under the Contract.

16 On July 14, 2014, Mr. Grosz contacted the City of Surrey to inquire about whether building permits had been obtained for the remediation work done to the Property. Joseph Marian, Commercial Plan Reviewer for the City of Surrey, e-mailed Mr. Grosz to confirm that no building permit had been obtained and that a building permit would be required to replace plumbing fixtures, to do any structural work, or to do any work affecting fire and sound separations. Mr. Grosz forwarded this correspondence to James D. Baird, the solicitor for Royal Trust, and demanded that Royal Trust obtain a retroactive building permit and remedy any deficiencies with the remediation work performed.

17 Mr. Grosz took the position that he could not remove the subject conditions until his demands were met. He claims that he spoke to Mehran Nazeman, a manager in the building division at the City of Surrey, and learned that City of Surrey would retroactively enforce the building permit requirement on him if he purchased the Property. He says that this would likely require him to "demolish the work and start over", which would likely cost more than the fair market value of the Property. He further says that if he completed the subject conditions, he would be purchasing a property that was "stigmatized" and "a liability, and one that cannot be lived in".

18 In July 2019, Mr. Grosz learned that the City of Surrey had not retroactively enforced the building permit requirement on the current owner of the Property, Ms. Jones, who purchased the Property in March of 2015.

19 On July 15, 2014, after Matryx had failed to waive or declare fulfilled the subject conditions, Royal Trust and its lawyers took the position that the Contract had terminated in accordance with its terms. This was communicated to Mr. Grosz by way of a letter sent by Mr. Baird. In it, Mr. Baird informs Mr. Grosz of Royal Trust's position that it had no further obligations to him or to Matryx under the Contract.

20 In a letter to Mr. Grosz in August of 2014, Heather Craig, the lawyer for Royal Trust in the First Action, repeated this position and informed Mr. Grosz that Royal Trust intended to deal with the Property in the ordinary course as it deems appropriate in its capacity as the executor and trustee of Ms. Bird's Estate, which included listing it for sale.

21 Mr. Grosz claims that, since August 4, 2014, he has been renting property in mitigation of his damages while

awaiting Royal Trust's performance of the Contract. He says that he can no longer afford to buy an alternative property.

22 Responses to civil claim were filed by the defendants in the First Action in July of 2014, with the exception of Ms. Bird's Estate. In August 2019, Ms. Craig amended Royal Trust's response to civil claim to include Ms. Bird's Estate. She also filed an affidavit in which she deposes that she initially failed to include Ms. Bird's Estate due to inadvertence. This amendment was triggered by an application brought by Mr. Grosz for default judgment against Ms. Bird's Estate.

23 Between July 2014 and July 2019, no steps were taken in the First Action. Mr. Grosz filed a notice of change of address in September 2015 and again in February 2019, which the defendants in the First Action say they never received.

24 On July 22, 2019, Royal Trust filed an application to have the First Action dismissed for want of prosecution (the "Dismissal Application"). It served the application by courier to Matryx's registered and records office at 1023 Expo Boulevard, and also served Mr. Grosz by email.

25 Upon receipt of this application, Mr. Grosz filed a notice of intention to proceed and a notice of address for service and served these documents on the defendants in the First Action. He also brought an application to strike the Dismissal Application (the "Strike Application"). In addition, without consulting the defendants, he secured a trial date in the First Action for January 4, 2021 for ten days.

26 On August 28, 2019, the parties to the First Action attended before me in chambers. Mr. Grosz indicated his intention to add further parties in the First Action, and as a result, I ordered:

a) the parties were not to file or serve any additional materials without seeking my leave to do so on September 24, 2019 (the date set for hearing the Dismissal Application); and

b) there were to be no chambers applications heard between August 28 and September 24, 2019, by any parties.

27 On September 3, 2019, while he was prevented from bringing an application to add parties to the First Action, Mr. Grosz started this action (the "Second Action"). In his notice of civil claim, he attaches as Appendix "A" the notice of civil claim from the First Action, and expressly re-pleads and incorporates it into the Second Action. He also describes the Second Action as a "parallel" proceeding to the First Action. He seeks the same relief as outlined above, but also seeks relief against 19 new parties for fraud and conspiracy arising from the same underlying allegations, as well as from their conduct in the First Action.

28 The parties who were added in the Second Action include:

a) several senior Royal Trust employees, being: Michael Van Der Kooy, Vice President; Jacqueline Eddy, Senior Trust Officer; and Pauline Savoy, Regional Client Service Manager (together with Royal Trust, the "Royal Trust defendants");

b) Boughton Law Corporation, the law firm representing Royal Trust in the First Action, and several of its lawyers and a staff member, being: James D. Baird, Estate solicitor; Heather Craig, lawyer for Royal Trust in the First Action; Gregg E. Rafter, lawyer for Royal Trust in the First Action; Marcia C. Pederson, legal assistant; and the law corporations of Baird, Craig, and Rafter (the "Boughton defendants");

c) the strata corporation for the complex in which the Property is located (the "Strata defendant");

d) the City of Surrey (the "Surrey defendant"); and

e) Tammy Esther Jones, who purchased the Property in March of 2015.

29 The five beneficiaries under Ms. Bird's will, all of whom reside in the United Kingdom, were also originally

named as defendants in the Second Action, but have since been removed pursuant to an order of Justice Groves to which Mr. Grosz agreed on September 26, 2019.

30 The Second Action makes the following new allegations (in addition to those re-pleaded from the First Action):

a) Royal Trust and the Strata defendant knew or had a duty to know that the remediation work required a building permit, but failed to obtain one;

b) the Royal Trust defendants and Mr. Baird breached their duty to ensure that there was no "unrecorded encumbrance" on the Property, referring to the fact that remediation work was done on the Property without a building permit;

c) the Royal Trust defendants, Mr. and Ms. Elliott, and Mr. Baird conspired to conceal the "unrecorded encumbrance";

d) Royal Trust failed in its duty to remedy the "unrecorded encumbrance" as it constituted a defect in the Property's title;

e) the Royal Trust defendants, Mr. and Ms. Elliott, and Mr. Baird failed to disclose documents demanded by Mr. Grosz, including documents relating to remediation work done on the Property, in breach of the Contract;

f) Royal Trust unreasonably refused Mr. Grosz's requests for an extension of the time to complete the subject conditions, despite being in breach of the Contract for failing to disclose relevant documents;

g) Mr. Baird's statement to Mr. Grosz on July 11, 2014 that Royal Trust had met all of its disclosure obligations under the Contract was "a false statement intended to conceal";

h) Royal Trust and Mr. Baird falsely declared the Contract terminated on July 15, 2014;

i) the above allegations were done for the purpose of defrauding Mr. Grosz by preventing him from completing the Contract so that the applicant defendants could keep his deposit;

j) Mr. Baird and Ms. Craig, knowing that they had no defence as to the merits of the case, engaged in procedural tactics in an attempt to have the action dismissed on a technicality;

k) Ms. Pederson couriered the materials for the Dismissal Application to a "bogus address", being the registered and records office of Matryx, in an attempt to deceive the Court into believing Matryx had been properly served. She also "deliberately falsifies the truth by a combination of tactics" in her affidavit, including failing to number the pages to the exhibits, omitting one page of a letter exhibited, and failing to attach a relevant email;

l) Ms. Pederson conspired with Ms. Craig to damage Mr. Grosz and Matryx by compiling Ms. Pederson's affidavit in a misleading manner and by waiting to serve this affidavit, along with the other Dismissal Application materials, when it could have been served earlier;

m) Ms. Craig committed perjury in her affidavit when she asserted that she consented to Mr. Grosz's request for further time to file and serve his responses to the Dismissal Application;

n) Mr. Rafter failed to produce corporate records when Mr. Grosz attended at Boughton Law Corporation and demanded to inspect them pursuant to s. 46(5) of the *Business Corporations Act*, S.B.C. 2002, c. 57.

o) Mr. Rafter falsely claimed that Mr. Grosz was photographing him in public, threatened to have him removed from the premises of a private restaurant, threatened to call the police on grounds of criminal harassment, and instructed Mr. Grosz not to speak to anyone other than himself at Boughton Law Corporation;

p) Mr. Rafter, Mr. Baird, Ms. Craig, Ms. Pederson, Mr. Van Der Kooy, Ms. Eddy, and Ms. Savoy conspired to cause Mr. Grosz and Matryx economic harm and to cause Mr. Grosz criminal harm;

q) West Coast Realty Ltd., Seasons Real Estate Services Corporation, and Mr. and Ms. Elliott conspired through their counsel with Mr. Rafter, Mr. Baird, Ms. Craig, Ms. Pederson, Mr. Van Der Kooy, Ms. Eddy, and Ms. Savoy to cause Mr. Grosz and Matryx economic harm; and

r) the Surrey defendant dispensed false information to Mr. Grosz, tortiously interfered in a contract, was negligent in failing to enforce its building code, and "conceal[ed] on 13/Aug/2019 the foregoing acts and omissions".

31 No new allegations appear to be made against Ms. Bird's Estate in the Second Action.

32 There is no allegation made that the Boughton defendants acted for Mr. Grosz. I am satisfied that, at all times, the Boughton defendants were only acting for Royal Trust. At no time did they act for Mr. Grosz.

33 Mr. Grosz seeks the following relief in the Second Action:

a) all of the relief he sought in the First Action (including specific performance of the Contract);

b) consolidation of the Second Action with the First Action and with the Estate probate petition;

c) relief for breach of contract against Royal Trust between July 1, 2014 and February 10, 2015 (when the Property was sold to Ms. Jones);

d) relief for breach of trust against Royal Trust;

e) relief for fraud, conspiracy to damage, and conspiracy by unlawful means against Royal Trust, West Coast Realty Ltd., Seasons Real Estate Services Corporation, Mr. and Ms. Elliott, Mr. Van Der Kooy, Ms. Eddy, Ms. Savoy, Boughton Law Corporation, Mr. Baird and his law corporation, Ms. Craig and her law corporation, Mr. Rafter and his law corporation, and Ms. Pederson;

f) relief for breach of contract, "specific performance of the [Contract] if full consideration not paid by T. Jones", conspiracy to damage, and conspiracy by unlawful means against Ms. Bird's Estate;

g) relief for "negligence in not getting a building permit required by its Bylaws" against the Strata defendant;

h) relief for "dispensing false information; tortious interference in a contract; negligence, misfeasance, and nonfeasance by failing to enforce its Surrey Building Bylaw...", and "concealing the foregoing acts and omissions" on August 13, 2019, against the Surrey defendant; and

i) relief for tortious interference (inducement to breach and interference with a contract), public mischief, conspiracy to damage, and conspiracy by unlawful means against Ms. Jones.

34 On September 24, 2019, I heard the Dismissal and Strike Applications. Mr. Grosz had also brought an application to have the Boughton lawyers disqualified as counsel in the First Action (the "Disqualification Application"), but I did not hear that application.

35 On October 21, 2019, without consulting the defendants, Mr. Grosz secured a trial date in the Second Action for September 21, 2020 for 10 days.

36 On November 21, 2019, I issued reasons for judgment, indexed at 2019 BCSC 1993 (the "Reasons"), dismissing the First Action for want of prosecution. I found that the five-year delay was inordinate and that no reasonable excuse had been provided. I rejected Mr. Grosz's argument that the defendants were to be blamed for the delay and that the defendants' lawyers were acting in a threatening manner in an attempt to ambush him. I also rejected Mr. Grosz's argument that he was waiting for Royal Trust to take steps to fix the Property and sell it to him. I found that the defendants had suffered prejudice from the delay, especially when considering the serious nature of the claims, which include allegations of fraud and professional misconduct.

37 On balance, I held that justice required a dismissal of the First Action. I rejected Mr. Grosz's argument that the

limitation period for his claims had yet to expire, holding instead that the default two-year limitation period in s. 6(1) of the *Limitation Act*, S.B.C. 2012, c. 13 [*Limitation Act*] applied to his claims in the First Action. I found that the claims advanced had little merit and very little chance of success, and that even if the allegations were made out, Mr. Grosz did not suffer any damages as a result.

The Current Applications

38 These reasons deal with the following applications:

a) applications by Royal Trust, Realtor, and the Strata defendants to have the Second Action dismissed pursuant to R. 9-6(5)(a) of *SCCR* on the basis that there is no genuine issue for trial; and

b) applications by the applicant defendants to have the Second Action dismissed pursuant to R. 9-5(1) of *SCCR*, on the basis that:

i. the pleadings disclose no reasonable claim;

ii. the action is frivolous, vexatious, and embarrassing; and

iii. the action is an abuse of the court's process.

39 Mr. Grosz did not file any application responses. At the beginning of the hearing of these applications, I dismissed his application for an adjournment. I issued written reasons for that decision, indexed at 2019 BCSC 2195.

Issues

Issue 1: Should the claim against Royal Trust, Realtor, and the Strata defendants be dismissed under R. 9-6(5)(a) of the *SCCR*?

Legal Principles

40 Rule 9-6(5)(a) provides that the court must dismiss a claim if it is satisfied that it raises no genuine issue for trial.

41 An application to dismiss a claim as time barred by the operation of a statutory limitation period is properly brought under this Rule. If an action is clearly statute-barred, it can be struck under this Rule. However, if there are real issues concerning postponement of the limitation period under the *Limitation Act*, the defendant should not succeed: *Sime v. Jupp*, 2009 BCSC 1154 at para. 17.

42 Section 6(1) of the *Limitation Act* provides that a proceeding in respect to a claim must not be commenced more than two years after the day on which the claim is discovered. Pursuant to s. 8 of the *Limitation Act*, a claim is discovered when a person knew or reasonably ought to have known:

(a) that injury, loss or damage had occurred;

(b) that the injury, loss or damage was caused by or contributed to by an act or omission;

(c) that the act or omission was that of the person against whom the claim is or may be made;

(d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

43 The trying of unmeritorious claims imposes a heavy price in terms of time and costs on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial: *McLean v. Law Society of British Columbia*, 2016 BCCA 368 at para. 36 (citing *Canada v. Lameman*, 2008 SCC 14 at para. 10).

Position of Royal Trust, Realtor, and the Strata Defendants

44 These defendants argue that Mr. Grosz's claims are governed by the basic two-year limitation period provided in s. 6(1) of the *Limitation Act*. The pleadings clearly disclose that the claims advanced against these defendants were discovered by Mr. Grosz on or before July 15, 2014. As such, the limitation period lapsed over three years ago.

45 These defendants argue that the claims against them are statute-barred and ought to be dismissed.

Position of the Plaintiff

46 Mr. Grosz's position is that he discovered new claims against Royal Trust, Realtor, and the Strata defendants on July 22, 2019, the day on which Royal Trust served him with the Dismissal Application, which means that the limitation period in the *Limitation Act* has not expired. On or after that date, he found out that:

a) the Property had been sold to Ms. Jones, which led him to believe that the Realtor and Royal Trust defendants had conspired with their counsel to "complete the fraud they had attempted to complete against Matryx" by selling the Property to Ms. Jones knowing that it contained an unrecorded encumbrance (the lack of building permit) which Ms. Jones would not remedy. He described this as an ongoing criminal conspiracy with Ms. Jones;

b) West Coast Realty Ltd. and Seasons Real Estate Services Corporation refused to allow full inspection of their corporate records "for the purpose of preventing discovery of other persons who conspired with Catherine and Ronald Elliott in their misrepresentation of the condo", which became part of the fraud allegation against them; and

c) the Strata defendant was responsible for hiring the contractors who performed the remediation work without obtaining a building permit.

47 Mr. Grosz further submits that s. 12(2) of the *Limitation Act* might apply. Section 12(2) provides the discoverability rules relating to trust claims or fraud claims involving trustees. To summarize in relevant terms, it provides that the fraud or trust claim is discovered when the beneficiary becomes fully aware that the injury, loss, or damage occurred; that it was caused by the fraud, act, or omission of the person against whom the claim is brought; and that, having regard to the nature of the injury, loss, or damage, a court proceeding was appropriate. Mr. Grosz conceded that he was not sure whether it applies because the term "beneficiary" is not defined, although he considers himself to be a beneficiary.

Analysis

Are the claims statute-barred?

48 The question of whether the claims are statute-barred turns on when Mr. Grosz discovered them. Although Mr. Grosz submitted that s. 12(2) of the *Limitation Act* might govern the analysis of when his claims were discovered, he provided no real reason for this aside from the bare assertion that he considers himself to be a beneficiary. While Royal Trust does act as a trustee in relation to the beneficiaries under Ms. Bird's will, there is no air of reality to Mr. Grosz's assertion that he is a beneficiary in relation to Royal Trust or any of the other applicant defendants in this action. I am satisfied that s. 12(2) does not apply. The general discovery rules under s. 8 of the *Limitation Act* apply.

49 I am also satisfied that Mr. Grosz had discovered his claims against Royal Trust, Realtor, and the Strata defendants on or before August 2014. By then, Mr. Grosz believed that the loss, being the failure to complete the Contract due to the alleged fraud, had occurred and that it was caused by the defendants who were named in the First Action, which was started in June 2014. Although the Strata defendant was not named in the First Action, Mr. Grosz wrote to Mr. Baird on July 15, 2014, threatening to add the Strata as a defendant if Royal Trust did not agree to settle the matter. Mr. Grosz was aware in July of 2014 that the Strata had been involved in the remediation efforts to the Property, but chose not to pursue them as a defendant until the fall of 2019 when he started the Second Action.

50 I also disagree with Mr. Grosz's assertion that he did not know he had a claim for conspiracy against Royal Trust and the Realtor defendants until he found out that the Property was sold to Ms. Jones. In his notice of civil claim in the First Action, he alleged:

> Royal Trust, Catherine and Ronald conspired to defraud plaintiffs, conceal the latent damages to the strata property of Bird, and misrepresent the strata property of Bird as to its condition, worth, and habitability.

51 Ms. Craig told Mr. Grosz in August 2014 that Royal Trust intended to continue to try to sell the Property. Even if it were true that a new fraud had been perpetuated with Ms. Jones when she purchased the Property, Mr. Grosz has not explained why this would give rise to any new injury, loss, or damage that he could claim. Furthermore, there are no facts pleaded in the notice of civil claim in the Second Action that support the Realtor defendants having been involved in the ultimate sale of the Property to Ms. Jones; in fact, Mr. Grosz names a different realtor as having listed the Property in the fall of 2014 at paragraph 57 of his notice of civil claim.

52 Finally, Mr. Grosz has not explained the actionable claim that was discovered by him when West Coast Realty Ltd. and Seasons Real Estate Services Corporation refused to allow him to inspect their corporate records. Even if this could be seen as evidence to support the fraud that he alleges on the part of the Realtor defendants, the discovery of additional evidence to support a claim is not the same thing as discovering a new claim.

Should the claims be dismissed pursuant to R. 9-6?

53 To summarize, I am satisfied that the claims against Royal Trust, Realtor, and the Strata defendants were all discovered on or before August 2014. Under s. 6(1) of the *Limitation Act*, the limitation period, therefore, expired over three years ago, well before the Second Action was commenced.

54 Accordingly, I am satisfied that there is no genuine issue for trial and that the claims against Royal Trust, Realtor, and the Strata defendants must be dismissed under R. 9-6(5)(a).

55 Despite this finding, given Mr. Grosz's indication that he intends to appeal any of the orders I make that go against him, I will go on to address all of the arguments raised by these defendants, including those under R. 9-5(1).

Issue 2: Should the pleadings be struck and the proceeding dismissed pursuant to R. 9-5(1) of the *SCCR?*

56 Each of the applicant defendants in this action apply to have the pleadings struck and the action dismissed pursuant to R. 9-5(1), which provides:

> At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

57 Each of the applicant defendants relies on R. 9-5(1)(a), (b), and (d). The Surrey defendant also relies on R. 9-5(1)(c).

General Legal Principles

58 On a motion to strike for not disclosing a reasonable cause of action under R. 9-5(1)(a), the applicable test is whether it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17. However, where the facts pleaded

are based purely on assumptions or wild speculations or are incapable of proof, they may be subject to scrutiny by the court, albeit with great caution: *Young v. Borzoni et al*, 2007 BCCA 16 at paras. 25-31; *McDaniel v. McDaniel*, 2009 BCCA 53 at para. 22.

59 The purpose of R. 9-5(1)(a) is to ensure the parties and the court have a clear understanding of the nature of the claims advanced. A party pleading a particular claim must plead assertions of fact which would establish the essential elements of a successful claim if proven. Prolix, convoluted, and incomprehensible pleadings do not lend themselves to permit the parties to have a clear understanding of the claims advanced: *Gill v. Canada*, 2013 BCSC 1703 at para. 7.

60 The Court is not required to assume as true wide-sweeping, inflammatory allegations of criminal conduct against the defendants. The court is entitled to subject them to "skeptical analysis" and not to assume they are true: *Stephen v. HMTQ*, 2008 BCSC 1656 at para. 60.

61 The case of *Ontario Consumers Home Services Inc. v. Enercare Inc.*, 2014 ONSC 4154 at paras. 24-29 [*Ontario Consumers*] provides a helpful summary of the applicable principles when a pleading of conspiracy is made. Such a pleading requires the facts to be stated with a heightened precision and clarity, being that conspiracy is an intentional tort and a serious allegation. It is insufficient to lump all of the defendants together into a general allegation of conspiracy, and bald or speculative conclusions are not sufficient to support a claim and must be struck.

62 In *Willow v. Chong*, 2013 BCSC 1083 at para. 20, Justice Fisher, as she then was, summarized the test for striking a pleading under R. 9-5(1)(b):

> Under Rule 9-5(1)(b), a pleading is unnecessary or vexatious if it does not go to establishing the plaintiff's cause of action, if it does not advance any claim known in law, where it is obvious that an action cannot succeed, or where it would serve no useful purpose and would be a waste of the court's time and public resources: *Citizens for Foreign Aid Reform Inc. v Canadian Jewish Congress*, [1999] B.C.J. No. 2160 (S.C.); *Skender v Farley*, 2007 BCCA 629. If a pleading is so confusing that it is difficult to understand what is pleaded, it may also be unnecessary, frivolous or vexatious. An application under this sub-rule may be supported by evidence.

63 In *Re Lang Michener and Fabian* (1987), 37 D.L.R. (4th) 685 (Ont. H.C.J.) at 691, the court outlined the following non-exhaustive list of principles to consider when determining whether an action is vexatious, which has been repeatedly endorsed by the B.C. Courts (see for example: *Simon v. Canada (Attorney General)*, 2015 BCSC 924 at para. 97, aff'd 2016 BCCA 52 [*Simon*]):

(a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;

(b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;

(c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;

(d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;

(e) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;

(f) the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;

(g) the respondent's conduct in persistently taking unsuccessful appeals form judicial decisions can be considered vexatious conduct of legal proceedings.

64 Under R. 9-5(1)(c), a pleading is "embarrassing" where it is so irrelevant that it will involve the parties in useless expense or where the pleadings are so confusing that it is difficult to understand what is being pleaded: *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress* (1999), 36 C.P.C. (4th) 266 (S.C.) at para. 47. A pleading is prejudicial where it fails to identify the cause of action, contains irrelevant material, or is intended to confuse: *Camp Development Corporation v. Greater Vancouver (Transportation Authority)*, 2009 BCSC 819 at para. 27, aff'd 2010 BCCA 284.

65 The doctrine of abuse of process allows the court to prevent a claim from proceeding where to do so would violate principles of judicial economy, consistency, finality, and integrity of the administration of justice: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 37. When determining whether the proceedings constitute an abuse of process, the court may consider whether its process is being used dishonestly or unfairly, or for some ulterior or improper purpose, and whether there have been multiple or successive related proceedings that are likely to cause vexation or oppression: *Young* at paras. 65-66. Bringing a serious of successive related proceedings is an abuse of the court's process, even where the plaintiff sincerely believes that earlier decisions were wrong and that he has not been treated fairly: *Budgell v. Oppal*, 2007 BCSC 991 at para. 28, aff'd 2008 BCCA 349.

Positions of the Parties

Rule 9-5(1)(a): Do the pleadings fail to disclose a reasonable claim against the applicant defendants?

Position of the applicant defendants

66 The applicant defendants generally argue that the pleadings disclose no reasonable claim against them and that the allegations of fraud and conspiracy are based on assumptions and unprovable speculation without foundation. They also argue that Mr. Grosz has failed to plead facts that demonstrate he has suffered damages as a result of the allegations. I will outline the arguments made by each defendant about the specific issues with the allegations made against them.

67 Royal Trust and the Realtor defendants submit that the notice of civil claim fails to plead facts that, if true, would give rise to a claim of conspiracy against them, whether under predominant purpose conspiracy or unlawful means conspiracy. They cite *Cement LaFarge v. B.C. Lightweight Aggregate*, [1983] 1 S.C.R. 452 for the elements of each branch of the tort. In that case, Etsey J. defined the two branches of the tort of conspiracy at 471-72:

> ... the law of torts does recognize a claim against [individual defendants who have caused injury to the plaintiff] in combination as the tort of conspiracy if:
>
> (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
>
> (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.
>
> In situation (2) it is not necessary that the predominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff.

68 Royal Trust and the Realtor defendants rely on *Can-Dive Services Ltd. v. Pacific Coast Energy Corp*. (1993), 96 B.C.L.R. (2d) 156 (C.A.), to argue that a sustainable claim for the tort of conspiracy must plead fully particularized allegations against each of the defendants who participated in the alleged conspiracy. They say that the allegations in the notice of civil claim fall well short of that requirement.

69 The Realtor defendants also argue that the notice of civil claim does not plead facts which, if true, could establish the elements required to prove a claim of misrepresentation. They cite *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at 110 for the following elements of a negligent misrepresentation claim: (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making the representations; (4) the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

70 In particular, they say that Mr. Grosz has not alleged a relationship of special proximity between himself and the realtors which would found a duty of care, or pleaded facts which could establish such a relationship. Furthermore, even if the first four elements are met (which they deny), it is clear on the face of the pleadings that Mr. Grosz has not suffered any detriment from relying on the misrepresentations. He never removed the subject conditions, paid a deposit, or completed the Contract, meaning that he would have been in the same position whether he had heard the alleged misrepresentations or not.

71 The Realtor defendants make a similar argument with respect to the allegations of fraud against them. They cite *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8 at para. 21, for the elements of the tort of civil fraud: (1) a false representation made by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss. As with the misrepresentation claim, the Realtor defendants argue that even if the first three elements were met (which they deny), Mr. Grosz has not pleaded any facts which would indicate that he suffered any loss in reliance on the alleged fraudulent statements, for the same reasons as stated above with respect to the misrepresentation claim.

72 Finally, with respect to the claims of breach of contract against the Realtor defendants, they submit that the claims are unfounded as Mr. Grosz does not plead that any of the realtors are parties to the Contract. The copy of the Contract attached as an exhibit to the notice of civil claim in the First Action clearly indicates that the realtors are not parties to the Contract.

73 The Strata defendant argues that the pleadings do not set out the essential elements of a claim in negligence, which include: (1) the Strata defendant owed Mr. Grosz a duty of care; (2) the Strata defendant's behaviour breached the standard of care; (3) Mr. Grosz sustained damage; and (4) the damage was caused by the Strata defendant's breach of the standard of care: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3. The Strata defendant points to the fact that Mr. Grosz does not set out the duty of care the Strata defendant owes him in relation to obtaining building permits to perform the remediation work on the Property, nor does he plead any facts or law that would establish a novel duty of care based on the elements set out in *Cooper v. Hobart*, 2001 SCC 79 at para. 30.

74 The Strata defendant further submits that the pleadings do not disclose any facts or law to support a breach of the standard of care, and that it was entitled to rely on the advice of the professionals performing the remediation work: *Hirji v. The Owners Strata Corporation Plan VR 44*, 2015 BCSC 2043 at para. 146. Finally, Mr. Grosz has not pleaded any facts relating to how the Strata defendant's alleged negligence caused his alleged loss; in other words, he suffered no damages. If Mr. Grosz was no longer able to afford to purchase property of equivalent value when the Contract failed to complete, such a consequence was not reasonably foreseeable.

75 The Surrey defendant also submits that Mr. Grosz's pleadings suffer a fatal defect in that they do not plead any facts relating to how the conduct of the City of Surrey caused his alleged loss, even if the allegations against it were taken to be true. By July 14, 2014, Mr. Grosz had already started the First Action and, by this date, it was clear that the sale would not have proceeded regardless of the information provided by the City of Surrey. The Surrey defendant further submits that several of the causes of action pleaded against it are either unclear or not known to law, including "tortious interference in a contract", "dispensing false information", and "concealing on 13/Aug/2019 the foregoing acts and omissions".

76 The Surrey defendant argues that if, by "tortious interference in a contract", Mr. Grosz was referring to the tort of interference with contractual relations or inducing breach of contract, he has not pleaded any material facts to support such a claim aside from the fact that a valid contract existed. If, by "dispensing with false information", Mr. Grosz was referring to negligent misrepresentation, he has not pleaded full particulars, including the existence of a "special relationship" between Surrey and himself.

77 With respect to the claims against it for "negligence, misfeasance and nonfeasance by failing to enforce its Surrey Building Bylaw, 2012, No. 17850", the Surrey defendant submits that it does not owe a duty of care to Mr. Grosz regarding the enforcement of a discretionary bylaw: *Westcoast Landfill Diversion Corp. v. CVRD*, 2009 BCSC 53 at para. 361. Municipalities owe a duty of good faith decision-making to the public as a whole and a duty to take reasonable care in the implementation of a regulatory scheme to those in sufficient proximity to merit that duty: *Froese v. Hik* (1993), 78 B.C.L.R. (2d) 389 (S.C.). The pleadings do not allege that any decision regarding the enforcement of its bylaw was due to bad faith, and as Mr. Grosz was neither an owner nor a neighbour and was in no way affected by the City of Surrey's alleged non-enforcement of its bylaws, there is no proximity to warrant a duty of care.

78 Finally, the Surrey defendant submits that it is unclear what cause of action Mr. Grosz alleges with respect to the allegation of concealing acts and omissions on August 13, 2019 and, in any event, no facts are pleaded in support of it.

79 The Boughton defendants argue that on their face, the allegations against them disclose no cause of action known to law. They argue that counsel owes no duty to an adverse party and, as such, allegations that counsel for the opposing party has misled or intentionally deceived the court resulting in decisions or rulings unfavourable to him do not found actionable breaches of a private duty owed to him: *Pearlman v. Critchley*, 2012 BCSC 1830 at para. 44; *Singh v. Nielsen*, 2016 BCSC 2420 at para. 20.

80 Furthermore, the Boughton defendants argue that any communications made by them in the course of or incidental to the First Action on behalf of their clients are protected by absolute privilege, which extends to statements made in documents used in the proceedings and statements contained in affidavits: *Hamouth v. Edwards & Angell*, 2005 BCCA 172 at paras. 2-3, 21-22, 29-40; *Lawrence v. Sandilands*, 2003 BCSC 211 at paras. 90-93; and *0976820 B.C. Ltd. v. Leung*, 2018 BCSC 1725 at para. 33.

Position of the plaintiff

81 Mr. Grosz concedes that the notice of civil claim, as it currently stands, is insufficient. However, he submits that the proper way to resolve this is to allow him to amend it. He did not submit a draft amended pleading for my review, but he explained his position to me in his oral submissions. He says that he will particularize the claims to provide that:

a) the Contract was not terminated, but was breached by Royal Trust for failing to provide documents;

b) the Boughton defendants and Royal Trust have conspired since before Matryx offered to purchase the Property to fraudulently sell the Property, and that fraud was completed against Ms. Jones' mortgagees when she purchased the Property;

c) the Boughton defendants conspired with Ms. Jones to make an unlawful charge of criminal harassment against him in an attempt to have him incarcerated so that he will not be able to prosecute the First and Second Actions;

d) but for the Surrey defendant's threats of condemning the Property, Matryx would have removed the subject conditions and purchased the Property;

e) the Surrey defendant has provided no reasonable explanation for its failure to enforce the requirements for a building permit;

f) the reference to the Surrey defendant having concealed acts and omissions relates to the City of Surrey's solicitor sending Mr. Grosz a letter in which it declined to tell Mr. Grosz what defences the City of Surrey might raise if the action was filed against it;

g) Mr. and Ms. Elliott are liable as agents for Royal Trust, but in any event, his primary claim against them is a breach of the B.C. *Realtor's Code of Ethics* rather than a breach of the Contract; and

h) the Strata defendant's bylaws required it to obtain a building permit, which it breached in unreasonably failing to ensure one was obtained by those it hired to perform the work.

82 Mr. Grosz says that he will also amend the notice of civil claim to remove some of the claims as he is no longer seeking to be involved in the administration of Ms. Bird's Estate and is not seeking injunctions or a reduction of the sale price of the Property.

83 Mr. Grosz explained that he always planned to make amendments and that he would have done so earlier, but he was prevented from bringing any applications. It is unclear where this understanding arises from, as there were no orders made in the Second Action, except that the hearing of the applicant defendants' applications would be set for December 3 and 4, 2019.

84 Mr. Grosz submits that all of his claims can be substantiated, but there are limits to what he can currently provide as he has not yet had a chance to conduct discovery. He also submits that he has had more pressing matters to deal with since he was alerted to the Dismissal Application, which involve actions he has brought against other unrelated individuals and corporations.

Submissions on damages

85 At the hearing of these applications, Mr. Grosz had difficulty explaining what loss or damage he sustained as a result of the actions of the applicant defendants. At Mr. Grosz's request, I granted him leave to prepare a written submission on this issue and to respond to two cases that were handed up by the applicant defendants during their reply submissions. The applicant defendants were also granted leave to reply to his submissions. I will address Mr. Grosz's argument with respect to the cases later in these reasons when I consider the appropriate remedy.

86 On December 9, 2019, Mr. Grosz submitted a document entitled "Written Submissions of Plaintiff on Damages before Suit", which consists of 15 pages of written submissions with 44 paragraphs and 32 exhibits, totaling 494 pages (the "Damages Submissions"). The essence of Mr. Grosz's submissions with respect to his damages are:

a) He was unable to remove the subject conditions on July 14, 2014, because of Royal Trust's failure to resolve the lack of building permit. Since the Contract was not completed, Mr. Grosz and his partner lost the opportunity to purchase a home, which they can no longer afford to do.

b) Mr. Grosz could not simply "walk away" from the Contract when he discovered the "unrecorded encumbrance" because he had already commenced the First Action and he could not dismiss it without suffering costs.

c) The time he spent on due diligence and communicating with various parties with respect to his execution and performance of the Contract was time that he could have spent working as a paralegal and earning income.

87 In an approach I greatly appreciated, the applicant defendants prepared one joint reply submission to the Damages Submissions. Their position is:

a) Mr. Grosz clearly discovered the alleged misrepresentations and fraud with respect to the death of Ms. Bird before the Contract completed, and therefore suffered no damages or loss as a result of the "unrecorded encumbrance" or the "stigmatized property".

b) The exhibits attached to Mr. Grosz's submissions are not admissible for the purpose of the applications as they have not been attached to a properly sworn affidavit, and any evidence sought to be admitted in these applications was required to be included in Mr. Grosz's application

response materials, which were never filed or served: R. 8-1(9). In any event, evidence is not admissible for the purposes of assessing whether there is a reasonable claim under R. 9-5(1)(a): R. 9-5(2).

c) If the Court deems the exhibits admissible, the evidence shows that Mr. Grosz was aware that he had no provable damages at the time he commenced the First Action and intended to use the litigation for strategic purposes. The fact that Mr. Grosz commenced the First Action before the period of time specified in the Contract for fulfilling the subject conditions elapsed, along with evidence contained in text message conversations between Mr. Grosz and his partner exhibited to his Damages Submissions, support the fact that he brought the First Action to leverage the circumstances of Ms. Bird's death in order to obtain the Property for less than the negotiated price in the Contract and/or turn a profit. The text messages also indicate that even if Mr. Grosz wanted to complete the Contract, he could not obtain the necessary financing to complete the purchase.

d) For reasons solely attributable to Mr. Grosz, the subject conditions, which were for his sole benefit, were never removed and the Contract never completed. The loss of opportunity to purchase a property does not flow from the termination of the Contract or any alleged misconduct by the applicant defendants as Mr. Grosz could have chosen to purchase a different property.

e) Mr. Grosz's loss of income claims are merely speculative as he has provided no evidence establishing a reasonable probability that he would have secured a full-time paralegal position at the material times, or any evidence about his previous work history or employability, aside from asserting that he was "qualified".

f) Even if Mr. Grosz's framing of damages can be proven, no such formulation of damages is set out in his pleadings, even if given the most generous interpretation.

88 I agree with the applicant defendants' submission that no evidence is admissible for the purpose of determining whether the pleadings disclose a reasonable claim and, therefore, I will not consider the exhibits submitted with the Damages Submissions. My decision as to whether or not the pleadings disclose a reasonable claim must be based on the pleadings alone as they currently stand. To the extent that the Damages Submissions contain information not pleaded in his notice of civil claim, I will consider it only with respect to the question of whether, to the extent I accept that the pleadings disclose no reasonable claim, the remedy should be to strike the pleadings or to allow Mr. Grosz to amend them.

Rule 9-5(1)(b), (c) and (d): are the pleadings frivolous, vexatious, embarrassing, or an abuse of process?

Position of the applicant defendants

89 Related to the above submissions arguing that the pleadings disclose no reasonable cause of action, the applicant defendants argue that Mr. Grosz's claims are vexatious because they do not establish the causes of action pleaded, they do not advance any claim known in law, and it is obvious that the action cannot succeed.

90 They argue that the fact that multiple proceedings have been brought regarding the same conduct and that Mr. Grosz has brought claims with no real prospect of success, including making allegations against his adversaries' counsel, demonstrate that the Second Action is an abuse of process.

91 The applicant defendants also submit that, in the circumstances, a reasonable inference to draw is that Mr. Grosz's purpose in commencing the Second Action when he did was:

a) to avoid the application to have the First Action struck for want of prosecution by commencing a duplicative Second Action;

b) to disqualify the adverse party's counsel in the First Action from pursuing the Dismissal Application; and

c) to avoid having to bring an application to add new defendants in the First Action, which would have faced issues due to the limitation and notice periods.

92 The applicant defendants submit that these are improper purposes, and that the pleadings should therefore be struck as vexatious and an abuse of process. To the extent that new allegations are made in the Second Action, the proper means to address that would have been to bring an application to add parties and amend the pleadings in the First Action.

93 The Realtor defendants also rely on s. 10 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, which provides:

> In the exercise of its jurisdiction in a cause or matter before it, the court must grant, either absolutely or on reasonable conditions that to it seem just, all remedies that any of the parties may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of those matters may be avoided.

Position of the plaintiff

94 Mr. Grosz submits that he was not intending to abuse the court's process by bringing a new action because, in his view, the limitation period has not expired. This means that he could file a new claim, and then seek to have them consolidated, which he has sought to do. Mr. Grosz also claims that in starting the Second Action, he was not attempting to circumvent the August 28, 2019 order that no applications were to be made in the First Action before September 24, 2019.

95 Mr. Grosz submits that starting the Second Action was advantageous to all of the parties, including the applicant defendants, because it would allow them to obtain an earlier trial date in September 2020 and have the matter resolved sooner.

96 He submits that the Second Action should be allowed to proceed with an order that he be permitted to amend the pleadings because there has been no finding on the merits of the First Action, seeing it was dismissed for want of prosecution. He says that, if given an opportunity to redraft his pleadings, it will contain three to four times the content in order to properly address all of the facts and the elements of the causes of action.

Analysis

97 As Justice Voith recognized in *Sahyoun v. Ho*, 2015 BCSC 392 at paras. 61-64, while R. 9-5(1)(a) to (d) address different concerns, there is also significant overlap among them. In the case of pleadings that are overwhelmed with difficulty, the various provisions of R. 9-5(1) may apply together: *Simon v. Canada (Attorney General)*, 2017 BCSC 1438 at para. 53.

98 I am satisfied that it is plain and obvious that the claims against the applicant defendants offend R. 9-5(1)(a), (b), (c), and (d). It is particularly clear that the Second Action is vexatious and an abuse of process.

99 I accept that Mr. Grosz commenced the Second Action for the purposes of:

a) disqualifying the Boughton defendants from acting for Royal Trust in the First Action; and

b) circumventing my order of August 28, 2019 that no applications were to be made prior to September 24, 2019.

100 I agree with the applicant defendants' submissions that these are improper purposes that support a finding that the pleadings are vexatious and an abuse of the court's process. Mr. Grosz's assertions that he was not attempting to circumvent my order are unbelievable and he has not provided any credible rationale to support this claim.

101 My finding that the Second Action was commenced for an improper purpose is supported by the fact that Mr. Grosz brought an application to disqualify the Boughton lawyers as counsel at the hearing of the Dismissal Application. The fact that Mr. Grosz has commenced multiple actions dealing with the same underlying conduct,

and even expressly re-pleads the notice of civil claim from the First Action in the Second Action, further supports that the action is vexatious.

102 I do not think it is necessary to go into detail about the deficiencies in the claims as they relate to each of the applicant defendants as I accept that the pleadings offend R. 9-5(1)(a) on the basis that, as a whole, they are prolix, convoluted, at times contradictory, and lacking in material facts and law. Rather than pleading material facts, the notice of civil claim is written as a lengthy narrative and contain many extracts from letters, emails, contracts, reports, and other evidence, which are not properly included in a notice of civil claim: R. 3-7(1).

103 I further accept the applicant defendants' argument that, despite the need to be cautious in looking behind the facts as pleaded for the purpose of assessing whether or not the pleadings disclose a reasonable claim, this is one of those cases in which it is necessary to subject the allegations to a sceptical analysis. Throughout his pleadings and his submissions before me, Mr. Grosz has advanced wildly speculative theories against the applicant defendants which are clearly embarrassing, scandalous, and vexatious, a sample of which include:

a) that the death of Ms. Bird was caused by foul play;

b) questioning why her name is "Bird", and how her Estate was accumulated;

c) that the Realtor, Royal Trust, and Boughton defendants conspired to create a fraudulent will for Ms. Bird;

d) that Ms. Jones bribed the Surrey defendant to gain an illegal exemption from the building permit requirement; and

e) that counsel have conspired to make false claims of criminal harassment against him in order to have him incarcerated so that he is unable to prosecute this action.

104 The fact that the notice of civil claim makes highly inflammatory allegations of fraud, conspiracy, and criminal conduct against the applicant defendants globally, several of whom Mr. Grosz has never met or even communicated with, which are not sufficiently particularized and are based on pure speculation, is also relevant to my finding that this action is vexatious and an abuse of process.

105 I am persuaded that Mr. Grosz is using the court process in an abusive manner. He continues to use the threat of a lawsuit as a means to achieve his personal goals, including to attempt to extract settlements from the applicant defendants in circumstances where it is obvious that the action cannot succeed and no reasonable person could expect a court to grant relief.

106 I am concerned by the use of judicial resources to fuel Mr. Grosz's speculative theories at an inordinate cost to the applicant defendants and to the detriment of other litigants awaiting hearings. To allow the Second Action to continue would be to allow the court's process to be misused and to allow an oppressive and vexatious action to continue against the applicant defendants.

Remedy

107 As I have found that the pleadings offend R. 9-5(1), I must now decide whether to allow Mr. Grosz an opportunity to amend the pleadings or to strike them. I find that the appropriate remedy in this case is to strike the pleadings and to dismiss the action against each of the applicant defendants.

108 Earlier in these reasons, I alluded to the fact that Mr. Grosz was granted leave to make written submissions on two cases raised by the applicant defendants in their reply submissions. Those case were *H.M.B. Holdings Limited v. Replay Resorts Inc.*, 2019 BCSC 1138 [*H.M.B. Holdings*] and *Beauchesne v. W.J. Selmaschuk and Associates Ltd.*, 2015 BCSC 921. Mr. Grosz also made written submissions on a third case that he did not receive leave to respond to, *Simon*, cited above. He says he was handed *Simon* just before the hearing of these applications on December 3 and was, therefore, not given proper notice of it. In fact, *Simon* was cited in the notices of application of each of the applicant defendants. Mr. Grosz had ample notice that the applicant defendants were relying on this case and I will, therefore, not address his submissions with respect to it.

109 The Realtor defendants rely on *H.M.B. Holdings* for authority that where there are fundamental deficiencies in the pleading, particularly in relation to damages that were not particularized or could not be claimed, the pleadings should be struck rather than allowing an amendment: paras. 4, 57-65, 72. Mr. Grosz submits that counsel has attempted to deceive the Court as to the holding in that case and that it should be distinguished because he has not filed a proposed amended notice of civil claim, as the plaintiffs in that case had done. He also submits that because counsel handed him the case at the hearing, he did not receive proper notice and that counsel should be sanctioned for improperly serving him with it.

110 *Beauchesne* was relied upon by the Surrey defendant to respond to Mr. Grosz's argument that he will be able to better particularize his claims once examinations for discovery are completed. In that case, the court rejected a similar argument and cited *Imperial Tobacco* for the proposition that it is incumbent upon the plaintiff to clearly plead the facts upon which it relies in making its claim, and a claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses: para. 21. Mr. Grosz submits that it can be distinguished on its facts.

111 Both *H.M.B. Holdings* and *Beauchesne* were raised by the applicant defendants in their reply submissions to arguments that Mr. Grosz raised in the hearing. The applicant defendants did not have any notice of Mr. Grosz's arguments because he did not file any application responses. It is unreasonable for Mr. Grosz to say that these cases cannot be relied upon because he did not have ample notice of them when the reason for this is that he failed to reply to the applications, giving the applicant defendants no advance notice of the arguments he would raise.

112 Furthermore, I have reviewed both decisions and the applicant defendants' submissions were in no way misleading as to the points of law for which they were cited. Mr. Grosz's claims that counsel was attempting to deceive the court is a further example of an unsubstantiated and inflammatory statement regarding the conduct of professionals with whom he deals.

113 Mr. Grosz seeks the opportunity to amend his pleading in order to plead the material facts to supports his claims for conspiracy and fraud. There is a heavy burden on a plaintiff to plead the material facts when pleading a conspiracy, which is an intentional tort: *Ontario Consumers* at para. 25.

114 In the pleadings:

a. Mr. Grosz has failed to list any material facts that would support a claim of fraud or conspiracy against the applicant defendants;

b. Mr. Grosz has made a bald statement that the Boughton defendants and Royal Trust employees conspired without providing any particulars of the overt acts done by each of the alleged conspirators in furtherance of the conspiracy;

c. there are no particulars of the time, place or mode of agreement amongst the alleged co-conspirators; and

d. there are no material facts pleaded that the alleged conspiracy caused him to suffer any damages.

115 I do not accept Mr. Grosz's submission that he should be permitted to conduct examinations for discovery. The onus is on a plaintiff to clearly plead the facts upon which he relies, and he cannot rely on the possibility that new facts will turn up.

116 I am not convinced that allowing Mr. Grosz the opportunity to amend his pleadings will cure the defects, nor would it be fair to do so in the circumstances. He has always had the ability to make amendments to his pleadings, but has chosen not to do so despite claiming to have discovered the last of the allegations in July and August of 2019, before the Second Action was commenced. Furthermore, his proposed solution to cure the defects is to include three to four times the volume of material in his pleadings. This would likely make the pleadings even more prolix and convoluted rather than assisting the applicant defendants in understanding the claims against them.

117 I also find that amending the pleadings will not assist Mr. Grosz with respect to the question of damages. The Contract is clear that the purchase of the Property was on an "as is" basis with no representations or warranties made with respect to its condition. The subject conditions were included solely for Mr. Grosz's benefit to allow him to walk away from the deal if he found the Property to be unsatisfactory. That is precisely what happened in this case, and, as I held in my November 21, 2019 Reasons at para. 139, the fact that Mr. Grosz did not purchase another property is not the fault of the applicant defendants.

118 It is also not the fault of the applicant defendants that Mr. Grosz chose to commence the First Action when he did. The costs he would have suffered from choosing to walk away from it in July of 2014 would have been far less than they are at this point in time.

119 Finally, I agree with the applicant defendants' submissions that Mr. Grosz's loss of income claims are speculative as he was unemployed at the time of the alleged misconduct and he has provided no basis on which to establish a "real and substantial possibility" that he would have secured employment: *Mickelson v. Borden Ladner Gervais LLP*, 2018 BCSC 348 at paras. 196-197.

120 These circumstances, combined with the fact that I have found these proceedings to be vexatious and an abuse of process, lead to the conclusion that the appropriate remedy in this case is to strike the pleadings and dismiss the action as against each of the applicant defendants.

Conclusion

121 I conclude that Mr. Grosz's claims against the Royal Trust defendants, the Boughton defendants, and the Strata defendant be struck, pursuant to R. 9-6 as time barred under the *Limitation Act*.

122 I also conclude that the pleadings offend R. 9-5(1)(a), (b), (c), and (d) as disclosing no reasonable claim and being vexatious, embarrassing, and an abuse of process. As such, the pleadings are struck and the proceeding dismissed against all of the applicant defendants.

Costs

123 Mr. Grosz submits that each party should bear its own costs, relying on the decision of *Dhillon v. Sher-A-Punjab Community Centre Corporation*, 2018 BCSC 571. However, in that case, the court held that the test for striking the pleadings under R. 9-5 had not been met and the defendants' application was dismissed. In this case, by contrast, all of the applicant defendants have been successful and the pleadings have been struck.

124 Accordingly, the applicant defendants are each entitled to their costs of the proceedings on Scale B. The issue that remains is whether special costs should be awarded.

125 Although the Strata and Realtor defendants sought special costs in their notice of application, I am of the view that I did not have the opportunity to hear full submissions from the applicant defendants on a claim for special costs, nor did Mr. Grosz have an opportunity to fully reply. If the applicant defendants wish to seek special costs, leave is granted for written submissions only. The following timelines are ordered:

a) The applicant defendants who seek special costs must serve and deliver to the registry written submissions, of no more than five pages each, on or before 4 p.m. on February 21, 2020. The applicant defendants may file joint submissions so long as the maximum length of the submissions does not exceed 25 pages.

b) Mr. Grosz must serve and deliver to the registry written submissions, of no more than 25 pages, on or before 4 p.m. on March 16, 2020.

c) The applicant defendants must serve and deliver to the registry any reply submissions, of no more than three pages each or 15 pages jointly, on or before 4 p.m. on March 30, 2020.

126 The written submission of the parties must not include any tabs, appendices, schedules, or exhibits. If a party wishes to rely on any type of affidavit evidence, leave must first be requested from me. The written submissions may be supplemented by a brief of authorities, but only with cases referred to in the written submissions.

127 Mr. Grosz's signature on the form of order is dispensed with.

C.L. FORTH J.

Homalco Indian Band v. British Columbia, [1998] B.C.J. No. 2703

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

K. Smith J.

Heard: October 26-28, 1998.

Judgment: filed November 13, 1998.

Vancouver Registry No. C944747

[1998] B.C.J. No. 2703 | 25 C.P.C. (4th) 107 | 83 A.C.W.S. (3d) 751 | 1998 CanLII 6658

Between Richard Harry, Susan Blaney, Mavis Coupal, Brian Leo and Darren Blaney on their own behalf, and on behalf of all members of the Homalco Indian Band, and the Homalco Indian Band, plaintiffs, and Her Majesty the Queen in Right of the Province of British Columbia and The Attorney General of Canada, defendants

(8 pp.)

Case Summary

Practice — Pleadings — Striking out pleadings — Grounds, prolix pleading — Grounds, unnecessary, irrelevant, immaterial or redundant — Grounds, prejudice, embarrass or delay fair trial.

This was an application by the defendants for orders striking out portions of the amended statement of claim, or for further and better particulars.
HELD: The defendants' application was allowed and the statement of claim was set aside, with leave to the plaintiffs to substitute a statement of claim prepared properly.

Further proceedings were stayed pending the filing and delivery of a fresh statement of claim. The statement of claim was prolix and convoluted, and violated several of the rules of pleading set out in the Rules and the case law. The material facts of some of the causes of action were separated in the pleading, and could be found only by careful study and meticulous attention to many internal cross-references. Particulars were sometimes mixed with material facts. It was not enough that the facts could be found in the statement of claim upon tortuous analysis of the document. It had to plead the causes of action in the traditional way so that the defendant could know the case it had to meet, and so that clear issues of fact and law were presented to the court. The statement of claim was an embarrassing pleading. It was prejudicial in that it would be difficult, if not impossible, to answer. Any attempt to reform it by striking out portions and amending other portions was likely to result in more confusion as to the real issues.

Statutes, Regulations and Rules Cited:

British Columbia Supreme Court Rules, Rules 19(1), 19(5), 19(9.1), 19(11), 19(24)(a), 19(24)(b), 19(24)(c), 19(24)(d).

Counsel

H.C.R. Clark, Q.C. and D.L. Kydd, for the plaintiffs. V.K. Orchard and R. Wright, for the defendant, Her Majesty the Queen in Right of the Province of British Columbia. R. Kyle and D. Prosser, for the Attorney General of Canada.

K. SMITH J.

1 The defendants seek orders pursuant to Rule 19(24) of the Rules of Court striking out portions of the amended statement of claim and staying proceedings until other parts are amended. Their alternative application for orders pursuant to Rule 19(16) for further and better particulars was adjourned by agreement of counsel.

2 Rule 19(24) provides as follows:

> (24) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

3 The amended statement of claim was filed and delivered, by agreement of counsel, in substitution for the original statement of claim and reply. The plaintiffs' claims were not stated clearly and were contained, in part, in the statement of claim and, in part, in the reply. The reason for the agreement was to permit the plaintiffs to collect their claims and to assert them clearly in a statement of claim. For ease of reference, I will hereafter refer to the amended statement of claim as the statement of claim.

4 The statement of claim is prolix and convoluted and violates several of the rules of pleading set out in Rule 19 of the Rules of Court and in the case law. Rule 19(1) requires the pleader to state in summary form, as briefly as the nature of the case will permit, the material facts upon which the party relies. It also prohibits the pleading of evidence by which the material facts are to be proven. Rule 19(5) provides that each allegation shall be contained in a separate paragraph. Rule 19(9.1) states that conclusions of law may be pled only if the material facts supporting them are pled. Rule 19(11) requires full particulars to be stated of allegations of misrepresentation, fraud, breach of trust, wilful default and undue influence. All of these rules are transgressed by this pleading.

5 The ultimate function of pleadings is to clearly define the issues of fact and law to be determined by the court. The issues must be defined for each cause of action relied upon by the plaintiff. That process is begun by the plaintiff stating, for each cause, the material facts, that is, those facts necessary for the purpose of formulating a complete cause of action: Troup v. McPherson (1965), 53 W.W.R. 37 (B.C.S.C.) at 39. The defendant, upon seeing the case to be met, must then respond to the plaintiff's allegations in such a way that the court will understand from the pleadings what issues of fact and law it will be called upon to decide.

6 A useful description of the proper structure of a plea of a cause of action is set out in J.H. Koffler and A. Reppy, Handbook of Common Law Pleading, (St. Paul, Minn.: West Publishing Co., 1969) at p. 85:

> Of course the essential elements of any claim of relief or remedial right will vary from action to action. But, on analysis, the pleader will find that the facts prescribed by the substantive law as necessary to constitute a cause of action in a given case, may be classified under three heads: (1) The plaintiff's right or title; (2) The defendant's wrongful act violating that right or title; (3) The consequent damage, whether nominal or substantial. And, of course, the facts constituting the cause of action should be stated with certainty and precision, and in their natural order, so as to disclose the three elements essential to every cause of action, to wit, the right, the wrongful act and the damage.

If the statement of claim is to serve the ultimate purpose of pleadings, the material facts of each cause of action relied upon should be set out in the above manner. As well, they should be stated succinctly and the particulars

should follow and should be identified as such: Gittings v. Caneco Audio-Publishers Inc. (1988), 26 B.C.L.R. (2d) 349 (C.A.) at 353.

7 Mr. Clark, who did not draw the statement of claim, said that the plaintiffs' claims are for breach of fiduciary duty against the Crown federal; for equitable fraud and undue influence against both the Crown federal and the Crown provincial; and for unjust enrichment, for intermeddling in a trust (trustee de son tort), for interference with riparian rights, and for trespass against the Crown provincial. While he admitted to some deficiencies that require amendment, essentially he defended the statement of claim on the basis that all of the necessary material facts and particulars of those causes of action can be found within it. Perhaps that is the case, but, if so, they are not collected in any conventional, organized way that would permit the defendants, or the trial judge for that matter, to easily grasp the nature and the constituent elements of the plaintiffs' claims.

8 If I followed Mr. Clark's submissions, it appears that the material facts of some of the causes of action are separated in the pleading and can be found only by careful study and by meticulous attention to the many internal cross-references. As well, in some instances allegations against one defendant are contained in the same paragraphs as allegations against the other defendant. Moreover, particulars are sometimes mixed with material facts and often serve as particulars of more than one material fact. Again, the nature and effect of these particulars must be discerned, if that is possible, by tortuous analysis of the document.

9 Nevertheless, Mr. Clark submitted, it is enough if the material facts can be found in the statement of claim and a plaintiff cannot be compelled to prepare it in the conventional form. I cannot agree. A statement of claim must plead the causes of action in the traditional way so that the defendant may know the case he has to meet to the end that clear issues of fact and law are presented for the court. The comments of Thesiger L.J. in Davy v. Garrett (1877), 7 Ch. D. 473 (C.A.) at 488 and 489 are apt here:

> I am disposed to agree with the contention that the mere stating material facts at too great length would not justify striking out a statement of claim. But when in addition to the lengthy statement of material facts we find long statements of immaterial facts, and of documents which are only material as evidence, a Defendant is seriously embarrassed in finding out what is the case he has to meet.
>
> ...
>
> Now, in any properly constituted system of pleading, if alternative cases are alleged, the facts ought not to be mixed up, leaving the Defendant to pick out the facts applicable to each case; but the facts ought to be distinctly stated, so as to shew on what facts each alternative of the relief sought is founded.

10 Mr. Clark, relying upon Keddie v. Dumas Hotels Ltd. (1985), 62 B.C.L.R. 145 (C.A.), further contended that the statement of claim cannot be described as "embarrassing" because it is not plain and obvious that the allegations are so irrelevant that to allow them to stand would involve useless expense and would prejudice the trial of the action. However, it is impossible to say whether many of the allegations are relevant or irrelevant to a cause of action, because one cannot identify the causes of action from the No. 2889, leading: see Continental Securities v. Fehr, [1993] B.C.J. No. 2889 (10 February 1993) Vancouver C914674 (B.C.S.C.) at para. 18.

11 In my view, the statement of claim is an embarrassing pleading. It contains much that appears to be unnecessary. As well, it is constructed in a manner calculated to confuse the defendants and to make it extremely difficult, if not impossible, to answer. As a result, it is prejudicial. Any attempt to reform it by striking out portions and by amending other portions is likely to result in more confusion as to the real issues. In the interests of all parties, it must be set aside with leave to the plaintiffs to substitute a statement of claim prepared in accordance with the principles set out in these reasons: see Gittings v. Caneco Audio-Publishers Inc., supra, at 352-53.

12 Further proceedings will be stayed pending the filing and delivery of a fresh statement of claim. The parties are at liberty, despite the stay, to take any interlocutory steps they may agree upon in the meantime without further order.

13 Although, in their notices of motion, the defendants each claimed costs in any event of the cause, no

submissions were made on costs. Counsel may speak to costs if they wish. If not, the defendants will have their costs as claimed.

K. SMITH J.

Khodeir v. Canada (Attorney General), [2022] F.C.J. No. 26

Federal Court Judgments

Federal Court

Ottawa, Ontario

S. Grammond J.

January 14, 2022.

Docket: T-1690-21

[2022] F.C.J. No. 26 | [2022] A.C.F. no 26 | 2022 FC 44

Between Lucien Khodeir, Applicant, and Attorney General of Canada, Respondent

(69 paras.)

Counsel

Lucien Khodeir: for the Applicant (on his own behalf).

Mariève Sirois-Vaillancourt, Ludovic Sirois, Benoît de Champlain: for the Respondent.

ORDER AND REASONS

S. GRAMMOND J.

1 Mr. Khodeir seeks judicial review of the federal government's requirement that all its employees be vaccinated against COVID-19. He asserts that this requirement is unreasonable, because he believes that the virus that causes the disease does not exist.

2 The Attorney General is asking me to strike Mr. Khodeir's application at the preliminary stage. He says that I should take judicial notice of the existence of SARS-CoV-2, the virus that causes COVID-19. As a consequence, Mr. Khodeir will be unable to prove the central premise of his application, which is thus bound to fail.

3 For the reasons that follow, I agree with the Attorney General. The existence of SARS- CoV-2 has become notorious. Courts have repeatedly taken judicial notice of it. Although Mr. Khodeir had the opportunity to file evidence and make submissions, he failed to offer any factual foundation for his belief in the inexistence of SARS-CoV-2. His application must therefore be struck.

I. Procedural Background

4 Mr. Khodeir brought an application for judicial review of the *Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police* [the Policy], made by the Treasury Board pursuant to sections 7 and 11.1 of the *Financial Administration Act*, RSC 1985, c F-11, and effective October 6, 2021. In a nutshell, the Policy requires all employees of the core public administration to be fully vaccinated against COVID-19 before October 29, 2021, unless there is a medical contraindication or a need for accommodation based on religion or another prohibited ground of discrimination.

5 Unlike other litigants who have challenged the validity of the Policy, Mr. Khodeir does not invoke his rights

guaranteed by the *Canadian Charter of Rights and Freedoms*. Rather, he asserts that the policy is *ultra vires* the *Financial Administration Act*, because it is unreasonable in the administrative law sense of the term. In this regard, his amended application alleges the following:

* The virus, named SARS-CoV-2, is the alleged cause of COVID-19;
* SARS-CoV-2 was never proven to exist according to three experts: two sought by the Applicant and one sought by the Respondent who cited 18 times SARS-CoV-2 in an affidavit of November 14th, 2021, but never referenced a proof of its existence;
* SARS-CoV-2 is the basis of all the COVID-19 vaccines;
* The [Policy] is enforcing COVID-19 vaccinations;
* It is unreasonable to mandate a vaccine to protect against a non-existent pathogen; [...].

6 The Attorney General responded to Mr. Khodeir's application by bringing a motion to strike, pursuant to Rule 221 of the *Federal Courts Rules*, SOR/98-106. He asserts that Mr. Khodeir's application is bereft of any possibility of success, because the Court can take judicial notice of the existence of SARS-CoV-2. He also asserts that Mr. Khodeir has no standing to bring the application, because he is not an employee of the core public administration and cannot claim public interest standing in the circumstances.

7 Mr. Khodeir made submissions in response to the Attorney General's motion to strike. He also filed three affidavits in support of his response, and moved for leave to amend his notice of application. The Attorney General did not object to the amendment or to the filing of the affidavits. Accordingly, I will grant Mr. Khodeir leave to amend his notice of application. I have already quoted from the amended application. I will consider the affidavits later in these reasons.

II. The Test for a Motion to Strike

8 Rule 221(1)(a) provides that a statement of claim that "discloses no reasonable cause of action" may be struck. While this rule applies to actions, a similar principle has been extended to applications for judicial review. Thus, in *David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1995] 1 FC 588 (CA) at 600 [*David Bull Laboratories*], the Federal Court of Appeal held that it could strike a notice of application for judicial review that is "so clearly improper as to be bereft of any possibility of success"; see also *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at paragraphs 47-48, [2014] 2 FCR 557 [*JP Morgan*]; *Wenham v Canada (Attorney General)*, 2018 FCA 199 at paragraphs 32-33.

9 By way of example, applications for judicial review have been struck where they are premature (*Dugré v Canada (Attorney General)*, 2021 FCA 8), where the Court lacks jurisdiction (*JP Morgan*), where the application obviously lacks legal foundation (*Canada (Attorney General) v Valero Energy Inc*, 2020 FCA 68 [*Valero*]) or where the facts alleged are purely speculative (*Assouline v Canada (Attorney General)*, 2021 FC 458).

10 A motion to strike is aimed at a defect in the pleadings. For this reason, it is sometimes called a "pleadings motion." According to rule 2, a pleading is "a document in a proceeding in which a claim is initiated, defined, defended or answered." In this case, the pleading is the notice of application. While it defines the claim, a pleading is not evidence. Evidence to support the claim is typically brought at a later stage of the proceedings. Thus, a motion to strike tests the validity of the claim in the abstract, before any evidence is considered.

11 For this reason, on a motion to strike, the general principle is that the allegations contained in the notice of application must be taken to be true: *JP Morgan*, at paragraph 52. On such a motion, the role of the Court is not to assess the potential evidence nor to predict whether the applicant will succeed in proving the allegations of the notice of application. This is reinforced by a prohibition on admitting evidence on certain categories of motions to strike: rule 221(2).

12 There are, however, exceptions to these principles.

13 First, where a pleading refers to supporting documents or evidence, they may be taken into consideration, as if incorporated in the pleading: *JP Morgan*, at paragraph 54.

14 Second, the rule that allegations must be taken to be true does not extend to facts "manifestly incapable of being proven:" *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at paragraph 22, [2011] 3 SCR 45. In *Operation Dismantle v The Queen*, [1985] 1 SCR 441 at 455, the Supreme Court noted that

> The rule that the material facts in a statement of claim must be taken as true for the purpose of determining whether it discloses a reasonable cause of action does not require that allegations based on assumptions and speculations be taken as true. The very nature of such an allegation is that it cannot be proven to be true by the adduction of evidence. It would, therefore, be improper to accept that such an allegation is true.

15 This will also be the case, as we will see below, where allegations are contrary to judicially noticed facts, because judicial notice is conclusive. Such allegations, therefore, are "manifestly incapable of being proven."

III. No Possibility of Success

16 I accept the Attorney General's invitation to take judicial notice of the existence of the SARS-CoV-2 virus, which causes COVID-19. To explain why, I must begin by outlining the contours of the concept of judicial notice. I then show that the existence of the SARS-CoV-2 virus is beyond reasonable debate and that Mr. Khodeir's submissions to the contrary are without merit.

A. *Judicial Notice*

(1) Definition and Purpose

17 Courts make decisions based on evidence brought in each particular case. Some facts, however, are so obvious that courts assume their existence and no evidence of them is required. This is called judicial notice: Jean-Claude Royer, *La preuve civile* (6th ed by Catherine Piché, Cowansville, Yvon Blais, 2020) at paragraphs 139-147 [Piché, *La preuve*]; Léo Ducharme, *Précis de la preuve* (6th ed, Montreal, Wilson & Lafleur, 2005) at paragraphs 74-92 [Ducharme, *Précis*]; Sidney N Lederman, Alan W Bryant and Michelle K Fuerst, *Sopinka, Lederman and Bryant: The Law of Evidence in Canada* (5th ed, Toronto, LexisNexis Canada, 2018) at paragraphs 19.16-19.63 [Sopinka, *Law of Evidence*]; David M Paciocco, Palma Paciocco and Lee Stuesser, *The Law of Evidence* (8th ed, Toronto, Irwin Law, 2020) at 573-583 [Paciocco and Stuesser, *Law of Evidence*].

18 The Supreme Court of Canada provided the following definition and test for judicial notice in *R v Find*, 2001 SCC 32 at paragraph 48, [2001] 1 SCR 863 [*Find*]:

> Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy [...].

19 While the above comments were made in the context of a criminal case, similar principles apply in Quebec civil law. Civil law principles are relevant in the present case because Mr. Khodeir's application was filed at the Montreal registry office, and this Court must apply the laws of evidence in force in the province where the application was filed: *Canada Evidence Act*, RSC 1985, c C-5, s 40. The following provisions of the *Civil Code of Québec* deal with judicial notice:

> **2806**. No proof is required of a matter of which judicial notice shall be taken.
>
> **2806**. Nul n'est tenu de prouver ce dont le tribunal est tenu de prendre connaissance d'office.

***

> **2808**. Judicial notice shall be taken of any fact that is so generally known that it cannot reasonably be questioned.
>
> **2808**. Le tribunal doit prendre connaissance d'office de tout fait dont la notoriété rend l'existence raisonnablement incontestable.

20 Judicial notice performs several functions: Danielle Pinard, "La notion traditionnelle de connaissance d'office des faits" (1997) 31 RJT 87 [Pinard, "La notion"]. It fosters efficiency, by ensuring that the bringing of evidence of obvious facts does not bog down the judicial process. It also promotes public confidence in the administration of justice. Courts would not be trusted if they required litigants to go to the expense of proving notorious facts or if they reached conclusions that are contrary to what is considered beyond reasonable dispute. The Supreme Court of Canada summarized this in *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66 at paragraph 57, [2004] 3 SCR 381:

> The purpose of judicial notice is not only to dispense with unnecessary proof but to avoid a situation where a court, on the evidence, reaches a factual conclusion which contradicts "readily accessible sources of indisputable accuracy", and which would therefore bring into question the accuracy of the court's own fact-finding processes. A finding on the evidence led by the parties, for example, that the Newfoundland deficit in 1988 was $5 million whereas anyone could ascertain from the public accounts that it was $120 million would create a serious anomaly.

(2) Scope

21 Thus, whether the matter is envisaged from the perspective of common law or civil law, judicial notice is taken of facts that are beyond reasonable dispute. A conclusion that a fact is beyond reasonable dispute may be based on a finding that the fact is notorious or on verifications in "sources of indisputable accuracy": *Find*, at paragraph 48.

22 The category of notorious facts includes everyday facts that anyone can personally ascertain. For example, judicial notice will be taken of the fact that when driving on St. Catherine Street in Montreal, one will cross Bleury, Jeanne-Mance and St. Urbain Streets in that order. If one is unaware of this, the consultation of a map will readily provide the answer; see, by way of analogy, *R v Krymowski*, 2005 SCC 7 at paragraph 22, [2005] 1 SCR 101.

23 Facts may be notorious even where the decision-maker cannot ascertain them personally. For example, in *R v Khawaja*, 2012 SCC 69 at paragraph 99, [2012] 3 SCR 555 [*Khawaja*], the Supreme Court of Canada took judicial notice of the war in Afghanistan, even though it is highly unlikely that its members, like most Canadians, travelled there to witness the hostilities. The existence of the war is nevertheless notorious because over the years, trusted sources of information have repeatedly mentioned it. Thus, reasonable persons would not doubt that there was a war in that distant country.

24 Based on the same logic, courts have taken judicial notice of facts of a technical or scientific nature. For example, in *Baie-Comeau (Ville de) c D'Astous*, [1992] RJQ 1483 at 1488 (CA) [*D'Astous*], the Quebec Court of Appeal noted that

> [TRANSLATION]
>
> ... radar, as an instrument of detection and measurement, is covered by the concept of judicial notice. Its use in air and marine navigation is as widespread as that of the compass. Moreover, all North Americans know from experience that it is also used to measure the speed of motor vehicles. We learned, in high school or in college, that the basic principle of radar is the emission, by a device, of beams of electromagnetic rays that, when they are reflected by an obstacle, return to the emitter. Any dictionary or encyclopedia provides the reader with scientific details. What then was a military secret at the beginning of the last world war has today become an indisputable fact.

25 Likewise, in *Telus Communications Inc v Vidéotron Ltée*, 2021 FC 1127 at paragraph 5 [*Telus*], I wrote, "Mobile phone technology requires the use of electromagnetic waves of various frequencies." The parties in that case did not bring any evidence regarding what electromagnetic waves are, how they were discovered or exactly how they

can be received by a mobile phone. Nonetheless, the fact that mobile phones use electromagnetic waves is notorious among the general public.

26 Courts are nevertheless mindful that there is disagreement about some aspects of scientific knowledge. They are careful not to take judicial notice of matters on which science has not reached consensus or which are laden with value judgments: *R v Spence*, 2005 SCC 71 at paragraph 63, [2005] 3 SCR 458 [*Spence*]; *R v Mabior*, 2012 SCC 47 at paragraph 71, [2012] 2 SCR 584; *Quebec (Attorney General) v A*, 2013 SCC 5 at paragraphs 273-274, [2013] 1 SCR 61 [*Quebec v A*].

27 Courts have also calibrated the test for judicial notice "according to the nature of the issue under consideration": *Spence*, at paragraph 60; see also Paciocco and Stuesser, *Law of Evidence*, at 576-581. They insist on stricter compliance with the above-mentioned test when the fact to be judicially noticed is central to the case: *R v Malmo-Levine*, 2003 SCC 74 at paragraph 28, [2013] 3 SCR 571; *Quebec v A*, at paragraph 274. This is because "the need for reliability and trustworthiness increases directly with the centrality of the 'fact' to the disposition of the controversy": *Spence*, at paragraph 65.

(3) Process and Consequences

28 In many cases, judicial notice is an implicit process. For example, in the *Telus* case mentioned above, I did not explicitly state that I was taking judicial notice of the use of electromagnetic waves by mobile phones. The parties did not dispute the point and took it for granted.

29 In other situations, the propriety of taking judicial notice will be debated. One party will argue that a particular fact is not beyond reasonable dispute and that the test for judicial notice is not met. When this happens, both parties may provide submissions and information to help the judge decide whether it is appropriate to take judicial notice.

30 The effect of judicial notice has been the subject of academic debate. Some writers assert that judicial notice is a rebuttable presumption: Pinard, "La notion"; Piché, *La preuve*, at paragraph 146. According to that view, a party may attempt to prove a fact contrary to judicial notice. The weight of judicial opinion, however, is to the effect that judicial notice is conclusive: *D'Astous*, at 1487-1488; *R v Zundel* (1987), 35 DLR (4th) 338 at 391 (Ont CA), cited with approval in *Spence*, at paragraph 55; see also Paciocco and Stuesser, *Law of Evidence*, at 576; Ducharme, *Précis*, at paragraph 89; Sopinka, *Law of Evidence*, at paragraphs 19.57-19.60. Not only does judicial notice dispense with proof of a fact, it also forecloses an attempt to prove the contrary. As I mentioned above, allowing attempts to disprove what is beyond reasonable dispute would erode trust in the administration of justice.

31 Those who assert that judicial notice should only be a rebuttable presumption are typically concerned with the fairness of the process. Judicial notice could be a vehicle for imposing commonly held stereotypes, which may in fact be wrong. This concern, however, does not arise where the propriety of taking judicial notice is the subject of adversarial debate. In such a case, the parties have a chance to show that the fact in question is not sufficiently notorious or beyond reasonable dispute to warrant judicial notice.

32 Having established the principles governing judicial notice, I can now turn to their application to the existence of the SARS-CoV-2 virus.

B. *Application to This Case*

33 In my view, the existence of the SARS-CoV-2 virus is beyond reasonable dispute and is a matter of judicial notice. I reach this conclusion for three reasons, developed below: the existence of the virus is notorious; other courts have taken judicial notice of it; and Mr. Khodeir's assertions to the contrary do not withstand scrutiny.

34 I am mindful that taking judicial notice of the existence of the virus is dispositive of Mr. Khodeir's application. In

these circumstances, the bar is high for the Court to take judicial notice. Nevertheless, the test is clearly met in this case.

35 I also wish to emphasize that the Attorney General is asking me to take judicial notice solely of a narrow and basic fact regarding the COVID-19 pandemic, namely, the existence of the virus causing the disease. Of course, knowledge about various aspects of COVID-19 continues to develop, and there is a lively debate about which public health measures are most appropriate to fight the pandemic. In this process, some facts beyond the mere existence of the virus may or may not be sufficiently indisputable or notorious to warrant judicial notice. I am not, however, called upon to set the outer boundaries of judicial notice in relation to the COVID- 19 pandemic.

(1) Notoriety

36 Over the last two years, most people on this planet have been affected in various ways by the COVID-19 pandemic. It has become common knowledge that COVID-19 is caused by a virus called SARS-CoV-2. Numerous trusted sources of information have repeated this fact, to the point that it is now beyond reasonable dispute. There is a lack of debate on this issue in scientific circles.

37 A fact, however, does not become indisputable by mere repetition. One must consider channels through which the information is conveyed, scrutinized and exposed to criticism, and the fact that these channels operate in a society based on freedom of discussion. This is particularly important in this case because, over the last two years, the COVID-19 pandemic and the public health measures deployed to fight it have been one of the most significant topics of public debate. Scientific knowledge about COVID-19 has developed under intense public scrutiny. The existence of the SARS-CoV-2 virus and the fact that it causes COVID-19 are at the root of the matter. As matters related to the pandemic have been debated so thoroughly, it is unimaginable that any actual scientific debate about these basic facts would have escaped public attention. Moreover, if there was any evidence incompatible with the existence of the virus, one would have expected Mr. Khodeir to provide it to the Court. As we will see later, he utterly failed in this regard.

38 Like the war in Afghanistan in *Khawaja*, the existence of the virus is notorious even though people cannot see the virus themselves, and have to rely on knowledge from trusted sources. The average person's lack of precise understanding of the functioning of viruses or methods for their isolation does not prevent the fact that the SARS-CoV-2 virus is the cause of COVID-19 from becoming notorious among the general public. Like the radar in *D'Astous* or the mobile phone in *Telus*, courts can take notice of the basic aspects of scientific or technical phenomena, even though most people do not understand the minute details.

39 As I find that the existence of SARS-CoV-2 and the fact that it causes COVID-19 are notorious, I need not decide whether they can also be ascertained by reference to sources of indisputable accuracy, nor attempt to set out what those sources would be.

(2) Precedent

40 On numerous occasions since the beginning of the pandemic, courts in this country have noted the link between the SARS-CoV-2 virus and COVID-19. In a number of cases, expert evidence was adduced. In others, courts took notice of various aspects of the pandemic. These statements made in previous cases may contribute to a finding that judicial notice is warranted: *R v Williams*, [1998] 1 SCR 1128 at paragraph 54.

41 In some cases, the virus is mentioned without debate. For example, in *Taylor v Newfoundland and Labrador*, 2020 NLSC 125 at paragraph 1, the court mentioned "the global impact of the SARS-CoV-2 virus, known more commonly by the infectious and potentially fatal disease it causes, COVID-19." Likewise, in *Spencer v Canada (Attorney General)*, 2021 FC 361 at paragraph 11, my colleague Justice William F. Pentney referred to "the SARS-CoV-2 virus - the virus that causes the potentially severe and life-threatening respiratory disease of COVID-19." See also *Gateway Bible Baptist Church v Manitoba*, 2021 MBQB 219 at paragraphs 53 and 61. In these cases, there does not appear to have been any controversy that SARS-CoV-2 causes COVID-19. It is true that the courts in these cases do not explicitly say whether they received evidence or are taking judicial notice, but the fact that

they did not feel the need to make this explicit buttresses my finding that the existence of SARS-CoV-2 is a notorious fact.

42 In other cases, courts have explicitly taken judicial notice of facts related to the COVID- 19 pandemic, including the fact that COVID-19 is caused by the SARS-CoV-2 virus. Thus, in *R v Morgan*, 2020 ONCA 279 at paragraph 8, the Ontario Court of Appeal wrote:

> We do, however, believe that it falls within the accepted bounds of judicial notice for us to take into account the fact of the COVID-19 pandemic, its impact on Canadians generally, and the current state of medical knowledge of the virus, including its mode of transmission and recommended methods to avoid its transmission.

43 Courts across the country have reached similar conclusions. In *Manzon v Carruthers*, 2020 ONSC 6511 at paragraph 18, the Ontario Superior Court of Justice took "judicial notice of the fact that COVID-19 is caused by SARS-CoV-2, a communicable and highly contagious virus." In *TRB v KWPB*, 2021 ABQB 997 at paragraph 12, the Alberta Court of Queen's Bench noted that

> Since early 2020, Canadians have been living in the midst of a global pandemic caused by the SARS-CoV-2 virus. I take judicial notice of this fact which is so notorious and indisputable as to not require proof.

44 In *OMS v EJS*, 2021 SKQB 243 at paragraphs 112-114, the Saskatchewan Court of Queen's Bench did the same, although referring to the "COVID virus." See also *BTK v JNS*, 2020 NBQB 136 at paragraphs 19-22; *R v Pruden*, 2021 ABPC 266 at paragraph 54; *Halton Condominium Corp No 77 v Mitrovic*, 2021 ONSC 2071 at paragraph 17.

45 Thus, Canadian courts have taken judicial notice of the fact that COVID-19 is caused by the SARS-CoV-2 virus. While these cases are not, strictly speaking, binding on me, they are persuasive authority.

46 In reviewing these cases, I also noted that there does not appear to be a single instance where a party challenged the existence of the SARS-CoV-2 virus or its link to COVID-19. Mr. Khodeir has not brought any such case to my attention. In fact, he asserts that the denial of the existence of the virus distinguishes his application from all others. The absence of any such challenge only reinforces my finding that the existence of the virus is beyond reasonable dispute.

(3) Mr. Khodeir's Evidence

47 In response to the Attorney General's motion to strike, Mr. Khodeir brought evidence. While evidence is usually not admissible on a motion to strike, Mr. Khodeir explicitly referred to this evidence in his amended notice of application. Moreover, when arguing about whether it is proper to take judicial notice, parties are entitled to provide the Court with information or evidence showing that the fact in question is or is not beyond reasonable dispute. The Attorney General did not object to the admission of the evidence tendered by Mr. Khodeir. In fact, Mr. Khodeir stated that, in response to the motion to strike, he provided the Court with all the evidence and submissions he intended to file on the merits. I will therefore analyze this evidence to see if it affects my conclusion that the existence of the virus is beyond reasonable dispute.

48 Mr. Khodeir first provides an affidavit from Dr. Daniel Yoshio Nagase, an emergency physician. At Mr. Khodeir's request, Dr. Nagase studied two documents, excerpts of which are appended to the affidavit.

49 The first is an article by Drosten and others published on January 23, 2020, in Euro Surveillance, which appears to be a scientific journal. It proposes a diagnostic methodology for identifying the SARS-CoV-2 virus, using a technique known as the PCR test. The paper was published merely two weeks after Chinese authorities published the genome sequence of the virus in various public databases.

50 The second document appended to Dr. Nagase's affidavit purports to be a review report of the Drosten paper, dated November 2020. Its authors assert that there are major flaws in the Drosten paper and request the Euro

Surveillance journal to retract it. Only short excerpts of the report are provided, which describe only one alleged flaw: the fact that the Drosten paper is based on a computerized model of the virus, instead of the actual virus. The authors also note that ten months after the initial publication, Drosten and his colleagues have not validated their methodology using the actual virus. Dr. Nagase does not say whether the review report was accepted for publication anywhere, nor whether the Drosten paper was retracted as a result.

51 Dr. Nagase concludes his short summary of the two documents by the following sentence: "Perhaps, Drosten could not update the Protocol because SARS-CoV2 did not really exist in nature but in a computer file." I attach no value whatsoever to this statement. It does not follow logically from what precedes it. It is pure speculation, not fact. There is absolutely nothing in the documents Dr. Nagase refers to suggesting that SARS-CoV-2 does not exist. Dr. Nagase himself carefully refrains from drawing a firm conclusion in this regard, by using the word "perhaps." In his amended notice of application, Mr. Khodeir misrepresents Dr. Nagase's evidence when saying that he concluded that SARS-CoV-2 "was never proven to exist." Dr. Nagase did not state such a conclusion and provides no facts that could support it.

52 Moreover, if Dr. Nagase's affidavit is intended to provide an overview of current knowledge regarding the SARS-CoV-2 virus, or even the narrower issue of the validity of the PCR tests, it is sorely lacking. Dr. Nagase merely highlights a November 2020 critique of a paper written in January 2020, at the very beginning of the pandemic. He does not provide any up-to-date information regarding the validation of PCR tests, even if he signed his affidavit a year later. He does not conduct his own search of the literature and does not offer any fulsome literature review. Rather, he confines himself to the two papers to which Mr. Khodeir drew his attention. If Dr. Nagase is intended to be an expert witness, the selective comparison he undertakes and the extremely narrow range of information he provides are fundamentally at odds with the neutrality expected of experts.

53 Mr. Khodeir also filed an affidavit from Ms. Christine Massey, who describes herself as a biostatistician and purports to testify as an expert, although we know little about her qualifications. Ms. Massey states that she has made access to information requests to 25 "Canadian health and science institutions," asking for

> all studies or reports in the possession, custody or control of each institution that describe the isolation/ purification of SARS-CoV2 directly from a sample taken from a diseased human where the patient sample was not first combined with any other source of genetic material.

54 Ms. Massey states that other persons in various countries made similar requests and forwarded the responses to her. She observes that none of the 138 institutions to whom a request was made was able to provide such records.

55 I am unable to draw any material conclusions from Ms. Massey's affidavit. The institutions to whom requests were made are not identified. One does not know if they can reasonably be expected to possess the studies or reports in question. I am also not in a position to assess the relevance of the restrictions contained in the description of the records sought. Thus, I do not know whether Ms. Massey's requests were designed for failure or, if not, what to infer from the negative responses.

56 What is also striking is that Ms. Massey does not herself attempt to draw any conclusions from the results of her access to information requests. Again, Mr. Khodeir's reliance upon her evidence to state that SARS-CoV-2 "was never proven to exist" is a misrepresentation. She says nothing of this kind. In truth, she states no fact that contradicts the existence of SARS-CoV-2.

57 Lastly, Mr. Khodeir filed his own affidavit. In addition to information about COVID-19 vaccines, he appends an affidavit sworn by Dr. Celia Lourenco of Health Canada in other proceedings in which the validity of the Policy is being challenged. He notes that Dr. Lourenco "cited 18 times SARS-CoV2 but never once referenced a single document which proves its existence." Again, nothing logically flows from this. The existence of SARS-CoV-2 was not an issue in these other proceedings, so Dr. Lourenco was not required to provide documents on this topic.

58 Thus, Mr. Khodeir's evidence does not erode the notoriety of the existence of the SARS- CoV-2 virus in any

way. What Mr. Khodeir does, with the assistance of his so-called experts, is to look for evidence of the existence of the virus in discrete and narrow places and, finding none, to ask the Court to infer its inexistence. This is irrational: the conclusion simply does not flow from the premise. The absence of evidence in one place does not mean that the evidence does not exist elsewhere and tells nothing about the fact in dispute.

59 One should not be fooled by Mr. Khodeir's reliance on so-called experts and scientific literature. His affiants have not been qualified as experts and the information they provide in their affidavits does not allow me to consider them as such. The selective citation of a few elements from the scientific literature does not confer scientific value on Mr. Khodeir's contentions.

60 In fact, Mr. Khodeir's arguments amount to this. He first raises suspicions by alleging that a crucial piece of information is missing, without, however, conducting a thorough search for that information. He then alludes to an explanation that runs against what has become notorious knowledge, without providing any positive evidence of that explanation. Finally, he jumps to the conclusion that the suggested explanation is true and uses it as a factual basis for his application for judicial review.

61 Such a process has no probative value, scientific or otherwise. Reasonable persons do not recognize this as establishing the veracity of an alleged fact. Put simply, the layering of affidavits from so-called experts and selected documents of dubious scientific value cannot make up for Mr. Khodeir's failure to bring a single fact that contradicts the existence of the SARS-CoV-2 virus.

(4) Summary

62 In summary, the fact that COVID-19 is caused by a virus called SARS-CoV-2 is so notorious that it is beyond reasonable dispute. Like many other judges across Canada, I am taking judicial notice of this fact. Despite having had the opportunity to present evidence and submissions, Mr. Khodeir failed to put forward any cogent reason for concluding otherwise.

63 Thus, if Mr. Khodeir's application were allowed to proceed, he would be precluded from attempting to prove that SARS-CoV-2 does not exist, as this would be contrary to a judicially noticed fact. Yet, this allegation is the premise of his whole application. It is the "lynchpin holding the elements of the Application together": *Valero*, at paragraph 29. Mr. Khodeir would be unable to prove this central allegation, although he would have the burden of doing so: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 100. His application would be bound to fail or "bereft of any possibility of success," to borrow the language of the Federal Court of Appeal in *David Bull Laboratories*. It must be struck at this preliminary stage.

64 In his submissions, Mr. Khodeir compares himself to Galileo, who was persecuted in the 17th century for asserting that the Earth revolves around the Sun, a theory unanimously accepted today. Yet, unlike Mr. Khodeir, Galileo buttressed the heliocentric theory with facts, especially his discovery of Jupiter's moons. In contrast, Mr. Khodeir asks us to believe his assertions regarding the SARS-CoV-2 virus without providing any tangible fact in support. The comparison is unfair to the great Italian scholar. Mr. Khodeir's case has no scientific footing.

IV. Standing

65 Given the conclusions I reach with respect to judicial notice, it is not necessary to analyze in detail the Attorney General's submissions regarding Mr. Khodeir's lack of standing. I will confine myself to making the following comments.

66 Mr. Khodeir is not directly affected by the Policy. He is not an employee of the federal government. Rather, in his affidavit, he states that he is an employee of a subsidiary of the Canadian Imperial Bank of Commerce [CIBC]. He lacks the personal standing necessary to bring an application for judicial review.

67 Relying on *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 1 SCR 524 [*Downtown Eastside*], however, Mr. Khodeir asks the Court to grant him public

interest standing. The Attorney General opposes this request because other applicants, who are employees of the federal government and are directly affected by it, have been able to mount judicial challenges to the Policy. The Attorney General's submission has much force. Indeed, this may well be a situation where "plaintiffs with a personal stake in the outcome of a case should get priority in the allocation of judicial resources": *Downtown Eastside*, at paragraph 27. Nevertheless, I would not go so far as to conclude that Mr. Khodeir's request for public interest standing is bound to fail, so I would not consider his lack of standing as an independent ground for striking his application.

V. Disposition and Costs

68 For these reasons, the Attorney General's motion to strike Mr. Khodeir's application for judicial review will be granted.

69 The Attorney General is seeking his costs. Relying on *McEwing v Canada (Attorney General)*, 2013 FC 953, Mr. Khodeir submits that no costs should be awarded against him. The usual rule is that the losing party is condemned to pay the costs of the prevailing party according to the tariff. The Court has discretion to depart from that rule, taking into account all the circumstances of the case. In contrast to *McEwing*, Mr. Khodeir's application is entirely devoid of factual foundation. Thus, I do not think is it appropriate to relieve Mr. Khodeir from a costs award.

ORDER in T-1690-21

THIS COURT ORDERS that:

1. The applicant's motion to amend his notice of application is granted.
2. The style of cause is amended so that the Attorney General of Canada is the respondent.
3. The respondent's motion to strike the notice of application is granted.
4. Costs are awarded to the respondent.

S. GRAMMOND J.

End of Document

Kuhn v. American Credit Indemnity Co., [1992] B.C.J. No. 953

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

(In Chambers)

Master Joyce

Heard: March 23, 1992

Judgment: April 15, 1992

Vancouver Registry No. C918353

[1992] B.C.J. No. 953

Between Harvey Alexander Kuhn, Plaintiff, and American Credit Indemnity Company, Howard C. Kaye, Wyn E. Shearer, and Robert Labelle, Defendants

(17 pp.)

Case Summary

Practice — Pleadings — Striking out pleadings — Statement of claim — Grounds — Prolix pleading — Failure to disclose cause of action — Evidentiary or subordinate facts — Conspiracy action.

The defendant applied to strike the plaintiff's statement of claim in an action for damages for conspiracy on the grounds that it failed to disclose a reasonable claim, and that it was prolix and replete with irrelevant facts, evidence and argument.
HELD: The action was dismissed.

The court was satisfied that the facts alleged in the statement of claim were not capable of supporting any reasonable claim for damages, and that the proceeding ought to be dismissed. The statement of claim was 84 pages long, and consisted of 456 numbered paragraphs. The court agreed with the defendants that for the most part, the statement of claim consisted of either irrelevant facts, argument or evidence. It would be nearly impossible for the defendants to plead in reply to this document. The court was of the opinion that these facts, even if proved, would not be sufficient to make out the causes of action which the plaintiff sought to advance.

STATUTES, REGULATIONS AND RULES CITED:

British Columbia Supreme Court Rules, Rule 19(1), 19(24).
Counsel for the Plaintiff: David A. Freeman. Counsel for the Defendants: P. Miller.

MASTER JOYCE

This is an application to strike the plaintiff's statement of claim under R.19(24) on the grounds, firstly, that it fails to disclose a reasonable claim and, secondly, on the ground that it is so prolix and so replete with irrelevant facts, evidence and argument as to be embarrassing.

The plaintiff's action arises as a consequence of the termination of his employment by the corporate defendant, whom I shall refer to as "American". The plaintiff does not allege, however, that the termination constituted a wrongful dismissal. He concedes it was not. Nor does the plaintiff allege that American owes him any salary or other remuneration or benefits for the period of his employment. While the prayer for relief claims an accounting, counsel for the plaintiff conceded there is no debt claim for moneys payable as a result of the plaintiff's employment.

Counsel for the plaintiff submits the essence of the case is conspiracy. The plaintiff alleges that American and the individual defendants are guilt of a civil conspiracy in connection with the termination of his employment.

The statement of claim by which the plaintiff seeks to plead his cause of action is 84 pages in length and consists of 456 numbered paragraphs. It is, in my view, a gross violation of R. 19(1) which provides that:

> "A pleading shall be as brief as the nature of the
>
> case will permit and must contain a statement in
>
> summary form of the material facts on which the party
>
> relies, but not the evidence by which the facts are to
>
> be proved."
>
> (emphasis added)

Having read the document carefully and in its entirety I must agree with counsel for the defendants that for the most part it consists of either irrelevant facts, argument or evidence. I am satisfied that the document is so prolix as to be embarrassing. It would be nearly impossible for the defendants properly to plead in reply to this document other than by bare denial. For this reason alone, I am of the opinion the statement of claim should be struck.

Putting aside its prolixity, I have further examined the statement of claim to determine whether it is possible for one to extract from the sea of evidence and irrelevancy sufficient material facts on which to found the essential allegation of conspiracy or any other cause of action, bearing in mind that in an application under R. 19(24)(a) the facts alleged in the statement of claim are assumed to be true and that statement of claim should be struck only where it is plain and obvious that it discloses no reasonable cause of action (Hunt v. T. & N plc. (1990) 49 B.C.L.R. (2d) 273 (S.C.C.).

In my view one must begin the analysis with paragraphs 442 to 450 where the plaintiff attempts to summarize his claims. In my opinion these paragraphs do not, in themselves, constitute pleadings of material facts. They state legal conclusions which the plaintiff suggests flow from the facts which are set out in the preceding paragraphs. These legal conclusions can be paraphrased as follows:

442. Between June 1, 1989 and June 26, 1991 two or more of the defendants conspired to injure the plaintiff in the office of his employment.

443. Between June 1, 1989 and June 26, 1991 two or more of the defendants conspired to engineer the termination of the plaintiff's employment.

444. Between June 1, 1989 and June 26, 1991 two or more of the defendants conspired to interfere with the contractual relationship between the plaintiff and American.

445. The defendants, either alone or jointly, intentionally or recklessly brought about the termination of the plaintiff's employment.

446. The defendants, either alone or jointly, intentionally or recklessly created mental stress to such an extent as to be oppressive on the plaintiff.

447. The defendants, either alone or jointly, intentionally or recklessly participated in or condoned acts or omissions that were oppressive to the plaintiff.

448. American breached its fiduciary duty to the plaintiff.

449. American breached its duty to protect the plaintiff from the actions of the individual defendants.

450. American breached its contractual obligations which it owed to the plaintiff not to restrict his post termination efforts to obtain employment.

I have attempted, as best I can, to distil from the preceding 441 paragraphs the essential averments making up the factual foundation upon which the plaintiff rests his action. The essential facts are as follows (the numbers in brackets correspond to the paragraphs in the statement of claim from which these facts are extracted):

1. American is an insurance company. (5)
2. The plaintiff was an employee of American and was its sole agent in British Columbia during the period 1987 to June 26, 1991. (4,12,16)
3. Kaye, Shearer and Labelle are employees and officers of American. (6,7,8)
4. "In their capacities as Officers of the defendant American, the defendants Kaye, Shearer and Labelle, were acting within the scope of their employment, relating to the carrying out of their offices, authorized to make decisions and bind the defendant American." (9)
5. The plaintiff was assigned excessive premium goals for the 1990 production year. (69-70, 71-73, 75, 77-79)
6. On November 12, 1990 Kaye and Shearer imposed excessive new business requirements on the plaintiff under the threat of probation. (115,135-137)
7. "The penultimate target of such excessive new business requirements was the penalty of probation". (138, 298)
8. "The penalty of probation was intended as having the direct, sole, exclusive and certain result of the non-achievement of the aforementioned imposed excessive new business requirements." (139)
9. The plaintiff did not meet his assigned goals due to a number of uncontrollable factors, including the imposition of the excessive new business requirements under the threat of probation. (76, 88)
10. The excessive new business requirements together with the necessity to maintain renewal premiums in accordance with the assigned goals created "a unconscionable combined objective" by Kaye, Shearer and American. (141)
11. "The aforesaid imposition had clearly been designed to cause a mental and physical burden under which the plaintiff's ability to effectively produce for the defendant American was impaired." (142)
12. Kaye gave instructions to issue a renewal policy prematurely with the intention to create a bad reflection on the plaintiff's performance. (148-151)
13. Kaye, "acting in his capacity as an officer of American", by imposing excessive new business requirements on the plaintiff intended the result of or was reckless as to the consequences of his actions. (154)
14. The plaintiff was assigned excessive premium goals for the 1991 production year. (179, 180, 183)
15. The plaintiff was injured in a motor vehicle accident on January 14, 1991 and his sales effectiveness was thereby dramatically reduced. (199-200, 206)
16. On February 15, 1991 Shearer placed the plaintiff in a "Formal Action Program": with additional new business requirements and under the threat of probation. (280-284)
17. Kaye, Shearer and American created the Action Programs "almost certainly intended to eventually bring about failure of the plaintiff in reaching the necessary figures". (289)
18. The plaintiff was systematically targeted by Kaye, Shearer and American with the express purpose of having his employment come to an end. (293)
19. Kaye, Shearer and American deliberately and purposely tampered with the numerical interpretation of the plaintiff's measured performance. (310)

20. Kaye, Shearer and American deliberately attempted to change the meaning and context of "annualized" in relation to annualized new premium so as to understate the plaintiff's performance and attempted to deceive and injure the plaintiff. (311-315, 371-374)

These actions were in accordance with an intention of having the plaintiff placed on probation. (316-317)

21. On April 24, 1991 Kaye, Shearer and American placed the plaintiff on Performance Probation under the threat of termination. (365)

22. The new business requirements contained within the Performance Probation were excessive and were imposed intentionally or with reckless disregard of the effect and consequences of such action upon the plaintiff. (367-370)

23. On May 28, 1991 the plaintiff received an "unsatisfactory" performance review from Kaye which review contained errors and inaccuracies. (392-396)

24. In completing the performance review Kaye wilfully and deliberately included inaccurate information with the intent to injure the plaintiff or was reckless as to the consequences of his actions. (397-398)

25. On or about June 26, 1991 the plaintiff's employment was terminated.

26. Since termination the plaintiff has been unable to find suitable employment. (452)

27. The non-achievement of the new business requirements

brought about termination of the plaintiff's employment. (140)

I am of the opinion that these facts, if proved, would not be sufficient to make out the causes of action which the plaintiff seeks to advance. They establish only that certain officers of American, acting within the scope of their offices and employment, placed excessive production demands on the plaintiff which he did not meet or which they perceived he did not meet and as a result of which his employment was terminated.

If the imposition of those demands or the imposition of "penalties" was not warranted and in breach of the terms of the plaintiff's employment, then he might have a remedy for breach of contract but that is not alleged. It is conceded that American was entitled to terminate the employment but it is suggested that the events leading up to the termination constitute a conspiracy.

In my view paragraphs 442, 443 and 444 each describe, in somewhat different language, the same claim. They allege a conspiracy to injure the plaintiff by bringing about the termination of his employment.

Counsel for the defendants refers to Remedies in Tort, Volume 1, L.D. Rainaldi, Ed., Carswell, 1987, which contains a convenient discussion of the essential elements of the tort of conspiracy beginning at page 3-12. In summary, the plaintiff must plead and must prove the following:

1. An agreement, in the sense of a joint plan or common intention on the part of the defendants to do the act which is the object of the alleged conspiracy.
2. An overt act or acts consequent upon the agreement.
3. Resulting damage to the plaintiff.

The defendants must intend to be a party to the combination. Mere knowledge of or approval of or acquiescence in the act is not sufficient to establish the existence of a common plan or design. The defendants must have intentionally participated in the act with a view to furtherance of the common design and purpose.

Where the acts relied on are in themselves unlawful it is sufficient to show that the defendants' conduct was directed toward the plaintiff and that the defendants should have known that injury to the plaintiff would result. Where the means employed to carry out the plan are in themselves lawful the plaintiff must establish that the predominant purpose was to injure the plaintiff.

In my opinion, the facts as set out in the statement of claim, if proved, do not establish the agreement or combination amongst the defendants which is required to make out the tort of conspiracy.

I note, in the first place, that the plaintiff fails to allege which of the defendants were party to the alleged conspiracy. He simply says "two or more of them". I note, as well, that it is only the defendants American, Kaye and Shearer who figure in the events described in the preceding paragraphs which the plaintiff suggests establishes the conspiracy. It is clear, in my view, that no cause of action is pleaded as against Labelle.

The plaintiff alleges acts done variously by American, Kaye and Shearer. The acts alleged are not, in themselves, unlawful.

The plaintiff further alleges an intention on the part of the defendants to bring about the termination of the plaintiff's employment and thereby injure the plaintiff. However, in my view, the pleadings fall short of alleging facts which would establish the agreement or combination which the law requires.

The acts of these individuals which are complained of are ones which, in my view, clearly were done by them in their capacities as officers of American. It is not alleged that they were done outside the scope of their office or employment. On the contrary, the plaintiff admits in paragraph 9 that in their capacities as officers the individual defendants were acting within the scope of their employment. They were, in my view, not the acts of these individuals done pursuant to a common plan but the acts of one person, the corporate defendant, acting through its officers. A person cannot conspire with himself.

In Desimone v. Herrmann Group Ltd., Ontario Judgments [1991] No. 929, Ontario Court of Justice-General Division, June 3, 1991, the court was concerned with an analogous situation. One of the defendants applied to strike out portions of the statement of claim on the ground that they disclosed no reasonable cause of action against her. The plaintiff claimed he was wrongfully dismissed by his employer, a corporation. In the action he joined claims against an individual defendant (the applicant), who was a director of the corporate defendant, of conspiring to have the corporate defendant wrongfully dismiss him and inducing the corporate defendant to breach the contract of employment.

In dealing with the claim for inducing breach of contract Weiler, J. at page 2 said this:

> "The applicant and respondent agree that the facts of the tort of inducing breach of contract must be independent of the breach of contract itself, the wrongful dismissal, although they may arise out of the same set of circumstances.
>
> "The applicant says there are no facts pleaded against the individual defendant which are independent of the wrongful dismissal. A company can only act by its officers, servants or agents and if the individual defendant was acting within the scope of her employment, and therefore as the company's alter ego, the claim must fail: D.C. Thomson & Co. Ltd. v. Deakin, et al. [1952] 2 All E.R. 361 at 370 (c.A.) quoting from Winfield's Law of Torts 5th ed. (1950) p. 603."
>
> (emphasis added)

The learned judge concluded that the individual defendant was not acting outside the scope of her employment and struck that claim against her.

With respect to the conspiracy claim the learned judge said at page 3:

> "Paragraph 10 of the statement of claim alleges a conspiracy on the part of the individual and corporate defendants. One cannot conspire to breach a contract with oneself: Patterson v. Canadian Pacific Ry. Co. (1918), 38 D.L.R. 183 and see also Katz v. Tannenbaum (supra) p. 2, 'It is logical that an individual may not conspire with himself.'"
>
> "For the reasons given above in dealing with inducing breach of contract, this claim too must fail."

In my view, if one cannot conspire to breach a contract with oneself, then, a fortiori, one cannot conspire with oneself to terminate a contract in accordance with one's contractual rights. In my opinion the statement of claim fails to disclose a reasonable claim based on the tort of conspiracy.

Counsel for the plaintiff agreed with my suggestion that the cause of action sought to be described in paragraph 445 amounted to "intentionally inducing a 'rightful' termination of employment". The plaintiff faces the same difficulty here as he does in the case of the alleged conspiracy. The acts complained of were the acts of American and one cannot induce oneself to breach a contract, let alone induce oneself to not breach a contract. In any event, in my

respectful opinion, there is no such cause of action as that suggested by counsel for the plaintiff known in law. Absent proof of a conspiracy to injure, I cannot imagine a remedy for inducing the termination of an employee's employment in a manner in which the employer is justified.

In my opinion paragraphs 445 and 447 do not describe a cause of action. The actions complained of are not, in my view, actionable in there own right. Unless they were done in furtherance of a conspiracy to injure they afford no remedy to the plaintiff.

With respect to paragraph 446, apart from the highly doubtful nature of the cause of action for infliction of mental stress in conduct leading up to a termination of contract which is not wrongful (see Edwards v. Mutual Life Assurance Company of Canada (1982) 41 B.C.L.R. 162 (C.A.) and Vorvis v. Insurance Corporation of British Columbia (1989) 58 D.L.R. (4th) 193 (S.C.C.)), the plaintiff has not pleaded any facts which would establish "mental stress to such an extent as to be oppressive" in my view. I would strike this paragraph.

With respect to paragraph 448, there are no facts pleaded which in my view establish the fiduciary duty allegedly owed by American, let alone the breach of any such duty. In my view no reasonable claim for breach of fiduciary duty is pleaded or is capable of being pleaded in these circumstances.

With respect to paragraph 449, in my opinion there are no facts pleaded which can give rise to the duty which is suggested, namely, to protect the plaintiff from the actions of its officers and employees, carried out in the performance of their duties, in setting performance criteria on behalf of the company and in making decisions or carrying out decisions to terminate the plaintiff's employment when those criteria are not met.

The claim referred to in paragraph 450, as I understand it, arises because the plaintiff considers that the terms of a confidentiality agreement which he made with American as part of his employment is making it difficult for him to find a new position. Counsel does not suggest, however, that the confidentiality agreement is not enforceable. He seems to suggest that by concluding this agreement, the validity of which is not challenged, the employer has somehow covenanted not to rely on it if the employment was terminated other than for cause. In my opinion, there are no facts here which can establish the "fundamental obligation" alleged. There is no reasonable claim advanced by this paragraph in my view.

In summary, I am satisfied that the facts alleged in this statement of claim are not capable of supporting any reasonable claim for damages and that the proceeding ought to be dismissed.

The action will be dismissed with costs to the defendants at scale 3.

MASTER JOYCE

Re Lang Michener et al. and Fabian et al., [1987] O.J. No. 355

Ontario Judgments

Ontario

High Court of Justice

Henry J.

April 15, 1987

[1987] O.J. No. 355 | 59 O.R. (2d) 353 | 37 D.L.R. (4th) 685 | 16 C.P.C. (2d) 93 | 4 A.C.W.S. (3d) 141 | 1987 CanLII 172 | 1987 CarswellOnt 378

Counsel

M.R. Gray, for applicants.

J. Fabian, appearing in person and representing respondent company.

HENRY J.

1 This in an application for an order pursuant to s. 150 of the Courts of Justice Act, 1984 (Ont.), c. 11, which provides:

> 150(1) Where a judge of the Supreme Court is satisfied, on application, that a person has persistently and without reasonable grounds,
>
> (a) instituted vexatious proceedings in any court; or
>
> (b) conducted a proceeding in any court in a vexatious manner,
>
> the judge may order that,
>
> (c) no further proceeding be instituted by the person in any court; or
>
> (d) a proceeding previously instituted by the person in any court not be continued,
>
> except by leave to a judge of the Supreme Court.
>
> (2) An application under subsection (1) shall be made only with the consent of the Attorney General, and the Attorney General is entitled to be heard on the application.

2 The consent of the Attorney-General has been filed as required.

3 The facts, as they have been placed before me in the affidavits filed, are substantially as follows:

4 The respondent Jozsef Fabian was the unsuccessful plaintiff in a motor vehicle personal injury action which came to trial in November, 1982. After the trial, Mr. Fabian commenced an action for damages of $12 million for loss of credibility and loss of the personal injury action against Dr. Albert Irwin Margulies, a medical doctor who submitted a medico-legal report and gave evidence for the defence at trial of the personal injury action. The statement of claim against Dr. Margulies alleged that he maliciously falsified facts in his written report and in oral testimony, thereby discrediting Mr. Fabian personally as well as his claim in the personal injury action. This statement of claim against Dr. Margulies was struck out by Labrosse J. on January 30, 1984 [53 O.R. (2d) at p.

381], as disclosing no reasonable cause of action and the action was dismissed; this decision was affirmed by the Court of Appeal: see Fabian v. Margulies loc. cit. p. 380. Immediately thereafter Mr. Fabian commenced a second action for $42 million damages against Dr. Margulies, three solicitors in the law firm which acted for the defendants in the personal injury action, and the defendants' insurer. The statement of claim alleged that the solicitors were negligent for stalling the personal injury action, attempting to dismiss the action, introducing fraudulent documents, and that the insurer was negligent for financing the defence of the personal injury action. The statement of claim as against the three solicitors and the insurer was struck out on April 4, 1984, by Southey J. on the basis that no reasonable cause of action was disclosed and the action was dismissed. The statement of claim against Dr. Margulies was struck out by Southey J. on the same day on the ground that it was an attempt to litigate the point already decided by Labrosse J. and, as such, it was vexatious and an abuse of process; and as well that it disclosed no reasonable cause of action; Southey J. dismissed the action. Mr. Fabian unsuccessfully appealed the orders in both actions to the Ontario Court of Appeal. He then sought leave to appeal to the Supreme Court of Canada, first from the Ontario Court of Appeal, and then from the Supreme Court of Canada itself. The Supreme Court of Canada denied leave to appeal the decisions in both actions on November 6, 1986 [57 O.R. (2d) 576n].

5 The respondent Jozsef Fabian is an officer and a principal of the respondent Napraforgo Construction Ltd. In 1980, Napraforgo commenced action No. 553580/80 ("the 1980 action") against Janin Building & Civil Works Ltd. for payment pursuant to a construction subcontract. The action went to trial in September, 1984, before the Honourable Mr. Justice Holland. Fabian, who is not a solicitor, was permitted to conduct the action on behalf of Napraforgo. At the conclusion of a four-day trial, Holland J. gave judgment on September 27, 1984 [summarized 27 A.C.W.S. (2d) 379], by which Napraforgo was awarded $27,640.50, an amount which Janin had conceded was due at the outset of the trial, subject to its own counterclaim. Janin succeeded on its counterclaim, the amount to be determined by reference before the master, and to be set off against Napraforgo's recovery on the principal claim. Napraforgo unsuccessfully appealed the judgment of Mr. Justice Holland to the Ontario Court of Appeal [summarized 37 A.C.W.S. (2d) 277], Subsequently, Napraforgo sought leave to appeal to the Supreme Court of Canada from the Ontario Court of Appeal. Leave to appeal was denied. It then applied to the Supreme Court of Canada for leave to appeal to that court; that application was dismissed on March 26, 1987. The reference to determine the amount of Janin's recovery on its counterclaim has not yet been held in view of the pending appeals.

6 Meantime, the respondents Fabian and Napraforgo have commenced three further actions against Janin, its former solicitors and its present solicitors, respectively. These actions all ostensibly arise from Janin's conduct of its defence in the main action.

7 The first of these three related actions, No. 16210/84, was commenced on March 23, 1984, against the law firm Harries Houser for damages of $2 million. In that action, Jozsef Fabian, as plaintiff, alleged bad faith and negligence by Harries Houser in its conduct of the defence of the 1980 action on behalf of Janin. This action was prompted by:

(a) a motion by Janin to stay the 1980 action until Napraforgo had obtained legal counsel which was withdrawn, and

(b) the delivery by Janin of its documents brief for trial.

In response to the action, Harries Houser successfully brought a motion before the Honourable Mr. Justice Galligan on May 24, 1984, to strike out the statement of claim on the basis that it disclosed no cause of action; the action was dismissed. Mr. Fabian unsuccessfully appealed the decision of Galligan J. to the Ontario Court of Appeal who affirmed that no such action lies; he then applied to the Supreme Court of Canada for leave to appeal to the Supreme Court of Canada. His application for leave to appeal was struck from the list for failure to file proper material.

8 The second related action, No. 17565/84, was commenced by Napraforgo against Janin on May 7, 1984 (before trial of the main action). Damages of $3.25 million were sought by Napraforgo from Janin due to Janin's conduct of its defence in the main action. Specifically, Napraforgo alleged that Janin had included fraudulent documentation in its documents brief then prepared for trial; also included was a further claim for damages based on Janin's refusal to pay for work performed (the subject of the main action). Without notice to Janin or its solicitors, Fabian noted

pleadings closed against Janin. Janin subsequently brought a motion to strike the statement of claim as disclosing no cause of action, or alternatively, for leave to file a defence to the action. On September 4, 1984, the Honourable Madam Justice McKinlay ordered that the noting of pleadings closed be set aside and stayed all other proceedings in this action until after the trial of the main action. Despite the order of Madam Justice McKinlay staying the action, Fabian unsuccessfully attempted to bring the matter on for trial as an undefended action before the Honourable Mr. Justice Anderson on January 18, 1985, and again before the Honourable Mr. Justice Smith on April 8, 1985. Fabian then unsuccessfully sought leave to appeal the decisions of each of the Justices McKinlay, Anderson and Smith before the Honourable Mr. Justice Steele on May 24, 1985. The motion for leave to appeal was refused. Janin was unrepresented on the appearances before Smith and Steele JJ., as no notice of either hearing had been given to Janin or its solicitor. Although the action was stayed, Mr. Fabian brought a further motion before me as I shall indicate.

9 The third related action, No. 14903/86, arising out of Janin's defence to the main action was brought by Mr. Fabian as plaintiff against Janin's present solicitors, Lang Michener Lash Johnston, and Daniel R. Dowdall, the solicitor who has had conduct of the file throughout the time Harries Houser and Lang Michener have acted for Janin. The writ of summons was issued October 14, 1986. In the statement of claim, Mr. Fabian claims damages of $9.2 million. The conduct complained of includes the use of the allegedly improper document book filed by Janin's former solicitors, Harries Houser, and the submissions made by Mr. Dowdall at the trial of the main 1980 action and before the Court of Appeal. Mr. Fabian acknowledged to me in court that these matters had already been raised before Holland J. at the trial and also before the Court of Appeal and the Supreme Court of Canada on his application for leave to appeal. This action was in substance similar to No. 16210/84 against Harries Houser, which Galligan J. dismissed.

10 Fabian has indicated to the solicitor for Janin on various occasions that he would drop the related actions against Harries Houser and Lang Michener if Janin would make a settlement favourable to Napraforgo in the 1980 action.

11 Awards of costs have been made against Fabian and Napraforgo, and have not been paid. Mr. Fabian has indicated on numerous occasions that he is on welfare and has persistently declined to have counsel represent Napraforgo as required by the rules of civil procedure.

12 Mr. Fabian has taken appeals in all the actions which have been determined at the Supreme Court of Ontario level. In more than one action, he has sought leave to appeal to the Supreme Court of Canada first from the Ontario Court of Appeal and subsequently from the Supreme Court of Canada itself, and has been unsuccessful on all occasions.

13 Mr. Fabian has, on several occasions, attempted to note pleadings closed without notice, and has taken interlocutory applications and appeals without notice to the solicitors for the responding party.

14 Fabian has made numerous allegations of bad faith and bias against Janin, Janin's solicitors, solicitors acting for the defendants in the personal injury action.

15 Mr. Fabian also commenced legal proceedings in the Supreme Court of Ontario against the Attorney-General of Ontario by issuing a writ of summons on May 7, 1984, together with a statement of claim, in action No. 17563/84. Mr. Fabian's claim against the Attorney-General was for malicious false imprisonment, conflict of interest, police harassment and damages of $1,854,000.

16 In response to these proceedings the Attorney-General brought a motion to strike out the statement of claim as disclosing no cause of action, being frivolous and vexatious, and raising matters which were res judicata. That motion was heard on July 9, 1984, by Griffiths J., who ordered that the statement of claim be struck out and the action dismissed. Mr. Fabian appealed that decision to the Court of Appeal; the appeal was heard on January 24, 1986, by a panel of three judges: Brooke, Morden and Finlayson JJ.A.; the appeal was dismissed and Mr. Fabian was ordered to pay costs if demanded.

17 Mr. Fabian subsequently sought leave to appeal to the Supreme Court of Canada, claiming that the Court of Appeal had "admitted malice concerning malicious false imprisonment" by the Attorney-General. Application for leave to appeal was heard by a panel composed of Blair, Thorson and Grange JJ.A. on November 3, 1986, and leave to appeal was refused. Following that, Mr. Fabian served a notice of motion in the Supreme Court of Canada for an extension of time and leave to appeal to that court. The application for leave to appeal was heard by the Supreme Court of Canada on January 27, 1987, and was dismissed by endorsement issued March 26, 1987.

18 I have been referred to the following judicial decisions by counsel for the applicants: Foy v. Foy (No. 2) (1979), 26 O.R. (2d) 220 at p. 226, 102 D.L.R. (3d) 342 at p. 348, 12 C.P.C. 188 (Ont. C.A.); Re Kitchener-Waterloo Record Ltd. and Weber (1986), 53 O.R. (2d) 687 at p. 693 (Ont. S.C.); Re Law Society of Upper Canada and Zikov (1984), 47 C.P.C. 42 (Ont. S.C.).

19 From these decisions the following principles may be extracted:

(a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;

(b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;

(c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;

(d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;

(e) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;

(f) the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;

(g) the respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings.

20 There are three additional matters to which I must refer. Although he had unsuccessfully sought leave to appeal the decisions of McKinlay, Anderson and Smith JJ. before Mr. Justice Steele, who refused leave, Mr. Fabian brought a further motion before me to reopen that matter and, in effect, again to seek leave to appeal from the decisions of those four judges; I dismissed that motion on March 6, 1987, on the ground that he had already exhausted his rights of appeal.

21 Second, at the same time as I heard argument in the present application on April 3rd, I heard the remainder of the motion brought before McKinlay J. on September 4, 1984, in No. 17565/ 84, which action had been stayed by her until after the trial of the 1980 action in Napraforgo v. Janin [unreported]. As Mr. Fabian and Napraforgo had exhausted all avenues of appeal in the 1980 action, I dealt with the remainder of the motion, lifting the stay to do so. The statement of claim seeks damages for $3.2 million for:

(a) refusal by Janin to pay for work done under the subcontract; this is a claim already raised and adjudicated by Holland J. at trial in the main (1980) action;

(b) added is a claim for damages for destruction of Napraforgo's business by the failure of Janin to pay for the work done; that claim ought to have been made at trial before Holland J. and it is now too late to do so and becomes res judicata as a result;

(c) introduction of fraudulent documents, a matter already raised at the subsequent trial and in later proceedings including the appellate courts;

(d) using the legal system to obtain money under false pretenses; complaints of conduct of defendant's counsel, alleged perjury of a witness and the alleged falsity of documents were all raised, as Mr. Fabian agreed in court, before Holland J. and in the Court of Appeal and Supreme Court of Canada (on application for leave to appeal) in the 1980 action. Otherwise, Holland J. has disposed of the claim and counterclaim in his judgment which awarded relief to both parties and was upheld on appeal.

22 I therefore concluded that the matters raised in the action which was before McKinlay J. raised matters and grounds of relief which had already been disposed of or should have been raised in the main 1980 action. Those matters are by now res judicata and the continuation of action No. 17565/84, in my opinion, constitutes an abuse of the process of the court. I have therefore dismissed that action.

23 Third, at the same time I heard the motion brought by Lang and Michener as defendants in the action brought against them by Mr. Fabian, to strike out the statement of claim as disclosing no reasonable cause of action. I was unable to find a proper cause of action on the statement of claim and I accordingly struck out the statement of claim and dismissed the action; I add that, in that proceeding, matters were raised with respect to the conduct of the defence by Janin and its counsel and a witness which Mr. Fabian alleged was improper, fraudulent and misleading, matters which had already been disposed of in the 1980 action tried by Holland J. and raised also in the Court of Appeal and on the application for leave to appeal to Supreme Court of Canada. The action against Lang, Michener must be regarded as vexatious and an abuse of the process of the court, and I have struck out the statement of claim and dismissed it.

24 On the basis of the foregoing facts, including the three matters which I disposed of in the motions before me, the conclusion is inescapable that Mr. Fabian's conduct as a litigant, as appears from the over-all review of his numerous proceedings in the courts, has brought himself within all of the principles emerging from the judicial decisions to which I have referred.

25 I have no hesitation in finding on the factual material before me that he has instituted vexatious proceedings in this court and in the appellate courts, and has conducted proceedings in the courts in a vexatious manner, within the meaning of s. 150(1) of the Courts of Justice Act, 1984.

26 I, therefore, have endorsed the application record that the following order shall issue:

(a) an order that no further proceedings be instituted by Jozsef Fabian and Napraforgo Construction Ltd. in any court, except by leave of a judge of the Supreme Court;

(b) an order that proceedings previously instituted by Jozsef Fabian against Harries Houser in Supreme Court Action No. 16210/84 and against Lang Michener Lash Johnston and Daniel Dowdall in Supreme Court Action No. 14903/86 not be continued except by leave of a judge of the Supreme Court;

(c) an order that proceedings in Supreme Court Actions Nos. 53358/80 and 17565/84 by Napraforgo Construction Ltd. against Janin Building & Civil Works Ltd. not be continued, except by leave of a judge of the Supreme Court, save and except for the reference to determine the amount due to Janin on its counterclaim, which was ordered by Mr. Justice Holland on September 27, 1985, following the trial in action No. 53358/80.

27 If costs are asked, the matter may be spoken to.

Order accordingly.

Li v. British Columbia, [2021] B.C.J. No. 1405

British Columbia Judgments

British Columbia Court of Appeal

Vancouver, British Columbia

B. Fisher, S.A. Griffin and P.G. Voith JJ.A.

Heard: October 28-30, 2020.

Judgment: June 29, 2021.

Docket: CA46520

[2021] B.C.J. No. 1405 | 2021 BCCA 256 | 491 C.R.R. (2d) 243

Between Jing Li, Appellant (Plaintiff), and Her Majesty the Queen in Right of the Province of British Columbia, Respondent (Defendant), and International Commission of Jurists Canada, Intervenor BROUGHT PURSUANT TO the Class Proceedings Act, R.S.B.C. 1996, c. 50

(234 paras.)

Case Summary

Constitutional law — Constitutional validity of legislation — Level of government — Provincial or territorial legislation — Interpretive and constructive doctrines — Paramountcy doctrine — Pith and substance — Appeal by Li from dismissal of her action that challenged constitutionality of amendments to Property Transfer Tax Act dismissed — Amendments imposed additional transfer tax on foreign purchasers of residential property in specified areas of province — Amendments were matter in relation to property and civil rights under s. 92(13) of Constitution Act and were not ultra vires province — Legislation was not inoperative under federal paramountcy doctrine as there was no operational conflict with Citizenship Act or NAFTA — Legislation did not violate s. 15(1) of Charter — Property Transfer Tax Act.

Constitutional law — Division of powers — Federal jurisdiction — Federal powers (Constitution Act, 1867, s. 91) — Provincial jurisdiction — Provincial powers (Constitution Act, 1867, s. 92) — Direct taxation within the province — Property and civil rights — Determination of jurisdiction — Appeal by Li from dismissal of her action that challenged constitutionality of amendments to Property Transfer Tax Act dismissed — Amendments imposed additional transfer tax on foreign purchasers of residential property in specified areas of province — Amendments were matter in relation to property and civil rights under s. 92(13) of Constitution Act and were not ultra vires province — Legislation was not inoperative under federal paramountcy doctrine as there was no operational conflict with Citizenship Act or NAFTA — Legislation did not violate s. 15(1) of Charter — Property Transfer Tax Act.

Constitutional law — Canadian Charter of Rights and Freedoms — Equality rights — Appeal by Li from dismissal of her action that challenged constitutionality of amendments to Property Transfer Tax Act dismissed — Amendments imposed additional transfer tax on foreign purchasers of residential property in specified areas of province — Amendments were matter in relation to property and civil rights under s. 92(13) of Constitution Act and were not ultra vires province — Legislation was not inoperative under federal paramountcy doctrine as there was no operational conflict with Citizenship Act or NAFTA — Legislation did not violate s. 15(1) of Charter — Property Transfer Tax Act.

Real property law — Real property tax — Land transfer tax — Foreign buyers tax — Appeal by Li from

dismissal of her action that challenged constitutionality of amendments to Property Transfer Tax Act dismissed — Amendments imposed additional transfer tax on foreign purchasers of residential property in specified areas of province — Amendments were matter in relation to property and civil rights under s. 92(13) of Constitution Act and were not ultra vires province — Legislation was not inoperative under federal paramountcy doctrine as there was no operational conflict with Citizenship Act or NAFTA — Legislation did not violate s. 15(1) of Charter — Property Transfer Tax Act.

Real property law — Proceedings — Constitutional issues — Federal v. provincial jurisdiction — Canadian Charter of Rights and Freedoms — Appeal by Li from dismissal of her action that challenged constitutionality of amendments to Property Transfer Tax Act dismissed — Amendments imposed additional transfer tax on foreign purchasers of residential property in specified areas of province — Amendments were matter in relation to property and civil rights under s. 92(13) of Constitution Act and were not ultra vires province — Legislation was not inoperative under federal paramountcy doctrine as there was no operational conflict with Citizenship Act or NAFTA — Legislation did not violate s. 15(1) of Charter — Property Transfer Tax Act.

Taxation — Provincial and territorial taxation — Constitutional validity of provincial or territorial tax — Land taxes — British Columbia — Appeal by Li from dismissal of her action that challenged constitutionality of amendments to Property Transfer Tax Act dismissed — Amendments imposed additional transfer tax on foreign purchasers of residential property in specified areas of province — Amendments were matter in relation to property and civil rights under s. 92(13) of Constitution Act and were not ultra vires province — Legislation was not inoperative under federal paramountcy doctrine as there was no operational conflict with Citizenship Act or NAFTA — Legislation did not violate s. 15(1) of Charter — Property Transfer Tax Act.

Appeal by Li from the dismissal of her action that challenged the constitutionality of amendments to the Property Transfer Tax Act. The amendments imposed an additional transfer tax on foreign purchasers of residential property in specified areas of the province where foreign demand had been shown to contribute to rising prices. The appellant was a Chinese citizen who moved to British Columbia in 2016. She held a valid work permit but was not a permanent resident of Canada. In 2016, she purchased a residential property in Langley and was required to pay the additional 15 per cent property transfer tax.
HELD: Appeal dismissed.

The amendments were not ultra vires the province. The dominant purpose of the tax, its pith and substance, was to address the problem of housing affordability by discouraging foreign nationals from purchasing residential property in specified areas, which was a matter in relation to property and civil rights under s. 92(13) of the Constitution Act and only incidentally affected the federal powers over aliens and international trade. The legislation was not inoperable under the federal paramountcy doctrine. There was no operational conflict between the legislation and the Citizenship Act or the North American Free Trade Agreement (ôNAFTAö). The additional tax did not prevent foreign nationals from acquiring and owning residential property but simply imposed a more stringent requirement on them to pay a higher transfer tax on purchase. The legislation did not violate s. 15(1) of the Charter. The provisions did not create a distinction based on citizenship or national origin. They created a distinction based on immigration status, which was not an enumerated or analogous ground under s. 15 of the Charter. They did not perpetuate a real disadvantage to the group of non-citizens affected by the tax. No negative stereotypical assumption made against the affected subset of non-citizens was perpetuated by the tax. The tax was not predicated on anti-Chinese prejudice.

Statutes, Regulations and Rules Cited:

An Act respecting Naturalization and Aliens, S.C. 1881, c. 13

Canada Act 1982(UK), 1982, c. 11

Canadian Charter of Rights and Freedoms, 1982, s. 1, s. 6, s. 6(2), s. 6(2)(a), s. 6(3)(b), s. 15, s. 15(1)

Citizenship Act, R.S.C. 1985, c. C-29, s. 24(1), s. 34, s. 35, s. 35(1), s. 35(3), s. 35(3)(b), s. 37

Class Proceedings Act, R.S.B.C. 1996, c. 50

Commercial Arbitration Act, R.S.C. 1985, c. 17 (2nd Supp.)

Constitution Act, 1867 (UK), 30 & 31 Vict., c. 3, s. 91, s. 91(2), s. 91(24), s. 91(25), s. 92, s. 92(1), s. 92(2), s. 92(13), s. 132

Constitution Act, 1982, s. 35

Home Owner Grant Act, R.S.B.C. 1996, c. 194

Immigration Act, R.S.C. 1985, c. I-2

Immigration and Refugee Protection Act, S.C. 2001, c. 27

Land Act, R.S.B.C. 1996, c. 245

Land Tax Deferment Act, R.S.B.C. 1996, c. 249

NAFTA Implementation Act, s. 4, s. 9, s. 10, s. 22, s. 50, s. 241

Naturalization Act, 1870, 33 Vic. c. 14

Notaries Act, R.S.B.C. 1996, c. 334

Patent Act, R.S.C. 1985, c. P-4

Property Transfer Tax Act, R.S.B.C. 1996, c. 378, s. 2.01, s. 2.04

Property Transfer Tax Regulation, B.C. Reg. 74/88 <LEGISLAITON/> Public Service Employment Act, R.S.C. 1985, c. P-33

World Trade Organization Agreement Implementation Act, S.C. 1994, c. 47

Youth Criminal Justice Act, S.C. 2002, c. 1, s. 37(10)

Court Summary:

The appellant challenges the constitutionality of amendments to the Property Transfer Tax Act, R.S.B.C. 1996, c. 378 that impose an additional transfer tax on foreign purchasers of residential property in specified areas of the province. She raises three grounds: (1) the tax is properly classified as legislation in relation to the federal power over naturalization and aliens under s. 91(25) or international trade under s. 91(2) of the Constitution Act, and therefore ultra vires the Province; (2) alternatively, the legislation is inoperable under the federal paramountcy doctrine as it is in operational conflict with s. 34 of the Citizenship Act, R.S.C. 1985, c. C-29 and Canada's obligations under Chapter 11 of the North American Free Trade Agreement, and also frustrates the purpose of s. 35 of the Citizenship Act and NAFTA; and (3) the tax infringes her equality rights under s. 15 of the Charter on the basis of citizenship or national origin.

Held: Appeal dismissed.

(1) The amendments are not ultra vires the province. The dominant purpose of the tax is to address the problem of housing affordability in specified areas of the province by discouraging foreign nationals from purchasing residential property in those areas, thereby reducing demand. This is a matter in relation to property and civil rights under s. 92(13) of the Constitution Act and only incidentally affects the federal powers over aliens and international trade.

(2) The legislation is not inoperable under the federal paramountcy doctrine. There is no operational conflict with s. 34 of the Citizenship Act, which permits non-citizens to take, acquire, hold and dispose of real and personal property "in the same manner in all respects as by a citizen". This provision was intended to reverse the common law disability for non-citizens to acquire, hold and transfer land to their heirs and the tax simply imposes a more stringent requirement on some non-citizens to pay a higher tax on the purchase of certain kinds of real property. There is no operational conflict or frustration of purpose with NAFTA because Chapter 11 has not been implemented into federal domestic law. There is no frustration of purpose with s. 35 of the Citizenship Act because it has never been proclaimed in British Columbia and has no legal effect in this province.

(3) The legislation does not violate s. 15(1) of the Charter. The appellant has not established that the tax provisions create a distinction, direct or indirect, based on either citizenship or national origin. The tax creates a distinction based on immigration status, which is not an enumerated or analogous ground under s. 15. Even if a distinction can be said to be based on citizenship, the tax provisions do not have the effect of perpetuating a real disadvantage to the group of non-citizens affected by the tax in the social and political context of the claim. In addition, even if a distinction can be said to be based on national origin, the appellant has not established that the tax has a disproportionate adverse impact on a sub-group of buyers from China.

Appeal From:

On appeal from an order of the Supreme Court of British Columbia, dated October 24, 2019 (*Li v. British Columbia*, 2019 BCSC 1819, Vancouver Docket S168644).

Counsel

Counsel for the Appellant, (via videoconference): J.J.M. Arvay, Q.C., D. Wu, L. Brasil, A. Sharon.

Counsel for the Respondent, (via videoconference): S.A. Bevan, M.A. Witten.

Counsel for the Intervenor, (via videoconference): G. van Ert.

Table of Contents

Reasons for Judgment

The judgment of the Court was delivered by

B. FISHER J.A.

1 This appeal concerns the constitutionality of an additional property transfer tax imposed by the Province of British Columbia, known as the foreign buyer's tax. At the time the tax was brought into force in August 2016, it imposed an additional 15% transfer tax on a purchaser of residential property in the Greater Vancouver Regional District who was not a Canadian citizen or permanent resident. The tax was subsequently increased to 20% and expanded to include several other regional districts in the province.

2 The appellant is a Chinese citizen who moved to Canada in 2011 and to British Columbia in June 2016. She held a valid work permit but was not a permanent resident of Canada. On July 13, 2016, she purchased a residential property in Langley, with a closing date of November 14, 2016. She was required to pay the additional 15% property transfer tax when she completed the sale and registered the transfer of the property.

3 The appellant challenges the foreign buyer's tax legislation, contained in ss. 2.01 to 2.04 of the *Property Transfer Tax Act*, R.S.B.C. 1996, c. 378 [the *PTTA*], on the basis that it is *ultra vires* the Province, inoperative under the federal paramountcy doctrine, and unjustifiably infringes her rights under s. 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [the *Charter*]. Her action was dismissed in the court below after a 21-day summary trial. In this appeal, she contends that the trial judge erred in his legal analysis on each issue and in his determinations on the admissibility of expert evidence.

4 For the reasons that follow, I have concluded that the impugned provisions of the *PTTA* were validly enacted by the provincial legislature and do not infringe the appellant's equality rights under s. 15 of the *Charter*.

The tax in context

5 Under the *PTTA*, a purchaser of real property in the province is required to pay a transfer tax when registering the transaction at the land title office, unless eligible for an exemption. The tax is calculated at rates of 1-5% of the fair market value of the property: 1% on the first $200,000, 2% on the value over $200,000 up to $2,000,000, 3% on the value over $2,000,000, and 5% on the value over $3,000,000.

6 There is no dispute that housing affordability has been a problem in Greater Vancouver (the GVRD) for some time. It had reached a critical level by June 2016, when prices of residential property had increased significantly from the previous 12 months -- almost 40% for single-family homes and just over 30% for condominiums. As of July 2016, the average price for a single-family home was about $1.2 million. The growth of incomes has not matched these increases.

7 The government of the day considered a number of options to calm the residential real estate market and increase affordability, and in June 2016 decided to enact several housing measures. It amended the *PTTA* to require the collection of information regarding the citizenship and permanent residence of transferees and collected data of property transfers for the period from June 10, 2016 to July 14, 2016. This data revealed that 6.6% of the residential transactions in the province during that month involved foreign buyers, which was a cumulative investment of over $1 billion. The proportion of those transactions in the GVRD was 9.7%.

8 Amendments to the *PTTA* in August 2016 required the payment of an additional 15% tax on the transfer of residential property in a specified area (the GVRD) where the purchaser is a "foreign entity" (defined as a "foreign national" or a "foreign corporation"1), a "taxable trustee"2 or both. A "foreign national" is defined by reference to the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [the *IRPA*], which is a person who is not a Canadian citizen or permanent resident of Canada.

9 In 2017, amendments were made to the *Property Transfer Tax Regulation*, B.C. Reg. 74/88 to exempt or refund foreign nationals who were close to obtaining permanent resident status and who lived or intended to live in the property: provincial nominees under the B.C. Provincial Nominee Program, and those who became citizens or permanent residents within one year of the registration date of the property transfer. In 2018, the tax rate was increased to 20% and expanded to include the regional districts of the Capital, Central Okanagan, Fraser Valley and Nanaimo.

10 It is important to note that the foreign buyers tax applies to only one segment of the real estate market -- residential property -- and only in areas where foreign demand has been shown to contribute to rising prices. It also applies only to individuals with no permanent or imminently permanent status in Canada or entities without ties to Canada. Foreign nationals who do not wish to pay the additional tax remain free to purchase non-residential property or residential property in areas unaffected by the tax.

Constitutional and statutory provisions

11 The subject-matters of constitutional authority between Parliament and provincial legislatures that are relevant to this case are found in the following subsections of ss. 91 and 92 of the *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3 [the *Constitution Act*]*:*

> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing

Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say...

2. The Regulation of Trade and Commerce.

...

25. Naturalization and Aliens.

...

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say...

2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

...

13. Property and Civil Rights in the Province.

12 Related to the federal power over "Naturalization and Aliens" are ss. 34 and 35 of the *Citizenship Act*, R.S.C. 1985, c. C-29:

34 Subject to section 35,

(a) real and personal property of every description may be taken, acquired, held and disposed of by a person who is not a citizen in the same manner in all respects as by a citizen; and

(b) a title to real and personal property of every description may be derived through, from or in succession to a person who is not a citizen in the same manner in all respects as though through, from or in succession to a citizen.

35 (1) Subject to subsection (3), the Lieutenant Governor in Council of a province or such other person or authority in the province as is designated by the Lieutenant Governor in Council thereof is authorized to prohibit, annul or in any manner restrict the taking or acquisition directly or indirectly of, or the succession to, any interest in real property located in the province by persons who are not citizens or by corporations or associations that are effectively controlled by persons who are not citizens.

(2) The Lieutenant Governor in Council of a province may make regulations applicable in the province for the purposes of determining

(a) what transactions constitute a direct or an indirect taking or acquisition of any interest in real property located in the province;

(b) what constitutes effective control of a corporation or association by persons who are not citizens; and

(c) what constitutes an association.

(3) Subsections (1) and (2) do not operate so as to authorize or permit the Lieutenant Governor in Council of a province, or such other person or authority as is designated by the Lieutenant Governor in Council thereof, to make any decision or take any action that

(a) prohibits, annuls or restricts the taking or acquisition directly or indirectly of, or the succession to, any interest in real property located in a province by a permanent resident within the meaning of subsection 2(1) of the Immigration and *Refugee Protection Act*;

(b) conflicts with any legal obligation of Canada under any international law, custom or agreement;

(c) discriminates as between persons who are not citizens on the basis of their nationalities, except in so far as more favourable treatment is required by any legal obligation of Canada under any international law, custom or agreement;

(d) hinders any foreign state in taking or acquiring real property located in a province for diplomatic or consular purposes; or

(e) prohibits, annuls or restricts the taking or acquisition directly or indirectly of any interest in real property located in a province by any person in the course or as a result of an investment that the Minister is satisfied or is deemed to be satisfied is likely to be of net benefit to Canada under the *Investment Canada Act*.

13 The provisions of the *Charter* relevant to this case are found in ss. 1 and 15:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

...

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The issues

14 The issues before this court are essentially the same as those before the court below, and raise primarily questions of constitutional law. The appellant challenges the foreign buyer's tax legislation in three ways:

1. The tax is properly classified as legislation in relation to the federal power of naturalization and aliens under s. 91(25) of the *Constitution Act*, or alternatively the federal power over international trade and commerce under s. 91(2), and is therefore *ultra vires* the Province.
2. If the tax is *intra vires*, the legislation is inoperable by virtue of the doctrine of federal paramountcy, as it is in operational conflict with s. 34 of the *Citizenship Act* and Canada's obligations under the *Northern American Free Trade Agreement* [*NAFTA*], and it also frustrates the purpose of *NAFTA* and s. 35 of the *Citizenship Act*.
3. The tax infringes the appellant's equality rights under s. 15 of the *Charter*, as it discriminates against her on the basis of citizenship or national origin, and is not justified under s. 1.

15 The appellant also disputes some of the trial judge's rulings on the admissibility of expert evidence and his apprehension of the evidence, which is primarily related to her challenge under s. 15 of the *Charter*.

16 The Province's position is that the tax is properly classified as legislation in relation to its powers of direct taxation under s. 92(2) and property and civil rights under s. 92(13) of the *Constitution Act*, and is not in operational conflict with federal legislation. The Province also says that the legislation does not infringe the appellant's rights under s. 15 of the *Charter*, or alternatively is demonstrably justified as a reasonable limit under s. 1. Finally, the Province says that the trial judge made no error in principle or palpable or overriding errors in his evidentiary rulings or his treatment of the evidence.

17 I would define the issues as follows:

1. Did the trial judge err in characterizing the tax provisions and classifying them as legislation in relation to the provincial powers under ss. 92(2) and (13) of the *Constitution Act*?
2. Did the trial judge err in concluding that the tax provisions were not inoperative under the federal paramountcy doctrine:
   a) Is the legislation in operational conflict with s. 34 of the *Citizenship Act*?
   b) Is the legislation in operational conflict or does it frustrate the purpose of Canada's obligations under *NAFTA*?

3. Did the trial judge err

   a) in concluding that the tax provisions did not infringe the appellant's equality rights under s. 15 on the basis of citizenship or national origin;

   b) in excluding some of the expert evidence adduced by the appellant or in assessing the evidence relevant to the appellant's equality rights under s. 15 of the *Charter*?

4. Did the trial judge err in concluding that the tax provisions were nevertheless justified as a reasonable limit under s. 1 of the *Charter*?

Constitutional principles of federalism

18 I do not propose to delve into the details of the constitutional principles of federalism but rather to provide a brief overview of the principles that are relevant to the issues raised in this appeal: the doctrines of pith and substance, paramountcy, and interjurisdictional immunity.

19 A two-stage analytical framework for reviewing legislation on federalism grounds is well established in the jurisprudence: (1) determine the "pith and substance" or essential character of the law, and (2) classify that essential character by reference to the heads of power under the *Constitution Act* to determine whether the law comes within the jurisdiction of the enacting government: *Reference re: Firearms Act*, 2000 SCC 31 at para. 15; *Reference re: Pan-Canadian Securities Regulation*, 2018 SCC 48 at para. 86; *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 at para. 26.

20 Determining the pith and substance requires an examination of the law's purpose and its legal and practical effects. The purpose may be ascertained by reference to statements in the legislation itself, by extrinsic material such as Hansard and government publications, or by considering the problem sought to be remedied (the "mischief" approach). The legal effects of a law flow directly from its provisions and the practical effects from their application: *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para. 51. This inquiry focuses on how the law sets out to achieve its purpose, not whether it is likely to do so. However, where the effects of the law diverge substantially from its stated purpose, this may suggest a purpose other than the stated purpose: *Reference re: Firearms Act* at paras. 16-18; *Reference re Genetic Non-Discrimination Act* at paras. 30, 34, 51. Therefore, it is always necessary to ascertain the true purpose of the law: *Canadian Western Bank v. Alberta*, 2007 SCC 22 at para. 27.

21 Legislation may have more than one purpose, but it is the dominant purpose that is decisive to its essential character. As long as the dominant purpose is within the jurisdiction of the legislature that enacted it, its secondary objectives and effects will not impact on its constitutionality, as "merely incidental effects will not disturb the constitutionality of an otherwise *intra vires* law": *Canadian Western Bank* at para. 28, citing *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21 at para. 23.

22 The second step of the analysis is to determine whether the law as characterized falls within the jurisdiction of the enacting legislature. This requires an examination of the heads of power under ss. 91 and 92 of the *Constitution Act* and a determination of what the matter is "in relation to". This is not an exact science, as in a federal system, laws in relation to the jurisdiction of one level of government may have "incidental effects" on the jurisdiction of the other. There is also a presumption of constitutionality, which means that the appellant, as the party challenging the legislation, must show that the impugned provisions of the *PTTA* do not fall within provincial jurisdiction: *Reference re: Firearms Act* at paras. 25-26.

23 If an analysis of the pith and substance of a law has resulted in a determination of validity, the doctrine of paramountcy may come into play. As summarized by Justice Newbury in *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181:

> [17] ...Paramountcy applies where the *validly enacted laws* of two levels of government conflict or the purpose of the federal law is 'frustrated' by the operation of the provincial law. Where this occurs, the provincial law will be rendered inoperative to the extent necessary to eliminate the conflict or frustration of

> purpose. In recent decades, the Supreme Court of Canada has viewed paramountcy with greater scrutiny than older authorities suggested, and has encouraged "co-operative federalism" and a "flexible" approach to constitutional interpretation where possible consistent with the *Constitution Act*. (See, e.g. *Canadian Western Bank (2007)* at para. 24; *Québec (Attorney General) v. Canada (Attorney General) (2015)* at para. 17; *Alberta (Attorney General) v. Moloney (2015)* at para. 27; *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd. (2015)* at paras. 22-3; *Reference re Pan-Canadian Securities Regulation (2018)* at para. 18; *Orphan Well Association v. Grant Thornton Ltd. (2019)* at para. 66.
>
> [Emphasis in original.]

24 A conflict will arise in one of two situations: (1) there is an operational conflict because it is not possible to comply with both laws, or (2) while it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal law: *Alberta (Attorney General) v. Moloney*, 2015 SCC 51 at para. 18 [*Moloney*]. The burden of proving a conflict is on the party alleging it, and the standard is high. As Justice Gascon said in *Moloney*:

> [27] ...In keeping with co-operative federalism, the doctrine of paramountcy is applied with restraint. It is presumed that Parliament intends its laws to co-exist with provincial laws. Absent a genuine inconsistency, courts will favour an interpretation of the federal legislation that allows the concurrent operation of both laws...

25 Although the application of the doctrine of interjurisdictional immunity is not in issue in this appeal, the doctrine has some relevance to the appellant's submissions on the scope of the federal power over aliens under s. 91(25). Justice Newbury provided a succinct summary of this doctrine in *Reference re Environmental Management Act*:

> [18] The more complex doctrine of interjurisdictional immunity applies when a *valid* law of a province trenches upon, or impairs the "core" of, a *matter* under exclusive federal jurisdiction. (In theory at least, the principle can also operate the other way around: *Canadian Western Bank (2007)* at para. 35.) In early cases involving federal undertakings, it was applied where the provincial law "sterilized" or "paralyzed" the federal undertaking, but the doctrine expanded to include laws that "affected" a "vital part" of the undertaking: *Commission du Salaire Minimum v. Bell Telephone Company of Canada (1966)* ("*Bell (1966)*"). In later cases, the doctrine was modified to require the *impairment* of a vital part of the undertaking. More recently, however, the difficulties inherent in applying the doctrine led the Supreme Court to suggest in *Canadian Western Bank (2007)* that it should be used "with restraint" in future...
>
> [Emphasis in original.]

26 Finally, when these various constitutional doctrines are applied, account must also be taken of the principle of co-operative federalism. This principle "favours, where possible, the concurrent operation of statutes enacted by governments at both levels": see *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23 at para. 38, and the cases cited therein.

1. Did the trial judge err in characterizing the tax provisions and classifying them as legislation in relation to the provincial powers under ss. 92(2) and (13) of the Constitution Act?

27 Before addressing this issue, it is important to explain the use of the terms "alien" and "citizen". At the time of Confederation in 1867, Canadian citizenship did not exist. An "alien" was a person who was not a British Subject and "naturalization" was the granting of that status to those born outside the British Empire. The concept of Canadian citizenship was created in 1947 with a new *Citizenship Act*, and by 1976, an "alien" became more simply "a person who is not a Canadian citizen". Hence, the words "Naturalization and Aliens" in s. 91(25) of the *Constitution Act* have today a slightly different meaning in the context of Canada's independent status as a nation: see Peter Hogg, *Constitutional Law of Canada*, 5th ed. Supplemented (Toronto: Thomson Reuters, 2007) (loose-leaf updated 2019, release 1) at 26.3 [Hogg]. The term "alien" is no longer used, but given the language in s. 91(25) and its jurisprudence, I will refer to both "alien" and "non-citizen" to mean the same thing.

28 The appellant bases her submission on the fact that the impugned tax provisions of the *PTTA* single out

"aliens", and she suggests that the law would have been constitutional had it applied to all non-residents, whether citizens or non-citizens.

29 The appellant submits, as she did before the trial judge, that the tax provisions fall within the federal power in relation to "Naturalization and Aliens" under s. 91(25) of the *Constitution Act*. She contends that the purpose and intended effect of the tax is to alter the behaviour of foreign nationals (aliens) and discourage them from participating in the local real estate market, and the fact that the tax only applies to foreign nationals is sufficient to determine that it falls within s. 91(25). Alternatively, the appellant submits that the tax provisions fall within the federal power over international trade and commerce under s. 91(2), on the basis that the tax is intended to restrict the flow of foreign capital into British Columbia.

The decision below

30 The trial judge began his analysis by determining the pith and substance, or dominant purpose, of the tax provisions. In doing so, he considered extrinsic evidence contained in Hansard as well as the data collected under the *PTTA* in the month following June 10, 2016 (referenced above):

> [111] The results of the first full month collection of data showed that 9.7% of residential real estate transactions in the GVRD involved foreign nationals. This represented a transactional value of $885,393,373. In the City of Vancouver the percentage was 10.9%, 17.7% in the City of Burnaby and 18.2% in the City of Richmond.
>
> [112] With that background, the objectives of the Amendments are readily discernable from the legislative debates in British Columbia before they were enacted. For example, Minister of Finance, Michael De Jong, said that the Amendments "...are intended to make home ownership more available, more affordable. It establishes a fund for market housing and rental initiatives... (Cleary affidavit #1, pp. 85-86; Hansard p. 13379-80) and further "...the volume of [foreign] capital in the face of our economy's ability to meet that demand appears to need further measures to help our local residents afford to realize their dream of owning a home." (Cleary affidavit #1 p. 86, Hansard, p. 13387). The Minister of Finance went on to say, "I cannot say with certainty - nor will I endeavour to do so - what the additional revenues from the additional property transfer tax on foreign nationals will be, but the intention is to allocate all those revenues to the new housing priority initiatives fund." (Cleary affidavit #1 p. 87; Hansard, p. 13381.
>
> [113] In Committee, the Finance Minister stated, "We have decided to apply an additional tax measure that is significant and designed to discourage foreign nationals from purchasing residential property within Metro Vancouver." (Cleary affidavit #1, Ex. G; Hansard July 28, 2016, PM, page 46)

31 The judge found that the dominant purpose of the tax was to foster affordability of residential property in the GVRD by discouraging foreign nationals from purchasing real property in that area and thus reducing demand. He also found a secondary purpose to raise revenue for provincial purposes, including housing priority initiatives.

32 The judge rejected the appellant's argument that the tax aimed to regulate the rights of aliens and its imposition could disrupt a potential foreign buyer's immigration process. He noted that the tax did not prevent foreign nationals from owning or renting property, or living and working in the GVRD, nor did the tax apply to foreign nationals who were permanent residents or provincial nominees.

33 The trial judge concluded that the tax provisions did not fall within s. 91(25) of the *Constitution Act*. He referred to *Morgan v. Prince Edward Island (Attorney General)*, [1976] 2 S.C.R. 349, where a provincial law prohibiting ownership of large parcels of land by non-resident aliens or Canadian citizens was upheld. Chief Justice Laskin held that the residency requirement, which affected both aliens and citizens alike, related to a competent provincial object of the holding of land in the province and limiting the size of the holdings, and could not be regarded as "a sterilization of the general capacity of an alien". The judge also referred to *Ontario (Minister of Revenue) v. Hala* (1977), 18 O.R. (2d) 88 (O.N.S.C.), which followed *Morgan* in upholding a tax provision that imposed a differential property transfer tax rate for non-resident citizens and non-citizens. The judge considered the case at bar to be similar to those cases in that the foreign buyer's tax does not "sterilize the general capacity of an alien" to acquire property or to live and work in B.C." (at paras. 125, 128).

34 The judge also rejected the appellant's alternative argument that the provisions fall within the federal power to regulate trade and commerce under s. 91(2) of the *Constitution Act*. He held that the tax would not be rendered invalid if it had some impact on international trade and commerce, such as discouraging the flow of foreign capital into the purchase of real property in the province, "if its pith and substance is a matter within provincial jurisdiction" (at para. 132). He then concluded that the pith and substance of the tax was a matter within provincial jurisdiction:

> [133] As the dominant purpose of the Tax is to deter the purchase of real property in the GVRD by foreign buyers so as to address housing affordability within the GVRD and the secondary purpose of generating revenue for provincial purposes, in my view, in pith and substance it is a measure that falls within provincial jurisdiction under both s. 92 (2) and (13) of the *Constitution* and is *intra vires* the Province of British Columbia. Any effect upon international trade and commerce is incidental and does not detract from the Province's jurisdiction to enact the Tax.

35 The appellant submits that the trial judge erred in characterizing the pith and substance of the law, and in classifying the tax as a measure that falls under s. 92 of the *Constitution Act*.

Characterizing the pith and substance of the law

36 The jurisprudence recognizes that characterizing the pith and substance of a law is a challenging exercise that plays a critical role in determining how the law is to be classified. Thus the pith and substance should be described as precisely as possible to capture the law's essential character. This was discussed by Justice Karakatsanis, for the majority, in *Reference re Genetic Non-Discrimination Act*:

> [31] Characterizing a law can be a challenging exercise, especially when the challenged law has multiple features, and the court must determine which of those features is most important. Characterization plays a critical role in determining how a law can be classified, and thus the law's matter must be precisely defined: see *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, at para. 35; see also [*Reference re Assisted Human Reproduction Act,* 2010 SCC 61] (*Reference re AHRA*), at paras. 190-91, per LeBel and Deschamps JJ. Identifying the pith and substance of the challenged law as precisely as possible encourages courts to take a close look at the evidence of the law's purpose and effects, and discourages characterization that is overly influenced by classification. The focus is on the law itself and what it is really about.
>
> [32] Identifying the law's matter with precision also discourages courts from characterizing the law in question too broadly, which may result in it being superficially related to both federal and provincial heads of power, or may exaggerate the extent to which the law extends into the other level of government's sphere of jurisdiction: *Desgagnés Transport*, at para. 35; *Reference re AHRA*, at para. 190. Precisely defining the impugned law's matter therefore facilitates classification. But precision should not be confused with narrowness. Pith and substance should capture the law's essential character in terms that are as precise as the law will allow.

37 The need to describe the pith and substance as precisely as possible was recently reiterated by Chief Justice Wagner, for the majority, in *Reference re Greenhouse Gas Pollution Pricing Act*:

> [52] ... A vague or general description is unhelpful, as it can result in the law being superficially assigned to both federal and provincial heads of powers or may exaggerate the extent to which the law extends into the other level of government's sphere of jurisdiction: *Desgagnés Transport*, at para. 35; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457 ("*Assisted Human Reproduction Act*"), at para. 190. However, precision should not be confused with narrowness. Instead, the pith and substance of a challenged statute or provision should capture the law's essential character in terms that are as precise as the law will allow: *Genetic Non-Discrimination*, at para. 32. It is only in this manner that a court can determine what the law is in fact "all about": *Desgagnés Transport*, at para. 35, quoting A. S. Abel, "The Neglected Logic of 91 and 92" (1969), 19 U.T.L.J. 487, at p. 490.

38 The appellant's primary submission is that the trial judge's characterization of the law was too broad, in that the purpose of fostering housing affordability improperly expands its objective. She submits that the objective of

housing affordability is inherently so diffused that it provides no meaningful information for the purpose of classifying the tax under a federal or provincial head of power. She cites the authorities referred to above, as well as *Rogers Communications*; *Greenhouse Gas Pollution Pricing Act (Re)*, 2019 ONCA 544, aff'd 2021 SCC 11; *Reference re: Anti-Inflation Act (Canada)*, [1976] 2 S.C.R. 373; *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19; and *Reference re Environmental Management Act*.

39 The appellant contends that housing affordability is the ultimate purpose of the tax but not its dominant purpose. She suggests two ways to characterize the tax: (1) "to reduce foreign investment in local residential real estate markets because of the assumed mischief associated with the decoupling of real estate from local incomes", or (2) "to reduce foreign investment in local real estate markets by taxing foreign nationals, thereby discouraging and deterring foreign nationals from purchasing residential real property in GVRD". She equates this latter characterization with that of the trial judge at para. 115 of his reasons, where he stated that the dominant purpose of the tax "was to discourage and deter foreign nationals from purchasing residential property in the GVRD" without mentioning housing affordability. The appellant candidly acknowledges that her submission on pith and substance turns on this point.

40 The Province submits that the determination of a law's pith and substance requires all facets of it to be considered, which includes its social and economic purposes, means, legal and practical effects, and the mischief to which it is directed. It refers to the need for a flexible approach as well as the need for sufficient precision that answers the question, "What's it all about?", citing *R. v. Morgentaler*, [1993] 3 S.C.R. 463 at 481 and *Desgagnés Transport Inc. v. Wärtsilä Canada Inc*., 2019 SCC 58 at para. 35.

41 The Province says that the trial judge made no error in characterizing the primary and secondary objectives of the tax and submits that the appellant's argument demonstrates a technical, formalistic approach that is not reflected in the authorities.

42 In this case, the impugned provisions of the *PTTA* levy a tax on foreign nationals who purchase residential real property in specified areas of the province. While it is clearly a taxing measure, the court is to look beyond this direct legal effect and inquire into the social or economic purposes the provisions were enacted to achieve: Hogg, at 15.5.

43 How precise the pith and substance of a law is to be characterized will depend on the particular law in question and the circumstances in which it was enacted. I do not accept the appellant's suggestion that the purpose of legislation is not the pith and substance, as both the purpose and the effects of the law inform its essential character. In some decisions, the purpose forms part of the language used to characterize the pith and substance: see, for example: "directed to enhancing public safety by controlling access to firearms through prohibitions and penalties" (*Reference re: Firearms Act* at para. 24); "to control systemic risks having the potential to create material adverse effects on the Canadian economy" (*Reference re: Pan-Canadian Securities Regulation* at para. 87); "concerned with the management of the Canadian fishery" (*Ward v. Canada (Attorney General)*, 2002 SCC 17 at para. 28). In others, the characterization is expressed more narrowly: see, for example: "to place conditions on, and if necessary, prohibit, the carriage of heavy oil through an interprovincial undertaking" (*Reference re Environmental Management Act* at para. 105); "the choice of the location of radio communication infrastructure (*Rogers Communication* at para. 46); "establishing minimum national standards of GHG price stringency to reduce GHG emissions" (*Reference re Greenhouse Gas Pollution Pricing Act* at para. 57). Moreover, it is also permissible to include the means in the identification of the pith and substance, where the means is so central to the legislative objective that it is necessary to properly understand the main thrust of a statute or provision: *Reference re Greenhouse Gas Pollution Pricing Act* at paras. 53-55.

44 I see no error in the trial judge's general characterization of the pith and substance of the law. While he was not always consistent in his description, it is clear from his reasons as a whole that he considered the dominant purpose of the tax to include fostering housing affordability in the GVRD. The enormous increase in the cost of housing in the GVRD was the mischief the legislature sought to remedy. The legal effect of the law was to make it more expensive for foreign nationals to purchase residential property in an area where recent data showed that this

group was purchasing a significant proportion of the housing market, raising serious concerns about "hyper-commodification of real estate". I do not consider the objective of housing affordability to expand the purpose of the tax improperly or to render the characterization too broad, as this overall purpose was coupled with the more specific purpose of discouraging foreign nationals from purchasing residential property, and only in specified areas where this problem had been identified. The extrinsic evidence shows that the tax would not have been imposed had the housing affordability problem in the GVRD not reached such a critical point.

45 I would re-phrase the pith and substance of the law as follows: the dominant purpose of the tax is to address the problem of housing affordability in specified areas of the province by discouraging foreign nationals from purchasing residential property in those areas, thereby reducing demand.

Classifying the law

46 The appellant submits that the judge erred in classifying the tax as a measure under provincial jurisdiction by resting his conclusion solely on the basis of a flawed analysis that it did not fall under s. 91(25) or s. 91(2), and conducting no analysis of the scope of the provincial powers under ss. 92(2) and (13). She says that the judge's analysis was flawed because the proper test for determining whether the tax falls within s. 91(25) is to determine whether it singles out or applies only to aliens, and not whether it rises to the level of sterilizing the capacity of aliens. She contends that the cases of *Morgan* and *Hala* do not stand for the proposition that a law that does not sterilize the capacity of aliens will necessarily be within provincial jurisdiction, as the "sterilization" test is relevant only under the interjurisdictional immunity doctrine. She also contends that neither of those cases singled out aliens but rather applied to non-residents, whether citizens or not. She urges an interpretation of s. 91(25) that is similar to the jurisprudence interpreting s. 91(24) regarding "Indians", where singling out this class of subject has rendered provincial legislation *ultra vires*, citing *Leighton v. British Columbia* (1989), 35 B.C.L.R. (2d) 216 (B.C.C.A.).

47 The appellant also submits that the trial judge's brief analysis of s. 91(2) demonstrates a misunderstanding of the basic analytic steps. She says his assumption that the tax was designed to discourage the flow of foreign capital into the purchase of real property in the province would naturally result in classifying the tax under the federal trade and commerce power.

48 The Province submits that the trial judge made no error in first determining that the law did not fall within ss. 91(25) or 91(2), as the provincial powers under s. 92(13) are "broad and plenary" and the relationship of the law to the power of direct taxation under s. 92(2) is self-evident. It also submits that the judge correctly defined the scope of the federal power under s. 91(25) as requiring a threshold of "sterilization of the general capacity of aliens" and this language is not restricted to the application of interjurisdictional immunity. It relies on *Morgan* as establishing this threshold, and *Hala* as a persuasive application of it. It challenges the appellant's attempt to broaden the interpretation of the s. 91(25) power over "Aliens" by reference to the s. 91(24) power over "Indians" and says that singling out is not a recognized test and in any event is not determinative.

49 With respect to s. 91(2), the Province submits that to the extent the tax can be said to be aimed at foreign capital, it is in narrowly defined circumstances involving residential property in specified local areas, and therefore cannot be a dominant feature. It differentiates this with goods and commodities that are traded across provincial and national borders, which in any event remain susceptible to provincial regulation, citing *Reference re Securities Act*, 2011 SCC 66 at para. 115.

Sections 92(13) & 91(25) -- Property and civil rights & aliens

50 As I will explain, it is my view that the law as characterized by its dominant purpose is a matter in relation to property and civil rights under s. 92(13) of the *Constitution Act*, and only incidentally affects the federal power over aliens under s. 91(25). The tax provisions are aimed at addressing a serious problem in respect of one category of real property in the province in specified local areas. As the trial judge noted, the provisions do not apply to foreign nationals who are or are close to becoming permanent residents, nor do they prevent foreign nationals from owning or renting property, or living and working in the GVRD. The additional tax simply makes it more expensive for them to purchase some residential real estate that is already prohibitively expensive for many people.

51 The provincial power over property and civil rights has been recognized as a "broad and plenary" or significant power (see *Reference re Genetic Non-Discrimination Act* at para. 66; *Reference re Greenhouse Gas Pollution Pricing Act* at para. 49), while the federal power over aliens has been treated more narrowly. I agree with the Province that *Morgan* continues to be the most important authority on the scope of the s. 91(25) power in relation to provincial landholding laws, but it needs to be read in light of subsequent developments in the law regarding interjurisdictional immunity.

52 Prior to *Morgan*, the scope of s. 91(25) regarding aliens had been considered by the Judicial Committee of the Privy Council (JCPC) in two decisions involving discriminatory provincial legislation that appeared to state inconsistent principles. The first was *Union Colliery Co. of British Columbia v. Bryden*, [1899] A.C. 580, [1899] UKPC 58, where legislation in British Columbia prohibited boys under the age of 12, all girls and women, and men of Chinese descent from working in any mine in the province. The JCPC found the provision, as it applied to men of Chinese descent, to be in pith and substance in relation to aliens and naturalized subjects. It defined s. 91(25) as investing Parliament with "exclusive authority in all matters which directly concern the rights, privileges and disabilities of the class of [men of Chinese descent] who are resident in the provinces of Canada".

53 This broad description was not repeated four years later in a case involving the validity of another British Columbia law that prohibited any "Japanese, whether naturalized or not" from voting. In *Cunningham v. Tomey Homma*, [1903] A.C. 151, [1902] UKPC 60, the JCPC did not find the pith and substance of the law to be in relation to aliens or naturalization but validly enacted under s. 92(1) (which authorized a province to amend its constitution). In doing so, they defined the s. 91(25) power more narrowly:

> Could it be suggested that the Province of British Columbia could not exclude an alien from the franchise in that Province? Yet if the mere mention of alienage in the enactment could make the law *ultra vires*, such a construction of s. 91(25) would involve that absurdity. The truth is that the language in that section does not purport to deal with the consequences of either alienage or naturalization. It undoubtedly reserves these subjects for the exclusive jurisdiction of the Dominion to determine what shall constitute either the one or the other, <u>but the question as to what consequences shall follow from either is not touched</u>. The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization, <u>but the privileges attached to it, where these depend upon residence</u>, are quite independent of nationality.
>
> [Emphasis added.]

54 The JCPC distinguished *Union Colliery* on the basis that the regulations there

> ... were not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that Province, since it prohibited their earning their living in that Province.

55 *Union Colliery* was not followed in *Quong-Wing v. The King* (1914), 49 S.C.R. 440, and the extent of the "aliens" power was discussed in *Winner v. S.M.T. (Eastern) Ltd*., [1951] S.C.R. 887, a case involving interprovincial and international transportation. In examining the *Union Colliery* and *Tomey Homma* cases, Justice Rand suggested a distinction between the "incidents of the status of citizenship" and the "attributes necessarily involved in the status itself", concepts which are reflected in the judgment of Chief Justice Laskin in *Morgan*.

56 *Morgan* involved a Prince Edward Island statute that restricted the amount of land that could be owned by non-residents of the province, citizens and non-citizens. The power of the province to regulate the way in which land could be held, transferred or used was not contested. The contention was that where the province differentiated in this respect between classes of persons, and where either citizens or non-citizens were disadvantaged against those who were resident in the province, the legislation must be regarded as in pith and substance in relation to citizenship and aliens.

57 Chief Justice Laskin did not agree with that characterization. He noted that the legislation did not prevent anyone from entering the province and taking up residence there. He considered s. 24(1) of the federal *Citizenship Act* (now s. 34), which granted to aliens the right to acquire, hold and dispose of real property in the same manner and in all respects as by a citizen, stating that it was "for Parliament alone to define citizenship and to define how it may be acquired and lost": at 356. He also considered *Union Colliery*, *Tomey Homma,* and Rand J.'s observations in *Winner*. He expressed disapproval of *Union Colliery*, describing the result as "very far-reaching" and the decision in *Tomey Homma* as an attempt to recede from the literal effect of the language used in *Union Colliery*: at 361. He was not prepared to read *Union Colliery* in broad terms and observed that the reasons in *Tomey Homma* (at 362):

> ... suggested a distinction between a privilege, e.g., the franchise, which the province could grant or withhold from aliens or naturalized or even natural-born citizens, and what appeared to it to be the draconian prohibition involved in the *Union Colliery Co.* case.

58 The Chief Justice considered the case before him to be far different from those cases in that it did not involve any attempt, direct or indirect, to exclude aliens from the province or to drive out any aliens residing there. He concluded that the federal power under the *Citizenship Act* could not be invoked

> ... to give aliens, naturalized persons or natural-born citizens any immunity from provincial regulatory legislation, otherwise within its constitutional competence, simply because it may affect one class more than another or may affect all of them alike by what may be thought to be undue stringency.
>
> [Emphasis added.]

59 He defined the question as:

> ... whether the provincial legislation, though apparently or avowedly related to an object within provincial competence, is not in truth directed to, say, aliens or naturalized persons so as to make it legislation striking at their general capacity or legislation so discriminatory against them as in effect to amount to the same thing.
>
> [Emphasis added.]

60 Chief Justice Laskin equated the issue with determining the validity of provincial legislation that applied to federally-incorporated companies, stating that they were not constitutionally entitled to any advantage as against provincial regulatory legislation "so long as their capacity to establish themselves as viable corporate entities" was not precluded. He held that the law was validly enacted landholding legislation (at 365):

> In the present case, the residency requirement affecting both aliens and citizens alike and related to a competent provincial object, namely the holding of land in the province and limitations on the size of holdings (relating as it does to a limited resource), can in no way be regarded as a sterilization of the general capacity of an alien or citizen who is a non-resident, especially when there is no attempt to seal off provincial borders against entry.
>
> [Emphasis added.]

61 *Morgan* was followed in *Hala*, where the impugned law was a significantly higher tax (20%) imposed on transfers of property purchased by non-residents from that imposed on residents. Non-residents included both citizens and non-citizens, but non-resident citizens were entitled to an exemption where the property was purchased as an intended personal residence or recreational property on their return to Canada. Justice Henry found the law to be in pith and substance in relation to the acquisition and holding of land in the province, "its object being to discourage (not prohibit) absentee ownership by non-residents and by non-entitled residents of Canada". Applying the principles in *Morgan*, he found that the law did not destroy the capacity of an alien or other non-Canadian citizen to acquire or hold land, nor did it preclude entry into the province or enjoyment of the ordinary rights of those lawfully in the province. Moreover, Henry J. did not consider the additional singling out of certain non-citizens to affect the application of those principles.

62 The appellant distinguishes *Morgan* and *Hala* on the basis that the legislation considered in both applied to all

non-residents, not just non-citizens, and submits that the "sterilization" language -- which later emerged in the interjurisdictional immunity doctrine -- is not applicable in the pith and substance analysis.

63 First, I am not convinced that *Morgan* and *Hala* are distinguishable on the basis that the legislation in those cases applied to non-residents more broadly. While *Morgan* was later interpreted by some to permit provinces to restrict land ownership to non-residents but not to only non-citizens,3 it does not necessarily follow that it is distinguishable on this basis. As Professor Hogg has observed, the language in *Morgan*4 suggests that the law would have been valid even if it had applied only to non-citizens. Importantly in my view, the impugned provisions in this case do not restrict foreign land ownership as did the provisions in issue in *Morgan*.

64 As for *Hala*, the distinction between non-resident citizens and non-citizens was less important given that the impugned provision did not restrict a non-resident from purchasing property in the province, and a significant exemption was available only to non-resident citizens.

65 Second, I do not agree that the principles in *Morgan* are not applicable to a pith and substance analysis of a provincial landholding law in the context of the federal power under s. 91(25). However, I have concerns about the "sterilization" language used in *Morgan* given the subsequent developments of the doctrine of interjurisdictional immunity. As reviewed above, interjurisdictional immunity operates to prevent laws enacted by one level of government from impermissibly trenching on the "unassailable core" of jurisdiction reserved for the other level of government. The doctrine originated in cases involving federal undertakings and was applied where a provincial law "sterilized" the federal undertaking. It was expanded and modified over the years to include laws that "affected", and then "impaired", a vital part of the undertaking, but more recently, the difficulties inherent in applying the doctrine led the Supreme Court of Canada to suggest that it should be used with restraint in the future: see *Reference re Environmental Management Act* at para. 18; *Canadian Western Bank; Marcotte c. Banque de Montréal*, 2014 SCC 55; Hogg at 15.8.

66 While Chief Justice Laskin's language in *Morgan* reflects this dated "sterilization" principle, he was clearly conducting a validity analysis under the pith and substance doctrine, and in doing so, he defined the scope of the federal power over aliens narrowly, restricting it to power over their essential status. He considered the issue before him to be analogous to the principles governing the validity of provincial legislation that purported to apply to federally-incorporated companies. In this context, the principles of interjurisdictional immunity and pith and substance are closely related. As Professor Hogg points out, it can be difficult to distinguish when one or the other should be applied, given that a law in relation to a provincial matter may validly "affect" a federal matter.

67 The old cases such as *Union Colliery* and *Tomey Homma* are difficult to read now given the prevailing racist attitudes reflected in the law of the day. I see *Union Colliery* as an example where the effects of the law diverged substantially from its stated purpose. In any event, it is no longer necessary to consider whether a law is so discriminatory as to amount to legislation striking at an individual's capacity, as described in *Morgan* (at 364). As this case demonstrates, problems associated with discriminatory laws may now be addressed through the rights guaranteed under s. 15 of the *Charter*. I agree with the Province that the decision in *Morgan* was a synthesis of the old cases into a more concise interpretation of the scope of the federal power over "Naturalization and Aliens" in s. 91(25) in relation to provincial landholding legislation.

68 I do not accept the appellant's submission that a provincial law that singles out non-citizens, or a subset of non-citizens, is the determinative test for invalidity in relation to s. 91(25). However, singling out is relevant to the pith and substance analysis. In *Morgan*, the court's comparison between the federal power over aliens and over federally incorporated companies demonstrates this, but confirms that such a law will be valid as long as it does not trench on the capacity of the non-citizen: see also Hogg at 15.5(b), and cases such as *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575. This is not inconsistent with some of the jurisprudence in relation to "Indians" under s. 91(24), although the scope of legislation that affects "their essential character as Indians" has been interpreted more broadly under that head of power: see, for example, *Leighton*. However, in light of the extensive jurisprudence in relation to Aboriginal rights under s. 35 of the *Constitution Act, 1982*, as well as the federal government's

fiduciary responsibilities towards Indigenous people, there is good reason, in my view, not to equate the power over "Indians" with that over "Aliens".

69 As Newbury J.A. observed in *Reference re Environmental Management Act*, the determination of the dominant purpose of legislation should not be conflated with deciding whether the law "impairs" a "vital part" of a federal power (at para. 92). For this reason, I would not use "sterilization" language to define the scope of the federal power under s. 91(25), but I consider *Morgan* to be binding authority establishing that laws related to provincial land holding, which do not strike at the "essential status" of a non-citizen, may be validly enacted under the provincial power over property and civil rights under s. 92(13). The provincial law in *Morgan* restricting the amount of land that could be held by non-residents did not strike at the essential status of a non-citizen as one class of non-resident, nor did the law in *Hala* imposing a higher tax on non-resident purchasers of real property who were primarily non-citizens. Similarly, the tax provisions in this case do not strike at the essential status of the non-permanent resident class of non-citizens who are affected. The additional tax they are required to pay does not interfere with their right to live and work, or to acquire, hold and dispose of property in British Columbia.

Sections 92(13) & 91(2) -- Property and civil rights & trade and commerce

70 Because trade and commerce is carried on by means of contracts that give rise to "civil rights" over "property", the federal power over the regulation of trade and commerce has been interpreted to include interprovincial and international trade and commerce or that which affects the nation: see Hogg at 20.1.

71 The appellant's submission that the impugned tax provisions fall within the federal trade and commerce power is predicated in part on the trial judge's assumption that the tax has "some impact on international trade and commerce in that it is designed to discourage the flow of foreign capital into the purchase of real property in the province": at para. 132. She contends that a law designed to discourage the flow of foreign capital would fall within the federal trade and commerce power.

72 With respect, this argument fails to recognize that this is not the dominant purpose of the impugned provisions. I accept that "discouraging foreign nationals from purchasing residential property" may have the effect of reducing the amount of foreign capital entering the province (assuming that foreign money is used to purchase the property). However, the tax applies regardless of the source of funds. I see no error in the trial judge's conclusion that any effect upon international trade and commerce was incidental and did not disturb the constitutionality of the tax as an otherwise *intra vires* provincial law.

73 Moreover, the circumstance of the use of foreign capital to purchase residential real property within a province does not fit within the normal paradigm of trade and commerce of commodities across borders. The case authorities relied on by the appellant relate to trade in goods such as milk, eggs, petroleum, natural gas, potash and hogs: see *Attorney General for Manitoba v. Manitoba Egg and Poultry Association et al*, [1971] S.C.R. 689; *Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan*, [1978] 2 S.C.R. 545; *Central Canada Potash Co. Ltd. et al v. Government of Saskatchewan*, [1979] 1 S.C.R. 42; *Burns Foods Ltd. et al v. Attorney General for Manitoba et al*, [1975] S.C.R. 494. I do not see these cases as useful comparisons to the circumstances here.

74 I also see the appellant's position that the tax would have been constitutional had it been based on non-residency only as inconsistent with her submission on s. 91(2), as interprovincial trade would be affected in the same way as international trade.

Section 92(2) -- Direct taxation

75 The appellant did not seriously challenge the trial judge's characterization of the secondary purpose of the law (to raise revenue for provincial purposes), other than to question this logic in light of his recognition that the less revenue the tax raised the more successful the measure would be to deter foreign nationals from purchasing property.

76 The Province submits that a statement of pith and substance in this case must recognize that the foreign buyer's tax is in fact a tax measure that raises revenue for provincial purposes each time it is levied. It suggests that

the question of whether the total revenue collected under the *PTTA* rose or fell as a result of this additional tax is not a matter that can properly be considered, "as taxes exist within an ecosystem of other tax measures".

77 The trial judge found that the secondary purpose of the tax was to raise revenue for provincial purposes, and held that this was sufficient to ground the law under s. 92(2) as well as s. 92(13). While the primary source of the provincial power is s. 92(13), I see no error in this conclusion. Where the foreign buyer's tax was payable, it clearly raised revenue for a provincial purpose that would presumably off-set revenue lost from a slower market.

Valid provincial power

78 The ultimate effect of the appellant's submissions on pith and substance is to deprive the Province of the ability to address a local problem of housing affordability by way of a measure aimed at foreign buyers. Common sense dictates that this kind of local problem requires a local solution, especially considering the fact that the tax applies only to residential property in certain districts in the province. I agree with the Province's description of the impugned provisions as a tax measure "that is embedded in the provincial land title registration system connected to private contracts for the transfer of property", and "a housing intervention addressed to local concerns with severe unaffordability of residential property in specified areas of BC".

79 As I have explained, the dominant purpose of this legislation brings it within the provincial power of property and civil rights under s. 92(13) of the *Constitution Act*, and any effects on the essential status of non-citizens, or on international trade and commerce, are incidental and do not affect its validity.

2. Did the trial judge err in concluding that the tax provisions were not inoperative under the federal paramountcy doctrine?

80 The appellant submits that the impugned tax provisions are inoperative under the paramountcy doctrine because they are in operational conflict with s. 34 of the *Citizenship Act*, which she says guarantees non-citizens equal rights as citizens to acquire and hold land. She also submits that the provisions are in operational conflict with the investor protections found in Chapter 11 of NAFTA. She says that this conflict with NAFTA also frustrates the purpose of Canada's obligations under NAFTA, as well as s. 35 of the *Citizenship Act*, which does not permit a province to restrict a non-citizen from acquiring property if the law conflicts with a legal obligation under an international agreement.

81 The appellant made similar arguments in the court below but focused more broadly on international treaties and various pieces of legislation that incorporated Canada's treaty obligations into domestic law.

The decision below

82 The trial judge recognized that the doctrine of paramountcy required a provincial law to be inoperative where it conflicts with a federal law, such that it is impossible to comply with both. He referred to the two branches described in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd*., 2015 SCC 53: operational conflict between federal and provincial legislation, and frustration of purpose of a federal law. He held that operational conflict does not arise when a federal law is permissive and a provincial law more restrictive. He concluded that s. 34

> [153] ... simply removes the common law disability of aliens to hold property and is permissive rather than restrictive in relation to provincial statutory restrictions which might be imposed on the land-owning capacity of aliens.

83 The judge considered the background of the enactment of s. 35 and considered the intention was to provide the provinces an administrative delegation of federal authority to ban foreign ownership of property on the assumption that they might otherwise not have such authority. However, he held that s. 35 had no application in this case because the section has never been proclaimed in force in British Columbia.

84 The judge found the tax provisions were "only intended to dampen demand and discourage acquisitions by foreign nationals without denying their capacity to acquire such property" and did not restrict or prohibit acquisitions (at para. 154). In doing so, he cited the following passage from *Morgan* at 364:

> I do not think that the federal power as exercised in ss. 22 and 24 of the *Citizenship Act*, or as it may be exercised beyond those provisions, may be invoked to give aliens, naturalized persons or natural-born citizens any immunity from provincial regulatory legislation, otherwise within its constitutional competence, simply because it may affect one class more than another or may affect all of them alike by what may be thought to be undue stringency. The question that would have to be answered is whether the provincial legislation, though apparently or avowedly related to an object within provincial competence, is not in truth directed to, say, aliens or naturalized persons so as to make it legislation striking at their general capacity or legislation so discriminatory against them as in effect to amount to the same thing.

85 The judge then concluded that the impugned provisions were not in conflict with s. 34 of the *Citizenship Act* because they did not "strike at the general capacity of aliens to acquire or hold property in British Columbia" (at para. 156).

86 The trial judge then addressed the appellant's argument that the tax provisions are in operational conflict with or frustrate the purpose of various pieces of federal legislation that incorporate treaty obligations of Canada into domestic law. He considered provisions of various treaties that provided for equal treatment of foreign investors operating in Canada and compensation upon expropriation of foreign-owned property.

87 Of the 37 treaties cited by the appellant, seven had federal implementing legislation that provided only a general approval of the relevant treaty. The judge held that such general approval does not have the effect of incorporating the content of the treaty into domestic law, citing *Pfizer Inc. v. Canada (T.D.)*, [1999] 4 FC 441, aff'd [1999] FCJ No 1598 (C.A.) and *Council of Canadians v. Canada (Attorney General)* (2006), 277 DLR (4th) 527 (O.N.C.A.). He also held that the implementing statutes incorporated only specific aspects of the treaties, excluding the investor protection provisions. He agreed with the Province that the provisions of the federal implementing statutes prohibiting a private cause of action were consistent with an intention of Parliament not to incorporate the investor protections into domestic law (at paras. 171-172).

88 The trial judge concluded:

> [174] Paramountcy requires the identification of a domestic federal law with which the impugned provincial legislation is in conflict and in my view the plaintiff has not succeeded in pointing to such a federal law. Accordingly, the plaintiff has not established that the Impugned Provisions are inoperative by reason of the paramountcy doctrine nor that they frustrate the purpose of a federal law.

a) Is the legislation in operational conflict with s. 34 of the Citizenship Act?

89 The *Citizenship Act* provides, in ss. 34, 35 and 37:

> 34 Subject to section 35,
>
> (a) real and personal property of every description may be taken, acquired, held and disposed of by a person who is not a citizen in the same manner in all respects as by a citizen; and
>
> (b) a title to real and personal property of every description may be derived through, from or in succession to a person who is not a citizen in the same manner in all respects as though through, from or in succession to a citizen.
>
> 35 (1) Subject to subsection (3), the Lieutenant Governor in Council of a province or such other person or authority in the province as is designated by the Lieutenant Governor in Council thereof is authorized to prohibit, annul or in any manner restrict the taking or acquisition directly or indirectly of, or the succession to, any interest in real property located in the province by persons who are not citizens or by corporations or associations that are effectively controlled by persons who are not citizens.
>
> ...
>
> 37 Sections 35 and 36 [Offences and punishment] shall come into force in any of the Provinces of Ontario, Quebec, Nova Scotia, New Brunswick, British Columbia, Prince Edward Island, Saskatchewan and Newfoundland and Labrador or in Yukon, the Northwest Territories or Nunavut on a day fixed in a

> proclamation of the Governor in Council declaring those sections to be in force in that Province or any of those territories.

90 The appellant submits that the trial judge's narrow interpretation of s. 34 of the *Citizenship Act* renders the language "in the same manner in all respects as by a citizen" superfluous. She relies on the language of s. 34 either on its own or as informed by s. 35. She says the right of a non-citizen to acquire and hold property "in the same manner in all respects as by a citizen" under s. 34 confers a right of non-discrimination in respect of the acquisition of property.

91 The appellant also submits that the legislative history of s. 35 contradicts the judge's interpretation of both s. 34 and *Morgan*. She says that s. 35 was introduced in light of *Morgan* as a statutory delegation of power to enable the provinces to restrict the property rights of foreign nationals; such a provision would be unnecessary if the provinces had the authority to do so. Because s. 35 has never been proclaimed into force in British Columbia, the appellant contends that the Province is without authority to "restrict the taking or acquisition" of property by a non-citizen. She repeats her contention that the sterilization language in *Morgan* refers to the question of constitutional applicability, not validity.

92 Finally, the appellant submits that s. 34 is not simply a permissive provision but rather provides for a positive entitlement, and the more restrictive tax provision frustrates the federal purpose, citing *Moloney* at para. 26.

93 The Province submits that the appellant's approach to paramountcy fails to recognize the principle of judicial restraint, in which "harmonious interpretations of federal and provincial legislation should be favoured over interpretations that result in incompatibility", per *Lemare Lake Logging* at paras. 20-23. It submits that the trial judge was correct to interpret s. 34 of the *Citizenship Act* as no more than a reversal of the common law denial of landownership to aliens, in relation to which the tax provisions cause no conflict or frustration of purpose. The Province suggests that an equally plausible interpretation of s. 34 is that it requires equality only in relation to the capacity to take, acquire, hold and dispose of land, and not in relation to all incidental matters that arise in connection with land acquisition.

94 The Province also submits that s. 35 of the *Citizenship Act* cannot support application of the doctrine of paramountcy since it has never been proclaimed to be in force in British Columbia, citing *Schneider v. The Queen*, [1982] 2 S.C.R. 112. It says that an essential part of Parliament's intention in relation to s. 35 is embodied in s. 37, which ensures that s. 35 is not in force and operative in any province unless specifically declared to be so.

95 At common law, aliens could not hold land or pass land to their heirs. As the trial judge noted, s. 34 of the *Citizenship Act* finds its origins in the British Parliament's *Naturalization Act*, 1870, 33 Vic. c. 14 (Imp.) and the Canadian Parliament's *An Act respecting Naturalization and Aliens*, S.C. 1881, c. 13, which reversed this common law disability. The wording of this provision is essentially the same now as it was originally, except that the more modern Canadian legislation now refers to Canadian citizens rather than British Subjects.

96 The key question raised by the appellant is whether the right of an alien to hold land "in the same manner in all respects" as a citizen broadens the interpretation of s. 34 beyond the basic capacity to hold land. In interpreting this provision, I am mindful that the words must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 117. I am also mindful that the principle of cooperative federalism favours, where possible, the concurrent operation of federal and provincial statutes: *Rogers Communications* at para. 38.

97 In my view, s. 34 cannot be read in the broad manner proposed by the appellant. I agree with the trial judge that it was intended to reverse the common law disability for aliens to acquire, hold and transfer land to their heirs. I do not consider the words "in the same manner in all respects" to be superfluous or to produce absurd consequences. The 1881 debates in the House of Commons demonstrate that the legislators did not intend to interfere with provincial jurisdiction over property and civil rights and the effect of the *Citizenship Act* was "to remove the disability

which, by the general law of the empire, all aliens labour under": *Debates of the House of Commons*, 44 Victoria 1881, Vol. XI at 1370-1371. See also J. Spencer, "The Alien Landowner in Canada" (1973) 51 Can. Bar Rev. 389 at 390-392.

98 I also see no error in the trial judge's reference to Chief Justice Laskin's comments in *Morgan* that what is now s. 34 does not give aliens immunity from valid provincial legislation regulating landholding simply because it affects aliens by undue stringency. I have already addressed the constitutional validity of the tax provisions.

99 I do not accept the appellant's submission that s. 35 and its legislative history contradict the trial judge's interpretation of s. 34 and *Morgan*. The impetus for s. 35 was interest of some provinces in the 1970s to prohibit foreign or non-resident ownership of land. In May 1973, a federal-provincial committee was formed to identify legal, constitutional and land use problems related to foreign and non-resident land ownership and examine ways for the federal and provincial governments to cooperate in order to "avoid possible legal and constitutional difficulties": Federal-Provincial Committee on Foreign Ownership of Land: Report to the First Ministers (Ottawa: Information Canada, 1975). At the time this Report was written, *Morgan* was under appeal to the Supreme Court of Canada, and the constitutional authority to legislate land ownership by aliens was considered to be uncertain. At pp. 29-30 of the Report:

> Although none of the decided cases regarding Parliament's exclusive power over aliens is conclusive, some courts have indicated that it extends to certain of their rights, privileges and disabilities. Other courts have indicated that provincial legislatures may deal with certain of these rights, privileges and disabilities. It was noted that while foreigners are subject to provincial legislation of general application, it could be argued that laws restricting aliens right to hold land on the ground of alienage might not meet this test. The recent decision of the Supreme Court of Prince Edward Island in banco [*Morgan*] upholding a provincial statute restricting land ownership in the province on the ground that it affected aliens only incidentally would seem to support this view... The extensive legislative power of provinces to regulate land ownership under sections 92(13) and 92(16) might not in itself invalidate legislation directed specifically at foreigners. However, the opinions of the delegations are divided on this subject. It is possible that certain provincial laws treating aliens differently from other persons might be upheld if they could be seen as rationally related to some legitimate provincial object, such as the disposition of interests in provincial Crown lands.
>
> [Underline in original.]

100 A number of possible measures were considered, both provincial and federal. Despite the reservations of some provinces regarding the extent to which provincial land jurisdiction is limited by the federal power over aliens5, the Committee noted that "some delegation of administrative authority from the federal government to the provinces" could avoid any constitutional uncertainties and facilitate provincial control over foreign land acquisitions (at p. 41).

101 The legislative record of the debates in the House of Commons and the Senate reflects these differing opinions and indicates an intent to provide the provinces an administrative delegation of federal authority to prohibit foreign ownership of land on the assumption that they might not otherwise have the authority.6 I agree with the Province's submission that s. 35 was enacted as a failsafe mechanism and not a determination of the scope of s. 34. Moreover, s. 37 of the *Citizenship Act* requires the Governor in Council to proclaim s. 35 into force in individual provinces, and to date this has only occurred in Alberta and Manitoba. The purpose of these individual proclamations is not clear, but the Province's suggestion that s. 37 was enacted in response to "provincial reticence" about the necessity or even the validity of the federal administrative delegation makes sense.

102 In any event, it is not necessary in the context of this appeal to decide whether the province has constitutional authority to prohibit foreign ownership of land. As I have already determined, the tax provisions here do not prohibit aliens from acquiring and holding land but simply impose a more stringent requirement on them to pay a higher transfer tax on purchase. Therefore, they are not in operational conflict with s. 34 of the *Citizenship Act*.

b) Is the legislation in operational conflict or does it frustrate the purpose of Canada's obligations under NAFTA?

103 The appellant says that the focus of her argument before the trial judge was on NAFTA, such that any potential conflicts with other treaties could be determined as part of a common issues trial following certification of the action as a class proceeding, but the judge failed to address this principal argument. She submits that the tax provisions conflict with the national treatment provision in Chapter 11 of NAFTA, and NAFTA has statutory effect either through s. 35(3)(b) of the *Citizenship Act*7 or the *NAFTA Implementation Act*, S.C. 1993, c. 44 [the *Act*].

104 In the Province's submission, paramountcy requires identification of a domestic federal law that conflicts with a provincial law. It says that Chapter 11 of NAFTA has not been incorporated into domestic law; nor does s. 35 of the *Citizenship Act*, unproclaimed in B.C., render the tax provisions inoperative.

105 It is my view that the appellant's argument on this issue cannot succeed for two main reasons.

106 First, the tax provisions cannot frustrate the purpose of s. 35 of the *Citizenship Act*, as s. 35 has no legal effect in this province. As the Supreme Court of Canada held in *Schneider,* no issue of paramountcy or conflict arises in the absence of operative federal legislation. Unless and until s. 35 is proclaimed into force in British Columbia, the "field is clear" for the application of the tax provisions. An unproclaimed portion of a statutory provision may be relevant to interpreting the provision as a whole (see, for example, the dissenting reasons of Ritchie J. in *Criminal Law Amendment Act, Reference*, [1970] S.C.R. 777 at 797), but it is not relevant to the frustration of purpose branch of the paramountcy analysis.

107 Second, the national treatment provision in Chapter 11 of NAFTA has not been implemented into federal domestic law under the *NAFTA Implementation Act*. As discussed below, while the purpose of the *Act* is to implement NAFTA, it does not do so by implementing the whole of the agreement. Rather, it implements portions of the agreement through amendments to numerous pieces of legislation, none of which address Chapter 11 generally.8 The *Act* contains a general approval provision in s. 10, which does not suffice, on its own, to implement treaty provisions: see Hogg at 11.4; Gib van Ert, *Using International Law in Canadian Courts*, 2nd ed. (Toronto: Irwin Law, 2008) at 245-246; *British Columbia (Attorney General) v. Canada (Attorney General); An Act Respecting the Vancouver Island Railway (Re)*, [1994] 2 S.C.R. 41 [*Vancouver Island Railway*]; *Pfizer*; *Council of Canadians* at para. 25.

108 The national treatment provision, contained in Article 1102 of NAFTA's Chapter 11, provides that "[e]ach Party shall accord to investors of another Party treatment no less favourable than it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments". For the purpose of this analysis, I will assume that the tax provisions in issue here are inconsistent with this treaty obligation.

109 It is well established (and not disputed) that international treaties are not part of Canadian law unless they have been implemented domestically, most often by statute, enacted by either Parliament or a provincial legislature depending on the subject matter9: *Canada (AG) v. Ontario (AG)*, [1937] UKPC 6 [*Labour Conventions*]; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 69; *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62 at para. 149; *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 at para. 159 (in dissenting reasons). Therefore, legislation that is inconsistent with a treaty obligation may attract consequences for Canada at international law but the breach of a treaty is irrelevant to the rights of parties to litigation in the courts: see Hogg at 11.4(a).

110 The rules of statutory interpretation are to be applied in interpreting an approval provision: *Vancouver Island Railway* at 110. The appellant's argument relies on the combined effect of ss. 4 and 10 of the *NAFTA Implementation Act*, but ignores other important sections -- notably s. 9 and the whole of Part II. I agree with the Province's submission that the *Act*, properly interpreted, does not implement Chapter 11 of NAFTA.

111 Section 4 of the *Act* simply states that its purpose is to implement NAFTA and sets out its objectives:

> **4** The purpose of this Act is to implement the Agreement, the objectives of which, as elaborated more specifically through its principles and rules, including national treatment, most-favoured-nation treatment and transparency, are to
>
> **(a)** eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the NAFTA countries;
>
> **(b)** promote conditions of fair competition in the free-trade area established by the Agreement;
>
> **(c)** increase substantially investment opportunities in the territories of the NAFTA countries;
>
> **(d)** provide adequate and effective protection and enforcement of intellectual property rights in the territory of each NAFTA country;
>
> **(e)** create effective procedures for the implementation and application of the Agreement, for its joint administration and for the resolution of disputes; and
>
> **(f)** establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of the Agreement.

112 Section 10 is the general approval provision:

> **10** The Agreement is hereby approved.

113 In the context of the legislation as a whole, these provisions do not express an intent to implement NAFTA generally, especially in light of the express provision in s. 9 and the extensive related and consequential amendments to federal legislation set out in Part II (which comprises the bulk of the *Act*, from ss. 22-241).

> **9** For greater certainty, nothing in this Act, by specific mention or omission, limits in any manner the right of Parliament to enact legislation to implement any provision of the Agreement or fulfil any of the obligations of the Government of Canada under the Agreement.

114 The reference to "national treatment" in s. 4 does not assist the appellant, as national treatment obligations appear in different contexts throughout NAFTA: for example, Articles 301 (trade in goods), 1003 (government procurement), 1202 (cross-border trade in services), 1405 (financial services) and 1703 (intellectual property).

115 Nor does the appellant's reliance on various comments in cases about general approval language in other treaties assist her, as they do not consider the specific provisions of the *NAFTA Implementation Act* in the context of the issues raised here. Moreover, at least one of the cases relied on an Empire treaty, which Canada had the power to directly enforce pursuant to s. 132 of the *Constitution Act* (see *Labour Conventions*) and which also contained clear implementing language.

116 I do not agree with the appellant's submission that *Pfizer* stands only for the proposition that aspects of international treaties that conflict with existing domestic legislation are not incorporated until the conflicting legislation is amended. In my view, the reasoning in *Pfizer* is persuasive and applicable in the context here, as the structure of the legislation in issue was similar to the *NAFTA Implementation Act*.

117 In *Pfizer*, the issue was whether an agreement on intellectual property rights that was annexed to the original Agreement establishing the World Trade Organization (the WTO Agreement) had been legislated into domestic law under the *World Trade Organization Agreement Implementation Act*, S.C. 1994, c. 47 [the *WTO Implementation Act*]. Pfizer owned a patent that was protected for 17 years under the *Patent Act*, R.S.C. 1985, c. P-4, and the annexed agreement provided for a minimum term of protection of 20 years. Pfizer sought to rely on the longer term of protection.

118 The *WTO Implementation Act* contained a purpose clause stating the purpose was to implement the WTO Agreement, the same general approval clause as s. 10 of the *NAFTA Implementation Act*, and an extensive Part II that contained amendments to a large number of federal statutes. Justice Lemieux concluded that Parliament had given legal effect to its treaty obligations "by carefully examining the nature of those obligations, assessing the state

of the existing federal statutory and regulatory law, and then deciding the specific and precise legislative changes which were required to implement the WTO Agreement": at para. 45. He rejected Pfizer's argument that the combined effect of the purpose clause and the general approval clause had effectively legislated the annexed agreement into domestic law:

> [48] In short, Pfizer fails in its arguments. When Parliament said, in section 3 of the WTO Agreement Implementation Act, that the purpose of that Act was to implement the Agreement, Parliament was merely saying the obvious; it was providing for the implementation of the WTO Agreement as contained in the statute as a whole including Part II dealing with specific statutory changes. When Parliament said in section 8 of the WTO Agreement Implementation Act that it was approving the WTO Agreement, Parliament did not incorporate the WTO Agreement into federal law. Indeed, it could not, because some aspects of the WTO Agreement could only be implemented by the provinces under their constitutional legislative authority pursuant to section 92 of the *Constitution Act, 1867* [30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1) [R.S.C., 1985, Appendix II, No. 5] ...

119 I also do not agree with the appellant's submission that *Council of Canadians* is distinguishable on the basis that it involved an instance of positive integration that required positive action by way of implementing legislation, whereas this case involves a non-discrimination provision that requires only negative integration measures. These categories of positive and negative integration were discussed by Professor Monahan (as he then was) in the context of the federal trade and commerce power, more specifically Parliament's power to legislate to maintain and enhance the proper functioning of the Canadian economy, and the distinctions between negative and positive integration were drawn from trade law: see Patrick Monahan, Byron Shaw & Padraic Ryan, *Constitutional Law*, 5th ed. (Toronto: Irwin Law, 2017) at ch. 9. I do not see these distinctions as directly relevant to the question of whether a treaty provision has been implemented by legislation, as negative integration may require positive implementation.

120 *Council of Canadians* concerned Chapter 11 of NAFTA. Objections had been made to Canada enforcing awards made by arbitration tribunals under NAFTA, and one of the issues was whether the NAFTA tribunals had been incorporated into Canadian domestic law. NAFTA permits an investor from a NAFTA country to claim that another NAFTA country has treated the investor unfairly in violation of Chapter 11. NAFTA also provides for such claims to be resolved by an arbitration tribunal and requires each NAFTA country to provide for the enforcement of an arbitration award in its territory. The decisions of the tribunals were incorporated into Canadian domestic law by s. 50 of the *NAFTA Implementation Act*, which expressly made such awards enforceable in Canadian courts by amending the *Commercial Arbitration Act*. However, the Ontario Court of Appeal concluded that the tribunals themselves were not incorporated, as s. 10 was not sufficient to establish anything more than parliamentary approval of the treaty. The court distinguished between "parliamentary approval of a treaty" and "incorporation of a treaty into domestic law" and held that the *NAFTA Implementation Act* "clearly does the former, and just as clearly does not purport to do the latter": at para. 25. I agree with this interpretation.

121 The appellant makes several other arguments that do not focus on the *NAFTA Implementation Act* but rather suggest that no implementing statute is necessary because federal domestic law is not at variance with the obligations in Article 1102 of NAFTA. While I accept that implementing legislation may be unnecessary in some circumstances, this point is a complex one, as reflected in some academic commentary: see, for example, Gib van Ert, *Using International Law in Canadian Courts*, 2nd ed. (Toronto: Irwin Law, 2008) at 246-250; Patrick J. Monahan, Byron Shaw & Padraic Ryan, *Constitutional Law*, 5th ed. (Toronto: Irwin Law, 2017) at 311. In the context of this appeal, I do not consider it necessary to address this point. It is not possible, on the record here, to determine if all federal legislation is compliant with Article 1102, and in any event, the appellant's primary argument relies on implementation of Chapter 11 under the *NAFTA Implementation Act.*

122 I also do not consider it necessary to address the submission of the Intervenor, the International Commission of Jurists Canada, that opinion evidence on questions of international law is generally inadmissible. Neither party to this appeal endorsed the Intervenor's submission, nor did they raise any issues related to the expert evidence that was tendered on the international law issues raised in this case.

123 Therefore, I am not satisfied that the appellant has established that the tax provisions are in operational conflict with, or frustrate the purpose of Canada's obligations under NAFTA.

124 For all of these reasons, I would not accede to this ground of appeal.

Section 15 of the *Charter*

125 Section 15(1) of the *Charter* guarantees to every individual the right of equality before and under the law and the right to equal protection and equal benefit of the law without discrimination.

126 Beginning with the seminal case of *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, the philosophical premise and animating norm of the s. 15 framework is substantive equality. This premise recognizes that true equality does not necessarily result from identical treatment, as formal distinctions may be necessary in some contexts to accommodate differences between individuals and thereby produce equal treatment in a substantive sense.

127 The current iteration of the test to ground a violation of s. 15(1) requires a claimant to establish that the law (1) on its face (directly) or in its impact (indirectly), creates a distinction based on enumerated or analogous grounds; and if so, (2) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage: *Ontario (Attorney General) v. G.*, 2020 SCC 38 at para. 43; *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at paras. 40-42; *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para. 25 [*Alliance*]; *Centrale des syndicats du Quebec v. Quebec (Attorney General)*, 2018 SCC 18 at para. 22 [*Centrale*]. An analogous ground is one that is like the enumerated grounds of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability, which illustrate personal characteristics that are immutable or changeable only at unacceptable cost to personal identity: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at 219.

128 This test has evolved over the years, but its essential substantive basis has remained constant. In *Andrews*, Justice McIntyre10 established an approach that considered three elements: (1) differential treatment between a claimant and others imposed by the law; (2) an enumerated or analogous ground as the basis for the differential treatment; and (3) discrimination in a substantive sense. He viewed discrimination as perpetuating prejudice or disadvantage on the basis of personal characteristics identified in the enumerated and analogous grounds, and stereotyping on the basis of those grounds that results in a law that does not correspond to a claimant's actual circumstances or characteristics. He also described discrimination (at 174)

> ... as a distinction, whether intentional or not but based on grounds related to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed on others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

129 The s. 15 jurisprudence that followed *Andrews* took steps to further define the concept of discrimination. In *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, Justice La Forest, for the court, confirmed that the principle of true equality stemming from *Andrews* permitted claims of discrimination to be based on the adverse effects of facially neutral laws -- now often referred to as claims of indirect discrimination. In *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, Justice Iacobucci, for the court, introduced the concept of human dignity to the discrimination analysis, describing the purpose of s. 15(1) "to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping or political or social prejudice". He also focused on a comparative approach in identifying differential treatment and a consideration of contextual factors in assessing whether a law has the effect of demeaning an individual's dignity. He identified four factors in assessing whether legislation has the effect of demeaning a claimant's dignity, not all of which would be relevant in every case: (1) pre-existing disadvantage (where it may be logical to conclude that further differential treatment would perpetuate the disadvantage); (2) relationship between the grounds and the claimant's characteristics or circumstances (generally where a enumerated or analogous ground may correspond with need,

capacity or circumstances, such as disability, sex or age); (3) ameliorative purpose or effects (where exclusion of more advantaged individuals or groups may largely correspond with the greater need or different circumstances of a disadvantaged group); and (4) the nature of the interest affected (whether the distinction restricts access to a fundamental social institution or affects "a basic aspect of full membership in Canadian society"): see paras. 63-75.

130 Justice Iacobucci expanded the three elements from *Andrews* and directed courts to make the following three broad inquiries (at para. 88):

(A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?

(B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?

(C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

131 The attempt in *Law* to employ human dignity as a legal test proved difficult to apply, and its comparative approach allowed elements of formal equality to resurface in the form of artificial comparator analyzes. In *R. v. Kapp*, 2008 SCC 41, Chief Justice McLachlin and Justice Abella, writing for the court in respect of the s. 15 analysis, restated the *Law* test more simply (at para. 17):

(1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

132 The court in *Kapp* did not consider *Law* to have imposed a new and distinctive test for discrimination, but rather affirmed the approach to substantive equality originally set out in *Andrews*:

> [23] The analysis in a particular case, as *Law* itself recognizes, more usefully focusses on the factors that identify impact amounting to discrimination. The four factors cited in *Law* are based on and relate to the identification in *Andrews* of perpetuation of disadvantage and stereotyping as the primary indicators of discrimination. Pre-existing disadvantage and the nature of the interest affected (factors one and four in *Law*) go to perpetuation of disadvantage and prejudice, while the second factor deals with stereotyping. The ameliorative purpose or effect of a law or program (the third factor in *Law*) goes to whether the purpose is remedial within the meaning of s. 15(2). (We would suggest, without deciding here, that the third *Law* factor might also be relevant to the question under s. 15(1) as to whether the effect of the law or program is to perpetuate disadvantage.)

133 The court added that the *Law* factors "should not be read literally as if they were legislative dispositions, but as a way of focusing on the central concern identified in *Andrews* -- combatting discrimination, defined in terms of perpetuating disadvantage and stereotyping": at para. 24.

134 In *Withler v. Canada (Attorney General)*, 2011 SCC 12, the court confirmed the two-step test set out in *Kapp* as an iteration consistent with *Andrews*, and clarified the role of comparator groups. Chief Justice McLachlin and Abella J., again writing for the court, removed the requirement for a claimant "to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination": at para. 63. They held that a claim should proceed to the second step as long as the claimant establishes a distinction based on one or more enumerated or analogous grounds, noting that establishing a distinction for an indirect discrimination claim will be more difficult. For such claims, it is necessary to establish that a law has a disproportionate negative impact on an individual or group that can be identified by factors relating to enumerated or analogous grounds: at para. 64.

135 The Chief Justice and Abella J. discussed substantive equality as rejecting "the mere presence or absence of a difference" and insisting on "going behind the façade of similarities and differences" and asking whether the characteristics on which the differential treatment is predicated are relevant considerations:

> [39] ... The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group.

136 They also confirmed that the *Law* factors may be helpful in determining whether a distinction is discriminatory, but it was not necessary to canvass them in every case, emphasizing that contextual factors will vary with the nature of the case:

> [66] ... Just as there will be cases where each and every factor need not be canvassed, so too will there be cases where factors not contemplated in *Law* will be pertinent to the analysis. At the end of the day, all factors that are relevant to the analysis should be considered. As Wilson J. said in [*R. v. Turpin*, [1989] 1 S.C.R. 1296],
>
> > In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context. [p. 1331]

137 A similar s. 15 analysis by Abella J. was accepted by a majority of the court in *Quebec v. A*, 2013 SCC 5, which found provisions in the Quebec *Civil Code* that excluded *de facto* spouses from patrimonial support rights granted to married and civil union spouses violated s. 15(1). Justice Abella noted several important features of Justice McIntyre's approach in *Andrews*: (1) the analysis of discrimination must take place within the context of the enumerated or analogous grounds; and (2) discrimination requires a distinction in treatment of different groups or individuals that involve prejudice or disadvantage. She confirmed that the test in *Kapp* was a reformulation of the *Andrews* test, but there is no rigid template; prejudice and stereotyping are two of the indicia that may help to answer the question of whether the law violates the norm of substantive equality, and not discrete elements of the test that a claimant must demonstrate: at para. 325. Justice Abella also emphasized that the inquiry should be flexible and contextual, focused on discriminatory impact and the question of "whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group": at paras. 327, 331.

138 In *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 [*Taypotat*], Abella J., writing for the court, discussed the two-part test:

> [19] The first part of the s. 15 analysis therefore asks whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground. Limiting claims to enumerated or analogous grounds, which "stand as constant markers of suspect decision making or potential discrimination", screens out those claims "having nothing to do with substantive equality and helps keep the focus on equality for groups that are disadvantaged in the larger social and economic context": *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 8; Lynn Smith and William Black, "The Equality Rights" (2013), 62 S.C.L.R. (2d) 301, at p. 336. Claimants may frame their claim in terms of one protected ground or several, depending on the conduct at issue and how it interacts with the disadvantage imposed on members of the claimant's group: *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 37.
>
> [20] The second part of the analysis focuses on arbitrary - - or discriminatory -- disadvantage, that is, whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage:
>
> > The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory. [*Quebec v. A*, at para. 332]

> [21] To establish a *prima facie* violation of s. 15(1), the claimant must therefore demonstrate that the law at issue has a disproportionate effect on the claimant based on his or her membership in an enumerated or analogous group. At the second stage of the analysis, the specific evidence required will vary depending on the context of the claim, but "evidence that goes to establishing a claimant's historical position of disadvantage" will be relevant: *Withler*, at para. 38; *Quebec v. A*, at para. 327.

139 In the twin pay equity cases, *Alliance* and *Centrale*, Abella J., for the majority, referred to the test described in *Taypotat* without reference to the word "arbitrary":

> Does the impugned law, on its face or in its impact, create a distinction based on enumerated or analogous grounds? If so, does the law impose "burdens or [deny] a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating ... disadvantage", including "historical" disadvantage" (*Taypotat*, at paras. 19-20).
>
> [*Alliance* at para. 25; the same test is articulated in *Centrale* at para. 22.]

140 In *Alliance*, Justice Abella considered the first step of the analysis to be neither a preliminary merits screen, nor an onerous hurdle designed to weed out claims on a technical basis, with focus to remain on the grounds of the distinction. As its purpose is to ensure that s. 15(1) is accessible to "those whom it was designed to protect", the distinction stage of the analysis should only bar claims that are not based on enumerated or analogous grounds. With respect to the second step, Justice Abella reiterated the principles from *Kapp*, *Withler* and *Quebec v. A* that it is not necessary to apply a step-by-step consideration of the *Law* factors and should focus on the impact of the distinction: at paras. 26, 28.

141 Finally, in *Fraser*, Justice Abella, again for the majority, reaffirmed that the court's jurisprudence subsequent to *Andrews* consistently applied the principle of substantive equality:

> [42] Our subsequent decisions left no doubt that substantive equality is the "animating norm" of the s. 15 framework (*Withler*, at para. 2; see also *Kapp*, at paras. 15 16; *Alliance*, at para. 25); and that substantive equality requires attention to the "full context of the claimant group's situation", to the "actual impact of the law on that situation", and to the "persistent systemic disadvantages [that] have operated to limit the opportunities available" to that group's members (*Withler*, at para. 43; *Taypotat*, at para. 17; see also *Quebec v. A*, at paras. 327 32; *Alliance*, at para. 28; *Centrale*, at para. 35).

142 She restated the test as follows:

> [27] ...To prove a *prima facie* violation of s. 15(1), a claimant must demonstrate that the impugned law or state action:
>
> * On its face or in its impact, creates a distinction based on enumerated or analogous grounds; and
>
> * Imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.

143 *Fraser* involved a claim of indirect discrimination regarding the pension consequences of a job-sharing program, where the claimants had to demonstrate that the "seemingly neutral law" had a disproportionate adverse impact on women with children. Justice Abella noted several "observations" relevant to the first step of an indirect claim: (1) proof of a discriminatory intent is not required, nor does an ameliorative purpose shield legislation from s. 15(1) scrutiny; (2) where a claimant demonstrates that the law has a disproportionate impact on members of a protected group, there is no need to prove that the protected characteristic caused the impact, or to inquire into whether the law itself is responsible for creating the systemic disadvantages; and (3) there is no need to show that the law affected all members of the protected group in the same way: at paras. 69-75.

144 With respect to the second step, Justice Abella expressly removed any requirement for a claimant to prove that a distinction is arbitrary, describing the nature of the inquiry as follows: (1) it will usually proceed similarly in cases of direct and indirect claims, there is no rigid template, and the goal is to examine the impact of the harm caused to the affected group; (2) the focus should be on the protection of groups that have experienced exclusionary disadvantage based on group characteristics; (3) social prejudices or stereotyping are not necessary

but may assist in showing that a law has negative effects on a particular group; (4) perpetuation of disadvantage is not less serious simply because it was relevant to a legitimate state objective; and (5) there is no need to prove that a distinction is arbitrary. The latter two considerations are inquiries properly left to s. 1: at paras. 76-80.

145 The Supreme Court of Canada has rendered two decisions on s. 15 since *Fraser*. In *Ontario (Attorney General) v. G.,* the court found provincial reporting requirements for a sex offender registry that treated those found not criminally responsible by reason of mental disorder (NCRMD) differently from those convicted of sexual offences to violate s. 15(1). Justice Karakatsanis, for the majority, confirmed that substantive equality focuses on the material impact of a law on members of a protected group in the context of their actual circumstances and both historical and current conditions of disadvantage:

> [43] The ultimate issue in s. 15(1) cases is whether the challenged law violates the animating norm of substantive equality (*Quebec v. A*, at para. 325, citing *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, at para. 2; *Fraser*, at para. 42; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 14). Substantive equality focuses both steps of the s. 15(1) analysis on the concrete, material impacts the challenged law has on the claimant and the protected group or groups to which they belong in the context of their actual circumstances, including historical and present day social, political, and legal disadvantage...
>
> ...
>
> [47] Emerging from the foundation laid in *Andrews*, substantive equality concerns itself with historical or current conditions of disadvantage, products of the persistent systemic discrimination that continues to oppress groups (*Fraser*, at para. 42). Substantive equality demands an approach "that looks at the full context, including the situation of the claimant group and ... the impact of the impugned law" on the claimant and the groups to which they belong, recognizing that intersecting group membership tends to amplify discriminatory effects (*Centrale des syndicats*, at para. 27, quoting *Withler*, at para. 40) or can create unique discriminatory effects not visited upon any group viewed in isolation. It must remain closely connected to "real people's real experiences" (*Egan v. Canada*, [1995] 2 S.C.R. 513, at para. 53, per L'Heureux-Dubé J.): it must not be applied "with one's eyes shut" (McIntyre, at p. 103)...

146 Finally, in *R. v. C.P.*, 2021 SCC 19, one of the issues involved a challenge to s. 37(10) of the *Youth Criminal Justice Act*, S.C. 2002, c. 1, which denies young persons an automatic right of appeal that is available to adults under the *Criminal Code*. The court was divided on whether the impugned provision violated s. 15(1). Put simply, the main difference centered on whether the court should, in the step two analysis, have regard to the legislative scheme underlying the impugned provision in assessing the *actual* impact of the law on the claimant as a young person. Chief Justice Wagner (writing for Moldaver, Brown and Rowe JJ.) held that it was crucial to such an assessment (at para. 145), and concluded that the distinction was not discriminatory. Justice Abella (writing for Karakatsanis and Martin JJ.) held that such considerations were to be considered under s. 1 (at para. 96), and concluded that the distinction was discriminatory and was not saved by s. 1.11

147 With this jurisprudence in mind, I turn to the questions at issue here.

1. Did the trial judge err in concluding that the tax provisions did not infringe the appellant's equality rights under s. 15(1) on the basis of citizenship or national origin?

148 Before the trial judge, the appellant asserted a direct discrimination claim on the basis of the analogous ground of citizenship, and an indirect discrimination claim on the basis of citizenship and national origin, and more specifically a subset of buyers from Asia or China. The judge dismissed these claims and held that the tax provisions did not violate s. 15(1).

149 The appellant makes the same assertions before this court and submits the trial judge erred in several ways:

a) concluding that the distinction in this case was based

on

a person's immigration status rather than citizenship;

b) failing to undertake the second step of the analysis on the basis of citizenship;

c) applying a formal, rather than a substantive, equality analysis in respect of the indirect discrimination claim; and

d) excluding expert evidence that was relevant to the indirect discrimination claim.

The decision below

150 The trial judge referred to the principles expressed in *Taypotat* and *Withler*, both which confirmed the principle that s. 15 protects substantive equality, and applied the two-step analysis referred to in those cases.

151 The judge articulated the first step as whether the tax provisions, on their face or in their impact, created a distinction on the basis of an enumerated or analogous ground. With respect to the appellant's direct discrimination claim, he found that the tax provisions created a distinction based on immigration status rather than citizenship because a distinction based on citizenship was not exclusive:

> [180] In the cases relied upon by the plaintiff to support her argument at the first stage that the Tax draws a distinction based on citizenship, the benefit or eligibility was conditional exclusively on citizenship. There was no exemption for permanent residents or Provincial nominees. In *Andrews*, [McIntyre J.] made it clear that a law that bars an entire class from certain forms of employment solely on the ground of citizenship violates the equality rights of that class.
>
> [181] No such exclusivity is present in the case at bar. The distinction drawn by the Impugned Provisions is not based solely on citizenship but also upon whether an individual is a permanent resident or is imminently entitled to permanent residency. In effect, the distinction is drawn between those persons who have a permanent entitlement to live in Canada or an imminent permanent entitlement to reside in B.C. and thus in Canada. In my view that distinction is based on a person's immigration status which has not been recognized as an analogous ground for the purpose of s. 15.

152 He noted that immigration status has not been recognized as an analogous ground because it is not immutable or changeable only at unacceptable cost to personal identity, citing *Corbiere* and *Toussaint v. Canada (Attorney General)*, 2011 FCA 213. He found this case to be similar to *Irshad (Litigation guardian of) v. Ontario (Ministry of Health)* (2001), 55 O.R. (3d) 43 (C.A.), where citizenship was one of many criteria that could qualify a person for benefits under the province's health insurance plan: at paras. 181-185. As the tax applies to a "foreign national", defined under the *IRPA* as a person who is not a Canadian citizen or a permanent resident of Canada, the judge was not satisfied that the tax drew "a broad or general distinction based on citizenship". He was also not satisfied that the tax created a distinction based on national origin because it applied equally to all foreign nationals regardless of citizenship or country of origin, and many within this group -- those who have permanent residence status or are Provincial nominees -- are not subject to it: at paras. 186-189.

153 The trial judge briefly addressed the appellant's indirect discrimination claim that the tax provisions have an adverse impact on buyers from China. He concluded that the tax was not responsible for any unequal burden on Asian persons, "due to social forces that are not connected to the Tax including demand factors or the population size of the buyers" and there was "nothing about the Tax itself that would cause Asian buyers to be taxed at a higher rate": at para. 190.

154 The judge went on to address the second step of the analysis only in relation to the appellant's indirect discrimination claim. It was his view that the group considered at the second step should be the same group identified at the first step, and because he did not accept that the tax drew a distinction based on citizenship, he only addressed this claim "for the sake of completeness". In doing so, he applied the following principles set out in *Taypotat*:

> [20] The second part of the analysis focuses on arbitrary - - or discriminatory -- disadvantage, that is, whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage...

155 He also recognized that prejudice and stereotyping are two indicia that may help answer the question, and not discrete elements that a claimant must demonstrate.

156 The judge held that the appellant was required to show that the tax itself perpetuated or exacerbated racial stereotypes and prejudices, and it was not enough that these stereotypes and prejudices existed or were mentioned in public discourse at the time the tax provisions were enacted. He found the view that foreign buyers were contributing to housing unaffordability was not prejudiced in respect of any particular group, and noted that all of the expert economists appeared to accept that foreign buyers had contributed to the problem. He also noted evidence of "overwhelming support" for the tax among Asians living in Greater Vancouver, and that citizens and permanent residents of Chinese descent were equally impacted by housing unaffordability and would benefit from any measures that would improve this. In that context, he concluded that the tax did not perpetuate an "Asian disadvantage".

157 The judge acknowledged that the majority of buyers after the tax provisions were enacted (until November 2017) were citizens of Asian countries, particularly China, but was not satisfied that the tax adversely affected Asian buyers:

> [201] ... As the defendant says, it is not a numbers game. Buyers from Asian countries, such as China, receive equal treatment that is proportionate to the demand from those countries. There is no burden imposed on buyers from Asian countries that is not imposed on buyers from other countries. Further, buyers from Asian countries have the same opportunity to seek permanent residency status or a provincial nomination so as to be exempt from the Tax.

158 He therefore concluded that the appellant had failed to establish that the tax is discriminatory due to a disproportionate impact on buyers from China.

The claims

159 As the jurisprudence demonstrates, violations under s. 15(1) may be direct or indirect, and usually a claim is one or the other. Here, the appellant makes both types of claims. While I do not suggest this is improper, there are several problems with the appellant's approach to this ground of appeal.

160 First, while the basis for the direct discrimination claim is clearly the analogous ground of citizenship, the basis for the indirect claim is less clear. In her factum, the appellant bases it on the enumerated grounds of race and national origin, but in oral submissions, she based it on the "intersecting" grounds of citizenship and national origin. Moreover, her arguments in respect of the indirect claim do not address the ground of national origin and focus only on "a subset of foreign nationals", which she describes as "buyers from Asian countries, especially buyers from China". Without a foundational enumerated or analogous ground, an argument based on a subset of "foreign nationals" cannot establish discrimination within the meaning of s. 15(1).

161 Second, the lack of clarity in the appellant's asserted enumerated or analogous grounds for the indirect claim is reflected throughout her argument. In respect of the subset group, she makes little distinction between buyers from Asia or China and "Asian" or "Chinese" persons, and she asserts a disproportionate impact grounded on the sad history in this province of discrimination against Asian and Chinese persons (a ground different from that asserted before the trial judge). An Asian or Chinese person may or may not be a citizen of Canada, and in the context of this case, may or may not be subject to the tax or affected by it. An Asian or Chinese person may also be part of the group for whom the tax was aimed to protect by making home ownership in the GVRD more affordable. While all members of a protected group do not have to be adversely affected by an impugned law, there must be an identifiable subgroup that is.

162 As I will explain, it is my view that the appellant has not established that the tax provisions create a distinction, whether direct or indirect, based on citizenship or national origin.

a) Direct discrimination on the basis of citizenship

Step 1 -- Distinction on enumerated or analogous grounds

163 It is clear that the impugned tax provisions directly create a distinction based on a definition of "foreign nationals". The question is whether that distinction is based on the analogous ground of citizenship.

164 The appellant submits that the trial judge's approach to a distinction based on citizenship imposes inclusivity criteria that is unsupported by *Andrews* and other case law. She says that the only relevant factor at the first step of the analysis is that all persons who pay the tax are non-citizens and it does not matter that the tax does not disadvantage all non-citizens. She cites several authorities to support the proposition that differential treatment can occur even where not all persons belonging to the protected group are equally mistreated: *Lavoie v. Canada*, [2002] 1 S.C.R. 769; *Eldridge*; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54; *Centrale*.

165 The appellant further submits that the judge's reliance on *Irshad* and *Toussaint* to ground his conclusion that the distinction was based on immigration status was misplaced. She says that *Irshad* involved a law based on residency, not citizenship, and no immigration status distinction was found in *Toussaint*.

166 The Province submits that immigration status is the only basis on which the tax provisions distinguish between transferees. It says the citizenship cases of *Andrews* and *Lavoi* e are distinguishable because the eligibility at issue in those cases was conditioned exclusively on citizenship, with no exemptions for permanent residents or other types of immigration status. It submits that *Martin* and *Centrale* establish that a distinction can be established at the level of a subset of a protected group, and do not suggest that a distinction will be drawn where the affected subset heterogeneously straddles both sides of the alleged distinction.

167 In addition to being the seminal case on s. 15 jurisprudence, *Andrews* established citizenship as an analogous ground. I agree with the appellant that *Andrews* did not establish a distinction based on citizenship that must be "perfectly inclusive". The citizenship requirement in *Andrews* did not adversely affect all non-citizens; it affected only those non-citizens who were permanent residents. The same group was adversely affected in *Lavoie*. However, there is a difference between the impact of the distinction and the basis for eligibility. In both of these cases, the group impacted was excluded from employment only on the basis of their citizenship.

168 The claimant in *Andrews* was a permanent resident who had fulfilled all the requirements for admission to the practice of law in British Columbia, except that of Canadian citizenship. The citizenship requirement had the effect of requiring permanent residents otherwise qualified to wait a minimum of three years from the date of establishing their permanent residence before being considered for admission to the Bar. This distinction was found to be discriminatory because it imposed a burden in the form of some delay on permanent residents who had acquired all or some of their legal training abroad. Justice McIntyre concluded that "[n]on-citizens, lawfully permanent residents of Canada, are ... a good example of a 'discrete and insular minority' who come within the protection of s. 15". It was in this context that he described the distinction as a "rule which bars an entire class of persons from certain forms of employment solely on the grounds of a lack of citizenship status".

169 In *Lavoie*, a provision in the federal *Public Service Employment Act*, R.S.C. 1985, c. P-33 that gave preferential treatment to Canadian citizens at a certain stage of open competitions was found to violate s. 15(1). Not only did the treatment affect only permanent residents, it did not impose a complete bar on non-citizens.

170 This case is in some respects the converse of *Andrews* and *Lavoie* in that the tax provisions apply only to those non-citizens who are *not* permanent residents. However, the citizenship distinction in both *Andrews* and *Lavoie* was obvious, given the clear citizenship requirement to be eligible for employment for otherwise qualified candidates. Even those persons who had a strong connection to the country, and were in fact permanent residents,

were excluded from employment because they fell on the opposite side of the demarcation between citizens and non-citizens. In contrast, non-citizens in this case fall on both sides of the demarcation made by the tax provisions.

171 On its face, by applying the definition of "foreign national" in the *IRPA*, the tax provisions make a distinction between persons who are neither Canadian citizens nor permanent residents of Canada and others, thus including more than one criterion. Subsequent regulations provided for exemptions for provincial nominees and entitlement to refunds for transferees who become Canadian citizens or permanent residents within a year of the transfer and who reside or intend to reside in the property. These exemptions create further criteria of persons whose status as a permanent resident is imminent.

172 In my view, *Irshad* provides a helpful analysis of the meaning of immigration status. In that case, the Ontario Court of Appeal dismissed a s. 15 challenge to regulations that defined "resident" for the purpose of establishing eligibility for public health insurance on the basis that a person's immigration status is not an enumerated or analogous ground. The impugned regulations, aimed at eliminating coverage for temporary residents, linked the definition of resident to one's status under the *Immigration Act*, R.S.C. 1985, c. I-2. To be eligible, a person had to be both ordinarily resident in the province and fall within one of 11 categories of immigration status. Under the previous regulations, a person's immigration status was irrelevant as long as that person could lawfully remain in Canada.

173 Justice Doherty, writing for the court, rejected the appellants' argument that the impugned regulations violated s. 15(1) on the basis of immigration status, as this was neither a ground enumerated under s. 15 nor an analogous ground. He also rejected an argument that the definition of residency drew a distinction between Canadian citizens ordinarily resident in the province and non-citizens ordinarily resident in the province:

> [125] ... The language of the regulation does not reflect this comparison. Many non-citizens are eligible for OHIP under the definition of resident. Canadian citizenship is but one of many criteria which may bring a person within the definition of resident and make that person eligible for OHIP if he or she is ordinarily resident in Ontario.

174 He found the distinction in the regulations to be

> [134] ... a distinction between those persons who are ordinarily resident in Ontario and whose status under federal immigration law is such that they are entitled or will shortly be entitled to be permanent residents of Ontario, and those persons who are ordinarily resident in Ontario but who, by virtue of their immigration status, are not entitled to become permanent residents in Ontario.

175 Justice Doherty recognized that the immigration process must be assumed to operate within constitutional limits and within the spirit of s. 15(1), and therefore a legislature's reliance on immigration status in determining matters such as residence in the province could not be classified as discriminatory: at para. 137.

176 In my view, *Irshad* was clearly a case of a law making a distinction based on immigration status. The focus of the impugned law was residency. The regulation in issue set out 11 ways in which a person ordinarily resident in the province was eligible for insurance benefits, which included: Canadian citizenship or landed immigrant (now permanent resident) status; a Convention refugee; persons at specified stages of the process for obtaining landed immigrant status and refugee status; persons with an employment contract holding an employment authorization; and persons under certain types of Minister's permit. There were numerous ways applicants could meet the requirement of having a legal status that permitted them to legitimately intend to make their permanent home in the province.

177 While the immigration status distinction was made in a different context in *Irshad*, it has clear parallels to the present case. Here, the group subject to the tax is more narrowly defined than the individuals who met the residency requirement in *Irshad*, but the distinction in both cases applies only to the subset of non-citizens who do not have a present or imminent right to permanently reside in Canada. The Province correctly notes that a s. 15 distinction has never been recognized where citizenship is not the only criterion. It also cautions that accepting a

citizenship distinction in this case would have far-reaching implications on government decisions that favour individuals who have committed to Canada for many valid purposes.12

178 Whatever the implications for government, the purpose of this first step is not to "weed out" claims on technical bases but to ensure that s. 15(1) is accessible to those whom it was designed to protect: groups that are disadvantaged in the larger social and economic context: *Taypotat* at para. 19. The enumerated or analogous grounds are critical as "constant markers of suspect decision making or potential discrimination": *Corbiere* at para. 8; *Alliance* at para. 26. Immigration status has not been recognized as an analogous ground under the principles set out in *Corbiere,* as such status is not immutable or changeable at unacceptable cost to personal identity, unlike citizenship: see *Irshad* at paras. 135-136; *Toussaint* at para. 99; *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2014 FC 651 at paras. 861-870. There is merit to the Province's submission that the appellant's assertion of the citizenship ground attempts to sidestep the immutability analysis.

179 Notably, the appellant did not pursue immigration status as constituting an analogous ground as an alternative argument in the appeal, other than pointing to some authority suggesting a view contrary to the cases referred to above: *Re Jaballah*, 2006 FC 115 and *Fraser v. Canada (Attorney General)*, 2005 CanLII 47783 (Ont. S.C.). However, there was no considered analysis in either case, and in *Fraser v. Canada*, the question was raised in the context of a motion to strike pleadings.

180 Respectfully, the appellant's argument that the only relevant factor is that all persons who pay the tax are non-citizens is too simplistic. Differential treatment can clearly occur among a subset of the protected group, as not all persons belonging to the protected group need be equally mistreated. The key, though, is a clear definition of the protected group defined by the applicable enumerated or analogous ground. For example, a distinction on the basis of sex may only affect pregnant women (*Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219); a distinction on the basis of disability may affect only chronic pain sufferers (*Martin*) or deaf people (*Eldridge*): see *Fraser* at paras. 72-75.

181 Here, the tax draws a distinction based on citizenship combined with another ground -- permanent residence -- that is neither an enumerated nor an analogous ground. While it is true that no citizens are required to pay the tax, non-citizens fall on both sides of the line drawn by this dual distinction.

182 Therefore, it is my view that the tax provisions draw a distinction based on immigration status, not citizenship. Indeed, an attempt to conduct step two of the analysis, as set out below, illustrates the difficulty of applying a citizenship distinction in this case, as the permanent residence "ground" distorts the analysis.

Step 2 -- Discrimination

183 The appellant submits that the tax provisions perpetuate disadvantage against non-citizens, as they impose a financial burden on non-citizens as a historically disadvantaged group. She says the tax is expressly intended to deter non-citizens from engaging in an economic activity -- home ownership -- that the trial judge acknowledged was a critical aspect of one's social identity and a potent symbol of belonging and moral worth. She further submits that the tax reinforces, perpetuates or exacerbates disadvantage, citing *Lavoie*.

184 In *Lavoie*, Justice Bastarache, writing for the majority on this issue, found that all four *Law* factors militated in favour of a violation of s. 15(1). In respect of the second factor (the relationship between the ground and the claimant's characteristics or circumstances), he found that the distinction was not based on "any actual differences between individuals" and placed an additional burden on an already disadvantaged group. He then turned to the remaining three factors (pre-existing disadvantage, ameliorative purpose or effects, and the nature of the interest affected):

> [45] ... First, while the claimants in this case are all relatively well-educated, it is settled law that non-citizens suffer from political marginalization, stereotyping and historical disadvantage. Indeed, the claimant in *Andrews*, who was himself a trained member of the legal profession, was held to be part of a class "lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated": see *Andrews, supra, per* Wilson J., at p. 152. In my view, this dictum applies

> no matter what the nature of the impugned law. Second, s. 16(4)(c) of the *PSEA* does not aim to ameliorate the predicament of a group more disadvantaged than non-citizens; rather, the comparator class in this case (unlike in *Law*, perhaps) enjoys greater status on the whole than the claimant class. Finally, the nature of the interest in this case -- namely, employment - - is most definitely one that enjoys constitutional protection. As repeatedly held by this Court, work is a fundamental aspect of a person's life, implicating his livelihood, self-worth and human dignity: see *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, *per* Dickson C.J., at p. 368, and subsequent cases. Although the scope of the affected interest in this case is fairly narrow owing to the fact that s. 16(4)(c) is limited to public sector employment and does not impose a complete bar on non-citizens, in my view the nature and scope of the affected interest still warrants constitutional protection. As stated above, work is a fundamental aspect of a person's life, and a law which operates to limit the range of employment options for non-citizens is still likely to implicate the individual's livelihood, self-worth and human dignity. Indeed, much of the discussion in this case was centered on the appellants' argument that Parliament's intention was to distinguish between citizens and non-citizens on the basis of their relative loyalty and commitment to Canada. In this context, a cursory look at the four *Law* factors suggests that s. 16(4)(c) of the *PSEA* violates s. 15(1) of the *Charter*.
>
> [Emphasis added.]

185 Justice Bastarache emphasized the importance of considering the overarching question of whether the law perpetuates the view that non-citizens are less capable or less worthy of recognition or value as human beings or members of Canadian society, and the need for "a contextualized look at how a non-citizen legitimately feels when confronted by a particular enactment":

> [52] Turning to the subjective-objective evaluation in this case, I think the claimants in this case felt legitimately burdened by the idea that, having made their home in Canada ..., their professional development was stifled on the basis of their citizenship status. Their subjective reaction to the citizenship preference no doubt differed from their reaction to not being able to vote, sit in the Senate, serve on a jury, or remain in Canada unconditionally. An obvious difference in this context is that employment is vital to one's livelihood and self-worth; another is that there is no apparent link between one's citizenship and one's ability to perform a particular job; finally, the distinction can reasonably be associated with stereotypical assumptions about loyalty and commitment to the country, even if that is not Parliament's intention...
>
> [Emphasis added.]

186 He therefore concluded:

> ... Immigrants come to Canada expecting to enjoy the same basic opportunities as citizens and to participate fully and freely in Canadian society. Freedom of choice in work and employment are fundamental aspects of this society and, perhaps unlike voting and other political activities, should be, in the eyes of immigrants, as equally accessible to them as to Canadian citizens. Discrimination in these areas has the potential to marginalize immigrants from the fabric of Canadian life and exacerbate their existing disadvantage in the Canadian labour market. This is true whether or not the discrimination operates on the basis of stereotyping; if it makes immigrants feel less deserving of concern, respect and consideration, it runs afoul of s. 15(1): see *Law, supra*, at para. 88. For these reasons, I conclude that s. 16(4)(c) of the *PSEA* violates s. 15(1) of the *Charter* and requires justification under s. 1.
>
> [Emphasis added.]

187 The appellant submits that one can replace the words "employment" with "housing" and the above reasoning applies with equal force in this case. She contends that the tax is intended to make access to homeownership less accessible to non-citizens and has the effect of perpetuating barriers to "meaningful access to what is generally available", citing *Quebec v. A* at para. 319.

188 Respectfully, I disagree. There is a significant difference between the nature of the interest affected in *Lavoie* and the interest in this case. In the context of the actual circumstances of the group of non-citizens affected by the tax, who do not have the same rights as those accorded to citizens and permanent residents to live and work in Canada, I do not see this case as simply about housing and homeownership.

189 I do not accept the appellant's submission that the tax perpetuates a disadvantage simply because a financial burden has been placed on non-citizens as a historically disadvantaged group, which is not placed on others. There is no question that a burden has been placed on some non-citizens, but the effect of that burden must be discriminatory to constitute a violation of s. 15(1).

190 I accept that in general, non-citizens suffer from political marginalization, stereotyping and historical disadvantage, and the appellant as a non-citizen can be said to be a person lacking in political power such that she is vulnerable to having her interests and rights overlooked: see *Lavoie* at para. 45, cited above. I do not accept, however, that this fact alone establishes discrimination where there has been differential treatment. As Justice Iacobucci stated in *Law*, a claimant's association with a group which has been historically disadvantaged is not conclusive of a violation under s. 15(1), as the result will depend on whether or not the distinction truly affects the dignity of the claimant: at para. 67. Within the current test, the distinction must truly disadvantage the claimant and the protected group in the full context of their actual circumstances: see *Ontario (Attorney General) v. G.* at paras. 43 and 47 (cited at para. 145 above); *Fraser* at para. 42.

191 It is here that the citizenship distinction, as asserted by the appellant, becomes blurred when permanent residents are not part of the protected group, as her position relies substantially on protections afforded to permanent residents.

192 In contrast with *Lavoie*, the nature of the interest affected in this case does not enjoy constitutional protection. Section 6 of the *Charter* draws a distinction between citizens and non-citizens, and between permanent residents and other non-citizens in respect of mobility rights:

> 6 (1) Every citizen of Canada has the right to enter, remain in and leave Canada.
>
> (2) Every citizen of Canada and every person who has the
>
> status of a permanent resident of Canada has the right
>
> (a) to move to and take up residence in any province; and
>
> (b) to pursue the gaining of a livelihood in any province.

193 There is no question that s. 6 does not deny non-citizens and non-permanent residents the protection of s. 15, which applies to "every individual". However, s. 6 may nevertheless be relevant to a s. 15 analysis. In *Irshad*, Justice Doherty considered a s. 6(2)(a) and s. 6(3)(b)13 of the *Charter* to be relevant to the s. 15 analysis because the alleged discrimination arose from a law that imposed limits on eligibility for publicly funded services:

> [98] ... The meaning to be given to one section of the Charter must be informed by the language and meaning of other provisions in the Charter: R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 at p. 344, 18 D.L.R. (4th) 321; R. v. Mills, [1999] 3 S.C.R. 668 at p. 688, 180 D.L.R. (4th) 1. Distinctions which are part of and integral to the mobility right recognized in s. 6(2) and s. 6(3)(b) cannot in and of themselves be discriminatory under s. 15: Chiarelli v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 711 at p. 736, 90 D.L.R. (4th) 289.14

194 Because s. 6(2)(a) and s. 6(3)(b) recognize that a distinction may appropriately be made between residents who meet a reasonable residency requirement and those who do not, Justice Doherty held that such a distinction would not be discriminatory under s. 15.

195 Similarly, s. 6(2) of the *Charter* recognizes that a distinction may appropriately be made between citizens and permanent residents, and non-citizens and non-permanent residents, in respect of the right to live and work in a province. In this context, the appellant's submission that the tax is intended to exclude non-citizens from the social and economic franchise of home ownership cannot be sustained. Home ownership attains value "as a potent symbol of belonging" in the context of individuals or groups with a degree of permanence in Canada. While I appreciate that the appellant, as an individual, has an immigration status that permits her to live and work in Canada, this is not a right with permanence, nor is it a right protected by the *Charter*. I would not therefore

characterize the nature of the interest affected -- the purchase of residential property in the GVRD -- to be vital to the livelihood and self-worth of the affected group of non-citizens here.

196 In any event, the focus is not on the intent of the law but on its concrete and material impact on the appellant as a non-citizen in the context of the actual circumstances of this group. Although the appellant may be disadvantaged by being politically marginalized, she is part of a group of non-citizens that has chosen to purchase residential property in the GVRD despite having no permanent right to reside in the province. The evidence does not support the contention that the tax has perpetuated a disadvantage to this subset of non-citizens in being able to acquire such property. This claimant group is far different from the group of disabled residents in long-term care facilities on whom an additional financial burden (an accommodation charge) was placed in *Elder Advocates of Alberta Society v. Alberta*, 2019 ABCA 342. Moreover, there was uncontroverted evidence among the three expert economists that foreign buyers were contributing to the rapid price escalation in the GVRD during the period preceding the imposition of the tax. Given this evidence, a distinction based on citizenship (and permanent residence) cannot reasonably be associated with the stereotypical application of presumed group or personal characteristics.

197 The appellant's evidence is that the tax made her feel unwelcome in Canada, and she submits that her subjective experience should be considered, again citing *Lavoie*. However, *Lavoie* makes it clear that there must be a rational foundation for a claimant's subjective view, and in fact applies the necessary "subjective-objective" evaluation to such evidence. Important in that evaluation is the fact that there was no apparent link between one's citizenship and one's ability to perform a particular job; thus, the distinction in *Lavoie* could reasonably be associated with stereotypical assumptions about matters such as loyalty and commitment to the country.

198 Here, the appellant has not identified a negative stereotypical assumption made against the affected subset of non-citizens that is perpetuated by the tax. Unlike *Lavoie*, there is a logical link between one's citizenship (and permanent residence) and the value of housing. That said, I appreciate that the appellant's subjective experience is an important consideration, but her evidence in this regard is primarily focused on her experience as a buyer from China, a further subset of non-citizens, which is the subject of her indirect discrimination claim.

199 As the foregoing discussion demonstrates, the fact that the tax draws a distinction on both citizenship and present or imminent permanent resident status has a significant impact on the discrimination analysis. Even if the distinction can be said to be based on citizenship, it cannot be said that the tax provisions have the effect of imposing or perpetuating a real disadvantage to the group of non-citizens affected in the social and political context of this claim.

b) Indirect discrimination on the basis of citizenship and national origin

200 Given these conclusions, the appellant's indirect discrimination claim, based on the "intersecting" grounds of citizenship and national origin, suffers from the absence of a significant foundational requirement of a distinction based on enumerated or analogous grounds. The ground of national origin is closely connected to the ground of citizenship, especially in the context of this case. Neither party addressed the trial judge's conclusion that the tax does not create a distinction based on national origin. However, I will address this in relation to the appellant's indirect discrimination claim.

Step 1 -- Distinction on enumerated or analogous grounds

201 For this indirect claim, it is alleged that the impugned tax provisions, while purporting to treat all foreign nationals alike, have a disproportionate impact on "buyers from Asian countries, especially buyers from China", thereby creating a distinction between this sub-group and other foreign nationals. The question here is whether this distinction is based on an enumerated or analogous ground.

202 This first step of the analysis is focused on establishing a "distinction", in the sense that the claimant is treated differently than others by reason of a personal characteristic that falls within the enumerated grounds of s. 15(1) or grounds analogous to them. To do so in an indirect discrimination claim is generally more difficult, as a claimant must establish that a law that purports to treat everyone the same has a disproportionately negative impact on her

and the claimant group, which can be identified by factors relating to enumerated or analogous grounds. The focus will be on the effect of the law and the situation of the claimant group: see *Withler* at paras. 61-64.

203 In the absence of the ground of citizenship, to establish a distinction based on indirect discrimination, the appellant must show that the tax provisions have a disproportionate negative impact on her as a member of a group based on the ground of national origin. She does not have to prove that her national origin caused the disproportionate impact or that the law affects all members of the protected group in the same way: see *Fraser* at paras. 70, 72.

204 Notably, the appellant does not explain the basis for her reliance on the ground of national origin or why the trial judge erred in concluding that the distinction was not based on this ground. She submits that an adverse discrimination claim does not depend on a distinction based on citizenship but rather, the "distinction criteria can be met by indirect discrimination". She says that the burden of the tax has a disproportionate impact on buyers from China because of the unique historic and contemporary reality of discrimination they face, and asserts that the distinction is created by this disproportionate impact. To support this argument, she refers to *Withler* at para. 64 and *Taypotat* at para. 19.

205 In my view, this is a circular argument that is not supported by these and other authorities. In no case involving an indirect discrimination claim was there a question regarding the applicable enumerated or analogous ground. In this case, there is. The appellant does not expressly relate the adverse impact to national origin, and I do not see an indirect claim as a way to enable a claimant to establish a distinction simply based on adverse impact. The same legal tests apply to both types of discrimination: *Fraser* at para. 49. A distinction, whether direct or indirect, must be based on a protected ground.

206 The jurisprudence has always required the s. 15 analysis to "take place within the context of the enumerated grounds and those analogous to them": *Andrews* at 180. As Justice Abella stated in *Fraser*:

> [30] ...Adverse discrimination occurs when a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground.
>
> [Emphasis added.]

207 In *Withler*, the court referred to an indirect claim as dealing with a law having a disproportionate impact "on a group or individual that can be identified by factors relating to enumerated or analogous grounds": at para. 64. I do not read this as in any way diminishing the requirement that the adverse impact must be on a member of a protected group. Nor is there anything in *Taypotat* that suggests otherwise. The focus at the first step is to remain on the grounds of the distinction: *Alliance* at para. 26.

208 Therefore, the appellant must establish that she is a member of a protected group, or that the subset she identifies in her indirect claim is a subset of a protected group. Otherwise, she is seeking to establish a distinction that is not protected by s. 15. In my view, she cannot do so by identifying the affected group as "buyers from China" and simply assuming that this group is a subset of a group that is protected under s. 15 on the ground of national origin.

209 The appellant challenges the trial judge's conclusion that "any unequal burden on Asian persons" was due to "social forces" and there was "nothing about the Tax itself that would cause Asian buyers to be taxed at a higher rate". She submits that this is a formal equality approach that reduces s. 15 to identical treatment. She draws an analogy with *Vriend v. Alberta*, [1998] 1 S.C.R. 493 to support the proposition that a distinction can be created by a disproportionate impact on an affected group "because of the historic and contemporary reality of discrimination" present in society.

210 There are several problems with this submission. First, the appellant does not address the trial judge's conclusion that the tax does not create a distinction based on national origin because many people of foreign national origin are not subject to the tax. The fact that many people within this group are not subject to the tax

burden is an important factor. As I indicated above, national origin is closely connected to citizenship and in the context of this case, similar considerations are relevant when considering whether the law creates a distinction on this basis. A person of a national origin other than Canada may be a permanent resident (or even a citizen) of Canada, and as with citizenship, the additional criterion of permanent residence changes the nature of the distinction. I do not see how the distinction based on immigration status can apply to the direct claim but not the indirect claim.

211 Secondly, the appellant's submission confuses the factors to be considered at the first step of the analysis with those in the second step. While I recognize the potential for overlap between the two steps in adverse effects cases, it remains important that the court answer the necessary questions relevant to the particular inquiry: see *Fraser* at para. 82. Here, the disproportionate impact asserted by the appellant on appeal is a rather imprecise impact of a social disadvantage to be considered with the historic and contemporary discrimination towards Asian and Chinese people. At step one, the focus is to be on a disproportionate impact, not whether that impact perpetuates a disadvantage, and evidence is important. However, the appellant does not refer to evidence that proves this assertion, especially in the context of Asian or Chinese people without permanent ties to the community. While disproportionate impact can be proven in different ways, evidence about the situation of the claimant group and the results of the law will be especially helpful. Both types of evidence must establish more than a "web of instinct": see *Fraser* at paras. 56-60.

212 On this issue, the appellant has not established an evidentiary basis for the disproportionate impact she asserts. Instead, she focuses her argument regarding this disadvantage at step two and relies on evidence that goes to the issue of discrimination rather than disproportionate impact.15 She has not simply overlapped the two inquiries but has essentially displaced the first with the second.

213 Notably, the appellant asserted a different impact before the trial judge: that the foreign buyers who are disproportionately affected by the tax come from Asian countries, with Chinese buyers being the most affected as the group most likely to purchase real estate. The evidence clearly showed that a higher proportion of foreign buyers were from China. It was in this context that the judge concluded that the tax applies equally to all "foreign nationals" regardless of country of origin and any unequal burden on "Asian persons" was due to "demand factors or the population size of the buyers". Facially, the judge's conclusion can be said to reflect a formal equality approach, as true equality does not necessarily result from identical treatment.

214 However, the deeper question is whether the distinction is disproportionate when considered in the context of the claimant group's situation. As Justice Abella noted in *Fraser*, adverse impact discrimination violates "the norm of substantive equality" when a facially neutral law ignores the "true characteristics" of a protected group: see para. 47. The evidence did not establish that buyers from China faced social, cultural or economic barriers. Even assuming that the distinction is based on national origin, in the context of this case, the impact on buyers from China cannot be said to be disproportionate to their situation; to the contrary, it is precisely proportionate to the demand for residential property from this group and their ability to buy it. As the evidence showed, many buyers from China have access to substantial financial resources to purchase residential property in a country to which they are not permanently tied. In this context, there is no *adverse* impact.

215 Finally, I do not consider *Vriend* to be a helpful analogy to this case. *Vriend* dealt with the application of the *Charter* to a provincial human rights statute that excluded sexual orientation as a ground of discrimination, which had an adverse impact on members of the LGBTQ+ community. The court rejected an argument that any distinction was not created by law, but rather existed independently of the legislation in society. It held that the reality of discrimination against LGBTQ+ persons provided the context in which the legislative distinction was to be analyzed, and concluded that the exclusion of the ground of sexual orientation, considered in that context, had a disproportionate impact on LGBTQ+ persons.

216 Two factors distinguish *Vriend* from this case. The first is that the distinction there was created by the under-inclusiveness of the statute. Here, there is no equivalent structural deficiency in the *PTTA*, which simply imposes an additional property transfer tax on "foreign nationals" for specified kinds of transactions. While a claimant does not

have to prove that the legislation creates the discrimination existing in society, she cannot rely only on historic and social circumstances, especially when those circumstances involved Asian and Chinese persons in very different situations than the claimant group here. There must be some relationship between the structure or operation of the law and the alleged disproportionate impact: see *Symes v. Canada*, [1993] 4 S.C.R. 695 at 764-765; *Eldridge* at para. 76. The second is that the distinction in *Vriend* resulted in the denial of the equal benefit and protection of the law on the basis of a recognized analogous ground (sexual orientation).16 Here, the appellant has simply assumed, without establishing, a distinction on the basis of national origin.

217 Therefore, it is my view that the appellant has not established that the tax provisions have a disproportionate impact on her because of "the unique historic and contemporary reality of discrimination" faced by buyers from China, nor has she established that she is a member of a protected group under s. 15(1).

218 The distinction drawn in this case -- immigration status -- is not based on a personal characteristic inherent in the enumerated grounds in s. 15 or those analogous to them. As Justice Abella stated in *Taypotat*:

> [19] ... Limiting claims to enumerated or analogous grounds, which "stand as constant markers of suspect decision making or potential discrimination", screens out those claims "having nothing to do with substantive equality and helps keep the focus on equality for groups that are disadvantaged in the larger social and economic context" ...

219 This echoes the observations of Justice McIntyre in *Andrews* at 168:

> It is not every distinction or differentiation in treatment at law which will transgress the equality guarantees of s. 15 of the *Charter*. It is, of course, obvious that legislatures may -- and to govern effectively -- must treat different individuals and groups in different ways. Indeed, such distinctions are one of the main preoccupations of legislatures. The classifying of individuals and groups, the making of different provisions respecting such groups, the application of different rules, regulations, requirements and qualifications to different persons is necessary for the governance of modern society. As noted above, for the accommodation of differences, which is the essence of true equality, it will frequently be necessary to make distinctions...

Further observations

220 In light of my conclusions, it is not necessary to address the second step of the s. 15 analysis in the indirect claim, nor is it necessary to address s. 1. However, as the appellant focused much of her submissions on these aspects of this ground of appeal, I will close with some brief observations.

221 The appellant's primary submission regarding her indirect claim of discrimination is that the tax perpetuates a social disadvantage that must be understood with reference to the history of discrimination against Chinese persons in British Columbia. In this context, she says the tax perpetuates historical exclusion of Chinese people and enflames the prejudicial stereotype that "Chinese people are the cause of housing affordability".

222 A substantial portion of the appellant's argument in relation to this relies on alleged errors by the trial judge regarding the admissibility of expert evidence. These kinds of decisions are entitled to deference absent an error in principle or an unreasonable conclusion (see *R. v. McManus*, 2017 ONCA 188). In my view, the judge considered and applied the correct legal principles (reiterated in *R. v. Bingley*, 2017 SCC 12) and generally, his rulings were reasonable.

223 The judge excluded the report of Dr. Henry Yu, a historian, which included a history of discriminatory provincial and federal laws against Chinese people up to the 1960s. It also included an opinion that anti-Chinese rhetoric remains common despite demographic changes in the Lower Mainland that have increased the number of residents of Asian ancestry; and the "pervasive public discourse" that preceded the imposition of the tax conflated "Chinese" with foreign, thereby targeting Chinese foreign buyers. The judge considered the historical portion of this report to be unnecessary and the remainder to constitute argument rather than proper expert evidence. He expressed

concern about the lack of references to source materials and Dr. Yu's reliance on Google searches, and letters to editors and provincial government ministers to support his conclusions.

224 The historical portion of Dr. Yu's report was relevant to the appellant's argument and some of this history was included in other reports that were admitted.17 I agree with the appellant that the exclusion of this portion of Dr. Yu's report was unreasonable. However, the judge had reason to be concerned about partiality in respect of the remainder of the report given the lack of rigor in Dr. Yu's supporting material and his attempt to present a conclusion on the essence of the discrimination issue before the court. As Cromwell J. cautioned in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, a trial judge must be alive to the need for expert opinion evidence to be fair, objective and non-partisan:

> [32] ... The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another.

225 The judge exercised his discretion to exclude this report after hearing testimony from Dr. Yu. His assessment of that testimony and his view that the benefits of admission did not outweigh the potential harm to the trial process are entitled to considerable deference. While he ought not to have excluded the entire report, the historical facts were not in dispute and this error had little effect on the analysis.

226 The judge also excluded parts of a report by Professor Nathanael Lauster, a sociologist, which discussed housing and home ownership in Canada, immigration patterns and the integration of immigrants. He considered the professor's review of Hansard and provincial government documents and his opinion on the legislative debates regarding the imposition of the tax to exceed the boundaries of an expert report by supplanting the court's role in interpreting government documents. He considered an opinion that the tax impeded the immigration process of a significant portion of immigrants, "especially those who use the purchase of a home as an anchoring point for a longer-term project of immigration" to be unsupported by empirical evidence. The judge excluded an opinion on whether the law had perpetuated or provoked any historical stereotypes or biases against immigrants to be the ultimate issue for the court to decide, and also outside the witness's area of expertise.

227 I see no basis for this court to interfere with these determinations. Professor Lauster's opinion regarding the legislative and government documents was unnecessary, as judges are able to assess such evidence, his conclusion regarding the immigration process was demonstrated in cross-examination to be unsupported by empirical data, and the issue of whether the tax is discriminatory was for the court to decide.18 It was well within the judge's discretion to reject this evidence.

228 The appellant also takes issue with the judge's acceptance of evidence of opinion polls that indicated a large majority (89%) of Asian residents in the GVRD supported the tax. She submits that polling data is inadmissible in *Charter* cases because its purpose is to protect constitutional rights, particularly when those rights affect minorities, citing *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2017 BCSC 860. She contends that there is no support for the notion that a law cannot disadvantage a certain group even if the majority of that group supports the law.

229 I agree that evidence about majority public opinion is not to be used simply to generally support the position of a party in *Charter* litigation, which is the reason certain polling data was not admitted in *Cambie Surgeries*.19 However, statistical evidence is admissible in s. 15 cases, as discussed in *Fraser*: see paras. 56-67. Whether polling data constitutes proper statistical evidence depends on its quality and methodology, and the use to which it is put.20 In this case, the trial judge did not assess the quality and methodology of the polling data, but considered it along with other evidence adduced for the purpose of establishing the appellant's assertion that the tax perpetuates "prejudice, stereotyping, or disadvantages of Chinese people in B.C.". I do not perceive that the judge used this evidence simply to support the position of the Province, but rather as an attempt to come to grips with the appellant's reliance on disadvantage to "Chinese people", and the province's submission that support for the tax among Asian residents of Greater Vancouver undermined this assertion.

230 As I understand the record, underlying some of the judge's concerns was evidence about prejudicial public sentiments based on newspaper articles, letters to politicians, and comments from opposition MLAs, which could not qualify as reliable empirical evidence. I appreciate, however, that prejudicial comments were made in some of the public discourse leading up to the imposition of the tax, and the appellant was understandably affected by this. There is no question that the history of this province includes some shameful discriminatory laws and attitudes towards Asian and Chinese people, and prejudicial attitudes still exist.

231 That said, the current social context in which the tax provisions were enacted is very different from the discriminatory laws of the past, some of which were aimed at discouraging immigration from Asian countries. The evidence shows that the public discourse surrounding the tax, and the discussions within government, were largely focused on the extent of foreign ownership and its effect on housing affordability for residents. The concerns were confirmed by the expert evidence that showed overall foreign demand to have been one of multiple factors contributing to the escalation of the price of housing in the GVRD at the relevant time. I agree with the Province that the evidence does not support the contention that the tax was predicated on anti-Chinese prejudice. It does not send a message that Asian or Chinese people are unwelcome to immigrate. Those who do will not be subject to the tax if they purchase a home in the GVRD (or the other specified areas) once their immigration status is permanent or close to permanent.

232 The current social context also includes more recent history of government policy encouraging Asian immigration, which resulted in substantial immigration from Asian countries since 1986. Many Canadian citizens and permanent residents now living in Canada originated from China and other Asian countries. There are today multiple-generations of families of Asian descent living in British Columbia who form an important part of the communities here. They, too, are affected by the high cost of housing.

233 It is unfortunate that some of the public discourse surrounding the tax reflected unacceptable discriminatory attitudes towards Asian and Chinese persons, but there were also many people who simply sought to have a candid discussion about the problem of foreign demand on the local residential housing market. Within this discourse, government considered a range of solutions and settled on the foreign buyer's tax as one of them. In his final consideration of s. 1, the trial judge concluded that "the view that foreign nationals significantly contributed to the escalation of prices of housing in the GVRD is neither a stereotype nor a continuation of racist policies from the past". This is a conclusion supported by the substantial evidentiary record before him.

Conclusion

234 For all of these reasons, it is my opinion that the impugned tax provisions in the *PTTA* are constitutionally valid, primarily under the provincial power of property and civil rights pursuant to s. 92(13) of the *Constitution Act*, and do not violate the appellant's equality rights under s. 15 of the *Charter*. I would therefore dismiss the appeal.

B. FISHER J.A.
S.A. GRIFFIN J.A.:— I agree.
P.G. VOITH J.A.:— I agree.

---

1 A "foreign corporation" is a corporation that is not incorporated in Canada or a non-public corporation that is controlled by a foreign national or a foreign corporation.

2 A "taxable trustee" is defined as "a trustee of a trust in respect of which any trustee is a foreign entity" or where a beneficiary of the trust is a foreign entity and holds a beneficial interest in the residential property upon the transfer.

3 See, for example, House of Commons Standing Committee comments on Bill C-20, *An Act respecting citizenship*, March 25, 1976 at pp. 45:11; 45:15; Senate Debates, April 29, 1976 at 2074.

4 That the federal power could not be invoked to give "aliens, naturalized persons or natural-born citizens" immunity from provincial legislation "simply because it may affect one class more than another or may affect all of them alike".

5 British Columbia, in particular, expressed the view that the province had the constitutional authority to prohibit land ownership by persons other than Canadian citizens and landed immigrants (now permanent residents): see British Columbia Position Paper on Foreign Ownership of Land, May 1973.

6 See *House of Commons Debates*, 30-1, Vol. VI (21 May 1975) at 5989-5990; 8 December 1975 at 9817-9818; *Senate Debates*, 20-1, Vol. III (29 April 1976) at 2074; 28 June 1976 at 2265-2267; 29 June 1976 at 2279-2286; 30 June 1976 at 2310; Standing Senate Committee on Foreign Affairs, *Senate Debates,* 30-1, No. 37 (8 June 1976) at 37:11-37:14.

7 Section 35(3)(b) provides that s. 35(1) does not operate so as to authorize or permit the Lieutenant Governor in Council of a province to take any action that "(b) conflicts with any legal obligation of Canada under any international law, custom or agreement". Section 35(3) is reproduced in full at para. 12.

8 Section 50 makes awards of arbitration tribunals that address claims of violations of Chapter 11 enforceable in Canadian courts by amending the *Commercial Arbitration Act*, R.S.C. 1985, c. 17 (2nd Supp.).

9 Unless a treaty provision expresses a rule of customary international law or a peremptory norm, which is not the case here: see *Kazemi Estate* at para. 149 and *Nevsun Resources Ltd*. at paras. 165-166 (dissenting reasons).

10 Justice McIntyre's analysis of s. 15 was accepted by the majority of the court.

11 In the result, the law was found to be constitutional. Justice Kasirer agreed with Justice Abella on s. 15 but found the distinction justified under s. 1. Justice Côté did not consider it necessary to address the question.

12 The Province cites a long list of federal and provincial statutes that rely on the definition of "permanent resident" in the *IRPA* or require citizenship or permanent residence to access various benefits or rights. In British Columbia, see for example: *Home Owner Grant Act*, R.S.B.C. 1996, c. 194; *Land Act*, R.S.B.C. 1996, c. 245; *Land Tax Deferment Act*, R.S.B.C. 1996, c. 249; *Notaries Act*, R.S.B.C. 1996, c. 334.

13 Which provides that the rights specified in subsection (2) are subject to laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

14 In *Chiarelli*, a federal law authorizing the deportation of permanent residents convicted of serious offences was held not to be discriminatory because s. 6 of the Charter specifically provides for differential treatment of non-citizens for immigration purposes: see Lavoie at para. 37.

15 In particular, the appellant's evidence about experiencing discrimination in the workplace and while looking at property, as well as her perception of the public discourse about the tax.

16 The circumstances in *Eldridge* were the same: see para. 76.

17 See Report of N. Lauster, paras. 38-45; Report of D. Ley, paras. 5.0, 5.6-5.9.

18 The appellant also contended that the trial judge was unprincipled in his application of the ultimate issue rule by excluding Prof. Lauster's evidence but admitting similar evidence from the Province's experts. This is not borne out by the evidence. The Province's experts provided data and technical analyzes relating to the economic rationale for the tax, which provided evidence for the judge to assess in determining whether the tax was grounded in stereotypes.

19 In *Cambie Surgeries*, the question of polling data evidence was briefly considered in the context of a large number of documents sought to be admitted by means of a Brandeis brief. In an Appendix to the reasons, the judge noted that the "thrust of the information" in the polling data was "apparently to demonstrate that public opinion supports the plaintiffs' position in one way or another. Essentially, that the plaintiffs' position is supported by the majority of a defined group."

20 Polling data has been relied upon at the s. 1 stage of the analysis: see, for example *Thomson Newspaper Co. v. Canada*, [1998] 1 S.C.R. 877; *R. v. Bryan*, 2007 SCC 12.

Mercantile Office Systems Private Ltd. v. Worldwide Warranty Life Services Inc., [2021] B.C.J. No. 2094

British Columbia Judgments

British Columbia Court of Appeal

Vancouver, British Columbia

R. Goepel, G.B. Butler and P.G. Voith JJ.A.

Heard: September 9, 2021.

Judgment: October 1, 2021.

Docket: CA47428

[2021] B.C.J. No. 2094 | 2021 BCCA 362

Between Mercantile Office Systems Private Limited and Sanjib Raj Bhandari, Appellants (Plaintiff and Defendant by Counterclaim), and Worldwide Warranty Life Services Inc., Respondent (Defendant)

(60 paras.)

Case Summary

Civil litigation — Civil procedure — Pleadings — Striking out pleadings or allegations — Appeal by plaintiff from a decision dismissing its application to strike out the respondent's response to civil claim and counterclaim allowed -- response and counterclaim were struck with leave to amend — Appellant sued for breach of settlement agreement — In its response, respondent asserted settlement was void or that it had entered the settlement under duress — Counterclaim simply repeated all of facts in response and added no further material facts — Response and counterclaim suffered from numerous and pervasive difficulties that caused them to be prolix and both confusing and inconsistent.

Appeal by the plaintiff from a decision dismissing its application to strike out the respondent's response to civil claim and counterclaim. The appellant sued for breach of a settlement agreement. The appellant alleged it provided services to the respondent. The parties then settled the dispute by the respondent agreeing to pay a $312,500 US over time. While the respondent made some payments, the appellant alleged it ceased making payments in 2018. In its response, the respondent asserted that the settlement was void or that it had entered the settlement under duress. The counterclaim simply repeated all of the facts contained in the response and added no further material facts. The response relied on the common law of contract and the law of negligence. The counterclaim purported to rely on the common law of contract, the law of negligence, the law of fraudulent misrepresentation, and the law of conversion. The chambers judge her that the appellant's application was structure-driven, in that the appellant sought to have the respondent organize its pleadings differently. She considered that she was being asked to micro-manage the respondent's pleading style. She concluded that the respondent's pleadings were proper, complete and should not be disturbed at all.
HELD: Appeal allowed.

The response and counterclaim suffered from the numerous and pervasive difficulties that caused the response and counterclaim to be prolix and both confusing and inconsistent in various respects. They offended various mandatory requirements of the Rules and frustrated the important objects that were served by proper pleadings. Both the response and counterclaim were struck with leave to amend. The respondent had not set out its version of the facts alleged in the civil claim, or the basis upon which it had denied those Several of the paragraphs of the notice of civil claim that were denied in the response were not expressly addressed in the response, and the respondent had not set out its version of the facts that had been alleged. Although there might be instances where

the material facts underlying a response and a counterclaim overlapped or mirrored each other, a counterclaim remained a distinct claim, and the material facts that pertained to that claim must be concisely identified. The claims in this counterclaim were different, broader and would necessarily rely on different material facts. Including in the response all material facts that related to both pleadings made that pleading unnecessarily lengthy and rendered the pleading confusing. The judge's assertion that a pleading could contain the evidence, as opposed to the material facts, that a party might be entitled to establish at trial, was an error in principle. The chambers judge's conclusion that the response did not set out evidence or present argument was palpably wrong.

Statutes, Regulations and Rules Cited:

Supreme Court Civil Rules, Rule 3-1(1), Rule 3-1(2), Rule 3-3, Rule 3-4, Rule 3-5, Rule 3-7, Rule 3-7(15), Rule 9-5(1), Rule 9-5(1)(b), Rule 9-5(1)(c), Rule 22-3(1)

Court Summary:

Appeal from the dismissal of an application to strike the respondent's response to civil claim and counterclaim. Held: Appeal allowed. Both the response to civil claim and counterclaim are struck out with leave to amend. The respondent's response and counterclaim suffer from numerous deficiencies that hinder the goals of the Supreme Court Civil Rules. The chambers judge erred in concluding that it was appropriate to merge the facts in both pleadings. A counterclaim is a distinct claim, and a defendant has no broad ability to adopt material facts from a response to civil claim in their counterclaim. The response incorrectly sets out evidence and arguments that are unrelated to the material facts. The pleadings offend several mandatory requirements in the Rules, they improperly plead evidence and they provide evasive responses to points of substance.

Appeal From:

On appeal from an order of the Supreme Court of British Columbia, dated March 29, 2021 (*Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.*, 2021 BCSC 561, Vancouver Docket S204832).

Counsel

Counsel for the Appellants: S.A. Dawson, K. Smith.

Counsel for the Respondent: A.M. Beddoes, J.M. Wiebe.

Reasons for Judgment

The judgment of the Court was delivered by

P.G. VOITH J.A.

1 Mercantile Office Systems Private Limited sued the respondent, Worldwide Warranty Life Services Inc., for breach of contract. Warranty Life filed a response to civil claim ("Response") and a counterclaim ("Counterclaim"), which added Sanjib Raj Bhandari as a defendant to the action. The appellants, Mercantile and Mr. Bhandari, applied to strike those pleadings. The application was dismissed by the chambers judge. Mercantile and Mr. Bhandari appeal that determination. For the reasons that follow, I would allow the appeal.

I. BACKGROUND

2 Mercantile sued Warranty Life on May 1, 2020, seeking judgment in the amount of Canadian currency needed to purchase $283,750US on the basis that:

a. Mercantile had supplied services to and at the request of Warranty Life in 2016, 2017 and 2018, for which Mercantile was to be paid at least $382,500US;

b. Disputes arose between the parties in July 2018 over the fees claimed, the quality of Mercantile's work and its value to Warranty Life;

c. Mercantile and Warranty Life settled their disputes on September 6, 2018, in writing. Pursuant to the settlement, Warranty Life agreed to pay over time, and Mercantile agreed to accept, $312,500US in satisfaction of Mercantile's fee;

d. The settlement involved fresh consideration and was partially implemented;

e. Warranty Life made some payments under the settlement but stopped doing so in or about December 2018, thereby breaching the settlement; and

f. Mercantile is entitled to the balance of the payments due from Warranty Life under the settlement as an account stated claim or, in the alternative, as liquidated damages for breach of the settlement agreement.

3 The Response filed by Warranty Life, properly distilled, should have been equally succinct and straightforward. Warranty Life denied, for various reasons, that Mercantile had an account stated claim. Warranty Life pleaded that it entered the settlement on the basis of various representations made by Mercantile and Mr. Bhandari that were "false, inaccurate, and misleading" and made negligently. In the result, it asserted that the settlement was void. Further, or in the alternative, Warranty Life pleaded that it had entered the settlement under duress. Under Part 3: Legal Basis, it relied on "the common law of contract and the law of negligence."

4 The Counterclaim simply repeated all of the facts contained in Part 1, Division 2 of the Response. It added no further material facts. Under Part 3: Legal Basis, Warranty Life relied on "the common law of contract, the law of negligence, the law of fraudulent misrepresentation, and the law of conversion." The Counterclaim sought, *inter alia*, various categories of damages and either the return of the shares Mr. Bhandari had received in Warranty Life pursuant to an agreement or a declaration that the shares are void.

II. STANDARD OF REVIEW

5 The appellants originally brought their application under R. 9-5(1) of the *Supreme Court Civil Rules* [*Rules*] without identifying the particular sub-paragraph they relied on, though, as a practical matter, the application appears to have been primarily addressed under subrule (b). Rule 9-5(1) states:

> **Scandalous, frivolous or vexatious matters**
>
> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

6 Although decisions under subrule 9-5(1)(a) typically involve questions of law, decisions made under subrules 9-5(1)(b),(c) and (d) are generally discretionary and determined by contextual and factual considerations: *Krist v. British Columbia*, 2017 BCCA 78 at para. 24. A decision involving the exercise of judicial discretion is owed deference on appeal, unless it is clear that insufficient weight was given to relevant considerations, the decision involves a palpable and overriding error, there is an extricable error in principle or it appears that the decision may result in injustice: *Timberwolf Log Trading Ltd. v. British Columbia (Forests, Lands and Natural Resources Operations)*, 2013 BCCA 24 at para. 19, citing *Stone v. Ellerman*, 2009 BCCA 294, leave to appeal ref'd [2009] S.C.C.A. No. 364; *Hirji v. The Owners Strata Corporation Plan VR 44*, 2020 BCCA 285 at para. 23; *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 1-6.

III. THE REASONS OF THE CHAMBERS JUDGE

7 The appellants raised numerous concerns before the chambers judge with both the Response and Counterclaim. Most of those issues are again raised on appeal. In the interest of clarity, I have chosen to address the judge's reasons in relation to each issue as I address it.

8 Generally speaking, the judge's reasons properly identified several of the concerns the applicants had raised. She referred to a number of relevant authorities that identified the role or function of pleadings. She concluded that the application alleged "technical deficiency 'in the air'." By this she meant that the applicants had not identified specific paragraphs as nonresponsive, argumentative or containing evidence. She was of the view that the application before her was "structure-driven," in that the applicants sought to have Warranty Life organize its pleadings differently. She considered that she was being asked to "micro-manage Warranty Life's pleading style". She concluded that Warranty Life's pleadings were proper, complete and should not be disturbed at all, though she granted Warranty Life leave to move a defined term from Part 3 to Part 1 of the Response. She dismissed the application before her and ordered that Warranty Life was entitled to costs of the application in any event of the cause.

IV. THE RELEVANT LEGAL FRAMEWORK

9 When considering the purpose, structure and content of a pleading, the starting point is the *Rules.* The formal requirements for both form, or structure, and content for notices of civil claim, responses to civil claim, counterclaims and third party claims are found in Rules 3-1, 3-3, 3-4 and 3-5 respectively. Each of these Rules is expressly supplemented by R. 3-7, which is found under the heading "Pleadings Generally."

10 Rules 3-1(1) and (2) provide:

> **Notice of civil claim**
>
> (1) To start a proceeding under this Part, a person must file a notice of civil claim in Form 1.
>
> **Contents of notice of civil claim**
>
> (2) A notice of civil claim must do the following:
>
> (a) set out a concise statement of the material facts giving rise to the claim;
>
> (b) set out the relief sought by the plaintiff against each named defendant;
>
> (c) set out a concise summary of the legal basis for the relief sought;
>
> ...
>
> (g) otherwise comply with Rule 3-7.
>
> [Emphasis added.]

11 Form 1 of Appendix A of the *Rules*, in turn, mirrors the requirements of R. 3-1(2). Its relevant parts, for the purposes of this appeal, provide:

> **Form 1 (Rule 3-1 (1))**
>
> ...
>
> **NOTICE OF CIVIL CLAIM** *[Rule 22-3 of the Supreme Court Civil Rules applies to all forms.]*
>
> ...
>
> Claim of the Plaintiff(s)
>
> **Part 1: STATEMENT OF FACTS**

[*Using numbered paragraphs, set out a concise statement of the material facts giving rise to the plaintiff's(s') claim.*]

1

2

...

Part 2: RELIEF SOUGHT

[*Using numbered paragraphs, set out the relief sought and indicate against which defendant(s) that relief is sought. Relief may be sought in the alternative.*]

1

2

Part 3: LEGAL BASIS

[*Using numbered paragraphs, set out a concise summary of the legal bases on which the plaintiff(s) intend(s) to rely in support of the relief sought and specify any rule or other enactment relied on. The legal bases for the relief sought may be set out in the alternative.*]

1

2

[Italics in original; underline emphasis added.]

12 Rules 3-3(1) and (2), which govern responses to civil claims, provide:

Filing a response to civil claim

(1) To respond to a notice of civil claim, a person must, within the time for response to civil claim referred to in subrule (3),

(a) file a response to civil claim in Form 2, and

(b) serve a copy of the filed response to civil claim on the plaintiff.

Contents of response to civil claim

(2) A response to civil claim under subrule (1)

(a) must

(b) indicate, for each fact set out in Part 1 of the notice of civil claim, whether that fact is

(A) admitted,

(B) denied, or

(C) outside the knowledge of the defendant,

(ii) for any fact set out in Part 1 of the notice of civil claim that is denied, concisely set out the defendant's version of that fact, and

(iii) set out, in a concise statement, any additional material facts that the defendant believes relate to the matters raised by the notice of civil claim,

(b) must indicate whether the defendant consents to, opposes or takes no position on the granting of the relief sought against that defendant in the notice of civil claim,

(c) must, if the defendant opposes any of the relief referred to in paragraph (b) of this subrule, set out a concise summary of the legal basis for that opposition, and

(d) must otherwise comply with Rule 3-7.

[Emphasis added.]

13 Form 2 mirrors these requirements and it provides:

Form 2 (Rule 3-3 (1))

...

RESPONSE TO CIVIL CLAIM *[Rule 22-3 of the Supreme Court Civil Rules applies to all forms.]*

...

Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

Division 1 -- Defendant's(s') Response to Facts *[Indicate, for each paragraph in Part 1 of the notice of civil claim, whether the fact(s) alleged in that paragraph is(are) admitted, denied or outside the knowledge of the defendant(s).]*

1 The facts alleged in paragraph(s) .....[*list paragraph numbers*]..... of Part 1 of the notice of civil claim are admitted.

2 The facts alleged in paragraph(s) .....[*list paragraph numbers*]..... of Part 1 of the notice of civil claim are denied.

3 The facts alleged in paragraph(s) .....[*list paragraph numbers*]..... of Part 1 of the notice of civil claim are outside the knowledge of the defendant(s).

Division 2 -- Defendant's(s') Version of Facts *[Using numbered paragraphs, set out the defendant's(s') version of the facts alleged in those paragraphs of the notice of civil claim that are listed above in paragraph 2 of Division 1 of this Part.]*

1

2

Division 3 -- Additional Facts *[If additional material facts are relevant to the matters raised by the notice of civil claim, set out, in numbered paragraphs, a concise statement of those additional material facts.]*

1

2

Part 2: RESPONSE TO RELIEF SOUGHT

[Indicate, for each paragraph in Part 2 of the notice of civil claim, whether the defendant(s) consent(s) to, oppose(s) or take(s) no position on the granting of that relief.]

1 The defendant(s) consent(s) to the granting of the relief sought in paragraphs .....[*list paragraph numbers*]..... of Part 2 of the notice of civil claim.

2 The defendant(s) oppose(s) the granting of the relief sought in paragraphs .....[*list paragraph numbers*]..... of Part 2 of the notice of civil claim.

3 The defendant(s) take(s) no position on the granting of the relief sought in paragraphs .....[*list paragraph numbers*]..... of Part 2 of the notice of civil claim.

Part 3: LEGAL BASIS

[Using numbered paragraphs, set out a concise summary of the legal bases on which the defendant(s) oppose(s) the relief sought by the plaintiff(s) and specify any rule or other enactment relied on. The legal bases for opposing the plaintiff's(s') relief may be set out in the alternative.]

1

2

...

[Italics in original; underline emphasis added.]

14 A similar relationship exists between Rules 3-4 and 3-5, which deal with counterclaims, responses to counterclaims and third-party claims, and Forms 3, 4 and 5. They do so in terms that are similar to Rules 3-1 and 3-3, and their accompanying forms, with respect to their prescriptive requirements, their emphasis on being concise, and the requirement that the pleading party set out the material facts they rely on.

15 Rule 22-3(1), found under the heading "Forms and Documents," provides:

> (1) The forms in Appendix A or A.1 must be used if applicable, with variations as the circumstances of the proceeding require, and each of those forms must be completed by including the information required by that form in accordance with any instructions included on the form.
>
> [Emphasis added.]

16 It will be apparent that the foregoing rules and forms address both issues of structure and content. The requirement in R. 22-3(1) to adhere, "with variations as the circumstances of the proceedings require," to the structure prescribed by a specific rule and its corresponding form is clear.

17 Aspects of the content of a pleading are also prescribed. Other types of content are prohibited. Thus, for example, we have seen that R. 3-1(2) states that a claimant "must" set out each of: (a) "a concise statement of the material facts giving rise to the claim"; (b) "the relief sought by the plaintiff against each named defendant"; and (c) "a concise summary of the legal basis for the relief sought". Form 1 mirrors these requirements and this language.

18 Rule 3-3(2) and Form 2 and R. 3-4(1) and Form 3 similarly mandate aspects of the contents of a response to civil claim and a counterclaim respectively.

19 Rule 3-7 contains numerous requirements and prohibitions. For present purposes the following subrules are relevant:

> (1) A pleading must not contain the evidence by which the facts alleged in it are to be proved.
>
> ...
>
> (6) A party must not plead an allegation of fact or a new ground or claim inconsistent with the party's previous pleading.
>
> (7) Subrule (6) does not affect the right of a party to make allegations in the alternative or to amend or apply for leave to amend a pleading.
>
> ...
>
> (12) In a pleading subsequent to a notice of civil claim, a party must plead specifically any matter of fact or point of law that
>
> ...
>
> (b) if not specifically pleaded, might take the other party by surprise,
>
> ...
>
> (15) If a party in a pleading denies an allegation of fact in the previous pleading of the opposite party, the party must not do so evasively but must answer the point of substance.
>
> [Emphasis added.]

20 I have addressed these various Rules and their accompanying forms at some length because they establish how comprehensive and prescriptive the requirements for specific categories of pleadings are. These formal and content-based requirements are neither anachronistic nor technical. Instead, they are necessary and serve to further the purposes of the *Rules*. Those purposes and their importance have been expressed on numerous occasions by both this Court and by trial judges.

21 Pleadings are foundational. They guide the litigation process. This is true in relation to the discovery of documents, examinations for discovery, many interlocutory applications and the trial itself.

22 Pleadings also give effect to the underlying policy objectives of the *Rules*, which are to ensure the litigation

process is fair and to promote justice between the parties: *Wong v. Wong*, 2006 BCCA 540 at paras. 22-23. They enable the parties and the court "to ascertain with precision the matters on which parties differ and the points on which they agree; and thus to arrive at certain clear issues on which both parties desire a judicial decision": *1076586 Alberta Ltd. v. Stoneset Equities Ltd.*, 2015 BCCA 182 at para. 55, citing D.B. Casson & I.H. Dennis, eds, *Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice*, 21st ed (London: Stevens & Sons, 1975) at 75-76.

23 For the court, pleadings serve the ultimate function of defining the issues of fact and law that will be determined by the court. In order for the court to fairly decide the issues before them, the pleadings must state the material facts succinctly: *Sahyoun v. Ho*, 2013 BCSC 1143 at paras. 15-22; *Shoolestani v. Ichikawa*, 2018 BCCA 155 at para. 30; *Weaver v. Corcoran*, 2017 BCCA 160 at para. 63. They must be organized in such a way that the court can understand what issues the court will be called upon to decide: Frederick M. Irvine, ed., *McLachlin & Taylor, British Columbia Practice*, 3rd ed, vol 1 (Markham, Ont.: LexisNexis Canada Inc., 2006) (loose-leaf updated 2021) at 3-6; *Simon v. Canada (Attorney General)*, 2015 BCSC 924 at paras. 17-18, aff'd 2016 BCCA 52.

V. ANALYSIS

24 With this legal framework in hand, I turn to the various difficulties that are found in the Response and Counterclaim.

A. Issues of Structure

25 The judge found, as I have said, that the appellants' application was "structure-driven." The appellants accept that an aspect of their application did relate to issues of structure. This concern, they argue, is supported by the *Rules* and it is reflected in two broad difficulties with Warranty Life's pleadings.

26 First, R. 3-3(2) and Form 2 mandate the requirements of Part 1 of a response to civil claim. One aspect of these requirements is, again, that for each fact set out in Part 1 of the notice of civil claim, the defendant "must" clearly identify whether that fact is admitted, denied or outside the knowledge of the defendant. If a fact set out in Part 1 of a notice of civil claim is denied, the defendant "must ... concisely set out [their] version of that fact". This is to be done in Division 2 of Form 2.

27 In addition, the defendant "must ... set out, in a concise statement, any additional material facts that the defendant believes relate to the matters raised by the notice of civil claim". This requirement is to be undertaken in Division 3 of Form 2.

28 In this case, Warranty Life merged these various requirements. Specifically, it included both its "version of facts" and the "additional facts" it sought to rely on under Division 2 of Form 2. It then indicated that Division 3 was "N/A."

29 I leave aside for the time being that the Response simply does not comply with a mandatory requirement of the *Rules*. This noncompliance, however, has several practical consequences. First, the Response is approximately 100 paragraphs and sub-paragraphs in length. Division 2 of the Response is nearly 70 paragraphs and sub-paragraphs in length. Warranty Life has not set out its version of the facts that are alleged in the appellant's notice of civil claim, or the basis upon which it has denied those facts, in any organized way. Instead, those facts are interspersed within Warranty Life's "additional facts." Thus, it is necessary to parse the whole of Division 2 of the Response in order to find the basis upon which Warranty Life has denied the material facts advanced by the appellants. For example, the first express response to a fact from the notice of civil claim is at paragraph 17 of the Response. The next express response is found several pages later at paragraph 36.

30 Furthermore, several of the paragraphs of the notice of civil claim that are denied in Division 1 of the Response are not expressly addressed in the Response, and Warranty Life has not set out its version of the facts that have been alleged. Thus, though a fact is denied there is no explanation of why that is so. This gives rise to further practical difficulties that I will return to.

31 The second broad structural difficulty arising from the Response and Counterclaim is that all of the facts that Warranty Life relies on are found in its Response. The Counterclaim simply adopts all of the facts that are set out in Part 1, Division 2 of the Response. The judge correctly noted that there is no hard and fast rule requiring individual pleadings to be able to stand in isolation. She also correctly noted that "[a] given counterclaim may be more or less factually entwined with the claim it counters." However, she concluded that merging the facts of the Response and Counterclaim was, in the circumstances of this case, appropriate. In my view, this conclusion reflected an underlying error in principle.

32 A counterclaim is an independent claim raised by the defendant, which is in the nature of a cross-claim. Rule 3-4(1) requires that a counterclaim be pleaded separately from a response to civil claim. Furthermore R. 3-4(6) indicates that, except to the extent that R. 3-4 provides otherwise, Rules 3-1, 3-7 (pleadings generally) and 3-8 (default judgment) apply to a counterclaim as if it were a notice of civil claim. Form 3, under Part 1: Statement of Facts, requires that the claimant "set out a concise statement of the material facts giving rise to the counterclaim."

33 Thus, though there may be instances where the material facts underlying a response and the material facts that underlie a counterclaim overlap or mirror each other, a counterclaim remains a distinct claim and the material facts that pertain to that claim must be concisely identified. There is no broad ability on the part of a defendant to include material facts in its response to civil claim that are simply irrelevant to that response. Similarly, there is no broad ability on the part of that same party to rely on material facts in its counterclaim that are adopted from a response to civil claim and that have nothing to do with the counterclaim itself. Otherwise both the response and counterclaim would contain material facts that have nothing to do with the defences and claims being advanced in the respective pleadings.

34 In this case, both of these prohibitions are engaged. I have said that the Response relied on "the common law of contract and the law of negligence." The Counterclaim purports to rely on "the common law of contract, the law of negligence, the law of fraudulent misrepresentation, and the law of conversion." The claims in the Counterclaim are different, broader and would necessarily rely on different material facts.

35 For example, Warranty Life has alleged in the Response that "Warranty Life shipped certain mobile devices to Mercantile" that were never returned and for which no credit was provided. That assertion of fact has nothing to do with the defences that are raised in the Response. It is, however, the narrow basis on which Warranty Life advances its claim in conversion. Those facts should be removed from the Response and included in the Counterclaim.

36 By way of further example, Warranty Life pleaded in the Response that Mr. Bhandari received common shares in Warranty Life pursuant to an "Advisor Agreement," and it describes the material terms of that agreement. The Advisor Agreement is not referred to again in the Response. Instead Warranty Life seeks, in the Counterclaim, to declare the "Advisor Agreement Shares" void on the basis that Mr. Bhandari breached the agreement in various respects. Reference to the Advisor Agreement, the shares that were issued under the agreement, and the conditions that may have attached to that agreement have no place in the Response. Instead, they are material facts that should have been pleaded in the Counterclaim.

37 Similarly, the Response develops, at considerable length, the harm and loss that Warranty Life suffered as a result of the misrepresentations and breaches of contract that were allegedly made by the appellants. These material facts again are irrelevant to the Response. Instead they are facts that are directed to the claims made in the Counterclaim and they should be included in that pleading.

38 Including in the Response all material facts that relate to both pleadings makes that pleading unnecessarily lengthy. It also renders the pleading confusing because many of the facts that are pleaded have little or nothing to do with the defences that are raised. The same difficulty arises when all material facts from the Response are simply adopted into the Counterclaim with no attempt to discern or identify what belongs where.

39 A further related difficulty arises. Warranty Life asserts in its Response that the appellants made various representations to it. In Part 1, Division 2, it pleads various facts in this regard. On the basis of these facts it then pleads, in Part 3: Legal Basis, that the representations were made negligently. Nevertheless, in its Counterclaim, and on the basis of these same facts, it pleads that these representations were made either negligently or fraudulently. The Counterclaim contains no additional material facts that would support a pleading of fraudulent misrepresentation.

40 A representation cannot be both negligent and fraudulent. The difference between a negligent and fraudulent misrepresentation is a dishonest state of mind. Either the requisite dishonest state of mind is present or it is not: *C.R.F. Holdings Ltd. v. Fundy Chemical International Limited* (1980), 21 B.C.L.R. 345 at 365-66, 1980 CanLII 586 (S.C.). The presence of a dishonest state of mind is a material fact in an action for fraudulent misrepresentation that should be expressly pleaded: Hon Mr. Justice Blair et al., eds, *Bullen & Leake & Jacob's Precedents of Pleadings*, 17th ed, vol 2, (London, UK: Thomson Reuters, 2012) at 948; *Kripps v. Touche Ross & Co.*, (1997), 33 B.C.L.R. (3d) 254 at para. 102, 1997 CanLII 2007 (C.A.).

41 In addition, R. 3-7(18) states that "full particulars ... must be stated in the pleading" if a pleading relies, *inter alia*, on fraud. No such material facts or particulars are contained in the Counterclaim.

B. The Narrative Issue

42 The chambers judge's reasons state that a pleading is a "factual narrative" that can contain "facts Warranty Life is entitled to attempt to establish at trial" even if that includes "information which, strictly speaking, is not necessary nor entirely proper." A "narrative" is defined in the Concise Oxford English Dictionary as a "written account of connected events; a story": Catherine Soanes et al, eds, *Concise Oxford English Dictionary*, 11th ed (New York: Oxford University Press, 2008).

43 Once again, elements of the judge's assertions are accurate. Drafting a pleading is not a mathematical exercise. It involves the exercise of judgment and it requires some degree of flexibility. This is reflected, for example, in R. 22-3(1) and in the numerous decisions where judges have considered the adequacy of a pleading. In addition, R. 1-1(2) confirms that, unless a contrary intention appears, the *Interpretation Act*, R.S.B.C. 1996, c. 238, applies to the *Rules*. Section 8 of the *Act* confirms that every enactment is to be construed as remedial and be given such "fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

44 Nevertheless, none of a notice of claim, a response to civil claim, and a counterclaim is a story. Each pleading contemplates and requires a reasonably disciplined exercise that is governed, in many instances in mandatory terms, by the *Rules* and the relevant authorities. Each requires the drafting party to "concisely" set out the "material facts" that give rise to the claim or that relate to the matters raised by the claim. None of these pleadings are permitted to contain evidence or argument.

45 What constitutes a material fact is well understood. Material facts are the elements essential to formulate a claim or a defence. In *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, Justice Binnie said:

> [54] A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court .... Establishing each such fact (sometimes referred to as material facts) constitutes a precondition to success. ...

46 This Court adopted a similar definition of material facts in *Young v. Borzoni et al*, 2007 BCCA 16 at para. 20:

> [20] ... "Material fact" is defined in *Delaney & Friends Cartoon Productions Ltd. v. Radical Entertainment Inc*., 2005 BCSC 371 at paragraph 9 as, "one that is essential in order to formulate a complete cause of action. If a material fact is omitted, a cause of action is not effectively pleaded."

47 In *Jones v. Donaghey*, 2011 BCCA 6 at para. 18, the Court said:

> [18] Thus, a material fact is the ultimate fact, sometimes called "ultimate issue", to the proof of which evidence is directed. It is the last in a series or progression of facts. It is the fact put "in issue" by the pleadings. Facts that tend to prove the fact in issue, or to prove another fact that tends to prove the fact in issue, are evidentiary or "relevant" facts. ...

48 Most recently, in *Muldoe v. Derzak*, 2021 BCCA 199 at para. 31, this Court said:

> [31] ... A material fact is one that is essential to formulate a cause of action. If supporting material facts are omitted, a cause of action is not effectively pleaded ....

49 The judge's assertion that a pleading can contain the evidence, as opposed to the material facts, that a party may be entitled to establish at trial is an error in principle. In saying this, I recognize that there are times where the distinction between what constitutes a material fact and what constitutes evidence may be blurred and difficult to apply. There are also times when, as a practical matter, some limited evidence may be necessary to make a pleading more comprehensible. But the distinction between what constitutes evidence and what constitutes a material fact is important. Furthermore, what evidence may be relevant at trial and what material facts are relevant to a pleading are two different things. This distinction is expressly identified in the *Rules* and in the relevant case law, and it is central to a proper pleading.

50 In *Gittings v. Caneco Audio-Publishers Inc.* (1988), 26 B.C.L.R. (2d) 349 at 352, 1988 CanLII 2832 (C.A.), Justice Esson, as he then was, and in circumstances that are apposite, said:

> That leaves the matter of the order striking out portions of the statement of claim. It is a very long document. In the words of counsel for the plaintiffs, it sets out to tell a story. Perhaps it does but, in approaching these complex issues in this way, it does not serve the purposes of a pleading. There is a mixture of material facts, evidence and background facts; and the difficulty is greatly compounded by the fact that there is no real segregation of the various issues that are raised by the action.

C. Evidence and Argument

51 The chambers judge concluded that "Part 1 of the [Response] does not set out evidence or present argument." In my view, this is palpably wrong. The following are some examples of pleas in the nature of evidence, sometimes with a component of argument, that are found in Part 1 of the Response:

a. What "[a] reasonably prudent person in Warranty Life's position would have considered based on Bhandari's words and conduct";

b. The allegation that Mercantile "inexplicably started work 'from scratch'";

c. Various pleas concerning the approval rating of the computer application that Mercantile created;

d. What "became apparent" to Warranty Life concerning Mercantile's conduct;

e. Why Warranty Life paid for programming at the invoiced amount in the alleged absence of an agreement on compensation;

f. Why historical source code is appropriately kept in source code repositories;

g. What amounts to a commercially reasonable approach for a business providing software services and, conversely, what a commercially reasonable and competent software development business "would never" do;

h. What Warranty Life intended to do after obtaining Mercantile's work product and why;

i. Warranty Life's post-settlement impressions of the quality of the work it had received;

j. Warranty Life's allegation about what it would have done had it not engaged Mercantile; and

k. The plea concerning what "[s]oftware developers possessing a commercially reasonable level of competency" can do, and that the software application "would have received higher reviews" if

> Warranty Life had "engaged a commercially reasonable provider of software development services".

52 Such evidence and arguments are unrelated to the material facts Warranty Life was required to plead and have no place in the Response.

D. A Response Must Clearly Answer the Point of Substance

53 Just as the requirement to concisely plead material facts requires clarity, so too does R. 3-7(15), which prohibits evasive denials. An example of an evasive plea is found in *Patym Holdings Ltd. v. Michalakis*, 2005 BCCA 636:

> [30] With respect, the master and the chambers judge were diverted from a proper analysis by their misunderstanding of Rule 19(21) and its reference to the "point of substance". The purpose of Rule 19(21) is to prohibit evasive pleading. For example, in *Tildesley v. Harper* (1877), 7 Ch. D. 403, it was held that a plea "that the defendant never offered a bribe of [pounds]500" was evasive and that the words "or any other sum" should be added. The "point of substance" was the allegation that the defendant offered a bribe: the amount of the alleged bribe was a particular. The defensive plea did not answer the point of substance of the plaintiff's plea since it left unanswered the bribery allegation by leaving open the possibility that the defendant offered a bribe of some amount other than [pounds]500. Similarly, in *Thorp v. Holdsworth* (1876), 3 Ch. D. 637, a defence in the words, "The terms of the arrangement were never definitely agreed upon as alleged" was evasive and failed to meet the point or points of substance in the statement of claim. Jessel, M.R., said, at 641, that the defendant
>
> > . . . is bound to deny that any agreements or any terms of arrangement were ever come to, if that is what he means; if he does not mean that, he should say that there were no terms of arrangement come to, except the following terms, and state what the terms were.

54 I have said that the Response does not follow the structure required by R. 3-3(2)(a) or Form 2 and that Warranty Life, though it denied the facts alleged by the appellants, failed in some instances to concisely set out its version of that denied fact. The result of this is that Warranty Life's position in relation to various alleged facts remains unclear. This is partly because its various responses are interspersed throughout the length of the Response and partly because the positions it has expressed appear to be inconsistent.

55 Though there are various examples of this, one example is sufficient to make the point. In its notice of civil claim, Mercantile pleaded that it entered into an agreement in 2016 with Warranty Life in which the parties agreed that "Mercantile would perform, and be compensated for, computer software programming undertaken for Warranty Life ... (the "Services")," on the terms and conditions that are described.

56 The Response advances different positions in relation to this assertion. At paragraph 16 it asserts that "In or around September, 2016, ... Warranty Life was induced to engage Bhandari and Mercantile ... to perform the Services." At paragraph 27 it asserts, *inter alia*, that "[d]espite the lack of a formal agreement, Warranty Life began paying Bhandari in good faith". At paragraph 41 it pleads, "First, prior to the Settlement, the parties had never formally agreed upon the terms on which Bhandari and Mercantile would provide the Services. Accordingly, no fees were due and payable pursuant to any agreement of any kind."

57 These various assertions are both inconsistent and evasive.

VI. CONCLUSION

58 I am of the view that the Response and Counterclaim suffer from the numerous and pervasive difficulties that I have described. These difficulties cause the Response and Counterclaim to be prolix and both confusing and inconsistent in various respects. They offend various mandatory requirements of the *Rules* and they frustrate the important objects that are served by proper pleadings.

59 I would strike out both the Response and Counterclaim and grant Warranty Life leave to amend those pleadings.

60 The appellants seek special costs of the application in the court below. I see no basis for such an award. I would, however, grant the appellants the costs of both the application in the court below and of this appeal.

P.G. VOITH J.A.
R. GOEPEL J.A.:— I agree.
G.B. BUTLER J.A.:— I agree.

Mousa v. Institute of Electrical and Electronics Engineers Inc., [2014] B.C.J. No. 2647

British Columbia Judgments

British Columbia Court of Appeal

Vancouver, British Columbia

E.C. Chiasson, N.J. Garson and A.W. MacKenzie J.A.

Heard: September 22, 2014.

Judgment: October 29, 2014.

Docket: CA041631

[2014] B.C.J. No. 2647 | 2014 BCCA 415

Between Abdul M. Mousa, Appellant (Plaintiff), and The Institute of Electrical and Electronics Engineers, Incorporated, Respondent (Defendant)

(37 paras.)

Case Summary

Civil litigation — Civil procedure — Pleadings — Striking out pleadings or allegations — Grounds — Failure to disclose a cause of action or defence — Appeal by plaintiff from order striking claim against Institute of Electrical and Electronics Engineers dismissed — Plaintiff voted against amended professional standard adopted by Institute on basis that it was technically deficient — Plaintiff believed process was corrupted by corporate interests — Plaintiff brought claim alleging defamation, misrepresentation and breach of duty — Motion judge did not err in striking claim in its entirety without leave to amend — Proposed amendments based on breach of contract did not disclose cause of action — Motion judge carefully applied correct principles to each category of allegations.

Professional responsibility — Self-governing professions — Governing body — Liability of governing body — Professions — Professional engineers — Appeal by plaintiff from order striking claim against Institute of Electrical and Electronics Engineers dismissed — Plaintiff voted against amended professional standard adopted by Institute on basis that it was technically deficient — Plaintiff believed process was corrupted by corporate interests — Plaintiff brought claim alleging defamation, misrepresentation and breach of duty — Motion judge did not err in striking claim in its entirety without leave to amend — Proposed amendments based on breach of contract did not disclose cause of action — Motion judge carefully applied correct principles to each category of allegations.

Appeal by the plaintiff, Mousa, from an order striking his claim against the defendant, the Institute of Electrical and Electronics Engineers (IEEE), without leave to amend. Mousa was an engineer and former member of the IEEE, a professional standards association. He worked on the development of a particular standard that was subsequently amended and approved by a vote of IEEE members. Mousa participated in the process and voted against the amended standard on the basis it was technically deficient. Mousa believed the IEEE had allowed itself to be corrupted by corporate interests in adopting the amended standard. Litigation ensued. The plaintiff claimed he was defamed as a professional by being listed among the members of the IEEE that had voted on the standard. He claimed the adoption of the standard was a breach of the IEEE's duty to protect the public and that it contained misrepresentations. He sought a declaration that the standard was null and void, plus, nominal and punitive damages. The motion judge struck Mousa's claim in its entirety for failure to disclose a reasonable claim. Listing Mousa's name on the voting ballot was not defamatory and there was nothing in the standard suggesting Mousa

approved it. No reasonable person would link the list of members' names to incompetence, bribery or corruption. No statements of the IEEE contained misrepresentations to Mousa or actionable misrepresentations to the public. His claim of breach of duty had no chance of success, as the IEEE had no duty to act in the public interest. The claim was struck without leave to amend. Mousa appealed.
HELD: Appeal dismissed.

The motion judge properly refused leave to amend on the basis that proposed amendments did not support a claim for breach of contract. Even if a contract existed, Mousa failed to identify anything approximating a breach thereof. The motion judge correctly articulated the legal principles applicable to a motion to strike and properly and carefully applied those principles to each category of allegations. There was no basis for appellate interference with the conclusion that the claim did not disclose a reasonable cause of action. There was no basis for interference with the motion judge's discretion to award lump sum costs fixed at $5,000.

Statutes, Regulations and Rules Cited:

British Columbia Supreme Court Civil Rules, Rule 6-1, Rule 9-5(1)(a)

Court Summary:

Mr. Mousa has a long standing disagreement with the respondent. He contends that its approval of a technical standard for the protection of electrical substations from lightning strikes was wrong. He sued the respondent and appeals the decision of a chambers judge to strike his notice of civil claim and the refusal to allow him to amend the claim in an attempt to allege a sustainable cause of action.

Held: appeal dismissed. Although Mr. Mousa could have amended his pleading without leave, he did not do so. The Rules entitled him to amend his notice of civil claim as a matter of right; they did not entitle him to an adjournment to enable him to do so. The judge correctly determined that Mr. Mousa's assertions would not result in an amendment that would cure the problem with the pleading. The judge applied the proper test for striking a pleading. He made no error in his analysis that led to the conclusion that the notice of civil claim did not disclose a reasonable cause of action. The judge's award of lump sum costs was an appropriate exercise of discretion. Lump sum costs of the appeal are awarded.

Appeal From:

On appeal from an order of the Supreme Court of British Columbia, dated February 5, 2014 (*Mousa v. The Institute of Electrical and Electronics Engineers, Incorporated*, 2014 BCSC 186, Vancouver Docket S135534).

Counsel

The Appellant appeared in person: A.M. Mousa.

Counsel for the Respondent: J.R. Schmidt and D.L. Yaverbaum.

Reasons for Judgment

The judgment of the Court was delivered by

E.C. CHIASSON J.A.

Introduction

1 Mr. Mousa appeals the decision of a chambers judge to strike his notice of civil claim and the refusal to allow him to amend the claim in an attempt to allege a sustainable cause of action.

Background

2 The Institute of Electrical and Electronic Engineers, Incorporated ("IEEE") is a not-for-profit corporation registered pursuant to the law of the State of New York, United States of America. The chambers judge noted at para. 3 that Mr. Mousa "is a retired electrical engineer with extensive experience and expertise in the design of systems for the protection of electrical installations from lightning strikes". He resides in British Columbia and has been a member of the IEEE since 1979.

3 The judge provided further background information at paras. 4-7:

> [4] In 1996, IEEE published a technical standard for the protection of electrical substations from lightning strikes. The plaintiff was a contributor to that standard.
>
> [5] In 1998, IEEE delegated the administration of its standards to the IEEE Standards Association ("IEEE-SA").
>
> [6] In 2006, revisions to the 1996 standard were proposed and, on December 5, 2012, approved by the IEEE and IEEE-SA as Standard 988-2012 (the "Standard").
>
> [7] The plaintiff perceives the Standard to be technically deficient and the process by which it was approved to be corrupt.

He continued at paras. 10-11:

> [10] The plaintiff is obviously an extremely intelligent man. However, to say that the plaintiff is passionate about and obsessed with what he perceives as wrongful conduct on the part of the IEEE and IEEE-SA in respect of the process by which its standards are approved would be an understatement.
>
> [11] After his many complaints and appeals to IEEE and other bodies since 2006 were either dismissed or not considered, the plaintiff commenced this action on July 23, 2013. His pleadings are lengthy, prolix and in many respects legally incoherent. He seeks:
>
> a) a declaration that the actions of the IEEE in the course of developing Standard 988-2012 constituted fraud and breach of a duty to the public;
>
> b) a declaration that IEEE violated its obligations as a not-for-profit tax-exempt corporation when it delegated the administration of its standards to IEEE-SA without compelling the IEEE-SA to honour the obligations of the IEEE under the terms of its Certificate of Incorporation;
>
> c) a declaration that the IEEE acted without authority when it permitted the adoption of Standard 998-2012 despite the concerns that were raised by lightning experts regarding its potential negative impact on public safety and public interest;
>
> d) a declaration that the IEEE's decision to adopt Standard 988-2012 was null and void;
>
> e) a declaration that the conduct of the administration of IEEE/IEEE-SA in connection with Standard 998-2012 defamed the lightning experts of the IEEE and diminished their works;
>
> f) an order that the IEEE cease the defamation by disclosing how each member of the ballot group voted by providing that information within every distributed copy of Standard 998-2012;
>
> g) nominal damages for defamation in the amount of $1 payable to the plaintiff;
>
> h) punitive damages in the amount of $100,000 to be paid into court by the IEEE and disbursed to a registered Canadian charity to be named by the plaintiff; and
>
> i) costs.

4 The IEEE applied to strike Mr. Mousa's pleading on the ground that it did not disclose a reasonable claim. Alternatively, it sought to strike the portion of the claim alleging breach of duty on the basis that the court did not

have subject-matter jurisdiction over the IEEE. Mr. Mousa applied for an order requiring the IEEE to pay interim costs of $200,000.

The chambers decision

5 The judge observed that the IEEE filed no affidavits and that Mr. Mousa "filed seven voluminous affidavits", which the judge listed (para. 15):

a) Mousa Affidavit No. 1 - Involvement of IEEE with British Columbia;

b) Mousa Affidavit No. 2 - Opposition of Lightning Experts Against IEEE Standard 998;

c) Mousa Affidavit No. 3 - Lack of Credibility of the IEEE;

d) Mousa Affidavit No. 4 - Appeal Record of IEEE Standard 988;

e) Mousa Affidavit No. 5 - IEEE's Mishandling of the Safety Issue and the Resulting Tarnishing of its Image;

f) Mousa Affidavit No. 6 - Re: Application for Interim Costs; and

g) Mousa Affidavit No. 7 - Reply to the IEEE Re: Interim costs.

He stated that these affidavits were "replete with speculation, hearsay, expressions of opinion and argument...such evidence is inadmissible" (para. 16).

6 The IEEE's application was brought pursuant to Rule 9-5(1)(a) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. It states:

(1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

(a) it discloses no reasonable claim or defence, as the case may be, ...

No evidence is admissible on an application under Rule 9-5(1)(a).

7 The judge addressed the law applicable to the application at paras. 18-21:

[18] The test for striking pleadings under Rule 9-5(1)(a) was recently stated by the Court of Appeal in *British Columbia (Director of Civil Forfeiture) v. Flynn*, 2013 BCCA 91:

> [10] The test for striking pleadings because they fail to disclose a reasonable cause of action is well-known. In *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, Chief Justice McLachlin stated it in these terms:
>
> > [17] The parties agree on the test applicable on a motion to strike for not disclosing a reasonable cause of action under r. 19(24)(a) of the B.C. *Supreme Court Rules*. This Court has reiterated the test on many occasions. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R.83; *Odhavji Estate; Hunt*; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

[19] Relevant guidelines the court considers include (a) whether there is a question fit to be tried regardless of complexity or novelty; (b) whether the outcome of the claim is beyond a reasonable doubt; (c) whether serious questions of law or questions of general importance are raised or if facts should be known before

rights are decided; (d) that pleadings might be amended; and (e) whether there is an element of abuse of process: *Owners, Strata Plan LMS 1328 v. Surrey (City of)*, 2001 BCCA 693 at para. 5.

[20] The Notice of Civil Claim should be read as generously as possible in determining whether a cause of action is disclosed: *Evergreen Holdings v. IBI Leaseholds Ltd.*, 2005 BCSC 1929 at para. 2.

[21] Where the pleading makes wide-sweeping and inflammatory accusations, the court is entitled to treat such accusations as speculation and not as true: *Stephen v. HMTQ*, 2008 BCSC 1656 at para. 60; *Young v. Borzoni*, 2007 BCCA 16 at paras. 30-32.

8 We are advised by counsel for the IEEE that on the first day of the hearing the judge raised the issue of breach of contract. Mr. Mousa indicated that he wanted to amend his notice of civil claim to include allegations of "breach of his membership agreement, breach of competition law and tax evasion". On the second day of the hearing, Mr. Mousa provided a document entitled "Alternative Pleading". The judge dealt with this situation at paras. 24-28:

[24] The plaintiff's affidavit evidence disclosed that he received legal advice on September 24, 2013 to the effect that his pleadings, as drafted, had the potential for being struck out and that he should amend them to include a claim for breach of contract. He did nothing in response to that advice.

[25] The proposed alternative pleadings do not set out when the alleged contract was made, how it arose, how the alleged terms came to form part of the contract, what consideration there was for the contract or what damages have been suffered as a result of its alleged breach. Further, they do not disclose a private cause of action under any Canadian combines or taxation legislation.

[26] I am not prepared to allow the plaintiff to amend his pleadings to add entirely new causes of action without notice. Moreover, I am not persuaded that the proposed amendments disclose a reasonable cause of action or cure the problems that exist with the pleadings as they now exist.

[27] The plaintiff submitted that, regardless, the Notice of Civil Claim already supports, at a minimum, a claim for breach of his membership agreement and hence no formal amendment is necessary. He relies on paragraph 111 of the Notice of Civil Claim, which states:

> [111] Adoption of Standard 998-2012 by the IEEE constituted breach of duty toward both the public and its own members.

[28] That plea does not raise an allegation of breach of contract. Rather, it alleges that IEEE breached a duty owed to its members.

9 The judge referred to Mr. Mousa's contention that the case could be characterized "as a quest for a remedy against oppression" and stated at paras. 30-34:

[30] In essence, the plaintiff is attempting in this action to claim something akin to a derivative action on behalf of himself and other unnamed members of IEEE who he says agree with his views. He does so by pleading private interest claims yet asserts his claims are made in the public interest. He conceded as much during his submissions. He advised the Court that he considers himself a defender of the public interest and feels he has an obligation in that regard.

[31] Although the plaintiff's aspirations may be laudable, they are misplaced.

[32] Generally, courts only give standing to those whose private rights are at stake or who are specifically affected by the issue: *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para. 1 ("*DESWUAVS")*. These limitations serve to ensure, among other things, that scarce judicial resources are not spent on marginal or redundant cases, that courts have the benefit of contending points of view from those most directly affected by the issues, and that courts maintain their proper role within our democratic system of government. As Cromwell J. commented in *DESWUAVS* at para. 1, "it would be intolerable if everyone had standing to sue for everything, no matter how limited a personal stake they had in the matter."

[33] The general rule has been relaxed to allow courts to grant some litigants public interest standing in public law cases. This is largely a recognition that in the face of increased governmental regulation and

> after the coming into force of the *Canadian Charter of Rights and Freedoms*, some public interest litigants are well placed to challenge legislation and government action: *DESWUAVS* at para. 22.
>
> [34] However, the plaintiff is a private individual who is attempting to claim against another private party. He does not seek to challenge a law or government action. Despite his candour in admitting that he brings this action primarily to protect the public, rather than to assert any right of his own, he does not seek public interest stading [*sic*] nor does he meet the criteria for it: *DESWUAVS* at para. 2.

10 The judge then turned to the specific claims advanced by Mr. Mousa in his notice of civil claim. He addressed each in turn.

11 Mr. Mousa alleged he was defamed because the IEEE listed the names of the members of the working group that approved the standard to which Mr. Mousa objected and stated:

> The following members of the individual balloting committee voted on this guide. Balloters may have voted for approval, disapproval, or abstention.
>
> Mr. Mousa did not approve of the standard and voted "no".

12 The judge observed at para. 37:

> Although evidence is not admissible on an application under Rule 9-5(1)(a), if the claim alleges defamation, the alleged defamatory publication is incorporated by reference into the Notice of Civil Claim and can be considered in determining whether the claim should be struck: *Johnstone v. Gardiner*, 2011 BCSC 1843 at para. 14, reversed on appeal based on the application of the law to the pleadings: 2012 BCCA 184.

13 He stated Mr. Mousa's position at para. 40:

> The plaintiff alleges that, because the Standard is flawed and was adopted in a corrupt manner and because it includes a list of the members of IEEE-SA (including the plaintiff) who voted on whether or not the Standard should be adopted without disclosing how each of them voted, anyone reading the Standard would suspect that the plaintiff was incompetent or had been bribed by the Vendor. The plaintiff alleges that, because the Standard is corrupt, a reader of the Standard may believe that the plaintiff too is corrupt.

14 Referring to *Isaac v. Guardian Capital Group*, 2004 BCSC 254, the judge noted that truth is an absolute defence to a claim for defamation and that the alleged defamatory statement was true. He referred to Mr. Mousa's assertion that the statement was "capable of implying to the reader of the Standard that he was one of the balloting committee members who voted to approve it" and rejected it stating at para. 45:

> In my view, from the perspective of a reasonable person of ordinary intelligence, the Standard is not capable of supporting the defamatory imputation alleged by the plaintiff. There is nothing in the Standard suggesting that, among the 174 voting members, the plaintiff is included among those who voted for approval. No reasonable person would link the list of members' names to incompetence, bribery or corruption.

15 The judge set out the details of the allegations Mr. Mousa made to support his claim of fraud at para. 107 of the notice of civil claim:

a) attaching the name of the IEEE to Standard 988-2012 when they knew that the lightning experts of the IEEE opposed it;

b) implying that the Standard met the requirements of the American National Standards Institute ("ANSI") process when they knew that it did not and that it would have faced overwhelming opposition if it was subjected to the public review requirement of that process;

c) asserting during a related ANSI hearing that the ANSI status of Standard 998 will be maintained, then stripping the Standard of its ANSI status thereafter;

d) asserting that the safety concerns of the opponents will be addressed prior to the adoption of the Draft, which false claim was maintained over a period of about 22 months, then adopting the Standard without doing a review of its safety aspects;

e) implying that the Standard represents a consensus of concerned interests when they knew that a large number of affected stakeholders were excluded from its development process;

f) approving a standard that falsely implies that the disputed [CVM] Model is widely used in designing the lightning protection systems of substations, contrary to the finding of the Hearing Panel of the IEEE Substations Committee;

g) implying that the Standard reflects "good practice" and is in accordance with "state-of-the-art" despite the contrary evidence;

h) implying that the subject Document has the status of a "standard" when in fact it has the lower status of a "guide";

i) approving the Draft despite the evidence that it exceeded its authorized scope; and

j) approving the Draft despite its lack of balance, and ignoring the related contrary recommendations of the Hearing Panel of the IEEE Substations Committee.

16 The merits of the claim were addressed at paras. 49-51:

> [49] An allegation of fraud must be scrupulously pleaded and fully particularized: *Grewal v. Sandhu*, 2012 BCCA 26 at para. 19. Here, it is not possible in many respects to decipher whether the alleged actions of the IEEE were representations of fact. In some instances, they are clearly not: see subparagraphs (a), (i) and (j). In others the impugned actions appear to be promises or statements of present intention which are not actionable: see subparagraphs (c) and (d).
>
> [50] Moreover, the plaintiff has failed to plead that [the] IEEE's actions were intended to deceive him, induced him to act or alter his position and that he suffered damages as a result, all of which are required elements of the tort of fraud: *Bruno Appliance and Furniture, Inc v. Hryniak*, 2014 SCC 8 at paras. 19 and 20.
>
> [51] Indeed, the plaintiff conceded during his submissions that he was not deceived in any way. Rather, he feels that the public has been deceived and this deception may result in future harm. The law does not recognize the notion of an anticipatory tort or a tort that anticipates future harm to the public: *Lee v. Li*, [2002 BCCA 209] at paras. 28-29.

17 The judge dealt with Mr. Mousa's assertion of breach of duty at paras. 54-56:

> [54] The plaintiff alleges that IEEE's conduct breached duties owed to the public and members of IEEE (Notice of Civil Claim Part 1 para. 111; Part 3 paras. 6-7), duties to serve the public good by virtue of IEEE's status as a not-for-profit tax-exempt corporation (Notice of Civil Claim Part 1 paras. 112-115; Part 3, paras. 9-10) and the terms of IEEE's "Certificate of Incorporation" (Notice of Civil Claim Part 3, para. 11).
>
> [55] IEEE submits that the plaintiff's claim for breach of duty does not establish a cause of action and does not advance a claim known to law for two reasons:
>
> a) the plaintiff has not identified any breach by IEEE of any recognized obligation in common law or statute; and
>
> b) the plaintiff has not claimed to have suffered any loss as a result of the alleged breach of duty.
>
> [56] I agree. The plaintiff has not identified any basis upon which a general duty on the part of a private entity to act in the public interest can be founded. A similar claim alleging breach of a public duty of care was struck out in *Bingo City Games Inc. & Other v. B.C. Lottery Corp.*, 2003 BCSC 637.

18 At para. 58, the judge noted that, "[a]n action for declaratory relief must be in relation to a right and must have some utility: *Lee v. Li*, at para. 19". He accepted the contention of the IEEE stating at paras. 59-60:

> [59] I agree with counsel for IEEE that the following declarations sought by the plaintiff are not in relation to any right owed by IEEE to the plaintiff and have no utility because any such declaration would have no binding effect on IEEE:
>
> a) a declaration that the IEEE acted without authority when it permitted the adoption of Standard 998-2012 despite the concerns that were raised by lightning experts regarding its potential negative impact on public safety and public interest; and
>
> b) a declaration that the decision of the IEEE/ IEEE-SA to adopt Standard 998-2012 was hence null and void.
>
> [60] In my view, the plaintiff's concerns with the Standard and the manner in which it was adopted are within the internal affairs and part of the governance of IEEE. I agree with IEEE that they are outside the subject-matter jurisdiction of this court.

19 The judge concluded that it was not necessary to deal with Mr. Mousa's application for interim costs because he was satisfied the notice of civil claim should be struck, but held that even if this were not the case, Mr. Mousa is not entitled to an order for interim costs. No evidence was adduced concerning Mr. Mousa's ability to pay costs.

20 The IEEE sought special costs or lump sum costs because Mr. Mousa made serious allegations of misconduct. The judge stated at paras. 71-74:

> [71] I agree with IEEE's counsel that these allegations are inflammatory and unsupported. However, I am not prepared to find that the plaintiff's conduct was sufficiently reprehensible that it should attract an order for special costs on a full indemnity basis. Although misguided, the plaintiff's actions were the result of a passionate belief that public safety is potentially at risk.
>
> [72] However, I am satisfied that the plaintiff's obsessive conduct is deserving of some form of sanction that will perhaps make him think twice about continuing his crusade against the IEEE.
>
> [73] The court has the power to fix costs summarily, although such power should be exercised sparingly: *Dawson v. Dawson*, 2014 BCSC 44 at para. 65.
>
> [74] I am satisfied that this is a case where such power should be exercised. I am awarding costs on the basis of the "rough and ready" approach. IEEE is entitled to its costs of this action which I am summarily fixing at $5000.

21 The IEEE seeks special costs on this appeal because Mr. Mousa has continued to make serious allegations.

Discussion

Proposed amendment

22 Mr. Mousa asserts, and the IEEE agrees, that pursuant to Rule 6-1 he was entitled to amend his notice of civil claim without leave. Counsel for the IEEE advised us that the judge was aware of this. The issue must be placed into context.

23 Fresh evidence proposed by Mr. Mousa contains an "Access Pro Bono Client Advice Form" dated October 3, 2013. It was not before the chambers judge, but he was apprised of its content. The advising lawyer noted that the IEEE was applying to strike Mr. Mousa's claim. The advice given was to draft an amendment to the claim to provide the elements of each claim and to look for personal damage. Potentially there were claims of misrepresentation, breach of fiduciary duty and "breach of contract [of the] membership agreement". The lawyer stated, "have draft reviewed by lawyer".

24 The judge noted correctly that Mr. Mousa had not amended his notice of civil claim. In his submissions, Mr. Mousa also acknowledged that a formal amendment was not proposed. Essentially, the issue was whether he should be allowed to do so in the middle of a hearing. The judge exercised his discretion and concluded that this

would not be fair to the IEEE. He was reinforced in this conclusion by his assessment of the merits of Mr. Mousa's assertions that he could amend his claim properly to plead breach of contract.

25 The document containing those assertions was before the judge and reviewed by him. I agree with the judge's conclusion that they do not support a claim by Mr. Mousa for breach of contract. They are general allegations of misconduct asserted on behalf of public interests.

26 While there are a number of cases which recognize the existence of a contract between a society and its members, these cases involve members' explicit responsibilities and entitlements, such as payment of membership dues, or the legitimacy of expelling members from an organization: *Senez v. Montreal Real Estate Board*, [1980] 2 S.C.R. 555; *Whittall v. Vancouver Lawn Tennis & Badminton Club*, 2005 BCCA 439; *Bector v. Vedic Hindu Cultural Society*, 2014 BCSC 230.

27 In the current case, Mr. Mousa has not identified any clear bylaw violation or other action taken by IEEE which directly impacts his membership entitlement. Put simply, even if a contract does exist between the IEEE and Mr. Mousa - an analysis that this Court does not need to undertake - Mr. Mousa has failed to identify anything approximating a breach of contract.

28 Although an adjournment was not addressed specifically, the effect of Mr. Mousa's position would have required an adjournment in order to allow him to amend his pleading. The Rules entitled him to amend his notice of civil claim as a matter of right; they did not entitle him to an adjournment to enable him to do so. The judge correctly determined that the assertions would not result in an amendment that would cure the problem with the pleading and that the IEEE's application should proceed on the basis of the existing pleadings.

The application to strike the notice of civil claim

29 The judge correctly articulated the correct legal principles applicable to a motion to strike pursuant to Rule 9-5(1)(a). The only issue in this Court can be whether he properly applied those principles.

30 I set out in detail the judge's review of each of the categories of allegations advanced by Mr. Mousa. It is clear that he examined Mr. Mousa's positions carefully. The judge was satisfied that Mr. Mousa's allegations did not disclose a reasonable cause of action.

31 At the hearing of this appeal, each of Mr. Mousa's claims was discussed with him. This Court and the chambers judge provided to Mr. Mousa the opportunity to review the basis on which he contends he has a cause of action against the IEEE. Having listened carefully to Mr. Mousa's positions and having reviewed the judge's detailed assessment of them, I see no basis on which this Court could interfere with the judge's conclusions.

32 Mr. Mousa is aggrieved and upset with the standard that has been adopted. He has done his best to make his concerns known. Some matters simply are not dealt with appropriately in a court of law. In my view, this is one of them. Although it would be difficult to do so, it is time for Mr. Mousa to move on. He has done his best to change the minds of others. That they have not done so is their responsibility.

Interim costs

33 Mr. Mousa agrees that the issue of interim costs does not arise if the dismissal of his claim is sustained. I need not deal with the application for interim costs.

Costs of the chambers hearing

34 An award of costs is highly discretionary. The judge rejected the request of the IEEE for special costs. He had the jurisdiction to award lump sum costs. While such an award may reflect a judge's concern with the conduct of a party, often it is an appropriate expedient to avoid further conflict and proceedings over the quantum of costs.

35 The judge was concerned with Mr. Mousa's obsessive conduct. While he is entitled to hold firmly to his views,

they must not be advanced capriciously or maliciously. I would not disturb the judge's exercise of discretion in awarding lumpsum costs in the amount of $5,000.

Costs of the appeal

36 The allegations advanced by Mr. Mousa on appeal mirrored to some extent his contentions in chambers. Arguably, they had to do so for him to advance his appeal. While I consider the legal battle sought to be waged by Mr. Mousa to be misplaced, I would not condemn him to special costs. In my view, it is appropriate to attempt to bring this conflict to an end and to reflect this Court's concern with the very serious allegations that Mr. Mousa makes. This Court has the discretion to order costs that depart from standard assessment, and to award costs in a fixed amount: *Dawson v. Dawson*, 2013 BCCA 344 at para. 25. I would award costs of this appeal in the fixed amount of $3,000.

Conclusion

37 I would dismiss this appeal and order that Mr. Mousa pay to the IEEE lump sum costs of the appeal in the amount of $3,000.

E.C. CHIASSON J.A.
N.J. GARSON J.A.:— I agree.
A.W. MacKENZIE J.A.:— I agree.

Nevsun Resources Ltd. v. Araya, [2020] S.C.J. No. 5

Supreme Court of Canada Judgments

Supreme Court of Canada

Present: R. Wagner C.J. and R.S. Abella, M.J. Moldaver, A. Karakatsanis, C. Gascon, S. Côté, R. Brown, M. Rowe and S.L. Martin JJ.

Heard: January 23, 2019;

Judgment: February 28, 2020.

File No.: 37919.

[2020] S.C.J. No. 5 | [2020] A.C.S. no 5 | 2020 SCC 5 | EYB 2020-347809 | 2020EXP-588 | 462 C.R.R. (2d) 87 | [2020] 4 W.W.R. 1 | 32 B.C.L.R. (6th) 1 | 44 C.P.C. (8th) 225 | 443 D.L.R. (4th) 183 | 2020 CarswellBC 447

Nevsun Resources Ltd., Appellant; v. Gize Yebeyo Araya, Kesete Tekle Fshazion and Mihretab Yemane Tekle, Respondents, and International Human Rights Program, University of Toronto Faculty of Law, EarthRights International, Global Justice Clinic at New York University School of Law, Amnesty International Canada, International Commission of Jurists, Mining Association of Canada and MiningWatch Canada, Interveners

(313 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Public international law — Human rights — Act of state doctrine — Customary international law — Jus cogens — Peremptory norms — Doctrine of adoption — Direct remedy for breach of customary international law - - Eritrean workers commencing action against Canadian corporation in British Columbia — Workers alleging they were forced to work at mine owned by Canadian corporation in Eritrea and subjected to violent, cruel, inhuman and degrading treatment and seeking damages for breaches of customary international law prohibitions and of domestic torts — Corporation bringing motion to strike pleadings on basis of act of state doctrine and on basis that claims based on customary international law have no reasonable prospect of success — Whether act of state doctrine forms part of Canadian common law — Whether customary international law prohibitions against forced labour, slavery, cruel, inhuman or degrading treatment and crimes against humanity can ground claim for damages under Canadian law — Whether claims should be struck.

Court Summary:

Three Eritrean workers claim that they were indefinitely conscripted through Eritrea's military service into a forced labour regime where they were required to work at a mine in Eritrea. They claim they were subjected to violent,

cruel, inhuman and degrading treatment. The mine is owned by a Canadian company, Nevsun Resources Ltd. The Eritrean workers started proceedings in British Columbia against Nevsun and sought damages for breaches of customary international law prohibitions against forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity. They also sought damages for breaches of domestic torts including conversion, battery, unlawful confinement, conspiracy and negligence. Nevsun brought a motion to strike the pleadings on the basis of the act of state doctrine, which precludes domestic courts from assessing the sovereign acts of a foreign government. Nevsun also took the position that the claims based on customary international law should be struck because they have no reasonable prospect of success. The chambers judge dismissed Nevsun's motion to strike, and the Court of Appeal agreed.

Held (Brown and Rowe JJ. dissenting in part and Moldaver and Côté JJ. dissenting): The appeal should be dismissed.

Per Wagner C.J. and **Abella**, Karakatsanis, Gascon and Martin JJ.: The act of state doctrine and its underlying principles as developed in Canadian jurisprudence are not a bar to the Eritrean workers' claims. The act of state doctrine has played no role in Canadian law and is not part of Canadian common law. Whereas English jurisprudence has reaffirmed and reconstructed the act of state doctrine, Canadian law has developed its own approach to addressing the twin principles underlying the doctrine: conflict of laws and judicial restraint. Both principles have developed separately in Canadian jurisprudence rather than as elements of an all-encompassing act of state doctrine. As such, in Canada, the principles underlying the act of state doctrine have been completely subsumed within this jurisprudence. Canadian courts determine questions dealing with the enforcement of foreign laws according to ordinary private international law principles which generally call for deference, but allow for judicial discretion to decline to enforce foreign laws where such laws are contrary to public policy, including respect for public international law.

Nor has Nevsun satisfied the test for striking the pleadings dealing with customary international law. Namely it has not established that it is "plain and obvious" that the customary international law claims have no reasonable likelihood of success.

Modern international human rights law is the phoenix that rose from the ashes of World War II and declared global war on human rights abuses. Its mandate was to prevent breaches of internationally accepted norms. Those norms were not meant to be theoretical aspirations or legal luxuries, but moral imperatives and legal necessities. Conduct that undermined the norms was to be identified and addressed.

While states were historically the main subjects of international law, it has long-since evolved from this state-centric template. The past 70 years have seen a proliferation of human rights law that transformed international law and made the individual an integral part of this legal domain, reflected in the creation of a complex network of conventions and normative instruments intended to protect human rights and ensure compliance with those rights. The rapid emergence of human rights signified a revolutionary shift in international law to a human-centric conception of global order. The result of these developments is that international law now works not only to maintain peace between states, but to protect the lives of individuals, their liberty, their health, and their education. The context in which international human rights norms must be interpreted and applied today is one in which such norms are routinely applied to private actors. It is therefore not plain and obvious that corporations today enjoy a blanket exclusion under customary international law from direct liability for violations of obligatory, definable, and universal norms of international law.

Customary international law is the common law of the international legal system, constantly and incrementally evolving based on changing practice and acceptance. Canadian courts, like all courts, play an important role in its ongoing development. There are two requirements for a norm of customary international law to be recognized as such: general but not necessarily universal practice, and *opinio juris*, namely the belief that such practice amounts to a legal right or obligation. When international practice develops from being intermittent into being widely accepted and believed to be obligatory, it becomes a norm of customary international law.

Within customary international law, there is a subset of norms known as *jus cogens*, or peremptory norms, from which no derogation is permitted. The workers claim breaches not only of norms of customary international law, but of norms accepted to be of such fundamental importance as to be characterized as *jus cogens*. Crimes against humanity have been described as among the least controversial examples of violations of *jus cogens*. Compelling authority confirms that the prohibitions against slavery, forced labour and cruel, inhuman and degrading treatment have attained the status of *jus cogens*. Refusing to acknowledge the differences between existing domestic torts and forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity, may undermine the court's ability to adequately address the heinous nature of the harm caused by this conduct.

Canada has long followed the conventional path of automatically incorporating customary international law into domestic law via the doctrine of adoption, making it part of the law of Canada. Therefore, customary international law is automatically adopted into domestic law without any need for legislative action. The fact that customary international law is part of our common law means that it must be treated with the same respect as any other law.

A compelling argument can therefore be made that since customary international law is part of Canadian common law, a breach by a Canadian company can theoretically be directly remedied. Since the workers' claims are based on norms that already form part of our common law, it is not "plain and obvious" that our domestic common law cannot recognize a direct remedy for their breach. Appropriately remedying the violations of *jus cogens* and norms of customary international law requires different and stronger responses than typical tort claims, given the public nature and importance of the violated rights involved, the gravity of their breach, the impact on the domestic and global rights objectives, and the need to deter subsequent breaches.

Nevsun has not demonstrated that the Eritrean workers' claim based on breaches of customary international law should be struck at this preliminary stage. The Court is not required to determine definitively whether the Eritrean workers should be awarded damages for the alleged breaches of customary international law. It is enough to conclude that the breaches of customary international law, or *jus cogens*, relied on by the Eritrean workers may well apply to Nevsun. Since the customary international law norms raised by the Eritrean workers form part of the Canadian common law, and since Nevsun is a company bound by Canadian law, the claims of the Eritrean workers for breaches of customary international law should be allowed to proceed.

Per **Brown** and **Rowe** JJ. (dissenting in part): The appeal should be allowed in part. There is agreement with the majority that the dismissal of Nevsun's application to strike the pleadings should be upheld as it regards the foreign act of state doctrine. However, there is disagreement on the matter of the use of customary international law. The workers' claims for damages based on breach of customary international law disclose no reasonable cause of action and are bound to fail.

Two separate theories have been advanced upon which the pleadings of the Eritrean workers could be upheld. The majority's theory is that the workers seek to have Canadian courts recognize a cause of action for breach of customary international law and to prosecute a claim thereunder. The second theory is that the workers seek to have Canadian courts recognize four new nominate torts inspired by customary international law: use of forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity. The latter theory is more consistent with the pleadings and with how the workers framed their claims before the Court. Regardless, the workers' claims are bound to fail on either theory.

The claims are bound to fail on the first theory. On this theory, the workers' pleading is viable only if international law is given a role that exceeds the limits placed upon it by Canadian law. For this pleading to succeed, then, Canadian law must change. Such a change would require an act of a competent legislature, as it does not fall within the competence of the courts. Without change, the pleading is doomed to fail.

Substantively, the content of customary international law is established by the actions of states on the international plane. A rule of customary international law exists when state practice evidences a custom and the practicing states accept that custom as law. These two requirements are called state practice and *opinio juris*.

The high bar established by the twin requirements of state practice and *opinio juris* reflects the extraordinary nature of customary international law: it leads courts to adopt a role otherwise left to legislatures; and, unless a state persistently objects, its recognition binds states to rules to which they have not affirmatively consented. Once a norm of customary international law has been established, it can become a source of Canadian domestic law unless it is inconsistent with extant statutory law.

The primacy given to contrary legislation preserves the legislature's ability to control the effects of international laws in the domestic legal system. If the legislature passes a law contravening a prohibitive norm of international law, that law is not subject to review by the courts. Similarly, if the legislature does not pass a law in contravention of a mandatory norm of international law, the courts cannot construct that law for them, unless doing so is otherwise within the courts' power. Courts may presume the intent of the legislature is to comply with customary international law norms, but that presumption is rebuttable: customary international law has interpretive force, but it does not formally constrain the legislature. Canada and the provinces have the ability, should they choose to exercise it, to violate norms of customary international law. But that is a choice that only Parliament or the provincial legislatures can make; the federal and provincial governments cannot do so without the authorization of those legislative bodies.

To determine whether a statute prevents amending the common law, courts must precisely identify the norm, determine how the norm would best be given effect and then determine whether any legislation prevents the court from changing the common law to create that effect. If no legislation does, courts should implement that change to the common law. If any legislation does, the courts should respect that legislative choice, and refrain from changing the common law.

Procedurally, the content of customary international law is established in Canada by the court first finding the facts of state practice and *opinio juris*. When there is or can be no dispute about the existence of a norm of customary international law, it is appropriate for the courts to take judicial notice. Courts will also be called on to evaluate both whether there exists a custom generally among states that is applied uniformly, and whether the practicing states respect the custom out of the belief that doing so is necessary in order to fulfil their obligations under customary international law. Once the facts of state practice and *opinio juris* are found, the second step is to identify which, if any, norms of customary international law must be recognized to best explain these facts. This is a question of law. The final step is to apply the norms, as recognized, to the facts of the case at bar. This is a question of mixed fact and law.

Applying this structure to the majority's theory, there is agreement with the majority that: there are prohibitions at international law against crimes against humanity, slavery, the use of forced labour, and cruel, inhuman, and degrading treatment; these prohibitions have the status of *jus cogens*; individuals and states both must obey some customary international law prohibitions, and it is a question for the trial judge whether they must obey these specific prohibitions; and individuals are beneficiaries of these prohibitions.

There is, however, disagreement that the majority's reasons provide a viable path to showing that a corporation may be civilly liable in Canada for a breach of customary international law norms. It is plain and obvious that corporations are excluded from direct liability at customary international law. Corporate liability for human rights violations has not been recognized under customary international law; at most, the proposition that such liability has been recognized is equivocal. Customary international law is not binding if it is equivocal. Absent a binding norm, the workers' cause of action is clearly doomed to fail.

It is unclear how the majority deduces the potential existence of a liability rule from an uncontroversial statement of a prohibition. Perhaps it sees a prohibition of customary international law as requiring Canada to provide domestic liability rules; perhaps it sees the prohibition as itself containing a liability rule; or perhaps it sees the doctrine of adoption as producing a liability rule in response to a prohibition. None of these options provide an interpretation of the majority's theory of the case that makes the claims viable.

The workers did not plead the necessary facts of state practice and *opinio juris* to support the proposition that a prohibition of customary international law requires states to provide domestic civil liability rules Indeed, states are typically free to meet their international obligations according to their own domestic institutional arrangements and preferences. A civil liability rule is but one possibility. A prohibition could also be effected through, for example, the criminal law or through administrative penalties.

The workers also did not plead the necessary facts to support the proposition that a prohibition of customary international law itself contains a liability rule. An essay that states it would not make sense to argue that international law may impose criminal liability on corporations, but not civil liability does not constitute state practice or *opinio juris*. State practice is the difference between civil liability and criminal liability at customary international law. Outside the sphere of criminal law, there is no corresponding acceptance-of-liability rules regarding individuals. For a customary international law prohibition to create a civil liability rule would require there to be widespread state practice that does not exist today.

Nor can the doctrine of adoption play the role of converting a general prohibition upon states and criminal prohibitions upon individuals into a civil liability rule. Applying the three-step process for determining whether to amend private common law rules in response to the recognition of a mandatory norm of customary international law, the relevant norms here are that Canada must prohibit and prevent slavery by third parties, *mutatis mutandis* for each of the claims. Although such norms may exist, they are appropriately given effect through, and only through the criminal law. The criminal law does not provide private law causes of action. Moreover, adopting the norms as crimes cannot be done because Parliament has, in s. 9 of the *Criminal Code*, clearly prohibited courts from creating criminal laws via the common law.

The majority's theory is no more tenable if a step back is taken and it is considered more conceptually. Essentially, the majority's theory amounts to saying that the doctrine of adoption has what jurists in Europe would call horizontal effect. It would be astonishing were customary international law to have horizontal effect where the *Canadian Charter of Rights and Freedoms* does not. The majority's approach also amounts to recognizing a private law cause of action for simple breach of customary international public law. This would be similarly astonishing, since there is no private law cause of action for simple breach of statutory Canadian public law.

Nor does the presence of international criminal liability rules make necessary the creation of domestic torts, at least outside the American context. In that country, the hoary and historically unique *Alien Tort Statute* requires courts to treat international law as creating civil liabilities. Essentially, the majority's approach would amount to Americanizing the Canadian doctrine of adoption. Canadian courts cannot adopt an U.S. statute when Parliament and the legislatures have not.

While there is agreement that where there is a right, there must be a remedy, the right to a remedy does not necessarily mean a right to a particular form, or kind of remedy. Further, a difference merely of damages or the extent of harm will not suffice to ground a new tort.

Canadian law, as is, furnishes an appropriate cause of action. When there is a breach of rights that is more grave or that needs to be deterred, increased damages are available under existing tort law. Punitive damages have as a goal the denunciation of misconduct. Moreover, a court can express its condemnation of wrongful conduct through its reasons, by stating in them that a party committed human rights abuses, even if the ultimate legal conclusion is that they committed assault, battery or other wrongs. Other states also recognize that such ordinary private law actions provide mechanisms to address the harm arising out of a grave breach of international criminal law. Even were this part of Nevsun's motion to strike to be granted, the workers could pursue in Canada the same relief they could obtain in most other states.

The only remaining way to support the majority's theory of the case is for the doctrine of adoption to change so that it provides a civil liability rule for breaches of prohibitions at customary international law. The Court cannot make

such a change Although, it is open to Parliament and the legislatures to make such a change, absent statutory intervention, the ability of the courts to shape the law is, as a matter of common-law methodology, constrained.

Courts develop the law incrementally. For a change to be incremental, it cannot have complex and uncertain ramifications. To alter the doctrine of adoption would set the law on an unknown course whose ramifications cannot be accurately gauged. It is thus for Parliament to decide whether to change the doctrine of adoption to provide courts the power to convert prohibitive rules of international law into free-standing torts. Parliament has not done so.

The claims are also bound to fail on the second theory that the workers sought to have the court recognize four new nominate torts inspired by international law: use of forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity.

Three clear rules for when the courts will not recognize a new nominate tort have emerged: where there are adequate alternative remedies; where it does not reflect and address a wrong visited by one person upon another; and where the change wrought upon the legal system would be indeterminate or substantial. The first rule, that of necessity, acknowledges at least three alternative remedies that could make recognizing a new tort unnecessary: an existing tort, an independent statutory scheme, and judicial review. A difference merely of damages or the extent of harm will not suffice. The second rule is reflected in the courts' resistance to creating strict or absolute liability regimes. The third rule reflects the courts' respect for legislative supremacy and the courts' mandate to ensure that the law remains stable, predictable and accessible.

The proposed tort of cruel, inhuman or degrading treatment should not be recognized as a new nominate tort, because it is encompassed by the extant torts of battery or intentional infliction of emotional distress. The proposed tort of crimes against humanity also should not be recognized, because it is too multifarious a category to be the proper subject of a nominate tort. It is, however, possible that the proposed torts of slavery and use of forced labour would pass the test for recognizing a new nominate tort.

Nevertheless, these proposed torts should not be recognized for the first time in a proceeding based on conduct that occurred in a foreign territory. In general, tortious conduct abroad will not be governed by Canadian law, even where the wrong is litigated before Canadian courts, except when the foreign state's law is so repugnant to the fundamental morality of the Canadian legal system as to lead the court not to apply it. Developing Canadian law in such circumstances is inadvisable because the law that is appropriate for regulating a foreign state may not also be law that is appropriate for regulating Canada and because doing so would take courts outside the limits of their institutional competence. The domain of foreign relations is perhaps the most obvious example of where the executive is competent to act, but where courts lack the institutional competence to do so. Setting out a novel tort in the exceptional circumstance of a foreign state's law being held by the court to be so repugnant to Canadian morality would be an intrusion into the executive's dominion over foreign relations. The courts' role within Canada is, primarily, to adjudicate on disputes within Canada, and between Canadian residents.

Not granting the motion to strike in this case offers this lesson: the more nebulous the pleadings and legal theory used to protect them, the more likely they are to survive a motion to strike.

The creation of a cause of action for breach of customary international law would require the courts to encroach on the roles of both the legislature (by creating a drastic change in the law and ignoring the doctrine of incrementalism), and the executive (by wading into the realm of foreign affairs). It is not up to the Court to ignore the foundations of customary international law, which prohibits certain state conduct, in order to create a cause of action against private parties. Nor is it for the courts to depart from foundational principles of judicial law-making in tort law. The result of doing so will be instability and uncertainty.

Per Moldaver and **Côté** JJ. (dissenting): There is agreement with Brown and Rowe JJ.'s analysis and conclusion concerning the workers' claims inspired by customary international law. It is plain and obvious that they are bound to fail. In addition, the extension of customary international law to corporations represents a significant departure in this area of law. The widespread, representative and consistent state practice and *opinio juris* required to establish

a customary rule do not presently exist to support the proposition that international human rights norms have horizontal application between individuals and corporations.

There is disagreement with the majority concerning the existence and applicability of the act of state doctrine. The workers' claims here are not amenable to adjudication within Canada's domestic legal order. Instead, they are allocated to the plane of international affairs for resolution in accordance with the principles of public international law and diplomacy. They are therefore not justiciable and should be dismissed in their entirety.

There is agreement with the majority that Canada's choice of law jurisprudence plays a similar role to that of certain aspects of the act of state doctrine; however, the act of state doctrine includes a second branch distinct from choice of law which renders some claims non-justiciable. This second branch of the doctrine bars the adjudication of civil actions which have their foundation in allegations that a foreign state has violated public international law. Whether referred to as a branch of the act of state doctrine or as a specific application of the more general doctrine of justiciability, these claims are not justiciable because adjudicating them would impermissibly interfere with the conduct by the executive of Canada's international relations.

Justiciability is rooted in a commitment to the constitutional separation of powers. A court must conform to the separation of powers by showing deference for the roles of the executive and the legislature in their respective spheres so as to refrain from unduly interfering with the legitimate institutional roles of those orders. A court has the institutional capacity to consider international law questions, and its doing so is legitimate, if they also implicate questions with respect to constitutional rights, the legality of an administrative decision or the interface between international law and Canadian public institutions. If, however, a court allows a private claim which impugns the lawfulness of a foreign state's conduct under international law, it will be overstepping the limits of its proper institutional role. The adjudication of such claims impermissibly interferes with the conduct by the executive of Canada's international relations. Litigation between private parties founded upon allegations that a foreign state has violated public international law is not the proper subject matter of judicial resolution because questions of international law relating to internationally wrongful acts of foreign states are not juridical claims amenable to adjudication on judicial or manageable standards.

While a court may consider the legality of acts of a foreign state under municipal or international law if the issue arises incidentally, a claim will not be justiciable if the allegation that the foreign state acted unlawfully is central to the litigation. In the instant case, the workers' claims are not justiciable because the issue of the legality of Eritrea's acts under international law is central to those claims and requires a determination that Eritrea has committed an internationally wrongful act. As the workers allege that Nevsun is liable because it was complicit in the Eritrean authorities' alleged internationally wrongful acts, Nevsun can be liable only if the acts of the actual alleged perpetrators -- Eritrea and its agents -- were unlawful as a matter of public international law. Since the workers' claims, as pleaded, requires a determination that Eritrea has violated international law, they must fail.

Cases Cited

By Abella J.

Distinguished: *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176; **considered:** *Belhaj v. Straw*, [2017] UKSC 3, [2017] A.C. 964; *Blad v. Bamfield* (1674), 3 Swans. 604, 36 E.R. 992; *Duke of Brunswick v. King of Hanover* (1848), 2 H.L.C. 1, 9 E.R. 993; *Yukos Capital sarl v. OJSC Rosneft Oil Co. (No. 2)*, [2012] EWCA Civ 855, [2014] Q.B. 458; *Oppenheimer v. Cattermole*, [1976] A.C. 249; *Buttes Gas and Oil Co. v. Hammer (No. 3)*, [1982] A.C. 888; *Moti v. The Queen*, [2011] HCA 50; *Laane and Baltser v. Estonian State Cargo & Passenger s.s. Line*, [1949] S.C.R. 530; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292; **referred to:** *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*, [2000] 1 A.C. 147; *Kuwait Airways Corpn. v. Iraqi Airways Co. (Nos. 4 and 5)*, [2002] UKHL 19, [2002] 2 A.C. 883; *Belhaj v. Straw MP*, [2014] EWCA Civ 1394, [2016] 1 All E.R. 121; *Habib v. Commonwealth of Australia*, [2010] FCAFC 12; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022; *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3,

[2010] 1 S.C.R. 44; *Canada v. Schmidt*, [1987] 1 S.C.R. 500; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779; *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; *India v. Badesha*, 2017 SCC 44, [2017] 2 S.C.R. 127; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45; *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263; *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441; *Willow v. Chong*, 2013 BCSC 1083; *North Sea Continental Shelf*, Judgment, I.C.J. Report 1969, p. 3; *Case concerning certain German interests in Polish Upper Silesia (Germany v. Poland)* (1926), P.C.I.J. Ser. A, No. 7; *Prosecutor v. Jelisiae*, IT-95-10-T, 14 December 1999; *Prosecutor v. Krstiae*, IT-98-33-T, 2 August 2001; *Prosecutor v. Erdemoviae*, IT-96-22-A, 7 October 1997; *The Paquete Habana*, 175 U.S. 677 (1900); *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 1 Q.B. 529; *Triquet v. Bath* (1764), 3 Burr. 1478, 97 E.R. 936; *Chung Chi Cheung v. The King*, [1939] A.C. 160; *The Ship "North" v. The King* (1906), 37 S.C.R. 385; *Reference as to Whether Members of the Military or Naval Forces of the United States of America are Exempt from Criminal Proceedings in Canadian Criminal Courts*, [1943] S.C.R. 483; *Friedmann Equity Developments Inc. v. Final Note Ltd.*, 2000 SCC 34, [2000] 1 S.C.R. 842; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210; *Watkins v. Olafson*, [1989] 2 S.C.R. 750; *Sidaway v. Board of Governors of the Bethlem Royal Hospital*, [1985] 1 A.C. 871; *Henry v. British Columbia (Attorney General)*, 2015 SCC 24, [2015] 2 S.C.R. 214; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575; *Great Western Railway v. Brown* (1879), 3 S.C.R. 159; *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28; *Dunlea v. Attorney-General*, [2000] NZCA 84, [2000] 3 N.Z.L.R. 136; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

By Brown and Rowe JJ. (dissenting in part)

Moran v. Pyle National (Canada) Ltd., [1975] 1 S.C.R. 393; *British Columbia/Yukon Assn. of Drug War Survivors v. Abbotsford (City)*, 2015 BCCA 142, 75 B.C.L.R. (5th) 69; *Kripps v. Touche Ross & Co.* (1992), 69 B.C.L.R. (2d) 62; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 ; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 ; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292 ; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176; *R. v. Jones (Margaret)*, [2006] UKHL 16, [2007] 1 A.C. 136; *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863; *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458; *R. v. Finta*, [1994] 1 S.C.R. 701; *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254 (2nd Cir. 2007); *Kadic v. Karadziae*, 70 F.3d 232 (2nd Cir. 1995); *Bouzari v. Islamic Republic of Iran* (2004), 71 O.R. (3d) 675; *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 ; *R. in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205; *Holland v. Saskatchewan*, 2008 SCC 42, [2008] 2 S.C.R. 551; *West Rand Central Gold Mining Company v. Rex*, [1905] 2 K.B. 391; *Chung Chi Cheung v. The King*, [1939] A.C. 160; *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551; *Merrifield v. Canada (Attorney General)*, 2019 ONCA 205 , 145 O.R. (3d) 494, leave to appeal refused, S.C.C. Bull., September 20, 2019, 7; *R. v. Vaillancourt*, [1987] 2 S.C.R. 636; *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177; *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, [2014] 1 S.C.R. 126; *Dhillon v. Dhillon*, 2006 BCCA 524, 232 B.C.A.C. 249; *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595 ; *Watkins v. Olafson*, [1989] 2 S.C.R. 750; *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299; *R. v. Salituro*, [1991] 3 S.C.R. 654; *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd*., [1999] 3 S.C.R. 108; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210; *Jones v. Tsige*, 2012 ONCA 32, 108 O.R. (3d) 241; *R. (Miller) v. Secretary of State*, [2017] UKSC 5, [2018] A.C. 61 ; *Frame v. Smith*, [1987] 2 S.C.R. 99; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 ; *McLean v. McLean*, 2019 SKCA 15; *6165347 Manitoba Inc. v. Jenna Vandal*, 2019 MBQB 69 ; *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181; *Harris v. GlaxoSmithKline Inc*., 2010 ONSC 2326, 101 O.R. (3d) 665 , aff'd 2010 ONCA 872, 106 O.R. (3d) 661, leave to appeal refused, [2011] 2 S.C.R. vii; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44.

By Côté J. (dissenting)

Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2nd Cir. 2010), aff'd 569 U.S. 108 (2013); *Jones v. Ministry of*

Interior of Saudi Arabia, [2006] UKHL 26, [2007] 1 A.C. 270; *Belhaj v. Straw*, [2017] UKSC 3, [2017] A.C. 964; *Johnstone v. Pedlar*, [1921] 2 A.C. 262; *Oppenheimer v. Cattermole*, [1976] A.C. 249; *Kuwait Airways Corpn. v. Iraqi Airways Co. (Nos. 4 and 5)*, [2002] UKHL 19, [2002] 2 A.C. 883; *Laane and Baltser v. Estonian State Cargo & Passenger s.s. Line*, [1949] S.C.R. 530; *Buck v. Attorney General*, [1965] 1 All E.R. 882; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289; *Buttes Gas and Oil Co. v. Hammer (No. 3)*, [1982] A.C. 888; *Blad v. Bamfield* (1674), 3 Swans. 604, 36 E.R. 992; *Duke of Brunswick v. King of Hanover* (1848), 2 H.L.C. 1, 9 E.R. 993; *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750; *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319; *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44; *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176; *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2005 WL 2082846; *International Association of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries*, 649 F.2d 1354 (1981); *Reference as to Powers to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943] S.C.R. 208; *Reference re Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792; *Reference re Newfoundland Continental Shelf*, [1984] 1 S.C.R. 86; *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., International*, 493 U.S. 400 (1990).

Statutes and Regulations Cited

Alien Tort Statute, 28 U.S.C. s. 1350 (2018).

Business Corporations Act, S.B.C. 2002, c. 57.

Canadian Charter of Rights and Freedoms, s. 7.

Constitution Act, 1867, s. 96.

Constitution Act, 1982, s. 52(1).

Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24.

Criminal Code, R.S.C. 1985, c. C-46, s. 9.

European Communities Act 1972 (U.K.), 1972, c. 68.

Human Rights Act 1998 (U.K.), 1998, c. 42, s. 6(1), (3).

Justice for Victims of Terrorism Act, S.C. 2012, c. 1, s. 2, s. 4.

Law and Equity Act, R.S.B.C. 1996, c. 253, s. 2.

State Immunity Act, R.S.C. 1985, c. S-18.

Supreme Court Civil Rules, B.C. Reg. 168/2009, rr. 9-5, 21-8.

Treaties and Other International Instruments

African Charter on Human and Peoples' Rights, 1520 U.N.T.S. 217, art. 5.

American Convention on Human Rights, 1144 U.N.T.S. 123, art. 5.

American Declaration of the Rights and Duties of Man, April 30, 1948, art. 26.

Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Can. T.S. 1987 No. 36, art. 16.

Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, art. 3.

Convention on the Rights of the Child, Can. T.S. 1992 No. 3, art. 37.

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1561 U.N.T.S. 363.

Inter-American Convention to Prevent and Punish Torture, O.A.S.T.S. No. 67.

International Covenant on Civil and Political Rights, Can. T.S. 1976 No. 47, arts. 2, 7.

North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America, Can. T.S. 1994 No. 2.

Statute of the International Court of Justice, Can. T.S. 1945 No. 7, art. 38(1).

Vienna Convention on the Law of Treaties, Can. T.S. 1980 No. 37, art. 53.

Authors Cited

Aftab, Yousuf, and Audrey Mocle. *Business and Human Rights as Law: Towards Justiciability of Rights, Involvement, and Remedy*. Toronto: LexisNexis, 2019.

Akhavan, Payam. "Canada and international human rights law: is the romance over?" (2016), 22 *Canadian Foreign Policy Journal* 331.

Alston, Philip, and Ryan Goodman. *International Human Rights*. Oxford: Oxford University Press, 2013.

Axworthy, Lloyd. *Navigating A New World: Canada's Global Future*. Toronto: Vintage Canada, 2003.

Banu, Roxana. "Assuming Regulatory Authority for Transnational Torts: An Interstate Affair? A Historical Perspective on the Canadian Private International Law Tort Rules" (2013), 31 Windsor Y.B. Access Just. 197.

Bassiouni, M. Cherif. "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*" (1996), 59 *Law & Contemp. Probs.* 63.

Baughen, Simon. *Human Rights and Corporate Wrongs: Closing the Governance Gap*. Cheltenham, U.K.: Edward Elgar Publishing, 2015.

Bianchi, Andrea. "Human Rights and the Magic of *Jus Cogens*" (2008), 19 *E.J.I.L.* 491.

Bingham, Tom. *The Rule of Law*. London: Allen Lane, 2010.

Blackstone, William. *Commentaries on the Laws of England: Book the Fourth*. Oxford: Clarendon Press, 1769.

Brierly, James L. *The Law of Nations: An Introduction to the International Law of Peace*, 6th ed. Oxford: Clarendon Press, 1963.

Brownlie, Ian. *Principles of Public International Law*, 7th ed. Oxford: Oxford University Press, 2008.

Brunnée, Jutta, and Stephen J. Toope. "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002), 40 *Can. Y.B. Intl Law* 3.

Brunnée, Jutta, and Stephen J. Toope. "International Law and the Practice of Legality: Stability and Change" (2018), 49 *V.U.W.L.R.* 429.

Bühler, Martin. "The Emperor's New Clothes: Defabricating the Myth of 'Act of State' in Anglo-Canadian Law", in Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation.* Portland, Or.: Hart Publishing, 2001, 343.

Canada. Global Affairs Canada. *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad*, last updated July 31, 2019 (online: http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Enhanced_CS_Strategy_ENG.pdf; archived version: https://www.scc-csc.ca/cso-dce/2020SCC-CSC5_1_eng.pdf).

Canada. Global Affairs Canada. *Minister Carr announces appointment of first Canadian Ombudsperson for Responsible Enterprise*, April 8, 2019 (online: https://www.canada.ca/en/global-affairs/news/2019/04/minister-carr-announces-appointment- of-first-canadian-ombudsperson-for-responsible-enterprise.html; archived version: https://www.scc-csc.ca/cso-dce/2020SCC-CSC5_2_eng.pdf).

Canada. Global Affairs Canada. *Responsible business conduct abroad -- Questions and answers*, last updated September 16, 2019 (online: https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other- autre/faq.aspx?lang=eng; archived version: https://www.scc-csc.ca/cso-dce/2020SCC-CSC5_3_eng.pdf).

Cassese, Antonio. *International Law*, 2nd ed. Oxford: Oxford University Press, 2005.

Clapham, Andrew. *Human Rights Obligations of Non-State Actors*. Oxford: Oxford University Press, 2006.

Clapham, Andrew. "On Complicity", dans Marc Henzelin et Robert Roth, dir., *Le droit pénal à l'épreuve de l'internationalisation*. Paris: L.G.D.J., 2002, 241.

Craig, Paul. "Britain in the European Union", in Jeffrey Jowell, Dawn Oliver and Colm O'Cinneide, eds., *The Changing Constitution*, 8th ed. Oxford: Oxford University Press, 2015, 104.

Crawford, James. *Brownlie's Principles of Public International Law*, 9th ed. Oxford: Oxford University Press, 2019.

Criddle, Evan J., and Evan Fox-Decent. "A Fiduciary Theory of Jus Cogens" (2009), 34 *Yale J. Intl L.* 331.

Currie, John H. *Public International Law*, 2nd ed. Toronto: Irwin Law, 2008.

Currie, John H. "Weaving a Tangled Web: *Hape* and the Obfuscation of Canadian Reception Law" (2007), 45 *Can. Y.B. Intl Law* 55.

Currie, John H., et al. *International Law: Doctrine, Practice, and Theory*, 2nd ed. Toronto: Irwin Law, 2014.

de Mestral, Armand, and Evan Fox-Decent. "Rethinking the Relationship Between International and Domestic Law" (2008), 53 McGill L.J. 573.

Dodge, William S. "Corporate Liability Under Customary International Law" (2012), 43 *Geo. J. Int'l L.* 1045.

Emanuelli, Claude. *Droit international public: Contribution à l'étude du droit international selon une perspective canadienne*, 3e éd. Montréal: Wilson & Lafleur, 2010.

Fitzgerald, Oonagh E. "Implementation of International Humanitarian and Related International Law in Canada", in Oonagh E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law*. Toronto: Irwin Law, 2006, 625.

Green, James A. *The Persistent Objector Rule in International Law*. Oxford: Oxford University Press, 2016.

Harrington, Joanna. "Redressing the Democratic Deficit in Treaty Law Making: (Re-)Establishing a Role for Parliament" (2005), 50 McGill L.J. 465.

Hathaway, Oona A., and Scott J. Shapiro. *The Internationalists: How a Radical Plan to Outlaw War Remade the World*. New York: Simon & Schuster, 2017.

Henckaerts, Jean-Marie. "Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict" (2005), 87 *Int'l Rev. Red Cross* 175.

Higgins, Rosalyn. "The Relationship Between International and Regional Human Rights Norms and Domestic Law" (1992), 18 *Commonwealth L. Bull.* 1268.

International Labour Organization. International Labour Office. "Forced labour in Myanmar (Burma) -- Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29)", *I.L.O. Official Bulletin: Special Supplement*, vol. LXXXI, 1998, Series B.

Jennings, Robert, and Arthur Watts. *Oppenheim's International Law*, vol. 1, 9th ed. Oxford: Oxford University Press, 2008.

Jouannet, Emmanuelle. "What is the Use of International Law? International Law as a 21st Century Guardian of Welfare" (2007), 28 Mich. J. Int'l L. 815.

Joyner, Christopher C. "'The Responsibility to Protect': Humanitarian Concern and the Lawfulness of Armed Intervention" (2007), 47 Va J. Int'l L. 693.

Kammerhofer, Jörg. "Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems" (2004), 15 *Eur. J. Int'l L.* 523.

Keyes, John Mark, and Ruth Sullivan. "A Legislative Perspective on the Interaction of International and Domestic Law", in Oonagh E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law*. Toronto: Irwin Law, 2006, 277.

Kindred, Hugh M. "The Use and Abuse of International Legal Sources by Canadian Courts: Searching for a Principled Approach", in Oonagh E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law*. Toronto: Irwin Law, 2006, 5.

Koh, Harold Hongju. "Civil Remedies for Uncivil Wrongs: Combatting Terrorism through Transnational Public Law Litigation" (2016), 50 *Tex. Intl L.J.* 661.

Koh, Harold Hongju. *International Law vs. Donald Trump: A Reply*, March 5, 2018 (online:

http://opiniojuris.org/2018/03/05/international-law-vs-donald-trump-a-reply/; archived version: https://www.scc-csc.ca/cso-dce/2020SCC-CSC5_4_eng.pdf).

Koh, Harold Hongju. "Separating Myth from Reality about Corporate Responsibility Litigation" (2004), 7 *J.I.E.L.* 263.

Koh, Harold Hongju. "Transnational Legal Process" (1996), 75 Neb. L. Rev. 181.

Koh, Harold Hongju. "Twenty-First Century International Lawmaking" (2013), 101 Geo. L.J. 725.

La Forest, Gérard V. "The Expanding Role of the Supreme Court of Canada in International Law Issues" (1996), 34 *Can. Y.B. Intl Law* 89.

Lauterpacht, Hersch. "Is International Law a Part of the Law of England?", *Transactions of the Grotius Society*, vol. 25, *Problems of Peace and War: Papers Read Before the Society in the Year 1939*. London: Sweet & Maxwell, 1940, 51.

LeBel, Louis. "A Common Law of the World? The Reception of Customary International Law in the Canadian Common Law" (2014), 65 U.N.B.L.J. 3.

LeBel, Louis, and Gloria Chao. "The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law" (2002), 16 S.C.L.R. (2d) 23.

Macklem, Patrick. *The Sovereignty of Human Rights*. New York: Oxford University Press, 2015.

McLachlan, Campbell. *Foreign Relations Law*. Cambridge: Cambridge University Press, 2014.

McLachlin, Beverley. "Unwritten Constitutional Principles: What is Going On?" (2006), 4 *N.Z.J.P.I.L.* 147.

O'Keefe, Roger. *International Criminal Law*. Oxford: Oxford University Press, 2015.

O'Keefe, Roger. "The Doctrine of Incorporation Revisited", in James Crawford and Vaughan Lowe, eds., *The British Year Book of International Law 2008*. Oxford: Oxford University Press, 2009, 7.

Pearson, Lester B. "Canadian Foreign Policy in a Two Power World", *The Empire Club of Canada: Addresses 1950-1951*. Toronto: T. H. Best Printing Co., 1951, 346.

Phillipson, Gavin. "The Human Rights Act, 'Horizontal Effect' and the Common Law: a Bang or a Whimper?" (1999), 62 *Mod. L. Rev.* 824.

Pitel, Stephen G. A., and Matthew B. Lerner. "Resolving Questions of Law: A Modern Approach to Rule 21" (2014), 43 *Adv. Q.* 344.

Provost, René. "Judging in Splendid Isolation" (2008), 56 Am. J. Comp. L. 125.

Ramasastry, Anita, and Robert C. Thompson. *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law -- A Survey of Sixteen Countries*. Oslo: Fafo, 2006.

Raponi, Sandra. "Grounding a Cause of Action for Torture in Transnational Law", in Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*. Portland, Or.: Hart Publishing, 2001, 373.

Roberts, Anthea. "Comparative International Law? ?The Role of National Courts in Creating and Enforcing International Law" (2011), 60 *I.C.L.Q.* 57.

Sands, Philippe. *East West Street: On the Origins of "Genocide" and "Crimes Against Humanity"*. New York: Alfred A. Knopf, 2016.

Schwartz, Osnat Grady. "International Law and National Courts: Between Mutual Empowerment and Mutual Weakening" (2015), 23 *Cardozo J. Intl & Comp. L.* 587.

Scott, Craig. "Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms", in Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*. Portland, Or.: Hart Publishing, 2001, 45.

Sharpe, Robert J. *Good Judgment: Making Judicial Decisions*. Toronto: University of Toronto Press, 2018.

Simma, Bruno, and Philip Alston. "The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles" (1988), 12 *Aust. Y.B.I.L.* 82.

Slama, Jo Lynn. "*Opinio Juris* in Customary International Law" (1990), 15 Okla. City U.L. Rev. 603.

Sossin, Lorne M. *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed. Toronto: Carswell, 2012.

Stephens, Beth. "The Amorality of Profit: Transnational Corporations and Human Rights" (2002), 20 *B.J.I.L.* 45.

Toope, Stephen J. "Inside and Out: The Stories of International Law and Domestic Law" (2001), 50 U.N.B.L.J. 11.

United Nations. General Assembly. *Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises*, U.N. Doc. A/HRC/4/035, February 9, 2007.

United Nations. Human Rights Committee. *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, May 26, 2004.

United Nations. International Law Commission. *Report of the International Law Commission*, 73rd Sess., Supp. No. 10, U.N. Doc. A/73/10, 2018.

van Ert, Gib. "The Domestic Application of International Law in Canada", in Curtis A. Bradley, ed., *The Oxford Handbook of Comparative Foreign Relations Law*. New York: Oxford University Press, 2019, 501.

van Ert, Gib. "The Reception of International Law in Canada: Three Ways We Might Go Wrong", in Centre for International Governance Innovation, *Canada in International Law at 150 and Beyond, Paper No. 2*. Waterloo, Ont.: Centre for International Governance Innovation, 2018.

van Ert, Gib. *Using International Law in Canadian Courts*, 2nd ed. Toronto: Irwin Law, 2008.

van Ert, Gib. "What Is Reception Law?", in Oonagh E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law*. Toronto: Irwin Law, 2006, 85.

Verdier, Pierre-Hugues, and Mila Versteeg. "International Law in National Legal Systems: An Empirical Investigation" (2015), 109 *Am. J. Intl L.* 514.

Virgo, Graham. "Characterisation, Choice of Law, and Human Rights", in Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*. Portland, Or.: Hart Publishing, 2001, 325.

Walker, Janet. *Castel & Walker: Canadian Conflict of Laws*, vol. 1, 6th ed. Toronto: LexisNexis, 2005 (loose-leaf updated 2019, release 77).

Warner La Forest, Anne. "Evidence and International and Comparative Law", in Oonagh E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law*. Toronto: Irwin Law, 2006, 367.

Weissbrodt, David, and Anti-Slavery International. *Abolishing Slavery and its Contemporary Forms*, U.N. Doc. HR/PUB/02/4. New York: United Nations, 2002.

Zerk, Jennifer. *Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies -- A report prepared for the Office of the UN High Commissioner for Human Rights*, February 2014 (online: https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf; archived version: https://www.scc-csc.ca/cso-dce/2020SCC-CSC5_5_eng.pdf).

History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Willcock and Dickson JJ.A.), 2017 BCCA 401, 4 B.C.L.R. (6th) 91, 419 D.L.R. (4th) 631, 12 C.P.C. (8th) 225, [2017] B.C.J. No. 2318 (QL), 2017 CarswellBC 3232 (WL Can.), affirming a decision of Abrioux J., 2016 BCSC 1856, 408 D.L.R. (4th) 383, [2016] B.C.J. No. 2095 (QL), 2016 CarswellBC 2786 (WL Can.). Appeal dismissed, Brown and Rowe JJ. dissenting in part and Moldaver and Côté JJ. dissenting.

Counsel

Mark D. Andrews, *Q.C.*, *Andrew I. Nathanson*, *Gavin R. Cameron* and *Caroline L. Senini*, for the appellant.

Joe Fiorante, *Q.C.*, *Reider M. Mogerman*, *Jen Winstanley*, *James Yap* and *Nicholas C. Baker*, for the respondents.

Cory Wanless and *Yolanda Song*, for the intervener the International Human Rights Program, University of Toronto Faculty of Law.

Tamara Morgenthau and *Alison M. Latimer*, for the interveners EarthRights International and the Global Justice Clinic at New York University School of Law.

Paul Champ, *Jennifer Klinck* and *Penelope Simons*, for the interveners Amnesty International Canada and the International Commission of Jurists.

Luis Sarabia and *Steven Frankel*, for the intervener the Mining Association of Canada.

Bruce W. Johnston, *Andrew E. Cleland*, *Jean-Marc Lacourcière* and *Clara Poissant-Lespérance*, for the intervener MiningWatch Canada.

The judgment of Wagner C.J. and Abella, Karakatsanis, Gascon and Martin JJ. was delivered by

R.S. ABELLA J.

1 This appeal involves the application of modern international human rights law, the phoenix that rose from the ashes of World War II and declared global war on human rights abuses. Its mandate was to prevent breaches of internationally accepted norms. Those norms were not meant to be theoretical aspirations or legal luxuries, but moral imperatives and legal necessities. Conduct that undermined the norms was to be identified and addressed.

2 The process of identifying and responsively addressing breaches of international human rights law involves a variety of actors. Among them are courts, which can be asked to determine and develop the law's scope in a particular case. This is one of those cases.

3 Gize Yebeyo Araya, Kesete Tekle Fshazion and Mihretab Yemane Tekle are refugees and former Eritrean nationals. They claim that they were indefinitely conscripted through their military service into a forced labour regime where they were required to work at the Bisha mine in Eritrea and subjected to violent, cruel, inhuman and degrading treatment. The mine is owned by a Canadian company, Nevsun Resources Ltd.

4 The Eritrean workers started these proceedings in British Columbia as a class action against Nevsun on behalf of more than 1,000 individuals who claim to have been compelled to work at the Bisha mine between 2008 and 2012. In their pleadings, the Eritrean workers sought damages for breaches of domestic torts including conversion, battery, "unlawful confinement" (false imprisonment), conspiracy and negligence. They also sought damages for breaches of customary international law prohibitions against forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity.1

5 Nevsun brought a motion to strike the pleadings on the basis of the "act of state doctrine", which precludes domestic courts from assessing the sovereign acts of a foreign government. This, Nevsun submits, includes Eritrea's National Service Program. Its position was also that the claims based on customary international law should be struck because they have no reasonable prospect of success.2

6 Both the Chambers Judge and the Court of Appeal dismissed Nevsun's motions to strike on these bases. For the reasons that follow, I see no reason to disturb those conclusions.

Background

7 The Bisha mine in Eritrea produces gold, copper and zinc. It is one of the largest sources of revenue for the Eritrean economy. The construction of the mine began in 2008. It was owned and operated by an Eritrean corporation, the Bisha Mining Share Company, which is 40 percent owned by the Eritrean National Mining Corporation and, through subsidiaries, 60 percent owned by Nevsun, a publicly-held corporation incorporated under British Columbia's *Business Corporations Act*, S.B.C. 2002, c. 57.

8 The Bisha Company hired a South African company called SENET as the Engineering, Procurement and Construction Manager for the construction of the mine. SENET entered into subcontracts on behalf of the Bisha Company with Mereb Construction Company, which was controlled by the Eritrean military, and Segen Construction Company which was owned by Eritrea's only political party, the People's Front for Democracy and Justice. Mereb and Segen were among the construction companies that received conscripts from Eritrea's National Service Program.

9 The National Service Program was established by a 1995 decree requiring all Eritreans, when they reached the age of 18, to complete 6 months of military training followed by 12 months of "military development service" (2016 BCSC 1856, at para. 26). Conscripts were assigned to direct military service and/or "to assist in the construction of public projects that are in the national interest".

10 In 2002, the period of military conscription in Eritrea was extended indefinitely and conscripts were forced to provide labour at subsistence wages for various companies owned by senior Eritrean military or party officials, such as Mereb and Segen.

11 For those conscripted to the Bisha mine, the tenure was indefinite. The workers say they were forced to provide labour in harsh and dangerous conditions for years and that, as a means of ensuring the obedience of conscripts at the mine, a variety of punishments were used. They say these punishments included "being ordered to roll in the hot sand while being beaten with sticks until losing consciousness" and the '"helicopter' which consisted of tying the

workers' arms together at the elbows behind the back, and the feet together at the ankles, and being left in the hot sun for an hour".

12 The workers claim that those who became ill -- a common occurrence at the mine -- had their pay docked if they failed to return to work after five days. When not working, the Eritrean workers say they were confined to camps and not allowed to leave unless authorized to do so. Conscripts who left without permission or who failed to return from authorized leave faced severe punishment and the threat of retribution against their families. They say their wages were as low as US$30 per month.

13 Gize Yebeyo Araya says he voluntarily enlisted in the National Service Program in 1997 but instead of being released after completing his 18 months of service, was forced to continue his military service and was deployed as a labourer to various sites, including the Bisha mine in February 2010. At the mine, he says he was required to work 6 days a week from 5:00 a.m. to 6:00 p.m., often outside in temperatures approaching 50 degrees Celsius. He escaped from Eritrea in 2011.

14 Kesete Tekle Fshazion says he was conscripted in 2002 and remained under the control of the Eritrean military until he escaped from Eritrea in 2013. He says he was sent to the Bisha mine in 2008 where he worked from 6:00 a.m. to 6:00 p.m. six days a week and 6:00 a.m. to 2:00 p.m. on the seventh day.

15 Mihretab Yemane Tekle says he was conscripted in 1994 and, after completing his 18 months of service, was deployed to several positions, mainly within the Eritrean military. He says he was transported to the Bisha mine in February 2010 where he worked 6 days a week from 6:00 a.m. to 6:00 p.m., often outside, uncovered, in temperatures approaching 50 degrees Celsius. He escaped Eritrea in 2011.

Prior Proceedings

16 Nevsun brought a series of applications seeking: an order denying the proceeding the status of a representative action; a stay of the proceedings on the basis that Eritrea was a more appropriate forum (*forum non conveniens*); an order striking portions of the evidence -- first-hand affidavit material and secondary reports -- filed by the Eritrean workers; an order dismissing or striking the pleadings pursuant to rule 21-8 or, alternatively, rule 9-5 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, on the grounds that British Columbia courts lacked subject matter jurisdiction as a result of the operation of the act of state doctrine; and an order striking that part of the pleadings based on customary international law as being unnecessary and disclosing no reasonable cause of action, pursuant to rule 9-5 of the *Supreme Court Civil Rules*.

17 The Chambers Judge, Abrioux J., observed that since it controlled a majority of the Board of the Bisha Company and Nevsun's CEO was its Chair, Nevsun exercised effective control over the Bisha Company. He also observed that there was operational control: "Through its majority representation on the board of [the Bisha Company, Nevsun] is involved in all aspects of Bisha operations, including exploration, development, extraction, processing and reclamation".

18 He denied Nevsun's *forum non conveniens* application, concluding that Nevsun had not established that convenience favours Eritrea as the appropriate forum. There was also a real risk of an unfair trial occurring in Eritrea. Abrioux J. admitted some of the first-hand affidavit material and the secondary reports for the limited purpose of providing the required social, historical and contextual framework, but he denied the proceeding the status of a representative action, meaning the Eritrean workers were not permitted to bring claims on behalf of the other individuals, many of whom are still in Eritrea.

19 As to the act of state doctrine, Abrioux J. noted that it has never been applied in Canada, but was nonetheless of the view that it formed part of Canadian common law. Ultimately, however, he concluded that it did not apply in this case.

20 In dealing with Nevsun's request to strike the claims based on customary international law, Abrioux J.

characterized the issue as "whether claims for damages arising out of the alleged breach of *jus cogens* or peremptory norms of customary international law ... may form the basis of a civil proceeding in British Columbia". He said that claims should only be struck if, assuming the pleaded facts to be true, it is "plain and obvious" that the pleadings disclose no reasonable likelihood of success and are bound to fail. He rejected Nevsun's argument that there is no reasonable prospect at trial that the court would recognize either "claims based on breaches of [customary international law]" or claims for "new torts based on the adoption of the customary norms advanced by the [workers]". He held that customary international law is incorporated into and forms part of Canadian common law unless there is domestic legislation to the contrary. Neither the *State Immunity Act*, R.S.C. 1985, c. S-18, nor any other legislation bars the Eritrean workers' claims. In his view, while novel, the claims stemming from Nevsun's breaches of customary international law should proceed to trial where they can be evaluated in their factual and legal context, particularly since the prohibitions on slavery, forced labour and crimes against humanity are *jus cogens*, or peremptory norms of customary international law, from which no derogation is permitted.

21 On appeal, Nevsun argued that Abrioux J. erred in refusing to decline jurisdiction on the *forum non conveniens* application; in admitting the Eritrean workers' reports, even for a limited purpose; in holding that the Eritrean workers' claims were not barred by the act of state doctrine; and in declining to strike the Eritrean workers' claims that were based on customary international law. The Eritrean workers did not appeal from Abrioux J.'s ruling denying the proceeding the status of a representative action.

22 Writing for a unanimous court, Newbury J.A. upheld Abrioux J.'s rulings on the *forum non conveniens* and evidence applications (2017 BCCA 401). As for the act of state doctrine, Newbury J.A. noted that no Canadian court has ever directly applied the doctrine, but that it was adopted in British Columbia by virtue of what is now s. 2 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, which recognizes that the common law of England as it was in 1858 is part of the law of British Columbia. She concluded, however, that the act of state doctrine did not apply in this case because the Eritrean workers' claims were not a challenge to the legal validity of a foreign state's laws or executive acts. Even if the act of state doctrine did apply, it would not bar the Eritrean workers' claims since one or more of the doctrine's acknowledged exceptions would apply.

23 Turning to the international law issues, Newbury J.A. noted that in actions brought against foreign states, courts in both England and Canada have not recognized a private law cause of action since they involved the principle of state immunity, codified in Canada by the *State Immunity Act*. But because the Eritrean workers' customary international law claims were not brought against a foreign state, they were not barred by the *State Immunity Act*.

24 Finally, Newbury J.A. was alert to what she referred to as a fundamental change that has occurred in public international law, whereby domestic courts have become increasingly willing to address issues of public international law when appropriate. With this in mind, she characterized the central issue on appeal as being "whether Canadian courts, which have thus far not grappled with the development of what is now called 'transnational law', might also begin to participate in the change described". She concluded that the fact that aspects of the Eritrean workers' claims were actionable as private law torts, did not mean that they had no reasonable chance of success on the basis of customary international law.

25 Ultimately, Newbury J.A. held that since the law in this area is developing, it cannot be said that the Eritrean workers' claims based on breaches of customary international law were bound to fail.

Analysis

26 Nevsun's appeal focussed on two issues:

(1) Does the act of state doctrine form part of Canadian common law?

(2) Can the customary international law prohibitions against forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity ground a claim for damages under Canadian law?

Nevsun did not challenge the Court of Appeal's decision on the admissibility of the reports or on *forum non conveniens*. As a result, there is no dispute that if the act of state doctrine does not bar the matter from proceeding, British Columbia courts are the appropriate forum for resolving the claims.

The Act of State Doctrine

27 Nevsun's first argument is that the entire claim should be struck because the act of state doctrine makes it non-justiciable.

28 The act of state doctrine is a known (and heavily criticized) doctrine in England and Australia. It has, by contrast, played no role in Canadian law. Nonetheless, Nevsun asserts that these proceedings are barred by its operation. It is helpful, then, to start by examining what the doctrine is.

29 There is no single definition that captures the unwieldly collection of principles, limitations and exceptions that have been given the name "act of state" in English law. A useful starting point, however, is Lord Millett's description: "the act of state doctrine is a rule of domestic law which holds the national court incompetent to adjudicate upon the lawfulness of the sovereign acts of a foreign state" (*R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3*), [2000] 1 A.C. 147 (H.L.), at p. 269).

30 The act of state doctrine shares some features with state immunity, which extends personal immunity to state officials for acts done in their official capacity. But the two are distinct, as Lord Sumption explained in *Belhaj v. Straw*, [2017] UKSC 3:

> Unlike state immunity, act of state is not a personal but a subject matter immunity. It proceeds from the same premise as state immunity, namely mutual respect for the equality of sovereign states. *But it is wholly the creation of the common law*. Although international law requires states to respect the immunity of other states from their domestic jurisdiction, it does not require them to apply any particular limitation on their subject matter jurisdiction in litigation to which foreign states are not parties and in which they are not indirectly impleaded. *The foreign act of state doctrine is at best permitted by international law*. [Emphasis added; para. 200.]

31 The outlines of the act of state doctrine can be traced to the early English authorities of *Blad v. Bamfield* (1674), 3 Swans 604, and *Duke of Brunswick v. King of Hanover* (1848), 2 H.L.C. 1, (see also *Yukos Capital Sarl v. OJSC Rosneft Oil Co. (No. 2)*, [2012] EWCA Civ 855, at para. 40).

32 In *Blad*, Bamfield and other English traders brought a claim in the English courts against a Danish trader who had been granted letters patent by the King of Denmark as ruler of Iceland "for the sole trade of Iceland" (p. 993). The trader seized Bamfield's goods in Iceland for allegedly fishing contrary to his letters patent. Bamfield challenged the validity of the letters patent. Lord Nottingham ruled that Bamfield's action was barred on the grounds that "to send it to a trial at law, where either the Court must pretend to judge of the validity of the king's letters patent in Denmark, or of the exposition and meaning of the articles of peace; or that a common jury should try whether the English have a right to trade in Iceland, is monstrous and absurd" (p. 993).

33 In the subsequent case of *Duke of Brunswick*, the deposed Duke sued the King of Hanover in England, alleging that, through acts done in Hanover and elsewhere abroad, he had aided in depriving the Duke of his land and title. The House of Lords refused to judge the acts of a sovereign in his own country. In the words of the Lord Chancellor:

> [A] foreign Sovereign, coming into this country, cannot be made responsible here for an act done in his sovereign character in his own country; whether it be an act right or wrong, whether according to the constitution of that country or not, the Courts of this country cannot sit in judgment upon an act of a Sovereign, effected by virtue of his Sovereign authority abroad, an act not done as a British subject, but supposed to be done in the exercise of his authority vested in him as Sovereign. [pp. 998-99]

34 Since then, the English act of state doctrine has developed a number of qualifications and limitations, and it no longer includes the sweeping proposition that domestic courts cannot adjudicate the lawfulness of foreign state acts. This became clear in the case of *Oppenheimer v. Cattermole*, [1976] A.C. 249, where the House of Lords refused to recognize and apply a Nazi decree depriving Jews of their German citizenship and leading to the confiscation of all their property on which the state could "lay its hands" (p. 278). Lord Cross held that such a discriminatory law "constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all", noting that it is "part of the public policy of this country that our courts should give effect to clearly established rules of international law" (p. 278). The House of Lords elaborated on this principle in *Kuwait Airways Corpn. v. Iraqi Airways Co. (Nos. 4 and 5)*, [2002] UKHL 19, where Lord Nicholls held that foreign laws "may be fundamentally unacceptable for reasons other than human rights violations" (para. 18).

35 There has also been a proliferation of limitations on, and exceptions to, the act of state doctrine in England, reflecting an attempt to respond to the difficulties of applying a single doctrine to a heterogeneous collection of issues. This challenge was identified by Lord Wilberforce in his influential account of the English act of state doctrine in *Buttes Gas and Oil Co. v. Hammer (No. 3)*, [1982] A.C. 888 (H.L.), a defamation action that arose in the context of two conflicting oil concessions granted by neighbouring states in the Arabian Gulf. He referred to the act of state doctrine as "a generally confused topic", adding that "[n]ot the least of its difficulty has lain in the indiscriminating use of 'act of state' to cover situations which are quite distinct, and different in law" (p. 930). He explained that, though often referred to using the general terminology of "act of state", English law differentiates between Crown acts of state (concerning the acts of officers of the Crown committed abroad) and foreign acts of state (concerning the justiciability in domestic courts of actions of foreign states). He went on to observe that within the foreign act of state doctrine, the cases support the existence of two separate principles: a more specific principle guiding courts to consider the choice of law in cases involving whether and when a domestic court will give effect in its law to a rule of foreign law; and the more general principle that courts refrain from adjudicating the transactions of foreign states.

36 And in the 2012 *Yukos* case, Rix L.J., writing for the Court of Appeal of England and Wales, modernized the description of the doctrine*:*

> It would seem that, generally speaking, the doctrine is confined to acts of state within the territory of the sovereign, but in special and perhaps exceptional circumstances ... may even go beyond territorial boundaries and for that very reason give rise to issues which have to be recognised as non-justiciable. The various formulations of the paradigm principle are apparently wide, and prevent adjudication on the validity, legality, lawfulness, acceptability or motives of state actors. It is a form of immunity *ratione materiae,* closely connected with analogous doctrines of sovereign immunity and, although a domestic doctrine of English (and American) law, is founded on analogous concepts of international law, both public and private, and of the comity of nations. It has been applied in a wide variety of situations, but often arises by way of defence or riposte: as where a dispossessed owner sues in respect of his property, the defendant relies on a foreign act of state as altering title to that property, and the claimant is prevented from calling into question the effectiveness of that act of state. [para. 66]

37 Rix L.J. noted the numerous limitations or exceptions to the doctrine which he grouped into five categories. First, the impugned act must occur within the territory of the foreign state for the doctrine to apply. Second, "the doctrine will not apply to foreign acts of state which are in breach of clearly established rules of international law, or are contrary to English principles of public policy, as well as where there is a grave infringement of human rights" (para. 69). Third, judicial acts are not "acts of state" for the purposes of the doctrine. Fourth, the doctrine will not apply to the conduct of a state that is of a commercial (rather than sovereign) character. Fifth, the doctrine does not apply where the only issue is whether certain acts have occurred, not the legal effectiveness of those acts.

38 *The effect of all these limitations, as he noted, was to dilute the doctrine substantially:*

> The important thing is to recognise that increasingly in the modern world the doctrine is being defined, like a silhouette, by its limitations, rather than to regard it as occupying the whole ground save to the extent that an exception can be imposed. That after all would explain why it has become wholly

> commonplace to adjudicate upon or call into question the acts of a foreign state in relation to matters of international convention, whether it is the persecution of applicant asylum refugees, or the application of the Rome Statute with regard to international criminal responsibility or other matters ... . That is also perhaps an element in the naturalness with which our courts have been prepared, in the face of cogent evidence, to adjudicate upon allegations relating to the availability of substantive justice in foreign courts. *It also has to be remembered that the doctrine was first developed in an era which predated the existence of modern international human rights law*. The idea that the rights of a state might be curtailed by its obligations in the field of human rights would have seemed somewhat strange in that era. That is perhaps why our courts have sometimes struggled, albeit ultimately successfully, to give effective support to their abhorrence of the persecutions of the Nazi era [as in *Oppenheimer*]. [Emphasis added; para. 115.]

39 The doctrine was again recently assessed by the English courts in *Belhaj*, where Mr. Belhaj and his wife alleged that English officials were complicit with the Libyan State in their illegal detention, abduction and removal to Libya in 2004. The court of first instance concluded that most of the claims were barred by the foreign act of state doctrine. On appeal, Lloyd Jones L.J. for the court cited with approval the modern description of the doctrine and its limitations set out in *Yukos* and held that the action could proceed in light of compelling public policy reasons ([2014] EWCA Civ 1394).

40 Upholding the Court of Appeal, a divided Supreme Court provided four separate sets of reasons, each seeking to clarify the doctrine but disagreeing on how to do so.

41 Lord Mance held that the doctrine should be disaggregated into three separate rules, subject to limitations. He concluded that the doctrine did not apply to the circumstances of the case and, if it did, a public policy exception like the one articulated in *Yukos* would apply. Lord Neuberger separated the doctrine into different rules from those of Lord Mance. Like Lord Mance, he concluded that the doctrine did not apply in this case and, even if it did, a public policy exception would preclude its application. Lady Hale and Lord Clarke agreed with Lord Neuberger and Lord Mance that the foreign act of state doctrine did not apply to the case and, notwithstanding the differing list of rules provided by Lords Mance and Neuberger, considered their reasons on the matter to be substantially the same. Lord Sumption maintained a more unified version of the doctrine, holding that it would have applied but for a public policy exception.

42 As the conflicting judgments in *Belhaj* highlight, the attempt to house several unique concepts under the roof of the act of state doctrine in English jurisprudence has led to considerable confusion. *Attempting to apply a doctrine which is largely* defined by its limitations has also caused some confusion in *Australia.* In *Habib v. Commonwealth of Australia*, [2010] FCAFC 12, Jagot J. observed that the act of state doctrine has been described as "a common law principle of uncertain application" (para. 51 (AustLII)).

43 Similarly, in *Moti v. The Queen*, [2011] HCA 50, the court rejected the contention that the act of state doctrine jurisprudence established "a general and universally applicable rule that Australian courts may not be required (or do not have or may not exercise jurisdiction) to form a view about the lawfulness of conduct that occurred outside Australia by reference to foreign law" (para. 50 (AustLII)). The court noted that "the phrase 'act of State', must not be permitted to distract attention from the need to identify the issues that arise in each case at a more particular level than is achieved by applying a single, all-embracing formula" (para. 52).

44 The Canadian common law has grown from the same roots. As in England, the foundational cases concerning foreign act of state are *Blad* and *Duke of Brunswick*. But since then, whereas English jurisprudence continually reaffirmed and reconstructed the foreign act of state doctrine, Canadian law has developed its own approach to addressing the twin principles underlying the doctrine articulated in *Buttes Gas*: conflict of laws and judicial restraint. Both principles have developed separately in Canadian jurisprudence rather than as elements of an all-encompassing "act of state doctrine". As such, in Canada, the principles underlying the act of state doctrine have been completely subsumed within this jurisprudence.

45 Our courts determine questions dealing with the enforcement of foreign laws according to ordinary private international law principles which generally call for deference, but allow for judicial discretion to decline to enforce foreign laws where such laws are contrary to public policy, including respect for public international law.

46 *Laane and Baltser v. Estonian State Cargo & Passenger Line*, [1949] S.C.R. 530, is an early example of how the law has developed in Canada. (see Martin Bühler, "The Emperor's New Clothes: Defabricating the Myth of 'Act of State' in Anglo-Canadian Law", in Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 343, at pp. 346-48 and 351). In *Laane*, this Court considered whether Canada would give effect to a 1940 decree of the Estonian Soviet Socialist Republic purporting to nationalize all Estonian merchant ships, including those in foreign ports, with compensation to the owners at a rate of 25 percent of each ship's value. One of the ships was in the port of Saint John, New Brunswick, when it was sold by court order at the insistence of crew members who were owed wages. The balance of the sale proceeds was claimed by the Estonian State Cargo and Passenger Steamship Line. This Court refused to enforce the 1940 decree because it was confiscatory and contrary to Canadian public policy. None of the four judges who gave reasons had any hesitation in expressing views about the lawfulness of Estonia's conduct, whether as a matter of international law or Canadian public policy. As Rand J. noted: "... there is the general principle that no state will apply a law of another which offends against some fundamental morality or public policy" (p. 545). No act of state concerns about Estonia's sovereignty or non-interference in its affairs were even raised by the Court. Instead, the case was dealt with as a straightforward private international law matter about whether to enforce the foreign law despite its penal and confiscatory nature.

47 Our courts also exercise judicial restraint when considering foreign law questions. This restraint means that courts will refrain from making findings which purport to be legally binding on foreign states. But our courts are free to inquire into foreign law questions when doing so is necessary or incidental to the resolution of domestic legal controversies properly before the court.

48 In *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, this Court confirmed that Canadian courts should not hesitate to make determinations about the validity of "foreign" laws where such determinations are incidental to the resolution of legal controversies properly before the courts. The issue in *Hunt* was whether the courts in British Columbia had the authority to determine the constitutionality of a Quebec statute. In concluding that British Columbia courts did have such authority and, ultimately, that the statute in question was constitutionally inapplicable to other provinces, La Forest J. made no reference to act of state:

> In determining what constitutes foreign law, there seems little reason why a court cannot hear submissions and receive evidence as to the constitutional status of foreign legislation. There is nothing in the authorities cited by the respondents that goes against this proposition. Quite the contrary, *Buck v. Attorney-General*, [1965] 1 All E.R. 882 (C.A.), holds only that a court has no jurisdiction to make a declaration as to the validity of the constitution of a foreign state. That would violate the principles of public international law. But here nobody is trying to challenge the constitution itself. The issue of constitutionality arises incidentally in the course of litigation... .
>
> ...
>
> The policy reasons for allowing consideration of constitutional arguments in determining foreign law that incidentally arises in the course of litigation are well founded. The constitution of another jurisdiction is clearly part of its law, presumably the most fundamental part. A foreign court in making a finding of fact should not be bound to assume that the mere enactment of a statute necessarily means that it is constitutional. [pp. 308-9]

49 The decision in *Hunt* confirms that there is no jurisdictional bar to a Canadian court dealing with the laws or acts of a foreign state where "the question arises merely incidentally" (p. 309). And in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, this Court noted that, in certain circumstances, the adjudication of questions of international law by Canadian courts will be necessary to determine rights or obligations within our legal system, and in these cases, adjudicating these questions is "not only permissible but unavoidable" (para. 23; see also Gib

van Ert, "The Domestic Application of International Law in Canada", in Curtis A. Bradley, ed., *The Oxford Handbook of Comparative Foreign Relations Law* (2019), 501).

50 Our courts are also frequently asked to evaluate foreign laws in extradition and deportation cases. In these instances, our courts consider comity but, as in other contexts, the deference accorded by comity to foreign legal systems "ends where clear violations of international law and fundamental human rights begin" (*R. v. Hape*, [2007] 2 S.C.R. 292, at para. 52; see also *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, at p. 1047; *Canada (Justice) v. Khadr*, [2008] 2 S.C.R. 125, at paras. 18 and 26; *Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44, at para. 16). In *Canada v. Schmidt*, [1987] 1 S.C.R. 500, an extradition case, La Forest J. recognized that

> in some circumstances the manner in which the foreign state will deal with the fugitive on surrender, whether that course of conduct is justifiable or not under the law of that country, may be such that it would violate the principles of fundamental justice to surrender an accused under those circumstances. [p. 522]

51 McLachlin J. endorsed this principle in *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, where she explained that "[t]he test for whether an extradition law or action offends s. 7 of the *Charter* on account of the penalty which may be imposed in the requesting state, is whether the imposition of the penalty by the foreign state 'sufficiently shocks' the Canadian conscience" (p. 849, citing *Schmidt*, at p. 522). As part of the inquiry, the reviewing court must consider "the nature of the justice system in the requesting jurisdiction" in light of "the Canadian sense of what is fair, right and just" (*Kindler*, at pp. 849-50).

52 And in *United States v. Burns*, [2001] 1 S.C.R. 283, this Court unanimously held that "[a]n extradition that violates the principles of fundamental justice will always shock the conscience" (para. 68 (emphasis in original)). The Court concluded that it was a violation of s. 7 of the *Canadian Charter of Rights and Freedoms* for the Minister to extradite Canadian citizens to the United States without, as a condition of extradition, assurances that the death penalty would not be sought.

53 In the deportation context, the Court's unanimous decision in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, concluded that the Minister, and by extension the reviewing court, should consider the human rights record of the foreign state when assessing whether the potential deportee will be subject to torture there.

54 The question of whether and when it is appropriate for a Canadian court to scrutinize the human rights practices of a foreign state in the context of deportation hearings was also squarely before the Court in *India v. Badesha*, [2017] 2 S.C.R. 127. Moldaver J., writing for the Court, said: "I am unable to accept ... that evidence of systemic human rights abuses in a receiving state amounts to a general indictment of that state's justice system", concluding that the Minister and the reviewing court are entitled to "consider evidence of the general human rights situation" in a foreign state (para. 44).

55 Even though all of these cases dealt to some extent with questions about the lawfulness of foreign state acts, none referred to the "act of state doctrine".

56 Despite the absence of any cases applying the act of state doctrine in Canada, Nevsun argues that the doctrine was part of the English common law received into the law of British Columbia in 1858.

57 While the English common law, including some of the cases which are now recognized as forming the basis of the act of state doctrine, was generally received into Canadian law at various times in our legal history, as the preceding analysis shows, Canadian jurisprudence has addressed the principles underlying the doctrine within our conflict of laws and judicial restraint jurisprudence, with no attempt to have them united as a single doctrine. The act of state doctrine in Canada has been completely absorbed by this jurisprudence.

58 To now import the English act of state doctrine and jurisprudence into Canadian law would be to overlook the development that its underlying principles have received through considered analysis by Canadian courts.

59 The doctrine is not part of Canadian common law, and neither it nor its underlying principles as developed in Canadian jurisprudence are a bar to the Eritrean workers' claims.

Customary International Law

60 The Eritrean workers claim in their pleadings that customary international law is part of the law of Canada and, as a result, a "breach of customary international law ... is actionable at common law". Specifically, the workers' pleadings claim:

> 7. The plaintiffs bring this action for damages against Nevsun under customary international law as incorporated into the law of Canada and domestic British Columbia law.
>
> ...
>
> 53. The plaintiffs seek damages under customary international law, as incorporated into the law [of] Canada, from Nevsun for the use of forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity.
>
> ...
>
> 56. The plaintiffs claim:
>
> (a) damages at customary international law as incorporated into the law of Canada;
>
> ...
>
> 60. The use of forced labour is a breach of customary international law and *jus cogens* and is actionable at common law.
>
> ...
>
> 63. Slavery is a breach of customary international law and *jus cogens* and is actionable at common law.
>
> ...
>
> 66. Cruel, inhuman or degrading treatment is a breach of customary international law and is actionable at common law.
>
> ...
>
> 70. Crimes against humanity are a breach of customary international law and *jus cogens* and are actionable at common law.

61 As these excerpts from the pleadings demonstrate, the workers broadly seek damages from Nevsun for breaches of customary international law as incorporated into the law of Canada.

62 As the Chambers Judge and the Court of Appeal noted, this Court is not required to determine definitively whether the Eritrean workers should be awarded damages for the alleged breaches of customary international law. The question before us is whether Nevsun has demonstrated that the Eritrean workers' claims based on breaches of customary international law should be struck at this preliminary stage.

63 Nevsun's motion to strike these customary international law claims was based on British Columbia's *Supreme Court Civil Rules* permitting pleadings to be struck if they disclose no reasonable claim (rule 9-5(1)(a)), or are unnecessary (rule 9-5(1)(b)).

64 A pleading will only be struck for disclosing no reasonable claim under rule 9-5(1)(a) if it is "plain and obvious" that the claim has no reasonable prospect of success (*R. v. Imperial Tobacco Canada Ltd.*, [2011] 3 S.C.R. 45, at para. 17; *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, at paras. 14-15). When considering an application to strike under this provision, the facts as pleaded are assumed to be true "unless they are manifestly incapable of being proven" (*Imperial Tobacco*, at para. 22, citing *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, at p. 455).

65 Under rule 9-5(1)(b), a pleading may be struck if "it is unnecessary, scandalous, frivolous or vexatious". Fisher J. articulated the relevant considerations in *Willow v. Chong*, 2013 BCSC 1083, stating:

> Under Rule 9-5(1)(b), a pleading is unnecessary or vexatious if it does not go to establishing the plaintiff's cause of action, if it does not advance any claim known in law, where it is obvious that an action cannot succeed, or where it would serve no useful purpose and would be a waste of the court's time and public resources: *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*, [1999] BCJ No. 2160 (SC (in chambers)); *Skender v. Farley*, 2007 BCCA 629. [at para. 20 (CanLII)]

66 This Court admonished in *Imperial Tobacco* that the motion to strike

> is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed... . Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial. [para. 21]

67 The Chambers Judge in this case summarized the issues as follows:

> The proceeding raises issues of transnational law being the term used for the convergence of customary international law and private claims for human rights redresses and which include:
>
> (a) whether claims for damages arising out of the alleged breach of *jus cogens* or peremptory norms of customary international law such as forced labour and torture may form the basis of a civil proceeding in British Columbia;
>
> (b) the potential corporate liability for alleged breaches of both private and customary international law. This in turn raises issues of corporate immunity and whether the act of state doctrine raises a complete defence to the plaintiffs' claims.

He concluded that though the workers' claims raised novel and difficult issues, the claims were not bound to fail and should be allowed to proceed for a full contextual analysis at trial.

68 In the British Columbia Court of Appeal, Newbury J.A. also believed that a private law remedy for breaches of the international law norms alleged by the workers may be possible. In her view, recognizing such a remedy may be an incremental first step in the development of this area of the law and, as a result, held that the claims based on breaches of customary international law should not be struck at this preliminary stage.

69 For the reasons that follow, I agree with the Chambers Judge and the Court of Appeal that the claims should be allowed to proceed. As the Chambers Judge put it: "The current state of the law in this area remains unsettled and, assuming that the facts set out in the [notice of civil claim] are true, Nevsun has not established that the [customary international law] claims have no reasonable likelihood of success".

70 Canadian courts, like all courts, play an important role in the ongoing development of international law. As La Forest J. wrote in a 1996 article in the *Canadian Yearbook of International Law*:

> [I]n the field of human rights, and of other laws impinging on the individual, our courts are assisting in developing general and coherent principles that apply in very significant portions of the globe. These principles are applied consistently, with an international vision and on the basis of international

> experience. Thus our courts -- and many other national courts -- are truly becoming international courts in many areas involving the rule of law. They will become all the more so as they continue to rely on and benefit from one another's experience. Consequently, it is important that, in dealing with interstate issues, national courts fully perceive their role in the international order and national judges adopt an international perspective.
>
> (Hon. Gérard V. La Forest, "The Expanding Role of the Supreme Court of Canada in International Law Issues" (1996), 34 *Can. Y.B. Intl Law* 89, at pp. 100-1)

71 Since "[i]nternational law not only percolates down from the international to the domestic sphere, but ... also bubbles up", there is no reason for Canadian courts to be shy about implementing and advancing international law (Anthea Roberts, "Comparative International Law? The Role of National Courts in Creating and Enforcing International Law" (2011), 60 *I.C.L.Q.* 57, at p. 69; Jutta Brunnée and Stephen J. Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002), 40 *Can. Y.B. Intl Law* 3, at pp. 4-6, 8 and 56; see also Hugh M. Kindred, "The Use and Abuse of International Legal Sources by Canadian Courts: Searching for a Principled Approach", in Oonagh E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law* (2006), 5, at p. 7).

72 Understanding and embracing our role in implementing and advancing customary international law allows Canadian courts to meaningfully contribute, as we already assertively have, to the "choir" of domestic court judgments around the world shaping the "substance of international law" (Osnat Grady Schwartz, "International Law and National Courts: Between Mutual Empowerment and Mutual Weakening" (2015), 23 *Cardozo J. Intl & Comp. L.* 587, at p. 616; see also René Provost, "Judging in Splendid Isolation" (2008), 56 Am. J. Comp. L. 125, at p. 171).

73 Given this role, we must start by determining whether the prohibitions on forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity, the violations of which form the foundation of the workers' customary international law claims, are part of Canadian law, and, if so, whether their breaches may be remedied. To determine whether these prohibitions are part of Canadian law, we must first determine whether they are part of customary international law.

74 Customary international law has been described as "the oldest and original source of international law" (Philip Alston and Ryan Goodman, *International Human Rights* (2013), at p. 72). It is the common law of the international legal system -- constantly and incrementally evolving based on changing practice and acceptance. As a result, it sometimes presents a challenge for definitional precision.

75 But in the case of the norms the Eritrean workers claim Nevsun breached, the task is less onerous, since these norms emerged seamlessly from the origins of modern international law, which in turn emerged responsively and assertively after the brutality of World War II. It brought with it acceptance of new laws like prohibitions against genocide and crimes against humanity, new institutions like the United Nations, and new adjudicative bodies like the International Court of Justice and eventually the International Criminal Court, all designed to promote a just rule of law and all furthering liberal democratic principles (Philippe Sands, *East West Street: On the Origins of "Genocide" and "Crimes Against Humanity"* (2016), at pp. 361-64; Lloyd Axworthy, *Navigating A New World: Canada's Global Future* (2003), at pp. 200-1).

76 The four authoritative sources of modern international law, including customary international law, are found in art. 38(1) of the *Statute of the International Court of Justice*, Can. T.S. 1945 No. 7, which came into force October 24, 1945:

> ...
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;

> c. the general principles of law recognized by civilized nations;
>
> d... . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Professors Brunnée and Toope have described art. 38 as the "litmus test for the sources of international law" (Brunnée and Toope (2002), "A Hesitant Embrace", at p. 11).

77 There are two requirements for a norm of customary international law to be recognized as such: general but not necessarily universal practice, and *opinio juris*, namely the belief that such practice amounts to a legal obligation (United Nations, International Law Commission, *Report of the International Law Commission*, 73rd Sess., Supp. No. 10, U.N. Doc. A/73/10, 2018, at p. 124; *North Sea Continental Shelf*, Judgment, I.C.J. Report 1969, p. 3, at para. 71; *Kazemi Estate v. Islamic Republic of Iran*, [2014] 3 S.C.R. 176, at para. 38; Harold Hongju Koh, "Twenty-First Century International Lawmaking" (2013), 101 Geo. L.J. 725, at p. 738; Jean-Marie Henckaerts, "Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict" (2005), 87 *Int'l Rev. Red Cross* 175, at p. 178; Antonio Cassese, *International Law* (2nd ed. 2005), at p. 157).

78 To meet the first requirement, the practice must be sufficiently general, widespread, representative and consistent (International Law Commission, at p. 135). To meet the second requirement, *opinio juris*, the practice "must be undertaken with a sense of legal right or obligation", as "distinguished from mere usage or habit" (International Law Commission, at p. 138; *North Sea Continental Shelf*, at para. 77).

79 The judicial decisions of national courts are also evidence of general practice or *opinio juris* and thus play a crucial role in shaping norms of customary international law. As the Permanent Court of International Justice noted in *Case concerning certain German interests in Polish Upper Silesia (Germany v. Poland)* (1926), P.C.I.J. Ser. A, No. 7, legal decisions are "facts which express the will and constitute the activities of States" (p. 19; see also *Prosecutor v. Jelisiae*, IT-95-10-T, Judgment, 14 December 1999 (ICTY, Trial Chamber), at para. 61; *Prosecutor v. Krstiae*, IT-98-33-T, Judgment, 2 August 2001 (ICTY, Trial Chamber), at paras. 541, 575 and 579-89; *Prosecutor v. Erdemoviae*, IT-96-22-A, Joint separate opinion of Judge McDonald and Judge Vohrah, 7 October 1997 (ICTY, Appeal Chamber), at paras. 47-55).

80 When an international practice develops from being intermittent and voluntary into being widely accepted and believed to be obligatory, it becomes a norm of customary international law. As Professor James L. Brierly wrote:

> Custom in its legal sense means something more than mere habit or usage; it is a usage felt by those who follow it to be an obligatory one. There must be present a feeling that, if the usage is departed from, some form of sanction will probably, or at any rate ought to, fall on the transgressor.
>
> (James L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (6th ed. 1963), at p. 59, cited in John H. Currie, et al., *International Law: Doctrine, Practice, and Theory* (2nd ed. 2014), at p. 116)

81 This process, whereby international practices become norms of customary international law, has been variously described as "accretion", "crystallization", "ripening" and "gel[ling]" (see, e.g., Bruno Simma and Philip Alston, "The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles" (1988), 12 *Aust. Y.B.I.L.* 82, at p. 104; *The Paquete Habana*, 175 U.S. 677 (1900), at p. 686; Jutta Brunnée and Stephen J. Toope, "International Law and the Practice of Legality: Stability and Change" (2018), 49 *V.U.W.L.R.* 429, at p. 443).

82 Once a practice becomes a norm of customary international law, by its very nature it "must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour" (*North Sea Continental Shelf*, at para. 63).

83 Within customary international law, there is a subset of norms known as *jus cogens*, or peremptory norms, which have been "accepted and recognized by the international community of States as a whole ... from which no

derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character" (*Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37 (entered into force 27 January 1980), art. 53). This Court acknowledged that "a peremptory norm, or *jus cogens* norm is a fundamental tenet of international law that is non-derogable" (*Kazemi*, at para. 47, citing John H. Currie, *Public International Law* (2nd ed. 2008), at p. 583; Claude Emanuelli, *Droit international public: Contribution à l'étude du droit international selon une perspective canadienne* (3rd ed. 2010), at pp. 168-69; *Vienna Convention on the Law of Treaties*, art. 53).

84 Peremptory norms have been accepted as fundamental to the international legal order (Ian Brownlie, *Principles of Public International Law* (7th ed. 2008), at pp. 510-12; see also Andrea Bianchi, "Human Rights and the Magic of *Jus Cogens*" (2008), 19 *E.J.I.L.* 491; Evan J. Criddle and Evan Fox-Decent, "A Fiduciary Theory of Jus Cogens" (2009), 34 *Yale J. Intl L.* 331).

85 How then does customary international law apply in Canada? As Professor Koh explains, "[l]aw-abiding states *internalize* international law by incorporating it into their domestic legal and political structures, through executive action, legislation, and judicial decisions which take account of and incorporate international norms" (Harold Hongju Koh, "Transnational Legal Process" (1996), 75 Neb. L. Rev. 181, at p. 204 (emphasis in original)). Some areas of international law, like treaties, require legislative action to become part of domestic law (Currie, et al., *International Law: Doctrine, Practice, and Theory*, at pp. 160-61 and 173-74; Currie, *Public International Law*, at pp. 225-26).

86 On the other hand, customary international law is automatically adopted into domestic law without any need for legislative action (Currie, *Public International Law*, at pp. 225-26; *Hape*, at paras. 36 and 39, citing *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 1 Q.B. 529 (Eng. C.A.), per Lord Denning; Hersch Lauterpacht, "Is International Law a Part of the Law of England?", in *Transactions of the Grotius Society*, vol. 25, *Problems of Peace and War: Papers Read Before the Society in the Year 1939* (1940), 51). In England this is known as the doctrine of incorporation and in Canada as the doctrine of adoption. As Professor Brownlie explains:

> The dominant principle ... is that customary rules are to be considered part of the law of the land and enforced as such, with the qualification that they are incorporated only so far as is not inconsistent with Acts of Parliament or prior judicial decisions of final authority. [p. 41]

87 The adoption of customary international law as part of domestic law by way of automatic judicial incorporation can be traced back to the 18th century (Gib van Ert, *Using International Law in Canadian Courts* (2nd ed. 2008), at pp. 184-208). Blackstone's 1769 *Commentaries on the Laws of England: Book the Fourth*, for example, noted that "the law of nations ... is here adopted in it[s] full extent by the common law, and is held to be a part of the law of the land", at p. 67; see also *Triquet v. Bath* (1764), 3 Burr. 1478, (K.B.)). Similarly, in the frequently cited case of *Chung Chi Cheung v. The King*, [1939] A.C. 160 (P.C.), Lord Atkin wrote:

> The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals. [p. 168]

88 Direct incorporation is also far from a niche preserve among nations. In a study covering 101 countries over a period between 1815 and 2013, Professors Pierre-Hugues Verdier and Mila Versteeg found widespread acceptance of the direct application of customary international law:

> [P]erhaps the most striking pattern that emerges from our data is that in virtually all states, CIL [Customary International Law] rules are in principle directly applicable without legislative implementation... . [M]ost countries that require treaty implementation do not apply the same rule to international custom, but rather apply it directly.
>
> (Pierre-Hugues Verdier and Mila Versteeg, "International Law in National Legal Systems: An Empirical Investigation" (2015), 109 *Am. J. Intl L.* 514, at p. 528)

89 In Canada, in *The Ship "North" v. The King* (1906), 37 S.C.R. 385, Davies J., in concurring reasons, expressed

the view that the Admiralty Court was "bound to take notice of the law of nations" (p. 394). Similarly, in *Reference as to Whether Members of the Military or Naval Forces of the United States of America are Exempt from Criminal Proceedings in Canadian Criminal Courts*, [1943] S.C.R. 483, Taschereau J., drawing on *Chung Chi Cheung*, held that the body of rules accepted by nations are incorporated into domestic law absent statutes to the contrary (pp. 516-17).

90 As these cases show, Canada has long followed the conventional path of automatically incorporating customary international law into domestic law via the doctrine of adoption, making it part of the common law of Canada in the absence of conflicting legislation. This approach was more recently confirmed by this Court in *Hape*, where LeBel J. for the majority held:

> Despite the Court's silence in some recent cases, the doctrine of adoption has never been rejected in Canada. Indeed, there is a long line of cases in which the Court has either formally accepted it or at least applied it. In my view, following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law *should* be incorporated into domestic law in the absence of conflicting legislation. The *automatic* incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly. Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law. [Emphasis added; para. 39.]

It is important to note that he concluded that rules of customary international law should be automatically incorporated into domestic law in the absence of conflicting legislation. His use of the word "may" later in the paragraph cannot be taken as overtaking his clear direction that, based on "a long line of cases", customary international law is automatically incorporated into Canadian law. Judicial decisions are not Talmudic texts whereby each word attracts its own exegetical interpretation. They must be read in a way that respects the author's overall intention, without permitting a stray word or phrase to undermine the overarching theory being advanced.

91 Justice LeBel himself, in an article he wrote several years after *Hape*, explained that the Court's use of the word "may" in *Hape* was in no way meant to diverge from the traditional approach of directly incorporating customary norms into Canadian common law:

> Following [*Hape*], there was some comment and concern to the effect that the [statement that "courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law" (para. 39)] left the law in a state of some doubt. These comments pointed out that this sentence could be read as holding that prohibitive norms are not actually part of the domestic common law, but may only serve to aid in its development. In my view, this was not the sense of this passage, for at least three reasons. First, the sentences immediately preceding this last sentence stated, without reservation, that prohibitive rules of customary international law are incorporated into domestic law in the absence of conflicting legislation. Second, the entire discussion of incorporation was for the purpose of showing how the norm of respect for the sovereignty of foreign states, forming, as it does, part of our common law, could shed light on the interpretation of s. 32(1) of the *Charter.* Third, the majority reasons also explicitly held that the customary principles of non-intervention and territorial sovereignty "may be adopted into the common law of Canada in the absence of conflicting legislation". The gist of the majority opinion in *Hape* was that accepting incorporation of customary international [law] was the right approach. *In conclusion, the law in Canada today appears to be settled on this point: prohibitive customary norms are directly incorporated into our common law and must be followed by courts absent legislation which clearly overrules them.* [Emphasis added.]
>
> (Louis LeBel, "A Common Law of the World? The Reception of Customary International Law in the Canadian Common Law" (2014), 65 U.N.B.L.J. 3, at p. 15)

92 As for LeBel J.'s novel use of the word "prohibitive", we should be wary of concluding that he intended to create a new category of customary international law unique to Canada. In the same article, LeBel J. clarified that "prohibitive" norms simply mean norms that are "mandatory", in the sense that they are obligatory or binding (LeBel, at p. 17). As Professor Currie observes, the word "prohibitive" is a "puzzling qualification [that] does not figure in any of the authorities cited by LeBel J. for the doctrine, nor is it a feature of the doctrine of adoption that operates in the United Kingdom" (John H. Currie, "Weaving a Tangled Web: *Hape* and the Obfuscation of Canadian Reception Law" (2007), 45 *Can. Y.B. Intl Law* 55, at p. 70; see also Armand de Mestral and Evan Fox-Decent, "Rethinking the Relationship Between International and Domestic Law" (2008), 53 McGill L.J. 573, at p. 587).

93 The use of the word "prohibitive", therefore, does not add a separate analytic factor, it merely emphasizes the mandatory nature of customary international law (see van Ert, *Using International Law in Canadian Courts*, at pp. 216-18). This aligns with LeBel J.'s statement in *Hape* that the "automatic incorporation" of norms of customary international law "is justified on the basis that *international custom, as the law of nations, is also the law of Canada*" (para. 39 (emphasis added)).

94 Therefore, as a result of the doctrine of adoption, norms of customary international law -- those that satisfy the twin requirements of general practice and *opinio juris* -- are fully integrated into, and form part of, Canadian domestic common law, absent conflicting law (Oonagh E. Fitzgerald, "Implementation of International Humanitarian and Related International Law in Canada", in Oonagh E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law* (2006), 625, at p. 630). Legislatures are of course free to change or override them, but like all common law, no legislative action is required to give them effect (Kindred, at p. 8). To suggest otherwise by requiring legislative endorsement, upends a 250 year old legal truism and would put Canada out of step with most countries (Verdier and Versteeg, at p. 528). As Professor Toope noted, "[t]he Canadian story of international law is not merely a story of 'persuasive' foreign law. International law also speaks directly to Canadian law and requires it to be shaped in certain directions. International law is more than 'comparative law', because international law is partly *our* law" (Stephen J. Toope, "Inside and Out: The Stories of International Law and Domestic Law" (2001), 50 U.N.B.L.J. 11, at p. 23 (emphasis in original)).

95 There is no doubt then, that customary international law is also the law of Canada. In the words of Professor Rosalyn Higgins, former President of the International Court of Justice: "In short, there is not 'international law' and the common law. International law is part of that which comprises the common law on any given subject" (Rosalyn Higgins, "The Relationship Between International and Regional Human Rights Norms and Domestic Law" (1992), 18 *Commonwealth L. Bull.* 1268, at p. 1273). The fact that customary international law is part of our common law means that it must be treated with the same respect as any other law.

96 In other words, "Canadian courts, like courts all over the world, are supposed to treat public international law as law, not fact" (Gib van Ert, "The Reception of International Law in Canada: Three Ways We Might Go Wrong", in Centre for International Governance Innovation, *Canada in International Law at 150 and Beyond, Paper No. 2* (2018), at p. 6; see also van Ert, *Using International Law in Canadian Courts*, at pp. 62-69).

97 Unlike foreign law in conflict of laws jurisprudence, therefore, which is a question of fact requiring proof, established norms of customary international law are law, to be judicially noticed (van Ert, "The Reception of International Law", at p. 6; van Ert, *Using International Law in Canadian Courts*, at pp. 62-69). Professor Higgins explains this as follows: "There is not a legal system in the world where international law is treated as 'foreign law'. It is everywhere part of the law of the land; as much as contracts, labour law or administrative law" (p. 1268; see also James Crawford, *Brownlie's Principles of Public International Law* (9th ed. 2019), at p. 52; Robert Jennings and Arthur Watts, *Oppenheim's International Law* (9th ed. 2008), vol. 1, at p. 57; van Ert, *Using International Law in Canadian Courts*, at p. 64).

98 And just as the law of contracts, labour law and administrative law are accepted without the need of proof, so too is customary international law. Taking judicial notice -- in the sense of not requiring formal proof by evidence -- is appropriate and an inevitable implication both of the doctrine of adoption3 and legal orthodoxy (Anne Warner La

Forest, "Evidence and International and Comparative Law", in Oonagh E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law* (2006), 367, at pp. 381-82; van Ert, *Using International Law in Canadian Courts*, at pp. 42-56 and 62-66).

99 Some academics suggest that when recognising *new* norms of customary international law, allowing evidence of state practice may be appropriate. While these scholars acknowledge that permitting such proof departs from the conventional approach of judicially noticing customary international law, they maintain that this in no way derogates from the nature of international law as law (Anne Warner La Forest, at pp. 384 and 388; van Ert, *Using International Law in Canadian Courts*, at pp. 67-69). The questions of whether and what evidence may be used to demonstrate the existence of a new norm are not, however, live issues in this appeal. Here the inquiry is less complicated and taking judicial notice is appropriate since the workers claim breaches not simply of established norms of customary international law, but of norms accepted to be of such fundamental importance as to be characterized as *jus cogens*, or peremptory norms.

100 Crimes against humanity have been described as among the "least controversial examples" of violations of *jus cogens* (Louis LeBel and Gloria Chao, "The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law" (2002), 16 S.C.L.R. (2d) 23, at p. 33).

101 The prohibition against slavery too is seen as a peremptory norm. In 2002, the Office of the United Nations High Commissioner for Human Rights confirmed that "it is now a well-established principle of international law that the 'prohibition against slavery and slavery-related practices have achieved the level of customary international law and have attained "*jus cogens*" status'" (David Weissbrodt and Anti-Slavery International, *Abolishing Slavery and its Contemporary Forms*, U.N. Doc. HR/PUB/02/4 (2002), at p. 3).

102 Compelling authority also confirms that the prohibition against forced labour has attained the status of *jus cogens*. The International Labour Organization, in a report entitled "Forced labour in Myanmar (Burma)", *I.L.O Official Bulletin: Special Supplement*, vol. LXXXI, 1998, Series B, recognized that, "there exists now in international law a peremptory norm prohibiting any recourse to forced labour and that the right not to be compelled to perform forced or compulsory labour is one of the basic human rights" (para. 203). To the extent that debate may exist about whether forced labour is a peremptory norm, there can be no doubt that it is at least a norm of customary international law.

103 And the prohibition against cruel, inhuman and degrading treatment has been described as an "absolute right, where no social goal or emergency can limit [it]" (Currie, et al., *International Law: Doctrine, Practice, and Theory*, at p. 627). This is reflected in the ratification of several international covenants and treaties such as the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47 (entered into force March 23, 1976), art. 7; the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Can T.S. 1987 No. 36 (entered into force June 26, 1987), art. 16; the European *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221, art. 3; the *American Declaration of the Rights and Duties of Man*, April 30, 1948, art. 26; the *American Convention on Human Rights*, 1144 U.N.T.S. 123, art. 5; the *African Charter on Human and Peoples' Rights*, 1520 U.N.T.S. 217, art. 5; the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, art. 37; the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, 1561 U.N.T.S. 363; and the *Inter-American Convention to Prevent and Punish Torture*, O.A.S.T.S. No. 67 (Currie et al., *International Law: Doctrine, Practice, and Theory*, at p. 627).

104 Nevsun argues, however, that even if customary international law norms such as those relied on by the Eritrean workers form part of the common law through the doctrine of adoption, it is immune from their application because it is a corporation.

105 Nevsun's position, with respect, misconceives modern international law. As Professor William S. Dodge has observed, "[i]nternational law ... does not contain general norms of liability or non-liability applicable to categories of actors" (William S. Dodge, "Corporate Liability Under Customary International Law" (2012), 43 *Geo. J. Int'l L.* 1045,

at p. 1046). Though certain norms of customary international law, such as norms governing treaty making, are of a strictly interstate character and will have no application to corporations, others prohibit conduct regardless of whether the perpetrator is a state (see, e.g., Dodge; Harold Hongju Koh, "Separating Myth from Reality about Corporate Responsibility Litigation" (2004), 7 *J.I.E.L.* 263, at pp. 265-267; Andrew Clapham, *Human Rights Obligations of Non-State Actors* (2006), at p. 58).

106 While states were classically the main subjects of international law since the Peace of Westphalia in 1648 (Cassese, at pp. 22-25; Oona A. Hathaway and Scott J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (2017), at p. xix), international law has long-since evolved from this state-centric template. As Lord Denning wrote in *Trendtex Trading Corp.*: "I would use of international law the words which Galileo used of the earth: 'But it does move'" (p. 554).

107 In fact, international law has so fully expanded beyond its Grotian origins that there is no longer any tenable basis for restricting the application of customary international law to relations between states. The past 70 years have seen a proliferation of human rights law that transformed international law and made the individual an integral part of this legal domain, reflected in the creation of a complex network of conventions and normative instruments intended to protect human rights and ensure compliance with those rights.

108 Professor Payam Akhavan notes that "[t]he rapid emergence of human rights signified a revolutionary shift in international law, from a state-centric to a human-centric conception of global order" (Payam Akhavan, "Canada and international human rights law: is the romance over?" (2016), 22 *Canadian Foreign Policy Journal* 331, at p. 332). The result of these developments is that international law now works "not only to maintain peace between States, but to protect the lives of individuals, their liberty, their health, [and] their education" (Emmanuelle Jouannet, "What is the Use of International Law? International Law as a 21st Century Guardian of Welfare" (2007), 28 Mich. J. Int'l L. 815, at p. 821). As Professor Christopher Joyner adds: "The rights of peoples within a state now transcend national boundaries and have become essentially a common concern under international law" (Christopher C. Joyner, "'The Responsibility to Protect': Humanitarian Concern and the Lawfulness of Armed Intervention" (2007), 47 Va J. Int'l L. 693, at p. 717).

109 This represents the international law actualization of Professor Hersch Lauterpacht's statement in 1943 that "[t]he individual human being ... is the ultimate unit of all law" (Sands, at p. 63).

110 A central feature of the individual's position in modern international human rights law is that the rights do not exist simply as a contract with the state. While the rights are certainly enforceable against the state, they are not defined by that relationship (Patrick Macklem, *The Sovereignty of Human Rights* (2015), at p. 22). They are discrete legal entitlements, held by individuals, and are "to be respected by everyone" (Clapham, *Human Rights Obligations*, at p. 58).

111 Moreover, as Professor Beth Stephens has observed, these rights may be violated by private actors:

> The context in which international human rights norms must be interpreted and applied today is one in which such norms are routinely applied to private actors. Human rights law in the past several decades has moved decisively to prohibit violations by private actors in fields as diverse as discrimination, children's rights, crimes against peace and security, and privacy... . It is clear that individuals today have both rights and responsibilities under international law. Although expressed in neutral language, many human rights provisions must be understood today as applying to individuals as well as to states.
>
> (Beth Stephens, "The Amorality of Profit: Transnational Corporations and Human Rights" (2002), 20 *B.J.I.L.* 45, at p. 73)

There is no reason, in principle, why "private actors" excludes corporations.

112 Canvassing the jurisprudence and academic commentaries, Professor Koh observes that non-state actors like corporations can be held responsible for violations of international criminal law and concludes that it would not

"make sense to argue that international law may impose criminal liability on corporations, but not civil liability" (Koh, "Separating Myth from Reality", at p. 266). He describes the idea that domestic courts cannot hold corporations civilly liable for violations of international law as a "myth" (Koh, "Separating Myth from Reality", at pp. 264-68; see also Simon Baughen, *Human Rights and Corporate Wrongs: Closing the Governance Gap* (2015), at pp. 130-32). Professor Koh also notes that

> [t]he commonsense fact remains that if states and individuals can be held liable under international law, then so too should corporations, for the simple reason that both states and individuals *act through* corporations. Given that reality, what legal sense would it make to let states and individuals immunize themselves from liability for gross violations through the mere artifice of corporate formation? [Emphasis in original.]
>
> (Koh, "Separating Myth from Reality", at p. 265)

113 As a result, in my respectful view, it is not "plain and obvious" that corporations today enjoy a blanket exclusion under customary international law from direct liability for violations of "obligatory, definable, and universal norms of international law", or indirect liability for their involvement in what Professor Clapham calls "complicity offenses" (Koh, "Separating Myth from Reality", at pp. 265 and 267; Andrew Clapham, "On Complicity", in Marc Henzelin and Robert Roth, eds., *Le Droit Pénal à l'Épreuve de l'Internationalisation* (2002), 241, at pp. 241-75). However, because some norms of customary international law are of a strictly interstate character, the trial judge will have to determine whether the specific norms relied on in this case are of such a character. If they are, the question for the court will be whether the common law should evolve so as to extend the scope of those norms to bind corporations.

114 Ultimately, for the purposes of this appeal, it is enough to conclude that the breaches of customary international law, or *jus cogens*, relied on by the Eritrean workers may well apply to Nevsun. The only remaining question is whether there are any Canadian laws which conflict with their adoption as part of our common law. I could not, with respect, find any.

115 On the contrary, the Canadian government has adopted policies to ensure that Canadian companies operating abroad *respect* these norms (see, e.g., Global Affairs Canada, *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad*, last updated July 31, 2019 (online); Global Affairs Canada, *Minister Carr announces appointment of first Canadian Ombudsperson for Responsible Enterprise*, April 8, 2019 (online) (announcing the creation of an Ombudsperson for Responsible Enterprise, and a Multi-stakeholder Advisory Body on Responsible Business Conduct)). With respect to the Canadian Ombudsperson for Responsible Enterprise, mandated to review allegations of human rights abuses of Canadian corporations operating abroad, the Canadian government has explicitly noted that "[t]he creation of the Ombudsperson's office does not affect the right of any party to bring a legal action in a court in any jurisdiction in Canada regarding allegations of harms committed by a Canadian company abroad" (Global Affairs Canada, *Responsible business conduct abroad -- Questions and answers*, last updated September 16, 2019 (online); Yousuf Aftab and Audrey Mocle, *Business and Human Rights as Law: Towards Justiciability of Rights, Involvement, and Remedy* (2019), at pp. 47-48).

116 In the absence of any contrary law, the customary international law norms raised by the Eritrean workers form part of the Canadian common law and potentially apply to Nevsun.

117 Is a civil remedy for a breach of this part of our common law available? Put another way, can our domestic common law develop appropriate remedies for breaches of adopted customary international law norms?

118 Development of the common law occurs where such developments are necessary to clarify a legal principle, to resolve an inconsistency, or to keep the law aligned with the evolution of society (*Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 S.C.R. 842, at para. 42; see also *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, at para. 93; *Watkins v. Olafson*, [1989] 2 S.C.R. 750). In my respectful view, recognizing the possibility of a remedy for the breach of norms already forming part of the common law is such a necessary development. As Lord Scarman noted:

> Unless statute has intervened to restrict the range of judge-made law, the common law enables the judges, when faced with a situation where a right recognised by law is not adequately protected, either to extend existing principles to cover the situation or to apply an existing remedy to redress the injustice. There is here no novelty: but merely the application of the principle *ubi jus ibi remedium* [for every wrong, the law provides a remedy].
>
> (*Sidaway v. Board of Governors of the Bethlem Royal Hospital*, [1985] 1 A.C. 871, at p. 884 (H.L.))

119 With respect specifically to the allegations raised by the workers, like all state parties to the *International Covenant on Civil and Political Rights*, Canada has international obligations to ensure an effective remedy to victims of violations of those rights (art. 2). Expounding on the nature of this obligation, the United Nations Human Rights Committee -- which was established by states as a treaty monitoring body to ensure compliance with the *International Covenant on Civil and Political Rights* -- provides additional guidance in its *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, May 26, 2004. In this document, the Human Rights Committee specifies that state parties must protect against the violation of rights not just by states, but also by private persons and entities. The Committee further specifies that state parties must ensure the enjoyment of *Covenant* rights to all individuals, including "asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party" (para. 10). As to remedies, the Committee notes:

> [T]he enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law. [para. 15]

120 In the domestic context, the general principle that "where there is a right, there must be a remedy for its violation" has been recognized in numerous decisions of this Court (see, e.g., *Kazemi*, at para. 159; *Henry v. British Columbia (Attorney General)*, [2015] 2 S.C.R. 214, at para. 65; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, at para. 25; *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, at para. 20; *Great Western Railway v. Brown* (1879), 3 S.C.R. 159, at p. 179).

121 The right to a remedy in the context of allegations of human rights violations was discussed by this Court in *Kazemi*, where a Canadian woman's estate sought damages against the Islamic Republic of Iran for torture. The majority did not depart from the position in *Hape* that customary international law, including peremptory norms, are part of Canadian common law, absent express legislation to the contrary. However, it concluded that the *State Immunity Act* was the kind of express legislation that prevented a remedy against the State of Iran for the breach of the *jus cogens* prohibition against torture, which it agreed was part of domestic Canadian law. LeBel J. for the majority noted that "[w]hile rights would be illusory if there was never a way to remedy their violation, the reality is that certain rights do exist even though remedies for their violation may be limited by procedural bars" (para. 159). In effect, the majority in *Kazemi* held that the general right to a remedy was overridden by Parliament's enactment of the *State Immunity Act*. However, the *State Immunity Act* protects "foreign states" from claims, not individuals or corporations.

122 Unlike *Kazemi*, there is no law or other procedural bar precluding the Eritrean workers' claims. Nor is there anything in *Kazemi* that precludes the possibility of a claim against a Canadian corporation for breaches in a foreign jurisdiction of customary international law, let alone *jus cogens*. As a result, it is not "plain and obvious" that Canadian courts cannot develop a civil remedy in domestic law for corporate violations of the customary international law norms adopted in Canadian law.

123 Nevsun additionally argues that the harms caused by the alleged breaches of customary international law can be adequately addressed by the recognized torts of conversion, battery, "unlawful confinement", conspiracy and negligence, all of which the Eritrean workers have also pleaded. In my view, it is at least arguable that the Eritrean workers' allegations encompass conduct not captured by these existing domestic torts.

124 Customary international law norms, like those the Eritrean workers allege were violated, are inherently different from existing domestic torts. Their character is of a more public nature than existing domestic private torts since the violation of these norms "shock[s] the conscience of humanity" (M. Cherif Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*" (1996), 59 *Law & Contemp. Probs.* 63, at p. 69).

125 Refusing to acknowledge the differences between existing domestic torts and forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity, may undermine the court's ability to adequately address the heinous nature of the harm caused by this conduct. As Professor Virgo notes, in the context of allegations of human rights violations, the symbolism reflected by the characterization or labelling of the allegations is crucial:

> From the perspective of the victim ... the fact that torture is characterized as a tort, such as battery, will matter -- simply because characterising torture in this way does not necessarily reflect the seriousness of the conduct involved. In the context of human rights ... symbolism is crucial.
>
> ...
>
> [In this context, accurately labelling the wrong is important] because the main reason why the victim wishes to commence civil proceedings will presumably be to ensure public awareness of the violation of fundamental human rights. The remedial consequence of successfully bringing a case is often, or even usually, only a secondary concern.
>
> (Graham Virgo, "Characterisation, Choice of Law, and Human Rights", in Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 325, at p. 335)

126 While courts can, of course, address the extent and seriousness of harm arising from civil wrongs with tools like an award of punitive damages, these responses may be inadequate when it comes to the violation of the norms prohibiting forced labour; slavery; cruel, inhuman or degrading treatment; or crimes against humanity. The profound harm resulting from their violation is sufficiently distinct in nature from those of existing torts that, as the workers say, "[i]n the same way that torture is something more than battery, slavery is more than an amalgam of unlawful confinement, assault and unjust enrichment". Accepting this premise, which seems to be difficult to refute conceptually, reliance on existing domestic torts may not "do justice to the specific principles that already are, or should be, in place with respect to the human rights norm" (Craig Scott, "Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms", in Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 45, at p. 62, fn 4; see also Sandra Raponi, "Grounding a Cause of Action for Torture in Transnational Law", in Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 373; Virgo).

127 The workers' customary international law pleadings are broadly worded and offer several ways in which the violation of adopted norms of customary international law may potentially be compensable in domestic law. The mechanism for how these claims should proceed is a novel question that must be left to the trial judge. The claims may well be allowed to proceed based on the recognition of new nominate torts, but this is not necessarily the only possible route to resolving the Eritrean workers' claims. A compelling argument can also be made, based on their pleadings, for a direct approach recognizing that since customary international law is part of Canadian common law, a breach by a Canadian company can theoretically be directly remedied based on a breach of customary international law.

128 The doctrine of adoption in Canada entails that norms of customary international law are directly and automatically incorporated into Canadian law absent legislation to the contrary (Gib van Ert, "What Is Reception Law?", in Oonagh E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law* (2006), 85, at p. 89). That may mean that the Eritrean workers' customary international law claims need not be converted into newly recognized categories of torts to succeed. Since these claims are based on

norms that already form part of our common law, it is not "plain and obvious" to me that our domestic common law cannot recognize a direct remedy for their breach. Requiring the development of new torts to found a remedy for breaches of customary international law norms automatically incorporated into the common law may not only dilute the doctrine of adoption, it could negate its application.

129 Effectively and justly remedying breaches of customary international law may demand an approach of a different character than a typical "private law action in the nature of a tort claim" (*Vancouver (City) v. Ward*, [2010] 2 S.C.R. 28, at para. 22, citing *Dunlea v. Attorney-General*, [2000] NZCA 84). The objectives associated with preventing violations of *jus cogens* and norms of customary international law are unique. A good argument can be made that appropriately remedying these violations requires different and stronger responses than typical tort claims, given the public nature and importance of the violated rights involved, the gravity of their breach, the impact on the domestic and global rights objectives, and the need to deter subsequent breaches.

130 As Professor Koh wrote about civil remedies for terrorism:

> Whenever a victim of a terrorist attack obtains a civil judgment in a United States court, that judgment promotes two distinct sets of objectives: The objectives of traditional tort law and the objectives of public international law. A judgment awarding compensatory and punitive damages to a victim of terrorism serves the twin objectives of traditional tort law, compensation and deterrence. At the same time, the judgment promotes the objectives of public international law by furthering the development of an international rule of law condemning terrorism. By issuing an opinion and judgment finding liability, the United States federal court adds its voice to others in the international community collectively condemning terrorism as an illegitimate means of promoting individual and sovereign ends.
>
> (Harold Hongju Koh, "Civil Remedies for Uncivil Wrongs: Combatting Terrorism through Transnational Public Law Litigation" (2016), 50 *Tex. Intl L.J.* 661, at p. 675)

131 This proceeding is still at a preliminary stage and it will ultimately be for the trial judge to consider whether the facts of this case justify findings of breaches of customary international law and, if so, what remedies are appropriate. These are complex questions but, as Wilson J. noted in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959:

> The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law ... will continue to evolve to meet the legal challenges that arise in our modern industrial society. [pp. 990-91]

132 Customary international law is part of Canadian law. Nevsun is a company bound by Canadian law. It is not "plain and obvious" to me that the Eritrean workers' claims against Nevsun based on breaches of customary international law cannot succeed. Those claims should therefore be allowed to proceed.

133 I would dismiss the appeal with costs.

The following are the reasons delivered by

R. BROWN AND M. ROWE JJ. (dissenting in part)

I. Introduction

134 At the British Columbia Supreme Court, Nevsun Resources Ltd. applied to strike 67 paragraphs of the Eritrean workers' notice of civil claim ("NOCC"). The chambers judge dismissed Nevsun's application, holding that the claim was not bound to fail (2016 BCSC 1856, 408 D.L.R. (4th) 383). His decision was upheld on appeal (2017 BCCA 401, 4 B.C.L.R. (6th) 91). The majority would also uphold the dismissal of Nevsun's application to strike the pleadings of the workers.

135 We would allow Nevsun's appeal in part. We agree with the majority that the dismissal of Nevsun's application should be upheld as it regards the foreign act of state doctrine, and we concur in the majority reasons from paras. 27 to 59. We would, however, allow Nevsun's appeal on the matter of the use of customary international law in creating tort liability. As we will explain, we part ways from the majority on this issue in several respects: the characterization of the content of international law; the procedure for identifying international law; the meaning of "adoption" of international law in Canadian law; and the availability of a tort remedy.

136 Our reasons are structured as follows. We begin by explaining the theories of the case which are advanced to defend the pleadings from the motion to strike. We then set out our view of the proper approach to customary international law: it is to determine what practices states in fact engage in out of the belief that these practices are mandated by customary international law. We then explain how the rules of customary international law (frequently termed "norms") are given effect in Canada. When the norms are prohibitive, this question is simple; when the norms are mandatory, the matter is more complicated. We then do our best to explain why, on its theory of the case, the majority finds it not plain and obvious the claim is doomed to fail. We identify three domains of disagreement: the content of international law in fact; how the doctrine of adoption operates; and the differences between the effect of international law on domestic criminal law and tort law. In the final section, we turn to the theory of the case upon which the chambers judge relied in dismissing the motion to strike: the workers seek recognition of new common law torts. After stating the test for determining whether a new tort should be recognized, we explain why the causes of action advanced in the pleadings do not meet it.

II. Two Theories of the Case

137 The majority explains that the pleadings are broadly worded and identifies two separate theories upon which they could be upheld (Majority Reasons, at para. 127). One of these is the focus of the majority's reasons with regard to customary international law; the other is the focus of the chambers judge's reasons. We would summarize these two theories as follows:

a) *The majority's theory*: The workers seek to have Canadian courts recognize a cause of action for "breach of customary international law" and to prosecute a claim thereunder (para. 127). (While the majority never describes the workers' pleadings as raising a "tort" claim, we observe that its theory of the case describes a cause of action that can only be understood in Canadian common law as a "tort". A tort is simply a wrong against a third party, actionable in law, typically for money damages (*Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393, at pp. 404-5). That is the very substance of the allegation here, and we will treat it as such. If the cause of action the majority is proposing is not a "tort", then it must be a species of action not known to Canadian common law, and so should fail simply on that basis).

b) *The chambers judge's theory*: The workers seek to have Canadian courts recognize four new nominate torts *inspired by* customary international law: use of forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity.4 The workers then seek to prosecute claims under those torts.

In our respectful view, the latter theory is more consistent with the pleadings before us, but both must be defeated in order for Nevsun to succeed on its motion to strike.

138 The following paragraphs of the workers' amended NOCC describe the proposed cause of action:

> 53. The plaintiffs seek damages under customary international law, as incorporated into the law [of] Canada, from Nevsun for the use of forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity.
>
> ...
>
> 57. Forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity are prohibited under international law. This prohibition is incorporated into and forms a part of the law of Canada.
>
> ...

> 60. The use of forced labour is a breach of customary international law and jus cogens and is actionable at common law.
>
> (A.R., vol. III, at pp. 170 and 172-73)

139 Paragraphs 63, 66, and 70 are to the same effect as para. 60, except "use of forced labour" is replaced by "slavery", "cruel, inhuman, or degrading treatment" and "crimes against humanity", respectively (A.R., vol. III, at pp. 173-75).

140 In our view, paras. 60, 63, 66 and 70 suggest that the workers sought to have four nominate torts recognized.

141 The chambers judge's theory accords with how the workers framed their claims before this Court, as the following excerpts from their factum demonstrate:

> 98. The development of the common law will be aided by the recognition of torts which fully capture the prohibited injurious conduct, rather than treating these kinds of claims as a variant or hybrid of traditional torts ... .
>
> ...
>
> 102... . In assessing whether to recognize new nominate torts, *Charter* values inform the assessment of the societal importance of the rights at issue ... .
>
> ...
>
> 117. To be clear, the [workers] do not contend that the adoption of *jus cogens* norms into Canadian law leads automatically to a civil remedy for the violation of those norms. Rather, the *jus cogens* norms serve as a source for development of the common law, and the test for recognition of new common law torts must still be satisfied.
>
> 118... . the recognition of these new torts is desirable given the factors outlined at paragraphs 97 to 110 above.
>
> ...
>
> 149. Here, recognizing new nominate torts for slavery or crimes against humanity under the common law complements and advances Parliament's broader intent in enacting legislation such as the *Crimes Against Humanity and War Crimes Act* that there be accountability for serious human rights abuses. [Emphasis added.]

142 We also observe that, at para. 117 of their factum, the workers specifically disavow the majority's theory of the case.

143 The second theory should be preferred also because, in deciding whether a pleading is bound to fail, it ought to be read generously. For example, the pleading ought to be considered as it might reasonably be amended (*British Columbia/Yukon Assn. of Drug War Survivors v. Abbotsford (City)*, 2015 BCCA 142, 75 B.C.L.R. (5th) 69, at para. 15; *Kripps v. Touche Ross & Co.* (1992), 69 B.C.L.R. (2d) 62 (C.A.)). In our view, the second theory is the *more* plausible claim. That said, the workers could reasonably amend their pleadings to clearly engage the first theory, so both must be considered.

144 As the majority has explained, we ask whether it is plain and obvious a pleading is "certain to fail" or "bound to fail" because this is the test that courts apply on a motion to strike (*Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980). This question is to be determined "in the context of the law and the litigation process", assuming the facts pleaded by the non-moving party are true (*R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at paras. 23 and 25 (emphasis omitted)).

145 Any confusion over whether a novel question of law can be answered on a motion to strike should be put to bed: it can. If a court would not recognize a novel claim when the facts as pleaded are taken to be true -- that is, in

the most favourable factual context possible in the litigation process -- the claim is plainly doomed to fail (S.G.A. Pitel and M.B. Lerner, "Resolving Questions of Law: A Modern Approach to Rule 21" (2014), 43 *Adv. Q.* 344, at p. 351). As Justice Karakatsanis explained for this Court in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, judges can and should resolve legal disputes promptly to facilitate rather than frustrate access to justice (paras. 24-25 and 32). Answering novel questions of law on a motion to strike is one way they can do so (Pitel and Lerner, at p. 358). But there also are some questions that the court *could* answer on a motion to strike, but ought not to. They include, for example, questions related to the interpretation of the *Canadian Charter of Rights and Freedoms*, or questions where the facts are unlikely, if not implausible. Deciding a question of law without proof of the facts in such circumstances risks distorting the law for an ultimately fruitless purpose.

146 The majority would find that it is not plain and obvious that the workers' cause of action is doomed to fail. So far as we can discern, the majority's reasons concern entirely extricated questions of law. In refraining to decide a question of law, there appears to be no pressing concern for judicial economy or for the integrity of the common law. The uncertainty in the majority's reasons relates to *which* theory the workers should rely on, not *whether* the workers' claim can succeed on either theory. We can only understand the inevitable effect of its reasons to be that, if the facts pleaded by the workers are proven, the workers' claim should succeed. In other words, in its view, the phoenix will fly. And concomitantly, it means that if the workers continue these proceedings relying on the majority's theory of the case, a court should recognize a new cause of action for tortious breach of customary international law.

147 That observation aside, however, our disagreement with the majority in this matter about the better theory of the case does not affect either our, or its, proposed disposition of the appeal. As previously mentioned, the question to be decided on a motion to strike is whether the pleadings are bound to fail on all reasonable theories of the case. In its view, the workers' claims are not bound to fail on either theory. In our view, they are, for four reasons.

148 First, the claims run contrary to how norms of international law become binding in Canada. According to the doctrine of adoption, the courts of this country recognize legal prohibitions that mirror the prohibitive rules of customary international law. Courts do not convert prohibitive rules into liability rules. Changing the doctrine of adoption to do so runs into the second problem, which is that doing so would be inconsistent with the doctrine of incrementalism and the principle of legislative supremacy. Nor does developing a theory of the case that does not rely on the doctrine of adoption rescue the pleadings: the third problem is that some of the claims are addressed by extant torts. And, finally, the viability of other claims requires changing the common law in a manner that would infringe the separation of powers and place courts in the unconstitutional position of conducting foreign relations, which is the executive's domain. We therefore find the workers' claims for damages based on breach of customary international law disclose no reasonable cause of action and are bound to fail.

III. On the First Theory, the Claim Is Bound to Fail

149 The majority maintains that, because international law is incorporated into Canadian law, it is not plain and obvious that a claim to remedy such a breach brought in a Canadian court is doomed to fail. But to give effect to this claim would displace international law from its proper role within the Canadian legal system. In the following section, we will explain why this is so. We will also explain why changing the role of international law within Canadian law exceeds the limits of the judicial role.

A. *The Operation of International Law in Canada*

150 One essential point of disagreement we have with the majority concerns which law is supreme in Canadian courts: Canadian law, or international law. The majority (at para. 94) adopts the opinion of Professor Stephen J. Toope, who has opined that "[i]nternational law ... speaks directly to Canadian law and requires it to be shaped in certain directions" ("Inside and Out: The Stories of International Law and Domestic Law" (2001), 50 U.N.B.L.J. 11, at p. 23). We disagree.

151 The conventional -- and, in our view, correct -- approach to the supremacy of legal systems is that each court treats its own constituting document as supreme (J. Crawford, *Brownlie's Principles of Public International Law* (9th

ed. 2019), at p. 101). An international tribunal or international court will apply the law of its constituting treaty. Canadian law cannot require international law to be shaped in certain directions, except insofar as international law grants that power to Canadian law.

152 It follows that Canadian courts will apply the law of Canada, including the supreme law of our Constitution. And it is that law -- Canadian law -- which defines the limits of the role international law plays within the Canadian legal system. To hold otherwise would be to ignore s. 52(1) of the *Constitution Act, 1982*, and s. 96 of the *Constitution Act, 1867*. To be clear, then: international law cannot require Canadian law to take a certain direction, except inasmuch as Canadian law allows it.

153 On the majority's theory, the workers' pleadings -- which seek the remedy of money damages -- are viable only if international law is given a role that exceeds the limits placed upon it by Canadian law. These limits are set out in *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 39, where this Court stated that "prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation". These prohibitive rules of customary international law, by their nature, *could not* give rise to a remedy. On its terms then, for these pleadings to succeed, Canadian law must change. And, in our view, such a change would require an act of a competent legislature. It does not fall within the competence of this Court, or any other. And yet, without that change, the pleadings are doomed to fail.

154 Below, we set out the existing limits of the role that public international law can play according to Canadian law. Public international law has two main sources: custom and convention, which have different effects on and in Canadian law. While the focus of this appeal is customary international law, its role and function can best be understood in relation to its counterpart, conventional international law. Below, we describe these two main sources of international law in more detail.

(1) Conventional International Law: the Role of Treaties

155 Although customary international law was historically the primary source of international law (J.H. Currie, *Public International Law* (2nd ed. 2008), at p. 124), convention, most often in the form of treaties, has become the source of much substantive international law today (J. Brunnée and S. J. Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002), 40 *Can. Y. B. Intl Law* 3, at p. 13). This trend originated in the late 19th and early 20th centuries, with the growth of international bodies and the elaboration of broader-based treaty regimes, mostly concerned with the conduct of war and humanitarian law (Currie, at p. 124).

156 A treaty is much like a contract, in the sense that it records the terms to which its signatories consent to be bound (J. Harrington, "Redressing the Democratic Deficit in Treaty Law Making: (Re-)Establishing a Role for Parliament" (2005), 50 McGill L.J. 465, at p. 470): "The essential idea [of treaties] is that states are bound by what they expressly consent to" (Brunnée and Toope, at p. 14). It sets out the parties' mutual legal rights and obligations, and are governed by international law (Currie, at p. 123). Article 38(1)(a) of the *Statute of the International Court of Justice*, Can. T.S. 1945 No. 7, contains an implicit definition of treaty when it specifies that the International Court of Justice shall apply "international conventions, whether general or particular, establishing rules expressly recognized by the contesting states" (see also Brunnée and Toope, at p. 14). A treaty may be bilateral (recording reciprocal undertakings among two or more states) or multilateral (recording a generalized agreement between several states) (Currie, at p. 123). In either form, it permits states to enter into agreements with other states on specific issues or projects, or to establish widely applicable norms intended to govern legal relationships with as many states as will expressly agree to their terms (p. 123).

157 Because a treaty is concerned with express agreement between states, certain formalities govern the process of entering a binding treaty (Brunnée and Toope, at p. 14), which we discuss below.

158 In Canada, each order of government plays a different role in the process of entering a treaty. Significantly, it is *the executive* which controls the negotiation, signature and ratification of treaties, in exercise of the royal prerogative power to conduct foreign relations. Its signature manifests initial consent to the treaty framework, but

does not indicate consent to be bound by specific treaty obligations; that latter consent is given by ratification. It is only when a treaty enters into force that the specific treaty obligations become binding. For multilateral treaties, entry into force usually depends on the deposit of a specific number of state ratifications. If a treaty is in force and ratified by Canada, the treaty binds Canada as a matter of international law (Brunnée and Toope, at pp. 14-15).

159 Many treaties do not require a change in domestic law to bind the state to a course of action. Where it does, however, and even when internationally binding, a treaty has no formal legal effect domestically until it is transformed or implemented through a domestic-law making process, usually by legislation (Harrington, at pp. 482-85; Currie, at p. 235). Giving an unimplemented treaty binding effect in Canada would result in the executive creating domestic law -- which, absent legislative delegation, it cannot do without infringing on legislative supremacy and thereby undermining the separation of powers. Any domestic legal effect therefore depends on Parliament or a provincial legislature adopting the treaty rule into a domestic law that can be invoked before Canadian courts (Currie, at p. 237). For example, the environmental commitments in the *North American Free Trade Agreement*, Can. T.S. 1994 No. 2 (entered into force January 1, 1994) ("*NAFTA*") were implemented by provincial governments through a Canadian Interprovincial Agreement (Harrington, at pp. 483-84). The formalities associated with treaties respect the role that each order of the state is competent to play, in accordance with the separation of powers and the principle of legislative supremacy.

(2) Customary International Law

160 As with conventional international law, the content of customary international law is established by the actions of states on the international plane. The relevance of customary international law to domestic law has both a substantive and a procedural aspect. Substantively, customary international law norms can have a direct effect on public common law, without legislative enactment. But for that substantive effect to be afforded a customary international law norm, the existence of the norm must be proven as a matter of fact according to the normal court process.

(a) *Sources of Customary International Law*

161 As the majority describes (at para. 77), customary international law is a general practice accepted as law that is concerned with the principles of custom at the international level. A rule of customary international law exists when state practice evidences a "custom" and the practicing states accept that custom as law (Currie, at p. 188).

162 A custom exists where a state practice is applied both generally and uniformly. To be general, it must be a sufficiently widespread practice. To be uniform, the states that apply that practice must have done so consistently. A state practice need not, however, be perfectly widespread or consistent at all times. And for good reason: if that were true, the moment one state departs from either requirement, the custom would cease to exist (Currie, pp. 188-93).

163 The requirement that states, which follow the practice, do so on the basis that they subjectively believe the practice to be legally mandated is known as *opinio juris* (Currie, at p. 188; J. L. Slama, "*Opinio Juris* in Customary International Law" (1990), 15 Okla. City U.L. Rev. 603, at p. 656). The practicing state must perform the practice out of the belief that this practice is necessary in order to fulfil its obligations under customary international law, rather than simply due to political, security or other concerns.5

164 The high bar established by the twin requirements of state practice and *opinio juris* reflects the extraordinary nature of customary international law: it leads courts to adopt a role otherwise left to legislatures; and, unless a state persistently objects, its recognition binds states to rules to which they have not affirmatively consented (Currie, at p. 187). And, if a rule becomes recognized as peremptory (i.e., as *jus cogens*) then even persistent objection will not relieve a state of the rule's constraints (J. A. Green, *The Persistent Objector Rule in International Law* (2016), at pp. 194-95).

(b) *The Adoption of Customary International Law in Canada*

165 Once a norm of customary international law has been established, it can become a source of Canadian

domestic law unless it is inconsistent with extant statutory law. This doctrine is called "adoption" in Canada and "incorporation" in its English antecedents. *Hape* explains the doctrine as follows:

> The English tradition follows an adoptionist approach to the reception of customary international law. Prohibitive rules of international custom may be incorporated directly into domestic law through the common law, without the need for legislative action. According to the doctrine of adoption, the courts may adopt rules of customary international law as common law rules in order to base their decisions upon them, provided there is no valid legislation that clearly conflicts with the customary rule: I. Brownlie, *Principles of Public International Law* (6th ed. 2003), at p. 41. Although it has long been recognized in English common law, the doctrine received its strongest endorsement in the landmark case of *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 1 Q.B. 529 (C.A.). Lord Denning considered both the doctrine of adoption and the doctrine of transformation, according to which international law rules must be implemented by Parliament before they can be applied by domestic courts. In his opinion, the doctrine of adoption represents the correct approach in English law. Rules of international law are incorporated automatically, as they evolve, unless they conflict with legislation ... .
>
> ...
>
> Despite the Court's silence in some recent cases, the doctrine of adoption has never been rejected in Canada. Indeed, there is a long line of cases in which the Court has either formally accepted it or at least applied it. In my view, following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly. Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law. [Emphasis added; paras. 36 and 39.]

166 In our view, two features of this passage are noteworthy: (1) that prohibitive rules of customary international law can be incorporated into domestic law "in the absence of conflicting legislation"; and (2) that adoption only operates with respect to "prohibitive rules of international custom". Taken together, these elements respect legislative supremacy in the incorporation of customary international law into domestic law.

167 The primacy given to contrary legislation preserves the legislature's ability to control the effect of international laws in the domestic legal system. As Currie writes, the adoption of customary international law preserves "the domestic legal system's ultimate ability, primarily through its legislative branch, to control the content of domestic law through express override of a customary rule" (p. 234).

168 The majority (at paras. 91-93) suggests that there is no difference between "mandatory" norms of international law and "prohibitive" norms, citing the extrajudicial writing of Justice LeBel (L. LeBel, "A Common Law of the World? The Reception of Customary International Law in the Canadian Common Law" (2014), 65 U.N.B.L.J. 3). We agree that this is not a distinction that is generally drawn in international law jurisprudence. It is, however, a helpful distinction for explaining the capacity of a common law court to remedy a breach of an international law norm. As James Crawford (a judge of the International Court of Justice) has explained, the first question when considering a rule of customary international law is to ask whether it is susceptible to domestic application (p. 65). Although a common law court adopts both prohibitive and mandatory norms, the domestic legal effect of the adoption of a prohibitive norm is different from the domestic legal effect of the adoption of a mandatory norm. This distinction becomes clear when comparing the roles of the various branches of the state.

169 To illustrate the difference between prohibitive and mandatory norms, it may be helpful to analogize to *certiorari* and *mandamus* or to acts and omissions. When a norm is prohibitive, in the sense that it prohibits a state from acting in a certain way, the doctrine of adoption means that actions by the executive branch contravening the norm can be set aside through judicial review, as is the case with *certiorari*. When a norm is mandatory, in the

sense that it mandates a state to act in a certain way, the doctrine of adoption means that omissions in contravention of the norm can be remedied through judicial review, as is the case with *mandamus*.6 *Mandamus* is a limited remedy -- it allows courts to enforce a clear public duty, but not to devise a regulatory scheme out of whole cloth.

170 When the legislative branch contravenes an adopted norm, there is no difference between prohibitive norms and mandatory norms. If the legislature passes a law contravening a prohibitive norm of international law, that law is not subject to review by the courts. Similarly, if the legislature does not pass a law in contravention of a mandatory norm of international law, the courts cannot construct that law for them, unless doing so is otherwise within the courts' power. Courts may presume the intent of the legislature is to comply with customary international law norms (see, for example, *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 182), but that presumption is rebuttable: customary international law has interpretive force, but it does not formally constrain the legislature. The interpretive force comes from the presumption that the legislature would not mean to inadvertently violate customary international law (J. M. Keyes and R. Sullivan, "A Legislative Perspective on the Interaction of International and Domestic Law", in O. E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law* (2006), 277, at p. 297).

171 The final question is what happens when private common law contravenes a norm.7 We are aware of no case where private common law has violated a prohibitive norm. Nor are we aware of any case where private common law has violated a mandatory norm. In the case that has come closest, *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176, this Court found that Canada was not under an obligation to provide a private law civil remedy for violations of a norm:

> While the prohibition of torture is certainly a *jus cogens* norm from which Canada cannot derogate (and is also very likely a principle of fundamental justice), the question in this case is whether this norm extends in such a way as to require each state to provide a civil remedy for torture committed abroad by a foreign state.
>
> Several national courts and international tribunals have considered this question, and they have consistently confirmed that the answer is no: customary international law does not extend the prohibition of torture so far as to require a civil remedy for torture committed in a foreign state. [paras. 152-53]

172 In short, even if a plaintiff can prove that, (1) a prohibition lies on nation states at international law; and (2) that prohibition is *jus cogens*, these two considerations are nonetheless insufficient to support the proposition that international law requires every state to provide a civil remedy for conduct in breach of the prohibition.

173 There are good reasons for distinguishing between executive action and legislative action. Canada - - and the provinces -- have the ability, should they choose to exercise it, to violate norms of customary international law. But that is a choice that only Parliament or the provincial legislatures can make; the federal and provincial governments cannot do so without the authorization of those legislative bodies.

174 But how does this inform the development of private common law? If there were a private common law rule that contravened a prohibitive norm -- we confess that such a combination of norm and private law rule is beyond our imagination, but perhaps it could exist -- we would agree that judges must alter that law. When the private common law contravenes a mandatory norm, the court is faced with determining whether any existing statutes prevent the court from amending the common law as necessary for it to comply with that norm.

175 How, then, to determine whether a statute prevents so amending the common law? We would suggest that courts should follow a three-step process. First, precisely identify the norm. Second, determine how the norm would best be given effect. Third, determine whether any legislation prevents the court from changing the common law to create that effect. If no legislation does so, courts should implement that change to the common law. If any legislation does so, the courts should respect that legislative choice, and refrain from changing the common law. In such circumstances, judicial restraint respects both legislative supremacy and the superior institutional capacity of

the legislatures to design regulatory schemes to comply with Canada's international obligations. These are foundational considerations, going to the proper roles of courts, legislatures and the executive. The incorporation of a rule of customary international law must yield to such constitutional principles (*R. v. Jones (Margaret)*, [2006] UKHL 16, [2007] 1 A.C. 136, at para. 23, per Lord Bingham; Crawford, at pp. 65-66).

176 One final point on the doctrine of adoption. *Hape* is ambivalent as to whether incorporation means that rules of customary international law are incorporated (at para. 36), should be incorporated (at para. 39) or simply may aid in the interpretation of the common law (at para. 39). The traditional English view is the first. But the modern English jurisprudence puts that view in doubt, and rightly so (see *Jones*, at para. 11, per Lord Bingham). As we discussed above, a rule of customary international law may need to be adapted to fit the differing circumstances of common law instead of public international law.

(c) *The Procedure for Recognizing Customary International Law*

177 Much of Canadian civil procedure depends on the distinction between law and facts. Facts are pled, but law is not; facts are determined through evidence, but law is not; facts cannot be settled on a motion to strike or summary judgment, but law can; factual findings by a trier of fact are deferred to by appellate courts; legal conclusions are not. Perhaps most importantly, judges cannot determine matters of fact without evidence led by the parties (except where judicial notice applies), but can decide questions of law. Judges doing their own research on law is not only accepted, but expected. Judges doing their own research on facts is impermissible.

178 The majority suggests that the content of customary international law should be treated as law by Canadian courts, not fact, but, incongruously, also recognizes that the authorities on which it relies for this proposition nonetheless maintain that *evidence* of state practice is necessary to prove a new norm of customary international law (para. 96, citing G. van Ert, "The Reception of International Law in Canada: Three Ways We Might Go Wrong", in Centre for International Governance Innovation, *Canada in International Law at 150 and Beyond, Paper No. 2* (2018), at p. 6; G. van Ert, *Using International Law in Canadian Courts* (2nd ed. 2008), at pp. 62-69). With respect, we see the approach of treating norms of international law as law and new norms of international law as fact as creating an unwieldy hybridization of law and fact. As we have discussed above, procedure in Canadian law is largely built upon the distinction between law and fact, and such a hybrid therefore promises to cause confusion. The absence of clear methodology will foster conclusionary reasoning, in other words decision making by intuition. And, what standard of review would be applied to such decisions? Confusion in means gives rise to uncertainty in ends.

179 The process is perhaps most conveniently understood as comprising three steps. The first requires the court to find the facts of state practice and *opinio juris*. In easy cases, the first step can be dispensed with without a trial due to the power of judicial notice. When there is or can be no dispute about the existence of a norm of customary international law it is appropriate for the courts to take judicial notice (*R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 48; *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458, at para. 61). In this case, we agree with the majority that the existence of some of the norms of international law that have been pled -- for example, that crimes against humanity are prohibited -- meets the threshold for taking judicial notice (Majority Reasons, at para. 99). Where, however, the existence of a norm of customary international law is contested -- as it is on the question of whether corporations can be held liable at international law -- judges should rely on the pleadings (on an application to strike or for summary judgment) or the evidence that is adduced before them.

180 It is in these contested, hard cases where this step is particularly important. Courts will be called on to evaluate both whether there exists a custom generally among states that is applied uniformly, and whether the practicing states respect the custom out of the belief that doing so is necessary in order to fulfil their obligations under customary international law. These are, fundamentally, empirical exercises: they do not ask what state practice should be or whether states should comply with the norm out of a sense of customary international legal obligation, but whether states in fact do so. As van Ert has acknowledged, "[s]tate practice ... is a matter of fact" (*Using International Law in Canadian Courts*, at p. 67) and that when a claimant asserts "a new rule of customary

international law", proof in evidence may be required ("The Reception of International Law in Canada", at p. 6, fn. 60).

181 As the majority has correctly described (at para. 79), the judicial decisions of national courts can be "evidence" of general practice or *opinio juris*. These national courts include Canadian courts, the courts of other common law systems, and the courts of every other national legal system. To determine whether a rule of customary international law exists, Canadian courts must be prepared to understand and evaluate judicial decisions from the world over. As this Court explained, "[t]o establish custom, an extensive survey of the practices of nations is required" (*R. v. Finta*, [1994] 1 S.C.R. 701, at p. 773). Canadian judges need to be able to understand decisions rendered in a foreign legal system, in which they are not trained, and in languages which they do not know. Making expert evidence available for judges to understand foreign language texts is simply sensible (van Ert, *Using International Law in Canadian Courts*, at p. 57). Put another way, the foundations of customary international law rest, in part, on foreign law. In Canada, foreign law is treated as fact, not law (J. Walker, *Castel & Walker: Canadian Conflict of Laws* (6th ed. (loose-leaf)), vol. 1, at p. 7-1). When a Canadian court applies Canadian conflict of laws rules and determines that the law of a foreign state is to be applied in a Canadian court proceeding, the Canadian judge does not then embark on their own analysis of the foreign law. Rather, the Canadian judge relies on the parties to adduce evidence of the content of the foreign law.

182 It is only once the facts of state practice and *opinio juris* are found that the court can proceed to a second step, which is to identify which, if any, norms of customary international law must be recognized to best explain these facts. This question arises since state practice and *opinio juris* may be consistent with more than one possible norm. This is a question of law.

183 The final step is to apply the norms, as recognized, to the facts of the case at bar. This is a question of mixed fact and law.

184 We should note that, although we disagree with the majority on this procedural point, and although this point is important, it is ultimately not the nub of our disagreement. The more the questions in dispute are questions of fact, the more difficult it is for a court to properly strike the pleadings. It is therefore more difficult for us to strike these claims on *our* understanding of the jurisprudential character of international law, than it is on *the majority's* understanding. Nonetheless, as we will explain, we would do just that.

B. *The Claim, on the Majority's Theory, Contravenes These Limits Placed Upon International Law Within Canadian Law*

185 In the following section, we explain why the majority's theory of the case cannot succeed. We begin here by summarizing its approach, as we understand it:

a)There are prohibitions at international law against crimes against humanity, slavery, the use of forced labour, and cruel, inhuman, and degrading treatment (paras. 100-3).

b)These prohibitions have the status of *jus cogens*, except possibly for that against the use of forced labour (paras. 100-3).

c)Individuals and states both must obey some customary international law prohibitions, and it is a question for the trial judge whether they must obey these specific prohibitions (paras. 105, 110-11 and 113).

d)Corporations must also obey certain such prohibitions (paras. 112-113).

e)Individuals are beneficiaries of these prohibitions (paras. 106-11).

f)It would not "make sense to argue that international law may impose criminal liability on corporations, but not civil liability" (para. 112, citing H. H. Koh, "Separating Myth from Reality about Corporate Responsibility Litigation" (2004), 7 *J.I.E.L.* 263, at p. 266).

g)The doctrine of adoption makes any action prohibited at international law also prohibited at domestic law, unless there is legislative action to the contrary (paras. 94, 114 and 116).

h)In domestic law, where there is a right there must be a remedy (paras. 120-21).

i)There is no adequate remedy in domestic law, including in existing tort (paras. 122-26).

186 We have no quarrel with steps (a), (b), (c), (e), and (h) of the majority's analysis.

187 In our respectful view, however, the majority's analysis goes astray at steps (d), (f), (g), and (i). The conclusion it draws at step (d) relies upon it being possible for a norm of customary international law to exist when state practice is not general and not uniform. The conclusions it draws at steps (f) and (g) are not supported by the premises on which it relies. And the conclusions the majority draws at step (i) are possible only if one ignores the express *Criminal Code*, R.S.C. 1985, c. C-46, prohibition against courts creating common law offences. We will address these in turn.

(1) As a Matter of Law, Corporations Cannot Be Liable at Customary International Law

188 The majority states that "it is not plain and obvious that corporations today enjoy a blanket exclusion under customary international law from direct liability for violations of 'obligatory, definable, and universal norms of international law'" (para. 113, citing Koh, at p. 267). The authority the majority cites in support of this proposition is a single law review essay by Professor Harold Koh. It cites no cases where a corporation has been held civilly liable for breaches of customary international law anywhere in the world, and we do not know of any. While it does cite a book by Simon Baughen and an article by Andrew Clapham, those authorities do not support its view of the matter (S. Baughen, *Human Rights and Corporate Wrongs: Closing the Governance Gap* (2015), at pp. 130-32; A. Clapham, "On Complicity", in M. Henzelin and R. Roth, eds., *Le Droit Pénal à l'Épreuve de l'Internationalisation* (2002), 241, at pp. 241-75). Baughen's discussion of norms of international criminal law imposing civil liability on aiders and abetters is specific to the provision in the United States Code now commonly known as the *Alien Tort Statute*, 28 U.S.C. s. 1350 (2018), and Clapham's article concerns the recognition of the complicity of corporations in international criminal law and human rights violations, not the recognition of civil liability rules.

189 In our view, that corporations are excluded from direct liability is plain and obvious. Although normally such a contested issue would be left to trial, in the context of a disputed norm of customary international law the existence of an opposing view can itself be dispositive. As this Court said in *Kazemi*, "customary international law is, by its very nature, unequivocal. It is not binding law if it is equivocal" (para. 102).

190 In this regard, and against Professor Koh's lone essay, we would pit the United Nations General Assembly's *Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises*, U.N. Doc. A/HRC/4/035, February 9, 2007, which states that "preliminary research has not identified the emergence of uniform and consistent state practice establishing corporate responsibilities under customary international law" (para. 34). This is confirmed by the evaluation of Judge Crawford, in the book that the majority cites at para. 97 of its reasons (*Brownlie's Principles of Public International Law*):

> At present, no international processes exist that require private persons or businesses to protect human rights. Decisions of international tribunals focus on states' responsibility for preventing human rights abuses by those within their jurisdiction. Nor is corporate liability for human rights violations yet recognized under customary international law. [Emphasis added; footnotes omitted.]
>
> (Crawford, at p. 630)

191 The authorities thus favour the proposition that corporate liability for human rights violations has *not* been recognized under customary international law; the most that one could credibly say is that the proposition that such liability has been recognized is equivocal. To repeat *Kazemi*, "customary international law is, by its very nature, unequivocal. It is not binding law if it is equivocal" (para. 102). Absent such a binding norm, the workers' cause of action is clearly doomed to fail.

(2) The Doctrine of Adoption Does Not Transform a Prohibitive Rule Into a Liability Rule

192 With respect, we find the majority's analysis in respect of steps (f) and (g) difficult to follow.

193 At paragraph 101, the majority writes that "[t]he prohibition against slavery too is seen as a peremptory norm". We are uncertain how it deduces the potential existence of a liability rule from this uncontroversial statement of a prohibition. Perhaps it sees a liability rule as inherent in a "prohibition", or perhaps it sees the doctrine of adoption as producing a liability rule in response to a prohibition, or perhaps both.8 We do not know.

194 Faced with such uncertainty, we will consider all the plausible reasoning paths that could take the majority from the existence of a prohibition to the existence of a liability rule. We see three such paths that correspond to distinct interpretations of its reasons:

(1) Prohibitions of customary international law *require* the Canadian state to provide domestic liability rules between individuals and corporations. With regard to slavery, the prohibition would require Canada to provide a legal rule pursuant to which enslaved persons could hold a corporation responsible for their enslavement liable. The doctrine of adoption requires our courts to create such rules if they do not already exist. Paragraph 119 of the majority's reasons supports this interpretation.

(2) A prohibition in customary international law itself contains a liability rule between individuals and corporations. With regard to slavery, the prohibition upon slavery would include a subordinate rule that 'a corporation who is responsible for enslavement is liable to enslaved persons'. The doctrine of adoption requires domestic courts to enforce these rules. Paragraphs 127 and 128 of the majority reasons support this interpretation.

(3) General (that is, non-criminal) customary international law requires states to enact laws prohibiting certain actions. International criminal law also prohibits corporations from taking these actions. With regard to slavery, the prohibition upon slavery would mean that, respectively, 'Canada must prohibit and prevent slavery by third parties' and 'it is an international crime for a corporation to enslave someone'. The doctrine of adoption transforms these requirements and prohibitions into tort liability rules. Paragraphs 117 and 122 of the majority reasons support this interpretation.

195 If either of the first two interpretations correctly represents the majority's reasons, then we would respectfully suggest that its reasons depend on customary international law norms that do not exist. If the third interpretation correctly represents the majority's reasons, we would respectfully suggest that its reasons depend on affording to the doctrine of adoption a role it cannot have.

196 If, as in the first interpretation above, the majority's reasons depend on customary international law *requiring* states to provide a civil remedy for breaches of prohibitions, then we say -- first of all -- that this theory is not what the workers have pleaded. The workers did not plead the necessary facts of state practice and *opinio juris*: they did not plead that there exists a general practice among states of providing a civil remedy for breaches of prohibitions, and that states perform that practice out of compliance with customary international law. Nor can the court take judicial notice of such practices, because they are not sufficiently well-established.

197 Further, and more fundamentally, states are typically free to meet their international obligations according to their own domestic institutional arrangements and preferences. Customary international law may well require all states to prohibit slavery, but it does not typically govern the form of that prohibition. A civil liability rule is but one possibility. A prohibition could also be effected through, for example, the criminal law or through administrative penalties. How legislatures accomplish such a goal is typically a matter for them to consider and decide. As the Second Circuit Court of Appeals observed in *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254 (2nd Cir. 2007), the "law of nations generally does not create private causes of action to remedy its violations, but leaves to each nation the task of defining the remedies that are available for international law violations" (at p. 269, citing *Kadic v. Karadziae*, 70 F.3d 232 (2nd Cir. 1995), at p. 246). While it is conceivable that international law could develop to give such a result, it has not done so (*Kazemi*, at para. 153). Asserting that it has done so or that it should do so does not make it so.

198 If, as in the second interpretation above, the majority's reasons depend on an existing a rule of customary international law that renders a corporation directly civilly liable to an individual, then we observe, once again, that this theory is not pleaded.

199 The support for this conclusion in the majority's reasons (at para. 112) consists of the aforementioned academic essay by Professor Koh. Professor Koh's essay states it would not "make sense to argue that international law may impose criminal liability on corporations, but not civil liability". If the majority is relying on this essay as evidence of the existence of such a rule, then we would say simply that a single essay does not constitute state practice or *opinio juris*.

200 Even taken on its own terms as authority for any proposition, the Koh essay does not indicate that customary international law *has* so evolved; rather, it simply speculates that it *could* so evolve. The mere possibility that customary international law *could* change is not sufficient, on a motion to strike, to save a claim from being doomed to fail. Otherwise, all kinds of suppositious claims would succeed on the basis that the legislature *could* create a new statutory cause of action to support them. Of course, on a motion to strike, it is impossible to strike a novel common law claim for novelty alone. The relevant distinction here is that courts have some discretion to change the common law. Courts do not have that discretion in respect of statutory law or customary international law. Courts can recognize a change to customary international law, but they cannot change it directly themselves.

201 We observe also that Professor Koh, in his other work, is clear that his academic project is normative in nature: he does not seek merely to *describe* the existing state of international law, but *to change* international law through his scholarship (see H. H. Koh, *International Law vs. Donald Trump: A Reply*, March 5, 2018 (online)). State practice is not a normative concept, but a descriptive one. It therefore cannot be established based on how a single U.S. academic thinks international law should work, but rather must be based on how states in fact behave. State practice is the difference between civil liability and criminal liability at customary international law. That criminal liability arises from customary international law has been accepted by the states of the international community since Nuremberg. It is precisely this acceptance that creates customary international law.

202 Outside the sphere of criminal law, there is no corresponding acceptance-of-liability rules regarding individuals. This widely accepted view is neatly summarized by Professor Roger O'Keefe, who writes, "[t]he phenomenon of individual criminal responsibility under international law sets this subset of international crimes apart from the general body of public international law, the breach of whose rules gives rise only to the delictual responsibility of any state in breach" (*International Criminal Law* (2015), at pp. 47-48 (footnote omitted)). Indeed, as the majority of this Court observed in *Kazemi* (at para. 104), criminal proceedings and civil proceedings are "seen as fundamentally different by a majority of actors in the international community".

203 Authority from this country also supports the view that customary international law prohibitions do not create civil liability rules. In *Bouzari v. Islamic Republic of Iran* (2004), 71 O.R. (3d) 675, the Court of Appeal for Ontario considered and rejected the argument that the customary international law prohibition against torture "constitutes a right to be free from torture and where there is a right there must be a remedy", and therefore a civil remedy must exist (para. 92). As *Bouzari* correctly held, "[a]s a matter of principle, providing a civil remedy for breach of the prohibition of torture is not the only way to give effect to that prohibition" (at para. 93) and "as a matter of practice, states do not accord a civil remedy for torture committed abroad by foreign states" (para. 94). The issue may be simply stated: a domestic court cannot effect a change to the law by "seeing a widespread state practice that does not exist today" (para. 95).

204 It may be that neither of our first two interpretations of its reasons is correct, and that the majority shares our view that there is no rule of customary international law that requires states to create civil liability rules or that purports to impose civil liability directly. If that is so, then, as in the third interpretation above, the doctrine of adoption must play in the majority's reasons the role of converting a general prohibition upon states and criminal prohibitions upon individuals into a civil liability rule. In our view, this would afford the doctrine of adoption a role it cannot play.

205 It is not enough to simply say that the doctrine of adoption incorporates prohibitive and mandatory rules into the common law. Outside the realm of criminal law, customary international law imposes prohibitions and mandates on states, not private actors. As Judge Crawford puts it, "human rights ... arise against the state, which so far has a virtual monopoly of responsibility" (p. 111). States are the only duty-holders under general customary international law.

206 Nor is it enough to say that the doctrine of adoption must respond to a state's duties under customary international law. We do not dispute that a state's duties may include one to prohibit and another to prevent violations of those aforementioned rights. Nor do we dispute that such a mandatory norm can trigger the doctrine of adoption. Our dispute is limited to *how* the doctrine of adoption leads Canadian law to change in response to recognition of a norm of customary international law. In our view, the three-step process we defined above for determining whether to amend private common law rules in response to the recognition of a mandatory norm of customary international law ought to govern.

207 At the first step, we would identify the mandatory norm at issue here as "Canada must prohibit and prevent slavery by third parties", *mutatis mutandis* for each of the activities alleged to be in violation of international law. We agree that the pleadings may allege that this norm may exist, and further, it is not plain and obvious to us that it does not. We would not therefore strike out the claim on that basis. This brings us to considering the second and third steps of the process for adopting a mandatory norm: determining how the norm would be best given effect, and determining whether any legislation prevents the court from changing the common law to give the norm that effect.

208 At the second step, we say that such a mandatory rule is appropriately given effect through, and only through, the criminal law. Indeed, the majority's reasons appear animated by concerns that are the subject of the criminal law. We will discuss this aspect of its reasons in greater detail in the next section and will not repeat the point here.

209 At the third step, we note that Parliament has, in s. 9 of the *Criminal Code*, clearly prohibited courts from creating criminal laws via the common law. In *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402, at para. 3, this Court explicitly rejected the idea that it could "turn back the clock and re-enter ... a period when the courts rather than Parliament could change the elements of criminal offences". At this step, we conclude that, on this interpretation of the majority's theory of the case, the pleadings are doomed to fail on two bases: first, that violations of the mandatory norms at issue here are properly remedied through the criminal law, for which there is not a private law cause of action; and secondly, that Parliament has prohibited the courts from creating new crimes.

210 The majority's approach is no more tenable if we take a step back and consider it more conceptually. Essentially, on this interpretation, the majority's approach amounts to saying that the doctrine of adoption has what jurists in Europe would call "horizontal effect". Articles of the treaties that constitute the European Union give individuals rights both against the state ("vertical effect") and against other private parties ("horizontal effect") (P. Craig, "Britain in the European Union", in J. Jowell, D. Oliver and C. O'Cinneide, eds., *The Changing Constitution* (8th ed. 2015), 104, at p. 127). In Canada, this Court rejected the idea that the *Charter* has horizontal effect (see *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 597; see also G. Phillipson, "The Human Rights Act, 'Horizontal Effect' and the Common Law: a Bang or a Whimper?" (1999), 62 *Mod. L. Rev.* 824, at p. 824). It would be astonishing were customary international law to have horizontal effect where the *Charter* does not. One wonders if the majority's view of the adoption of customary international law would amount to a new Bill of Horizontal Rights; conceptually, these are very deep waters.

211 The majority's approach also amounts to recognizing a private law cause of action for simple breach of customary international public law. This would be similarly astonishing, since there is no private law cause of action for simple breach of statutory Canadian public law (see *R. in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205; *Holland v. Saskatchewan*, 2008 SCC 42, [2008] 2 S.C.R. 551, at para. 9). As Judge Crawford has explained, a rule of customary international law will not be adopted if it is itself "contradicted by some antecedent

principle of the common law" (p. 66, citing *West Rand Central Gold Mining Company v. Rex*, [1905] 2 K.B. 391, at p. 408, per Lord Alverstone C.J.; *Chung Chi Cheung v. The King*, [1939] A.C. 160 (P.C.), at p. 168, per Lord Atkin).

212 Further yet, the mere existence of international criminal liability rules does not make necessary the creation of domestic torts. As we have already noted, in support of its view that domestic courts can hold corporations civilly liable for breaches of international law, the majority (at para. 112) relies upon an essay by Professor Koh. But this essay concerns the domestic courts of the United States, not Canada. And the law being applied by U.S. courts differs in a highly significant respect. As Professor Koh writes, "Congress passed two statutes -- the Alien Tort Statute and the Torture Victim Protection Act (TVPA) -- precisely to provide civil remedies for international law violations" ("Separating Myth from Reality about Corporate Responsibility Litigation", at pp. 266-67 (emphasis added)). The former, the hoary and historically unique *Alien Tort Statute*, requires American courts to treat international law as creating civil liabilities (*Khulumani*, at p. 270, fn. 5). The *Alien Tort Statute* has no analogue outside the United States (A. Ramasastry and R. C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law -- A Survey of Sixteen Countries* (2006), at p. 24; J. Zerk, *Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies -- A report prepared for the Office of the UN High Commissioner for Human Rights*, February 2014 (online), at p. 45). The existence of these statutes has influenced the peculiar American equivalent to the doctrine of adoption. Essentially, the majority's approach would amount to Americanizing the Canadian doctrine of adoption without accounting for the unique statutory context from which the American doctrine arose. It goes without saying that Canadian courts cannot adopt a U.S. statute when Parliament and the legislatures have not.

213 In short, in order to reach the conclusion it does about the necessity of a tort liability rule, the majority must significantly change the doctrine of adoption. As we will explain below (see section III, subheading C), this is not a change that this Court is empowered to make.

(3) A Tort Remedy Is Not Necessary

214 At what we identified as step (h) of its reasons, the majority suggests that where there is a right, there must be a remedy. We agree. It adds, in what we termed step (i) of its reasons, that this truism signifies there is no bar to Canadian courts granting a civil remedy for violations of customary international law norms. Here is another point of disagreement. In our view, it is possible, even at this early stage of proceedings, to exclude a remedy *for money damages* for violations of customary international law norms. The right to a remedy does not necessarily mean a right to a *particular form, or kind of* remedy. Parliament could prefer another remedy, such as judicial review, or a criminal sanction. As this Court said in *Kazemi*, "[r]emedies are by no means automatic or unlimited; there is no societal consensus that an effective remedy is always guaranteed to compensate for every rights violation" (para. 159).

215 The majority rejects the possibility that existing domestic torts could suffice. In its view, "it is at least arguable that the Eritrean workers' allegations encompass conduct not captured by these existing domestic torts" (para. 123). It tells us it is difficult to refute the concept that "torture is something more than battery" and that "slavery is more than an amalgam of unlawful confinement, assault and unjust enrichment" (para. 126, citing R.F., at para. 4). There is, it says (at para. 125), important "symbolism", in the labelling of an action as "torture" or "battery". It adopts the view that the "remedial consequence of successfully bringing a case is often, or even usually, only a secondary concern" (para. 125, citing G. Virgo, "Characterisation, Choice of Law, and Human Rights", in C. Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 325, at para. 335). The majority also explains that these proposed causes of action are "inherently different from" and have "a more public nature than" traditional torts, since these tortious actions "shoc[k] the conscience" (para. 124, citing M. C. Bassiouni, "International Crimes: *Jus Cogens and Obligatio Erga Omnes*" (1996), 59 *Law & Contemp. Probs.* 63, at p. 69). It concludes by explaining that an appropriate remedy must emphasize "the public nature and importance of the violated rights involved, the gravity of their breach, the impact on the domestic and global rights objectives, and the need to deter subsequent breaches" (para. 129).

216 With respect, these considerations are not relevant to deciding the scope of tort law. A difference merely of

damages or the extent of harm will not suffice to ground a new tort. For example, in *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551, this Court explained that a separate tort of sexual battery was unnecessary because the harms addressed by sexual battery were fully encompassed by battery. The sexual aspect of the claim went to the amount of damages, which did not require the recognition of a separate tort (para. 27). Similarly, the Court of Appeal for Ontario recently held that "an increased societal recognition" of the wrongfulness of conduct did not necessitate the creation of a new tort (*Merrifield v. Canada (Attorney General)*, 2019 ONCA 205, 145 O.R. (3d) 494, at paras. 50-53, leave to appeal refused, [2019] S.C.C.A. No. 174, S.C.C. Bull., September 20, 2019, at p. 7). The point is this: since all torture is battery (or intentional infliction of emotional distress), albeit a particularly severe form thereof, it does not need to be recognized as a new tort. Our law, as is, furnishes an appropriate cause of action.

217 The majority provides plausible reasons for recognizing four new common law *crimes*, were that something courts could do. However, in our respectful view, they are inapposite for determining whether a new common law *tort* should be recognized.

218 The suitability of criminal law, relative to tort law, in addressing this conduct, is readily apparent. Parliament reached precisely this conclusion when it chose to criminalize crimes against humanity (see *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24). Parliament chose not to provide for a liability rule in tort. As we have already mentioned, to find a new tort based on mere degree of harm would contradict *Scalera*. A more profound degree of harm, may, however, be an appropriate reason for crafting a different criminal remedy. "[S]ymbolism", too, is an issue well-addressed by criminal remedies and poorly addressed by tort. The labelling of a crime matters (*R. v. Vaillancourt*, [1987] 2 S.C.R. 636); the labelling of a tort, not so much. Tort is not an area of law in which the primary value of bringing a case is often, or even usually, symbolic. Finally, the tort system has its own, built-in way to adapt to breaches of rights that are more grave or that need to be deterred: by awarding increased damages.

219 The majority also suggests recognizing new nominate torts so that this Court can "ad[d] its voice to others in the international community collectively condemning [these crimes]" and so "furthe[r] the development of an international rule of law" (para. 130, citing H. H. Koh, "Civil Remedies for Uncivil Wrongs: Combatting Terrorism through Transnational Public Law Litigation" (2016), 50 *Tex. Intl L.J.* 661, at p. 675).

220 In making this suggestion, the majority undervalues the tools Canadian courts already have that can be used to condemn crimes against humanity and degrading treatment. First, even were this action formally for the tort of battery, a court can express its condemnation of the conduct through its reasons. Nothing would prevent the trial judge in this case from writing in his or her reasons that Nevsun committed, or was complicit in, forced labour, slavery and other human rights abuses, even if his or her ultimate legal conclusion is that Nevsun committed assault, battery, or other wrongs. Causes of action sometimes go by different names. For example, what this Court referred to as the "unlawful means" tort in *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177, is commonly referred to as "'unlawful interference with economic relations', 'interference with a trade or business by unlawful means', 'intentional interference with economic relations', or simply 'causing loss by unlawful means'" (para. 2). Similarly, what this Court referred to as the "tort of civil fraud" in *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, [2014] 1 S.C.R. 126, at para. 21, and *Mauldin*, at para. 87, is also commonly referred to as the "tort of deceit" (see *Dhillon v. Dhillon*, 2006 BCCA 524, 232 B.C.A.C. 249, at para. 77).

221 A trial court could also express its condemnation through its damage award. Punitive damages, for example, have been recognized by this Court as "straddl[ing] the frontier between civil law (compensation) and criminal law (punishment)", have as a goal the *denunciation* of misconduct (*Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, at paras. 36 and 44). The majority tells us that an award of punitive damages "may be inadequate" to remedy the violation of these international norms (para. 126). It says that a "different and stronger" response may be required (para. 129). But the "different and stronger" response that the majority concludes must be given appears to be a tort with a new name but the same remedy. Again, the better conclusion is that a remedy in criminal law is appropriate, while a remedy in tort law (established by the courts, rather than the legislature) is not.

222 We note also that the majority's approach in this regard would put Canada out of step with other states. As Dr. Zerk explains, although "most jurisdictions provide for the possibility of private claims for compensation for wrongful behaviour", "these kinds of claims are not in most cases aimed at gross human rights abuses specifically" (p. 43). Instead, torts such as "assault", "battery", "false imprisonment", and "negligence" are used (pp. 43-44). Indeed, corporate liability for violations of customary international law generally depends on "ordinary common law torts or civil law delicts" (Ramasastry and Thompson, at p. 22). Such ordinary private law actions provide mechanisms to address the "harm arising out of a grave breach" of international criminal law (p. 24). This is a critical point here, where the workers advance such ordinary private law claims in addition to their claim founded on customary international law. Even were this part of Nevsun's motion to strike to be granted, the workers could pursue in Canada the same relief they could obtain in most other states.

223 And, as we will discuss below in section IV, subheading D, our existing private international law jurisprudence also provides a vehicle by which courts can declare that the law of another state is so morally repugnant that the courts of this country will decline to apply it.

C. *Changing the Limits of International Law Is Not the Job of Courts*

224 Above, we have described how the majority's reasons either depend on customary international law norms that do not exist or depend on affording to the doctrine of adoption a role it does not have. This requires us to consider whether this Court can change the doctrine of adoption so that it provides a civil liability rule for breaches of prohibitions at customary international law. In our view, it cannot, regardless of whether it is framed as recognizing a cause of action for breach of customary international law or as giving horizontal effect to that law.

225 It is of course open to Parliament and the legislatures to make such a change. Absent statutory intervention, however, the ability of courts to shape the law is, as a matter of common-law methodology, constrained. Courts develop the law *incrementally*. This is a manifestation of the unwritten constitutional principle of legislative supremacy, which goes to the core of just governance and to the respective roles of the legislature, the executive and the judiciary (*Watkins v. Olafson*, [1989] 2 S.C.R. 750, at pp. 760-61; *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299, at pp. 436-38; *R. v. Salituro*, [1991] 3 S.C.R. 654, at pp. 666-67; *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd*., [1999] 3 S.C.R. 108, at para. 43; B. McLachlin, "Unwritten Constitutional Principles: What is Going On?" (2006), 4 *N.Z.J.P.I.L.* 147). It also reflects the comparative want of expertise of the courts, relative to the legislature. The legislature has the institutional competence and the democratic legitimacy to enact major legal reform. By contrast, the courts are confined by the record to considering the circumstances of the particular parties before them, and so cannot anticipate all the consequences of a change.

226 The importance, both practical and normative, of confining courts to making only incremental changes to the common law was stated by this Court in *Watkins*, at pp. 760-61:

> This branch of the case, viewed thus, raises starkly the question of the limits on the power of the judiciary to change the law. Generally speaking, the judiciary is bound to apply the rules of law found in the legislation and in the precedents. Over time, the law in any given area may change; but the process of change is a slow and incremental one, based largely on the mechanism of extending an existing principle to new circumstances. While it may be that some judges are more activist than others, the courts have generally declined to introduce major and far-reaching changes in the rules hitherto accepted as governing the situation before them.
>
> There are sound reasons supporting this judicial reluctance to dramatically recast established rules of law. The court may not be in the best position to assess the deficiencies of the existing law, much less problems which may be associated with the changes it might make. The court has before it a single case; major changes in the law should be predicated on a wider view of how the rule will operate in the broad generality of cases. Moreover, the court may not be in a position to appreciate fully the economic and policy issues underlying the choice it is asked to make. Major changes to the law often involve devising subsidiary rules and procedures relevant to their implementation, a task which is better accomplished through consultation between courts and practitioners than by judicial decree. Finally,

> and perhaps most importantly, there is the long-established principle that in a constitutional democracy it is the legislature, as the elected branch of government, which should assume the major responsibility for law reform.
>
> Considerations such as these suggest that major revisions of the law are best left to the legislature. Where the matter is one of a small extension of existing rules to meet the exigencies of a new case and the consequences of the change are readily assessable, judges can and should vary existing principles. But where the revision is major and its ramifications complex, the courts must proceed with great caution. [Emphasis added.]

227 In the same vein, Justice Robert J. Sharpe, writing extra-judicially, has reflected on the limits of the judicial role when faced with polycentric issues:

> The first question is whether the proposed change is of a nature that falls within the capacity of the courts to decide. Judges, as I have argued, should be conscious of the inherent limits of adjudication and the fact that their view of a legal issue will necessarily be limited by the dynamics of the adversarial litigation process. That process is well-suited to deal with the issues posed by bipolar disputes and considerably less capable of dealing with polycentric issues that raise questions and pose problems that transcend the interests of the parties. Judges should hesitate to move the law in new directions when the implications of doing so are not readily captured or understood by looking at the issue through the lens of the facts of the case they are deciding. The legislative process is better suited to consider and weigh competing policy choices that are external to legal rights and duties. Elected representatives have the capacity to reflect the views of the population at large. Government departments have the resources to study and evaluate policy options. The legislative process allows all interested parties to make their views known and encourages consideration and accommodation of competing viewpoints.
>
> The second question relates to the magnitude of the change. Common law judges constantly refer to incremental or interstitial change and characterize the development of the common law as a gradual process of evolution. Former Senior Law Lord Tom Bingham put it this way: it is very much in the common law tradition "to move the law a little further along a line on which it is already moving, or to adapt it to accord with modern views and practices." If the proposed change fits that description, there is a strong tradition to support judicial law-making. It is quite another thing, however, "to seek to recast the law in a radically innovative or adventurous way," as that makes the law "uncertain and unpredictable" and is unfair to the losing party who relied on the law as it existed before the change. Developments of the latter magnitude may best be left to the legislature. [Footnote omitted.]
>
> (*Good Judgment: Making Judicial Decisions* (2018), at p. 93)

Accordingly, for a change to be incremental, it cannot have complex and uncertain ramifications. This Court has repeatedly declined to change the common law in those very circumstances (*Watkins*, at p. 761; *London Drugs Ltd.*, at pp. 436-38; *Salituro*, at pp. 677-78; *Fraser River Pile & Dredge Ltd.*, at para. 44).

228 There is much accumulated wisdom in this jurisprudence. To alter the courts' treatment of customary international law would "se[t] the law on an unknown course whose ramifications cannot be accurately gauged" (*Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, at para. 93). As this Court explained in *Kazemi*, at para. 108:

> The common law should not be used by the courts to determine complex policy issues in the absence of a strong legal foundation or obvious and applicable precedents that demonstrate that a new consensus is emerging. To do otherwise would be to abandon all certainty that the common law might hold. Particularly in cases of international law, it is appropriate for Canadian courts only to follow the "bulk of the authority" and not change the law drastically based on an emerging idea that is in its conceptual infancy.

The majority views such a change as "necessary" (at para. 118), but provides no reason to believe the change will have anything other than complex and uncertain ramifications. Such a fundamental reform to the common law must

be left to the legislature, even though doing so by judge-made law might seem intuitively desirable (*Salituro*, at p. 670).

229 If Parliament wishes to create an action for a breach of customary international law, that is a decision for Parliament itself to take. It is not one for this Court to take on Parliament's behalf. As stated by Professor O'Keefe:

> ... the recognition by the courts of a cause of action in tort for the violation of a rule of customary international law would be no less than the judicial creation of a new tort, something which has not truly happened since the coining of the unified tort of negligence in *Donoghue v Stephenson* in 1932.9 The reason for this is essentially constitutional: given its wide-reaching implications, economic and sometimes political, the creation of a novel head of tort is now generally recognised as better left to Parliament, on account of the latter's democratic legitimacy and superior capacity to engage beforehand in the necessary research and consultation. [Footnote omitted.]
>
> (R. O'Keefe, "The Doctrine of Incorporation Revisited", in J. Crawford and V. Lowe, eds., *The British Year Book of International Law 2008* (2009), 7, at p. 76.)

230 When the English courts determined to give horizontal effect to an international instrument (the European *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221), they did so pursuant to the direction of *a statute* that made it unlawful for a public authority -- which by the terms of the statute included the courts -- to act "in a way which is incompatible with a Convention right" (*Human Rights Act 1998* (U.K.), 1998, c. 42, s. 6(1) and (3)). Similarly, the horizontal effect of the Treaties of the European Union in the United Kingdom depends on a statutory instruction in the *European Communities Act 1972* (U.K.), 1972, c. 68 (*R. (Miller) v. Secretary of State*, [2017] UKSC 5, [2018] A.C. 61, at paras. 62-68). While we agree with the majority's reasoning (at para. 94) that legislative endorsement is not required for there to be *vertical* effect in the common law (that is, an effect against the executive) of a mandatory or prohibitive norm of customary international law, there is no such tradition of *horizontal* effect in the common law (that is, an effect on the relations between private parties) without legislative action. Further, and to the extent such an effect is even possible, it should be governed by the considerations we set out at paras. 174-75 concerning the effect of mandatory and prohibitive norms in private common law.

231 It is thus for Parliament to decide whether to change the doctrine of adoption to provide courts the power to convert prohibitive rules of international law into free-standing torts. Parliament has not done so. While it has created a statutory cause of action for victims of terrorism, it has not chosen to do so for every violation of customary international law (see s. 4 of the *Justice for Victims of Terrorism Act*, S.C. 2012, c. 1, s. 2).

IV. On the Second Theory, the Claims Are Also Bound to Fail

232 We have thus far confined our comments to the theory of the case given by the majority. As part of reading the pleadings generously, however, we must also consider the theory given by the chambers judge and the Court of Appeal. Under this theory, the amended pleadings sought to have the court recognize four new nominate torts *inspired* by international law: use of forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity.

233 On this theory of the case, international law plays a limited role. It will be of merely persuasive authority in recognizing the tort to begin with. It will also play less ongoing significance. Although proving the content of customary international law may be valuable for showing the urgency of recognizing a new tort, once a new tort is recognized, the new tort will have a comfortable home within the common law. If slavery is recognized as a tort, a future litigant will have no need to prove that an edge-case of slavery is a violation of customary international law; they can instead simply invoke the domestic tort. It is far easier for Canadian judges to know the contours of a domestic tort than it is for them to know the contours of customary international law. The transmutation of customary international law into individual domestic torts has another advantage, too. On an edge-case, where it is unclear whether states are obliged to prohibit the conduct under customary international law, Canadian judges will not be faced with a partly empirical question (as they would on the majority's theory of the case), but a normative question.

234 The question that remains is: when should Canadian common law courts recognize these new nominate torts?

235 We explain below, first, the test that Canadian courts have developed for recognizing -- or more precisely, for refusing to recognize -- a new nominate tort. We then apply that test to the four torts the workers allege.

A. *The Test for Recognizing a New Nominate Tort*

236 In *Frame v. Smith*, [1987] 2 S.C.R. 99, at p. 120, Wilson J. (dissenting, but not on this point) described the history of disputed theories for recognizing new torts:

> It has been described in Solomon, Feldthusen and Mills, *Cases and Materials on the Law of Torts* (2nd ed. 1986), as follows (at p. 6):
>
> Initially, the search for a theoretical basis for tort law centred on the issue of whether there was a general principle of tortious liability. Sir John Salmond argued that tort law was merely a patchwork of distinct causes of action, each protecting different interests and each based on separate principles of liability [see Salmond, *The Law of Torts* (6th ed., 1924) at pp. 9-10]. Essentially the law of torts was a finite set of independent rules, and the courts were not free to recognize new heads of liability. In contrast, writers such as Pollock contended that the law of torts was based upon the single unifying principle that all harms were tortious unless they could be justified [see Pollock, *The Law of Torts* (13th ed., 1929) at p. 21]. The courts were thus free to recognize new torts. Glanville Williams suggested a compromise between the two viewpoints. He argued that tort law historically exhibited no comprehensive theory, but that the existing categories of liability were sufficiently flexible to enable tort law to grow and adapt. [Emphasis added.]

Justice Wilson agreed with, and adopted, Glanville Williams's pragmatic approach (p. 120, citing G. L. Williams, "The Foundation of Tortious Liability" (1939), 7 *Cambridge L.J.* 1).

237 Three clear rules for when the courts will not recognize a new nominate tort have emerged: (1) The courts will not recognize a new tort where there are adequate alternative remedies (see, for example, *Scalera*); (2) the courts will not recognize a new tort that does not reflect and address a wrong visited by one person upon another (*Saskatchewan Wheat Pool*, at pp. 224-25); and (3) the courts will not recognize a new tort where the change wrought upon the legal system would be indeterminate or substantial (*Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at paras. 76-77). Put another way, for a proposed nominate tort to be recognized by the courts, at a minimum it must reflect a wrong, be necessary to address that wrong, and be an appropriate subject of judicial consideration.

238 The first rule, that of necessity, acknowledges at least three alternative remedies: another tort, an independent statutory scheme, and judicial review. If any of these alternatives address the wrong targeted by the proposed nominate tort, then the court will decline to recognize it.

239 As we described above, a difference merely of damages or the extent of harm will not suffice to ground a new tort (*Scalera*). The proposed torts of "harassment" and "obstruction" also failed at the necessity stage. As the Saskatchewan Court of Appeal recently observed in *McLean v. McLean*, 2019 SKCA 15, at paras. 103-5 (CanLII), the proposed tort of harassment was entirely encompassed by the tort of intentional infliction of mental suffering and so need not be recognized as a distinct tort (see also *Merrifield*, at para. 42). Similarly, the proposed tort of obstruction -- the plaintiffs had alleged the defendants had obstructed them from clearing trees -- was encompassed by the existing torts of nuisance and trespass (*6165347 Manitoba Inc. v. Jenna Vandal*, 2019 MBQB 69, at paras. 91 and 100 (CanLII)).

240 A statutory remedy can also suffice to show that a new nominate tort is unnecessary. For example, in *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181, at p. 195, this Court held that the *Ontario Human Rights Code*, R.S.O. 1970, c. 318 ("*Code*") foreclosed the development of a common law tort based on the same policies embodied in the *Code*. Similarly, in *Frame*, at p. 111, the Court declined to create a common

law tort concerning alienation of affection in the family context because the legislature had occupied the field through the *Children's Law Reform Act*, R.S.O. 1980, c. 68.

241 The second rule, that the tort must reflect a wrong visited by one person upon another, is also well-established and is reflected in the courts' resistance to creating strict or absolute liability regimes (see, for example, *Saskatchewan Wheat Pool*, at p. 224). It is also the converse of the idea so memorably expressed by Sharpe J.A. in *Jones v. Tsige*, 2012 ONCA 32, 108 O.R. (3d) 241, at para. 69: there, the "facts ... cr[ied] out for a remedy". When the facts do not make such a cry, the courts will not recognize a tort.

242 Finally, the change wrought to the legal system must not be indeterminate or substantial. This rule reflects the courts' respect for legislative supremacy and the courts' mandate to ensure that the law remains stable, predictable and accessible (T. Bingham, *The Rule of Law* (2010), at p. 37). Hence, the Ontario Superior Court's rejection of a proposed tort of "derivative abuse of process" that would provide compensation for someone allegedly injured by another person's litigation. Such a tort, the court noted, would create indeterminate liability (*Harris v. GlaxoSmithKline Inc*., 2010 ONSC 2326, 101 O.R. (3d) 665, aff'd on other grounds, 2010 ONCA 872, 106 O.R. (3d) 661, leave to appeal refused, [2011] S.C.C.A. No. 85, [2011] 2 S.C.R. vii). Similarly, in *Wallace*, this Court rejected the proposed tort of "bad faith discharge" (at para. 78) because it would create a "radical shift in the law" (at para. 77) and contradict "established principles of employment law" (para. 76). A shift will be less radical when it is presaged by some combination of *obiter*, academic commentary, and persuasive foreign judicial activity, none of which are present here.

243 *Jones v. Tsige* provides a rare and instructive example of where a proposed new nominate tort was found by a court to have passed this test. The breach of privacy was indeed seen by the court as a wrong caused by one person to another, and as a wrong for which there existed no other remedy in tort law or in statute. The Court of Appeal for Ontario found support to recognize a cause of action for intrusion upon seclusion in the common law and *Charter* jurisprudence (at para. 66), and looked to other jurisdictions which had recognized a similar cause of action arising from a right to privacy, either by statute or by the common law (paras. 55-64). The court defined the elements of the cause of action (at paras. 70-72) and identified factors to guide an assessment of damages (paras. 87-90). Having undertaken this careful analysis, the court concluded that it had the competence as an institution to make this incremental change to the common law -- it being "within the capacity of the common law to evolve to respond to the problem" (para. 68).

B. *Two of the Proposed Nominate Torts Fail This Test*

244 In our view, the proposed torts of cruel, inhuman or degrading treatment, and "crimes against humanity" both fail this test.

245 The proposed tort of cruel, inhuman or degrading treatment fails the necessity test, since any conduct captured by this tort would also be captured by the extant torts of battery or intentional infliction of emotional distress. To the extent that this tort describes a greater degree of harm than that typically litigated in the conventional torts, this goes only to damages. As this Court found in *Scalera*, no distinct tort is necessary.

246 The proposed tort of "crimes against humanity" also fails, but for a different reason: it is too multifarious a category to be the proper subject of a nominate tort. Many crimes against humanity would be already addressed under extant torts. If there are individual crimes against humanity that would not already be recognized as tortious conduct in Canada, the workers should specify them, rather than rely on a catch-all phrase that includes wrongs already covered. Adopting such a tort wholesale would not be the kind of incremental change to the common law that a Canadian court ought to make.

C. *Two of the Proposed Nominate Torts May Pass This Test*

247 In our view, it is possible the proposed torts of slavery and use of forced labour would pass the test for recognizing a new nominate tort. Recognizing each of these torts -- subject to further development throughout the proceedings -- may prove to be necessary, in that each may capture conduct not independently captured in torts

such as battery, intentional infliction of emotional distress, negligence, or forcible confinement. For example, it is possible that the facts, if fully developed in the course of trial, might show that one person kept another person enslaved without need for any force or violence, simply by convincing that other person that they are rightfully property. Use of forced labour also, by its terms, may include liability that pierces the corporate veil or extends through agency relationships. And, to the extent there are non-tort alternative remedies under the criminal law, they would not restore the victim as tort law would.

248 It is also uncontroversial that each of these torts -- again, subject to further development -- reflects wrongs being done by one person to another.

249 Finally, the admission of these torts would not cause unforeseeable or unknowable harm to Canadian law. Both slavery and use of forced labour are widely understood in this country to be illegal and, indeed, morally reprehensible, and liability for such conduct would herald no great shift in expectations.

250 Nonetheless, for the reasons that follow, we would hold that the attempt to create such nominate torts is doomed to fail.

D. *Slavery and Use of Forced Labour Should Not Be Recognized for the First Time in the Circumstances of This Case*

251 In our view, proposed torts should not be recognized for the first time in a proceeding based on conduct that occurred in a foreign territory, where the workers in this case had no connection to British Columbia at the time of the alleged torts, and where the British Columbian defendant has only an attenuated connection to the tort.

252 In general, tortious conduct abroad will not be governed by Canadian law, even where the wrong is litigated before Canadian courts. It is the law of the place of the tort that will, normally, govern (*Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, at p. 1050). The only exception is when such law is so repugnant to the fundamental morality of the Canadian legal system as to lead the court not to apply it (p. 1054).

253 One of two possibilities may arise when the proceedings in this case continue. It may be that the court finds Eritrean law not so offensive, and proceeds to apply it. In that case, judicial restraint would prevent the courts from recognizing a novel tort in Canadian law, because its application would be moot. Alternatively, if Eritrean law is found to be repugnant, the British Columbia courts would be in the unfortunate position of setting out a position for the first time on these proposed new torts based on conduct that occurred in a foreign state.

254 There are problems, both practical and institutional, with developing Canadian law based on conduct that occurred in a foreign state.

255 The practical problem is that the law that is appropriate for regulating a foreign state may not also be law that is appropriate for regulating Canada. It is trite to say that hard cases make bad law. When a case comes through the public policy exception to conflicts of law, it will, almost by definition, be a hard case.

256 The institutional problem is well expressed by La Forest J. in *Tolofson*, at p. 1052:

> It seems to me self evident, for example, that State A has no business in defining the legal rights and liabilities of citizens of State B in respect of acts in their own country, or for that matter the actions in State B of citizens of State C, and it would lead to unfair and unjust results if it did.

If that is true of legislatures, it is ever the more true for courts. Courts simply must recognize the limits of their institutional competence and the distinct roles of the judiciary vis-à-vis Parliament and the executive (*Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at paras. 46-47). The judiciary is confined to making incremental changes to the common law, and can only respond to the evidence and argument before it. In contrast, the executive has the resources to study complex matters of state, conduct research, and consult with affected groups and the public. Parliament can do so, too, as well as hearing expert testimony through its committees. While

the remedy that a court may order is limited to the question before the court, the executive can craft broad legal and institutional responses to these issues. The executive can create delegated regulatory authority, and implement policy and procedures. Further, whereas courts do not have the jurisdiction or resources to monitor the impact of its decisions, the executive can develop specialized units with a mandate to monitor, make recommendations, implement and, where necessary, adjust a course of action. The domain of foreign relations is, in our view, perhaps the most obvious example of where the executive is competent to act, but where courts lack the institutional competence to do so.

257 Lester B. Pearson, in a speech before the Empire Club of Canada and the Canadian Club of Toronto in 1951, spoke about developing foreign policy in Canada ("Canadian Foreign Policy in a Two Power World", *The Empire Club of Canada: Addresses 1950-1951* (1951), 346). Mr. Pearson emphasized the delicacy of foreign relations, which calls for balancing political, economic and geographical considerations and consultation with other nations -- a role that courts are not institutionally suited to undertake:

> The formulation of foreign policy has special difficulties for a country like Canada, which has enough responsibility and power in the world to prevent its isolation from the consequences of international decisions, but not enough to ensure that its voice will be effective in making those decisions.
>
> Today, furthermore, foreign policy must be made in a world in arms, and in conflict ... .
>
> ...
>
> We all agree, however, that we must play our proper part, no less and no more, in the collective security action of the free world, without which we cannot hope to get through the dangerous days ahead. But how do we decide what that proper part is, having regard to our own political, economic and geographical situation? It is certainly not one which can be determined by fixing a mathematical proportion of what some other country is doing. As long as we live in a world of sovereign states, Canada's part has to be determined by ourselves, but this should be done only after consultation with and, if possible, in agreement with our friends and allies. We must be the judge of our international obligations and we must decide how they can best be carried out for Canada ... . [pp. 349 and 352]

258 Mr. Pearson's speech was given in the Cold War context, and considered Canada's foreign relations policy vis-à-vis two major world powers. Clearly, the landscape of international relations and Canada's role on the world stage have changed dramatically since 1951. Today, as the political and economic relationships between nations become increasingly complex, Mr. Pearson's message is even more compelling: foreign relations is a delicate matter, which the executive -- and not the courts -- is equipped to undertake.

259 Setting out a novel tort in the exceptional circumstance of a foreign state's law being held by the court to be so repugnant to Canadian morality would be an intrusion into the executive's dominion over foreign relations. The courts' role within this country is, primarily, to adjudicate on disputes within Canada, and between Canadian residents. This is the purpose for which the courts have been vested their powers by s. 96 of the *Constitution Act, 1867*. Our courts' legitimacy depends on our place within the constitutional architecture of this country; Canadian courts have no legitimacy to write laws to govern matters in Eritrea, or to govern people in Eritrea. Developing Canadian law in order to respond to events in Eritrea is not the proper role of the court: that is a task that ought to be left to the executive, through the conduct of foreign relations, and to the legislatures and Parliament.

260 In making these observations, we do not question the public policy exception to applying the law indicated by a choice of law exercise. The proper use of that exception, however, is to apply existing Canadian law, which is either the product of legislative enactment or the common law, to situations where applying the foreign law would be repugnant to the consciences of Canadians. That exception should not be used as a back door for the courts to create new law governing the behaviour of the citizens of other states in their home state.

V. Conclusion

261 This appeal engages fundamental questions of procedure and substance. The majority's approach to the procedural question at the heart of a motion to strike will encourage parties to draft pleadings in a vague and

underspecified manner. It offers this lesson: the more nebulous the pleadings and legal theory used to protect them, the more likely they are to survive a motion to strike. This approach will suck much of the utility from the motion to strike. Doomed actions will occupy the superior courtrooms of this country, persisting until the argument collapses at summary judgment or trial. In a moment where courts are struggling to handle the existing caseload, increasing the load is likely not to facilitate access to justice, but to frustrate it.

262 In substance, this appeal is about, as much as anything else, maintaining respect for the appropriate role of each order of the Canadian state. The creation of a cause of action for breach of customary international law would require the courts to encroach on the roles of both the legislature (by creating a drastic change in the law and ignoring the doctrine of incrementalism), and the executive (by wading into the realm of foreign affairs).

263 It is not up to the Court to ignore the foundations of customary international law, which prohibits certain state conduct, in order to create a cause of action against private parties. Rather, it would be up to Parliament to create a statutory cause of action. And, where an issue has consequences for foreign relations, the executive, not courts, is institutionally competent to decide questions of policy. Fundamentally, it is this understanding and respect for the institutional competence of each order of the state that underlies the proper functioning of the domestic and international order.

264 A final word. The implications of the majority's reasons should be comprehended. On the majority's approach to determining what norms of customary international law may exist, generalist judges will be called upon to determine the practices of foreign states and the bases for those practices without hearing evidence from either party. They are to make these determinations aided only by lawyers, who themselves will rarely be experts in this field. The judiciary is institutionally ill-suited to make such determinations.

265 The result, we fear, will be instability. In international law, on the majority's approach, Canadian courts will, perhaps on the word of a single law professor, be empowered to declare what the states of the world have through their practices agreed upon. And this uncertainty will redound upon the law of this country. The line of reasoning set out in this judgment departs from foundational principles of judicial law-making in tort law, and there is no reason to believe that Canadian courts will in the future be any more restrained with their use of international law. So fundamental a remaking of the laws of this country is not for the courts. This, ultimately, is where we part ways with the majority.

266 For these reasons, we would allow the appeal in part and strike the paragraphs of the workers' claims related to causes of action arising from customary international law norms, with costs to Nevsun in this Court and in the courts below.

The reasons of Moldaver and Côté JJ. were delivered by

S. COTÉ J. (dissenting)

I. Introduction

267 My main point of departure from the analysis of my colleague, Abella J., concerns the existence and applicability of the act of state doctrine, or some other rule of non-justiciability barring the respondents' claims. As for the reasons of Brown and Rowe JJ. concerning the respondents' claims inspired by customary international law, while I agree with their analysis and conclusion, I wish to briefly stress a few points on that issue before addressing the act of the state doctrine.

II. Claims Inspired by Customary International Law

268 On this first issue, I must emphasize that the extension of customary international law to corporations represents a significant departure in this area of the law.

269 The question posed to this Court is not whether corporations are "immune" from liability under customary international law (Abella J.'s reasons, at para. 104), but whether customary international law extends the scope of liability for violation of the norms at issue to corporations: *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2nd Cir. 2010), at p. 120, aff'd on other grounds, 569 U.S. 108 (2013). While my colleague recites the rigorous requirements for establishing a norm of customary international law (at paras. 77-78), when it comes to actually analyzing whether international human rights law applies to corporations, she does not engage in the descriptive inquiry into whether there is a sufficiently widespread, representative and consistent state practice. Instead, she relies on normative arguments about why customary international law ought to apply to corporations: see paras. 104-13. A court cannot abandon the test for international custom in order to recast international law into a form more compatible with its own preferences:

> As Professor Dworkin demonstrated in *Law's Empire* (1986), the ordering of competing principles according to the importance of the values which they embody is a basic technique of adjudication. But the same approach cannot be adopted in international law, which is based upon the common consent of nations. It is not for a national court to "develop" international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states.
>
> (*Jones v. Ministry of Interior of Saudi Arabia*, [2006] UKHL 26, [2007] 1 A.C. 270, at p. 298, per Lord Hoffman)

My colleague is indeed correct that international law "does move" (at para. 106), but it moves only so far as state practice will allow. The widespread, representative and consistent state practice and *opinio juris* required to establish a customary rule do not presently exist to support the proposition that international human rights norms have horizontal application between individuals and corporations: J. Crawford, *Brownlie's Principles of Public International Law* (9th ed.
2019), at pp. 102 and 607.

III. Act of State Doctrine

270 Turning to the issue of the act of state doctrine, this is not a conflict of laws case. This Court is not being asked to determine whether the courts of British Columbia have jurisdiction over the parties, whether a court of another jurisdiction is a more appropriate forum to hear the dispute, whether the law of another jurisdiction should be applied or what the content of that foreign law happens to be.

271 Rather, we must decide whether the respondents' claims are amenable to adjudication by courts within Canada's domestic legal order or whether they are allocated to the plane of international affairs for resolution in accordance with the principles of public international law and diplomacy. In my view, the respondents' claims, as pleaded, fall within this latter category. Accordingly, I would allow the appeal and dismiss the respondents' claims in their entirety, as they are not justiciable.

272 In the reasons that follow, I begin by outlining two distinct branches within the act of state doctrine. I conclude that our choice of law jurisprudence does indeed play a similar role to that of certain aspects of the act of state doctrine. However, I also conclude that the act of state doctrine includes a second branch distinct from choice of law which renders some claims non-justiciable. This branch of the doctrine bars the adjudication of civil actions which have their foundation in allegations that a foreign state has violated public international law.

273 Next, I discuss how the doctrine of justiciability and the constitutional separation of powers explain why a Canadian court may not entertain a civil claim between private parties where the outcome depends on a finding that a foreign state violated international law. Finally, I apply the doctrine of justiciability to the respondents' claims, ultimately finding that they are not justiciable, because they require a determination that Eritrea has committed an internationally wrongful act.

A. *Substantive Foundations of the Act of State Doctrine*

274 Whether a national court is competent to adjudicate upon the lawfulness of sovereign acts of a foreign state is a question that has many dimensions. As the United Kingdom Supreme Court explained in *Belhaj v. Straw*, [2017] UKSC 3, [2017] A.C. 964, the act of state doctrine can be disaggregated into an array of categories: para. 35, per Lord Mance; paras. 121-22, per Lord Neuberger; paras. 225-38, per Lord Sumption.

275 My colleague holds that the act of state doctrine, and all of its animating principles, have been completely subsumed by the Canadian choice of law and judicial restraint jurisprudence. With respect, I am unable to agree with her approach. There is another distinct, though complementary, dimension of the act of state doctrine in addition to the choice of law dimension. Claims founded upon a foreign state's alleged breach of international law raise a unique issue of justiciability which is not addressed in my colleague's reasons.

276 Whether this dimension is referred to as a branch of the act of state doctrine or as a specific application of the more general doctrine of justiciability, the Canadian jurisprudence leads to the conclusion that some claims are not justiciable, because adjudicating them would impermissibly interfere with the conduct by the executive of Canada's international relations.

277 I pause to note that the distinction between the non-justiciability and choice of law branches does not exhaust the "array of categories" within the act of state doctrine. Rather, I prefer to consider the doctrine along two axes: (1) unlawfulness under the foreign state's domestic law, as opposed to unlawfulness under international law; and (2) the choice of law branch, as opposed to the non-justiciability branch, of the doctrine. These two axes are interrelated. As I explain below, there are choice of law rules that apply to a court's review of alleged unlawfulness under the foreign state's domestic law and under international law. There are also rules of non-justiciability which address unlawfulness under the foreign state's domestic law and unlawfulness under international law. The discussion that follows is not intended to be comprehensive, as my aim is simply to demonstrate that the issue before this Court is whether a domestic court is competent to adjudicate claims based on a foreign state's violations of international law under the non-justiciability branch of the doctrine.

278 I turn now to the underlying rationale for drawing a distinction between the respective branches of the act of state doctrine.

(1) Choice of Law Branch of the Act of State Doctrine

279 The choice of law branch of the act of state doctrine establishes a general rule that a foreign state's domestic law -- or "municipal law" -- will be recognized and normally accepted as valid and effective: *Belhaj*, at paras. 35 and 121-22. In England, the effect of this principle is that English courts will not adjudicate on the lawfulness or validity of sovereign acts performed by a state under its own laws: *Johnstone v. Pedlar*, [1921] 2 A.C. 262, at p. 290 (H.L.). This branch is focused on whether an English court should give effect to a foreign state's municipal law.

280 There are exceptions to this general rule. The act of state doctrine gives way to the "well-established exception in private international law of public policy": C. McLachlan, *Foreign Relations Law* (2014), at para. 12.157. For example, in *Oppenheimer v. Cattermole*, [1976] A.C. 249, the House of Lords refused to apply a Nazi-era law depriving Jews of their citizenship and property: pp. 277-78. Lord Cross reasoned that "it is part of the public policy of this country that our courts should give effect to clearly established rules of international law", and that the Nazi decree was "so grave an infringement of human rights that the courts of this country ought to refuse to recognize it as a law at all": p. 278. The House of Lords reiterated this principle in *Kuwait Airways Corpn. v. Iraqi Airways Co. (Nos. 4 and 5)*, [2002] UKHL 19, [2002] 2 A.C. 883, holding that the domestic law of a foreign state could be disregarded if it constitutes a serious violation of international law. Iraq had issued a decree expropriating aircrafts of the Kuwait Airways Corporation which were then in Iraq. The House of Lords held that the Iraqi decree was a clear violation of international law and that the English courts were therefore at liberty to refuse to recognize it on grounds of public policy. This shows how international law informs the public policy exception of the choice of law branch.

281 In Canada, similar principles are reflected in this Court's choice of law jurisprudence. In *Laane and Baltser v. Estonian State Cargo & Passenger s. s. Line*, [1949] S.C.R. 530, this Court declined to give effect to a 1940 decree of the Estonian Soviet Socialist Republic that purported to nationalize all Estonian merchant vessels and also purported to have extraterritorial effect. The appeal was decided on the principle that a domestic court will not give effect to foreign public laws that purport to have extraterritorial effect: see p. 538, per Rinfret C.J.; p. 542, per Kerwin J.; p. 547, per Rand J.; pp. 547-51, per Kellock J. However, Rand J. would also have held that, irrespective of the decree's extraterritorial scope, there is a "general principle that no state will apply a law of another which offends against some fundamental morality or public policy": p. 545. I note that no act of state issue actually arose on the facts of that case, as the domestic law branch of the act of state doctrine applies only to acts carried out in the foreign state's territory: see, e.g., *Belhaj*, at paras. 229 and 234, per Lord Sumption. Therefore, it is unsurprising that "[n]o act of state concerns about Estonia's sovereignty or non-interference in its affairs were even raised by the Court": Abella J.'s reasons, at para. 46.

282 In another English case, *Buck v. Attorney General*, [1965] 1 All E.R. 882 (C.A.), the plaintiffs sought a declaration that the constitution of Sierra Leone was invalid. Lord Harman held that an English court could not make a declaration that impugned the validity of the constitution of a foreign state: p. 885. Lord Diplock reasoned that the claim had to be dismissed because the issue of the validity of the foreign law did not arise incidentally:

> The only subject-matter of this appeal is an issue as to the validity of a law of a foreign independent sovereign state, in fact, the basic law prescribing its constitution. The validity of this law does not come in question incidentally in proceedings in which the High Court has undoubted jurisdiction as, for instance, the validity of a foreign law might come in question incidentally in an action on a contract to be performed abroad. The validity of the foreign law is what this appeal is about; it is nothing else. This is a subject-matter over which the English courts, in my view, have no jurisdiction. [pp. 886-87]

283 While the facts of *Buck* fall within the non-justiciability branch, the effect of Lord Diplock's reasoning is that the act of state doctrine does not prevent a court from examining the validity of a foreign law if the court is obliged to determine the content of the foreign law as a choice of law issue. As Professor McLachlan points out, any other approach could lead to perverse results, because a court applying foreign law must apply the law as it would have been applied in the foreign jurisdiction: McLachlan, at para. 12.139.

284 In this regard, too, this Court reached a similar result in *Hunt v. T&N plc*, [1993] 4 S.C.R. 289. The issue in it was whether British Columbia's superior court could rule on the constitutionality of a Quebec statute which prohibited the removal from Quebec of business documents required for judicial processes outside Quebec. This Court approached the question as one of conflict of laws, observing that there was no reason why a court should never be able to rule on the constitutionality of another province's legislation. Ultimately, this Court held that a provincial superior court has jurisdiction to make findings respecting the constitutionality of a statute enacted by the legislature of another province if this issue arises incidentally in litigation before it. The constitutionality of the Quebec statute was not foundational to the claim advanced in the British Columbia courts. Rather, it arose in the discovery process in the context of the parties' obligation to disclose relevant documents, some of which were in Quebec. Therefore, the constitutionality of the statute could properly be considered in the choice of law analysis. Of course, because the facts of that case gave rise to an issue involving the British Columbia courts and Quebec legislation, it is, again, unsurprising that this Court "made no reference to act of state": Abella J.'s reasons, at para. 48.

285 Nonetheless, based on this comparative review of the case law, it appears that this Court's choice of law jurisprudence leads to the same result as the choice of law branch of the English Act of State doctrine: see McLachlan, at paras. 12.24 and 12.126-12.167. To this extent, I agree with Abella J. that that jurisprudence plays a similar role to that of the choice of law branch of the act of state doctrine in the context of alleged unlawfulness under foreign domestic and international law: paras. 44-57. However, this is not true as regards the non-justiciability branch as applied to alleged violations of international law.

(2) Non-justiciability Branch of the Act of State Doctrine

286 The non-justiciability branch of the doctrine is concerned with judicial abstention from adjudicating upon the lawfulness of actions of foreign states: see *Buttes Gas and Oil Co. v. Hammer (No. 3)*, [1982] A.C. 888 (H.L.), at p. 931; McLachlan, at paras. 12.168 and 12.177-12.178. As I explain below, a court should not entertain a claim, even one between private parties, if a central issue is whether a foreign state has violated its obligations under international law.

287 *Blad v. Bamfield* (1674), 3 Swans 604, 36 E.R. 992, may be the earliest case regarding this branch of the act of state doctrine. A Danish man, Blad, had seized property of English subjects (including Bamfield) in Iceland on the authority of letters patent granted by the King of Denmark. Blad was sued in England for this allegedly unlawful act. He sought an injunction to restrain the proceeding. In the High Court of Chancery, Lord Nottingham entered a stay of the proceeding against Blad because the English subjects' defence against the injunction was premised on a finding that the Danish letters patent were inconsistent with articles of peace between England and Denmark. Lord Nottingham reasoned that a misinterpretation of the articles of peace "may be the unhappy occasion of a war" (p. 606), and that it would be "monstrous and absurd" (p. 607) to have a domestic court decide the question of the legality of the Danish letters patent, the meaning of the articles of peace or the question of whether the English had a right to trade in Iceland.

288 Another early case on the act of state doctrine is *Duke of Brunswick v. King of Hanover* (1848), 2 H.L.C.1, 9 E.R. 993. Revolutionaries in the German duchy of Brunswick overthrew the reigning Duke, Charles, in 1830. The King of Hanover deposed Charles in favour of Charles' brother, William, and placed Charles' assets under the guardianship of the Duke of Cambridge. Charles brought an action in which he sought an accounting for the property of which he had been deprived. In the House of Lords, Lord Chancellor Cottenham reasoned that the action was not concerned with determining private rights as between individuals but, rather, concerned an allegation that the King of Hanover had acted contrary to the "laws and duties and rights and powers of a Sovereign exercising sovereign authority": p. 1000. This led the Lord Chancellor to conclude that the English courts cannot "entertain questions to bring Sovereigns to account for their acts done in their sovereign capacities abroad": p. 1000.

289 The leading case on the non-justiciability branch is *Buttes Gas*. The Occidental Petroleum Corporation and Buttes Gas and Oil Co. held competing concessions to exploit disputed oil reserves near an island in the Arabian Gulf. Occidental claimed its right to exploit the reserves under a concession granted by the emirate of Umm al Qaiwain. Buttes Gas claimed its right pursuant to one granted by the emirate of Sharjah. Both emirates, as well as Iran, claimed to be entitled to the island and to its oil reserves. After the United Kingdom intervened, the dispute was settled by agreement. Occidental's concession was subsequently terminated. Occidental alleged that Buttes Gas and Sharjah had fraudulently conspired to cheat and defraud Occidental, or to cause the United Kingdom and Iran to act unlawfully to the injury of Occidental: p. 920. Buttes Gas argued that an English court should not entertain such claims, as they concerned acts of foreign states.

290 In the House of Lords, Lord Wilberforce held that Occidental's claim was not justiciable. He identified a branch of the act of state doctrine which he said was concerned with the applicability of foreign domestic legislation: p. 931. He suggested that this branch was essentially a choice of law rule concerned with the choice of the proper law to apply to a dispute: p. 931. However, he drew one important distinction:

> It is one thing to assert that effect will not be given to a foreign municipal law or executive act if it is contrary to public policy, or to international law (cf. *In re Helbert Wagg & Co. Ltd's Claim* [1956] Ch. 323) and quite another to claim that the courts may examine the validity, under international law or some doctrine of public policy, of an act or acts operating in the area of transactions between states. [p. 931]

291 Lord Wilberforce went on to hold, following *Blad*, *Duke of Brunswick* and other authorities, that private law claims which turn on a finding that a foreign state has acted in a manner contrary to public international law are not justiciable by an English court:

> It would not be difficult to elaborate on these considerations, or to perceive other important inter-state issues and/or or issues of international law which would face the court. They have only to be stated to compel the conclusion that these are not issues upon which a municipal court can pass. Leaving aside all possibility of embarrassment in our foreign relations (which it can be said not to have been drawn to the attention of the court by the executive) there are ... no judicial or manageable standards by which to judge these issues, or to adopt another phrase (from a passage not quoted), the court would be in a judicial no-man's land: the court would be asked to review transactions in which four sovereign states were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were "unlawful" under international law. [p. 938]

292 In the two passages reproduced above, Lord Wilberforce touched on an important point: a distinction must be drawn between the types of problems addressed in justiciability cases and the types of problems addressed in choice of law cases. Private international law is a response to the problem of how to distribute legal authority among competing municipal jurisdictions: R. Banu, "Assuming Regulatory Authority for Transnational Torts: An Interstate Affair? A Historical Perspective on the Canadian Private International Law Tort Rules" (2013), 31 Windsor Y.B. Access Just. 197, at p. 199. However, the problem posed by claims based on violations of public international law is that the international plane constitutes an additional legal system with its own claim to jurisdiction over certain legal questions: McLachlan, at para. 12.22. Thus, conflict of laws rules alone are not capable of addressing the concerns raised by Lord Wilberforce in *Buttes Gas*, because they do not mediate between domestic legal systems and the international legal system. In order to address the problems raised by Lord Wilberforce regarding the legitimacy of a domestic court's consideration of questions of international law, this Court must inquire into whether such questions are justiciable under Canada's domestic constitutional arrangements.

293 Before doing so, I want to express my agreement with Newbury J.A. that the early English cases which underpin the act of state doctrine were received into the law of British Columbia in 1858 by what is now s. 2 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253: 2017 BCCA 401, 4 B.C.L.R. (6th) 91, at para. 123. However, for conceptual clarity, the principles animating early cases such as *Blad* and *Duke of Brunswick* should be reflected through the lens of the modern doctrine of justiciability recognized by this Court in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750. It is to that doctrine which I now turn.

B. *Justiciability of International Law Questions in Canada*

294 Justiciability is rooted in a commitment to the constitutional separation of powers: L. M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (2nd ed. 2012), at p. 289. The separation of powers under the Constitution prescribes different roles for the executive, legislative and judicial orders: *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at pp. 469-70. In exercising its jurisdiction, a court must conform to the separation of powers by showing deference for the roles of the executive and the legislature in their respective spheres so as to refrain from unduly interfering with the legitimate institutional roles of those orders: *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at paras. 29-30. It is "fundamental" that each order not "overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other": *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, at p. 389, per McLachlin J. The doctrine of justiciability reflects these institutional limitations.

295 This Court recognized the existence of a general doctrine of non-justiciability in *Highwood Congregation*, stating that the main question to be asked in applying the doctrine of justiciability is whether the issue is one that is appropriate for a court to decide: para. 32. The answer to that question depends on whether the court asking the question has the institutional capacity to adjudicate the matter and whether its doing so is legitimate: para. 34.

296 A court has the institutional capacity to consider international law questions, and its doing so is legitimate, if they also implicate questions with respect to constitutional rights (*Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125), the legality of an administrative decision (*Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3) or the interface between international law and Canadian public

institutions (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 23). If, however, a court allows a private claim which impugns the lawfulness of a foreign state's conduct under international law, it will be overstepping the limits of its proper institutional role. In my view, although the court has the institutional capacity to consider such a claim, its doing so would not be legitimate.

297 The executive is responsible for conducting international relations: *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 39. In *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176, this Court observed that creating a universal civil jurisdiction allowing torture claims against foreign officials to be pursued in Canada "would have a potentially considerable impact on Canada's international relations", and that such decisions are not to be made by the courts: para. 107. Similar concerns arise in the case of litigation between private parties founded upon allegations that a foreign state has violated public international law. Such disputes "are not the proper subject matter of judicial resolution" (Sossin, at p. 251), because questions of international law relating to internationally wrongful acts of foreign states are not juridical claims amenable to adjudication on "judicial or manageable standards" (*Buttes Gas*, at p. 938, per Lord Wilberforce). Such questions are allocated to the plane of international affairs for resolution in accordance with the principles of public international law and diplomacy.

298 In *Khadr* (2010), this Court justified its interference with the exercise by the executive of an aspect of its power over international relations on the basis that the judiciary possesses "a narrow power to review and intervene on matters of foreign affairs to ensure the constitutionality of executive action": para. 38. However, the same cannot be said of a private claim for compensation which is dependent upon a determination that a foreign state has breached its international obligations. This is not a case in which a court would be abdicating its constitutional judicial review function if it were to decline to adjudicate the claim.

299 *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2005 WL 2082846 (S.D. New York), is an example of how private litigation can interfere with the responsibility of the executive for the conduct of international relations. In *Presbyterian*, a foreign state had sent a diplomatic note to the United States Department of State in response to litigation initiated in the U.S. by Sudanese residents against a company incorporated and domiciled in the foreign state that had operations in Sudan. The allegations were based on violations of international law by Sudan. Although the company's motion to dismiss the claim was not successful, the incident was significant enough to spur the foreign state to send the diplomatic note in which it insisted that its foreign policy was being undermined by the litigation. I would point out in particular that the motion failed because the action as pleaded did "not require a judgment that [the foreign state's foreign policy] was or caused a violation of the law of nations", which suggests that if the reverse were true, the claim would have been barred: para. 5. Thus, even in the case of disputes between private parties, when courts "engage in piecemeal adjudication of the legality of the sovereign acts of states, they risk disruption of our country's international diplomacy": *International Association of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries*, 649 F.2d 1354 (1981), at pp. 1358-60 (C.A., 9th Circuit).

300 As a practical matter, Canadian courts have good reason to refrain from passing judgment on alleged internationally wrongful acts of foreign states. If Canadian courts claimed the power to pass judgment on violations of public international law by states, that could well have unforeseeable and grave impacts on the conduct of Canada's international relations, expose Canadian companies to litigation abroad, endanger Canadian nationals abroad and undermine Canada's reputation as an attractive place for international trade and investment. Sensitive diplomatic matters which do not raise domestic public law questions should be kept out of the hands of the courts.

301 Further, as this doctrine consists in a rule of non-justiciability, it is not amenable to the application of a public policy exception. It arises from the constitutional separation of powers and the limits of the legitimacy of acts of the judiciary. The public importance and fundamental nature of the values at stake cannot render justiciable that which is otherwise not within the judiciary's bailiwick.

302 Abella J. relies on the *Secession Reference* as authority for the proposition that the adjudication of questions of international law is permitted for the purpose of determining the private law rights or obligations of individuals within our legal system: para. 49. With respect, this is an overstatement of the scope of the reasoning in the *Secession Reference*, in which this Court held that it could consider the question whether international law gives the

National Assembly, the legislature or the Government of Quebec the right to effect the secession of Quebec from Canada unilaterally: paras. 21-23. In the Court's view, the question was not a "pure" question of international law, because its purpose was to determine the legal rights of a public institution which exists as part of the domestic Canadian legal order: para. 23. This Court's holding was confined to delineating the scope of Canada's obligation to respect the right to self-determination of the people of Quebec. No issue regarding private law claims or internationally wrongful acts of a foreign state arose in the *Secession Reference*.

303 In its public law decisions, this Court has had recourse to international law to determine issues relating to other public authorities, such as whether municipalities can levy rates on foreign legations (*Reference as to Powers to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943] S.C.R. 208) and whether the federal or provincial governments possess proprietary rights in Canada's territorial sea and continental shelf (*Reference re Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792; *Reference re Newfoundland Continental Shelf*, [1984] 1 S.C.R. 86). It has never held that a Canadian court is free, in adjudicating a private law claim, to decide whether a foreign state -- which does not exist as a part of the domestic Canadian legal order -- has violated public international law.

304 Abella J. also relies on decisions in the extradition and deportation contexts, in which courts consider the human rights records of foreign states as part of their decision-making process: paras. 50-55. However, when Canadian courts examine the human rights records of foreign states in extradition and deportation cases, they do so to ensure that Canada complies with its own international, statutory and constitutional obligations: see *Suresh*. The same cannot be said of a civil claim for compensation. To equate the respondents' civil claim for a private law remedy to claims in the public law extradition and deportation contexts is to disregard the judiciary's statutory and constitutional mandates to consider human rights issues in foreign states in extradition and deportation cases. No such mandate exists in the context of private law claims.

305 In conclusion, although a court has the institutional capacity to consider international law questions, it is not legitimate for it to adjudicate claims between private parties which are founded upon an allegation that a foreign state violated international law. The adjudication of such claims impermissibly interferes with the conduct by the executive of Canada's international relations. That interference is not justified without a mandate from the legislature or a constitutional imperative to review the legality of executive or legislative action in Canada. In the absence of such a mandate or imperative, claims based on a foreign state's internationally wrongful acts are allocated to the plane of international affairs for resolution in accordance with the principles of public international law and diplomacy.

IV. The Respondents' Claims Require a Determination That Eritrea Violated Public International Law

306 In this context, justiciability turns on whether the outcome of the claims is dependent upon the allegation that the foreign state acted unlawfully. If this issue is central to the litigation, the claims are not justiciable: e.g., *Buck*, at pp. 886-87; *Buttes Gas*, at pp. 935-38. By contrast, a court may consider the legality of acts of a foreign state under municipal or international law if the issue arises incidentally: e.g., *Hunt*; *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., International*, 493 U.S. 400 (1990), at p. 406.

307 In *Buck*, the issue of the validity of the foreign state's constitution was central to the plaintiffs' claim, because the plaintiffs were seeking a declaration that the constitution of Sierra Leone was invalid: p. 886. Lord Diplock stated:

> I do not think that this rule [that a state does not purport to exercise jurisdiction over the internal affairs of another state], which deprives the court of jurisdiction over the subject-matter of this appeal because it involves assertion of jurisdiction over the internal affairs of a foreign sovereign state, can be eluded by the device of making the Attorney-General of England a party instead of the government of Sierra Leone. [p. 887]

308 A case to the opposite effect is *Kirkpatrick*, in which the respondent alleged that the petitioner had obtained a construction contract from the Nigerian Government by bribing Nigerian officials, which was prohibited under

Nigerian law. Scalia J. found that the factual predicate for application of the act of state doctrine did not exist in that case, as nothing in the claim required the court to declare an official act of a foreign state to be invalid: p. 405. Scalia J. reasoned that:

> [a]ct of state issues only arise when a court *must decide* -- that is, when the outcome of the case turns upon -- the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine. That is the situation here. Regardless of what the court's factual findings may suggest as to the legality of the Nigerian contract, its legality is simply not a question to be decided in the present suit, and there is thus no occasion to apply the rule of decision that the act of state doctrine requires. [Emphasis in original; p. 406.]

309 Similarly, in *Hunt*, La Forest J. concluded that the issue of the constitutionality of the "foreign" statute arose incidentally, because it arose in a proceeding in which the plaintiff sought the disclosure of relevant documents, which was barred by the impugned Quebec statute. In *Buttes Gas*, on the other hand, Occidental pleaded the tort of conspiracy against Buttes Gas, but to succeed, the claim required a determination that Sharjah, Umm al Qaiwain, Iran and the United Kingdom had violated international law. This was not incidental to the claim, and the House of Lords held that it was not justiciable: p. 938.

310 In the case at bar, the issue of the legality of Eritrea's acts under international law is central to the respondents' claims. To paraphrase Lord Diplock in *Buck*, at p. 887, the respondents are simply using the appellant, Nevsun Resources Ltd., as a device to avoid the application of Eritrea's sovereign immunity from civil proceedings in Canada. The respondents' central allegation is that Eritrea's National Service Program is an illegal system of forced labour (A.R., vol. III, at pp. 162-64) that constitutes a crime against humanity (p. 175). The respondents allege that "Nevsun expressly or implicitly condoned the use of forced labour and the system of enforcement through threats and abuse, by the Eritrean military", and that it is directly liable for injuries suffered by the respondents as a result of its "failure to stop the use of forced labour and the enforcement practices at its mine site when it was obvious ... that the plaintiffs were forced to work there against their will": A.R., vol. III, at p. 178.

311 In other words, the respondents allege that Nevsun is liable because it was complicit in the Eritrean authorities' alleged internationally wrongful acts. As was the case in *Buttes Gas*, Nevsun can be liable only if the acts of the actual alleged perpetrators -- Eritrea and its agents -- were unlawful as a matter of public international law. The case at bar is therefore materially different from *Hunt* and *Kirkpatrick*, in which the legality of the acts of a foreign sovereign state, or of an authority in another jurisdiction, had arisen incidentally to the claim.

312 To obtain relief, the respondents would have to establish that the National Service Program is a system of forced labour that constitutes a crime against humanity. This means that determinations that the Eritrean state acted unlawfully would not be incidental to the allegations of liability on Nevsun's part. In my view and with respect, Newbury J.A. erred in finding that the respondents were not asking the court to "inquire into the legality, validity or 'effectiveness' of the acts of laws or conduct of a foreign state": C.A reasons, at para. 172. As she had noted earlier in her reasons -- and I agree with her on this point -- given how the complaint was being pleaded, Nevsun could only be found liable if "Eritrea, its officials or agents were found to have violated fundamental international norms and Nevsun were shown to have been complicit in such conduct": para. 92. The respondents' claims, as pleaded, require a determination that Eritrea has violated international law and must therefore fail.

V. Conclusion

313 It is plain and obvious that the respondents' claims are bound to fail, because private law claims which are founded upon a foreign state's internationally wrongful acts are not justiciable, and the respondents' claims are dependent upon a determination that Eritrea has violated its international obligations. Additionally, for the reasons given by Brown and Rowe JJ., I find that it is plain and obvious that the respondents' causes of action which are inspired by customary international law are bound to fail. Accordingly, I would allow the appeal and dismiss the respondents' claims.

Appeal dismissed with costs, BROWN *and* ROWE JJ. *dissenting in part and* MOLDAVER *and* COTÉ JJ. *dissenting*.

Solicitors:

Solicitors for the appellant: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the respondents: Camp Fiorante Matthews Mogerman, Vancouver.

Solicitors for the intervener the International Human Rights Program, University of Toronto Faculty of Law: Waddell Phillips Professional Corporation, Toronto; University of Toronto, Toronto.

Solicitors for the interveners EarthRights International and the Global Justice Clinic at New York University School of Law: Arvay Finlay, Vancouver.

Solicitors for the interveners Amnesty International Canada and the International Commission of Jurists: Champ & Associates, Ottawa; Power Law, Vancouver; University of Ottawa, Ottawa.

Solicitors for the intervener the Mining Association of Canada: Davies Ward Phillips & Vineberg, Toronto.

Solicitors for the intervener MiningWatch Canada: Trudel Johnston & Lespérance, Montréal; Andrew E. Cleland, Montréal.

---

1 Eritrean workers' amended notice of civil claim, at paras. 7, 53, 56(a), 60, 63, 66, 70 and 71 (A.R., vol. III, at p. 159).

2 Nevsun's notice of application: application to strike workers' customary international law claims as disclosing no reasonable claim (A.R., vol. III, at p. 58).

3 As Anne Warner La Forest writes: "[I]f custom is indeed the law of the land, then the argument in favour of judicial notice, as traditionally understood, is a strong one. It is a near perfect syllogism. If custom is the law of the land, and the law of the land is to be judicially noticed, then custom should be judicially noticed" (p. 381).

4 See chambers judgment, at paras. 427, 444, 455 and 465-66.

5 That this creates a paradox of sorts is a well-known problem in the theory of customary international law (see, for example, J. Kammerhofer, "Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems" (2004), 15 *Eur. J. Int'l L.* 523). It is not a paradox we have cause to address in this case.

6 To be clear, we do not mean to suggest that relief in the nature of *certiorari* and *mandamus* are the only remedies available in such a situation: for example, equitable remedies such as injunctive or declaratory relief may also be available.

7 We say "private" common law in contradistinction to "public" common law. Public common law is the law that governs the activities of the Crown, and is of course the law related to the executive branch, discussed previously. "Private" common law is law that governs relations between non-state entities.

8 There is, of course, a further possibility, but it is not one that the majority advances. It may be neither the prohibition at customary international law nor the doctrine of adoption that creates the liability rule. Rather, it would be a prosaic change to the common law that creates the liability rule, inspired by the recognition that an action prohibited at customary international law is wrongful. This was the theory of the case by which the chambers judge upheld the pleadings. We consider and reject this theory in Part IV of our reasons.

9 This statement was written prior to *Jones v. Tsige*, 2012 ONCA 32, 108 O.R. (3d) 241.

R. v. Find, [2001] 1 S.C.R. 863

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

2000: October 13 / 2001: May 24.

File No.: 27495.

[2001] 1 S.C.R. 863 | [2001] 1 R.C.S. 863 | [2001] S.C.J. No. 34 | [2001] A.C.S. no 34 | 2001 SCC 32

Karl Find, appellant; v. Her Majesty The Queen, respondent, and The Attorney General for Alberta and the Criminal Lawyers' Association (Ontario), interveners.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO (110 paras.)

Case Summary

Criminal law — Jurors — Right to challenge for cause — Nature of offence — Whether charges of sexual assault against children raise realistic possibility of juror partiality entitling accused to challenge for cause — Criminal Code, R.S.C. 1985, c. C-46, s. 638(1)(b).

The accused was charged with 21 counts of sexual offences involving complainants ranging between 6 and 12 years of age at the time of the alleged offences. Prior to jury selection, he applied to challenge potential jurors for cause, arguing that the nature of the charges against him gave rise to a realistic possibility that some jurors might be unable to try the case against him impartially and solely on the evidence before them. The trial judge rejected the application. The accused was tried and convicted on 17 of the 21 counts. The majority of the Court of Appeal dismissed the accused's appeal, upholding the trial judge's ruling not to permit the accused to challenge prospective jurors for cause.

Held: The appeal should be dismissed. The nature of the charges against the accused did not give rise to the [page864] right to challenge prospective jurors for cause on the ground of partiality.

Section 638(1)(b) of the Criminal Code permits a party to challenge for cause where a prospective juror is not indifferent between the Crown and accused. Lack of indifference constitutes partiality. Establishing a realistic potential for juror partiality generally requires satisfying the court on two matters: (1) that a widespread bias exists in the community; and (2) that some jurors may be incapable of setting aside this bias, despite trial safeguards, to render an impartial decision. The first branch of the test is concerned with the existence of a material bias, while the second is concerned with the potential effect of the bias on the trial process. However, the overarching consideration, in all cases, is whether there exists a realistic potential for partial juror behaviour. The first branch involves two concepts: "bias" and "widespread". "Bias" in the context of challenges for cause refers to an attitude that could lead jurors to decide the case in a prejudicial and unfair manner. Prejudice capable of unfairly affecting the outcome of the case is required. Bias is not determined at large but in the context of the specific case and may flow from a number of different attitudes. The second concept, "widespread", relates to the prevalence or incidence of the bias in question. The bias must be sufficiently pervasive in the community to raise the possibility that it may be harboured by members of a jury pool. If widespread bias is shown, the second branch of the test requires an accused to show that some jurors may not be able to set aside their bias despite the cleansing effect of the trial judge's instructions and the trial process itself. Ultimately, the decision to allow or deny an application to challenge for cause falls to the discretion of the trial judge. Where a realistic potential for partiality is shown to exist, the right to challenge must follow. If in doubt, the judge should err on the side of permitting challenges. Since jurors are presumed to be impartial, in order to rebut the presumption of impartiality, a party must call evidence or ask the trial judge to take judicial notice of facts, or both. In addition, the judge may draw inferences from events that occur in

the proceedings and may make common sense inferences about how certain biases, if proved, may affect the decision-making process. The accused did not call any evidence in support of his application but relied heavily on proof by judicial notice. The threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by [page865] resort to readily accessible sources of indisputable accuracy.

Here, the material presented by the accused falls short of grounding judicial notice of widespread bias in Canadian society against an accused in sexual assault trials. First, while the widespread nature of abuse and its potentially traumatic impact are not disputed, widespread victimization, standing alone, fails to establish widespread bias that might lead jurors to discharge their task in a prejudicial and unfair manner. Second, strong views about a serious offence do not ordinarily indicate bias and nothing in the material supports the contention, nor is it self-evident, that an exception arises in the case of sexual assaults on children. Third, there was also no proof that widespread myths and stereotypes undermine juror impartiality. While stereotypical beliefs might incline some jurors against an accused, it is not notorious or indisputable that they enjoy widespread acceptance in Canadian society. Fourth, although crimes arouse deep and strong emotions, one cannot automatically equate strong emotions with an unfair and prejudicial bias against the accused. Jurors are not expected to be indifferent toward crimes. Strong emotions are common to the trial of many serious offences and have never grounded a right to challenge for cause. The proposition that sexual offences are generically different from other crimes in their tendency to arouse strong passions is debatable, and does not, therefore, lend itself to judicial notice. Fifth, the survey of past challenge for cause cases involving sexual offences does not, without more, establish widespread bias arising from sexual assault charges. The number of prospective jurors disqualified, although relied on as support for judicial notice of widespread bias, is equally consistent with the conclusion that the challenge processes disqualified prospective jurors for acknowledging the intense emotions, beliefs, experiences and misgivings anyone might experience when confronted with the prospect of sitting as a juror [page866] on a case involving charges of sexual offences against children. Lastly, the theory of "generic prejudice" against accused persons in sexual assault trials has not been proved, nor could judicial notice be taken of the proposition that such prejudice exists. While judicial notice could be taken of the fact that sexual crimes are almost universally abhorred, this does not establish widespread bias arising from sexual assault trials.

Although the accused failed to satisfy the first branch of the test for partiality, it is prudent to consider the second branch, as the two parts are not watertight compartments. It is open to a trial judge reasonably to infer, in the absence of direct evidence, that some strains of bias by their very nature may prove difficult for jurors to identify and eliminate from their reasoning. The strength of the inference varies with the nature of the bias in issue, and its amenability to judicial cleansing. Fundamental distinctions exist between racial bias and the more general bias relating to the nature of the offence itself. Firstly, racial bias may impact more directly on a jury's decision than bias stemming from the nature of the offence because it is directed against a particular class of accused by virtue of an identifiable immutable characteristic. Secondly, trial safeguards may be less successful in cleansing racial prejudice because of its subtle, systemic and often unconscious operation. Bias directed toward the nature of the offence, however, is more susceptible to cleansing by the rigours of the trial process because it is more likely to be overt and acknowledged. The trial judge is more likely to address these concerns in the course of directions to the jury. Moreover, many of the safeguards the law has developed may be seen as a response to this type of bias. In the absence of evidence that strongly held beliefs or attitudes may affect jury behaviour in an unfair manner, it is difficult to conclude that they could not be cleansed by the trial process. It is speculative to assume that [page867] jurors will act on their beliefs to the detriment of an accused, in violation of their oath or affirmation, the presumption of innocence and the directions of the trial judge. As well, absent evidence to the contrary, there is no reason to believe that stereotypical attitudes about accused persons charged with a crime of a sexual nature are more elusive of the cleansing measures than stereotypical attitudes about complainants. It follows that such myths and stereotypes, even if widespread, provide little support for any inference of a behavioural link between these beliefs and the potential for juror partiality. Finally, absent evidence, it is highly speculative to suggest that the emotions surrounding sexual crimes will lead to prejudicial and unfair juror behaviour. The safeguards of the trial process and the instructions of the trial judge are designed to replace emotional reactions with rational, dispassionate assessment. Our long experience in the context of the trial of other serious offences suggests that our faith in this

cleansing process is not misplaced. The accused failed to establish that sexual offences give rise to a strain of bias that is uniquely capable of eluding the cleansing effect of trial safeguards.

Cases Cited

Applied: R. v. Williams, [1998] 1 S.C.R. 1128; R. v. Parks (1993), 84 C.C.C. (3d) 353; R. v. Sherratt, [1991] 1 S.C.R. 509; R. v. Betker (1997), 115 C.C.C. (3d) 421; referred to: R. v. K. (A.) (1999), 45 O.R. (3d) 641; R. v. Barrow, [1987] 2 S.C.R. 694; R. v. G. (R.M.), [1996] 3 S.C.R. 362; R. v. O'Connor, [1995] 4 S.C.R. 411; R. v. Carosella, [1997] 1 S.C.R. 80; R. v. Lyons, [1987] 2 S.C.R. 309; R. v. Harrer, [1995] 3 S.C.R. 562; M. (A.) v. Ryan, [1997] 1 S.C.R. 157; R. v. Leipert, [1997] 1 S.C.R. 281; R. v. Hubbert (1975), 29 C.C.C. (2d) 279; R. v. L. (R.) (1996), 3 C.R. (5th) 70; R. v. Mattingly (1994), 28 C.R. (4th) 262; R. v. Potts (1982), 66 C.C.C. (2d) 219; R. v. Alli (1996), 110 C.C.C. (3d) 283; R. v. Seaboyer, [1991] 2 S.C.R. 577; R. v. Lavallée, [1990] 1 S.C.R. 852; R. v. Hillis, [1996] O.J. No. 2739 (QL); R. v. Osolin, [1993] 4 S.C.R. 595; R. v. Ewanchuk, [page868] [1999] 1 S.C.R. 330; R. v. W. (R.), [1992] 2 S.C.R. 122; R. v. D.D., [2000] 2 S.C.R. 275, 2000 SCC 43.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 11(d). Criminal Code, R.S.C. 1985, c. C-46, ss. 626 to 644, 629(1), 632 [am. 1992, c. 41, s. 2], 634, 638(1)(b), (2), 640(2), 649, 658(1).

Authors Cited

Bala, N. "Double Victims: Child Sexual Abuse and the Canadian Criminal Justice System", in W. S. Tarnopolsky, J. Whitman and M. Ouellette, eds., Discrimination in the Law and the Administration of Justice. Montreal: Thémis, 1993, 231. Canada. Law Reform Commission. Studies on the Jury. "Jury Selection", by Perry Schulman and Edward R. Myers. Ottawa: The Commission, 1979. Granger, Christopher. The Criminal Jury Trial in Canada, 2nd ed. Scarborough, Ontario: Carswell, 1996. New Oxford Dictionary of English. Oxford: Clarendon Press, 1998, "bias". Paciocco, David. "Challenges for Cause in Jury Selection after Regina v. Parks: Practicalities and Limitations". Toronto: Canadian Bar Association - Ontario, February 11, 1995. Sopinka, John, Sidney N. Lederman, and Alan W. Bryant. The Law of Evidence in Canada, 2nd ed. Toronto: Butterworths, 1999. Tanovich, David M., David M. Paciocco, and Steven Skurka. Jury Selection in Criminal Trials: Skills, Science, and the Law. Concord, Ontario: Irwin Law, 1997. Vidmar, Neil. "Generic Prejudice and the Presumption of Guilt in Sex Abuse Trials" (1997), 21 Law & Hum. Behav. 5. Wiener, Richard L., Audrey T. Feldman Wiener, and Thomas Grisso. "Empathy and Biased Assimilation of Testimonies in Cases of Alleged Rape" (1989), 13 Law & Hum. Behav. 343.

APPEAL from a judgment of the Ontario Court of Appeal (1999), 126 O.A.C. 261, [1999] O.J. No. 3295 (QL), dismissing the accused's appeal from his conviction on 17 counts relating to sexual offences. Appeal dismissed.

[page869]

David M. Tanovich and Umberto Sapone, for the appellant. Jamie Klukach and Jennifer Woollcombe, for the respondent. David M. Paciocco, for the intervener, the Criminal Lawyers' Association (Ontario). Written submission by Jack Watson, Q.C., for the intervener, the Attorney General for Alberta.

Solicitors for the appellant: Pinkofsky Lockyer, Toronto; Sapone & Cautillo, Toronto. Solicitor for the respondent: The Ministry of the Attorney General, Toronto. Solicitors for the intervener, the Criminal Lawyers' Association (Ontario): Edelson & Associates, Ottawa. Solicitor for the intervener, the Attorney General for Alberta: The Attorney General for Alberta, Edmonton.

The judgment of the Court was delivered by

McLACHLIN C.J.

I - Introduction

1 Trial by jury is a cornerstone of Canadian criminal law. It offers the citizen the right to be tried by an impartial panel of peers and imposes on those peers the task of judging fairly and impartially. Since our country's earliest days, Canadian jurors have met this challenge. Every year in scores of cases, jurors, instructed that they must be impartial between the prosecution and the accused, render fair and carefully deliberated verdicts. Yet some cases may give rise to real fears that, despite the safeguards of the trial process and the directions of the trial judge, some jurors may not be able to set aside personal views and function impartially.

2 The criminal law has developed procedures to address this possibility. One of the most important is the right of the accused to challenge a potential juror "for cause" where legitimate concerns arise. This Court recently held that widespread prejudice against the accused's racial group may permit an accused to challenge for cause: R. v. Williams, [1998] 1 S.C.R. 1128. In this appeal we are asked to find that charges of sexual assault of children similarly evoke widespread prejudice in the community [page870] and also entitle the accused to challenge prospective jurors for cause.

3 At stake are two important values. The first is the right to a fair trial by an impartial jury under s. 11(d) of the Canadian Charter of Rights and Freedoms. The second is the need to maintain an efficient trial process, unencumbered by needless procedural hurdles. Our task is to set out guidelines that ensure a fundamentally fair trial without unnecessarily complicating and lengthening trials and increasing the already heavy burdens placed on jurors.

4 The appellant was charged with sexual assault of children. Before the jury was empanelled, he applied to challenge the potential jurors for cause. The nature of the charges against him, he contended, gave rise to a realistic possibility that some prospective jurors might harbour such prejudice that they would be unable to act impartially and try the case solely on the evidence before them. The trial judge rejected this request, as did the majority of the Ontario Court of Appeal. Before this Court, the appellant reasserts his claim that the denial of the right to challenge for cause violated s. 638(1)(b) of the Criminal Code, R.S.C. 1985, c. C-46, and deprived him of his Charter right to a fair trial.

5 I conclude that the appellant has not established the right to challenge for cause. No basis has been shown to support the conclusion that charges of sexual assault against children raise a realistic possibility of juror partiality entitling the accused to challenge for cause. Accordingly, the appeal must be dismissed.

II - History of the Case

6 The appellant was tried on 21 counts of sexual assault involving three complainants, who ranged [page871] between the ages of 6 and 12 at the time of the alleged offences. Prior to jury selection, defence counsel applied to challenge potential jurors for cause. No evidence was led in support of this application; rather, defence counsel contended a realistic potential for juror partiality arose from the ages of the alleged victims, the high number of alleged assaults, and the alleged use of violence. Defence counsel proposed that the following questions be put to potential jurors:

> Do you have strong feelings about the issue of rape and violence on young children?
>
> If so, what are those feelings based on?
>
> Would those strong feelings concerning the rape and violence on young children prevent you from giving Mr. Find a fair trial based solely on the evidence given during the trial of this case?

The trial judge, in a brief oral ruling, dismissed the application on the basis that it simply "doesn't fall anywhere near the dicta of the Court of Appeal in Regina v. Parks" (in R. v. Parks (1993), 84 C.C.C. (3d) 353, the Ontario Court of Appeal held that the accused was entitled to challenge potential jurors for cause on the basis of racial prejudice).

7 Later, during the process of empanelling the jury, a potential juror spontaneously offered that he had two children, stating "I just don't think I could separate myself from my feelings towards them and separate the case". This prospective juror was peremptorily challenged, and defence counsel renewed the request to challenge for cause, to no avail. The appellant was tried and convicted on 17 of the 21 counts.

8 The appellant appealed on the ground, inter alia, that the trial judge erred in not allowing challenges for cause. The spontaneous admission of the potential juror during the selection process was the only evidence relied upon before the Ontario Court of Appeal. The majority, per McMurtry C.J.O., held [page872] that this admission did not demonstrate a realistic potential for partiality and offered no evidentiary basis for allowing challenges for cause: (1999), 126 O.A.C. 261, at para. 8. Since no other evidence was led, the appellant could succeed only if the court could take judicial notice of a widespread bias in the community in relation to sexual offences of this kind. The majority held that judicial notice could not be taken of that fact, for the reasons articulated in R. v. K. (A.) (1999), 45 O.R. (3d) 641, a judgment released concurrently. Moldaver J.A. dissented on the challenge for cause issue, also relying on his reasons from K. (A.). Since both opinions import the substance of their reasons from the companion case of K. (A.), it is necessary to consider this case in some detail.

9 K. (A.) involved two brothers charged with the sexual assault of children aged 4 to 12 years at the time of the alleged assaults. The majority of the Court of Appeal, per Charron J.A., upheld the trial judge's decision to deny challenges for cause, while allowing the appeal on other grounds. Charron J.A. emphasized the distinction between racial prejudice and prejudice against persons charged with sexual assault, arguing that the first goes to a want of indifference towards the accused while the second relates to a want of indifference towards the nature of the crime. The connection between racial prejudice and a particular accused is direct and logical, whereas "strong attitudes about a particular crime, even when accompanied by intense feelings of hostility and resentment towards those who commit the crime, will rarely, if ever, translate into partiality in respect of the accused" (para. 41). She rejected the argument that this Court's decision in Williams, supra, expanded the right to challenge for cause. While Williams recognized the possibility of bias arising from the nature of an offence, it did not eliminate the need to show a realistic potential for partiality, which remains [page873] the governing test for challenges for cause. This test was not met in the case before the court.

10 Charron J.A. found little support for the accused's application in statistics indicating widespread sexual abuse in Canadian society. These statistics, she observed, only demonstrate the prevalence of abuse; they do not indicate a resultant bias, let alone the nature of that bias or its impact on jury deliberation. To her mind, they did not support the inference that there exists a realistic risk of juror partiality. As to the appellant's contention that widespread attitudes about sexual offences may cause jurors to act contrary to their oath, Charron J.A. concluded that the material before the court did not describe the alleged attitudes, or indicate how they would affect juror behaviour. She noted that the work of Professor Neil Vidmar, often advanced in support of the concept of generic prejudice, is the subject of heated debate and suffers from a number of flaws, most notably a lack of attention to the impact of juror attitudes on deliberation behaviour.

11 Charron J.A. also found that the presence of "strong feelings, opinions and beliefs" is not so notorious as to be the subject of judicial notice - in fact, it was unclear exactly what beliefs and opinions were being targeted for judicial notice. Beliefs and opinions regarding allegations of sexual abuse are all over the map: some believe children never lie about abuse, others believe that children are especially susceptible to the influence of adults, and that their testimony should not be relied [page874] upon; some believe the trial system to be stacked in favour of the accused, others the complainant. Even if these opinions and beliefs are accepted as widespread, they are likely to be diffused in deliberation. The existence of feelings, opinions and beliefs about the crime of sexual assault does not translate into partiality - jurors are neither presumed, nor desired, to function as blank slates.

12 Finally, Charron J.A. remained unconvinced by evidence that a high proportion of prospective jurors were successfully challenged for cause in cases where challenges were allowed. She found it "impossible to draw any meaningful inference from the answers provided by the jurors when confronted with general questions such as those found ... in this case and in other cases relied upon" (K. (A.), supra, at para. 51). Many of the responses

demonstrated nothing more than that the candidate would have difficulty hearing the case. No meaningful direction had been provided by the trial judge on the nature of jury duty or the meaning of impartiality, and no distinction drawn between partiality and the beliefs, emotions and opinions that influence all decision making.

13 Moldaver J.A., dissenting on this issue, was satisfied that a "realistic potential" of juror partiality arises from the nature of sexual assault charges, grounding a right in the accused to challenge prospective jurors for cause. Considering the evidence in its entirety, and taking judicial notice of what he found to be notorious facts, he made a number of preliminary findings: (1) sexual abuse impacts a large percentage of the population, supporting a reasonable inference that any jury panel may contain victims, perpetrators and people closely associated with them; (2) the effects of sexual abuse, or wrongful allegations, are potentially devastating and lifelong; (3) sexual assault tends to be committed [page875] along gender lines; (4) women and children have been subjected to systemic discrimination, including in the justice system - recent changes have gone too far for some, but not far enough for others; (5) where challenges for cause have been permitted, literally hundreds of potential jurors have been found partial; and (6) unlike many crimes, a wide variety of stereotypes and beliefs surround the crime of sexual abuse.

14 Moldaver J.A. concluded that these factors, in combination, raised a realistic concern about juror partiality. At the very least, they left him in doubt, which should be resolved in favour of the accused: Williams, supra, at para. 22. While asserting that challenges for cause based on the nature of the offence are exceptional, he concluded that "unlike other crimes, by its nature, the crime of sexual abuse can give rise to intense and deep-seated biases that may be immune to judicial cleansing and highly prejudicial to an accused" (K. (A.), supra, at para. 189).

15 Two arguments held particular sway with Moldaver J.A. First, he accepted that the high incidence of juror disqualification where challenges for cause were allowed disclosed the existence of a widespread bias against persons charged with sexual assault. Second, he adopted Professor David Paciocco's theory that the prevalence of sexual assault and the politicization of this offence have created two groups of people, "dogmatists" and "victims", both of which contain people who may be unable to set aside their political convictions or experiences with abuse to render an impartial decision.

[page876]

III - Relevant Statutory and Constitutional Provisions

16 Criminal Code, R.S.C. 1985, c. C-46

> 638. (1) A prosecutor or an accused is entitled to any number of challenges on the ground that
>
> ...
>
> (b) a juror is not indifferent between the Queen and the accused;
>
> ...
>
> (2) No challenge for cause shall be allowed on a ground not mentioned in subsection (1).

Canadian Charter of Rights and Freedoms

> 11. Any person charged with an offence has the right
>
> ...
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

IV - Issue

17 Did the nature of the charges against the accused give rise to the right to challenge jurors for cause on the ground of partiality?

V - Analysis

A. Overview of the Jury Selection Process

18 To provide context and guidance to the determination of this issue, it is necessary to consider the process of jury selection and the place of challenges for cause in that process.

19 The jury selection process falls into two stages. The first is the "pre-trial" process, whereby a panel (or "array") of prospective jurors is organized and made available at court sittings as a pool from which trial juries are selected. The second stage is the "in-court" process, involving the selection of a trial jury from this previously prepared panel. Provincial [page877] and federal jurisdictions divide neatly between these two stages: the first stage is governed by provincial legislation, while the second stage falls within the exclusive domain of federal law (see C. Granger, The Criminal Jury Trial in Canada (2nd ed. 1996), at pp. 83-84; R. v. Barrow, [1987] 2 S.C.R. 694, at pp. 712-13).

20 Both stages embody procedures designed to ensure jury impartiality. The "pre-trial" stage advances this objective by randomly assembling a jury pool of appropriate candidates from the greater community. This is assured by provincial legislation addressing qualifications for jury duty; compilation of the jury list; the summoning of panel members; selection of jurors from the jury list; and conditions for being excused from jury duty. These procedures furnish, so far as possible, a representative jury pool: R. v. Sherratt, [1991] 1 S.C.R. 509, at pp. 525-26; P. Schulman and E. R. Myers, "Jury Selection", in Studies on the Jury (1979), a report to the Law Reform Commission of Canada at p. 408.

21 The "in-court" process is governed by ss. 626 to 644 of the Criminal Code. Its procedures directly address juror impartiality. The selection of the jury from the assembled pool of potential jurors occurs in an open courtroom, with the accused present. The jury panel is brought into the courtroom and the trial judge makes a few opening remarks to the panel. Provided the validity of the jury panel itself is not challenged (pursuant to the grounds listed in s. 629(1)), the Registrar reads the indictment, the accused enters a plea, and the empanelling of the jury immediately begins: see Sherratt, supra, at pp. 519-22.

22 Members of the jury pool may be excluded from the jury in two ways during the empanelling process. First, the trial judge enjoys a limited preliminary power to excuse prospective jurors. This is referred to as "judicial pre-screening" of the jury array. At common law, the trial judge was empowered [page878] to ask general questions of the panel to uncover manifest bias or personal hardship, and to excuse a prospective juror on either ground. Today in Canada, the judge typically raises these issues in his remarks to the panel, at which point those in the pool who may have difficulties are invited to identify themselves. If satisfied that a member of the jury pool should not serve either for reasons of manifest bias or hardship, the trial judge may excuse that person from jury service.

23 Judicial pre-screening at common law developed as a summary procedure for expediting jury selection where the prospective juror's partiality was uncontroversial, such as where he or she had an interest in the proceedings or was a relative of a witness or the accused: Barrow, supra, at p. 709. The consent of both parties to the judicial pre-screening was presumed, provided the reason for discharge was "manifest" or obvious. Otherwise, the challenge for cause procedure applied: Sherratt, supra, at p. 534. In 1992, s. 632 of the Criminal Code was enacted to address judicial pre-screening of the jury panel. This provision allows the judge, at any time before the trial commences, to excuse a prospective juror for personal interest, relationship with the judge, counsel, accused or prospective witnesses, or personal hardship or other reasonable cause.

24 The second way members of the jury may be excluded during the empanelling process is upon a challenge of the prospective juror by the Crown or the accused. Both parties are entitled to challenge potential members of the jury as these prospective jurors are called to "the book". Two types of challenge are available to both the Crown and the accused: (1) a limited number of peremptory challenges without providing reasons pursuant to s. 634; and (2) an unlimited number of challenges for cause, with leave of the judge, on one of the grounds enumerated under s. 638(1) of the Criminal Code.

[page879]

25 One ground for challenge for cause is that a prospective juror is "not indifferent between the Queen and the accused": Criminal Code, s. 638(1)(b). If the judge is satisfied that a realistic potential for juror partiality exists, he or she may permit the requested challenges for cause. If challenged for cause, the impartiality of the candidate is tried by two triers of fact, usually two previously sworn jurors: Criminal Code, s. 640(2). Absent elimination, the juror is sworn and takes his or her place in the jury box. After the full complement of 12 jurors is empanelled, the accused is placed in their charge, and the trial commences.

26 The Canadian system of selecting jurors may be contrasted with procedures prevalent in the United States. In both countries the aim is to select a jury that will decide the case impartially. The Canadian system, however, starts from the presumption that jurors are capable of setting aside their views and prejudices and acting impartially between the prosecution and the accused upon proper instruction by the trial judge on their duties. This presumption is displaced only where potential bias is either clear and obvious (addressed by judicial pre-screening), or where the accused or prosecution shows reason to suspect that members of the jury array may possess biases that cannot be set aside (addressed by the challenge for cause process). The American system, by contrast, treats all members of the jury pool as presumptively suspect, and hence includes a preliminary voir dire process, whereby prospective jurors are frequently subjected to extensive questioning, often of a highly personal nature, to guide the respective parties in exercising their peremptory challenges and challenges for cause.

27 The respective benefits and costs of the different approaches may be debated. With respect to benefits, it is unclear that the American system produces better juries than the Canadian system. As Cory J. observed in R. v. G. (R.M.), [1996] 3 S.C.R. 362, at para. 13, we possess "a centuries-old tradition of juries reaching fair and courageous [page880] verdicts". With respect to costs, jury selection under the American system takes longer and intrudes more markedly into the privacy of prospective jurors. It has also been suggested that the extensive questioning permitted by this process, while aimed at providing an impartial jury, is open to abuse by counsel seeking to secure a favourable jury, or to indoctrinate jurors to their views of the case (see Schulman and Myers, supra, at p. 429).

28 The ultimate requirement of a system of jury selection is that it results in a fair trial. A fair trial, however, should not be confused with a perfect trial, or the most advantageous trial possible from the accused's perspective. As I stated in R. v. O'Connor, [1995] 4 S.C.R. 411, at para. 193, "[w]hat constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process... . What the law demands is not perfect justice, but fundamentally fair justice". See also R. v. Carosella, [1997] 1 S.C.R. 80, at para. 72; R. v. Lyons, [1987] 2 S.C.R. 309, at p. 362; R. v. Harrer, [1995] 3 S.C.R. 562, at para. 14. At the same time, occasional injustice cannot be accepted as the price of efficiency: M. (A.) v. Ryan, [1997] 1 S.C.R. 157, at para. 32; R. v. Leipert, [1997] 1 S.C.R. 281.

29 These are the considerations that must guide us in assessing whether the appellant in this case has established the right to challenge for cause. Challenges for cause that will serve no purpose but to increase delays and intrude on prospective jurors' privacy are to be avoided. As the Ontario Court of Appeal cautioned in R. v. Hubbert (1975), 29 C.C.C. (2d) 279, at p. 291: "[t]rials should not be unnecessarily prolonged by speculative and sometimes suspect challenges for cause". However, if there exists reason to believe that the jury pool may be so tainted by incorrigible prejudices that [page881] the trial may not be fair, then challenges for cause must be allowed.

B. The Test: When Should Challenges for Cause Be Granted Under Section 638(1)(b)?

1. The Test for Partiality

30 Section 638(1)(b) of the Code permits a party to challenge for cause on the ground that "a juror is not indifferent between the Queen and the accused". Lack of indifference may be translated as "partiality". Both terms describe a predisposed state of mind inclining a juror prejudicially and unfairly toward a certain party or conclusion: see Williams, supra, at para. 9.

31 In order to challenge for cause under s. 638(1)(b), one must show a "realistic potential" that the jury pool may contain people who are not impartial, in the sense that even upon proper instructions by the trial judge they may not be able to set aside their prejudice and decide fairly between the Crown and the accused: Sherratt, supra; Williams, supra, at para. 14.

32 As a practical matter, establishing a realistic potential for juror partiality generally requires satisfying the court on two matters: (1) that a widespread bias exists in the community; and (2) that some jurors may be incapable of setting aside this bias, despite trial safeguards, to render an impartial decision. These two components of the challenge for cause test reflect, respectively, the attitudinal and behavioural components of partiality: Parks, supra, at pp. 364-65; R. v. Betker (1997), 115 C.C.C. (3d) 421 (Ont. C.A.), at pp. 435-36.

33 These two components of the test involve distinct inquiries. The first is concerned with the existence of a material bias, and the second with the [page882] potential effect of the bias on the trial process. However, the overarching consideration, in all cases, is whether there exists a realistic potential for partial juror behaviour. The two components of this test serve to ensure that all aspects of the issue are examined. They are not watertight compartments, but rather guidelines for determining whether, on the record before the court, a realistic possibility exists that some jurors may decide the case on the basis of preconceived attitudes or beliefs, rather than the evidence placed before them.

34 The test for partiality involves two key concepts: "bias" and "widespread". It is important to understand how each term is used.

35 The New Oxford Dictionary of English (1998), at p. 169, defines "bias" as "prejudice in favour of or against one thing, person, or group compared with another, especially in a way considered to be unfair". "Bias", in the context of challenges for cause, refers to an attitude that could lead jurors to discharge their function in the case at hand in a prejudicial and unfair manner.

36 It is evident from the definition of bias that not every emotional or stereotypical attitude constitutes bias. Prejudice capable of unfairly affecting the outcome of the case is required. Bias is not determined at large, but in the context of the specific case. What must be shown is a bias that could, as a matter of logic and experience, incline a juror to a certain party or conclusion in a manner that is unfair. This is determined without regard to the cleansing effect of trial safeguards and the direction of the trial judge, which become relevant only at the second stage consideration of the behavioural effect of the bias.

[page883]

37 Courts have recognized that "bias" may flow from a number of different attitudes, including: a personal interest in the matter to be tried (Hubbert, supra, at p. 295; Criminal Code, s. 632); prejudice arising from prior exposure to the case, as in the case of pre-trial publicity (Sherratt, supra, at p. 536); and prejudice against members of the accused's social or racial group (Williams, supra, at para. 14).

38 In addition, some have suggested that bias may result from the nature and circumstances of the offence with which the accused is charged: R. v. L. (R.) (1996), 3 C.R. (5th) 70 (Ont. Ct. (Gen. Div.)); R. v. Mattingly (1994), 28 C.R. (4th) 262 (Ont. Ct. (Gen. Div.)); N. Vidmar, "Generic Prejudice and the Presumption of Guilt in Sex Abuse Trials" (1997), 21 Law & Hum. Behav. 5. In Williams, supra, at para. 10, this Court referred to Vidmar's suggestion that bias might, in some cases, flow from the nature of the offence. However, the Court has not, prior to this case, directly considered this kind of bias.

39 The second concept, "widespread", relates to the prevalence or incidence of the bias in question. Generally speaking, the alleged bias must be established as sufficiently pervasive in the community to raise the possibility that it may be harboured by one or more members of a representative jury pool (although, in exceptional circumstances, a less prevalent bias may suffice, provided it raises a realistic potential of juror partiality: Williams, supra, at para.

43). If only a few individuals in the community hold the alleged bias, the chances of this bias tainting the jury process are negligible. For this reason, a court must generally be satisfied that the alleged bias is widespread in the community before a right to challenge for cause may flow.

40 If widespread bias is shown, a second question arises: may some jurors be unable to set aside their bias despite the cleansing effect of the judge's instructions and the trial process? This is the [page884] behavioural component of the test. The law accepts that jurors may enter the trial with biases. But the law presumes that jurors' views and biases will be cleansed by the trial process. It therefore does not permit a party to challenge their right to sit on the jury because of the existence of widespread bias alone.

41 Trial procedure has evolved over the centuries to counter biases. The jurors swear to discharge their functions impartially. The opening addresses of the judge and the lawyers impress upon jurors the gravity of their task, and enjoin them to be objective. The rules of process and evidence underline the fact that the verdict depends not on this or that person's views, but on the evidence and the law. At the end of the day, the jurors are objectively instructed on the facts and the law by the judge, and sent out to deliberate in accordance with those instructions. They are asked not to decide on the basis of their personal, individual views of the evidence and law, but to listen to each other's views and evaluate their own inclinations in light of those views and the trial judge's instructions. Finally, they are told that they must not convict unless they are satisfied of the accused's guilt beyond a reasonable doubt and that they must be unanimous.

42 It is difficult to conceive stronger antidotes than these to emotion, preconception and prejudice. It is against the backdrop of these safeguards that the law presumes that the trial process will cleanse the biases jurors may bring with them, and allows challenges for cause only where a realistic potential exists that some jurors may not be able to function impartially, despite the rigours of the trial process.

43 It follows from what has been said that "impartiality" is not the same as neutrality. Impartiality does not require that the juror's mind be a blank [page885] slate. Nor does it require jurors to jettison all opinions, beliefs, knowledge and other accumulations of life experience as they step into the jury box. Jurors are human beings, whose life experiences inform their deliberations. Diversity is essential to the jury's functions as collective decision-maker and representative conscience of the community: Sherratt, supra, at pp. 523-24. As Doherty J.A. observed in Parks, supra, at p. 364, "[a] diversity of views and outlooks is part of the genius of the jury system and makes jury verdicts a reflection of the shared values of the community".

44 To treat bias as permitting challenges for cause, in the absence of a link with partial juror behaviour, would exact a heavy price. It would erode the threshold for entitlement defined in Sherratt and Williams, and jeopardize the representativeness of the jury, excluding from jury service people who could bring valuable experience and insight to the process. Canadian law holds that "finding out what kind of juror the person called is likely to be - his personality, beliefs, prejudices, likes or dislikes" is not the purpose of challenges for cause: Hubbert, supra, at p. 289. The aim is not favourable jurors, but impartial jurors.

45 Ultimately, the decision to allow or deny an application to challenge for cause falls to the discretion of the trial judge. However, judicial discretion should not be confused with judicial whim. Where a realistic potential for partiality exists, the right to challenge must flow: Williams, supra, at para. 14. If in doubt, the judge should err on the side of permitting challenges. Since the right of the accused to a fair trial is at stake, "[i]t is better to risk allowing what are in fact unnecessary challenges, [page886] than to risk prohibiting challenges which are necessary": Williams, supra, at para. 22.

2. Proof: How a Realistic Potential for Partiality May Be Established

46 A party may displace the presumption of juror impartiality by calling evidence, by asking the judge to take judicial notice of facts, or both. In addition, the judge may draw inferences from events that occur in the proceedings and may make common sense inferences about how certain biases, if proved, may affect the decision-making process.

47 The first branch of the inquiry - establishing relevant widespread bias- requires evidence, judicial notice or trial events demonstrating a pervasive bias in the community. The second stage of the inquiry - establishing a behavioural link between widespread attitudes and juror conduct - may be a matter of proof, judicial notice, or simply reasonable inference as to how bias might influence the decision-making process: Williams, supra, at para. 23.

48 In this case, the appellant relies heavily on proof by judicial notice. Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy: R. v. Potts (1982), 66 C.C.C. (2d) 219 (Ont. C.A.); [page887] J. Sopinka, S. N. Lederman and A. W. Bryant, The Law of Evidence in Canada (2nd ed. 1999), at p. 1055.

49 The scientific and statistical nature of much of the information relied upon by the appellant further complicates this case. Expert evidence is by definition neither notorious nor capable of immediate and accurate demonstration. This is why it must be proved through an expert whose qualifications are accepted by the court and who is available for cross-examination. As Doherty J.A. stated in R. v. Alli (1996), 110 C.C.C. (3d) 283 (Ont. C.A.), at p. 285: "[a]ppellate analysis of untested social science data should not be regarded as the accepted means by which the scope of challenges for cause based on generic prejudice will be settled".

C. Were the Grounds for Challenge for Cause Present in this Case?

50 To challenge prospective jurors for cause, the appellant must displace the presumption of juror impartiality by showing a realistic potential for partiality. To do this, the appellant must demonstrate the existence of a widespread bias arising from the nature of the charges against him (the "attitudinal" component), that raises a realistic potential for partial juror behaviour despite the safeguards of the trial process (the "behavioural" component). I will discuss each of these requirements in turn as they apply to this case.

1. Widespread Bias

51 In this case, the appellant alleges that the nature and the circumstances of the offence with which he is charged give rise to a bias that could unfairly incline jurors against him or toward his conviction. [page888] He further alleges that this bias is widespread in the community. In support of this submission, the appellant relies on the following propositions from Moldaver J.A.'s dissent in K. (A.), supra, at para. 166. The parties generally agree on these facts, but dispute the conclusions to be drawn from them:

- Studies and surveys conducted in Canada over the past two decades reveal that a large percentage of the population, both male and female, have been the victims of sexual abuse. From this, it is reasonable to infer that any given jury panel may contain victims of sexual abuse, perpetrators and people closely associated with them.
- The harmful effects of sexual abuse can prove devastating not only to those who have been victimized, but those closely related to them. Tragically, many victims remain traumatized and psychologically scarred for life. By the same token, for those few individuals who have been wrongfully accused of sexual abuse, the effects can also be devastating.
- Sexual assault tends to be committed along gender lines. As a rule, it is women and children who are victimized by men.
- Women and children have been subjected to systemic discrimination reflected in both individual and institutional conduct, including the criminal justice system. As a result of widespread media coverage and the earnest and effective efforts of lobby groups in the past decade, significant and

long overdue changes have come about in the criminal justice system. For some, the changes have not gone far enough; for others, too far.

- Where challenges for cause have been permitted in cases involving allegations of sexual abuse, literally hundreds of prospective jurors have been found to be partial by the triers of fact. In those cases where trial judges have refused to permit the challenge, choosing instead to vet the panel at large for bias, the numbers are equally substantial.

[page889]

- Unlike many crimes, there are a wide variety of stereotypical attitudes and beliefs surrounding the crime of sexual abuse.

52 While the parties agree on these basic facts, they disagree on whether they demonstrate widespread bias. The appellant called no evidence, expert or otherwise, on the incidence or likely effect of prejudice stemming from the nature of the offences with which he is charged. Instead, he asks the Court to take judicial notice of a widespread bias arising from allegations of the sexual assault of children. The Crown, by contrast, argues that the facts on which it agrees do not translate into bias, much less widespread bias.

53 The appellant relies on the following: (a) the incidence of victimization and its effect on members of the jury pool; (b) the strong views held by many about sexual assault and the treatment of this crime by the criminal justice system; (c) myths and stereotypes arising from widespread and deeply entrenched attitudes about sexual assault; (d) the incidence of intense emotional reactions to sexual assault, such as a strong aversion to the crime or undue empathy for its victims; (e) the experience of Ontario trial courts, where hundreds of potential jurors in such cases have been successfully challenged as partial; and (f) social science research indicating a "generic prejudice" against the accused in sexual assault cases. He argues that these factors permit the Court to take judicial notice of widespread bias arising from charges of sexual assault of children.

54 It is worth reminding ourselves that at this stage we are concerned solely with the nature and prevalence of the alleged biases (i.e., the "attitudinal" component), and not their amenability to cleansing [page890] by the trial process, which is the focus of the "behavioural" component.

(a) Incidence of Victimization

55 The appellant argues that the prevalence and potentially devastating impact of sexual assault permit the Court to conclude that any given jury pool is likely to contain victims or those close to them who may harbour a prejudicial bias as a consequence of their experiences.

56 The Crown acknowledges both the widespread nature of abuse and its potentially traumatic impact. Neither of these facts is in issue. Nor is it unreasonable to conclude from these facts that victims of sexual assault, or those close to them, may turn up in a jury panel. What is disputed is whether this widespread victimization permits the Court to conclude, without proof, that the victims and those who share their experience are biased, in the sense that they may harbour prejudice against the accused or in favour of the Crown when trying sexual assault charges.

57 The only social science research before us on the issue of victim empathy is a study by R. L. Wiener, A. T. Feldman Wiener and T. Grisso, "Empathy and Biased Assimilation of Testimonies in Cases of Alleged Rape" (1989), 13 Law & Hum. Behav. 343. The appellant cites this study for the proposition that those participants acquainted in some way with a rape victim demonstrated a greater tendency, under the circumstances of the study, to find a defendant guilty. However, as the Crown notes, this study offers no evidence that victim status in itself impacts jury verdicts. In fact, the study found no correlation between degree of empathy for rape victims and tendency to convict, nor did it find higher degrees of victim empathy amongst those persons acquainted with rape victims. Further, the study was limited to a small sample of participants. It made no attempt to simulate an actual jury trial, and did not involve a deliberation [page891] process or an actual verdict. In the absence of expert testimony, tested under cross-examination, as to the conclusions properly supported by this study, I can only

conclude that it provides little assistance in establishing the existence of widespread bias arising from the incidence of sexual assault in Canadian society.

58 Moldaver J.A. concluded that the prevalence of sexual assault in Canadian society and its traumatic and potentially lifelong effects, provided a realistic basis to believe that victims of this crime may harbor intense and deep-seated biases. In arriving at this conclusion, he expressly relied on an unpublished article by Professor David Paciocco, "Challenges for Cause in Jury Selection after Regina v. Parks: Practicalities and Limitations", Canadian Bar Association - Ontario, February 11, 1995, which he quoted at para. 176 for the proposition that "[o]ne cannot help but believe that these deep scars would, for some, prevent them from adjudicating sexual offence violations impartially".

59 This is, however, merely the statement of an assumption, offered without a supporting foundation of evidence or research. Courts must approach sweeping and untested "common sense" assumptions about the behaviour of abuse victims with caution: see R. v. Seaboyer, [1991] 2 S.C.R. 577 (per L'Heureux-Dubé J., dissenting in part); R. v. Lavallee, [1990] 1 S.C.R. 852, at pp. 870-72 (per Wilson J.). Certainly these assumptions are not established beyond reasonable dispute, or documented with indisputable accuracy, so as to permit the Court to take judicial notice of them.

60 I conclude that while widespread victimization may be a factor to be considered, standing alone it [page892] fails to establish widespread bias that might lead jurors to discharge their task in a prejudicial and unfair manner.

(b) Strongly Held Views Relating to Sexual Offences

61 The appellant submits that the politicized and gender-based nature of sexual offences gives rise to firmly held beliefs, opinions and attitudes that establish widespread bias in cases of sexual assault.

62 This argument found favour with Moldaver J.A. in K. (A.). Moldaver J.A. judicially noticed the tendency of sexual assault to be committed along gender lines. He also took judicial notice of the systemic discrimination women and children have faced in the criminal justice system, and the fact that recent reforms have gone too far for some and not far enough for others. From this foundation of facts, he inferred that the gender-based and politicized nature of sexual offences leads to a realistic possibility that some members of the jury pool, as a result of their political beliefs, will harbour deep-seated and virulent biases that might prove resistant to judicial cleansing. Quoting from the work of Professor Paciocco, Moldaver J.A. emphasized that strong political convictions and impartiality are not necessarily incongruous, but that for some "feminists" "commitment gives way to zealotry and dogma". The conviction that the justice system and its rules are incapable of protecting women and children, it is argued, may lead some potential jurors to disregard trial directions and rules safeguarding the presumption of innocence. Little regard for judicial direction can be expected from "those who see the prosecution of [page893] sexual offenders as a battlefront in a gender based war" (para. 177).

63 The appellant supports this reasoning, adding that the polarized, politically charged nature of sexual offences results in two prevalent social attitudes: first, that the criminal justice system is incapable of dealing with an "epidemic" of abuse because of its male bias or the excessive protections it affords the accused; and second, that conviction rates in sexual offence cases are unacceptably low. These beliefs, he alleges, may jeopardize the accused's right to a fair trial. For example, jurors harbouring excessive political zeal may ignore trial directions and legal rules perceived as obstructing the "truth" of what occurred, or may simply "cast their lot" with the victim. All this, the appellant submits, amounts to widespread bias in the community incompatible with juror impartiality.

64 The appellant does not deny that jurors trying any serious offence may hold strong views about the relevant law. Nor does he suggest such views raise concerns about bias in the trial of most offences. Few rules of criminal law attract universal support, and many engender heated debate. The treatment of virtually all serious crimes attracts sharply divided opinion, fervent criticism, and advocacy for reform. General disagreement or criticism of the relevant law, however, does not mean a prospective juror is inclined to take the law into his or her own hands at the expense of an individual accused.

65 The appellant's submission reduces to this: while strong views on the law do not ordinarily indicate bias, an exception arises in the case of [page894] sexual assaults on children. The difficulty, however, is that there is nothing in the material that supports this contention, nor is it self-evident. There is no indication that jurors are more willing to cross the line from opinion to prejudice in relation to sexual assault than for any other serious crime. It is therefore far from clear that strongly held views about sexual assault translate into bias, in the required sense of a tendency to act in an unfair and prejudicial manner.

66 Moreover, assuming that the strong views people may hold about sexual assault raise the possibility of bias, how widespread such views are in Canadian society remains a matter of conjecture. The material before the Court offers no measure of the prevalence in Canadian society of the specific attitudes identified by the appellant as corrosive of juror impartiality. Some people may indeed believe that the justice system is faltering in the face of an epidemic of abuse and that perpetrators of this crime too often escape conviction; yet, it is far from clear that these beliefs are prevalent in our society, let alone that they translate into bias on a widespread scale.

(c) Myths and Stereotypes About Sexual Offences

67 The appellant suggests that the strong views that surround the crime of sexual assault may contribute to widespread myths and stereotypes that undermine juror impartiality. In any given jury pool, he argues, some people may reason from the prevalence of abuse to the conclusion that the accused is likely guilty; some may assume children never lie about abuse; and some may reason that the accused is more likely to be guilty because he is a man.

[page895]

68 Again, however, the proof falls short. Although these stereotypical beliefs clearly amount to bias that might incline some people against the accused or toward conviction, it is neither notorious nor indisputable that they enjoy widespread acceptance in Canadian society. Myths and stereotypes do indeed pervade public perceptions of sexual assault. Some favour the accused, others the Crown. In the absence of evidence, however, it is difficult to conclude that these stereotypes translate into widespread bias.

(d) Emotional Nature of Sexual Assault Trials

69 The appellant asks the Court to take judicial notice of the emotional nature of sexual assault trials and to conclude that fear, empathy for the victim, and abhorrence of the crime establish widespread bias in the community. His concern is that jurors, faced with allegations of sexual assaults of children, may act on emotion rather than reason. This is particularly the case, he suggests, for past victims of abuse, for whom the moral repugnancy of the crime may be amplified. He emphasizes that the presumption of innocence in criminal trials demands the acquittal of the "probably" guilty. An intense aversion to sexual crimes, he argues, may incline some jurors to err on the side of conviction in such circumstances. Undue empathy for the victim, he adds, may also prompt a juror to "validate" the complaint with a guilty verdict, rather than determine guilt or innocence according to the law.

70 Crimes commonly arouse deep and strong emotions. They represent a fundamental breach of the perpetrator's compact with society. Crimes make victims, and jurors cannot help but sympathize [page896] with them. Yet these indisputable facts do not necessarily establish bias, in the sense of an attitude that could unfairly prejudice jurors against the accused or toward conviction. Many crimes routinely tried by jurors are abhorrent. Brutal murders, ruthless frauds and violent attacks are standard fare for jurors. Abhorred as they are, these crimes seldom provoke suggestions of bias incompatible with a fair verdict.

71 One cannot automatically equate strong emotions with an unfair and prejudicial bias against the accused. Jurors are not expected to be indifferent toward crimes. Nor are they expected to remain neutral toward those shown to have committed such offences. If this were the case, prospective jurors would be routinely and successfully challenged for cause as a preliminary stage in the trial of all serious criminal offences. Instead, we accept that jurors often abhor the crime alleged to have been committed - indeed there would be cause for alarm if

representatives of a community did not deplore heinous criminal acts. It would be equally alarming if jurors did not feel empathy or compassion for persons shown to be victims of such acts. These facts alone do not establish bias. There is simply no indication that these attitudes, commendable in themselves, unfairly prejudice jurors against the accused or toward conviction. They are common to the trial of many serious offences and have never grounded a right to challenge for cause.

72 Recognizing this fact, the appellant and the intervener Criminal Lawyers' Association ("CLA") contend that allegations of sexual offences against children incite emotional reactions of an intensity above and beyond those invoked by other criminal acts. Such offences, they contend, stand alone in their capacity to inflame jurors and cloud reason. Moldaver J.A., dissenting in K. (A.), distinguished sexual offences from most [page897] other despicable criminal acts, on the basis that "sexual assault trials tend to be emotionally charged, particularly in cases of child abuse, where the mere allegation can trigger feelings of hostility, resentment and disgust in the minds of jurors" (para. 188).

73 The proposition that sexual offences are generically different from other crimes in their ability to arouse strong passion is not beyond reasonable debate or capable of immediate and accurate demonstration. As such, it does not lend itself to judicial notice. Nor was evidence led on this issue. Some may well react to allegations of a sexual crime with emotions of the intensity described by the appellant. Yet how prevalent such emotions are in Canadian society remains a matter of conjecture. The Court simply cannot reach conclusions on these controversial matters in an evidentiary vacuum. As a result, the appellant has not established the existence of an identifiable bias arising from the emotionally charged nature of sexual crimes, or the prevalence of this bias should it in fact exist.

(e) The History of Challenges for Cause in Ontario

74 The appellant refers this Court to the experience of Ontario trial courts where judges have allowed defence counsel to challenge prospective jurors for cause in cases involving allegations of sexual assault: see Vidmar, supra, at p. 5; D. M. Tanovich, D. M. Paciocco, S. Skurka, Jury Selection in Criminal Trials: Skills, Science, and the Law (1997), at pp. 239-42. These sources, cataloguing 34 cases, indicate that hundreds of potential jurors have been successfully challenged for cause as not indifferent between the Crown and the accused. It is estimated that 36 percent of the prospective jurors challenged were disqualified.

[page898]

75 The appellant argues that the fact that hundreds of prospective jurors have been found to be partial is in itself sufficient evidence of widespread bias arising from sexual assault trials. This is proof, he asserts, that the social realities surrounding sexual assault trials give rise to prejudicial beliefs, attitudes and emotions on a widespread scale in Canadian communities.

76 The Crown disagrees. It argues first, that the survey lacks validity because of methodological defects, and second, that even if the results are accepted, the successful challenges do not demonstrate a widespread bias, but instead may be attributed to other causes.

77 The first argument against the survey is that its methodology is unsound. The Crown raises a number of concerns: the survey is entirely anecdotal, not comprehensive or random; not all of the questions asked of prospective jurors are indicated; there is no way in which to assess the directions, if any, provided by the trial judge, especially in relation to the distinction between strong opinions or emotions and partiality; and no comparative statistics are provided contrasting these results with the experience in other criminal law contexts. The intervener CLA concedes that the survey falls short of scientific validity, but contends that it nevertheless documents a phenomena of considerable significance. Hundreds of prospective jurors disqualified on the grounds of bias by impartial triers of fact must, it is argued, displace the presumption of juror impartiality. Nonetheless, the lack of methodological rigour and the absence of expert evidence undermine the suggestion that the Ontario experience establishes widespread bias.

78 The second argument against the survey is that the questions asked were so general, and the information elicited so scarce, that no meaningful inference [page899] can be drawn from the responses given by challenged jurors or from the number of potential jurors disqualified. Charron J.A., for the majority in K. (A.), observed that prospective jurors in that case received no meaningful instruction on the nature of jury duty or the meaning and importance of impartiality. Further, they often indicated confusion at the questions posed to them or asked that the questions be repeated. In the end, numerous prospective jurors were disqualified for offering little more than that they would find it difficult to hear a case of this nature, or that they held strong emotions about the sexual abuse of children.

79 The challenge for cause process rests to a considerable extent on self-assessment of impartiality by the challenged juror, and the response to questions on challenge often will be little more than an affirmation or denial of one's own ability to act impartially in the circumstances of the case. In the absence of guidance, prospective jurors may conflate disqualifying bias with a legitimate apprehension about sitting through a case involving allegations of sexual abuse of children, or the strong views or emotions they may hold on this subject.

80 Where potential jurors are challenged for racial bias, the risk of social disapprobation and stigma supports the veracity of admissions of potential partiality. No similar indicia of reliability attach to the frank and open admission of concern about one's ability to approach and decide a case of alleged child sexual abuse judiciously. While a prospective juror's admission of racial prejudice may suggest partiality, the same cannot be said of an admission of abhorrence or other emotional attitude toward the sexual abuse of children. We do not know whether the potential jurors who professed concerns about serving on juries for sexual assault charges were doing so because they were biased, or for other reasons. We do not know [page900] whether they were told that strong emotions and beliefs would not in themselves impair their duty of impartiality, or whether they were informed of the protections built into the trial process.

81 In fact, the number of prospective jurors disqualified, although relied on as support for judicial notice of widespread bias, is equally consistent with the conclusion that the challenge processes, despite the best intentions of the participants, disqualified prospective jurors for acknowledging the intense emotions, beliefs, experiences and misgivings anyone might experience when confronted with the prospect of sitting as a juror on a case involving charges of sexual assault of children. As discussed, the mere presence of strong emotions and opinions cannot be equated automatically with bias against the accused or toward conviction.

82 It follows that the survey of past challenge for cause cases involving charges of sexual assault does not without more establish widespread bias arising from these charges.

(f) Social Science Evidence of "Generic Prejudice"

83 The appellant argues that social science research, particularly that of Vidmar, supports the contention that social realities, such as the prevalence of sexual abuse and its politically charged nature, translate into a widespread bias in Canadian society.

84 In Williams, supra, the Court referred to Vidmar's research in concluding that the partiality targeted by s. 638(1)(b) was not limited to biases [page901] arising from a direct interest in the proceeding or pre-trial exposure to the case, but could arise from any of a variety of sources, including the "nature of the crime itself" (para. 10). However, recognition that the nature of an offence may give rise to "generic prejudice" does not obviate the need for proof. Labels do not govern the availability of challenges for cause. Regardless of how a case is classified, the ultimate issue is whether a realistic possibility exists that some potential jurors may try the case on the basis of prejudicial attitudes and beliefs, rather than the evidence offered at trial. The appellant relies on the work of Vidmar for the proposition that such a possibility does in fact arise from allegations of sexual assault.

85 Vidmar is known for the theory of a "generic prejudice" against accused persons in sexual assault trials and for the conclusion that the attitudes and beliefs of jurors are frequently reflected in the verdicts of juries on such trials.

However, the conclusions of Vidmar do not assist in finding widespread bias. His theory that a "generic prejudice" exists against those charged with sexual assault, although in the nature of expert evidence, has not been proved. Nor can the Court take judicial notice of this contested proposition. With regard to the behaviour of potential jurors, the Court has no foundation in this case to draw an inference of partial juror conduct, as discussed in more detail below, under the behavioural stage of the partiality test.

86 Vidmar himself acknowledges the limitations of his research. He concedes that the notion of "generic prejudice" lacks scientific validity, and that none of the studies he relies on actually asked the questions typically asked of Canadian jurors, including whether they can impartially adjudicate guilt or innocence in a sexual assault trial: Vidmar, supra. Moreover, the authorities Vidmar relies on are almost exclusively "confined to examination of [page902] public attitudes towards certain criminal acts, especially child sexual abuse. Not surprisingly, it appears the public is quite disapproving of persons who have sexually abused children, and of such conduct itself": R. v. Hillis, [1996] O.J. No. 2739 (Gen. Div.) (QL), at para. 7. While judicial notice may be taken of the uncontested fact that sexual crimes are almost universally abhorred, this does not establish widespread bias arising from sexual assault trials.

87 The attempt of Vidmar and others to conduct scientific research on jury behaviour is commendable. Unfortunately, research into the effect of juror attitudes on deliberations and verdicts is constrained by the almost absolute prohibition in s. 649 of the Criminal Code against the disclosure by jury members of information relating to the jury's proceedings. More comprehensive and scientific assessment of this and other aspects of the criminal law and criminal process would be welcome. Should Parliament reconsider this prohibition, it may be that more helpful research into the Canadian experience would emerge. But for now, social science evidence appears to cast little light on the extent of any "generic prejudice" relating to charges of sexual assault, or its relationship to jury verdicts.

(g) Conclusions on the Existence of a Relevant, Widespread Bias

88 Do the factors cited by the appellant, taken together, establish widespread bias arising from charges relating to sexual abuse of children? In my view, they do not. The material presented by the appellant, considered in its totality, falls short of grounding judicial notice of widespread bias in Canadian society against the accused in such trials. At best, it establishes that the crime of sexual [page903] assault, like many serious crimes, frequently elicits strong attitudes and emotions.

89 However, the two branches of the test for partiality are not watertight compartments. Given the challenge of proving facts as elusive as the nature and scope of prejudicial attitudes, and the need to err on the side of caution, I prefer not to resolve this case entirely at the first, attitudinal stage. Out of an abundance of caution, I will proceed to consider the potential impact, if any, of the alleged biases on juror behaviour.

2. Is it Reasonable to Infer that Some Jurors May Be Incapable of Setting Aside Their Biases Despite Trial Safeguards?

90 The fact that members of the jury pool may harbour prejudicial attitudes, opinions or feelings is not, in itself, sufficient to support an entitlement to challenge for cause. There must also exist a realistic possibility that some jurors may be unable or unwilling to set aside these prejudices to render a decision in strict accordance with the law. This is referred to as the behavioural aspect of the test for partiality.

91 The applicant need not always adduce direct evidence establishing this link between the bias in issue and detrimental effects on the trial process. Even in the absence of such evidence, a trial judge may reasonably infer that some strains of bias by their very nature may prove difficult for jurors to identify and eliminate from their reasoning.

92 This inference, however, is not automatic. Its strength varies with the nature of the bias in issue, and its amenability to judicial cleansing. In Williams, the Court inferred a behavioural link between the pervasive racial prejudice established [page904] on the evidence and the possibility that some jurors, consciously or not, would decide the case based on prejudice and stereotype. Such a result, however, is not inevitable for every form of bias,

prejudice or preconception. In some circumstances, the appropriate inference is that the "predispositions can be safely regarded as curable by judicial direction": Williams, supra, at para. 24.

93 Fundamental distinctions exist between the racial prejudice at issue in Williams and a more general bias relating to the nature of the offence itself. These differences relate both to the nature of these respective biases, and to their susceptibility (or resistance) to cleansing by the trial process. It may be useful to examine these differences before embarking on a more extensive consideration of the potential effects on the trial process, if any, of the biases alleged in the present case.

94 The first difference is that race may impact more directly on the jury's decision than bias stemming from the nature of the offence. As Moldaver J.A. stated in Betker, supra, at p. 441, "[r]acial prejudice is a form of bias directed against a particular class of accused by virtue of an identifiable immutable characteristic. There is a direct and logical connection between the prejudice asserted and the particular accused". By contrast, the aversion, fear, abhorrence, and beliefs alleged to surround sexual assault offences may lack this cogent and irresistible connection to the accused. Unlike racial prejudice, they do not point a finger at a particular accused.

95 Second, trial safeguards may be less successful in cleansing racial prejudice than other types of bias, as recognized in Williams. As Doherty J.A. observed in Parks, supra, at p. 371: "[i]n deciding whether the post-jury selection safeguards against partiality provide a reliable antidote to racial bias, the nature of that bias must be emphasized". The nature of racial prejudice - in particular its subtle, systemic and often unconscious operation - compelled [page905] the inference in Williams that some people might be incapable of effacing, or even identifying, its influence on their reasoning. In reaching this conclusion, the Court emphasized the "invasive and elusive" operation of racial prejudice and its foundation "on preconceptions and unchallenged assumptions that unconsciously shape the daily behaviour of individuals" (paras. 21-22).

96 The biases alleged in this case, by contrast, may be more susceptible to cleansing by the rigours of the trial process. They are more likely to be overt and acknowledged than is racial prejudice, and hence more easily removed. Jurors are more likely to recognize and counteract them. The trial judge is more likely to address these concerns in the course of directions to the jury, as are counsel in their addresses. Offence-based bias has concerned the trial process throughout its long evolution, and many of the safeguards the law has developed may be seen as a response to it.

97 Against this background, I turn to the question of whether the biases alleged to arise from the nature of sexual assault, if established, might lead jurors to decide the case in an unfair and prejudicial way, despite the cleansing effect of the trial process.

98 First, the appellant contends that some jurors, whether victims, friends of victims, or simply people holding strong views about sexual assault, may not be able to set aside strong beliefs about this crime - for example, that the justice system is biased against complainants, that there exists an epidemic of abuse that must be halted, or that conviction rates are too low - and decide the case solely on its merits. Some jurors, he says, may disregard rules of law that are perceived as obstructing the "truth" of what occurred. Others may simply "cast their lot" with groups that have [page906] been victimized. These possibilities, he contends, support a reasonable inference that strong opinions may translate into a realistic potential for partial juror conduct.

99 This argument cannot succeed. As discussed, strongly held political views do not necessarily suggest that jurors will act unfairly in an actual trial. Indeed, passionate advocacy for law reform may be an expression of the highest respect for the rule of law, not a sign that one is willing to subvert its operation at the expense of the accused. As Moldaver J.A. eloquently observed in Betker, supra, at p. 447, "the test for partiality is not whether one seeks to change the law but whether one is capable of upholding the law...".

100 In the absence of evidence that such beliefs and attitudes may affect jury behaviour in an unfair manner, it is difficult to conclude that they will not be cleansed by the trial process. Only speculation supports the proposition that

jurors will act on general opinions and beliefs to the detriment of an individual accused, in disregard of their oath or affirmation, the presumption of innocence, and the directions of the trial judge.

101 The appellant also contends that myths and stereotypes attached to the crime of sexual assault may unfairly inform the deliberation of some jurors. However, strong, sometimes biased, assumptions about sexual behaviour are not new to sexual assault trials. Traditional myths and stereotypes have long tainted the assessment of the conduct and veracity of complainants in sexual assault cases - the belief that women of "unchaste" character are more likely to have consented or are less worthy of belief; that passivity or even resistance may in fact constitute consent; and that some women invite sexual assault by reason of their [page907] dress or behaviour, to name only a few. Based on overwhelming evidence from relevant social science literature, this Court has been willing to accept the prevailing existence of such myths and stereotypes: see, for example, Seaboyer, supra; R. v. Osolin, [1993] 4 S.C.R. 595, at pp. 669-71; R. v. Ewanchuk, [1999] 1 S.C.R. 330, at paras. 94-97.

102 Child complainants may similarly be subject to stereotypical assumptions, such as the belief that stories of abuse are probably fabricated if not reported immediately, or that the testimony of children is inherently unreliable: R. v. W. (R.), [1992] 2 S.C.R. 122; R. v. D.D., [2000] 2 S.C.R. 275, 2000 SCC 43; N. Bala, "Double Victims: Child Sexual Abuse and the Canadian Criminal Justice System", in W. S. Tarnopolsky, J. Whitman and M. Ouellette, eds., Discrimination in the Law and the Administration of Justice (1993), 231.

103 These myths and stereotypes about child and adult complainants are particularly invidious because they comprise part of the fabric of social "common sense" in which we are daily immersed. Their pervasiveness, and the subtlety of their operation, create the risk that victims of abuse will be blamed or unjustly discredited in the minds of both judges and jurors.

104 Yet the prevalence of such attitudes has never been held to justify challenges for cause as of right by Crown prosecutors. Instead, we have traditionally trusted the trial process to ensure that such attitudes will not prevent jurors from acting impartially. We have relied on the rules of evidence, statutory protections, and guidance from the judge and counsel to clarify potential misconceptions and [page908] promote a reasoned verdict based solely on the merits of the case.

105 Absent evidence to the contrary, there is no reason to believe that stereotypical attitudes about accused persons are more elusive of these cleansing measures than stereotypical attitudes about complainants. It follows that the myths and stereotypes alleged by the appellant, even if widespread, provide little support for any inference of a behavioural link between these beliefs and the potential for juror partiality.

106 Finally, the appellant argues that the strong emotions evoked by allegations of sexual assault, especially in cases involving child complainants, may distort the reasoning of some jurors. He emphasizes that a strongly held aversion to the offence may incline some jurors to err on the side of conviction. Others may be swayed by "undue empathy" for the alleged victim, perceiving the case as a rejection or validation of the complainant's claim, rather than a determination of the accused's guilt or innocence according to law.

107 Again, absent evidence, it is highly speculative to suggest that the emotions surrounding sexual crimes will lead to prejudicial and unfair juror behaviour. As discussed, the safeguards of the trial process and the instructions of the trial judge are designed to replace emotional reactions with rational, dispassionate assessment. Our long experience in the context of the trial of other serious offences suggests that our faith in this cleansing process is not misplaced. The presumption of innocence, the oath or affirmation, the diffusive effects of collective deliberation, the requirement of jury unanimity, specific directions from the trial judge and counsel, a regime of evidentiary and statutory protections, the adversarial nature of the proceedings and their general solemnity, and numerous other precautions both subtle and manifest - all [page909] collaborate to keep the jury on the path to an impartial verdict despite offence-based prejudice. The appellant has not established that the offences with which he is charged give rise to a strain of bias that is uniquely capable of eluding the cleansing effect of these trial safeguards.

108 It follows that even if widespread bias were established, we cannot safely infer, on the record before the Court,

that it would lead to unfair, prejudicial and partial juror behaviour. This is not to suggest that an accused can never be prejudiced by the mere fact of the nature and circumstances of the charges he or she faces; rather, the inference between social attitudes and jury behaviour is simply far less obvious and compelling in this context, and more may be required to satisfy a court that this inference may be reasonably drawn. The nature of offence-based bias, as discussed, suggests that the circumstances in which it is found to be both widespread in the community and resistant to the safeguards of trial may prove exceptional. Nonetheless, I would not foreclose the possibility that such circumstances may arise. If widespread bias arising from sexual assault were established in a future case, it would be for the court in that case to determine whether this bias gives rise to a realistic potential for partial juror conduct in the community from which the jury pool is drawn. I would only caution that in deciding whether to draw an inference of adverse effect on jury behaviour the court should take into account the nature of the bias and its susceptibility to cleansing by the trial process.

[page910]

VI - Conclusion

109 The case for widespread bias arising from the nature of charges of sexual assault on children is tenuous. Moreover, even if the appellant had demonstrated widespread bias, its link to actual juror behaviour is speculative, leaving the presumption that it would be cleansed by the trial process firmly in place. Many criminal trials engage strongly held views and stir up powerful emotions - indeed, even revulsion and abhorrence. Such is the nature of the trial process. Absent proof, we cannot simply assume that strong beliefs and emotions translate into a realistic potential for partiality, grounding a right to challenge for cause. I agree with the majority of the Court of Appeal that the appellant has not established that the trial judge erred in refusing to permit him to challenge prospective jurors for cause.

110 I would dismiss the appeal and affirm the conviction.

R. v. Imperial Tobacco Canada Ltd., [2011] 3 S.C.R. 45

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

Heard: February 24, 2011;

Judgment: July 29, 2011.

File Nos.: 33559, 33563.

[2011] 3 S.C.R. 45 | [2011] 3 R.C.S. 45 | [2011] S.C.J. No. 42 | [2011] A.C.S. no 42 | 2011 SCC 42

Her Majesty The Queen in Right of Canada, Appellant/Respondent on cross-appeal; v. Imperial Tobacco Canada Limited, Respondent/Appellant on cross-appeal, and Attorney General of Ontario and Attorney General of British Columbia, Interveners. And Attorney General of Canada, Appellant/Respondent on cross-appeal; v. Her Majesty The Queen in Right of British Columbia, Respondent, and Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc., Rothmans Inc., JTI-MacDonald Corp., R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International Inc., B.A.T. Industries p.l.c., British American Tobacco (Investments) Limited, Carreras Rothmans Limited, Philip Morris USA Inc. and Philip Morris International Inc., Respondents/Appellants on cross-appeal, and Attorney General of Ontario, Attorney General of British Columbia and Her Majesty The Queen in Right of the Province of New Brunswick, Interveners. [page46]

(151 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Catchwords:

Civil procedure — Third-party claims — Motion to strike — Tobacco manufacturers being sued by provincial government to recover health care costs of tobacco-related illnesses, and by consumers of "light" or "mild" cigarettes for damages and punitive damages — Tobacco companies issuing third-party notices to federal government claiming contribution and indemnity — Whether plain and obvious that third-party claims disclose no reasonable cause of action.

Catchwords:

Torts — Negligent misrepresentation — Failure to warn — Negligent design — Duty of care — Proximity — Tobacco manufacturers being sued by provincial government and consumers and issuing third-party notices to federal government claiming contribution and indemnity — Federal government claiming representations constituted government policy immune from judicial review — Whether facts as pleaded establish prima facie duty of care — If so, whether conflicting policy considerations negate such duty.

Catchwords:

Torts — Provincial statutory scheme establishing rights of action against tobacco manufacturers and suppliers — Whether federal government liable as a "manufacturer" under the Tobacco Damages and

Health Care Costs Recovery Act, S.B.C. 2000, c. 30, or a "supplier" under the Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2, and the Trade Practice Act, R.S.B.C. 1996, c. 457.

Summary:

The appeal concerns two cases before the courts in British Columbia. In the *Costs Recovery* case, the [page47] Government of British Columbia is seeking to recover, pursuant to the *Tobacco Damages and Health Care Costs Recovery Act* ("*CRA*"), the cost of paying for the medical treatment of individuals suffering from tobacco-related illnesses from a group of tobacco companies, including Imperial. British Columbia alleges that by 1950, the tobacco companies knew or ought to have known that cigarettes were harmful to one's health, and that they failed to properly warn the public about the risks associated with smoking their product. In the *Knight* case, a class action was brought against Imperial alone on behalf of class members who purchased "light" or "mild" cigarettes, seeking a refund of the cost of the cigarettes and punitive damages. The class alleges that the levels of tar and nicotine listed on Imperial's packages for light and mild cigarettes did not reflect the actual deliveries of toxic emissions to smokers, and alleges that the smoke produced by light cigarettes was just as harmful as that produced by regular cigarettes.

In both cases, the tobacco companies issued third-party notices to the Government of Canada, alleging that if the tobacco companies are held liable to the plaintiffs, they are entitled to compensation from Canada for negligent misrepresentation, negligent design and failure to warn, as well as at equity. They also allege that Canada would itself be liable as a "manufacturer" under the *CRA* or a "supplier" under the *Business Practices and Consumer Protection Act* and the *Trade Practice Act*, and that they are entitled to contribution and indemnity from Canada pursuant to the *Negligence Act*. Canada brought motions to strike the third-party notices, arguing that it was plain and obvious that the third-party claims failed to disclose a reasonable cause of action. In both cases, the chambers judges struck all of the third-party notices. The British Columbia Court of Appeal allowed the tobacco companies' appeals in part. A majority held that the negligent misrepresentation claims arising from Canada's alleged duty of care to the tobacco companies in both the *Costs Recovery* case and the *Knight* case should proceed to trial. A majority in the *Knight* case further held that the negligent misrepresentation claim based on Canada's alleged duty of care to consumers should proceed, as should the negligent design claim. The court unanimously struck the remainder of the tobacco companies' claims.

[page48]

Held: The appeals should be allowed and the claims should be struck out. The tobacco companies' cross-appeals should be dismissed.

On a motion to strike, a claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action. The approach must be generous, and err on the side of permitting a novel but arguable claim to proceed to trial. However, the judge cannot consider what evidence adduced in the future might or might not show. Here, it is plain and obvious that none of the tobacco companies' claims against Canada have a reasonable chance of success.

Canada's Alleged Duties of Care to Smokers in the Costs Recovery Case

In the *Costs Recovery* case, the private law claims against Canada for contribution and indemnity based on alleged breaches of a duty of care to smokers must be struck. A third party may only be liable for contribution under the *Negligence Act* if it is directly liable to the plaintiff, in this case, British Columbia. Here, even if Canada breached duties to smokers, this would have no effect on whether it was liable to British Columbia.

The Claims for Negligent Misrepresentation

There are two relationships at issue in these claims: one between Canada and consumers and one between Canada and tobacco companies. In the *Knight* case, Imperial alleges that Canada negligently represented the

health attributes of low-tar cigarettes to consumers. In both the *Knight* case and the *Costs Recovery* case, the tobacco companies allege that Canada made negligent misrepresentations to the tobacco companies.

The facts as pleaded do not bring Canada's relationship with consumers and the tobacco companies within a settled category of negligent misrepresentation. Accordingly, to determine whether the alleged causes of action have a reasonable prospect of success, the general requirements for liability in tort must be met. At [page49] the first stage, the question is whether the facts disclose a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the plaintiff. In a claim of negligent misrepresentation, both of these requirements for a *prima facie* duty of care are established if there was a "special relationship" between the parties. A special relationship will be established where: (1) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and (2) reliance by the plaintiff would be reasonable in the circumstances of the case. If proximity is established, a *prima facie* duty of care arises and the analysis proceeds to the second stage, which asks whether there are policy reasons why this *prima facie* duty of care should not be recognized.

Here, on the facts as pleaded, Canada did not owe a *prima facie* duty of care to consumers. The relationship between the two was limited to Canada's statements to the general public that low-tar cigarettes are less hazardous. There were no specific interactions between Canada and the class members. Consequently, a finding of proximity in this relationship must arise from the governing statutes. However, the relevant statutes establish only general duties to the public, and no private law duties to consumers. In light of the lack of proximity, this claim in the *Knight* case should be struck at the first stage of the analysis.

As for the tobacco companies, the facts pleaded allege a history of interactions between Canada and the tobacco companies capable of establishing a special relationship of proximity giving rise to a *prima facie* duty of care. The allegations are that Canada assumed the role of adviser to a finite number of manufacturers and that there were commercial relationships entered into between Canada and the companies based in part on the advice given to the companies by government officials, going far beyond the sort of statements made by Canada to the public at large. Furthermore, Canada's regulatory powers over the manufacturers coupled with its specific advice and its commercial involvement could be seen as supporting a conclusion that Canada ought reasonably to have foreseen that the tobacco companies would rely on the representations and that such reliance would be reasonable in the pleaded circumstance.

[page50]

Canada's alleged negligent misrepresentations do not give rise to tort liability, however, because of conflicting policy considerations. The alleged representations constitute protected expressions of government policy. Core government policy decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith. The representations in this case were part and parcel of a government policy, adopted at the highest level in the Canadian government and developed out of concern for the health of Canadians and the individual and institutional costs associated with tobacco-related disease, to encourage people who continued to smoke to switch to low-tar cigarettes.

The claims for negligent misrepresentation should also fail because they would expose Canada to indeterminate liability. Recognizing a duty of care for representations to the tobacco companies would effectively amount to a duty to consumers. While the quantum of damages owed by Canada to the companies in both cases would depend on the number of smokers and the number of cigarettes sold, Canada had no control over the number of people who smoked light cigarettes.

The Claims for Failure to Warn

The tobacco companies make two allegations for failure to warn: (1) that Canada directed the tobacco companies not to provide warnings on cigarette packages about the health hazards of cigarettes and (2) that Canada failed to warn the tobacco companies about the dangers posed by the strains of tobacco it designed and licensed. These

two claims should be struck. The crux of the first claim is essentially the same as the negligent misrepresentation claim, and should be rejected for the same policy reasons. The Minister of Health's recommendations on warning labels were integral to the government's policy of encouraging smokers to switch to low-tar cigarettes. As such, they cannot ground a claim in failure to warn. The same is true of the second claim. While the tort of failure to warn requires evidence of a positive duty towards the plaintiff, nothing in the third-party notices suggests that Canada was under such a positive duty here. A plea of negligence, without more, will not suffice to raise a duty to warn. In any event, [page51] such a claim would fail for the policy reasons applicable to the negligent misrepresentation claim.

The Claims for Negligent Design

The tobacco companies have brought two types of negligent design claims against Canada. They submit that Canada breached its duty of care to the tobacco companies when it negligently designed its strains of low-tar tobacco. In the *Knight* case, Imperial submits that Canada breached its duty of care to consumers of light and mild cigarettes. The two negligent design claims establish a *prima facie* duty of care. With respect to Canada's design of low-tar tobacco strains, the proximity alleged with the tobacco companies is not based on a statutory duty, but on commercial interactions between Canada and the tobacco companies. In the *Knight* case also, it is at least arguable that Canada was acting in a commercial capacity towards the consumers of light and mild cigarettes when it designed its strains of tobacco. However, the decision to develop low-tar strains of tobacco on the belief that the resulting cigarettes would be less harmful to health is a decision that constitutes a course or principle of action based on Canada's health policy and based on social and economic factors. As a core government policy decision, it cannot ground a claim for negligent design. These claims should accordingly be struck.

Liability as a "Manufacturer" and a "Supplier"

The tobacco companies' contribution claim in the *Costs Recovery* case that Canada could qualify as a "manufacturer" under the *CRA* should be struck. It is plain and obvious that the federal government does not qualify as a manufacturer of tobacco under that Act. When the Act is read in context and all of its provisions are taken into account, it is apparent that the British Columbia legislature did not intend Canada to be liable as a manufacturer. This is confirmed by the text of the statute, the intent of the legislature in adopting the Act, [page52] and the broader context of the relationship between the province and the federal government. Holding Canada accountable under the *CRA* would defeat the legislature's intention of transferring the health-care costs resulting from tobacco-related wrongs from taxpayers to the tobacco industry. Similarly, the tobacco companies cannot rely on the recently adopted *Health Care Costs Recovery Act* in an action for contribution under the *CRA*. Finally, Canada could not be liable for contribution under the *Negligence Act* or at common law since it is not directly liable to British Columbia.

Imperial's claim in the *Knight* case that Canada could qualify as a "supplier" under the *Trade Practice Act* and the *Business Practices and Consumer Protection Act* which replaced it should also be struck. Canada's purpose for developing and promoting tobacco as described in the third-party notice suggests that it was not acting "in the course of business" or "in the course of the person's business" as those phrases are used in those statutes. Those phrases must be understood as limited to activities undertaken for a commercial purpose. Here, it is plain and obvious from the facts pleaded that Canada did not promote the use of low-tar cigarettes for a commercial purpose, but for a health purpose. Canada is therefore not a supplier and is not liable under those statutes.

Claims for Equitable Indemnity and Procedural Considerations

The tobacco companies' claims of equitable indemnity should be struck. Equitable indemnity is a narrow doctrine, confined to situations of an express or implied understanding that a principal will indemnify its agent for acting on the directions given. When Canada directed the tobacco industry about how it should conduct itself, it was doing so in its capacity as a government regulator that was concerned about the health of Canadians. Under such circumstances, it is unreasonable to infer that Canada was implicitly promising to indemnify the industry for acting on its request.

Finally, the claims for declaratory relief should be struck. The tobacco companies' ability to mount defences would not be severely prejudiced if Canada was no longer a third party in the litigation.

[page53]

Cases Cited

Applied: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; *Anns v. Merton London Borough Council*, [1978] A.C. 728; *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537; *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165; **referred to:** *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735; *Donoghue v. Stevenson*, [1932] A.C. 562; *Hedley Byrne & Co. v. Heller & Partners, Ltd.*, [1963] 2 All E.R. 575; *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441; *Giffels Associates Ltd. v. Eastern Construction Co.*, [1978] 2 S.C.R. 1346; *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129; *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210; *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5, [2010] 1 S.C.R. 132; *Heaslip Estate v. Mansfield Ski Club Inc.*, 2009 ONCA 594, 96 O.R. (3d) 401; *Eliopoulos Estate v. Ontario (Minister of Health and Long-Term Care)* (2006), 276 D.L.R. (4) 411; *Just v. British Columbia*, [1989] 2 S.C.R. 1228; *Home Office v. Dorset Yacht Co.*, [1970] 2 W.L.R. 1140; *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420; *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445; *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145; *X v. Bedfordshire County Council*, [1995] 3 All E.R. 353; *Stovin v. Wise*, [1996] A.C. 923; *Barrett v. Enfield London Borough Council*, [2001] 2 A.C. 550; *Sutherland Shire Council v. Heyman* (1985), 157 C.L.R. 424; *Pyrenees Shire Council v. Day*, [1998] HCA 3, 192 C.L.R. 330; *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990); *United States v. Neustadt*, 366 U.S. 696 (1961); *Dalehite v. United States*, 346 U.S. 15 (1953); *United States v. Gaubert*, 499 U.S. 315 (1991); *Berkovitz v. United States*, 486 U.S. 531 (1988); *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984); *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737; *Day v. Central Okanagan (Regional District)*, 2000 BCSC 1134, 79 B.C.L.R. (3d) 36; *Elias v. Headache and Pain Management Clinic*, 2008 CanLII 53133; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473; *Blackwater v. Plint*, 2005 SCC 58, [2005] 3 S.C.R. 3; *Parmley v. Parmley*, [1945] S.C.R. 635.

[page54]

Statutes and Regulations Cited

Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2, s. 1(1) "supplier".

Department of Agriculture and Agri-Food Act, R.S.C. 1985, c. A-9, s. 4.

Department of Health Act, S.C. 1996, c. 8, s. 4(1).

Federal Tort Claims Act, 28 U.S.C. ss.2680(a), (h).

Health Care Costs Recovery Act, S.B.C. 2008, c. 27, ss. 8(1), 24(3)(b).

Negligence Act, R.S.B.C. 1996, c. 333.

Supreme Court Civil Rules, B.C. Reg. 168/2009, r. 9-5.

Supreme Court Rules, B.C. Reg. 221/90, rr. 19(24), (27).

Tobacco Act, S.C. 1997, c. 13, s. 4.

Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30, ss. 1(1) "manufacture", "manufacturer", 2, 3(3)(b).

Tobacco Products Control Act, R.S.C. 1985, c. 14 (4 Supp.), s. 3 [rep. 1997, c. 13, s. 64].

Trade Practice Act, R.S.B.C. 1996, c. 457, s. 1 "supplier".

Authors Cited

British Columbia. *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 20, 4 Sess., 36 Parl., June 7, 2000, p. 16314.

New Oxford Dictionary of English. Oxford: Clarendon Press, 1998, "policy".

History and Disposition:

APPEAL and CROSS-APPEAL from a judgment of the British Columbia Court of Appeal (Hall, Saunders, Lowry, Tysoe and Smith JJ.A.), 2009 BCCA 541, 99 B.C.L.R. (4) 93, 313 D.L.R. (4) 695, [2010] 2 W.W.R. 9, 280 B.C.A.C. 160, 474 W.A.C. 160, [2009] B.C.J. No. 2445 (QL), 2009 CarswellBC 3300, reversing in part a decision of Satanove J. striking out third-party notices, 2007 BCSC 964, 76 B.C.L.R. (4) 100, [2008] 4 W.W.R. 156, [2007] B.C.J. No. 1461 (QL), 2007 CarswellBC 1806 (*sub nom. Knight v. Imperial Tobacco Canada Ltd.*). Appeal allowed and cross-appeal dismissed.

APPEAL and CROSS-APPEAL from a judgment of the British Columbia Court of Appeal (Hall, Saunders, Lowry, Tysoe and Smith JJ.A.), 2009 BCCA 540, 98 B.C.L.R. (4) 201, 313 D.L.R. (4) 651, [2010] 2 W.W.R. 385, 280 B.C.A.C. 100, 474 W.A.C. 100, [2009] B.C.J. No. 2444 (QL), 2009 CarswellBC 3307, reversing in part a decision of Wedge J. striking out third-party notices, [page55] 2008 BCSC 419, 82 B.C.L.R. (4) 362, 292 D.L.R. (4) 353, [2008] 12 W.W.R. 241, [2008] B.C.J. No. 609 (QL), 2008 CarswellBC 687 (*sub nom. British Columbia v. Imperial Tobacco Canada Ltd.*). Appeal allowed and cross-appeal dismissed.

Counsel

John S. Tyhurst, *Paul Vickery* and *Travis Henderson*, for the appellant/respondent on cross-appeal Her Majesty the Queen in Right of Canada (33559).

Paul Vickery, *John S. Tyhurst* and *Travis Henderson*, for the appellant/respondent on cross-appeal the Attorney General of Canada (33563).

Deborah Glendining and *Nada Khirdaji*, for the respondent/appellant on cross-appeal Imperial Tobacco Canada Limited (33559).

Ryan D. W. Dalziel and *Daniel A. Webster*, *Q.C.*, for the respondent Her Majesty the Queen in Right of British Columbia (33563).

John J. L. Hunter, *Q.C.*, and *Brent B. Olthuis*, for the respondent/appellant on cross-appeal Imperial Tobacco Canada Limited (33563).

Written submissions only by *Kenneth N. Affleck*, *Q.C.*, for the respondents/appellants on cross-appeal Rothmans, Benson & Hedges Inc. and Rothmans Inc. (33563).

Written submissions only by *Jeffrey J. Kay*, *Q.C.*, for the respondents/appellants on cross-appeal JTI-MacDonald Corp., R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International Inc. (33563).

Written submissions only by *Craig P. Dennis* and *Michael D. Shirreff*, for the respondents/appellants on cross-appeal B.A.T. Industries p.l.c. and British American Tobacco (Investments) Limited (33563).

Written submissions only by *Christopher M. Rusnak*, for the respondent/appellant on cross-appeal Carreras Rothmans Limited (33563).

Written submissions only by *D. Ross Clark*, for the respondent/appellant on cross-appeal Philip Morris U.S.A. Inc. (33563).

[page56]

Simon V. Potter, *Michael A. Feder* and *Angela M. Juba*, for the respondent/appellant on cross-appeal Philip Morris International Inc. (33563).

Malliha Wilson and *Lynne McArdle*, for the intervener the Attorney General of Ontario (33559-33563).

Jeffrey S. Leon, *Robyn M. Ryan Bell* and *Michael A. Eizenga*, for the intervener Her Majesty the Queen in Right of the Province of New Brunswick (33563).

Nancy Brown, for the intervener the Attorney General of British Columbia (33559-33563).

The judgment of the Court was delivered by

McLACHLIN C.J.

TABLE OF CONTENTS

[page57]

[page58]

I. Introduction

1 Imperial Tobacco Canada Ltd. ("Imperial") is a defendant in two cases before the courts in British Columbia, *British Columbia v. Imperial Tobacco Canada Ltd.*, Docket: S010421, and *Knight v. Imperial Tobacco Canada Ltd.*, Docket: L031300. In the first case, the Government of British Columbia is seeking to recover the cost of paying for the medical treatment of individuals suffering from tobacco-related illnesses from a group of 14 tobacco companies, including Imperial ("*Costs Recovery* case"). The second case is a class action brought against Imperial alone by Mr. Knight on behalf of class members who purchased "light" or "mild" cigarettes, seeking a refund of the cost [page59] of the cigarettes and punitive damages ("*Knight* case").

2 In both cases, the tobacco companies issued third-party notices to the Government of Canada, alleging that if the tobacco companies are held liable to the plaintiffs, they are entitled to compensation from Canada for negligent misrepresentation, negligent design, and failure to warn, as well as at equity. They also allege that Canada would itself be liable under the statutory schemes at issue in the two cases. In the *Costs Recovery* case, it is alleged that Canada would be liable under the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30 ("*CRA*"), as a "manufacturer". In the *Knight* case, it is alleged that Canada would be liable as a "supplier" under the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 ("*BPCPA*"), and its predecessor, the *Trade Practice Act*, R.S.B.C. 1996, c. 457 ("*TPA*").

3 In both cases, Canada brought motions to strike the third party notices under r. 19(24) of the *Supreme Court Rules*, B.C. Reg. 221/90 (replaced by the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 9-5), arguing that it was plain and obvious that the third-party claims failed to disclose a reasonable cause of action. In both cases, the chambers judges agreed with Canada, and struck all of the third-party notices. The British Columbia Court of Appeal allowed the tobacco companies' appeals in part. A majority of 3-2 held that the negligent misrepresentation claims arising from Canada's alleged duty of care to the tobacco companies in both the *Costs Recovery* case and the *Knight* case should proceed to trial. A majority in the *Knight* case further held that the negligent misrepresentation claim based on Canada's alleged duty of care to consumers should proceed, as should the negligent design claims in the *Knight* case. The court unanimously [page60] struck the remainder of the tobacco companies' claims.

4 The Government of Canada appeals the finding that the claims for negligent misrepresentation and the claim for negligent design should be allowed to go to trial. The tobacco companies cross-appeal the striking of the other claims.

5 For the reasons that follow, I conclude that all the claims of Imperial and the other tobacco companies brought against the Government of Canada are bound to fail, and should be struck. I would allow the appeals of the Government of Canada in both cases and dismiss the cross-appeals.

II. Underlying Claims and Judicial History

A. *The Knight Case*

6 In the *Knight* case, consumers in British Columbia have brought a class action against Imperial under the *BPCPA* and its predecessor, the *TPA*. The class consists of consumers of light or mild cigarettes. It alleges that Imperial engaged in deceptive practices when it promoted low-tar cigarettes as less hazardous to the health of consumers. The class alleges that the levels of tar and nicotine listed on Imperial's packages for light and mild cigarettes did not reflect the actual deliveries of toxic emissions to smokers, and alleges that the smoke produced by light cigarettes was just as harmful as that produced by regular cigarettes. The class seeks reimbursement of the cost of the cigarettes purchased, and punitive damages.

[page61]

7 Imperial issued a third-party notice against Canada. It alleges that Health Canada advised tobacco companies and the public that low-tar cigarettes were less hazardous than regular cigarettes. Imperial alleges that while Health Canada was initially opposed to the use of health warnings on cigarette packaging, it changed its policy in 1967. It instructed smokers to switch to low-tar cigarettes if they were unwilling to quit smoking altogether, and it asked tobacco companies to voluntarily list the tar and nicotine levels on their advertisements to encourage consumers to purchase low-tar brands. Contrary to expectations, it now appears that low-tar cigarettes are potentially more harmful to smokers.

8 Imperial also alleges that Agriculture Canada researched, developed, manufactured, and licensed several strains of low-tar tobacco, and collected royalties from the companies, including Imperial, that used these strains. By 1982, Imperial pleads, the tobacco strains developed by Agriculture Canada were "almost the only tobacco varieties available to Canadian tobacco manufacturers" (*Knight* case, amended third-party notice of Imperial, at para. 97).

9 Imperial makes five allegations against Canada:

(1) Canada is itself liable under the *BPCPA* and the *TPA* as a "supplier" of tobacco products that engaged in deceptive practices, and Imperial is entitled to contribution and indemnity from Canada pursuant to the provisions of the *Negligence Act*, R.S.B.C. 1996, c. 333.

(2) Canada breached private law duties to consumers by negligently misrepresenting the health attributes of low-tar cigarettes, by failing to warn them against the hazards of low-tar cigarettes, and by failing to design its tobacco [page62] strain with due care. Consequently, Imperial alleges that it is entitled to contribution and indemnity from Canada under the *Negligence Act*.

(3) Canada breached its private law duties to Imperial by negligently misrepresenting the health attributes of low-tar cigarettes, by failing to warn Imperial about the hazards of low-tar cigarettes, and by failing to design its tobacco strain with due care. Imperial alleges that it is entitled to damages against Canada to the extent of any liability Imperial may have to the class members.

(4) In the alternative, Canada is obliged to indemnify Imperial under the doctrine of equitable indemnity.

(5) If Canada is not liable to Imperial under any of the above claims, Imperial is entitled to declaratory relief against Canada so that it will remain a party to the action and be subject to discovery procedures under the *Supreme Court Rules*.

10 Canada brought an application to strike the third-party claims. It was successful before Satanove J. in the Supreme Court of British Columbia (2007 BCSC 964, 76 B.C.L.R. (4th) 100). The chambers judge struck all of the claims against Canada. Imperial was partially successful in the Court of Appeal (2009 BCCA 541, 99 B.C.L.R. (4th) 93). The Court of Appeal unanimously struck the statutory claim, the claim of negligent design between Canada and Imperial, and the equitable indemnity claim. However, the majority, *per* Tysoe J.A., held that the two negligent misrepresentation claims and the negligent design claim between Canada and consumers should be allowed to proceed. The majority reasons did not address the [page63] failure to warn claim. Hall J.A., dissenting, would have struck all the third-party claims.

B. *The Costs Recovery Case*

11 The Government of British Columbia has brought a claim under the *CRA* to recover the expense of treating tobacco-related illnesses caused by "tobacco related wrong[s]". Under the *CRA*, manufacturers of tobacco products are liable to the province directly. The claim was brought against 14 tobacco companies. British Columbia alleges that by 1950, these tobacco companies knew or ought to have known that cigarettes were harmful to one's health, and that they failed to properly warn the public about the risks associated with smoking their product.

12 Various defendants in the *Costs Recovery* case, including Imperial, brought third-party notices against Canada for its alleged role in the tobacco industry. I refer to them collectively as the "tobacco companies". The allegations in this claim are strikingly similar to those in the *Knight* case. The tobacco companies plead that Health Canada advised them and the public that low-tar cigarettes were less hazardous and instructed smokers that they should quit smoking or purchase low-tar cigarettes. The tobacco companies allege that Canada was initially opposed to the use of warning labels on cigarette packaging, but ultimately instructed the industry that warning labels should be used and what they should say. The tobacco companies also plead that Agriculture Canada researched, developed, manufactured and licensed the strains of low-tar tobacco which they used for their cigarettes in exchange for royalties.

[page64]

13 The tobacco companies brought the following claims against Canada:

(1) Canada is itself liable under the *CRA* as a "manufacturer" of tobacco products, and the tobacco companies are entitled to contribution and indemnity from Canada pursuant to the *Negligence Act*.

(2) Canada breached private law duties to consumers for failure to warn, negligent design, and negligent misrepresentation, and the tobacco companies are entitled to contribution and indemnity from Canada to the extent of any liability they may have to British Columbia under the *CRA*.

(3) Canada breached its private law duties owed to the tobacco companies for failure to warn and negligent design, and negligently misrepresented the attributes of low-tar cigarettes. The tobacco companies allege that they are entitled to damages against Canada to the extent of any liability they may have to British Columbia under the *CRA*.

(4) In the alternative, Canada is obliged to indemnify the tobacco companies under the doctrine of equitable indemnity.

(5) If Canada is not liable to the tobacco companies under any of the above claims, they are entitled to declaratory relief.

14 Canada was successful before the chambers judge, Wedge J., who struck all of the claims (2008 BCSC 419, 82 B.C.L.R. (4th) 362). In the Court of Appeal, the majority, *per* Tysoe J.A., allowed the negligent misrepresentation

claim between Canada and the tobacco companies to proceed (2009 BCCA 540, 98 B.C.L.R. (4th) 201). Hall J.A., [page65] dissenting, would have struck all the third-party claims.

III. Issues Before the Court

15 There is significant overlap between the issues on appeal in the *Costs Recovery* case and the *Knight* case, particularly in relation to the common law claims. Both cases discuss whether Canada could be liable at common law in negligent misrepresentation, negligent design and failure to warn, and in equitable indemnity. To reduce duplication, I treat the issues common to both cases together.

16 There are also issues and arguments that are distinct in the two cases. Uniquely in the *Costs Recovery* case, Canada argues that all the contribution claims based on the *Negligence Act* and Canada's alleged duties of care to smokers should be struck because even if these alleged duties were breached, Canada would not be liable to the sole plaintiff British Columbia. The statutory claims are also distinct in the two cases. The issues may therefore be stated as follows:

1. What is the test for striking out claims for failure to disclose a reasonable cause of action?
2. Should the claims for contribution and indemnity based on the *Negligence Act* and alleged breaches of duties of care to smokers be struck in the *Costs Recovery* case?
3. Should the tobacco companies' negligent misrepresentation claims be struck out?

[page66]

4. Should the tobacco companies' claims of failure to warn be struck out?
5. Should the tobacco companies' claims of negligent design be struck out?
6. Should the tobacco companies' claim in the *Costs Recovery* case that Canada could qualify as a "manufacturer" under the *CRA* be struck out?
7. Should Imperial's claim in the *Knight* case that Canada could qualify as a "supplier" under the *TPA* and the *BPCPA* be struck out?
8. Should the tobacco companies' claims of equitable indemnity be struck out?
9. If Canada is not liable to the tobacco companies under any of the third-party claims, are the tobacco companies nonetheless entitled to declaratory relief against Canada so that it will remain a party to both actions and be subject to discovery procedures under the *Supreme Court Rules*?

IV. Analysis

A. *The Test for Striking Out Claims*

17 The parties agree on the test applicable on a motion to strike for not disclosing a reasonable cause of action under r. 19(24)(a) of the B.C. *Supreme Court Rules*. This Court has reiterated the test on many occasions. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of [page67] success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Odhavji Estate*; *Hunt*; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

18 Although all agree on the test, the arguments before us revealed different conceptions about how it should be applied. It may therefore be useful to review the purpose of the test and its application.

19 The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping

measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.

20 This promotes two goods - efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be - on claims that have a reasonable chance of success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties' respective positions on those issues and the merits of the case.

21 Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised [page68] on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners, Ltd.*, [1963] 2 All E.R. 575 (H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson.* Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

22 A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven: *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 455. No evidence is admissible on such a motion: r. 19(27) of the *Supreme Court Rules* (now r. 9-5(2) of the *Supreme Court Civil Rules*). It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

[page69]

23 Before us, Imperial and the other tobacco companies argued that the motion to strike should take into account, not only the facts pleaded, but the possibility that as the case progressed, the evidence would reveal more about Canada's conduct and role in promoting the use of low-tar cigarettes. This fundamentally misunderstands what a motion to strike is about. It is not about evidence, but the pleadings. The facts pleaded are taken as true. Whether the evidence substantiates the pleaded facts, now or at some future date, is irrelevant to the motion to strike. The judge on the motion to strike cannot consider what evidence adduced in the future might or might not show. To require the judge to do so would be to gut the motion to strike of its logic and ultimately render it useless.

24 This is not unfair to the claimant. The presumption that the facts pleaded are true operates in the claimant's favour. The claimant chooses what facts to plead, with a view to the cause of action it is asserting. If new developments raise new possibilities - as they sometimes do - the remedy is to amend the pleadings to plead new facts at that time.

25 Related to the issue of whether the motion should be refused because of the possibility of unknown evidence appearing at a future date is the issue of speculation. The judge on a motion to strike asks if the claim has any reasonable prospect of success. In the world of abstract speculation, there is a mathematical chance that any number of things might happen. That is not what the test on a motion to strike seeks to determine. Rather, it

operates on the assumption that the claim will proceed through the court system in the usual way - in an adversarial system where judges are under a duty to apply the law as set out in (and as it may develop from) statutes and precedent. The question is whether, considered in *the context of the [page70] law and the litigation process*, the claim has no reasonable chance of succeeding.

26 With this framework in mind, I proceed to consider the tobacco companies' claims.

B. *Canada's Alleged Duties of Care to Smokers in the Costs Recovery Case*

27 In the *Costs Recovery* case, Canada argues that all the claims for contribution based on its alleged duties of care to smokers must be struck. Under the *Negligence Act*, Canada submits, contribution may only be awarded if the third party would be liable to the plaintiff directly. It argues that even if Canada breached duties to smokers, such breaches cannot ground the tobacco companies' claims for contribution if they are found liable to British Columbia, the sole plaintiff in the *Costs Recovery* case. This argument was successful in the Court of Appeal.

28 The tobacco companies argue that direct liability to the plaintiff is not a requirement for being held liable in contribution. They argue that contribution in the *Negligence Act* turns on fault, not liability. The object of the *Negligence Act* is to allow defendants to recover from other parties that were also at fault for the damage that resulted to the plaintiff, and barring a claim against Canada would defeat this purpose, they argue.

29 I agree with Canada and the Court of Appeal that a third party may only be liable for contribution under the *Negligence Act* if it is directly liable to the plaintiff. In *Giffels Associates Ltd. v. Eastern Construction Co.*, [1978] 2 S.C.R. 1346, dealing [page71] with a statutory provision similar to that in British Columbia, Laskin C.J. stated:

> ... I am of the view that it is a precondition of the right to resort to contribution that there be liability to the plaintiff. I am unable to appreciate how a claim for contribution can be made under s. 2(1) by one person against another in respect of loss resulting to a third person unless each of the former two came under a liability to the third person to answer for his loss. [Emphasis added; p. 1354.]

30 Accordingly, it is plain and obvious that the private law claims against Canada in the *Costs Recovery* case that arise from an alleged duty of care to consumers must be struck. Even if Canada breached duties to smokers, this would have no effect on whether it was liable to British Columbia, the plaintiff in that case. This holding has no bearing on the consumer claim in the *Knight* case since consumers of light or mild cigarettes are the plaintiffs in the underlying action.

31 The discussion of the private law claims in the remainder of these reasons will refer exclusively to the claims based on Canada's alleged duties of care to the tobacco companies in both cases before the Court, and Canada's alleged duties to consumers in the *Knight* case.

C. *The Claims for Negligent Misrepresentation*

32 There are two types of negligent misrepresentation claims that remain at issue on this appeal. First, in the *Knight* case, Imperial alleges that Canada negligently misrepresented the health attributes of low-tar cigarettes to consumers, and is therefore liable for contribution and indemnity on the basis of the *Negligence Act* if the class members [page72] are successful in this suit. Second, in both cases before the Court, Imperial and the other tobacco companies allege that Canada made negligent misrepresentations to the tobacco companies, and that Canada is liable for any losses that the tobacco companies incur to the plaintiffs in either case.

33 Canada applies to have the claims struck on the ground that they have no reasonable prospect of success.

34 For the purposes of the motion to strike, we must accept as true the facts pleaded. We must therefore accept that Canada represented to consumers and to tobacco companies that light or mild cigarettes were less harmful, and that these representations were not accurate. We must also accept that consumers and the tobacco companies relied on Canada's representations and acted on them to their detriment.

35 The law first recognized a tort action for negligent misrepresentation in *Hedley Byrne.* Prior to this, parties were confined to contractual remedies for misrepresentations. *Hedley Byrne* represented a break with this tradition, allowing a claim for economic loss in tort for misrepresentations made in the absence of a contract between the parties. In the decades that have followed, liability for negligent misrepresentation has been imposed in a variety of situations where the relationship between the parties disclosed sufficient proximity and foreseeability, and policy considerations did not negate liability.

36 Imperial and the other tobacco companies argue that the facts pleaded against Canada bring their claims within the settled parameters of the [page73] tort of negligent misrepresentation, and therefore a *prima facie* duty of care is established. The majority in the Court of Appeal accepted this argument in both decisions below (*Knight* case, at paras. 45 and 66; *Costs Recovery* case, at para. 70).

37 The first question is whether the facts as pleaded bring Canada's relationships with consumers and the tobacco companies within a settled category that gives rise to a duty of care. If they do, a *prima facie* duty of care will be established: see *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643, at para. 15. However, it is important to note that liability for negligent misrepresentation depends on the nature of the relationship between the plaintiff and defendant, as discussed more fully below. The question is not whether negligent misrepresentation is a recognized tort, but whether there is a reasonable prospect that the relationship alleged in the pleadings will give rise to liability for negligent misrepresentation.

38 In my view, the facts pleaded do not bring either claim within a settled category of negligent misrepresentation. The law of negligent misrepresentation has thus far not recognized liability in the kinds of relationships at issue in these cases. The error of the tobacco companies lies in assuming that the relationships disclosed by the pleadings between Canada and the tobacco companies on the one hand and between Canada and consumers on the other are like other relationships that have been held to give rise to liability for negligent misrepresentation. In fact, they differ in important ways. It is sufficient at this point to note that the tobacco companies have not been able to point to any case where a government has been held liable in negligent misrepresentation for statements made to an industry. To determine whether such a cause of action has a reasonable prospect of success, we must therefore consider whether the general requirements for liability in tort are met, on the test [page74] set out by the House of Lords in *Anns v. Merton London Borough Council*, [1978] A.C. 728, and somewhat reformulated but consistently applied by this Court, most notably in *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537.

39 At the first stage of this test, the question is whether the facts disclose a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the plaintiff. If this is established, a *prima facie* duty of care arises and the analysis proceeds to the second stage, which asks whether there are policy reasons why this *prima facie* duty of care should not be recognized: *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129.

(1) Stage One: Proximity and Foreseeability

40 On the first branch of the test, the tobacco companies argue that the facts pleaded establish a sufficiently close and direct, or "proximate", relationship between Canada and consumers (in the *Knight* case) and between Canada and tobacco companies (in both cases) to support a duty of care with respect to government statements about light and mild cigarettes. They also argue that Canada could reasonably have foreseen that consumers and the tobacco industry would rely on Canada's statements about the health advantages of light cigarettes, and that such reliance was reasonable. Canada responds that it was acting exclusively in a regulatory capacity when it made statements to the public and to the industry, which does not give rise to sufficient proximity to ground the alleged duty of care. In the *Costs Recovery* case, Canada also alleges that it could not have reasonably foreseen that the B.C. legislature would enact the *CRA* and therefore cannot be liable for the [page75] potential losses of the tobacco companies under that Act.

41 Proximity and foreseeability are two aspects of one inquiry - the inquiry into whether the facts disclose a relationship that gives rise to a *prima facie* duty of care at common law. Foreseeability is the touchstone of

negligence law. However, not every foreseeable outcome will attract a commensurate duty of care. Foreseeability must be grounded in a relationship of sufficient closeness, or proximity, to make it just and reasonable to impose an obligation on one party to take reasonable care not to injure the other.

42 Proximity and foreseeability are heightened concerns in claims for economic loss, such as negligent misrepresentation: see, generally, *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210. In a claim of negligent misrepresentation, both these requirements for a *prima facie* duty of care are established if there was a "special relationship" between the parties: *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 24. In *Hercules Managements*, the Court, *per* La Forest J., held that a special relationship will be established where: (1) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and (2) reliance by the plaintiff would be reasonable in the circumstances of the case (*ibid.*). Where such a relationship is established, the defendant may be liable for losses suffered by the plaintiff as a result of a negligent misstatement.

[page76]

43 A complicating factor is the role that legislation should play when determining if a government actor owed a *prima facie* duty of care. Two situations may be distinguished. The first is the situation where the alleged duty of care is said to arise explicitly or by implication from the statutory scheme. The second is the situation where the duty of care is alleged to arise from interactions between the claimant and the government, and is not negated by the statute.

44 The argument in the first kind of case is that the statute itself creates a private relationship of proximity giving rise to a *prima facie* duty of care. It may be difficult to find that a statute creates sufficient proximity to give rise to a duty of care. Some statutes may impose duties on state actors with respect to particular claimants. However, more often, statutes are aimed at public goods, like regulating an industry (*Cooper*), or removing children from harmful environments (*Syl Apps*). In such cases, it may be difficult to infer that the legislature intended to create private law tort duties to claimants. This may be even more difficult if the recognition of a private law duty would conflict with the public authority's duty to the public: see, e.g., *Cooper* and *Syl Apps*. As stated in *Syl Apps*, "[w]here an alleged duty of care is found to conflict with an overarching statutory or public duty, this may constitute a compelling policy reason for refusing to find proximity" (at para. 28; see also *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5, [2010] 1 S.C.R. 132, at para. 39).

45 The second situation is where the proximity essential to the private duty of care is alleged to arise from a series of specific interactions between the government and the claimant. The argument in these cases is that the government has, through its conduct, entered into a special relationship with the plaintiff sufficient to establish the necessary proximity for a duty of care. In these cases, the [page77] governing statutes are still relevant to the analysis. For instance, if a finding of proximity would conflict with the state's general public duty established by the statute, the court may hold that no proximity arises: *Syl Apps*; see also *Heaslip Estate v. Mansfield Ski Club Inc.*, 2009 ONCA 594, 96 O.R. (3d) 401. However, the factor that gives rise to a duty of care in these types of cases is the specific interactions between the government actor and the claimant.

46 Finally, it is possible to envision a claim where proximity is based both on interactions between the parties and the government's statutory duties.

47 Since this is a motion to strike, the question before us is simply whether, assuming the facts pleaded to be true, there is any reasonable prospect of successfully establishing proximity, on the basis of a statute or otherwise. On one hand, where the sole basis asserted for proximity is the statute, conflicting public duties may rule out any possibility of proximity being established as a matter of statutory interpretation: *Syl Apps.* On the other, where the asserted basis for proximity is grounded in specific conduct and interactions, ruling a claim out at the proximity stage may be difficult. So long as there is a reasonable prospect that the asserted interactions could, if true, result in a finding of sufficient proximity, and the statute does not exclude that possibility, the matter must be allowed to

proceed to trial, subject to any policy considerations that may negate the *prima facie* duty of care at the second stage of the analysis.

48 As mentioned above, there are two relationships at issue in these claims: the relationship between Canada and consumers (the *Knight* case), and the relationship between Canada and tobacco companies (both cases). The question at this stage is whether there is a *prima facie* [page78] duty of care in either or both these relationships. In my view, on the facts pleaded, Canada did not owe a *prima facie* duty of care to consumers, but did owe a *prima facie* duty to the tobacco companies.

49 The facts pleaded in Imperial's third-party notice in the *Knight* case establish no direct relationship between Canada and the consumers of light cigarettes. The relationship between the two was limited to Canada's statements to the general public that low-tar cigarettes are less hazardous. There were no specific interactions between Canada and the class members. Consequently, a finding of proximity in this relationship must arise from the governing statutes: *Cooper*, at para. 43.

50 The relevant statutes establish only general duties to the public, and no private law duties to consumers. The *Department of Health Act*, S.C. 1996, c. 8, establishes that the duties of the Minister of Health relate to "the promotion and preservation of the health of the people of Canada": s. 4(1). Similarly, the *Department of Agriculture and Agri-Food Act*, R.S.C. 1985, c. A-9, s. 4, the *Tobacco Act*, S.C. 1997, c. 13, s. 4, and the *Tobacco Products Control Act*, R.S.C. 1985, c. 14 (4th Supp.), s. 3 [rep. 1997, c. 13, s. 64], only establish duties to the general public. These general duties to the public do not give rise to a private law duty of care to particular individuals. To borrow the words of Sharpe J.A. of the Ontario Court of Appeal in *Eliopoulos Estate v. Ontario (Minister of Health and Long-Term Care)* (2006), 276 D.L.R. (4th) 411, "I fail to see how it could be possible to convert any of the Minister's public law discretionary powers, to be exercised in the general public interest, into private law duties owed to specific individuals": para. 17. At the same time, the governing statutes do not foreclose the possibility of recognizing a duty of care to the tobacco companies. Recognizing a duty of care on the government when it makes representations to the tobacco companies about the health attributes of tobacco strains would not conflict with its general duty to protect the health of the public.

[page79]

51 Turning to the relationship between Canada and the tobacco companies, at issue in both of the cases before the Court, the tobacco companies contend that a duty of care on Canada arose from the transactions between them and Canada over the years. They allege that Canada went beyond its role as regulator of industry players and entered into a relationship of advising and assisting the companies in reducing harm to their consumers. They hope to show that Canada gave erroneous information and advice, knowing that the companies would rely on it, which they did.

52 The question is whether these pleadings bring the tobacco companies within the requirements for a special relationship under the law of negligent misrepresentation as set out in *Hercules Managements*. As noted above, a special relationship will be established where (1) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation, and (2) such reliance would, in the particular circumstances of the case, be reasonable. In the cases at bar, the facts pleaded allege a history of interactions between Canada and the tobacco companies capable of fulfilling these conditions.

53 What is alleged against Canada is that Health Canada assumed duties separate and apart from its governing statute, including research into and design of tobacco and tobacco products and the promotion of tobacco and tobacco products (third-party statement of claim of Imperial in the *Costs Recovery* case, A.R., vol. II, at p. 66). In addition, it is alleged that Agriculture Canada carried out a programme of cooperation with and support for tobacco growers and cigarette manufacturers including advising cigarette manufacturers of the desirable content of nicotine in tobacco to be used in the manufacture of tobacco products. It is alleged that officials, drawing on their knowledge and expertise in smoking and health matters, provided both advice and directions to the manufacturers including advice that the tobacco strains [page80] designed and developed by officials of Agriculture Canada and sold or

licensed to the manufacturers for use in their tobacco products would not increase health risks to consumers or otherwise be harmful to them (*ibid.*, at pp. 109-10). Thus, what is alleged is not simply that broad powers of regulation were brought to bear on the tobacco industry, but that Canada assumed the role of adviser to a finite number of manufacturers and that there were commercial relationships entered into between Canada and the companies based in part on the advice given to the companies by government officials.

54 What is alleged with respect to Canada's interactions with the manufacturers goes far beyond the sort of statements made by Canada to the public at large. Canada is alleged to have had specific interactions with the manufacturers in contrast to the absence of such specific interactions between Canada and the class members. Whereas the claims in relation to consumers must be founded on a statutory framework establishing very general duties to the public, the claims alleged in relation to the manufacturers are not alleged to arise primarily from such general regulatory duties and powers but from roles undertaken specifically in relation to the manufacturers by Canada apart from its statutory duties, namely its roles as designer, developer, promoter and licensor of tobacco strains. With respect to the issue of reasonable reliance, Canada's regulatory powers over the manufacturers, coupled with its specific advice and its commercial involvement, could be seen as supporting a conclusion that reliance was reasonable in the pleaded circumstance.

55 The indicia of proximity offered in *Hercules Managements* for a special relationship (direct financial interest; professional skill or knowledge; advice provided in the course of business, deliberately or in response to a specific request) may not be particularly apt in the context of alleged [page81] negligent misrepresentations by government. I note, however, that the representations are alleged to have been made in the course of Health Canada's regulatory and other activities, not in the course of casual interaction. They were made specifically to the manufacturers who were subject to Health Canada's regulatory powers and by officials alleged to have special skill, judgment and knowledge.

56 Before leaving this issue, two final arguments must be considered. First, in the *Costs Recovery* case, Canada submits that there is no *prima facie* duty of care between Canada and the tobacco companies because the potential damages that the tobacco companies may incur under the *CRA* were not foreseeable. It argues that "[i]t was not reasonably foreseeable by Canada that a provincial government might create a wholly new type of civil obligation to reimburse costs incurred by a provincial health care scheme in respect of defined tobacco related wrongs, with unlimited retroactive and prospective reach" (A.F., at para. 36).

57 In my view, Canada's argument was correctly rejected by the majority of the Court of Appeal. It is not necessary that Canada should have foreseen the precise statutory vehicle that would result in the tobacco companies' liability. All that is required is that it could have foreseen that its negligent misrepresentations would result in a harm of some sort to the tobacco companies: *Hercules Managements*, at paras. 25-26 and 42. On the facts pleaded, it cannot be ruled out that the tobacco companies may succeed in proving that Canada foresaw that the tobacco industry would incur this type of penalty for selling a more hazardous product. As held by Tysoe J.A., it is not necessary that Canada foresee that the liability would extend to health care costs specifically, or that provinces would create statutory causes of action to recover these costs. Rather, "[i]t is sufficient that Canada could have reasonably foreseen in a general way that the appellants would [page82] suffer harm if the light and mild cigarettes were more hazardous to the health of smokers than regular cigarettes" (*Costs Recovery* case, at para. 78).

58 Second, Canada argues that the relationship in this case does not meet the requirement of reasonable reliance because Canada was not acting in a commercial capacity, but rather as a regulator of an industry. It was therefore not reasonable for the tobacco companies to have relied on Canada as an advisor, it submits. This view was adopted by Hall J.A. in dissent, holding that "it could never have been the perception of the appellants that Canada was taking responsibility for their interests" (*Costs Recovery* case, at para. 51).

59 In my view, this argument misconceives the reliance necessary for negligent misrepresentation under the test in *Hercules Managements.* When the jurisprudence refers to "reasonable reliance" in the context of negligent misrepresentation, it asks whether it was reasonable for the listener to rely on the speaker's statement as accurate, not whether it was reasonable to believe that the speaker is guaranteeing the accuracy of its statement. It is not

plain and obvious that it was unreasonable for the tobacco companies to rely on Canada's statements about the advantages of light or mild cigarettes. In my view, Canada's argument that it was acting as a regulator does not relate to reasonable reliance, although it exposes policy concerns that should be considered at stage two of the *Anns/Cooper* test: *Hercules Managements*, at para. 41.

60 In sum, I conclude that the claims between the tobacco companies and Canada should not be struck out at the first stage of the analysis. The pleadings, assuming them to be true, disclose a *prima facie* duty of care in negligent misrepresentation. However, the facts as pleaded in the *Knight* [page83] case do not show a relationship between Canada and consumers that would give rise to a duty of care. That claim should accordingly be struck at this stage of the analysis.

(2) Stage Two: Conflicting Policy Considerations

61 Canada submits that there can be no duty of care in the cases at bar because of stage-two policy considerations. It relies on four policy concerns: (1) that the alleged misrepresentations were policy decisions of the government; (2) that recognizing a duty of care would give rise to indeterminate liability to an indeterminate class; (3) that recognizing a duty of care would create an unintended insurance scheme; and (4) that allowing Imperial's claim would transfer responsibility for tobacco products to the government from the manufacturer, and the manufacturer "is best positioned to address liability for economic loss" (A.F., at para. 72).

62 For the reasons that follow, I accept Canada's submission that its alleged negligent misrepresentations to the tobacco industry in both cases should not give rise to tort liability because of stage-two policy considerations. First, the alleged statements are protected expressions of government policy. Second, recognizing a duty of care would expose Canada to indeterminate liability.

(a) *Government Policy Decisions*

63 Canada contends that it had a policy of encouraging smokers to consume low-tar cigarettes, [page84] and pursuant to this policy, promoted this variety of cigarette and developed strains of low-tar tobacco. Canada argues that statements made pursuant to this policy cannot ground tort liability. It relies on the statement of Cory J. in *Just v. British Columbia*, [1989] 2 S.C.R. 1228, that "[t]rue policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors" (p. 1240).

64 The tobacco companies, for their part, contend that Canada's actions were not matters of policy, but operational acts implementing policy, and therefore, are subject to tort liability. They submit that Canada's argument fails to account for the "facts" as pleaded in the third-party notices, namely that Canada was acting in an operational capacity, and as a participant in the tobacco industry. The tobacco companies also argue that more evidence is required to determine if the government's actions were operational or pursuant to policy, and that the matter should therefore be permitted to go to trial.

65 In the *Knight* case, the majority in the Court of Appeal, *per* Tysoe J.A., agreed with Imperial's submissions, holding that "evidence is required to determine which of the actions and statements of Canada in this case were policy decisions and which were operational decisions" (para. 52). Hall J.A. dissented; in his view, it was clear that all of Canada's initiatives were matters of government policy:

> [Canada] had a responsibility, as pleaded in the Third Party Notice, to protect the health of the Canadian public including smokers. Any initiatives it took to develop less hazardous strains of tobacco, or to publish the tar and nicotine yields of different cigarette brands were directed to this end. While the development of new [page85] strains of tobacco involved Agriculture Canada, in my view the government engaged in such activities as a regulator of the tobacco industry seeking to protect the health interests of the Canadian public. Policy considerations underlaid all of these various activities undertaken by departments of the federal government. [para. 100]

66 In order to resolve the issue of whether the alleged "policy" nature of Canada's conduct negates the *prima facie*

duty of care for negligent misrepresentation established at stage one of the analysis, it is necessary to first consider several preliminary matters.

(i) Conduct at Issue

67 The first preliminary matter is the conduct at issue for purposes of this discussion. The third-party notices describe two distinct types of conduct - one that is related to the allegation of negligent misrepresentation and one that is not. The first type of conduct relates to representations by Canada that low-tar and light cigarettes were less harmful to health than other cigarettes. The second type of conduct relates to Agriculture Canada's role in developing and growing a strain of low-tar tobacco and collecting royalties on the product. In argument, the tobacco companies merged the two types of conduct, emphasizing aspects that cast Canada in the role of a business operator in the tobacco industry. However, in considering negligent misrepresentation, only the first type of conduct - conduct relevant to statements and representations made by Canada - is at issue.

(ii) Relevance of Evidence

68 This brings us to the second and related preliminary matter - the helpfulness of evidence in resolving the question of whether the third-party claims for negligent misrepresentation should be [page86] struck. The majority of the Court of Appeal concluded that evidence was required to establish whether Canada's alleged misrepresentations were made pursuant to a government policy. Likewise, the tobacco companies in this Court argued strenuously that insofar as Canada was developing, growing, and profiting from low-tar tobacco, it should not be regarded as a government regulator or policy maker, but rather a business operator. Evidence was required, they urged, to determine the extent to which this was business activity.

69 There are two problems with this argument. The first is that, as mentioned, it relies mainly on conduct - the development and marketing of a strain of low-tar tobacco - that is not directly related to the allegation of negligent misrepresentation. The only question at this point of the analysis is whether policy considerations weigh against finding that Canada was under a duty of care to the tobacco companies to take reasonable care to accurately represent the qualities of low-tar tobacco. Whether Canada produced strains of low-tar tobacco is not directly relevant to that inquiry. The question is whether, insofar as it made statements on this matter, policy considerations militate against holding it liable for those statements.

70 The second problem with the argument is that, as discussed above, a motion to strike is, by its very nature, not dependent on evidence. The facts pleaded must be assumed to be true. Unless it is plain and obvious that on those facts the action has no reasonable chance of success, the motion to strike must be refused. To put it another way, if there is a reasonable chance that the matter as pleaded may in fact turn out not to be a matter of policy, then the application to strike must be dismissed. Doubts as to what may be proved in the [page87] evidence should be resolved in favour of proceeding to trial. The question for us is therefore whether, assuming the facts pleaded to be true, it is plain and obvious that any duty of care in negligent misrepresentation would be defeated on the ground that the conduct grounding the alleged misrepresentation is a matter of government policy and hence not capable of giving rise to liability in tort.

71 Before we can answer this question, we must consider a third preliminary issue: what constitutes a policy decision immune from review by the courts?

(iii) What Constitutes a Policy Decision Immune From Judicial Review?

72 The question of what constitutes a policy decision that is generally protected from negligence liability is a vexed one, upon which much judicial ink has been spilled. There is general agreement in the common law world that government policy decisions are not justiciable and cannot give rise to tort liability. There is also general agreement that governments may attract liability in tort where government agents are negligent in carrying out prescribed duties. The problem is to devise a workable test to distinguish these situations.

73 The jurisprudence reveals two approaches to the problem, one emphasizing discretion, the other, policy, each with variations. The first approach focuses on the discretionary nature of the impugned conduct. The "discretionary

decision" approach was first adopted in *Home Office v. Dorset Yacht Co.*, [1970] 2 W.L.R. 1140 (H.L.). This approach holds that public authorities should be exempt from liability if they are acting within their discretion, unless the challenged decision is irrational.

[page88]

74 The second approach emphasizes the "policy" nature of protected state conduct. Policy decisions are conceived of as a subset of discretionary decisions, typically characterized as raising social, economic and political considerations. These are sometimes called "true" or "core" policy decisions. They are exempt from judicial consideration and cannot give rise to liability in tort, provided they are neither irrational nor taken in bad faith. A variant of this is the policy/operational test, in which "true" policy decisions are distinguished from "operational" decisions, which seek to implement or carry out settled policy. To date, the policy/operational approach is the dominant approach in Canada: *Just*; *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420; *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445; *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145.

75 To complicate matters, the concepts of discretion and policy overlap and are sometimes used interchangeably. Thus Lord Wilberforce in *Anns* defined policy as a synonym for discretion (p. 754).

76 There is wide consensus that the law of negligence must account for the unique role of government agencies: *Just*. On the one hand, it is important for public authorities to be liable in general for their negligent conduct in light of the pervasive role that they play in all aspects of society. Exempting all government actions from liability would result in intolerable outcomes. On the other hand, "the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions": *Just*, at p. 1239. The challenge, [page89] to repeat, is to fashion a just and workable legal test.

77 The main difficulty with the "discretion" approach is that it has the potential to create an overbroad exemption for the conduct of government actors. Many decisions can be characterized as to some extent discretionary. For this reason, this approach has sometimes been refined or replaced by tests that narrow the scope of the discretion that confers immunity.

78 The main difficulty with the policy/operational approach is that courts have found it notoriously difficult to decide whether a particular government decision falls on the policy or operational side of the line. Even low-level state employees may enjoy some discretion related to how much money is in the budget or which of a range of tasks is most important at a particular time. Is the decision of a social worker when to visit a troubled home, or the decision of a snow-plow operator when to sand an icy road, a policy decision or an operational decision? Depending on the circumstances, it may be argued to be either or both. The policy/operational distinction, while capturing an important element of why some government conduct should generally be shielded from liability, does not work very well as a legal test.

79 The elusiveness of a workable test to define policy decisions protected from judicial review is captured by the history of the issue in various courts. I begin with the House of Lords. The House initially adopted the view that all discretionary decisions of government are immune, unless they are irrational: *Dorset Yacht*. It then moved on to a two-stage test that asked first whether the decision was discretionary and, if so, rational; and asked second whether it was a core policy decision, [page90] in which case it was entirely exempt from judicial scrutiny: *X v. Bedfordshire County Council*, [1995] 3 All E.R. 353. Within a year of adopting this two-stage test, the House abandoned it with a ringing declamation of the policy/operational distinction as unworkable in difficult cases, a point said to be evidenced by the Canadian jurisprudence: *Stovin v. Wise*, [1996] A.C. 923 (H.L.), *per* Lord Hoffmann. In its most recent foray into the subject, the House of Lords affirmed that both the policy/operational distinction and the discretionary decision approach are valuable tools for discerning which government decisions attract tort liability, but held that the final test is a "justiciability" test: *Barrett v. Enfield London Borough Council*, [2001] 2 A.C. 550. The ultimate question on this test is whether the court is institutionally capable of deciding on the question, or "whether the court should accept that it has no role to play" (p. 571). Thus at the end of the long judicial voyage the traveller

arrives at a test that essentially restates the question. When should the court hold that a government decision is protected from negligence liability? When the court concludes that the matter is one for the government and not the courts.

80 Australian judges in successive cases have divided between a discretionary/irrationality model and a "true policy" model. In *Sutherland Shire Council v. Heyman* (1985), 157 C.L.R. 424 (H.C.), two of the justices (Gibbs C.J. and Wilson J.) adopted the *Dorset Yacht* rule that all discretionary decisions are immune, provided they are rational (p. 442). They endorsed the policy/operational distinction as a logical test for discerning which decisions should be protected, and adopted Lord Wilberforce's definition of policy as a synonym for discretion. Mason J., by contrast, held that only core policy decisions, which he viewed as a narrower subset of discretionary decisions, were protected (p. 500). Deane J. agreed with Mason J. [page91] for somewhat different reasons. Brennan J. did not comment on which test should be adopted, leaving the test an open question. The Australian High Court again divided in *Pyrenees Shire Council v. Day*, [1998] HCA 3, 192 C.L.R. 330, with three justices holding that a discretionary government action will only attract liability if it is irrational and two justices endorsing different versions of the policy/operational distinction.

81 In the United States, the liability of the federal government is governed by the *Federal Tort Claims Act* of 1946, 28 U.S.C. ("*FTCA*"), which waived sovereign immunity for torts, but created an exemption for discretionary decisions. Section 2680(a) excludes liability in tort for

> [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or 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 be abused.

Significantly, s. 2680(h) of the *FTCA* exempts the federal government from any claim of misrepresentation, either intentional or negligent: *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), at p. 430; *United States v. Neustadt*, 366 U.S. 696 (1961).

82 Without detailing the complex history of the American jurisprudence on the issue, it suffices to say that the cases have narrowed the concept of discretion in the *FTCA* by reference to the concept of policy. Some cases develop this analysis by distinguishing between policy and operational decisions: [page92] e.g., *Dalehite v. United States*, 346 U.S. 15 (1953). The Supreme Court of the United States has since distanced itself from the approach of defining a true policy decision negatively as "not operational", in favour of an approach that asks whether the impugned state conduct was based on public policy considerations. In *United States v. Gaubert*, 499 U.S. 315 (1991), White J. faulted the Court of Appeals for relying on "a nonexistent dichotomy between discretionary functions and operational activities" (p. 326). He held that the "discretionary function exception" of the *FTCA* "protects only governmental actions and decisions based on considerations of public policy" (at p. 323, citing *Berkovitz v. United States*, 486 U.S. 531 (1988), at p. 537 (emphasis added)), such as those involving social, economic and political considerations: see also *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984).

83 In *Gaubert*, only Scalia J. found lingering appeal in defining policy decisions as "not operational", but only in the narrow sense that people at the operational level will seldom make policy decisions. He stated that "there is something to the planning vs. operational dichotomy - though ... not precisely what the Court of Appeals believed" (p. 335). That "something" is that "[o]rdinarily, an employee working at the operational level is not responsible for policy decisions, even though policy considerations may be highly relevant to his actions". For Scalia J., a government decision is a protected policy decision if it "ought to be informed by considerations of social, economic, or political policy and is made by an officer whose official responsibilities include assessment of those considerations".

[page93]

84 A review of the jurisprudence provokes the following observations. The first is that a test based simply on the

exercise of government discretion is generally now viewed as too broad. Discretion can imbue even routine tasks, like driving a government vehicle. To protect all government acts that involve discretion unless they are irrational simply casts the net of immunity too broadly.

85 The second observation is that there is considerable support in all jurisdictions reviewed for the view that "true" or "core" policy decisions should be protected from negligence liability. The current Canadian approach holds that only "true" policy decisions should be so protected, as opposed to operational decisions: *Just*. The difficulty in defining such decisions does not detract from the fact that the cases keep coming back to this central insight. Even the most recent "justiciability" test in the U.K. looks to this concept for support in defining what should be viewed as justiciable.

86 A third observation is that defining a core policy decision negatively as a decision that is not an "operational" decision may not always be helpful as a stand-alone test. It posits a stark dichotomy between two water-tight compartments - policy decisions and operational decisions. In fact, decisions in real life may not fall neatly into one category or the other.

87 Instead of defining protected policy decisions negatively, as "not operational", the majority in *Gaubert* defines them positively as discretionary legislative or administrative decisions and conduct that are grounded in social, economic, and [page94] political considerations. Generally, policy decisions are made by legislators or officers whose official responsibility requires them to assess and balance public policy considerations. The decision is a considered decision that represents a "policy" in the sense of a general rule or approach, applied to a particular situation. It represents "a course or principle of action adopted or proposed by a government": *New Oxford Dictionary of English* (1998), at p. 1434. When judges are faced with such a course or principle of action adopted by a government, they generally will find the matter to be a policy decision. The weighing of social, economic, and political considerations to arrive at a course or principle of action is the proper role of government, not the courts. For this reason, decisions and conduct based on these considerations cannot ground an action in tort.

88 Policy, used in this sense, is not the same thing as discretion. Discretion is concerned with whether a particular actor had a choice to act in one way or the other. Policy is a narrow subset of discretionary decisions, covering only those decisions that are based on public policy considerations, like economic, social and political considerations. Policy decisions are always discretionary, in the sense that a different policy could have been chosen. But not all discretionary decisions by government are policy decisions.

89 While the main focus on the *Gaubert* approach is on the nature of the decision, the role of the person who makes the decision may be of assistance. Did the decision maker have the responsibility of looking at social, economic or political factors and formulating a "course" or "principle" of action with respect to a particular problem facing the government? Without suggesting that [page95] the question can be resolved simply by reference to the rank of the actor, there is something to Scalia J.'s observation in *Gaubert* that employees working at the operational level are not usually involved in making policy choices.

90 I conclude that "core policy" government decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith. This approach is consistent with the basic thrust of Canadian cases on the issue, although it emphasizes positive features of policy decisions, instead of relying exclusively on the quality of being "non-operational". It is also supported by the insights of emerging jurisprudence here and elsewhere. This said, it does not purport to be a litmus test. Difficult cases may be expected to arise from time to time where it is not easy to decide whether the degree of "policy" involved suffices for protection from negligence liability. A black and white test that will provide a ready and irrefutable answer for every decision in the infinite variety of decisions that government actors may produce is likely chimerical. Nevertheless, most government decisions that represent a course or principle of action based on a balancing of economic, social and political considerations will be readily identifiable.

91 Applying this approach to motions to strike, we may conclude that where it is "plain and obvious" that an

impugned government decision is a policy decision, the claim may properly be struck on the ground that it cannot ground an action in tort. If it is not plain and obvious, the matter must be allowed to go to trial.

[page96]

(iv) Conclusion on the Policy Argument

92 As discussed, the question is whether the alleged representations of Canada to the tobacco companies that low-tar cigarettes are less harmful to health are matters of policy, in the sense that they constitute a course or principle of action of the government. If so, the representations cannot ground an action in tort.

93 The third-party notices plead that Canada made statements to the public (and to the tobacco companies) warning about the hazards of smoking, and asserting that low-tar cigarettes are less harmful than regular cigarettes; that the representations that low-tar cigarettes are less harmful to health were false; and that insofar as consumption caused extra harm to consumers for which the tobacco companies are held liable, Canada is required to indemnify the tobacco companies and/or contribute to their losses.

94 The third-party notices implicitly accept that in making the alleged representations, Health Canada was acting out of concern for the health of Canadians, pursuant to its policy of encouraging smokers to switch to low-tar cigarettes. They assert, in effect, that Health Canada had a policy to warn the public about the hazardous effects of smoking, and to encourage healthier smoking habits among Canadians. The third-party claims rest on the allegation that Health Canada accepted that some smokers would continue to smoke despite the adverse health effects, and decided that these smokers should be encouraged to smoke lower-tar cigarettes.

95 In short, the representations on which the third-party claims rely were part and parcel of a government policy to encourage people who continued to smoke to switch to low-tar cigarettes. This was a "true" or "core" policy, in the sense of a course or principle of action that the government [page97] adopted. The government's alleged course of action was adopted at the highest level in the Canadian government, and involved social and economic considerations. Canada, on the pleadings, developed this policy out of concern for the health of Canadians and the individual and institutional costs associated with tobacco-related disease. In my view, it is plain and obvious that the alleged representations were matters of government policy, with the result that the tobacco companies' claims against Canada for negligent misrepresentation must be struck out.

96 Having concluded that the claims for negligent misrepresentation are not actionable because the alleged representations were matters of government policy, it is not necessary to canvas the other stage-two policy grounds that Canada raised against the third-party claims relating to negligent misrepresentation. However, since the argument about indeterminate liability was fully argued, I will briefly discuss it. In my view, it confirms that no liability in tort should be recognized for Canada's alleged misrepresentations.

(b) *Indeterminate Liability*

97 Canada submits that allowing the defendants' claims in negligent misrepresentation would result in indeterminate liability, and must therefore be rejected. It submits that Canada had no control over the number of cigarettes being sold. It argues that in cases of economic loss, the courts must limit liability to cases where the third party had a means of controlling the extent of liability.

98 The tobacco companies respond that Canada faces extensive, but not indeterminate liability. [page98] They submit that the scope of Canada's liability to tobacco companies is circumscribed by the tort of negligent misrepresentation. Canada would only be liable to the smokers of light cigarettes and to the tobacco companies.

99 I agree with Canada that the prospect of indeterminate liability is fatal to the tobacco companies' claims of negligent misrepresentation. Insofar as the claims are based on representations to consumers, Canada had no control over the number of people who smoked light cigarettes. This situation is analogous to *Cooper*, where this Court held that it would have declined to apply a duty of care to the Registrar of Mortgage Brokers in respect of

economic losses suffered by investors because "[t]he Act itself imposes no limit and the Registrar has no means of controlling the number of investors or the amount of money invested in the mortgage brokerage system" (para. 54). While this statement was made in *obiter*, the argument is persuasive.

100 The risk of indeterminate liability is enhanced by the fact that the claims are for pure economic loss. In *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737, the Court, *per* Rothstein J., held that "in cases of pure economic loss, to paraphrase Cardozo C.J., care must be taken to find that a duty is recognized only in cases where the class of plaintiffs, the time and the amounts are determinate" (para. 62). If Canada owed a duty of care to consumers of light cigarettes, the potential class of plaintiffs and the amount of liability would be indeterminate.

101 Insofar as the claims are based on representations to the tobacco companies, they are at first blush more circumscribed. However, this distinction breaks down on analysis. Recognizing a duty of care for representations to the tobacco [page99] companies would effectively amount to a duty to consumers, since the quantum of damages owed to the companies in both cases would depend on the number of smokers and the number of cigarettes sold. This is a flow-through claim of negligent misrepresentation, where the tobacco companies are passing along their potential liability to consumers and to the province of British Columbia. In my view, in both cases, these claims should fail because Canada was not in control of the extent of its potential liability.

(c) *Summary on Stage-Two Policy Arguments*

102 In my view, this Court should strike the negligent misrepresentation claims in both cases as a result of stage-two policy concerns about interfering with government policy decisions and the prospect of indeterminate liability.

D. *Failure to Warn*

103 The tobacco companies make two allegations of failure to warn: B.A.T. alleges that Canada directed the tobacco companies not to provide warnings on cigarette packages (the labelling claim) about the health hazards of cigarettes; and Imperial alleges that Canada failed to warn the tobacco companies about the dangers posed by the strains of tobacco designed and licensed by Canada.

(1) Labelling Claim

104 B.A.T. alleges that by instructing the industry to not put warning labels on their cigarettes, Canada is liable in tort for failure to warn. In the *Knight* case, Tysoe J.A. did not address the failure [page100] to warn claims. Hall J.A., writing for the minority, would have struck those claims on stage-two grounds, finding that Canada's decision was a policy decision and that liability would be indeterminate. Hall J.A. also held that liability would conflict with the government's public duties (para. 99). In the *Costs Recovery* case, Tysoe J.A. adopted Hall J.A.'s analysis from the *Knight* case in rejecting the failure to warn claim as between Canada and the tobacco companies (para. 89). B.A.T. challenges these findings.

105 The crux of this failure to warn claim is essentially the same as the negligent misrepresentation claim, and should be rejected for the same policy reasons. The Minister of Health's recommendations on warning labels were integral to the government's policy of encouraging smokers to switch to low-tar cigarettes. As such, they cannot ground a claim in failure to warn.

(2) Failure to Warn Imperial About Health Hazards

106 The Court of Appeal, *per* Tysoe J.A., held that the third-party notices did not sufficiently plead that Canada failed to warn the industry about the health hazards of its strains of tobacco. Imperial argues that this was in error, because the elements of a failure to warn claim are identical to the elements of the negligence claim, which was sufficiently pleaded.

107 Canada points out that the two paragraphs of the third-party notices that discuss failure to warn only mention the claims that relate to labels, and not the claim that Canada failed to [page101] warn Imperial about potential health hazards of the tobacco strains. Canada also argues that to support a claim of failure to warn, the plaintiff

must not only show that the defendant acted negligently, but that the defendant was also under a positive duty to act. It submits that nothing in the third-party notices suggests that Canada was under such a positive duty here.

108 I agree with Canada that the tort of failure to warn requires evidence of a positive duty towards the plaintiff. Positive duties in tort law are the exception rather than the rule. In *Childs v. Desormeaux*, the Court held:

> Although there is no doubt that an omission may be negligent, as a general principle, the common law is a jealous guardian of individual autonomy. Duties to take positive action in the face of risk or danger are not free-standing. Generally, the mere fact that a person faces danger, or has become a danger to others, does not itself impose any kind of duty on those in a position to become involved. [para. 31]

Moreover, none of the authorities cited by Imperial support the proposition that a plea of negligence, without more, will suffice to raise a duty to warn: *Day v. Central Okanagan (Regional District)*, 2000 BCSC 1134, 79 B.C.L.R. (3d) 36, *per* Drossos J.; see also *Elias v. Headache and Pain Management Clinic*, 2008 CanLII 53133 (Ont. S.C.J.), *per* Macdonald J. (paras. 6 to 9).

109 Even if pleading negligence were viewed as sufficient to raise a claim of duty to warn, which I do not accept, the claim would fail for the stage-two policy reasons applicable to the negligent misrepresentation claim.

E. *Negligent Design*

110 The tobacco companies have brought two types of negligent design claims against Canada [page102] that remain to be considered. First, they submit that Canada breached its duty of care to the tobacco companies when it negligently designed its strains of low-tar tobacco. The Court of Appeal held that the pleadings supported a *prima facie* duty of care in this respect, but held that the duty was negated by the stage-two policy concern of indeterminate liability. Second, Imperial submits that Canada breached its duty of care to the consumers of light and mild cigarettes in the *Knight* case. A majority of the Court of Appeal held that this claim should proceed to trial.

111 In my view, both remaining negligent design claims establish a *prima facie* duty of care, but fail at the second stage of the analysis because they relate to core government policy decisions.

(1) *Prima Facie* Duty of Care

112 I begin with the claim that Canada owed a *prima facie* duty of care to the tobacco companies. Canada submits that there was no *prima facie* duty of care since there is no proximity between Canada and the tobacco companies, relying on the same arguments that it raises in the negligent misrepresentations claims.

113 In my view, the Court of Appeal correctly concluded that Canada owed a *prima facie* duty of care towards the tobacco companies with respect to its design of low-tar tobacco strains. I agree with Tysoe J.A. that the alleged relationship in this case meets the requirements for proximity:

> If sufficient proximity exists in the relationship between a designer of a product and a purchaser of the product, it would seem to me to follow that there is sufficient proximity in the relationship between the designer of a product and a manufacturer who uses the product in goods sold to the public. Also, the designer of the [page103] product ought reasonably to have the manufacturer in contemplation as a person who would be affected by its design in the context of the present case. It would have been reasonably foreseeable to the designer of the product that a manufacturer of goods incorporating the product could be required to refund the purchase price paid by consumers if the design of the product did not accomplish that which it was intended to accomplish. [*Knight* case, para. 67]

114 The allegation is that Canada was acting like a private company conducting business, and conducted itself toward the tobacco companies in a way that established proximity. The proximity alleged is not based on a statutory duty, but on interactions between Canada and the tobacco companies. Canada's argument that a duty of care would result in conflicting private and public duties does not negate proximity arising from conduct, although it may be a relevant stage-two policy consideration.

115 For similar reasons, I conclude that on the facts pleaded, Canada owed a *prima facie* duty of care to the consumers of light and mild cigarettes in the *Knight* case. On the facts pleaded, it is at least arguable that Canada was acting in a commercial capacity when it designed its strains of tobacco. As Tysoe J.A. held in the court below, "a person who designs a product intended for sale to the public owes a *prima facie* duty of care to the purchasers of the product" (para. 48).

(2) Stage-Two Policy Considerations

116 For the reasons given in relation to the negligent misrepresentation claim, I am of the view that stage-two policy considerations negate this *prima facie* duty of care for the claims of negligent design. The decision to develop low-tar strains of tobacco on the belief that the resulting cigarettes would be less harmful to health is a decision that constitutes a course or principle of action based on Canada's health policy. It was a decision based on [page104] social and economic factors. As a core government policy decision, it cannot ground a claim for negligent design. This conclusion makes it unnecessary to consider the argument of indeterminate liability also raised as a stage-two policy objection to the claim of negligent design.

F. *The Direct Claims Under the Costs Recovery Acts*

117 The tobacco companies submit that the Court of Appeal erred when it held that it was plain and obvious that Canada could not qualify as a manufacturer under the *CRA*. They also present three alternative arguments: (1) that if Canada is not liable under the Act, it is liable under the recently adopted *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27 ("*HCCRA*"); (2) that if Canada is not liable under either the *CRA* or the *HCCRA*, it is nonetheless liable to the defendants for contribution under the *Negligence Act*; and (3) that in the further alternative, Canada could be liable for contribution under the common law (joint factum of Rothmans, Benson & Hedges ("RBH") and Philip Morris only).

118 Section 2 of the *CRA* establishes that "[t]he government has a direct and distinct action against a manufacturer to recover the cost of health care benefits caused or contributed to by a tobacco related wrong". The words "manufacture" and "manufacturer" are defined in s. 1(1) of the Act as follows:

1 (1) ...

"manufacture" includes, for a tobacco product, the production, assembly or packaging of the tobacco product;

[page105]

"manufacturer" means a person who manufactures or has manufactured a tobacco product and includes a person who currently or in the past

(a) causes, directly or indirectly, through arrangements with contractors, subcontractors, licensees, franchisees or others, the manufacture of a tobacco product,

(b) for any fiscal year of the person, derives at least 10% of revenues, determined on a consolidated basis in accordance with generally accepted accounting principles in Canada, from the manufacture or promotion of tobacco products by that person or by other persons,

(c) engages in, or causes, directly or indirectly, other persons to engage in the promotion of a tobacco product, or

(d) is a trade association primarily engaged in

(i) the advancement of the interests of manufacturers,

(ii) the promotion of a tobacco product, or

(iii) causing, directly or indirectly, other persons to engage in the promotion of a tobacco product;

The third-party notices allege that Canada grew (manufactured) tobacco and licensed it to the tobacco industry for a profit, and that Canada "promoted" the use of mild or light cigarettes to the industry and the public. These facts, they say, bring Canada within the definition of "manufacturer" of the *CRA*.

119 Canada submits that it is not a manufacturer under the Act. In the alternative, it submits that it is immune from the operation of this provincial statute at common law and alternatively under the Constitution.

120 For the reasons that follow, I conclude that Canada is not a manufacturer under the Act. Indeed, [page106] holding Canada accountable under the *CRA* would defeat the legislature's intention of transferring the health-care costs resulting from tobacco related wrongs from taxpayers to the tobacco industry. This conclusion makes it unnecessary to consider Canada's arguments that it would in any event be immune from liability under the provincial Act. I would also reject the tobacco companies' argument for contribution under the *HCCRA* and the *Negligence Act*, and the common law contribution argument.

(1) Could Canada Qualify as a Manufacturer Under the *Tobacco Damages and Health Care Costs Recovery Act*?

121 The Court of Appeal held that the definition of "manufacturer" could not apply to the Government of Canada. I agree. While the argument that Canada could qualify as a manufacturer under the *CRA* has superficial appeal, when the Act is read in context and all of its provisions are taken into account, it is apparent that the British Columbia legislature did not intend for Canada to be liable as a manufacturer. This is confirmed by the text of the statute, the intent of the legislature in adopting the Act, and the broader context of the relationship between the province and the federal government.

(a) *Text of the Statute*

122 The definition of manufacturer in s. 1(1) "manufacturer" (b) of the Act includes a person who "for any fiscal year of the person, derives at least 10% of revenues, determined on a consolidated basis in accordance with generally accepted accounting principles in Canada, from the manufacture or promotion of tobacco products by that person or by other persons". Hall J.A. held that this definition indicated that the legislature intended the Act to apply to companies involved in the tobacco industry, and not to governments.

[page107]

123 The tobacco companies respond that the definition of "manufacturer" is disjunctive since it uses the word "or", such that an individual will qualify as a manufacturer if it meets any of the four definitions in (a) to (d). Even if Canada is incapable of meeting the definition in (b) of the Act (deriving 10% of its revenues from the manufacture or promotion of tobacco products), Canada qualifies under subparagraphs (a) (causing the manufacture of tobacco products) and (c) (engaging in or causing others to engage in the promotion of tobacco products) on the facts pled, they argue.

124 Like the Court of Appeal, I would reject this argument. It is true that s. 1 must be read disjunctively, and that an individual will qualify as a manufacturer if it meets any of the four definitions in (a) to (d). However, the Act must nevertheless be read purposively and as a whole. A proper reading of the Act will therefore take each of the four definitions into account. It will also consider the rest of the statutory scheme, and the legislative context. When the Act is read in this way, it is clear that the B.C. legislature did not intend to include the federal government as a potential manufacturer under the *CRA*.

125 The fact that one of the statutory definitions is based on revenue percentage suggests that the term "manufacturer" is meant to capture businesses or individuals who earn profit from tobacco-related activities. This interpretation is reinforced by the provisions of the Act that establish the liability of defendants. Section 3(3)(b) provides that "each defendant to which the presumptions [provided in s. 3(2) of the *CRA*] apply is liable for the

proportion of the aggregate cost referred to in paragraph (a) equal to its market share in the type of tobacco product". This language cannot be stretched to include the Government of Canada.

126 I conclude that the text of the *CRA*, read as a whole, does not support the view that Canada is a "manufacturer" under the Act.

[page108]

(b) *Legislative Intention*

127 I agree with Canada that considerations related to legislative intent further support the view that Canada does not fall within the definition of "manufacturer". When the *CRA* was introduced in the legislature, the Minister responsible stated that "the industry" manufactured a lethal product, and that "the industry" composed of "tobacco companies" should accordingly be held accountable (B.C. *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 20, 4th Sess., 36th Parl., June 7, 2000, at p. 16314). It is plain and obvious that the Government of Canada would not fit into these categories.

128 Imperial submits that it is improper to rely on excerpts from *Hansard* on an application to strike a pleading, since evidence is not admissible on such an application. However, a distinction lies between evidence that is introduced to prove a point of fact and evidence of legislative intent that is provided to assist the court in discerning the proper interpretation of a statute. The former is not relevant on an application to strike; the latter may be. Applications to strike are intended to economize judicial resources in cases where on the facts pled, the law does not support the plaintiff's claim. Courts may consider all evidence relevant to statutory interpretation in order to achieve this purpose.

(c) *Broader Context*

129 The broader context of the statute strongly supports the conclusion that the British Columbia legislature did not intend the federal government to be liable as a manufacturer of tobacco products. The object of the Act is to recover the cost of providing health care to British Columbians from the companies that sold them tobacco products. As held by this Court in *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473:

[page109]

> [T]he driving force of the Act's cause of action is compensation for the government of British Columbia's health care costs, not remediation of tobacco manufacturers' breaches of duty. While the Act makes the existence of a breach of duty one of several necessary conditions to a manufacturer's liability to the government, it is not the mischief at which the cause of action created by the Act is aimed. [para. 40]

The legislature sought to transfer the medical costs from provincial taxpayers to the private sector that sold a harmful product. This object would be fundamentally undermined if the funds were simply recovered from the federal government, which draws its revenue from the same taxpayers.

130 The tobacco companies' proposed application of the *CRA* to Canada is particularly problematic in light of the long-standing funding relationship between the federal and provincial governments with regards to health care. The federal government has been making health transfer payments to the provinces for decades. As held by Hall J.A.:

> If the *Costs Recovery Act* were to be construed to permit the inclusion of Canada as a manufacturer targeted for the recovery of provincial health costs, this would permit a direct economic claim to be advanced against Canada by British Columbia to obtain further funding for health care costs. In light of these longstanding fiscal arrangements between governments, I cannot conceive that the legislature of British Columbia could ever have envisaged that Canada might be a target under the *Costs Recovery Act*. [para. 33]

131 Imperial argues that the only way to achieve the object of the *CRA* is to allow the province to recover from all those who participated in the tobacco industry, including the federal government. I disagree. Holding the federal

government accountable under the Act would defeat the legislature's intention of transferring the cost of medical treatment from taxpayers to the tobacco industry.

[page110]

(d) *Summary*

132 For the foregoing reasons, I conclude that it is plain and obvious that the federal government does not qualify as a manufacturer of tobacco products under the *CRA*. This pleading must therefore be struck.

(2) Could Canada Be Found Liable Under the *Health Care Costs Recovery Act*?

133 The tobacco companies submit that if Canada is not liable under the *CRA*, it would be liable under the *HCCRA*, which creates a cause of action for the province to recover health care costs generally from wrongdoers (s. 8(1)). Canada submits that the *HCCRA* is inapplicable because it provides that the cause of action does not apply to cases that qualify as "tobacco related wrong[s]" under the *CRA* (s. 24(3)(b)). RBH and Philip Morris respond that a "tobacco related wrong" under the *CRA* may only be committed by a "manufacturer". Consequently, if the *CRA* does not apply to Canada because it cannot qualify as a manufacturer, it is not open to Canada to argue that the more general *HCCRA* does not apply either.

134 In my view, the tobacco companies cannot rely on the *HCCRA* in a *CRA* action for contribution. While it is true that Canada is incapable of committing a tobacco-related wrong itself if it is not a manufacturer, the underlying cause of action in this case is that it is the defendants who are alleged to have committed a tobacco-related wrong. The *HCCRA* specifies that it does not apply in cases "arising out of a tobacco related wrong as defined in the *Tobacco Damages and Health Care Costs Recovery Act*" (s. 24(3)(b)). This precludes contribution claims arising out of that Act.

[page111]

(3) Could Canada Be Liable for Contribution Under the *Negligence Act* if It Is Not Directly Liable to British Columbia?

135 RBH and Philip Morris submit that even if Canada is not liable to British Columbia, it can still be held liable for contribution under the *Negligence Act*. They argue that direct liability to the plaintiff is not a requirement for being held liable in contribution.

136 As noted above, I agree with Canada's submission that, following *Giffels*, a party can only be liable for contribution if it is also liable to the plaintiff directly.

137 Accordingly, I would reject the argument that the *Negligence Act* in British Columbia allows recovery from a third party that could not be liable to the plaintiff.

(4) Could Canada Be Liable for Common Law Contribution?

138 RBH and Philip Morris submit that if this Court rejects the contribution claim under the *Negligence Act*, it should allow a contribution claim under the common law. They rely on this Court's decisions in *Bow Valley* and *Blackwater v. Plint*, 2005 SCC 58, [2005] 3 S.C.R. 3, in which this Court recognized claims of contribution which were not permitted by statute.

139 I would reject this argument. In my view, the cases cited by RBH and Philip Morris support common law contribution claims only if the third party is directly liable to the plaintiff. In *Bow Valley*, the Court recognized a limited right of contribution "between tortfeasors", and noted that the defendants were "jointly and severally liable to the plaintiff" (paras. 101 and 102). A similar point was made by this Court in *Blackwater* (*per* McLachlin C.J.), which stated that a "common law right of contribution between tortfeasors may exist" (para. 68 [page112] (emphasis

added)). There is no support in our jurisprudence for allowing contribution claims in cases where the third party is not liable to the plaintiff.

G. *Liability Under the Trade Practice Act and the Business Practices and Consumer Protection Act*

140 In the *Knight* case, Imperial alleges that Canada satisfies the definition of a "supplier" under the *Trade Practice Act* ("*TPA*") and the *Business Practices and Consumer Protection Act* ("*BPCPA*"). The *TPA* was repealed and replaced by the *BPCPA* in 2004. Imperial argues that the Court of Appeal erred in striking its claim against Canada under these statutes.

141 In my view, Canada could not qualify as a "supplier" under the Acts on the facts pled. Section 1 of the *TPA* defined "supplier" as follows:

> **1** ...
>
> "**supplier**" means a person, other than a consumer, who in the course of the person's business solicits, offers, advertises or promotes the disposition or supply of the subject of a consumer transaction or who engages in, enforces or otherwise participates in a consumer transaction, whether or not privity of contract exists between that person and the consumer, and includes the successor to, and assignee of, any rights or obligations of the supplier.

Section 1(1) of the *BPCPA* defines "supplier" as follows:

> **1** (1) ...
>
> **"supplier"** means a person, whether in British Columbia or not, who in the course of business participates in a consumer transaction by
>
> [page113]
>
> (a) supplying goods or services or real property to a consumer, or
>
> (b) soliciting, offering, advertising or promoting with respect to a transaction referred to in paragraph (a) of the definition of "consumer transaction",
>
> whether or not privity of contract exists between that person and the consumer, and includes the successor to, and assignee of, any rights or obligations of that person and, except in Parts 3 to 5 *[Rights of Assignees and Guarantors Respecting Consumer Credit; Consumer Contracts; Disclosure of the Cost of Consumer Credit]*, includes a person who solicits a consumer for a contribution of money or other property by the consumer;

142 The Court of Appeal unanimously held that neither definition could apply to Canada because its alleged actions were not undertaken "in the course of business". The court held that the pleadings allege that Canada promoted the use of mild or light cigarettes, but only in order to reduce the health risks of smoking, not in the course of a business carried on for the purpose of earning a profit (*Knight* case, para. 35).

143 Imperial submits that it is not necessary for Canada to have been motivated by profit to qualify as a "supplier" under the Acts, provided it researched, designed and manufactured a defective product. Canada responds that its alleged purpose of improving the health of Canadians shows that it was not acting in the course of business. This was not a case where a public authority was itself operating in the private market as a business, but rather a case where a public authority sought to regulate the industry by promoting a type of cigarette.

144 I accept that Canada's purpose for developing and promoting tobacco as described in the third-party notice suggests that it was not acting "in the course of business" or "in the course of the person's business" as those phrases are used in [page114] the *TPA* or the *BPCPA*, and therefore that Canada could not be a "supplier" under either of those statutes. The phrases "in the course of business" and "in the course of the person's business" may have different meanings, depending of the context. On the one hand, they can be read as including all activities that an individual undertakes in his or her professional life: e.g., see discussion of the indicia of reasonable reliance

above. On the other, they can be understood as limited to activities undertaken for a commercial purpose. In my view, the contexts in which the phrases are used in the *TPA* and the *BPCPA* support the latter interpretation. The definitions of "supplier" in both Acts refer to "consumer transaction[s]", and contrast suppliers, who must have a commercial purpose, with consumers. It is plain and obvious from the facts pleaded that Canada did not promote the use of low-tar cigarettes for a commercial purpose, but for a health purpose. Canada is therefore not a supplier under the *TPA* or the *BPCPA*, and the contribution claim based on this ground and the *Negligence Act* should be struck.

145 Having concluded that Canada is not liable under the *TPA* and the *BPCPA*, it is unnecessary to consider whether, if it were, Canada would be protected by Crown immunity.

H. *The Claim for Equitable Indemnity*

146 RBH and Philip Morris submit that if the tobacco companies are found liable in the *Costs Recovery* case, Canada is liable for "equitable indemnity" on the facts pleaded. They submit that whenever a person requests or directs another person to do something that causes the other to incur liability, the requesting or directing person is liable to indemnify the other for its liability. Imperial adopts this argument in the *Knight* case.

[page115]

147 Equitable indemnity is a narrow doctrine, confined to situations of an express or implied understanding that a principal will indemnify its agent for acting on the directions given. As stated in *Parmley v. Parmley*, [1945] S.C.R. 635, claims of equitable indemnity "proceed upon the notion of a request which one person makes under circumstances from which the law implies that both parties understand that the person who acts upon the request is to be indemnified if he does so" (p. 648, quoting Bowen L.J. in *Birmingham and District Land Co. v. London and North Western Railway Co.* (1886), 34 Ch. D. 261, at p. 275.

148 In my view, the Court of Appeal, *per* Hall J.A., correctly held that the tobacco companies could not establish this requirement of the claim:

> [I]f the notional reasonable observer were asked whether or not Canada, in the interaction it had over many decades with the appellants, was undertaking to indemnify them from some future liability that might be incurred relating to their business, the observer would reply that this could not be a rational expectation, having regard to the relationship between the parties. Likewise, if Canada through its agents had been specifically asked or a suggestion had been made to its agents by representatives of the appellants that Canada might in future be liable for any such responsibility or incur such a liability, the answer would have been firmly in the negative. [*Costs Recovery* case, para. 57]

When Canada directed the tobacco industry about how it should conduct itself, it was doing so in its capacity as a government regulator that was concerned about the health of Canadians. Under such circumstances, it is unreasonable to infer that Canada was implicitly promising to indemnify the industry for acting on its request.

I. *Procedural Considerations*

149 In the courts below, the tobacco companies argued that even if the claims for compensation against Canada are struck, Canada should [page116] remain a third party in the litigation for procedural reasons. The tobacco companies argued that their ability to mount defences against British Columbia in the *Costs Recovery* case and the class members in the *Knight* case would be severely prejudiced if Canada was no longer a third party. This argument was rejected in chambers by both Wedge J. and Satanove J. The majority of the Court of Appeal found it unnecessary to consider the question, while Hall J.A. would have affirmed the holdings of the chambers judges.

150 The tobacco companies did not pursue this issue on appeal. I would affirm the findings of Wedge J., Satanove J. and Hall J.A. and strike the claims for declaratory relief.

V. Conclusion

151 I conclude that it is plain and obvious that the tobacco companies' claims against Canada have no reasonable chance of success, and should be struck out. Canada's appeals in the *Costs Recovery* case and the *Knight* case are allowed, and the cross-appeals are dismissed. Costs are awarded throughout against Imperial in the *Knight* case, and against the tobacco companies in the *Costs Recovery* case. No costs are awarded against or in favour of British Columbia in the *Costs Recovery* case.

Appeals allowed and cross-appeals dismissed with costs.

Solicitors:

Solicitor for the appellants/respondents on cross-appeal (33559-33563): Attorney General of Canada, Ottawa.

Solicitors for the respondent/appellant on cross-appeal Imperial Tobacco Canada Limited (33559): [page117] Hunter Litigation Chambers Law Corporation, Vancouver.

Solicitors for the respondent Her Majesty the Queen in Right of British Columbia (33563): Bull, Housser & Tupper, Vancouver.

Solicitors for the respondent/appellant on cross-appeal Imperial Tobacco Canada Limited (33563): Osler, Hoskin & Harcourt, Toronto.

Solicitors for the respondents/appellants on cross-appeal Rothmans, Benson & Hedges Inc. and Rothmans Inc. (33563): Affleck Hira Burgoyne, Vancouver.

Solicitors for the respondents/appellants on cross-appeal JTI-MacDonald Corp., R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International Inc. (33563): Farris, Vaughan, Wills & Murphy, Vancouver.

Solicitors for the respondents/appellants on cross-appeal B.A.T. Industries p.l.c. and British American Tobacco (Investments) Limited (33563): Sugden, McFee & Roos, Vancouver.

Solicitors for the respondent/appellant on cross-appeal Carreras Rothmans Limited (33563): Harper Grey, Vancouver.

Solicitors for the respondent/appellant on cross-appeal Philip Morris U.S.A. Inc. (33563): Davis & Company, Vancouver.

Solicitors for the respondent/appellant on cross-appeal Philip Morris International Inc. (33563): McCarthy Tétrault, Montréal.

Solicitor for the intervener the Attorney General of Ontario (33559-33563): Attorney General of Ontario, Toronto.

Solicitors for the intervener Her Majesty the Queen in Right of the Province of New Brunswick (33563): Bennett Jones, Toronto.

[page118]

Solicitor for the intervener the Attorney General of British Columbia (33559-33563): Attorney General of British Columbia, Victoria.

End of Document

Sahyoun v. Ho, [2013] B.C.J. No. 1388

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

P.G. Voith J.

Heard: April 25-26, 2013.

Judgment: June 26, 2013.

Docket: S080713

Registry: Vancouver

[2013] B.C.J. No. 1388 | 2013 BCSC 1143 | 229 A.C.W.S. (3d) 681 | 41 C.P.C. (7th) 231 | 2013 CarswellBC 1922

Between Antonios Nabil Riad Sahyoun, By His Committee and Father, Dr. Nabil Riad Sahyoun, and Mariam Nabil Riad Sahyoun, and Bishoy Nabil Riad Sahyoun., and Mrs. Sanaa Riad Sahyoun, and Dr. Nabil Riad Sahyoun, Plaintiffs, and Dr. Helena Ho, Dr. Anton Miller, Speech and Language Pathologist Elizabeth Payne, Provincial Health Services Authority (doing business as Sunny Hill Health Centre for Children, formerly Sunny Hill Hospital For Children, and doing business as BC Children's Hospital), The University of British Columbia, Speech and Language Pathologist Martha Hilliard, Vancouver Coastal Health Authority, formerly Vancouver Health Department, Her Majesty the Queen In Right of the Province Of British Columbia, as represented by the BC Ministry of Health, Audiologist Margaret Hardwick, Dr. Kevin Farrell, Dr. Jean Hlady, Dr. Fred Kozak, Dr. Keith Riding, Dr. Neil Longridge, Vancouver Coastal Health Authority (doing business as Vancouver General Hospital), Laura Wang, Dr. Brian Westerberg, Providence Health Care (doing business as St. Paul's Hospital), Dr. Jason Chew, Dr. Douglas Graeb, Beverley Underhill, Dr. Jean Moore, Karen Till, Robert Pearmain, Allan McLeod, Donald Goodridge, Carol McRae, Deceased, Kenneth Ronald Bradley McRae, as Representative and Administrator of the Estate of the Deceased Carol McRae, Vancouver Board of Education, formerly Vancouver School Board, Her Majesty the Queen In Right of the Province of British Columbia, as represented by the BC Ministry of Education, David Duncan, BC Legal Services Society, Harinder Mahil, Judith Williamson, Her Majesty the Queen in Right of the Province of British Columbia, as represented by The Attorney General of BC for the former BC Council of Human Rights, Ross Dawson, Cheryl Carteri, Haris Zakouras, Her Majesty the Queen in Right of the Province of British Columbia, as represented by the BC Ministry of Children and Family Development, formerly BC Ministry for Children and Families, Lorill Johl, Gateway Society: Services for Persons with Autism, Detective Constable Ennis, Constable Schaaf, Acting Sergeant Schilling, Constable Lemcke, Sergeant Pike, Constable Green, Vancouver Police Department, City of Vancouver, Her Majesty the Queen in Right of the Province of British Columbia, Defendants

(63 paras.)

Counsel

Appearing on behalf of Mariam Nabil Riad Sahyoun and Bishoy Nabil Riad Sahyoun and on his own behalf: Dr. Nabil Riad Sahyoun.

Appearing on her own behalf: Mrs. Sanaa Riad Sahyoun.

Counsel for the Defendants Dr. Helena Ho, Dr. Anton Miller, Dr. Brian Westerberg, Dr. Keith Riding, Dr. Neil Longridge, Dr. Fred Kozak, Dr. Jean Hlady, Dr. Douglas Graeb: Kim Yee.

Counsel for the Defendant, The University of British Columbia: Erica C.L. Miller.

Counsel for the Defendants, Elizabeth Payne, Sunny Hill Health Centre, Martha Hilliard, Margaret Hardwick, Vancouver Coastal Health Authority, Vancouver General Hospital, Laura Wang, Robert Permain, St. Paul's Hospital, Beverley Underhill, Dr Jean Moore, Karen Till, Allan McLeod, Carol McRae, Donald Goodridge, Lorill Johl, Gateway Society: Services for Persons with Autism: Timothy C. Hinkson, T. Schapiro, A/S.

Counsel for the Defendants, Haris Zakouras, Judith Williamson, Harinder Mahil, Ross Dawson, Cheryl Carteri and HMTQ (British Columbia): Bryant A. Mackey.

Reasons for Judgment

P.G. VOITH J.

Overview

1 These reasons arise out of cross-applications brought by the plaintiffs other than Antonios Sahyoun (the "Plaintiffs") and by many, but not all, of the defendants. The defendants who were involved in the application are identified on the front page of these reasons and fall into four groups: a) 10 different physicians (the "Defendant Physicians"); b) a collection of individuals, health care facilities and authorities, the Vancouver School Board and Gateway Society: Services for Persons with Autism (the "Health and School Defendants"); c) the University of British Columbia; and d) various individuals employed by the Province of British Columbia and the Province of British Columbia.

2 For the purposes of these reasons, I have described these four groups of defendants collectively as the "Defendants" recognizing full well that there are still other defendants named in the action. Though the specific positions of the Defendants vary modestly in some details, I consider that those positions can be expressed collectively.

3 The Defendants seek to compel the plaintiffs to file an amended notice of civil claim which complies with the Supreme Court Civil Rules, B.C. Reg. 168/2009 (the "Rules"). In response to this application, the Plaintiffs seek to file the draft amended notice of civil claim which they have prepared. The Defendants oppose the filing of this pleading on the basis that it continues to suffer from numerous deficiencies and that it does not address the concerns that arise from the Plaintiffs' earlier pleadings.

Background

4 I was appointed to case manage this action in December 2009. There are five plaintiffs. Dr. and Mrs. Sahyoun are the parents of Antonios, Bishoy and Miriam Sahyoun. Bishoy and Miriam have reached the age of majority. Dr. Sahyoun appeared and spoke on their behalf with their authority and without opposition from any party. Mrs. Sahyoun addressed the court on her own behalf.

5 Antonios was born on February 9, 1987. In December 2009, Mr. Justice Bracken declared that Antonios was, as a result of various limitations, incapable of managing himself or his affairs. In that same order, Dr. Sahyoun was appointed committee of the person and the estate of Antonios.

6 On January 31, 2008, this action was brought in the name of Antonios by his committee, Dr. Sahyoun. On January 31, 2008, Master Tokarek declared that the plaintiffs in this action were indigent.

7 The claim against the various Defendant Physicians regarding the plaintiff Antonios is in medical negligence and relates to an alleged delay in the diagnosis and treatment of an ear infection and a misdiagnosis of autism.

8 The action was commenced by writ of summons filed on January 31, 2008. An amended writ of summons was filed on February 7, 2008. A statement of claim was filed on January 2, 2009. A second amended writ of summons was filed on April 14, 2009. An amended statement of claim was filed on April 14, 2009.

9 On October 3, 2011, I stayed the claim brought by Antonios until such time as counsel could be retained for him. As I indicated, Antonios had been represented by his father as litigation guardian, in the absence of counsel, contrary to Rule 20-2(4). The remaining plaintiffs were permitted to proceed with their action.

10 Because the action brought by Antonios was stayed, only the four remaining plaintiffs participated in the present application. My use of the word "Plaintiffs" for the balance of the reasons refers to only these four remaining plaintiffs.

11 In response to various communications from the defendants, an amended notice of civil claim was filed on April 2, 2012. Thereafter, counsel for both the Defendant Physicians and for the Health and School Defendants wrote to the Plaintiffs indicating that their amended pleadings did not comport with the requirements of Rule 3-1. The focus of these concerns related to the fact that the amended notice of civil claim failed to: a) establish or identify which of the plaintiffs were said to have a claim against which defendant, b) identify the nature of the duty, or the legal basis for the duty, that the plaintiffs say various of the defendants owed them, c) describe how that duty or any other cause of action was breached and d) describe the damages or the nature of the damages the individual plaintiffs allege they suffered.

12 The Defendants argue, as I have said, that the Plaintiffs' proposed amended notice of civil claim (the "Proposed Pleading") does not address the concerns that they identified earlier and that it is also deficient in multiple other respects.

13 On February 21, 2013, the Plaintiffs served the Defendants, or some of them, with an unfiled notice of application indicating that they sought an order to file the Proposed Pleading.

14 This action was commenced more than five years ago. It pertains to conduct that dates as far back as 1990. No trial date has yet been set. The Proposed Pleading names 49 defendants. It is 49 pages and 191 paragraphs long. A number of the Defendants intend, if and when the pleadings are closed, to bring a summary trial application.

Analysis

i) The General Objects and Requirements of a Notice of Civil Claim

15 Rule 3-1(2) provides, in part:

> (2) A notice of civil claim must do the following:
>
> (a) set out a concise statement of the material facts giving rise to the claim;
>
> (b) set out the relief sought by the plaintiff against each named defendant;
>
> (c) set out a concise summary of the legal basis for the relief sought;
>
> ...
>
> (g) otherwise comply with Rule 3-7.

16 The new Rules alter the structure in which pleadings are to be prepared. The core object of a notice of civil claim, however, remains the same. That object is concisely captured in Frederick M. Irvine, ed., *McLachlin and Taylor, British Columbia Practice,* 3rd ed., vol. 1 (Markham, Ont.: LexisNexis Canada Inc., 2006) at 3-4 - 3-4.1:

> If a statement of claim (or, under the current Rules, a notice of civil claim) is to serve the ultimate function of pleadings, namely, the clear definition of the issues of fact and law to be determined by the court, the material facts of each cause of action relied upon should be stated with certainty and precision, and in their

> natural order, so as to disclose the three elements essential to every cause of action, namely, the plaintiff's right or title; the defendant's wrongful act violating that right or title; and the consequent damage, whether nominal or substantial. The material facts should be stated succinctly and the particulars should follow and should be identified as such...

17 These requirements serve two foundational purposes: efficiency and fairness. These purposes align with Rule 1-3 which confirms that "the object of [the] Supreme Court Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits."

18 I emphasize efficiency because a proper notice of civil claim enables a defendant to identify the claim he or she must address and meet. The response filed by a defendant, together with the notice of civil claim and further particulars, if any, will confine the ambit of examinations for discovery and of the issues addressed at the trial itself. Proper pleadings limit the prospect of delay or adjournments. They allow parties to focus their resources on those matters that are of import and to ignore those that are not. They facilitate effective case management and the role of the trier of fact.

19 A proper notice of civil claim also advances the fairness of pre-trial processes and of the trial. Defendants should not be required to divine the claim(s) being made against them. They should not have to guess what it is they are alleged to have done.

20 In *Keene v. British Columbia (Ministry of Children and Family Development)*, 2003 BCSC 1544, 20 B.C.L.R. (4th) 170, Justice Parrett confirmed that the essential purpose of pleadings is to define the issues, giving the opposing parties notice of the case they have to meet and to provide the "boundaries and the context for effective pre-trial case management, the extent of disclosure required, as well as the parameters or necessity of expert opinions" (para. 27).

21 In *Homalco Indian Band v. British Columbia* (1998), 25 C.P.C. (4th) 107 (B.C.S.C.), a case which is often referred to because of the succinctness and clarity with which it describes the object and required structure of an appropriate pleading, Justice K. Smith, as he then was, said:

> 5 The ultimate function of pleadings is to clearly define the issues of fact and law to be determined by the court. The issues must be defined for each cause of action relied upon by the plaintiff. That process is begun by the plaintiff stating, for each cause, the material facts, that is, those facts necessary for the purpose of formulating a complete cause of action: Troup v. McPherson (1965), 53 W.W.R. 37 (B.C.S.C.) at 39. The defendant, upon seeing the case to be met, must then respond to the plaintiff's allegations in such a way that the court will understand from the pleadings what issues of fact and law it will be called upon to decide.

22 Furthermore, notwithstanding the changes in form that are required by the present Rules and by Form 1, certain essential aspects of the structure of pleadings also remain the same. In *Homalco*, Justice Smith described that structure and said:

> 6 A useful description of the proper structure of a plea of a cause of action is set out in J.H. Koffler and A. Reppy, Handbook of Common Law Pleading, (St. Paul, Minn.: West Publishing Co., 1969) at p. 85:
>
> > Of course the essential elements of any claim of relief or remedial right will vary from action to action. But, on analysis, the pleader will find that the facts prescribed by the substantive law as necessary to constitute a cause of action in a given case, may be classified under three heads: (1) The plaintiff's right or title; (2) The defendant's wrongful act violating that right or title; (3) The consequent damage, whether nominal or substantial. And, of course, the facts constituting the cause of action should be stated with certainty and precision, and in their natural order, so as to disclose the three elements essential to every cause of action, to wit, the right, the wrongful act and the damage.
>
> If the statement of claim is to serve the ultimate purpose of pleadings, the material facts of each cause of action relied upon should be set out in the above manner. As well, they should be stated succinctly and the

particulars should follow and should be identified as such: Gittings v. Caneco Audio-Publishers Inc. (1988), 26 B.C.L.R. (2d) 349 (C.A.) at 353.

ii) The Need to be Clear and Concise

23 The requirement in Rule 3-1(2), that a notice of civil claim "set out a concise statement of the material facts giving rise to the claim" and "set out a concise summary of the legal basis for the relief sought", are mandatory and directed to promoting clarity. Indeed, the word "concise" is defined in *The Oxford English Dictionary*, 11th ed. Revised, as "giving information clearly and in a few words". Thus, both brevity and lucidity are important.

iii) The Requirement to Identify Material Facts

24 Though the Rules do not define what constitutes a "material fact", that concept is well defined in the case law.

25 A material fact is one that is essential in order to formulate a complete cause of action. If a material fact is omitted, a cause of action is not effectively pled. The foregoing definition of "material fact" was specifically approved by the Court of Appeal in *Skybridge Investments Ltd. v. Metro Motors Ltd.,* 2006 BCCA 500 at para. 9, 61 B.C.L.R. (4th) 241, and in *Young v. Borzoni,* 2007 BCCA 16 at para. 20, 64 B.C.L.R. (4th) 157. That same definition was also referred to and applied by judges of this court in *Budgell v. British Columbia,* 2007 BCSC 991 at para. 8, and in *Micka v. Oliver & District Community Economic Development Society,* 2008 BCSC 1623 at para. 9.

26 More recently, in *Jones v. Donaghey,* 2011 BCCA 6, 96 C.P.C. (6th) 10, the court explained that a material fact is one that, when resolved, will have legal consequences as between the parties to the dispute. At para. 18, the court provided that "a material fact is the ultimate fact, sometimes called 'ultimate issue', to the proof of which evidence is directed. It is the last in a series or progression of facts. It is the fact put 'in issue' by the pleadings. Facts that tend to prove the fact in issue, or to prove another fact that tends to prove the fact in issue, are evidentiary or 'relevant' facts". See also *British Columbia Teachers' Federation v. British Columbia,* 2012 BCSC 1722 at paras. 15-17 [*BCTF*].

iv) Particulars

27 At the same time, though the distinction can be difficult to apply, material facts are not particulars. In *McLachlin and Taylor* at 3-6, the authors state:

> There is a distinction between material facts and particulars. A material fact is one that is essential in order to formulate a complete cause of action. If a material fact is omitted, a cause of action is not effectively pleaded. Particulars, on the other hand, are intended to provide the defendant with sufficient detail to inform him or her of the case he or she has to meet. Particulars are provided to disclose what the pleader intends to prove.

28 Rule 3-7(18), which is also relevant in this case, states:

> If the party pleading relies on misrepresentation, fraud, breach of trust, wilful default or undue influence, or if particulars may be necessary, full particulars, with dates and items if applicable, must be stated in the pleading.

v) No Evidence

29 Rule 3-7(1) confirms that "[a] pleading must not contain the evidence by which the facts alleged in it are to be proved".

vi) The Relief Sought

30 Rule 3-1(2)(b), to which I referred earlier, requires a notice of civil claim to "set out the relief sought ... against each named defendant".

31 To the extent a plaintiff sues multiple defendants and seeks different forms of relief against those various defendants, such differences must be apparent.

vii) The Legal Basis for the Relief Sought.

32 Historically, it was not necessary to identify by name the cause of action that a plaintiff sought to advance: *Alford v. Canada (Attorney General)* (1997), 31 B.C.L.R. (3d) 228 (S.C.), aff'd [1998] B.C.J. No. 2965 (C.A.). Nor was it necessary for the plaintiff to plead a statute that he or she relied on: *Gold v. Toronto Dominion Bank*, [1998] B.C.J. No. 3074 (S.C.).

33 Neither of these propositions appears to remain valid under the current Rules. Thus, the authors of *McLachlin and Taylor* state at 3-5 and 3-7, respectively:

> ... under Rule 3-1(2)(c) a notice of civil claim must "set out a concise summary of the legal basis for the relief sought". It would appear that where the cause of action is breach of contract, that must be stated as the basis for the relief sought. Similarly, where the cause of action is a nominate tort, the tort must be named. Where the cause of action is negligence, it may not be necessary to identify that as the cause of action, but in that case there would have to be a statement that the legal basis of the claim made is the existence of a duty of care, breach of the duty of care, and damages resulting from the breach of a duty of care.
>
> ...
>
> The requirement under [Rule 3-1(2)(c)] to set out a concise summary of the legal basis for the relief sought means that earlier case law stating that it was not necessary to plead a statute if the material facts giving rise to the right to relief under the statute were pled is no longer applicable in British Colombia.

Deficiencies in the Proposed Pleading

34 The Proposed Pleading is severely deficient. It offends virtually all of the foregoing Rules and requirements of a proper pleading.

35 The Proposed Pleading is extremely prolix. It was fairly described by one counsel as a "running narrative". It contains a great deal of evidence. In those instances where it is possible to discern what cause of action is being advanced, the material facts which would be necessary to establish that cause of action are often absent.

36 Importantly for present purposes, it is not possible to identify which plaintiff asserts what cause of action against which defendant.

37 Broadly speaking, this is apparent in several ways. In many instances, the Proposed Pleading alleges that some wrong was committed against all of the plaintiffs. After I asked Dr. or Mrs. Sahyoun questions, however, it became apparent that not all the plaintiffs were advancing these causes of action. Conversely, other paragraphs purport to pertain to multiple defendants; on questioning, it became clear that only some of the defendants were alleged to have harmed one or more (but not all) of the plaintiffs. An example which captures both of these difficulties is found at paragraph 120 of the Proposed Pleading:

> 120. Moreover, the Defendant the Vancouver Board of Education is vicariously and [severally] liable for the actions and omissions ... of its employees Dr. Jean Moore, Beverley Underhill, Karen Till, Robert Pearmain, Allan McLeod and Donald Goodridge, who obstructed and hindered Antonios's, Miriam's and Bishoy's education, and caused the unlawful and the forceful removal of the three children from their parents' care on November 5, 1998, and caused severe injury, harm, loss, and damages to the Plaintiffs which have and will continue to affect all Plaintiffs for the duration of their lifetimes.

38 Following a series of questions that I posed, it became apparent that Dr. and Mrs. Sahyoun only purport to have a claim against Messrs. McLeod and Goodridge, though this is clearly not apparent from reading paragraph 120.

39 Throughout the application, I repeatedly asked Dr. and Mrs. Sahyoun to identify with precision what cause of action they and/or Bishoy and Miriam purported to advance against which defendant. The very fact that that exercise was necessary speaks to the extent of the problem. The exercise revealed further difficulties.

40 Thus, the position of Dr. Sahyoun changed between the first and second day of the hearing. Furthermore, the positions of Dr. Sahyoun and Mrs. Sahyoun were not entirely consistent. Still further, I explained to Dr. Sahyoun on the first day of the application that some of the conduct he complained of (for example against Dr. Ho, one of the Defendant Physicians) did not appear to ground a cause of action that either he or his wife could advance. On the second day of the application, he announced that he had, overnight, obtained new information against Dr. Ho that would cause him to now add new causes of action to the Proposed Pleading.

41 Portions, but not all, of the Proposed Pleading are structured chronologically. The consequence is that the role of various Defendants and the claims advanced against such defendants are interspersed throughout the pleading.

42 The foregoing difficulties, individually and collectively, make it virtually impossible for the Defendants to either identify or to understand the claims being advanced against them.

43 There were further problems with some of the causes of action that the Plaintiffs wished to advance. The following examples are simply illustrative and not exhaustive of these difficulties.

44 Mrs. Sahyoun repeatedly told me that she had a claim against a particular defendant because that defendant's conduct had somehow affected one of her children and "what affects my children affects me". Though this may be true in the broadest sense, it is not a proposition that can ground a cause of action.

45 In *B.D. (Litigation guardian of) v. Halton Region Children's Aid Society*, [2004] O.J. No. 6196 at paras. 18-21 (S.C.J.), Justice Hoilett referred to various decisions which confirm, for example, that a physician who provides care to a child owes a duty of care to the child and not to the child's parents. Similar principles and limitations would govern claims apparently being made by Dr. and Mrs. Sahyoun against various defendants who are not physicians.

46 The plaintiffs also advanced claims against various defendants because they had "perjured" themselves. In *D.L.H. v. M.J.M.*, 2011 BCSC 1228 at para. 63, Justice Verhoeven confirmed that the criminal offences of perjury and of fabricating evidence do not give rise to a civil claim; see also *Workum v. Olnick*, 2005 BCSC 1262 at paras. 6-11; and *Sahyoun v. Broadfoot* (4 February 2011), Vancouver S084539 (B.C.S.C.) oral reasons at para. 8 [*Broadfoot* 2011]. This last decision is particularly relevant, for reasons that I will come to, because it involved Dr. and Mrs. Sahyoun.

47 The Proposed Pleading also purports to advance various claims as a result of the adverse administrative decisions that were made by various tribunals and tribunal members. Such claims appear to be ill conceived and to constitute impermissible collateral attacks on the decisions that were made; see for example *Budgell* at paras. 23-27; *Shaw Cablesystems Limited v. Concord Pacific Group Inc.*, 2009 BCSC 203 at para. 24, 80 R.P.R. (4th) 163; and *Sahyoun v. Broadfoot*, 2008 BCSC 1836 at paras. 54-55 [*Broadfoot* 2008], var'd on other grounds 2009 BCCA 489. Once again this latter decision is of some import because it involves Dr. and Mrs. Sahyoun.

48 Part 2 of the Proposed Pleading, under the heading "Relief Sought", advances a single, generic prayer for relief by all plaintiffs against all defendants. It includes claims for special as well as punitive, aggravated and general damages. It does not begin to set out the relief that is claimed "against each named defendant". While I do not suggest that such relief must be repeated in rote form against each of 49 defendants, this portion of the pleading must surely signal to a defendant, as well as to the trier of fact, what relief is being claimed against a particular defendant or a particular group of defendants.

49 Part 3 of the Proposed Pleading, under the heading "Legal Basis", lists some 15 legal authorities, 21 statutes, regulations or international conventions, 14 articles from various medical journals and miscellaneous appendices including the 1990 and 1991 Vancouver White Pages. It does not, in any way, tie any of these materials to any particular defendant, though some of the materials, and in particular some statutes, are referred to earlier in Part 1 of the Proposed Pleading.

50 In *BCTF*, Justice Griffin, in the context of an application for particulars, dealt with the required content of Part 3 of a notice of civil claim under the new Rules, and said:

> [14] Starting out with Part 3 of the notice of civil claim itself, I see nothing wrong with the way in which the plaintiff has set out the legal basis for the relief sought. The "Legal Basis" portion of the notice of civil claim is appropriately concise; it commits the BCTF to a cause of action and it adequately informs the Province of the legal foundation of claim.

51 Accordingly, a plaintiff must, in its pleadings, commit to a cause of action and adequately inform the defendant of the legal foundation of its claim. Part 3 of the Proposed Pleading does not begin to achieve these objects; see also *Fletcher v. British Columbia (Minister of Public Safety and Solicitor General)*, 2013 BCSC 554 at paras. 25-27.

52 The current Rules and Form 1 have, as I said earlier, changed the traditional structure of a notice of civil claim. Nevertheless, the need for clarity and coherence persists. In *Homalco*, Justice Smith addressed these requirements and said:

> 9 Nevertheless, Mr. Clark submitted, it is enough if the material facts can be found in the statement of claim and a plaintiff cannot be compelled to prepare it in the conventional form. I cannot agree. A statement of claim must plead the causes of action in the traditional way so that the defendant may know the case he has to meet to the end that clear issues of fact and law are presented for the court. The comments of Thesiger L.J. in Davy v. Garrett (1877), 7 Ch. D. 473 (C.A.) at 488 and 489 are apt here:
>
> > I am disposed to agree with the contention that the mere stating material facts at too great length would not justify striking out a statement of claim. But when in addition to the lengthy statement of material facts we find long statements of immaterial facts, and of documents which are only material as evidence, a Defendant is seriously embarrassed in finding out what is the case he has to meet.
> >
> > ...
> >
> > Now, in any properly constituted system of pleading, if alternative cases are alleged, the facts ought not to be mixed up, leaving the Defendant to pick out the facts applicable to each case; but the facts ought to be distinctly stated, so as to shew on what facts each alternative of the relief sought is founded.

53 At bottom, in a case that involves multiple plaintiffs, multiple defendants and multiple causes of action, it remains necessary for each plaintiff to identify with precision what material facts (not evidence), what causes of action and what relief he or she is advancing against which defendant(s).

54 Neither a defendant nor a trier of fact should have to parse through a notice of civil claim and either cobble together or speculate about what cause of action is being advanced against which defendant.

The Test for Amending Pleadings

55 In *Shaw Cablesystems Limited*, Justice N. Smith said:

> [8] Rule 24(1) allows a party to amend a pleading at any time with leave of the court. Applications for leave to amend should be considered on the same basis as applications to strike existing pleadings. In *Victoria Grey Metro Trust Company v. Fort Gary Trust Company* [(1982)], 30 B.C.L.R. (2d) 45 at page 47 (S.C.) McLachlin J. (as she then was) said:
>
> > ...it seems to me obvious that the court will not give its sanction to amendments which violate the rules which govern pleadings. These include the requirements relating to conciseness (R. 19(1)); material facts (R. 19(1)); particulars (R. 19(11)); and the prohibition against pleadings which disclose no reasonable claim or are otherwise scandalous, frivolous or vexatious (R. 19(24)). With respect to the latter, it may be noted that it is only in the clearest cases that a pleading will be struck out as disclosing no reasonable claim; where there is doubt on either the facts or law, the matter should be allowed to proceed for determination at trial... While these cases deal with striking out claims already pleaded,

> consistency demands that the same considerations apply to the question of amendment to permit new claims.
>
> ...
>
> [9] Rule 19(24) reads:
>
> (24) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other documentation on the ground that
>
> (a) it discloses no reasonable claim or defence as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing or the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> And the court may grant judgment or other the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.
>
> ...
>
> [12] In *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*, [1999] B.C.J. No. 2160 (B.C.S.C.) at para. 34 Romilly J. said:
>
> ... as long as the pleadings disclose a triable issue, either as it exists, or as it may be amended, then the issue should go to trial. The mere fact that the case is weak or not likely to succeed is no ground for striking it out under the provisions of Rule 19(24).

56 Although *Shaw Cablesystems Limited* was decided under Rule 19(24) of the old Rules of Court, the present rule, Supreme Court Civil Rule 9-5(1), mirrors its language.

57 The decision in *Victoria Grey Metro Trust Company*, cited in the foregoing quote, is also pertinent in that the court said:

> [2] ... These provisions arguably support a generous approach to the question of amendments. However, the court will not allow useless amendments[.]

Ultimately, *Victoria Grey Metro Trust Company* was overturned as the B.C. Court of Appeal found that the proposed amendments "raise[d] questions which are proper to raise having regard to the origin of the proceeding" ((1982), 30 B.C.L.R. (2d) 50 at para. 4). But the principle articulated - that a useless amendment will not be allowed - still holds.

58 In this case, having regard to the numerous and varied deficiencies in the Proposed Pleading, I am satisfied that it should not be filed. There was some suggestion by some of the Defendants that I ought not to allow the Plaintiffs to redraft the Proposed Pleading. In *The Owners, Strata Plan LMS3259 v. Sze Hang Holdings Inc.*, 2009 BCSC 473 at paras. 40-43, Justice Sinclair Prowse described both the authorities that addressed the circumstances in which a party will not be permitted to redraft pleadings that were struck by the court as well as the conceptual basis for the exercise of that discretion.

59 The notices of application that were filed by the Defendants do not seek any such relief nor do I consider that it would be appropriate, for various reasons, to limit the Plaintiffs' ability to amend and file a proper claim.

60 The courts will, to the extent reasonably possible and depending on the history of a matter, extend some indulgence to a self-represented litigant who is not conversant with the Rules or the law. Such indulgences do not, however, extend to any diminution or impairment of another party's substantive rights. Allowing the Proposed Pleading to be filed, for example, would impair the ability of the Defendants to respond to and defend the claims being made against them. It would render their defence inefficient. It would impede their intended application to

strike all or parts of the claims being made against them. An indulgence granted to a self-represented litigant cannot extend this far.

61 Providing the Plaintiffs a further opportunity to prepare a proper claim does not engage these concerns. Having said this, other concerns do arise. In *Broadfoot 2011* and *Broadfoot 2008*, Justices Silverman and Williams, respectively, identified various deficiencies in the pleadings advanced by Dr. and Mrs. Sahyoun. Some of those deficiencies are repeated in the Proposed Pleading. Furthermore, in *Broadfoot 2008,* Justice Williams addressed Dr. and Mrs. Sahyoun's attacks on various administrative decision-makers and observed:

> [80] I reach my conclusion having carefully examined the statement of claim. While it is important to be cautious of allegations that they are really just attacks on the decision dressed up to allege serious bad faith misconduct, the court must bear carefully in mind the test which is to be employed in assessing this application and to which I adverted earlier. It must be assumed that the facts alleged can be proved.

62 These comments resonate in the present case. The Proposed Pleading contains numerous serious allegations of fraudulent misrepresentation, falsification of materials, perjury and malicious behavior on the part of numerous unrelated defendants. It is open to a plaintiff, on a proper basis, to advance some of these matters either independently or in support of an action if a proper foundation exists for the allegation. It is thoroughly wrong to do so for strategic reasons. I have explained to Dr. and Mrs. Sahyoun that they must reflect carefully on what allegations they advance and should be mindful of the sanctions that potentially exist where a claim of this nature is not made out.

63 I am ordering the Plaintiffs to provide the Defendants with a further amended notice of civil claim, which complies with Rule 3-1, within 60 days of receipt of these reasons. That timeframe provides the Plaintiffs ample time to reflect on these reasons and to make the amendments that are required. It also recognizes that the Defendants have been seeking to obtain a proper pleading from the Plaintiffs for many months and that they wish to address the claims being made against them.

P.G. VOITH J.

Simon v. Canada (Attorney General), [2015] B.C.J. No. 1122

British Columbia Judgments

British Columbia Supreme Court

Salmon Arm, British Columbia

S.A. Donegan J. (In Chambers)

Heard: January 27, 2015.

Oral judgment: February 27, 2015.

Docket: 4756

Registry: Golden

[2015] B.C.J. No. 1122 | 2015 BCSC 924

Between Zoltan Andrew Simon and Zuan Hao Zhong, Plaintiffs, and Attorney General of Canada and Attorney General of British Columbia, Defendants

(156 paras.)

Counsel

The Plaintiff, Zoltan Andrew Simon, appeared on his own behalf.

No one appeared on behalf of the Plaintiff, Zuan Hao Zhong.

Counsel for Defendant, Attorney General of Canada: T.E. Fairgrieve.

Counsel for Defendant Attorney General of British Columbia: M.A. Witten.

Oral Reasons for Judgment

S.A. DONEGAN J. (orally)

INTRODUCTION

1 Zoltan Simon and his wife have sued the Attorney General of Canada and the Attorney General of British Columbia. In their 72 page notice of civil claim, they seek damages of nearly $10 million as well as various declaratory and other relief.

2 The precise number of proposed or potential causes of action against the two named and various unnamed defendants is difficult to determine. The parties themselves are only able to provide a broad estimate of somewhere between 20 and perhaps 60 various proposed causes of action, although some of the proposed causes are not known to law.

3 The defendants each bring applications pursuant to Rule 9-5(1) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Civil Rules*] seeking to strike the notice of civil claim in its entirety without leave to amend. Both defendants rely upon Rule 9-5(1) (a), (b) and (d), with the Attorney General of Canada placing primary emphasis on subparagraph (d), abuse of process.

4 Mr. Simon, on behalf of both plaintiffs, opposes these applications. In the event that the defendants' applications are successful, he made it very clear that he does not seek leave to amend his pleadings.

5 I have taken a great deal of time since and prior to the oral hearing of this matter to carefully consider the written materials, the oral submissions, the notice of civil claim in its entirety, and the numerous case authorities that all three parties provided, as I recognize that, as "[v]aluable as it is, the motion to strike is a tool that must be used with care." As the Supreme Court of Canada indicated in *R. v. Imperial Tobacco*, 2011 SCC 42, the law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. As I say, the motion to strike is a tool that must be used with care.

BACKGROUND

6 In January of 1999, Mr. Simon signed a sponsorship agreement in support of his then wife, Ms. Reyes, and her sons for immigration to Canada. In the agreement, Mr. Simon undertook to provide for their essential needs. The undertaking he signed included a provision that he would be in default of the undertaking if those he sponsored received social assistance during the validity period of the undertaking. The undertaking also included provisions that any social assistance paid during that period would become a debt owed by Mr. Simon. Any default of the undertaking would prohibit him from sponsoring another person.

7 Unfortunately, within only a few months of her arrival in Canada, Ms. Reyes and Mr. Simon parted ways. Between approximately 2000 and 2005, Ms. Reyes received social assistance benefits from the Province of British Columbia ("British Columbia") in the amount of approximately $38,000.

8 In 2008 and 2009, British Columbia garnished approximately $3,800 from funds standing to Mr. Simon's credit in his tax account with Canada Revenue Agency ("CRA"), on the basis of the sponsorship undertaking. Nothing further has been paid on the outstanding amount.

9 In December of 2006, Mr. Simon married the other plaintiff in this matter, Zuan Hao Zhong, a Chinese citizen. In February of 2007, he applied to Citizenship and Immigration Canada ("CIC"), to sponsor her and her son for immigration to Canada. His application was refused, because he was found to be in default of his previous undertaking.

10 CIC's refusal of his sponsorship application triggered a series of court actions brought by Mr. Simon over the last several years. These unsuccessful actions have been brought in various courts at various levels and in various jurisdictions. This action is the latest in this series.

11 The Attorney General of Canada fairly summarized these various actions at paragraphs 4-13 of its notice of application:

> 4. On October 1, 2007, Mr. Simon brought a Federal Court action, alleging wrongdoing in relation to the Citizenship and Immigration Canada ("CIC") sponsorship forms, British Columbia's provision of social benefits to Ms. Reyes, and CIC's treatment of his application to sponsor Ms. Zhong. On November 7, 2007, Justice Mactavish struck out Mr. Simon's Statement of Claim, because, *inter alia,* he had not yet exhausted his remedies at the IAD.
>
> 5. On May 27, 2009, Mr. Simon sought an Order for mandamus compelling the IAD to issue a decision. This application was dismissed on September 10, 2009.
>
> 6. On October 29, 2009, Mr. Simon brought an action in the Supreme Court of British Columbia ("BCSC"), Registry No. S-097926, with allegations similar to his October 2007 Federal Court action. Mr. Simon discontinued this action on May 27, 2010.

7. On November 17, 2009, the IAD issued a decision dismissing Mr. Simon's appeal. Mr. Simon brought an application for leave and judicial review to challenge that refusal. The Federal Court dismissed that application on March 30, 2010.

8. On April 23, 2010, Mr. Simon brought a second action in the Federal Court, again raising similar allegations as in his October 2007 Federal Court action. He sought a declaration that he did not owe a debt to British Columbia under the sponsorship agreement. On June 8, 2010, the Federal Court struck out Mr. Simon's Statement of Claim, without leave to amend. However, the Federal Court of Appeal allowed Mr. Simon's appeal in part, so as to grant leave to Mr. Simon to file an amended statement of claim. The Federal Court of Appeal found that the "propriety of the Canada Revenue Agency's treatment of monies otherwise owing to Mr. Simon unquestioningly falls within the jurisdiction of the Federal Court."

9. Mr. Simon filed an Amended Statement of Claim on February 17, 2011. The Federal Court again struck this amended claim without leave to amend on May 19, 2011. The Federal Court concluded that Mr. Simon's claim suffered from various defects. Further the Federal Court found that "this claim is one against the BC Provincial Crown" and "[a]ny complaints about the actions of the Federal Crown appear to be ancillary to his main allegations against the BC government". The Federal Court concluded that Mr. Simon's Amended Statement of Claim "does not disclose a reasonable cause of action against the Defendant in respect of the actions of the CRA" and that his pleadings raised the issue of collateral attack on the refusal of the Visa Officer to allow him to sponsor his second wife.

10. The Federal Court of Appeal upheld this decision, concluding that "B.C.'s assertion of a debt claim against Mr. Simon is at the root of his legal difficulties." Mr. Simon's "Notice of Appeal" to the Supreme Court of Canada was treated as an application for leave to appeal. This application was refused on October 4, 2012.

11. On May 25, 2012, Mr. Simon brought his third action in the Federal Court against the Ministry of Human Resources and Skills Development, the Registry of the Supreme Court of Canada, and "the federal authority that approved the official website [of the Supreme Court of Canada]", among others. Mr. Simon claimed damages "in lieu of' Canada Pension Plan and Old Age Security benefits because "the authorities have been unwilling to issue any official document regarding a guaranteed amount of his future pension benefits." He also claimed damages against Supreme Court officials in relation to their treatment of documents that he wished to file.

12. The Federal Court dismissed his claim in two Orders dated July 20, 2012 on the basis that allegations did not disclose a viable cause of action. The Federal Court of Appeal upheld these Orders on February 18, 2014, rejecting Mr. Simon's argument that the judge was biased.

13. Mr. Simon has attempted to appeal this Federal Court of Appeal decision to the Supreme Court of Canada. He has been informed that his Notice of Appeal will be treated as an application for leave to appeal but that he must provide additional documents. On April 14, 2014, he filed a "Notice of Motion to the Chief Justice or a Judge to state a Constitutional Question". This motion was dismissed on October 23, 2014.

[Footnotes omitted]

12 To this summary I would add that Mr. Simon also commenced an action against British Columbia and a particular Ministry of Justice lawyer in the Provincial Court of British Columbia. In that case, Mr. Simon alleged that the defendants misinterpreted statutes and denied him a reasonable payment plan with respect to the undertaking debt. This action was dismissed in May of 2009.

13 I would also add that a few days ago Mr. Simon's application for leave to appeal in respect of the Federal Court matter was denied by the Supreme Court of Canada.

ISSUES

14 The issues to be considered in these two companion applications are as follows:

1) Does the notice of civil claim fail to disclose a reasonable claim against either or both of the defendants?

2) Are the pleadings against either or both of the defendants unnecessary, scandalous, frivolous or vexatious?

3) Are the pleadings an abuse of process of this court?

4) If the answer to any one of the preceding three questions is "yes", should the plaintiffs be granted leave to amend their pleadings?

ANALYSIS

Pleadings: General

15 Rule 3-1(2) of the *Civil Rules* sets out what a notice of civil claim must do. It provides, in part:

(2) A notice of civil claim must do the following:

(a) set out a concise statement of the material facts giving rise to the claim;

(b) set out the relief sought by the plaintiff against each named defendant;

(c) set out a concise summary of the legal basis for the relief sought;

...

(g) otherwise comply with Rule 3-7.

16 Rule 3-7 of the *Civil Rules* provides, in part:

(1) A pleading must not contain the evidence by which the facts alleged in it are to be proved.

...

(9) Conclusions of law must not be pleaded unless the material facts supporting them are pleaded.

...

(14) If general damages are claimed, the amount of the general damages claimed must not be stated in any pleading.

17 The function of pleadings is to clearly define the issues of fact and law to be determined by the court. A plaintiff must state, for each cause of action, the material facts. Material facts are those necessary for the purpose of formulating the cause of action. The defendant then sees the case to be met and may respond to the allegations. By referring to the pleadings, the court will understand what issues of fact and law it will be called upon to decide: *Homalco Indian Band v. British Columbia*, [1998] B.C.J. No. 2703 (S.C.) at para. 5.

18 This very basic rule of pleadings involves four separate elements:

1) every pleading must state facts and not merely conclusions of law;

2) it must include material facts;

3) it must state facts and not the evidence by which they are to be proved; and

4) it must state facts concisely in a summary form.

Glaxo Canada Inc. v. Canada (Department of National Health and Welfare) (1987), 15 C.P.R. (3d) 1 at para. 11.

19 A "material fact" was defined by Mr. Justice K.J. Smith in *Jones (Litigation Guardian of) v. Donaghey*, 2011 BCCA 6 at para. 18, as follows:

> [18] ... a material fact is the ultimate fact, sometimes called "ultimate issue", to the proof of which evidence is directed. It is the last in a series or progression of facts. It is the fact put "in issue" by the pleadings.

20 A plaintiff must clearly plead the facts upon which he relies in making his claim. Where a claim is brought by a self-represented litigant, the court should consider amendments to correct defective pleadings. However, it is not the court's role to give advice to a plaintiff about how to cure deficiencies or how to present their claim: *Ahmed v. Assu*, 2014 BCSC 1768 at para. 19.

Rule 9-5(1) Striking Pleadings: An Overview

21 Rule 9-5(1) of the *Civil Rules* provides, in part, as follows:

> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> ...
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

22 Rule 9-5(2) of the *Civil Rules* stipulates that:

> (2) No evidence is admissible on an application under subrule (1)(a).

23 I also note that a high onus must be met before a cause of action may be struck under Rule 9-5: *Moses v. Lower Nicola Indian Band*, 2015 BCCA 61 at para. 45.

24 It is trite law that before a claim may be struck under Rule 9-5, it must have "no reasonable prospect of success". Stated another way, it must be "plain and obvious" that the cause will fail: *Imperial Tobacco* at para. 17. However, as held by the British Columbia Court of Appeal in *Moses v. Lower Nicola Indian Band* at para. 41:

> [41] ...At the same time, the law must be permitted to evolve. If there is some realistic chance that the cause of action could be 'saved' by a future development, the court should allow the action to proceed. As Chief Justice McLachlin stated in *Imperial Tobacco*:
>
> > Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners, Ltd.*, [1963] 2 All E.R. 575 (H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.
>
> [Emphasis in original]

25 The Court then confirmed the importance of allowing amendments, writing at para. 41:

> [41] ...Further, if a cause of action requires clarification by an amendment, the court should allow the plaintiff to make such amendment as a condition of dismissing the application under Rule 9-5.

The Notice of Civil Claim: An Overview

26 Mr. Simon and his wife commenced this action in May of 2014, following Mr. Simon's seven-year unsuccessful odyssey through the processes of the Immigration and Refugee Board, its Appeal Division, the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, the Supreme Court of British Columbia, and the Provincial Court of British Columbia. Many of these courts confronted prolix and confusing pleadings filed by Mr. Simon, leading to successful defence applications to strike. On occasion, guidance and further opportunities were given to Mr. Simon to amend his pleadings. Unfortunately, Mr. Simon's pleadings in the case before me appear to have become even more prolix and convoluted than in the past. To borrow the words of Mr. Justice K. Smith in *Homalco* "to review this notice of civil claim requires a "tortuous analysis" of the document in order to attempt to discern its nature and effect.

27 In this 72-page typed, single-spaced document, it is difficult, if not impossible, to identify what claims the plaintiffs seek to advance against the named defendants. As I indicated at the outset, the parties themselves are unable to provide a clear number of proposed causes of action.

28 I believe the root of Mr. Simon's complaint is the 1999 sponsorship agreement and undertaking that he signed. I can glean from the pleadings that he appears to question the propriety of that document, the propriety of British Columbia's support of his ex-wife and her sons, his obligation to repay those support benefits, and the propriety of the $3,800 that was garnished. Other than these general impressions regarding the genesis of his various complaints, it is difficult to disentangle the myriad of intertwined complaints contained in the notice of civil claim.

29 I will take some time to provide a detailed overview of this document. It is divided into three parts. In Part 1: Statement of Facts, the plaintiffs have written nearly 22 pages outlining Mr. Simon's perception of his dealings with, and wrongs committed by, various persons over the last 15 years. His complaints include accusations against his first wife, his second wife (Ms. Reyes); various provincial and federal government officials including ministers, deputy ministers, and various public servants; government lawyers; court registry staff; administration staff; a number of ambassadors to several different countries; as well as many unnamed persons.

30 Many of the "facts" alleged by the plaintiffs involve convoluted and bizarre assertions of cover-ups, misleading of the courts, judicial bias, conspiracy, fraud, and perjury (to name a few), committed by various named and unnamed persons. Many of these "facts" can be, I think, fairly described as inflammatory arguments. A small sampling of paragraphs from Part 1 will suffice to demonstrate this point:

> 4. The key officials of the Crown that have caused the damages in different torts for the plaintiffs will be called "honourable tortfeasors" below, since it is hard to find a better definition for this group. It includes the ministers of the CIC (Citizenship and Immigration Canada, or Citizenship, Immigration and Multiculturalism): Mr. Monte Solberg (January 2006 to January 3, 2007), Ms. Diane Finley (January 4, 2007 to October 29, 2008), Mr. Jason Kenney (October 30, 2008 to July 14, 2013), and Mr. Chris Alexander (from July 15, 2013); the ministers of Human Resources and Skills [or Social] Development: Ms. Diane Finley (January 2006 to January 4, 2007 and from October 30, 2008 to July 15, 2013); ministers of Department of Justice [Ministers of Justice and Attorneys General]: Mr. Vic Toews (February 6, 2006 to January 3, 2007), Mr. Rob Nicholson (January 4 2007 to July 14, 2013), and Mr. Peter MacKay (since July 15, 2013). The Commissioner and Chief Executive Officer, the head of the CRA, also belongs to this group. Or, rather, the Deputy Commissioner named Mr. Bill Baker who had knowledge of the matters. Further members of this honourable group are Mr. Stephen Harper, Prime Minister, Mr. Wally Oppal (A.G. of BC), Ms. Penelope Lipsack (Counsel to the Government of BC was also involved and even sued by the plaintiff), Mr. Gordon O'Connor and Jean-Pierre Blackburn, both Minister of National Revenue, Ms.

> Sylvia Dalman (CRA), and Ms. Sharon Shanks (Service Canada). On behalf of Ombudsman BC, R. Brown and Ms. Judy Ashbourne may be mentioned. As for the employees of the Registry of the Supreme Court of Canada, Mr. Roger Bilodeau, Ms. Mary Ann Achakji, Ms. Barbara Kincaid, Ms. Nathalie Beaulieu and Mr. Michel Jobidon belong to this group of tortfeasors. Finally, Mr. Daniel Gosselin is a tortfeasor representing the Courts Administration Service. The Attorneys General of Canada and BC have vicarious liability for the acts, errors, and omissions of all these officials listed above.

...

> 99. In a series of legal controversies, the federal administrators unexplainably kept relying on the personal decisions of one or a few provincial administrators that seemed to be unfamiliar with the laws of Canada but were protected by their provincial superiors. The federal and provincial administrators relied on each other's policies and ignored many of the related federal and provincial laws. More than thirty paragraphs or subparagraphs of the (mainly federal) legislation have been knowingly violated by the Crown's servants.

...

> 117. On or about May 24, 2012, the plaintiff received the letter of Ms. Barbara Kincaid, legal counsel for the Registry of the Supreme Court of Canada. She wrote that there was "no automatic right to appeal" in civil cases so the document could not be filed. Thus, she contradicted and contravened the French version of 61. of the *Supreme Court Act* that prescribed automatic appeal (without the application for leave to appeal stage).

...

> 120. On or after June 18, 2012, the plaintiff received the Response of the Crown in the file #34831 that was a deposition into the Registry of the SCC. In it, the Crown's Counsel -- Ms. Wendy Bridges -- kept repeating a false statement, claiming that the plaintiff had had claims only against British Columbia (and not against Canada). Counsel's false statement was determinative for the three judges of the Supreme Court of Canada. They fully relied on her statement while perhaps they did not have time to read the plaintiff's pleadings in full.

...

> 128. During 2012 or 2013, the Plaintiff informed the Head of the Courts Administration Service regarding the long list of torts and unlawful controversies, regarding the lack of procedural fairness, in the whole administration service nationwide. He has not received any answer. (It seems probably that Mr. Gosselin or one of his deputies had orchestrated those torts.)

...

> 137. In about this time, the plaintiff received a copy of a booklet entitled *Representing Yourself in the Supreme Court of Canada*, Volume I (a guide published by Mr. R. Bilodeau, or the Registry of the SCC). The booklet tortuously omits section 61. of the *Supreme Court Act*, just like the official website of the SCC Registry with the step-by-step filing instructions.

...

> 139. Early in 2013, the unprofessional, vague, "Dodonaic" or controversial Order of Mr. Justice Marc Nadon initiated another unfairness. He failed to specify or identify the documents in question by name, and there were several pending motions. The Registry, in bad faith, arbitrarily interpreted his Order and returned too many of those documents to the plaintiff. (Mr. Harper, observing Mr. Nadon's potential usefulness for him, soon appointed Mr. Nadon to the Supreme Court of Canada.)

31 Part 1 also contains lengthy arguments, not material facts, that are based upon an erroneous understanding of the law. As only one example, in arguing that sponsorship agreements generally are invalid all over Canada, the plaintiffs write:

159. About every third sponsored immigrant wants to leave his or her sponsor and become independent a.s.a.p. Thus, the only practical solution for a sponsor to prevent a sponsored person from entering a government office is to lock him or her up as prisoner. (One may imagine a fragile lady that sponsored a 300-lbs heavy man from a Third World country. The man, after landing in Canada, notices hundreds of beautiful women on his city's streets, many of whom are smiling or winking at him. He cannot resist and wants to become independent from his sponsor wife. He applies for benefits in the first office of the Crown. The wife's only solution would have been his forceful confinement, so she could have kept him as her "sex slave" locked up in a room for ten years.) However, ss. 279. (2) (a) of the *Criminal Code* states about forcible confinement, "Every one who, without lawful authority, confines, imprisons or forcibly seizes another person is guilty of (a) an indictable offence and liable to imprisonment for a term not exceeding ten years..." Thus, the cornerstone of the Sponsorship Agreement is a condition that is a punishable offence under the *Code*. Such circumstance makes the plaintiff's Sponsorship Agreement void *ab initio*.

160. Thus, the only 100% effective way for a sponsor to prevent a sponsored person from applying and receiving social assistance is only by committing a crime, an indictable offence. Therefore, due to this *main condition precedent*, the essence of the text on the CIC sponsorship forms is unconstitutional, unlawful and prescribes a physical impossibility. It is typical maxim "*ex turpi causa*" situation that renders the sponsorship agreements invalid, a nullity from the legal and constitutional point of view in cases where the sponsored person has no intention to stay with the sponsor. Please refer to paragraph 4 (3) of the *Immigration Regulations*, *1978* SOR/ 78-172 -- under which the sponsorship agreement was signed in 1999 and under which the default took place in 2000. It states, "The family class does not include a spouse who entered into the marriage primarily for the purpose of gaining admission to Canada as a member of the family class and not with the intention of residing permanently with the other spouse." The same *Regulations* adds, under ss. 6.1 (2), "Where a sponsor sponsors an application for landing of a member of the family class described in paragraph *(h)* of the definition "member of the family class" in subsection 2(1) and that member is unable to meet the requirements of the Act and these Regulations or dies, the sponsor may sponsor the application for landing of another member of the family class described in that paragraph."

32 At the conclusion of Part 1, the plaintiffs provide a summary of damages caused by torts of the Crown. Those summaries are contained at paragraphs 167 through 193. They appear as an itemized list of wrongs alleged to have been committed where the plaintiffs have assigned a monetary value for damages:

167 BALLPARK FIGURES FOR THE PLAINTIFF'S

DAMAGES BASED ON THE CRIMINAL CODE:

168. A. False statement related to Crown Counsel $600,000

169. B. Tort of material misrepresentation of the *IRPA* $350,000

170. C. Tort of fraud or false pretences: $100,000 or $700,000 $400,000

171. D. Misfeasance in public office=punitive

damages for 7 yrs separation $2,818,200

172. E. Tort of breach of trust $250,000

173. F. Tort of fraudulent conversion $100,000

174. G. Tort of interference and failure to deliver monies $700,000

175. H. Tort of contravening several Acts of Parliament $300,000

176. I. Tort of fraudulent conspiracy and attempt of conspiracy $700,000

177. J. Tort of mental torture of the plaintiffs by conspiracies $700,000

178. K. Tort of corruption, fraud on government $250,000

179. L. Tort of facilitating terrorist activity against re-victimized sponsors $500,000

180. M. Possession and laundering the proceeds of crime $500,000

181. N. Unjust enrichment of the Crown by using CIC processing fees $ 1,190

182. O. Restitution of the plaintiff's tax credits taken unlawfully in 2008-9 $ 3,542

183. P. Crown's unjust enrichment related to plaintiff's tax returns 2009 -13 $ 12,500

184. Q. The plaintiff's losses due to his wasted travel costs caused by torts $ 14,120

185. R. The plaintiffs' loss due to need to maintain more than 1 household $ 56,800

186. S. Tort of defrauding the public by deceit $700,000

187. T. Violations of the plaintiff's *Charter* rights, mental suffering $ 55,000

188. U. Plaintiff's losses due to the necessity to declare personal bankruptcy $ 4,800

189. V. Aggravated damages for reduction of life expectancy by 7 years $350,000

190. W. Plaintiff's lost (past and future) earnings if he needs to live abroad $131,500

191. X. The family's damages due to loss of Canadian medical coverage $300,000

192. Y. Plaintiff's losses due to costs, orders and fees paid in 9 court cases $ 9,000

193. **Y. TOTAL LOSSES OF THE PLAINTIFFS CAUSED BY CROWN TORTS $9,806.452**

[Emphasis in original]

33 Part 2 of the notice of civil claim contains the relief sought. Here, the plaintiffs seek various declaratory orders, an order in the nature of mandamus, restitution, and specific amounts for general damages.

34 Part 3 of the notice of civil claim entitled "Legal Basis", is, like Part 1, prolix and convoluted. This part is scattered with various arguments that attempt to fit vague yet serious allegations against a multitude of government, judicial, and legal officials into two broad causes of action: contract and tort, with primary emphasis and argument placed upon the tort claim.

Contract Claim

35 A portion of the plaintiffs' action in contract is found at paragraphs 2-5 of Part 3:

> 2. The plaintiff's action is framed both in contract and tort. The alleged Crown parties to the alleged contract on which this action is based were the plaintiff and a Minister, apparently the Minister of Immigration (CIC). The action in contract is based on wrongs done to the plaintiff because he has never received a photocopy of that alleged contract.
>
> 3. The Crown -- either Canada or BC -- claims that an alleged debt of the plaintiff, in the amount of $38,149.45, arose out of a contract. Thus, the financial subject-matter before this Honourable court is more than thirty-eight thousand dollars. (Due to the unlawful garnishments on two counts, it has decreased to about thirty thousand dollars.) The amount involved here is definitely over $5,000 that is often a threshold in the *Criminal Code*. The two governments are adamant about the magnitude of the amount involved.
>
> 4. The plaintiff's wife and stepson had no contract with Canada or BC. However, they are and have been clients of the CIC since February 2007, with an assigned client file number.

5. On or about January 4, 2011, Ms. Zuanhao ZHONG and her son Jianfeng YE, citizens of China, assigned their rights in this action to the plaintiff personally by an official affidavit. It took place in the Guangzhou Notary Public Office in China, by a bilingual affidavit. They authorized Zoltan A. Simon to represent them at any time in any Canadian court, primarily in legal and financial issues related to immigration, human rights, and work permits. Thus, the main plaintiff, Zoltan A. Simon, is bringing the action on behalf of his wife (Ms. Zhong) and himself. The claim on Ms. Zhong's behalf also contains the claim for damages for her son --Jian Feng YE -- while the latter was a minor under her guardianship. Considering that he was a minor until his age of 19 years, based on the laws of Canada, the interval of Ms. Zhong's claim for damages on behalf of Mr. Ye started in April 2007 and ended on October 3, 2010.

Action in Tort

36 The plaintiffs' tort claims are outlined mainly throughout pages 24-67. In these pages, the plaintiffs attempt to categorize and argue various interlocking and overlapping "tort" claims. Paragraphs 7-15 of Part 3 read as follows:

7. The action in tort is complicated to characterize because it partly overlaps with the claims for fraudulent misrepresentation, fraud or false pretences, conversion or theft, abuse of power, misfeasance in a public office, conspiracy, money extortion, etc. These torts are comparable to a pyramid that has been constructed by improper stones or bricks of many different colours. (In our case the different colours are the different torts that interlocking and overlapping with each other. However, studying the stones of a certain colour only, taken out of context as floating in the air, the pyramid-shape would hardly appear.)

8. Since we have a long list of independent and interlocking torts, the plaintiffs have no means to specify and repeat the names of the public servants involved in each individual tort or count. As a general rule, at each tort claim, the so-called "Honourable tortfeasors" indicate or include the following federal ministers: Mr. Stephen Harper, Mr. Rob Nicholson, Mr. Jason Kenney, and Ms. Diane Finley. Please refer to the full list of the Crown tortfeasors' names on page 3 above. All of them acted knowingly, in bad faith, in order to get unlawful gains for the Crown by creating deprivation for the re-victimized sponsors (that had signed their CIC forms before June 28, 2002) -- including the instant plaintiff -- and often ruining the lives of their families. They are the key persons that invented, approved, promoted or/and maintained most of the torts or several systems of tort. Under certain claims below, where the tortfeasors were the employees of the SCC Registry, or administrators of British Columbia, that circumstance will be indicated or emphasized separately.

9. There are and have been, in all material times, five major groups of Crown conspirators as follow:

10. (A) Ms. Wendy Bridges, Counsel, with at least one of her superiors;

11. (B) The top administrators of the CIC, CRA and the federal Ministry of Justice;

12. (C) The top administrators or officials of the RSBC, Ministry of Housing and Social Development of BC, Ministry of Finance of BC, and Ombudsman BC, with some moral support from the BC Ministry of Justice;

13. (D) The top officials or administrators of the FC/ FCA Registry in Edmonton, with the moral support of the Courts Administration Service;

14. (E) The administrators of the SCC Registry, including Mr. Bilodeau and one of his superiors.

15. In our case, the entire structure of the Crown's policies and tricks is false and unlawful. One cannot study only one of them absolutely separately from the other torts, taken out of context.

37 The plaintiffs then go on to discuss these tort claims. Again, only a small sample of these pleadings is required to exemplify their inappropriate, prolix, and convoluted nature.

Fraudulent Misrepresentation

38 The plaintiffs discuss a nationwide tort involving a governmental "pyramid of power" at paragraphs 18, 19, and 20 of Part 3:

> 18. In the case at bar, the plaintiffs respectfully submit, the issues are related to a pyramid of power that has been carefully designed by the honourable tortfeasors by several unlawful elements. One cannot say that several such pyramids of power have been built by the Crown, totally independently from each other.
>
> 19. A person with reasonable mind cannot imagine that tens of thousands of public servants revolted simultaneously from the laws of Canada as a "grassroots movement." The Government of Canada would have notified the media regarding such problem. Also, one cannot imagine such grassroots movement, revolt, or conspiracy of the Cabinet's ministers against the Prime Minister of Canada. The media would have informed the country about such thing, and the P.M. would have ordered them to resign.
>
> 20. Therefore, a reasonably thinking average Canadian can assume that the pyramid of power is associated with the person of the Prime Minister that must have known about the existence of such nationwide torts in four of his federal ministries. He may state or swear by an affidavit that he had zero knowledge of such ongoing torts between 2006 and 2014. Or, he may show an official paper issued by his family doctor stating, say, that he had suffered by brain tumor or bipolar disorder during those years. Canadians may accept such circumstance as an explanation but they are entitled to challenge the ministers' unlawful actions and omissions that have turned Canada upside down, so to speak.

39 The plaintiffs then seek to draw an analogy between their claims and the Nuremberg Trials at paragraph 21:

> 21. However, people should keep in their minds the Nuremberg Trials for the prosecution of prominent members of the political, military, and economic leadership of Nazi Germany. Hitler committed suicide but his ministers were prosecuted. If that trial was based on legal foundations and principles -- and few people doubt that -- a somewhat similar conspiracy of Canadian ministers against innocent citizens may be and shall be prosecuted as well although they did not institute gas chambers for the re-victimized sponsors.

40 The plaintiffs then go on to outline a "bad faith element" where, with no factual foundation, the plaintiffs plead the existence of a wide-ranging cover-up at paragraph 23:

> 23. The bad faith element is clear and obvious from the extents of the torts as nationwide, during eight years (2006 to present), involving more and more cover-ups or larger and larger cover-ups through increasing oppression placed on the plaintiffs and the civil servants involved. The peak of such cover-ups is the heavy pressure on the administrators in several court registries, also the undue pressure placed on many federal judges in order to stop the plaintiff's appeals and proceedings in general, mainly by refusing to file documents that may hurt the Harper Government's reputation.

41 Under the heading "False Statements", the plaintiffs allege that a government lawyer made deliberately false or misleading statements before the Supreme Court of Canada, arguing that such conduct amounts to perjury or obstruction of justice. Again, with no factual foundation pleaded, the plaintiffs assert that this lawyer acted somehow not of her own free will. Paragraph 40 in Part 3 reads:

> 40. The plaintiff claims that Counsel representing Her Majesty the Queen in Right of Canada made and deposited a misleading statement in the SCC Registry on or about June 18, 2012 in her printed Response pleadings. The deliberately false or misleading representations or declarations of Crown Counsel -- Ms. Wendy Bridges -- before the Supreme Court of Canada, by commission or omission, the plaintiff respectfully submits, should be determinative. Although the plaintiff is certain that Ms. Bridges is/has been a person with high personal integrity, honesty and goodwill, obviously she has been under a tremendous pressure of her superior(s) that instructed or

> pressured her toward the last-ditch effort of the Crown, namely to make a false statement by affidavit or deposition. Subsection 131.(1) of the *Criminal Code* refers such false or misleading statements, whether by affidavit, under oath, or by deposition. The plaintiff submits that Counsel committed such indictable offence under ss. 131. (1) by knowingly making such false statement.

42 As with several other of these type of claims, the plaintiffs then go on to calculate a specific amount for damages as a result of this alleged "false statement". This is done by some method of translating *Criminal Code* sentencing ranges into monetary awards.

43 Paragraph 75 appears to summarize some or all of the allegations identified by the plaintiffs as tort claims. It reads:

> 75. The plaintiffs respectfully submit that in the case at bar the federal and provincial Crown(s) were cheating and defrauding deliberately dishonestly to the prejudice of their and the re-victimized sponsors' proprietary rights through a sophisticated tort system and conspiracy and extortion, by preventing the plaintiffs to defend themselves before a Court of competent jurisdiction before garnishment, and creating insurmountable obstacles for the unification of their family.

44 As I have indicated, many of the "causes of action" that are pleaded are not known to law, including:

1) the torts of contravening several acts of Parliament;
2) the torts of interference and failure to deliver monies;
3) the torts of fraudulent conversion;
4) the torts of mental torture by the plaintiff by conspiracies; and
5) the tort of defrauding the public by deceit.

45 As well, the plaintiffs allege numerous violations of the *Criminal Code* against various individuals who are not named as defendants. These allegations include money laundering, torture, perjury, obstruction of justice, and terrorist activities on the part of various government and other officials, to name a few. These are spurious allegations that are not supported by any pleaded material facts and are not properly raised in a civil action.

46 I also note that, throughout Part 3, the plaintiffs rely upon at least 40 statutes, many of which could have no possible bearing on this case. For example, under the "tort claim" identified as the "*contra proferentem* rule - released from liability", the plaintiffs refer to the Laws of Hammurabi, King of Babylonia. At paragraph 86, in reference to those laws, the plaintiffs argue that "a man is not responsible for the debts created by his wife". Paragraph 86 reads as follows:

> 86. The laws of Hammurabi, king of Babylonia (r. 1848-1805 BC), recorded that a man is not responsible for the debts created by his wife. This principle has been accepted universally and it is valid in our days world-wide. If the CIC or the CRA wishes to challenge such massively established international common law, they must produce some good legal argument to this Honourable Court.

47 As another example, under the "tort claim" identified as "mental torture by conspiracies and an extortion scheme", the plaintiffs allege that several public servants, most unnamed, have participated in the long-lasting mental torture of Mr. Simon, and this can be found at paragraph 166 under Part 3 of the notice of civil claim:

> 166. The In the case at bar, torture by a conspiracy and fraudulent money extortion scheme is associated with *mental torture*. Several public servants (ministers, officers and administrators of the federal Crown) participated in the long-lasting mental torture of the plaintiff. Their degree of involvement and the cruelty of each participant may have been different. The plaintiff does not know the details and the names, only the devastating effects. An exception is the mental torture caused by the false testimony of Ms. Bridges at the SCC for which the details are shown under that claim (Perjury or False Testimony). Perhaps the most heinous crime was the mental torture committed by the administrators of

the FCA Registry in Edmonton. Between 2012 and 2014, they committed seven major errors against the plaintiff, probably by following the oral orders issued by the Head Office of the Courts Administration Service. The purpose of such conspiracy was to break the plaintiff mentally and spiritually, so he would give up his legal actions and quit for good.

48 Under this same "tort claim", paragraph 168 provides a good example of a highly improper pleading:

> 168. The plaintiff often feels fits of anger and anguish. For example, the seven cowardly administrative tortures during the seven (or so) procedural steps in the federal court system made him so furious that he often felt like being able to murder any public servant or become a terrorist -- a mental syndrome. He has lost his identity as a good Canadian citizen that had always respected the government and its public servants everywhere.

49 The impropriety of these pleadings might best be exemplified in the section entitled "A concise summary of the legal basis for the relief sought" found at paragraphs 234-237 of Part 3:

> 234. It is not beyond all doubt that the plaintiffs' claim is clearly impossible to success. British Columbia is under a Liberal government that is careful in observing the laws of Canada and the Province. The court system of BC is not as corrupt as the federal one, particularly keeping the Courts Administration Service in mind. It is not certain that this matter would get into the hands of judges that are corrupt, biased, or not independent. Therefore, the plaintiffs respectfully submit that they have more than a scintilla of chance to succeed.
>
> 235. By and large, the (Conservative) Crown's typical tricks are as follow: Through silencing and eliminating a paragraph "A" that a minister or a registrar does not like while arbitrarily extrapolating a bit similar paragraph "B" beyond logic, against the *Interpretation Act*. The final result is that paragraph "A" disappears and the modified paragraph "B" is exactly the opposite of the original purpose of paragraph "A." Thus, the minister defeats the legislation and Parliament's will by fraud.
>
> 236 In the case at bar, the Crown (CIC, CRA, and RSBC) eliminates section 146. of the *IRPA* while misinterprets its section 145. (3) by unlawful extrapolation. Similarly, the Registrar of the SCC and his administrators eliminate section 61. of the *Supreme Court Act* and unlawfully extrapolate its ss. 40. (1). By doing this, they arbitrarily add a condition (automatic appeal applies in certain criminal cases only) and remove a condition (that when errors in law are alleged, the appeal is automatic).
>
> 237. In addition, the Registrar of the SCC ignores and contravenes s. 52. of the *Supreme Court Act*, "52. The Court shall have and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada, and the judgment of the Court is, in all cases, final and conclusive." The Registrar is not a judge but he usurps the role of the SCC and asserts that the last word belongs to him. In other words, he acts as he would be the "exclusive ultimate appellate" jurisdiction in Canada: a major fraud. His fraud and the conspiracy in his Registry makes Canada seem like an airplane flying upside down.

50 These paragraphs are followed by complex diagrams purporting to depict the various interconnected allegations made in the notice of civil claim, again all of which is not, in my view, supported by any pleaded material facts.

Issue #1 - Rule 9(1)(a) of the *Civil Rules*

51 Do the pleadings fail to disclose a reasonable claim against either or both of the defendants?

52 As I indicated at the outset, the test for striking a pleading on the basis that it discloses no reasonable claim is set out in *Imperial Tobacco*. A claim will only be struck if it is plain and obvious, assuming the facts pleaded are

true, that the pleading discloses no "reasonable cause of action", has no "reasonable prospect of success", or if it is "certain to fail".

53 If there is a chance the plaintiff might succeed, he or she should not be "driven from the judgment seat": *Ahmed* at para. 16.

54 The rule that material facts in the notice of civil claim must taken as true requires explanation, particularly in a case like this where the notice of civil claim is replete with assumptions, speculation, and in some instances, outrageous allegations. The law is clear that allegations based on assumption and speculation need not be taken as true. In *Willow v. Chong*, 2013 BCSC 1083, Madam Justice Fisher provided a concise summary of the law in this area at para. 19:

> [19] The rule that material facts in a notice of civil claim must be taken as true does not mean that allegations based on assumption and speculation must be taken as true. This was discussed in *Operation Dismantle Inc. v The Queen*, [1985] 1 SCR 441, where Dickson J. (as he then was) stated that "[n]o violence is done to the rule where allegations, incapable of proof, are not taken as proven". In *Young v Borzoni*, 2007 BCCA 16, the court stated (at paras. 30-31) that great caution must be taken in relying on *Operation Dismantle* as a general authority that allegations in pleadings should be weighed as to their truth, but it is not fundamentally wrong to look behind allegations in some cases, and it may be appropriate to subject the allegations in the pleadings to a sceptical analysis. It was considered appropriate in *Young*, where the plaintiff made sweeping allegations of things like intolerance, deceit, harassment, intimidation and falsifying documents against the defendants, which the court concluded could only be viewed as speculation.

55 Mr. Justice Rogers put it another way, to the same effect, in *Gill v. Canada*, 2013 BCSC 1703 at para. 7:

> [7] Rule 9-5(2) stipulates that no evidence is admissible in the context of an application under Rule 9-5(1)(a). Another way of putting this stipulation is that the court should assume that the facts [pleaded are] true as it considers whether those facts disclose a reasonable claim. A common sense exception to this stipulation exists when the pleadings assert some bizarre or impossible proposition. The purpose of Rule 9-5(1)(a) is to ensure that the parties and the court have a clear understanding of the nature of the claims advanced. A clear understanding of the claims will allow the parties to efficiently litigate the issues and will allow the court to make considered and judicious findings on those issues. Prolix, convoluted, and incomprehensible pleadings do not lend themselves to permit in the parties to achieve a clear understanding of the claims advanced. Further, a party pleading a particular type of claim must, at a minimum, plead assertions of fact which, if proven, would establish the essential elements of a successful claim.

56 It is apparent that this notice of civil claim suffers from many defects and deficiencies, many of which I have highlighted already. In my view, it is plain and obvious that the action against both defendants cannot succeed.

57 First, the pleadings fail to satisfy their basic purpose. The issues are not defined. There is no concise statement of material facts that are necessary to support any complete cause of action. Instead of pleading material facts, the plaintiffs have filed a lengthy, rambling, at some points bizarre narrative filled with irrelevant information, sweeping allegations against named and unnamed persons based upon assumptions and speculation, with scattered references to legislation bearing no relevance to the remedies that are sought.

58 Second, a number of potential causes of action are pleaded that are unknown to the law. They are not, in my view, the type of novel but arguable claims as described in the case law such that they should be allowed to proceed to trial.

59 Third, insofar as I can identify any potential causes of action known to law against either or both of the defendants, they appear to include a claim in contract, an overall claim in tort, and a claim based upon unjust enrichment. The tort claim involves a complex combination of various "torts", including perhaps, negligence, breach of statutory duty, misfeasance of public office, and conspiracy. I will address all of these, but I will say that overall

my conclusions about all of the plaintiffs' claims are similar to those found by Associate Chief Justice Cullen in *Fowler v. Canada (Attorney General)*, 2012 BCSC 367. I find that the plaintiffs have failed to plead material facts in support of each element of these claims. Any of the claims raised rely upon the plaintiffs' lengthy and argumentative narrative in which it is impossible to separate the material from the immaterial, the fabric of one potential cause of action or claim from that of another, or conjecture and opinion from the asserted facts: *Fowler* at para. 54. In my view, none of these claims disclose any reasonable cause of action, specifically a contract claim.

1. Contract Claim

60 As I have outlined, the pleadings in support of this claim are conclusory statements with no factual foundation. The terms of any contract has not been pleaded, nor has what or whose conduct is said to constitute a breach.

2. Tort Claim

61 The plaintiffs' allegations against the CRA are articulated best at paragraphs 56-152 of Part 1, where it is asserted that unnamed Crown servants, "wrongfully, knowingly, by tortious conduct, released funds or monies from the 2007 and 2008 tax credits of the plaintiff for the Revenue Services of British Columbia."

62 This bare assertion is insufficient. The plaintiffs do not specify what or whose conduct was tortious. The plaintiffs do not specify what tort any such conduct would constitute. It is plain and obvious that this general tort claim is bound to fail.

(a) Negligence

63 Reading the pleadings as generously as possible, one may perhaps discern an action in negligence attempting to be pleaded. References to negligence are found throughout the document. For example, at Part 3, paragraph 25, the plaintiffs allege that the Government of Canada, the Minister of Immigration and/or Minister of Justice had a duty to use reasonable care in the preparation of printed CIC forms.

64 Further, at paragraph 55 of Part 1, the plaintiffs allege that the BC Ministry of Housing and Social Services wrongfully converted funds from Mr. Simon's tax account, such conversion taking place in the CRA. The pleadings allege that Mr. Simon thought the CRA owed him a duty of care just like a chartered bank and that the plaintiff relied to his detriment on "the CRA as an agency that knew and obeyed the laws of Canada."

65 Similarly, at paragraph 63 of Part 3, the plaintiffs allege that the directors of the CRA involved in this case and the Commissioner of Revenue "failed to exercise a reasonable standard of care, diligence and skill towards the public."

66 One can also see at paragraph 93 of Part 3, after alleging that Crown servants of the federal ministries and the British Columbia ministries or agencies are parties to various crimes, the plaintiffs appear to raise a claim in negligence:

> 93. Even if an Honourable Court would conclude that the ministers and their agents and administrators were only negligent, since they markedly departed from the standard of care required, the fact remains that their superiors -- the ministers -- involved were faulty and malicious, not only negligent. A perpetual system of governmental cover-ups for more than seven years cannot be called mere negligence. They did not participate in those cover-ups negligently. Rather, their participation was a state of art, a very carefully designed system of torts and fraud. But a "Swiss watch" of torts is still a tort. The more sophisticated is the least foolproof.

67 At paragraph 126 of Part 3, the plaintiffs allege criminal wrongdoing by "[a]n unnamed officer or employee of the Government of Canada" in relation to his or her dealings with an immigration officer. The plaintiffs go on to claim it was negligence on the immigration officer's behalf not to investigate the status of the debt claim.

68 The necessary elements that must be established or found in an action in negligence are well known. They are:

1) a duty of care owed by the defendant to the plaintiff;

2) a breach of the duty of care by a failure to exercise the standard of care of a reasonable and careful person in the circumstances; and

3) the plaintiff suffered damages as a result of the breach.

Fowler at para. 24.

69 No particulars of an alleged duty of care are pleaded. No particulars of who specifically might owe this duty to the plaintiffs and by what conduct a breach of such duty occurred is pleaded. The plaintiffs have failed to plead material facts in support of each element of this claim. It is plain and obvious this claim discloses no reasonable cause of action and is bound to fail.

(b) Breach of Statutory Duty

70 The notice of civil claim includes a section entitled "Claim for breach of trust". No material facts are pleaded in support of this claim. A generous reading of this section, in conjunction with other sections, including the one entitled "Charge for contravening several Acts of Parliament", might perhaps be interpreted to mean that the plaintiffs are alleging a breach of statutory duty. Even so, it is not a cause of action. As Mr. Justice Verhoeven noted in *Stoneman v. Denman Island Local Trust Committee*, 2010 BCSC 636 at para. 35, quoting Madam Justice McLachlin in *Holland v. Saskatchewan*, 2008 SCC 42:

> [35] To the extent that the plaintiffs allege breach of statutory duty, without more (as in paras. 12, 17(c), and 17(i) of the amended statement of claim), that is not a cause of action. As stated by McLachlin C.J.C. in *Holland v. Saskatchewan*, 2008 SCC 42 at para. 9:
>
> > The law to date has not recognized an action for negligent breach of statutory duty. It is well established that mere breach of a statutory duty does not constitute negligence: *The Queen in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205. The proper remedy for breach of statutory duty by a public authority, traditionally viewed, is judicial review for invalidity. The appellant pursued this remedy before Gerein C.J.Q.B. and obtained a declaration that the government's action of reducing the herd certification status was unlawful and invalid. No parallel action lies in tort.

71 Indeed, in this case Mr. Simon did pursue judicial review in respect of some of the decisions made in his case. He has been unsuccessful. In my view, it is plain and obvious that the claim discloses no reasonable cause of action and is bound to fail.

(c) Misfeasance of Public Office

72 The plaintiffs also advance a claim for misfeasance of public office, which is found primarily at paragraphs 117-124 in Part 3. The plaintiffs' argument, and it is properly classified as argument, in support of such a cause of action can be seen at paragraphs 118(a)-(c) and 119:

> 118. Misfeasance in public office is an intentional tort. The tort is meant to provide a measure of accountability for public officials who do not exercise their duties of office in good faith. To make out this tort, the instant plaintiffs are demonstrating the four elements as follow:
>
> (a) The public officials deliberately engaged in unlawful conduct in the exercise of public functions. Namely, the ministers responsible for the lawful operation of the CRA and the CIC knowingly issued unlawful policies (*IP 2* and *MuO*) in 2006), in order to mislead the public servants. They forced all of their employees to follow those rules while ignore the relevant legislation (the *IRPA* and its *Regulations*, the *Interpretation Act*, federal and provincial legislation related to garnishment, the laws regarding limitation of acts, etc.);
>
> (b) The public officials, including the ministers mentioned above plus the Minister of Justice, the minister responsible for Service Canada, and the Minister of Housing and Social Development, etc. (of BC) were aware since 2006 that the conduct was unlawful and was likely to injure the plaintiff and their class: the re-victimized sponsors. They admitted in print that the said two policies, at least the *MoU*, may not be valid before a Court. They indicated in the IMM 1344 C (02-98) E or/and IMM 1344 B (02-

98) E forms that a court may -- and probably would -- find certain parts of the CIC sponsorship undertaking forms unlawful or unconstitutional and, therefore, severable from the agreements. [Please note that the severability clause seems to be missing from the modern versions of those forms.] The Minister of Justice knew that the *IRPA* prescribed the operation of a filing system in the Federal Court in order to keep track of sponsorship debts. However, he ignored the law and allowed or encouraged his employees to do the same by skipping the involvement of any Court in real practice. The plaintiff kept informing the top officials of Canada and BC about their unlawful policies. The leaders of Service Canada and its Minister knowingly intimidated the plaintiff by the false claim that his CPP pension benefits may be garnisheed before the involvement of any court. This was a conspiracy between Ms. Sharon Shanks and Minister Diane Finley. In a similar case, the Court ordered the Crown to pay Mr. Longley $55,000 in damages although there was no coercion or intimidating element: *Longley v. Canada (Minister of National Revenue)*, 1999, [1999] B.C.J. No. 1705, In the instant case at bar the silence of the CRA was intimidating, with the aim of coercion in order to get the monies of the concerned plaintiff by misquoting the laws. The plaintiffs submit that an item of $55,000 would apply in this case as shown in the table above.

The officials of the four ministries involved acted dishonestly, in bad faith. As Iacobucci J. said in *Odhavji*, public officials who deliberately engage in conduct that they know to be inconsistent with the obligations of their office risk liability for the tort;

(c) The public officials' tortious conduct was the legal cause of the plaintiffs' injuries. Namely, they conduct influenced the Immigration Officer in Hong Kong in the refusal to grant temporary resident visa to Ms. Zhong in April 2007. The honourable tortfeasors remained adamant in maintaining their systems of torts nationwide. These key factors resulted in the forced separation of Zoltan A. Simon from his family members: Ms. Zhong and Mr. Ye for more than seven years. This is a *Charter* violation as well: a cruel and unusual treatment of innocent and law-obedient human beings, by contravention of section 12. of the *Charter*.

119. The injuries suffered by the plaintiff are compensable in tort law because torts, frauds, deceit, misinterpretation, offences relating to public officers, breach of duty of care, breach of trust, misfeasance, conversion of chattels, intimidation, undue interference, conspiracy, money extortion schemes, laundering of proceeds of crime, terrorist activity and perjury or false statements are all crimes or indictable offences punishable by law. One can find detailed description of these torts and their punishments in the *Criminal Code*.

73 The tort of misfeasance of public office is an intentional tort. It was described in *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 32 by the Supreme Court of Canada as having two distinguishing elements:

1) deliberate unlawful conduct in the exercise of public functions; and

2) awareness that the conduct is unlawful and likely to injure the plaintiff.

Of course, the plaintiff must also prove the requirements common to all torts, including causation and compensable damages.

74 As I have repeatedly emphasized in these reasons, the plaintiffs' pleadings involve many assumptions, speculation, and in some instances what I think can fairly be described as bizarre conjecture. They contain no material facts to support a claim for deliberate unlawful conduct by named persons or an awareness that such conduct is unlawful and likely to injure the plaintiffs. They simply make bare allegations of wrongdoing by unnamed defendants, supported by only the plaintiffs' assumptions and speculation. There are no material facts pleaded in support of the elements of this claim, and as such it is plain and obvious that this claim is bound to fail.

(d) Conspiracy

75 The plaintiffs reference various conspiracies against them throughout the pleadings, but specifically outline the claim at paragraphs 161-171 of Part 3. As I understand the complex allegations and arguments advanced, the

plaintiffs assert that one conspiracy exists between CRA and the CIC to possess proceeds of crime. They also allege another conspiracy between various public servants, Ministers, officers, and administrators of the Federal Crown. All of these persons, known and unknown, all participated, it is alleged, in mental torture of the plaintiffs. Overall, the plaintiffs seem to allege a complex conspiratorial web, woven between most courts and government officials with whom Mr. Simon has come into contact. The aim of the conspiracy, it seems, is to tortiously and criminally victimize him and his family.

76 Madam Justice Fisher summarized the requirements of the tort of conspiracy in *Willow* at para. 67:

> [67] The tort of conspiracy requires three essential elements, all of which must be pleaded: (1) an agreement, including a joint plan or common intention by the defendant, to do the act which is the object of the conspiracy; (2) an overt act consequent on the agreement; and (3) resulting damage: *Kuhn v American Credit Indemnity Co.*, [1992] B.C.J. No. 953 (SC). In *Kuhn*, the court added:
>
> > The defendants must intend to be a party to the combination. Mere knowledge of or approval of or acquiescence in the act is not sufficient to establish the existence of a common plan or design. The defendants must have intentionally participated in the act with a view to furtherance of the common design and purpose.

77 The pleadings in this case, no matter how generously read, do not contain material facts to support the elements of the tort of conspiracy. Again, the pleadings only contain speculative assumptions. This claim, plainly and obviously, discloses no reasonable cause of action and is bound to fail.

(e) Charter Breaches

78 The plaintiffs appear to allege a cause of action arising from breaches of the *Charter*. General, conclusory statements in relation to this assertion are found scattered throughout the pleadings. For example, at Part 1, paragraph 155, the plaintiffs claim they are entitled to damages, namely for pain and mental distress, suffering and violations of the plaintiffs' *Charter* rights with punitive damages, all of which are personal in nature.

79 At paragraph 187 of Part 1, the plaintiffs list in their improper claim for specific damages, among other things: "T. Violations of the plaintif's *Charter* rights, mental suffering $55,000".

80 Another example can be found at paragraph 157 of Part 1. Comparing the substantial financial responsibility born by sponsors to that of the sponsored person, the plaintiffs write: "This is a prejudiced statement of discrimination based on nationality."

81 As well, at paragraph 31 of Part 3, under the heading "Invalid Sponsorship Agreement and Undertaking", the plaintiffs plead:

> [31] The cornerstone of the CIC Sponsorship Agreement and Undertaking constitutes an infringement of ss. 15. (1) of the *Charter*, Canada's constitution, regarding equality rights. It cannot be justified in a free and democratic society, and s. 1 of the *Charter* does not save it. As in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, some important factors influencing the determination of whether (sub)sections of several acts and regulations have been infringed are, among others: (A) Pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue; (C) The ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society; (D) The nature and scope of the interest affected by the impugned law.

82 Another example can be found at paragraph 118(c) of Part 3 under the heading "The claim for misfeasance in public office". Here, following an argument and allegation that the "honourable tortfeasors remained adamant in maintaining their systems of torts nationwide", the plaintiffs go on to allege this to be a *Charter* violation as well. Mr. Simon asserts that by forcing his wife and her son to live apart from him, he is subject to "cruel and unusual treatment of innocent and law-obedient human beings", a violation of s. 12 of the *Charter*.

83 At paragraph 132 of Part 3, under the heading "Claim in tort for breach of duty of care," the plaintiffs make the

bare allegation that the CIC sponsorship and undertaking form violates several *Charter* rights, such as discrimination between Canadian sponsors, sponsored aliens, and public servants of the Crown as three distinct groups of the society, with such violations not justified by s. 1 of the *Charter*.

84 Another reference to the *Charter* can be found in Part 3 under a section entitled "Claim for violations of the plaintiffs' *Charter* rights, mental suffering". The various lengthy paragraphs contain what can only be described as submissions regarding alleged violations of ss. 7, 8, 11(a), (b), (e), 12, and 15 of the *Charter* is found at paragraph 217:

> 217. After this long introduction, the plaintiff submits that his *Charter* rights set in sections 7., 8., 11. (a), (b), and (e), 12., and 15. (1) have been violated. He submits that his family -- particularly his person -- has been subject to unusual and cruel treatment and punishment, also excessive stress since 2006. Pursuant to s. 8. of the *Charter*, "Everyone has the right to be secure against unreasonable search or seizure." The plaintiff submits that the snatching of his tax credit amounts in 2008 and 2009 by the CRA and the RSBC were "unreasonable seizures." He was charged with the offence of a major debt but the Crown failed to inform him without unreasonable delay -- that is maximum 30 days -- of the specific offence, and avoided to take him to a trial within the same reasonable time. Therefore, the Crown infringed his *Charter* rights regarding ss. 11. (a) and (b). Also, applying the liberal and remedial reading of the *Interpretation Act*, he was denied reasonable bail without just cause. Namely, Ms. P. Lipsack, Counsel and representative of the British Columbia ministry involved, denied him a reasonable payment plan that would have been equivalent with a bail. Therefore, ss. 11. (e) of the *Charter* was contravened as well. A "bail" -- by $200 monthly payments -- was allowed for a Vietnamese man that owed over $101,000 to British Columbia.

85 Another example of the plaintiffs' inappropriate and argumentative pleadings can also be found at paragraph 221 of Part 3. In relation to their s. 15 of the *Charter* claim, the plaintiffs allege that Canada's authorities have discriminated against Chinese and Hungarian people based on nationality. The plaintiffs decline to quantify this particular damage claim, writing at paragraph 25 that: "... his table on page 22 is complete and the insertion of a line now would scramble his whole document and ruin the dollar figures."

86 No matter how generously one reads these pleadings, it is plain and obvious there are no material facts pleaded to support any cause of action based on *Charter* violations. All that is pleaded are assumptions, speculation, and misconstrued legal argument.

(f) Abuse of Process

87 It is unclear if the plaintiffs are attempting to plead the tort of abuse of process. Scattered references throughout the notice of civil claim to malicious conduct by various court officials in conjunction with the overall tenor of the pleadings lead me to conclude that this could be what the plaintiffs intend.

88 Madam Justice Fisher summarized the elements of tort of abuse of process in *Willow* at para. 54:

> [54] The tort of abuse of process requires the following elements to be established: (1) a willful misuse or perversion of a court process for an extraneous or improper purpose; and (2) some damage resulting: *Border Enterprises Ltd. v Beazer East Inc.*, 2002 BCCA 449 at para. 51. An additional element, that some act or threat has been made in furtherance of the process, may also be required, although this is not clear in British Columbia: see *Smith v Rusk*, 2009 BCCA 96 at para. 34; *Bajwa v British Columbia Veterinary Medical Association*, 2012 BCSC 878 at paras. 178-181; and *Home Equity Development Inc. v Crow*, 2002 BCSC 1747 at para. 19. In *Home Equity*, it was held that some definite conduct in furtherance of an illegitimate purpose is essential, as there is no liability where the defendant is employing its regular process, even if it does so with bad intentions: see para. 20, citing *Guilford Industries Ltd. v Hankinson Management Services Ltd.*, [1974] 1 WWR 141.

89 As with the other asserted causes of action, in my view the pleadings fall far short of stating material facts in

support of any of the elements of the tort of abuse of process. I am satisfied that it is plain and obvious that any claim in relation to this claim is also bound to fail.

3. Unjust Enrichment

90 The plaintiffs claim unjust enrichment at paragraphs 193-202 of Part 3. As I understand it, the plaintiffs assert that the Crown has been unjustly enriched in three ways:

1) by use of CIC processing fees paid by Mr. Simon in the amount of $1,190;

2) by unlawful taking of tax credits, roughly $3,500; and

3) by its unlawful conduct which forced Mr. Simon to not file personal tax returns for five years. This is quantified at approximately $12,500.

91 The elements of an unjust enrichment claim are well known:

1) the enrichment of the defendant;

2) a corresponding deprivation of the plaintiff; and

3) the absence of juristic reason for the enrichment.

92 Once again, in my opinion, there are no material facts pleaded in support of these claims, only speculation and allegations. I am satisfied it is plain and obvious that this claim too is bound to fail.

93 As I am confident my reasons thus far have made clear, the plaintiffs' pleadings are so prolix and convoluted that it is difficult, if not impossible, to ascertain what causes of action are brought against whom and why. The plaintiffs make sweeping allegations of unlawful conduct against nearly every government and court official with whom Mr. Simon has had contact with regard to these matters. No material facts are asserted in support of these claims. To the extent that some causes of action are identifiable, I have concluded that it is plain and obvious that they all disclose no reasonable claim and are bound to fail.

Rule 9-5(1)(b) of the *Civil Rules*

94 I conclude that these pleadings run afoul of this subrule as well. Unlike Rule 9-5(1)(a), evidence is admissible on an application brought pursuant to Rules 9-5(1)(b) through (d).

95 A pleading is frivolous if it is without substance, groundless, fanciful, "trifles with the court" or wastes time: *Borsato v. Basra*, 2000 BCSC 28 at para. 24.

96 A pleading may be vexatious if it is irrelevant to the plaintiff's cause of action, whatever that cause of action may be, or if it does not disclose a claim known to law: *Fowler* at para. 40.

97 The nature of a vexatious action was described by Henry J. in *Re Lang Michener* (1987), 37 D.L.R. (4th) 685 (Ont. H.C.J.) at 691:

From these decisions the following principles may be extracted:

(a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;

(b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;

(c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;

(d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;

(e) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;

(f) the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;

(g) the respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings.

98 A pleading is scandalous if it is so badly drawn that to litigate upon the pleading would require the parties to undertake useless expense or cause them to litigate matters irrelevant to the claim itself: *Gill* at para. 9.

99 Madam Justice Fisher described it this way in *Willow* at para. 20:

> [20] Under Rule 9-5(1)(b), a pleading is unnecessary or vexatious if it does not go to establishing the plaintiff's cause of action, if it does not advance any claim known in law, where it is obvious that an action cannot succeed, or where it would serve no useful purpose and would be a waste of the court's time and public resources: *Citizens for Foreign Aid Reform Inc. v Canadian Jewish Congress*, [1999] B.C.J. No. 2160 (SC); *Skender v Farley*, 2007 BCCA 629. If a pleading is so confusing that it is difficult to understand what is pleaded, it may also be unnecessary, frivolous or vexatious. An application under this sub-rule may be supported by evidence.

100 In my view, it is plain and obvious that the plaintiffs' claims must be struck under Rule 9-5(1)(b) as well. These claims, I find, are frivolous, vexatious, and scandalous. The pleadings are without substance, fanciful, groundless, and will waste the time of the court. They are so prolix and confusing that it is difficult, if not impossible, for the defence to understand the case to be met in court. The notice of civil claim does not meet any standard which enables a proper response to be filed by the defendants. The pleadings are vague, over-inclusive, and contain a great deal of irrelevant information. The pleadings run afoul of Rule 3-1(2) and Rule 3-7(1), (9) and (14). The plaintiffs' lengthy legal arguments, which include case law, hypothetical scenarios, reference to irrelevant statutes, and diagrams, are incapable of supporting proof of any cause of action.

Rule 9-5(1)(d) of the *Civil Rules*

101 Abuse of process under this subrule is a flexible doctrine allowing the court to prevent a claim from proceeding where to do so would violate principles of judicial economy, consistency, finality, and the integrity of the administration of justice: *Willow* at para. 21.

102 A claim may be struck where it is a collateral attack on an administrative decision that is subject to appeal or judicial review: *Cimaco International Sales, Inc. v. British Columbia (Attorney General)*, 2010 BCCA 342. A claim may also be struck as an abuse of process where it is an attempt to relitigate an issue that has already been decided: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63.

103 In *Toronto (City)*, Madam Justice Arbour explained the concept of abuse of process at para. 37 as follows:

> [37] In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:
>
> > The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the

> specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
>
> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis added.]

As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/ mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. (See, for example, *Franco v. White* (2001), 53 O.R. (3d) 391 (C.A.); *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.); and *Bjarnarson v. Government of Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), aff'd (1987), 21 C.P.C. (2d) 302 (Man. C.A.). This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is in effect non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (Watson*, supra*, at pp. 624-25).

104 The vexatious action and one that is an abuse of process are two concepts that courts have noted have strikingly similar features. Mr. Justice Macaulay noted this in *Freshway Specialty Foods v. Map Produce LLC*, 2005 BCSC 1485 at para. 52, where he wrote:

> [52] There is no bright line dividing a vexatious proceeding from one that is an abuse of the court's process. In my view, the factors that signal a vexatious proceeding also signal an abusive process. Abuse of process is a wider concept however and may extend beyond vexatious proceedings to capture any circumstance in which the court's process is used for an improper purpose. As pointed out by Baker J., in *Babavic v. Babowech*, [1993] B.C.J. No. 1802 (S.C.), a decision not referred to by counsel, the categories of abuse of process remain open and include, for example, "proceedings which are without foundation or serve no useful purpose and multiple or successive proceedings which cause or are likely to cause vexation or oppression" (para. 18).

105 The Attorney General of Canada submits that it is plain and obvious that the plaintiffs' allegations against it are a collateral attack against the decisions of the IAD, the Federal Court, and the Federal Court of Appeal. As such, it asserts the litigation is an abuse of the court process. I agree.

106 Insofar as both defendants are concerned, I have already concluded that the pleadings are vexatious, with reference to the criteria in *Lang Michener*.

107 The pleadings make substantial and widespread criminal allegations against numerous government officials, including registry staff, government lawyers, and others, many of whom are unnamed. The pleadings also use inflammatory language to describe alleged actions of government employees and officials as crime, as "cowardly administrative tortures", and "efficient weapons". The plaintiffs have clearly rolled issues raised in previous actions forward into this action, where they have repeated them and supplemented them with allegations brought against the lawyers who have acted against them, or just Mr. Simon, in earlier proceedings, as well as court registry staff and a whole host of other government officials. It is clear that the plaintiffs are attempting to relitigate some matters already decided in respect of the Attorney General of Canada.

108 The plaintiffs' pleadings in regard to the Attorney General of Canada contain allegations against the CIC, CRA, and Service Canada. Regarding the CIC, the plaintiffs allege that its forms are invalid and that Mr. Simon's wife's application for permanent residency was wrongfully refused. Mr. Simon has previously appealed the refusal of that application to the IAD and sought leave to apply for judicial review in Federal Court. The Federal Court's order dismissing that application concluded the matter. Mr. Simon then brought a collateral attack against that order in another Federal Court action, which included appeals to the Federal Court of Appeal and an application for leave to appeal to the Supreme Court of Canada. He repeats this attack in this present action. The matter is clearly *res judicata*.

109 Regarding the claims alleged against the CRA, Mr. Simon again claims that in 2008 and 2009 unnamed Crown servants wrongfully, knowingly, and by tortious conduct, released funds or monies from the 2007 and 2008 tax credits of Mr. Simon to Revenue Services of British Columbia. The same allegation was before the Federal Court in action T-639-10. The Federal Court of Appeal dismissed this claim. Mr. Simon sought leave to appeal the Federal Court of Appeal's decision to the Supreme Court of Canada.

110 I agree with the Attorney General of Canada that Mr. Simon has had two opportunities in that Federal Court action to bring a viable cause of action in relation to the CRA, and it would be an abuse of this court's process for him to be allowed to relitigate this matter in this forum.

111 Regarding Service Canada, Mr. Simon alleges that it "threatened" and "tried to coerce" him. He seeks a declaration that his future Canada Pension Plan and Old Age Security benefits cannot be automatically garnished by Service Canada in the context of the case at bar. These issues have been adjudicated by the Federal Court in action T-1029-12. There, the court found that no action for damages premised on a hypothetical administrative decision can succeed, because no damage has yet materialized. This decision was upheld on appeal. This too is *res judicata*.

112 I also note that within the British Columbia Provincial Court action, Mr. Simon alleged that Ms. Lipsack, a BC Ministry of Justice lawyer, misinterpreted statutes and denied him a reasonable payment plan for his debt. A judge of the Provincial Court dismissed this claim on May 14, 2009. The case at bar repeats the allegations against Ms. Lipsack. This issue has been previously decided and is *res judicata*.

113 Further, it must be recognized that it is an abuse of the court process to do any of the following:

1) To make serious and baseless allegations against the court, Federal Court, or Supreme Court of Canada. The plaintiffs' claim that registry staff committed fraud, contravened various pieces of legislation, "silenced" Mr. Simon, covered up errors, acted in bad faith, and acted in furtherance of a conspiracy. The plaintiffs refer to an order of the Federal Court of Appeal as unprofessional, vague, "Dodanaic", and controversial.

2) To make serious and baseless allegations against legal counsel and public officials involved with this case. The plaintiffs allege, without material facts pleaded as a foundation, that legal counsel for the Supreme Court of Canada "contradicted and contravened" the *Supreme Court Act*, R.SC. 1985, c. S-26. They further allege that counsel for the Federal Crown gave false testimony, which amounted to perjury, all in the course of making legal argument. They further allege, without factual foundation, that certain acts or omissions of named and unnamed public servants constitute "terrorist activities" and conspiracy intended to intimidate a segment of the public and endanger a person's life.

3) To calculate damage awards by translating *Criminal Code* sentencing ranges into monetary awards.

4) To disclose that, as a result of mental torture, one of the plaintiffs feels murderous impulses toward government employees.

These examples are but a few of the many that, in my view, clearly demonstrate this action was brought for an improper purpose.

114 In light of the foregoing and considering the pleadings as a whole, I am satisfied that it is plain and obvious this claim is an abuse of process.

CONCLUSION

115 I conclude that both defendants have met the high onus upon them in their applications. Their applications to

strike the notice of civil claim in its entirety pursuant to Rule 9-5(1) of the *Civil Rules* is granted, with no leave to amend. Mr. Simon, on behalf of the plaintiffs, made it clear that he does not seek leave to amend. Even so, the law requires that I give it consideration. I have. In light of Mr. Simon's numerous attempts to file proper pleadings in many other courts in relation to these matters over the last several years, it is my view that it would not be appropriate to grant leave to amend in this case. Mr. Simon has demonstrated he is incapable of composing proper pleadings.

116 The parties have already addressed the issue of costs. Both defendants seek a reduced lump sum amount of costs in the event of their success in these applications. The amounts they seek would not even compensate them for their disbursements, but in any event they do seek a reduced sum. Mr. Simon did not oppose such an application.

117 In my view, it is appropriate in the circumstances of this case to exercise my discretion to award costs in favour of the successful parties, in this case both of the defendants. I also find it appropriate to award lump sum costs, consistent with my review of the case law. Those costs will be in an amount that is greatly reduced from an amount that could have been awarded had costs been assessed on the ordinary scale. The plaintiff, Mr. Simon, will be required to pay each defendant costs in the amount of $1,000 each, payable forthwith.

118 This concludes my reasons. Anything further?

119 MR. SIMON: The question to the parties, Your Honour?

120 THE COURT: Pardon me, Mr. Simon?

121 MR. SIMON: Was your question to the parties if there is any comment?

122 THE COURT: No comments, but just any questions.

123 MR. SIMON: Well, my question is that it is no material facts have been pleaded or too many material facts have been pleaded? That's a bit unclear for me, because there were [inaudible] kind of causes of action and you admitted in your speech that several of them -- some of them have legal grounds. No, the thing is the pleading, if something is vague, like not mentioning like unnamed public officials or public servants, I would like to refer to the case *of Just v. British Columbia*, the falling rock, and that gentleman won the case in British Columbia. I think it was a separate court eventually. And he didn't name the official who failed to remove that rock which killed his daughter. Anyway, I found several case which the judge decides that it's not necessary to name by name the officials who failed, like acted improperly or illegally. My claim doesn't really show negligence. Only one case that say -

124 THE COURT: Mr. Simon, I am sorry to interrupt you, but I feel that I have to. By my question I meant if there were any sort of procedural type of questions. This is not an opportunity to reargue the case. I have made my decision and I have outlined my reasons just now. Unless there is any sort of procedural type questions, we will conclude proceedings now.

125 MR. SIMON: Yeah, the procedural type that if all my facts are taken as true or pled as true, that condition is satisfied, you think that not even one of the 60 allegations would be able to prove? Because the IP too and those kind of controversies between the forms, the government forms, and I can prove the conspiracy [inaudible], but I was not allowed to produce evidence, though the Crown was allowed to show evidence, because affidavit is in evidence and I didn't have that advantage. So I could prove everything if not [inaudible] misconstrued, scattered references and rambling allegations or speculation, but I am able to prove everything, all the 60, and it is very unlikely that even if one of my facts can be, you know, supported by evidence, that means that a judge won't have the right to discuss this as [inaudible]. There is a good chance that one of the 60 would succeed, because there would be another government and there would be more reasonable staff who let me review all the errors of the present government. So it's not absolutely impossible that a new government would return to obey the laws of Canada. I don't think that's impossible.

126 THE COURT: Thank you, Mr. Simon.

127 MR. SIMON: Thank you.

128 MR. WITTEN: My Lady, it's Mark Witten here in for the Province, and I understand from Ms. Brown that when the order was circulated that you previously made about adjourning the trial date -

129 THE COURT: Yes.

130 MR. WITTEN: -- that Mr. Simon was unwilling to sign that order. So I would ask that you make an order dispensing with the need for Mr. Simon or the plaintiffs' signature with respect to the judgment that you just gave today.

131 THE COURT: Mr. Simon, just so you understand, oftentimes when there are self-represented litigants, or the parties are a great distance apart, or if one party has demonstrated an inability or unwillingness to sign the form of prior orders, a judge will make an order dispensing with the signature of one of the parties on the form of the order.

132 The order that I have made today striking your claim in its entirety without leave to amend is valid as of today. What happens from here is that the successful parties or party will prepare the order, will type it up, and normally they would send it to the lawyer for the unsuccessful party to sign to indicate by their signature that the wording of the order is consistent with as I said today. It would then be sent to the court registry for them to ensure its accuracy, and then once that step is completed and the registry is assured it is accurate, it gets sent to me to sign to also ensure that it is accurate. There are a number of steps to ensure the actual order entered is accurate, and what counsel has just asked me for is an order that is typically asked for in these types of circumstances, to save time and to add convenience, that is to dispense with your signature on the form of the order. Do you have any opposition to that?

133 MR. SIMON: Well, you know, that's -- my letter, you know, that's two pages. That's irrelevant now, because of course I obey your judgment and it doesn't matter. I will appeal it as soon as possible, and I am just wondering, if I appeal it, that means that I don't need to pay the $2,000 today, or do I have to?

134 THE COURT: I am not going give you any legal advice, Mr. Simon.

135 MR. SIMON: No, but the requirement on -

136 THE COURT: I am not going to give you any legal advice at all.

137 MR. SIMON: Okay.

138 THE COURT: All right. What about this application to dispense with your signature?

139 MR. SIMON: Well, it's irrelevant, Your Honour, because if you dismiss my claim, that means that that scheduled -- hearing scheduled to the 16th of March is probably not tenable. I don't know. It's in the air. That's your decision, and I don't think it's applicable. I have to go to the British Columbia Court of Appeal I think. That would be maybe an abuse of process to hear it by another judge or whatever who is not more knowledgeable than yourself, so unless a panel of three judges would hear it at this level, at the Supreme Court of British Columbia, which I don't think that option exists. So my only choice is acceptance, obey your order, your decision, and whatever the Crown parties' counsel would trust with that order, I may make a comment that they change this word or insert that word or only that word, but otherwise I -- but even if I don't sign it, it won't make any difference, because I have to obey your order [inaudible].

140 THE COURT: The trial date scheduled sometime in March, which had been scheduled unilaterally by the

plaintiffs, was cancelled last day. I am going to make it clear again today. That trial date no longer exists for this matter. I have dismissed this claim now. Mr. Simon, there is no court date in March. There is no necessity for Mr. Simon to sign the form of that order that I made last day.

141 MR. SIMON: Okay. Yes.

142 THE COURT: I will dispense with Mr. Simon's signature on the form of that order, where I adjourned that trial date. Given the history of this matter and Mr. Simon's comments just now, I will make an order today dispensing with Mr. Simon's signature on the form of the order that I have made today. Mr. Simon, you will get a copy of the entered order in due course, so if you do change your address, your mailing address, please advise the court registry so they know where to mail it to.

143 MR. SIMON: Yes, Your Honour. I know.

144 MR. WITTEN: Thank you, My Lady.

145 THE COURT: Thank you.

146 MS. FAIRGRIEVE: My Lady.

147 THE COURT: Yes.

148 MR. FAIRGRIEVE: Sorry, this is Tim Fairgrieve for the Attorney General of Canada. There is one other matter that I wanted to raise. I believe -- it's my understanding that my colleague Alison Brown had requested that if costs were to be ordered in a lump sum at the conclusion of the application against the plaintiffs, that they be ordered against Mr. Simon alone and not the wife.

149 THE COURT: That is quite right. Mr. Simon, I think you had agreed with that the other day as well.

150 MR. SIMON: Yes, yes.

151 THE COURT: Yes, I had forgotten about that. Thank you very much for reminding me. Costs will be payable by Mr. Simon only.

152 MR. SIMON: Yes.

153 MR. FAIRGRIEVE: So we'll include that in the order.

154 THE COURT: Yes. Thank you very much.

155 MR. FAIRGRIEVE: Thank you.

156 MR. SIMON: Thank you everybody.

S.A. DONEGAN J.

Strata Plan LMS3259 v. Sze Hang Holding Inc., [2009] B.C.J. No. 694

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

J.A. Sinclair Prowse J.

Heard: October 11, 2007; September 2-4, 2008.

Judgment: April 7, 2009.

Dockets: L050030 and L052756

Registry: Vancouver

[2009] B.C.J. No. 694 | 2009 BCSC 473 | 178 A.C.W.S. (3d) 341

Between The Owners, Strata Plan LMS3259, Plaintiff, and Sze Hang Holding Inc. and Leon Lam, Defendants And between The Owners, Strata Plan LMS3259, Plaintiff, and Sze Hang Holding Ltd. and Leon Lam, Defendants

(94 paras.)

Case Summary

Civil litigation — Civil procedure — Pleadings — Striking pout pleadings or allegations — Grounds — False, frivolous, vexatious or abuse of process — Parties — Capacity to sue or be sued — Party types — Corporations, partnerships and sole proprietorships — Motion by the defendant unit owners for dismissal of two actions on the ground that the Strata Corporation had no jurisdiction to bring the actions dismissed — Motion by Strata Corporation to strike out the defences and for judgment allowed — Strata Corporation sued defendants for failing to comply with various bylaws and for payment of fines levied — Strata Corporation had standing to bring action as required resolution was passed — Defences and counterclaims were confusing and prolix — Allowing defendants to amend pleading would constitute abuse of process — Rules of Court, Rule 19(24).

Motion by the defendant unit owners for dismissal of two actions on the ground that the Strata Corporation had no jurisdiction to bring the actions. Motion by the Strata Corporation to strike out the defences and for judgment. The plaintiff Strata Corporation sued the defendants to enforce various bylaws against them. The plaintiff was the strata corporation of a commercial development. The plaintiff alleged that the defendants failed to open these units for business as required under the bylaws resulting in unpaid fines and that the defendants stored items on the common property contrary to the bylaws. In the second action, the Strata Corporation alleged the defendants failed to grant it access to the units to check the repairs on a sewer line and to investigate the cause of steam coming from an adjacent unit. The defendants argued the Strata Corporations had not passed the required resolution to bring the actions.

HELD: Motion by the defendants dismissed.

Motion by the Strata Corporation allowed. The required resolution to commence these actions was passed by a vote at the 2006 annual meeting. The statements of defence were so prolix and confusing that it was difficult to understand the case to be met. These pleadings included arguments, opinions, and allegations against non-parties. The defendants should not be granted the opportunity to redraft their pleadings as to do so would constitute an abuse of process. Some of the proposed defences and counterclaims could not be redrafted as they were without legal foundation. The defendants had been given several opportunities to draft appropriate pleadings in other actions that raised essentially the same issues. The defendants also brought counterclaims prohibited by a prior court order and endeavoured to re-litigate matters that they knew had already been considered and decided.

Statutes, Regulations and Rules Cited:

Rules of Court, Rule 19(24), Rule 57(9)

Strata Property Act, SBC 1998, CHAPTER 43, s. 3, s. 4, s. 26, s. 56, s. 129, s. 133, s. 147(1), s. 292(2)(g)

Counsel

Counsel for the Plaintiff: R. Shore, P. Mendes.

Leon Lam: Appearing on his own behalf.

S.H. Lee: Appearing on behalf of Sze Hang Holding Inc.

[Editor's note: A corrigendum was released by the Court April 16, 2009; the correction has been made to the text and the corrigendum is appended to this document.]

Reasons for Judgment

J.A. SINCLAIR PROWSE J.

(I) NATURE OF THE HEARING

1 The Plaintiff is the Strata Corporation of the strata development in which the Defendants own two units. In these two actions (which have been ordered to be heard together), the Strata Corporation is seeking to enforce various bylaws against the Defendants as owners of those units.

2 In this hearing, the Defendants seek to have these actions dismissed on the ground that the Strata Corporation is without jurisdiction to bring them. The Strata Corporation, on the other hand, seeks, pursuant to R. 19(24), to have the Defendants' pleadings struck; to have the Defendants denied permission to redraft any of their pleadings; and to have Judgment entered on its behalf.

3 Before addressing these applications, it became apparent upon reviewing the pleadings of all of the parties that a typographical error had been made in the style of cause in the second action (Vancouver Registry No. L0527856). Specifically, the Defendant Sze Hang Holding Inc. is mistakenly described as Sze Hang Holding Ltd. Because this is a typographical error, leave is granted to the Strata Corporation to amend its pleading to correct this error.

(II) BACKGROUND CIRCUMSTANCES

4 To put the issues raised in these applications in context, the Strata Corporation is the strata corporation for Pacific Plaza, a business as opposed to a residential strata development. Although there is a dispute as to whether the proper business designation of this strata development is "wholesale industrial" (the position of the Defendants) or "a combination of wholesale industrial and commercial retail" (the position of the Strata Corporation), there is no issue that it is a "business" as opposed to a "residential" strata development.

5 This strata development was built by Ernest & Twins Ventures (PP) Ltd. and completed in 1998. The Defendants were not original owners. Rather, it was about 3 years after it was built that Sze Hang Holding purchased two units (namely, the North and South Units).

6 It was not until 1 year after that (or 4 years after it was built) that Mr. Lam acquired any ownership interest in any of the strata units. This is the ownership that he continues to hold. Specifically, the South Unit is owned by him and

Sze Hang Holding - Mr. Lam having acquired a 1% interest and Sze Hang Holding having a 99% interest. The North Unit is wholly owned by Sze Hang Holding.

7 Although Mr. Lam did not acquire an ownership interest in any of the strata units until the summer of 2002, he has operated a business from those units from the time that they were acquired by Sze Hang Holding. For much, if not all, of this time, Extra Gift Exchange Inc. has been the tenant of these units. (Extra Gift Exchange is a company in which Mr. Lam and Ms. Sze Hang Lee are principals. Ms. Lee is also a principal in Sze Hang Holding.)

8 In addition, to operating a business in this strata development from at least 2001, Mr. Lam has been actively involved in the affairs of the strata development and in particular of the Strata Council. (As with all strata developments, pursuant to s. 4 and s. 26 of the ***Strata Property Act***, S.B.C. 1998, c. 43 [***SPA***] the strata council is the mechanism through which the powers and duties of the strata corporation are exercised. Put another way, the strata council acts as the board of directors for the strata corporation.)

9 Over the last 8 years, Mr. Lam has been involved in a number of actions pertaining to various aspects of this strata development. Although some of these matters have been completed, there are approximately 5 other outstanding actions in addition to the present actions. While some of these actions include claims of defamation and personal injury, for the most part these actions pertain to claims regarding the construction, sale, management, and governance of this development. (This was also the situation with the actions that are now completed.) I am the Case Management Judge for the present actions as well as the 5 other outstanding ones.

10 As far as the present actions are concerned, as was set out earlier, the Strata Corporation is seeking to enforce various bylaws. Specifically, in the first action (Vancouver Registry No. L050030) which will hereinafter be referred to as the Fines Action, the Strata Corporation claims that for the last few years the Defendants have failed to open either of these units for business at all, let alone for the requisite number of business hours required under the bylaws; that as of December 2007, the Defendants had incurred fines in the amount of $91,571.58 with respect to the South Unit and $38,840.15 with respect to the North Unit because of these violations; and that to date the Defendants have neither paid these fines nor complied with the bylaws by opening their units for business.

11 Moreover, the Strata Corporation claims that the Defendants have posted notices in the windows of their units, the purpose of these notices being to criticize and embarrass the members of the Strata Council.

12 Further, the Strata Corporation claims that the Defendants stored items on the common property adjoining the South Unit contrary to the bylaws and that the Strata Corporation had to incur the costs of removing and then storing these items. (It still has these items and is still paying the costs of this storage.)

13 With respect to the second action (Vancouver Registry No. L052756) which will hereinafter be referred to as the Access Action, the Strata Corporation claims that, contrary to the bylaws, the Defendants failed to grant it access to the North Unit to check that a sewer line that had backed up had been properly repaired (that is, in accordance with the building code); to the South Unit to investigate the cause of steam that was coming from it into an adjacent unit; and to the North Unit to investigate whether it was being used as a residence.

14 As far as the present hearing is concerned, as is set out in an earlier decision in these proceedings (namely, 2008 BCSC 481), it was set at my direction for the purpose of clarifying the pleadings and specifically clarifying the claims, defences, and counterclaims to be made. The basis for this direction was that it had become apparent in pre-trial applications, pertaining to such matters as the extent of document production, the extent of examinations for discovery, and the period of time needed for trial, that the pleadings would have to be clarified sooner rather than later as the issues raised in these pre-trial applications could not be decided until that was done.

15 As an example, in these pre-trial applications the Defendants took the position that their defences and claims raised issues requiring extensive document production from the Strata Corporation (approximately 600,000 documents) and a trial of at least a month in length. The Strata Corporation, on the other hand, took the position that the issues in these actions were simple matters, requiring modest document production, and a trial of two

weeks at the very most. Specifically, the Strata Corporation took the position that most, if not all, of the Defendants' pleadings were without legal foundation and would have been struck when considered by the Court.

16 It was in these circumstances that I directed this hearing. The parties were invited to make whatever applications that they considered appropriate regarding the clarification of the pleadings.

(III) THE APPLICATION OF THE DEFENDANTS THAT THESE ACTIONS SHOULD BE DISMISSED BECAUSE THE STRATA CORPORATION DOES NOT HAVE THE AUTHORITY TO BRING THEM

17 In this application, the Defendants submit that the Strata Corporation was not authorized to bring these actions as it had not passed the resolution required by s. 171 of the ***SPA***. This section of the ***SPA*** specifies that a resolution must be passed by a 3/4 vote at an annual or special general meeting before litigation may be commenced by a strata corporation.

18 Included in their arguments, the Strata Corporation submits that the Defendants do not have standing to bring this application. Rather, it is only the other owners that have standing to bring this application as they will be required to finance these purportedly unauthorized actions.

19 It was unnecessary to determine this issue as the evidence does not support this application of the Defendants. To the contrary, the evidence shows that the required resolution to commence these actions was passed by a 3/4 vote at the annual or special general meeting held on October 26, 2006.

20 Given these circumstances, this preliminary objection is dismissed.

(IV) THE APPLICATION OF THE STRATA CORPORATION TO STRIKE AND DISMISS THE PLEADINGS OF THE DEFENDANTS PURSUANT TO R. 19(24)

21 The Strata Corporation brings this application pursuant to R. 19(24). Not only do the Defendants oppose this application, but they also contend that it should be dismissed on a preliminary basis as the Court is without jurisdiction to hear it.

(A) *The Preliminary Application Of The Defendants To Dismiss The R. 19(24) Application Of The Strata Corporation*

22 The Defendants submit that the Court has already approved all of their pleadings as presently drawn and, therefore, it is without jurisdiction to revisit the matter. The Defendants contend that the matter is *res judicata*.

23 The record of these proceedings does not support this contention.

24 As is set out in my earlier decision (namely, 2008 BCSC 481), in the fall of 2007 at the request of both parties I directed that issues that had been raised regarding the Defendants' pleadings be postponed until the trial. (That is, those issues would be determined at trial by the trial judge.) However, as was touched upon earlier in these Reasons for Judgment as well as being set out in the aforementioned decision, it became apparent in the course of subsequent pre-trial applications that those issues could not be deferred until trial.

25 There was never a decision made that the Defendants' pleadings were valid pleadings. To the contrary, the earlier direction went no further than postponing that decision until trial.

26 As the issues raised in this hearing have not been addressed by the Court, these applications are not *res judicata*.

27 For these reasons, this application is dismissed.

(B) *The R. 19(24) Application Of The Strata Corporation*

28 The Defendants filed individual pleadings in each of these actions. In the Fines Action, they individually filed a Statement of Defence and Counterclaim and in the Access Action, they filed individual Statements of Defence. Mr. Lam also filed a Counterclaim in the Access Action while Sze Hang Holding did not.

29 With respect to the South Unit, because they are joint owners Mr. Lam and Sze Hang Holding do not have the standing individually to raise defences or to bring claims as owners: ***Extra Gift Exchange Inc., Lam and Richmond Liquidation Sales v. Ernest & Twins Ventures (PP) Ltd. et al***, 2007 BCSC 426. Rather, the standing to raise defences and to bring counterclaims as owners of the South Unit rests with the Defendants jointly.

30 Although as the sole owner of the North Unit, Sze Hang Holding could file individual pleadings on behalf of that unit, it makes little sense to do so in this case, as for the most part (if not entirely) the Defendants bring the same defences and counterclaims for each of the units.

31 For example, in the Fines Actions, with the exception of paragraphs 1-3, 38-40, 46, 55, 66, 83, and 96-98 in Mr. Lam's pleadings and paragraphs 1, 2, 38, 42, 51, 79, 92, and 93 in Sze Hang Holding's pleadings, the pleadings are essentially the same. In the Access action, with the exception of paragraphs 1, 30-36, 43, 60, 63-66, 68-70, 72-74, and 80-104 in Mr. Lam's pleadings and paragraphs 1, 30, 53, 54, 56, and 57 in Sze Hang Holding's pleadings, the pleadings are the same.

32 During his submissions, Mr. Lam explained that, in addition to the defences and counterclaims that he is pursuing as an owner, he is also pursuing some individual claims as a tenant - that is, Sze Hang Holding is not pursuing these tenant claims. Because he has these individual claims, he argued that his pleadings should be individual.

33 This argument is not sound in law. Rather, as was just set out, because neither Mr. Lam nor Sze Hang Holding has standing to individually defend or pursue any claims based as owners of the South Unit, their pleadings must be joint. Any claims made solely by one of the Defendants on grounds other than as owners should be set out as an individual claim within that joint pleading.

34 However, even though these pleadings were not brought in the proper form for purposes of this hearing, I have proceeded as if they had been. Furthermore, as the parties did during the hearing, I have addressed the pleadings in both actions collectively. (Many of the defences and counterclaims are repeated in both actions.)

35 As was set out at the beginning of this section of this Judgment, the application of the Strata Corporation to strike the Defendants' pleadings is brought pursuant to R. 19(24). That rule provides that:

> At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing or the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

36 Pursuant to this rule, pleadings that are so prolix and confusing that it is difficult, if not impossible, to understand the case to be met, should be struck: ***Gittings v. Caneco Audio-Publishers Inc.*** (1987), 17 B.C.L.R. (2d) 38 (S.C.), rev'd (1988), 26 B.C.L.R. (2d) 349 (C.A.) but not on this point. The underlying rationale of this principle is that if causes of action (or defences for that matter) are not properly pleaded, it is impossible for a defendant (or a plaintiff) to know the case to meet: ***Homalco Indian Band v. British Columbia*** (1998), 25 C.P.C. (4th) 107 (B.C.S.C.).

37 The Defendants' pleadings are lengthy. In the Fines Action, Mr. Lam's Statement of Defence and Counterclaim (including the Prayer for Relief) is 51 pages long with 120 paragraphs while Sze Hang Holding's Statement of Defence and Counterclaim (including the Prayer for Relief) is 48 pages and 115 paragraphs. In the Access Action, Mr. Lam's Statement of Defence and Counterclaim is 42 pages and 114 paragraphs long while Sze Hang Holding's Statement of Defence is 25 pages and 65 paragraphs long. (As was touched on earlier, Sze Hang Holding did not file a Counterclaim in the Access Action.)

38 These pleadings are so prolix and confusing that it is difficult, if not impossible, to understand the case to be met. In addition to the proposed defences and counterclaims being incomprehensible, these pleadings include arguments, opinions, and allegations against people and businesses which are not parties - for example, allegations against members of the Strata Council, the present property management company, and a lawyer who has provided legal services to the Strata Corporation.

39 Given these facts, the pleadings must be struck. Thus, the next issue is whether the Defendants should be permitted to redraft these pleadings.

40 Generally, if the problem with a pleading is that it is inadequately drafted, a party will be given the opportunity to redraft it. However, if it is plain and obvious that even if redrafted a pleading is bound to fail because it does not raise an arguable issue (that is, it is without legal foundation), a party will not be granted the opportunity to redraft: ***Braun Investment Group Inc. v. Emco Investment Corp.*** (1984), 58 B.C.L.R. 396, 46 C.P.C. 85 (S.C.), aff'd (1985), 67 B.C.L.R. 247 (C.A.); and ***McNaughton v. Baker*** (1988), 25 B.C.L.R. (2d) 17, [1988] 4 W.W.R. 742 (C.A.).

41 In addition to this ground for denying a party the opportunity to redraft a pleading, the Court may deny that opportunity on the ground that to grant it would constitute an abuse of process.

42 That is, as explained in John W. Horn & Hon. Susan A. Griffin, ***Fraser Horn & Griffin, The Conduct of Civil Litigation in British Columbia***, 2d ed., looseleaf (Markham, Ont.: LexisNexis, 2007) at 25-5:

> A pleading or portion of a pleading may be struck out on any of the grounds set out in Rule 19(24)(b), (c) and (d). Though such an application is not usually made with the object of securing judgment in a summary way, the Rule in terms provides that this result may follow. If the ground of the application is that the entire proceeding is ... an abuse of process ... then the entire action may be stayed or dismissed or the entire defence struck out.

43 As described in Frederick M. Irvine, ***McLachlin & Taylor British Columbia Practice***, 3rd ed., looseleaf (Markham, Ont.: LexisNexis, 3006) at 19-63(3):

> Abuse of process is not limited to cases where a claim or an issue has already been decided in other litigation, but is a flexible doctrine applied by the court to values fundamental to the court system. In *Toronto (City) v. Canadian Union of Public Employees, Local 79 (C.U.P.E.)*, [2003] 3 S.C.R. 77, [2003] S.C.J. No. 64, the court stated at para. 37:
>
> > Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.

44 Applying these principles to the circumstances of this case, for the reasons that follow I have concluded that the Defendants should not be granted the opportunity to redraft their pleadings. Given this decision, in turn, results in there being no Statements of Defences or Counterclaims field in either of these actions, I have also concluded that the Strata Corporation should be granted judgment.

45 Some of the proposed defences and claims of the Defendants could not be redrafted in any event as they are

without legal foundation. That is, no matter how they are redrafted, they are bound to fail because they do not raise an arguable issue.

46 For example, as they explained in their submissions (because it could not be discerned in their pleadings) the Defendants contend that the bylaws which form the basis of the Strata Corporation's claims are invalid because they are *ultra vires*. In other words, those bylaws are beyond the authority of the Strata Corporation to pass, let alone enforce.

47 This contention is not supported by the law. Pursuant to s. 3 of the ***SPA*** "... the strata corporation is responsible for managing and maintaining the common property and common assets of the strata corporation for the benefit of the owners." Moreover, as is set out in s. 119 of the ***SPA***, strata corporations "must have bylaws" and the bylaws "may provide for the control, management, maintenance, use and enjoyment of the strata lots, common property and common assets of the strata corporation and for the administration of the strata corporation."

48 Under s. 129 and s. 133 of the ***SPA***, the Strata Corporation may impose fines to enforce bylaws and may do what is reasonably necessary to remedy a contravention of its bylaws or rules, including doing work on or to a strata lot, the common property, or common assets; removing objects from the common property or common assets; and requiring that reasonable costs of remedying the contravention be paid by the person who may be fined.

49 As the bylaws in the present actions fall within the scope of the statutory responsibilities of strata corporations and as strata corporations are statutorily required to exercise these responsibilities through the passage and enforcement of bylaws, the bylaws are not *ultra vires* the power of the Strata Corporation.

50 Given the statutory provisions governing strata corporations, there is no legal foundation for this contention either as a defence or as a claim. It is bound to fail.

51 As another example of a pleading that cannot be redrafted in any event because it is without legal foundation, the Defendants submit that invalid proxies have been used to elect many, if not all, of the members of the Strata Council and have been used to pass resolutions, including the resolutions creating the bylaws that the Strata Corporation seeks to enforce in these actions. The Defendants argue that the proxies are invalid because the owners of the proxies sold them to other owners. As a result of this flawed process, the Defendants submit that the bylaws are invalid and unenforceable.

52 Assuming that some owners sold their proxies to other owners and that those proxies were used to elect members of the Strata Council and/or to pass resolutions creating or enforcing these bylaws, that fact alone does not invalidate the election of the members of Strata Council; the creation of the bylaws; and/or the enforcement of the bylaws.

53 The fact that an owner chooses to sell his/her proxy to another owner does not invalidate that proxy. Pursuant to s. 56 of the ***SPA***, a person who is otherwise eligible to vote at a general meeting may do so in person or by proxy. In other words, whether it is the election of members to the strata council or the passage of a resolution, a strata unit owner may exercise his/her vote by proxy.

54 To be valid, as is set out in s. 56 of the ***SPA***, a proxy must:

(a) be in writing and signed by the person appointing the proxy;

(b) be general or for a specific meeting or resolution; and

(c) be revocable (and, by extension, a later proxy must be considered to revoke an earlier one).

In other words, as long as the proxy meets these statutory requirements, it is valid. The fact that an owner chooses to sell his/her proxy to another owner does not invalidate it.

55 Although s. 292(2)(g) of the ***SPA*** authorizes the making of regulations "respecting the person who may be

proxies, the number of proxies they may hold, the circumstances in which they may be proxies and restrictions on their powers as proxies", to date no regulations have been made that hold that the selling of a proxy invalidates it.

56 Given these conclusions, any defences and/or counterclaims based on the premise that a proxy that has been sold is invalid are bound to fail because that is not a basis on which a proxy would be rendered invalid. Consequently, there is no point in redrafting these pleadings because they are without legal foundation.

57 A further example of pleadings that cannot be redrafted in any event are the counterclaims brought by Mr. Lam as a tenant. (Presumably, these claims are brought as the tenant of the North Unit as he is an owner of the South Unit.) Aside from the fact that Mr. Lam has consistently maintained in these actions, as well as in related actions, that Extra Gift Exchange is the tenant of this unit as well as the South Unit, tenants do not have standing to bring claims or to raise a defence with respect to the bylaws.

58 That is, although some powers and duties can be assigned to a tenant pursuant to s. 147(1) of the ***SPA***, the landlord (that is, Sze Hang Holding as the owner) cannot assign to a tenant the responsibility for fines or the costs of remedying a contravention of the bylaws or rules.

59 Mr. Lam relies on the provisions of the now-repealed ***Condominium Act***, R.S.B.C. 1996, c. 64 to provide him with standing to bring claims as a tenant. In addition to the fact that claims based on this statute are bound to fail because this statute has been repealed, as was set out in ***Extra Gift Exchange Inc., Lam and Richmond Liquidation Sales v. Ernest & Twins Ventures (PP) Ltd.***, 2007 BCSC 426 when Mr. Lam brought claims on behalf of Extra Gift Exchange as a tenant, the provisions of the ***Condominium Act*** pertain to tenants of "residential" strata units. Given this situation, even if this statute had not been repealed, any claims or defences of the Defendants brought pursuant to its provisions would be bound to fail as it does not give them standing, the Pacific Plaza being a business rather than residential strata development.

60 Quite apart from the fact that many, if not most, of the Defendants' pleadings could not be redrafted in any event because there is no legal foundation for the defences and counterclaims made, in the circumstances of this case it would be inappropriate to grant the Defendants permission to redraft their pleadings as to do so would constitute an abuse of process.

61 To begin with, over the last 7, almost 8, year period the Defendants have been given at least 4 opportunities (including this time) to draft appropriate pleadings. These earlier opportunities were granted by Mr. Justice Thackray in ***Extra Gift Exchange Inc. and Lam v. The Strata Corporation LMS3259*** (18 September 2001), Vancouver No. S014678; Mr. Justice Shabbits in ***Extra Gift Exchange Inc., Lam, and Richmond Liquidation Sales v. Ernest & Twins Ventures (PP) Ltd.*** (18 February 2004), Vancouver No. L031802; ***Extra Gift Exchange Inc., Lam, and Richmond Liquidation Sales v. Ernest & Twins Ventures (PP) Ltd.*** (19 February 2004), Vancouver No. L031802; ***Extra Gift Exchange Inc., Lam, and Richmond Liquidation Sales v. Ernest & Twins Ventures (PP) Ltd.*** (20 February 2004), Vancouver No. L031802; and ***Extra Gift Exchange Inc., Lam, and Richmond Liquidation Sales v. Ernest & Twins Ventures (PP) Ltd.*** (18 March 2004), Vancouver No. L031802; and by myself in ***Extra Gift Exchange Inc. v. Ernest & Twins Ventures (PP) Ltd.***, 2007 BCSC 426.

62 Although the actions were different, the claims made in them are basically the same claims as the claims and defences made by the Defendants in these actions. That is, the claims pertain to the governance, management, and construction of this strata development.

63 Furthermore, although Sze Hang Holding was not a party in any of these earlier actions, Mr. Lam brought all of the claims for its benefit as well as his own. In addition, Ms. Sze Hang Lee (who is a principal of Sze Hang Holding and who represented it throughout this proceeding) was in attendance for all of these other matters, either by assisting Mr. Lam or as the representative of Extra Gift Exchange. Moreover, as a review of the pleadings in these earlier efforts disclose, although not named as a party the claims were brought for the benefit of Sze Hang Holding as well as the named parties.

64 Given the direct involvement of a principal of Sze Hang Holding in most if not all of these actions and the fact that claims were for the benefit of Sze Hang Holding as well as the named parties, I am satisfied that, for all practical purposes, Sze Hang Holding has also been given the benefit of these earlier opportunities.

65 As occurred in the present actions, the Defendants were self-represented in these other actions. Because of that fact, in my view they have been given more opportunities than would normally have been given to redraft their pleadings properly. On a number of previous occasions, the Court has urged them to secure legal assistance in this process. They have been advised that there are various legal organizations that can provide assistance at a modest cost. Given the state of the present pleadings, I can only conclude that the Defendants have either chosen not to get that assistance or have chosen not to follow the advice given.

66 There may be defences or claims that if properly drafted, the Defendants could have pursued. However, that opportunity is now gone. Given the number of previous opportunities, it would be an abuse of process to permit the Defendants yet another opportunity to redraft their pleadings.

67 In addition to being given these previous opportunities, it would be an abuse of process to permit the Defendants to redraft because of the fact that in their pleadings in the present actions the Defendants raised (as defences and counterclaims) claims that they knew had already been addressed and dismissed. Furthermore, they contravened earlier Court orders by raising matters that they had been specifically prohibited from raising in these actions.

68 To put this conclusion in context, although the present actions were commenced before ***Extra Gift Exchange Inc. et al. v. Ernest & Twins Ventures (PP) Ltd.***, 2007 BCSC 426, was released, the pleadings of the Defendants in these actions were drafted and filed after that judgment was issued.

69 In the ***Ernest & Twins*** matter, Mr. Lam and Extra Gift Exchange (Ms. Lee, a principal in Sze Hang Holding, is also a principal in Extra Gift Exchange), made claims against a number of parties including the developer, the past and current property management companies, and the former and current members of Strata Council. The claims pursued in that action pertained to construction, sale, management, and governance of the strata development.

70 In the ***Ernest & Twins*** action, Mr. Lam and Extra Gift Exchange were the plaintiffs. Judgment was granted against the plaintiffs with respect to most of their claims. That is, most of the claims were dismissed because they were without legal foundation. There was no point to redrafting them because they did not raise an arguable issue-they were bound to fail.

71 However, with respect to a few claims pertaining to the Strata Corporation and the current members of the Strata Council (current being defined as from 2002 onward), Mr. Lam was granted permission to redraft because there was potentially an arguable issue if they were properly drafted and if they were properly brought. However, that permission to redraft was subject to terms. Included in those terms was the requirement that the orders for special costs had to be paid before those potential claims could be pursued. (There were two orders for special costs - one in one of the earlier actions and the second I made in the ***Ernest & Twins*** matter.)

72 However, there was an exception to the payment of that special costs term. In particular, Mr. Lam was granted the opportunity to redraft some of the claims against the Strata Corporation and bring them as counterclaims in the present actions, without having to pay the special costs order first.

73 The rationale behind this exception was that some of the potential claims that Mr. Lam had been given the opportunity to redraft against the Strata Corporation pertained to bylaw matters such as the oppressive and unfair levying of fines. Because these potential claims were interrelated to the claims that were being brought against him and Sze Hang Holding in the present actions, I concluded that it was inappropriate to require Mr. Lam to pay the special costs orders before they could pursue these potential claims as counterclaims in these actions.

74 However, the claims from the ***Ernest & Twins*** decision that Mr. Lam was given the opportunity to redraft and pursue in the present actions were very limited. Specifically, as far as the present actions were concerned:

> With the exception of claims pertaining to the oppressive and unfair levying of fines and penalties, and the arbitrary and improper waiving of these fines and penalties (which also includes the improper acquisition and use of proxies), none of the potential claims may be brought until the outstanding orders of special costs have been paid.

In addition, "the potential counterclaims will not extend to potential claims against the Current Strata Council Members." That is, this exception did not extend to any of the potential claims against the current members of the Strata Council - the current members of the Strata council being defined as members from 2002 onwards. Put another way, before these claims could be redrafted and pursued Mr. Lam had to comply with all of the terms set out in ***Ernest & Twins*** decision which included the payment of the special costs orders.

75 Unfortunately, not only did the Defendants pursue defences and claims in the present actions that went beyond the permitted categories, they pursued defences and counterclaims that had been dismissed (that is, had been found to be without legal foundation) in the ***Ernest & Twins*** action.

76 Included in the defences and counterclaims that fall outside the permitted categories are the allegations that the Defendants have made in their pleadings against the members of the Strata Council. Although the Defendants have framed their defences and counterclaims as allegations of mismanagement by the Strata Corporation, these allegations are really against the members of Strata Council as it is their purported unauthorized acts and misconduct that the Defendants plead constitutes this mismanagement.

77 Another prohibited claim that was included in the Defendants' pleadings in the present actions is the claim that the Strata Corporation failed to pursue an action for fraudulent misrepresentation against the developers, an action that was purportedly authorized by a resolution supported by at least 3/4 of the owners.

78 To bring claims that contravene a Court order is an abuse of process.

79 As was just touched upon earlier, with respect to many of the claims in the ***Ernest & Twins*** action, judgment was granted against the plaintiffs (that is, Mr. Lam) because the claims were without legal foundation - they did not raise an arguable issue. The Defendants bought many of these dismissed claims in the present actions, claims such as the failure of the Strata Corporation to take action regarding structural deficiencies; the alleged misconduct of the Strata Corporation regarding the payment of legal expenditures incurred by the Strata Corporation to defend or pursue actions; and breaches of fiduciary duty. These claims are *res judicata*. The Court has already determined that they are bound to fail. To bring them again is an abuse of process.

80 Sze Hang Holding argues that as it was not a party to the ***Ernest & Twins*** action, it is not bound by any orders arising from that decision. I do not agree.

81 As was just touched upon, some of the claims in the ***Ernest & Twins*** decision were dismissed. Those claims were dismissed because they were without legal foundation and therefore were bound to fail. With respect to these dismissed claims, the fact that there are now brought by Sze Hang Holding alone or jointly with Mr. Lam does not change the fact that they are not legally recognized claims. They do not raise an arguable issue.

82 As far as the other orders in the ***Ernest & Twins*** decision are concerned, Sze Hang Holding's standing to defend the claims brought in the present actions and to bring counterclaims against the Strata Corporation is as an owner. As its ownership in the South Unit is joint with Mr. Lam, Sze Hang Holding cannot defend any claims or bring any counterclaims with respect to that unit without Mr. Lam.

83 Consequently, because Mr. Lam was a party in the ***Ernest & Twins*** decision; because some of the orders in that case limited his capacity to bring or defend claims as an owner of the South Unit; and because Sze Hang

Holding cannot raise defences or bring claims as an owner of the South Unit without Mr. Lam, Sze Hang Holding is bound by the orders made in that decision.

84 Sze Hang Holding argues that with respect to the North Unit, however, because it was not a party to the ***Ernest & Twins*** decision and because it is the sole owner of that unit, it is not bound by the ***Ernest & Twins*** decision with respect to counterclaims and defences raised on behalf of that unit. In the circumstances of this case, that argument is not persuasive.

85 For the most part, if not entirely, the defences and counterclaims that it raises as owner of the North Unit are the same defences and counterclaims that it raises jointly with Mr. Lam as owners of the South Unit. In these circumstances, to permit Sze Hang Holding to pursue counterclaims or defences as the owner of the North Unit that it is prohibited from pursuing on behalf of the South Unit, as a result of the ***Ernest & Twins*** decision, would constitute an abuse of process as it would thwart that earlier decision.

86 To summarize, in my view given all of the circumstances set out above, to allow the Defendants the opportunity to redraft some or all of their pleadings would, in the circumstances of this case, constitute an abuse of process. It would violate the principles of judicial economy, consistency, finality, and the integrity of the administration of justice.

87 Having denied the Defendants the opportunity to redraft their pleadings, their Statements of Defence and Counterclaims are dismissed.

(C) ***Conclusion***

88 The Defendants pleadings are struck because they are so prolix and confusing that it is impossible for the Strata Corporation to discern the case that it is to meet.

89 The Defendants are denied the opportunity to redraft not only because many of their defences and counterclaims are bound to fail as they do not raise an arguable issue, but primarily because it would constitute an abuse of process. Not only have the Defendants been granted previous opportunities to redraft but in these pleadings they contravened court orders and endeavoured to re-litigate matters that they knew had already been considered and decided.

90 As the Defendants pleadings have been struck and as they have been denied the opportunity to redraft them, this matter will proceed as if Statements of Defence or Counterclaims had not been filed. Given those circumstances, Judgment is granted to the Strata Corporation in both actions against both Defendants.

91 As far as the Fines Action is concerned, the question of the quantum of the fines to be awarded against the Defendants in regard to 1080 - 8888 Odlin Crescent, Richmond B.C. (the South Unit) for the breach of the business hour bylaw as of December 1, 2007; of the quantum of the fines to be awarded against the Defendant Sze Hang Holding in regard to 1380 - 8888 Odlin Crescent Richmond B.C. (the North Unit) for the breach of the business hour bylaw as of December 1, 2007; and of the amount to be awarded against the Defendants in regard to the cost of moving and storing the Defendants' property are all referred to the Registrar who will certify their findings.

92 In the Access Action, with respect to the relief granted as a result of the Judgment against the Defendants, this Court orders:

(a) that the Defendants, on or before 5:00 p.m. on May 15, 2009, provide access on a date and time agreed upon by the parties to enable a representative of the Strata Corporation (that representative having been chosen by the Strata Corporation) to attend the premises located at 1010 - 8888 Odlin Crescent in Richmond B.C. (the South Unit), the purpose of that access being to enable the Strata Corporation to determine whether the Defendants are complying with the bylaws;

(b) that the Defendant Sze Hang Holding, on or before 5:00 p.m. on May 15, 2009, provide access on a date and time agreed upon by it and the Strata Corporation to enable a representative of Strata

Corporation (that representative having been chosen by the Strata Corporation) to attend the premises located at 1380 - 8888 Odlin Crescent in Richmond B.C. (the North Unit), the purpose of that access being to enable the Strata Corporation to determine whether the Defendant Sze Hang Holding is complying with the bylaws;

(c) that if the Defendants or either of them fail to comply with the aforementioned orders, the representative of the Strata Corporation is entitled to enter the premises with the assistance of a locksmith, provided that after that inspection is completed by the representative of the Strata Corporation that he or she secures the premises and provides the owners and/or owner of the premises entered with the new key to those premises or premise; and

(d) that if the Defendants or either of them impedes or attempts to impede the representative of the Strata Corporation from entering 1380 - 8888 Odlin Crescent and/or 1010 - 8888 Odlin Crescent as permitted by this order, any peace officer and member of the Royal Canadian Mounted Police is authorized to arrest and remove that Defendant or Defendants.

(e) COSTS

93 As the successful party, pursuant to R. 57(9), the Strata Corporation is entitled to be awarded costs. Under R. 19(24), the Court may order costs to be paid as special costs.

94 Given that the Defendants included in their pleadings claims that they knew had been dismissed in other proceedings and that the Defendants contravened previous Court orders by including in these pleadings claims that they had been directed not to bring, I will exercise my discretion and award these costs as special costs.

J.A. SINCLAIR PROWSE J.

* * * * *

Corrigendum

Released: April 16, 2009

Revised Judgment

Corrigendum to Reasons for Judgment dated April 7, 2009, issued, advising that:

[1] Paragraph 81 will now read:

> As was just touched upon, some of the claims in the ***Ernest & Twins*** decision were dismissed. Those claims were dismissed because they were without legal foundation and therefore were bound to fail. With respect to these dismissed claims, the fact that there are now brought by Sze Hang Holding alone or jointly with Mr. Lam does not change the fact that they are not legally recognized claims. They do <u>not</u> raise an arguable issue.
>
> (amendment underlined)

The Reasons for Judgment are amended accordingly. In all other aspects, the Reasons stand.

Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79, [2003] 3 S.C.R. 77

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

Heard: February 13, 2003;

Judgment: November 6, 2003.

File No.: 28840.

[2003] 3 S.C.R. 77 | [2003] 3 R.C.S. 77 | [2003] S.C.J. No. 64 | [2003] A.C.S. no 64 | 2003 SCC 63

Canadian Union of Public Employees, Local 79 , appellant; v. City of Toronto and Douglas C. Stanley, respondents, and Attorney General of Ontario , intervener.

(135 paras.)

Case Summary

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Catchwords:

Labour law — Arbitration — Dismissal without just cause — Evidence — Recreation instructor dismissed after being convicted of sexual assault — Conviction upheld on appeal — Arbitrator ruling that instructor had been dismissed without just cause — Whether union entitled to relitigate issue decided against employee in criminal proceedings — Evidence Act, R.S.O. 1990, c. E.23, s. 22.1 — Labour Relations Act, S.O. 1995, c. 1, Sch. A, s. 48.

Catchwords:

Judicial review — Standard of review — Labour arbitration — Recreation instructor dismissed after being convicted of sexual assault — Arbitrator ruling that instructor had been dismissed without just cause — Whether arbitrator entitled to revisit conviction — Whether correctness is appropriate standard of review — Evidence Act, R.S.O. 1990, c. E.23, s. 22.1 — Labour Relations Act, S.O. 1995, c. 1, Sch. A, s. 48.

Summary:

O worked as a recreation instructor for the respondent City. He was charged with sexually assaulting a boy under his supervision. He pleaded not guilty. At trial before a judge alone, he testified and was cross-examined. [page78] The trial judge found that the complainant was credible and that O was not. He entered a conviction, which was affirmed on appeal. The City fired O a few days after his conviction. O grieved the dismissal. At the arbitration hearing, the City submitted the complainant's testimony from the criminal trial and the notes of O's supervisor, who had spoken to the complainant at the time. The complainant was not called to testify. O testified, claiming that he had never sexually assaulted the boy. The arbitrator ruled that the criminal conviction was admissible evidence, but that it was not conclusive as to whether O had sexually assaulted the boy. No fresh evidence was introduced. The arbitrator held that the presumption raised by the criminal conviction had been rebutted, and that O had been

dismissed without just cause. The Divisional Court quashed the arbitrator's ruling. The Court of Appeal upheld that decision.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and Arbour JJ.: When asked to decide whether a criminal conviction, *prima facie* admissible in a proceeding under s. 22.1 of the Ontario *Evidence Act*, ought to be rebutted or taken as conclusive, courts will turn to the doctrine of abuse of process to ascertain whether relitigation would be detrimental to the adjudicative process. The doctrine engages the inherent power of the court to prevent the misuse of its procedure, in a way that would bring the administration of justice into disrepute. It has been applied to preclude relitigation in circumstances where the strict requirements of issue estoppel are not met, but where allowing litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. The motive of the party who seeks to relitigate, and the capacity in which he or she does so, cannot be decisive factors in the application of the bar against relitigation. What is improper is to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum. A proper focus on the process, rather than on the interests of a party, will reveal why relitigation should not be permitted. From the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. Casting doubt over the validity of a criminal conviction is a very serious matter. Collateral attacks and relitigation are not appropriate methods of redress since they inordinately tax the adjudicative process while doing nothing to ensure a more trustworthy [page79] result. The common law doctrines of issue estoppel, collateral attack and abuse of process adequately capture the concerns that arise when finality in litigation must be balanced against fairness to a particular litigant. There is no need to endorse a self-standing and independent "principle of finality" as either a separate doctrine or as an independent test to preclude relitigation.

The appellant union was not entitled, either at common law or under statute, to relitigate the issue decided against the grievor in the criminal proceedings. The facts in this appeal point to the blatant abuse of process that results when relitigation of this sort is permitted. O was convicted in a criminal court and he exhausted all his avenues of appeal. In law, his conviction must stand, with all its consequent legal effects. There is nothing in this case that militates against the application of the doctrine of abuse of process to bar the relitigation of O's criminal conviction. The arbitrator was required as a matter of law to give full effect to the conviction. As a result of that error of law, the arbitrator reached a patently unreasonable conclusion. Properly understood in the light of correct legal principles, the evidence before the arbitrator could only lead him to conclude that the respondent City had established just cause for O's dismissal.

Issue estoppel has no application in this case since the requirement of mutuality of parties has not been met. With respect to the collateral attack doctrine, the appellant does not seek to overturn the sexual abuse conviction itself, but rather contest, for the purposes of a different claim with different legal consequences, whether the conviction was correct.

Per LeBel and Deschamps JJ.: As found by the majority, this case is appropriately decided on the basis of the doctrine of abuse of process, rather than the narrower and more technical doctrines of either collateral attack or issue estoppel. There was also agreement that the appropriate standard of review for the question of whether a criminal conviction may be relitigated in a grievance proceeding is correctness. This is a question of law involving the interpretation of the arbitrator's constituent statute, [page80] an external statute, and a complex body of common law rules and conflicting jurisprudence dealing with relitigation, an issue at the heart of the administration of justice. The arbitrator's determination in this case that O's criminal conviction could indeed be relitigated during the grievance proceeding was incorrect. As a matter of law, the arbitrator was required to give full effect to O's conviction. His failure to do so was sufficient to render his ultimate decision that O had been dismissed without just cause -- a decision squarely within the arbitrator's area of specialized expertise and thus reviewable on a deferential standard -- patently unreasonable, according to the jurisprudence of the Court.

Because of growing concerns with the ways in which the standards of review currently available within the

pragmatic and functional approach are conceived of and applied, the administrative law aspects of this case require further discussion. The patent unreasonableness standard does not currently provide sufficiently clear parameters for reviewing courts to apply in assessing the decisions of administrative adjudicators. Certain fundamental legal questions -- for instance constitutional and human rights questions and those involving civil liberties, as well as other questions that are of central importance to the legal system as a whole, such as the issue of relitigation -- typically fall to be decided on the correctness standard. Not all questions of law, however, must be reviewed under a standard of correctness. Resolving general legal questions may be an important component of the work of some administrative adjudicators. In many instances, the appropriate standard of review in respect of the application of general common or civil law rules by specialized adjudicators should not be one of correctness, but rather of reasonableness. If the general question of law is closely connected to the adjudicator's core area of expertise, the decision will typically be entitled to deference.

In reviewing a decision under the existing standard of patent unreasonableness, the court's role is not to identify the correct result. To pass a review for patent unreasonableness, a decision must be one that can be rationally supported. It would be wrong for a reviewing court to intervene in decisions that are incorrect, rather than limiting its intervention to those decisions that lack a rational foundation. If this occurs, the line between correctness on the one hand, and patent unreasonableness, on the other, becomes blurred. The boundaries between [page81] patent unreasonableness and reasonableness *simpliciter* are even less clear and approaches to sustain a workable distinction between them raise their own problems. In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? In summary, the current framework exhibits several drawbacks. These include the conceptual and practical difficulties that flow from the overlap between patent unreasonableness and reasonableness *simpliciter*, and the difficulty caused at times by the interplay between patent unreasonableness and correctness.

The role of a court in determining the standard of review is to be faithful to the intent of the legislature that empowered the administrative adjudicator to make the decision, as well as to the animating principle that, in a society governed by the rule of law, power is not to be exercised arbitrarily or capriciously. Judicial review on substantive grounds ensures that the decisions of administrative adjudicators are capable of rational justification; review on procedural grounds ensures that they are fair.

Administrative law has developed considerably over the last 25 years. This evolution, which reflects a strong sense of deference to administrative decision makers and an acknowledgment of the importance of their role, has given rise to some problems or concerns. It remains to be seen, in an appropriate case, what should be the solution to these difficulties. Should courts move to a two standard system of judicial review, correctness and a revised unified standard of reasonableness? Should we attempt to more clearly define the nature and scope of each standard or rethink their relationship and application? This is perhaps some of the work which lies ahead for courts, building on the developments of recent years as well as on the legal tradition which created the framework of the present law of judicial review.

Cases Cited

By Arbour J.

Referred to: Ontario v. O.P.S.E.U., [2003] 3 S.C.R. 149, 2003 SCC 64; Dr. Q v. College of Physicians and Surgeons of British Columbia, [2003] 1 S.C.R. 226, 2003 SCC 19; Law Society of New Brunswick v. Ryan, [2003] 1 S.C.R. 247, 2003 SCC 20; Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982; Toronto (City) Board of Education v. O.S.S.T.F., District 15, [1997] 1 S.C.R. 487; Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324, [2003] 2 S.C.R. 157, 2003 SCC 42; [page82] Demeter v. British Pacific Life Insurance Co. (1983), 150 D.L.R. (3d) 249, aff'd (1984), 48 O.R. (2d) 266; Hunter v. Chief Constable of the West Midlands Police, [1982] A.C. 529, aff'g McIlkenny v. Chief Constable of the West Midlands, [1980] 1 Q.B. 283; Re Del Core and Ontario College of Pharmacists (1985), 51 O.R. (2d) 1; Danyluk v. Ainsworth Technologies Inc., [2001] 2 S.C.R. 460, 2001 SCC 44; Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); R. v. Regan, [2002] 1 S.C.R. 297, 2002 SCC 12; Lemay v. The King, [1952] 1 S.C.R. 232; R. v. Banks, [1916] 2 K.B.

621; Wilson v. The Queen, [1983] 2 S.C.R. 594; R. v. Sarson, [1996] 2 S.C.R. 223; R. v. Consolidated Maybrun Mines Ltd., [1998] 1 S.C.R. 706; R. v. Power, [1994] 1 S.C.R. 601; R. v. Conway, [1989] 1 S.C.R. 1659; R. v. Scott, [1990] 3 S.C.R. 979; Blencoe v. British Columbia (Human Rights Commission), [2000] 2 S.C.R. 307, 2000 SCC 44; R. v. O'Connor, [1995] 4 S.C.R. 411; United States of America v. Shulman, [2001] 1 S.C.R. 616, 2001 SCC 21; Canam Enterprises Inc. v. Coles (2000), 51 O.R. (3d) 481, rev'd [2002] 3 S.C.R. 307, 2002 SCC 63; Franco v. White (2001), 53 O.R. (3d) 391; Bomac Construction Ltd. v. Stevenson, [1986] 5 W.W.R. 21; Bjarnarson v. Government of Manitoba (1987), 38 D.L.R. (4th) 32, aff'd (1987), 21 C.P.C. (2d) 302; R. v. McIlkenny (1991), 93 Cr. App. R. 287; United States v. Burns, [2001] 1 S.C.R. 283, 2001 SCC 7; R. v. Bromley (2001), 151 C.C.C. (3d) 480; Q. v. Minto Management Ltd. (1984), 46 O.R. (2d) 756; Nigro v. Agnew-Surpass Shoe Stores Ltd. (1977), 18 O.R. (2d) 215, aff'd (1978), 18 O.R. (2d) 714; Germscheid v. Valois (1989), 68 O.R. (2d) 670; Simpson v. Geswein (1995), 25 C.C.L.T. (2d) 49; Roenisch v. Roenisch (1991), 85 D.L.R. (4th) 540; Saskatoon Credit Union, Ltd. v. Central Park Enterprises Ltd. (1988), 47 D.L.R. (4th) 431; Canadian Tire Corp. v. Summers (1995), 23 O.R. (3d) 106.

By LeBel J.

Referred to: Chamberlain v. Surrey School District No. 36, [2002] 4 S.C.R. 710, 2002 SCC 86; Ontario v. O.P.S.E.U., [2003] 3 S.C.R. 149, 2003 SCC 64; C.U.P.E. v. Ontario (Minister of Labour), [2003] 1 S.C.R. 539, 2003 SCC 29; Dr. Q v. College of Physicians and Surgeons of British Columbia, [2003] 1 S.C.R. 226, 2003 SCC 19; Miller v. Workers' Compensation Commission (Nfld.) (1997), 154 Nfld. & P.E.I.R. 52; Toronto (City) Board of Education v. O.S.S.T.F., District 15, [1997] 1 S.C.R. 487; Canada (Attorney General) v. Public Service Alliance of Canada, [1993] 1 S.C.R. 941; Ivanhoe inc. v. UFCW, Local 500, [2001] 2 S.C.R. 565, 2001 SCC 47; Canadian Broadcasting Corp. v. Canada (Labour Relations Board), [1995] 1 S.C.R. 157; Pushpanathan v. Canada (Minister of Citizenship and Immigration), [page83] [1998] 1 S.C.R. 982; Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748; Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557; National Corn Growers Assn. v. Canada (Import Tribunal), [1990] 2 S.C.R. 1324; Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554; Pasiechnyk v. Saskatchewan (Workers' Compensation Board), [1997] 2 S.C.R. 890; Macdonell v. Quebec (Commission d'accès à l'information), [2002] 3 S.C.R. 661, 2002 SCC 71; Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227; Law Society of New Brunswick v. Ryan, [2003] 1 S.C.R. 247, 2003 SCC 20; Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association, [1975] 1 S.C.R. 382; Anisminic Ltd. v. Foreign Compensation Commission, [1969] 2 A.C. 147; Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796, [1970] S.C.R. 425; CAIMAW v. Paccar of Canada Ltd., [1989] 2 S.C.R. 983; Canadian Union of Public Employees, Local 301 v. Montreal (City), [1997] 1 S.C.R. 793; Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles), [1993] 2 S.C.R. 756; Canada Safeway Ltd. v. RWDSU, Local 454, [1998] 1 S.C.R. 1079; Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740, [1990] 3 S.C.R. 644; Hao v. Canada (Minister of Citizenship and Immigration) (2000), 184 F.T.R. 246; United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd., [1993] 2 S.C.R. 316; Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817; Reference re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753; Reference re Secession of Quebec, [1998] 2 S.C.R. 217.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms.

Evidence Act, R.S.O. 1990, c. E.23, s. 22.1 [ad. 1995, c. 6, s. 6(3)].

Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A, s. 48(1).

Authors Cited

Allars, Margaret. "On Deference to Tribunals, With Deference to Dworkin" (1994), 20 Queen's L.J. 163.

Comtois, Suzanne. Vers la primauté de l'approche pragmatique et fonctionnelle: Précis du contrôle judiciaire des décisions de fond rendues par les organismes administratifs. Cowansville, Qué.: Yvon Blais, 2003.

[page84]

Cowan, Jeff G. "The Standard of Review: The Common Sense Evolution?", paper presented to the Administrative Law Section Meeting, Ontario Bar Association, January 21, 2003.

Dyzenhaus, David. "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., The Province of Administrative Law. Oxford: Hart Publishing, 1997, 279.

Elliott, David W. "Suresh and the Common Borders of Administrative Law: Time for the Tailor?" (2002), 65 Sask. L. Rev. 469.

Evans, J. M., et al. Administrative Law: Cases, Text, and Materials, 3rd ed. Toronto: Emond Montgomery, 1989.

Falzon, Frank A. V. "Standard of Review on Judicial Review or Appeal", in Administrative Justice Review Background Papers: Background Papers prepared by Administrative Justice Project for the Attorney General of British Columbia, June 2002.

Garant, Patrice. Droit administratif, vol. 2, 4e éd. Cowansville, Qué.: Yvon Blais, 1996.

Holloway, Ian. "'A Sacred Right': Judicial Review of Administrative Action as a Cultural Phenomenon" (1993), 22 Man. L.J. 28.

Howard, M. N., Peter Crane and Daniel A. Hochberg. Phipson on Evidence, 14th ed. London: Sweet & Maxwell, 1990.

Jones, David Phillip. "Notes on Dr. Q and Ryan: Two More Decisions by the Supreme Court of Canada on the Standard of Review in Administrative Law", paper presented at the Canadian Institute for the Administration of Justice, Western Roundtable, Edmonton, April 25, 2003.

Lange, Donald J. The Doctrine of Res Judicata in Canada. Markham, Ont.: Butterworths, 2000.

Law Society of Upper Canada. Rules of Professional Conduct. Toronto: Law Society of Upper Canada, 2000.

Lovett, Deborah K. "That Curious Curial Deference Just Gets Curiouser and Curiouser — Canada (Director of Investigation and Research) v. Southam Inc." (1997), 55 Advocate (B.C.) 541.

MacLauchlan, H. Wade. "Transforming Administrative Law: The Didactic Role of the Supreme Court of Canada" (2001), 80 Can. Bar Rev. 281.

McLachlin, Beverley. "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998-1999), 12 C.J.A.L.P. 171.

Mullan, David J. Administrative Law. Toronto: Irwin Law, 2001.

Mullan, David J. "Of Chaff Midst the Corn: American Farm Bureau Federation v. Canada (Canadian Import [page85] Tribunal) and Patent Unreasonableness Review" (1991), 45 Admin. L.R. 264.

Mullan, David J. "Recent Developments in Standard of Review", in Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners. Canadian Bar Association (Ontario), October 20, 2000.

Paciocco, David M., and Lee Stuesser. The Law of Evidence, 3rd ed. Toronto: Irwin Law, 2002.

Perell, Paul M. "Res Judicata and Abuse of Process" (2001), 24 Advocates' Q. 189.

Perrault, Gabrielle. Le contrôle judiciaire des décisions de l'administration: De l'erreur juridictionnelle à la norme de contrôle. Montréal: Wilson & Lafleur, 2002.

Sossin, Lorne. "Developments in Administrative Law: The 1997-98 and 1998-99 Terms" (2000), 11 S.C.L.R. (2d) 37.

Sprague, James L. H. "Another View of Baker" (1999), 7 Reid's Administrative Law 163.

Sullivan, Ruth. Sullivan and Driedger on the Construction of Statutes, 4th ed. Markham, Ont.: Butterworths, 2002.

Teplitsky, Martin. "Prior Criminal Convictions: Are They Conclusive Proof? An Arbitrator's Perspective", in K. Whitaker et al., eds., Labour Arbitration Yearbook 2001-2002, vol. I. Toronto: Lancaster House, 2002, 279.

Watson, Garry D. "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990), 69 Can. Bar Rev. 623.

History and Disposition:

APPEAL from a judgment of the Ontario Court of Appeal (2001), 55 O.R. (3d) 541, 205 D.L.R. (4th) 280, 149 O.A.C. 213, 45 C.R. (5th) 354, 37 Admin. L.R. (3d) 40, 2002 CLLC para. 220-014, [2001] O.J. No. 3239 (QL), affirming a judgment of the Divisional Court (2000), 187 D.L.R. (4th) 323, 134 O.A.C. 48, 23 Admin. L.R. (3d) 72, 2000 CLLC para. 220-038, [2000] O.J. No. 1570 (QL). Appeal dismissed.

Counsel

Douglas J. Wray and Harold F. Caley, for the appellant.

Jason Hanson, Mahmud Jamal and Kari M. Abrams, for the respondent the City of Toronto.

No one appeared for the respondent Douglas C. Stanley.

[page86]

Sean Kearney, Mary Gersht and Meredith Brown, for the intervener.

The judgment of McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and Arbour JJ. was delivered by

ARBOUR J.

I. Introduction

1 Can a person convicted of sexual assault, and dismissed from his employment as a result, be reinstated by a labour arbitrator who concludes, on the evidence before him, that the sexual assault did not take place? This is essentially the issue raised in this appeal.

2 Like the Court of Appeal for Ontario and the Divisional Court, I have come to the conclusion that the arbitrator may not revisit the criminal conviction. Although my reasons differ somewhat from those of the courts below, I would dismiss the appeal.

II. Facts

3 Glenn Oliver worked as a recreation instructor for the respondent City of Toronto. He was charged with sexually assaulting a boy under his supervision. He pleaded not guilty. At trial before a judge alone, he testified and was cross-examined. He called several defence witnesses, including character witnesses. The trial judge found that the complainant was credible and that Oliver was not. He entered a conviction, which was later affirmed on appeal. He sentenced Oliver to 15 months in jail, followed by one year of probation.

4 The respondent City of Toronto fired Oliver a few days after his conviction, and Oliver grieved his dismissal. At the hearing, the City of Toronto submitted the boy's testimony from the criminal trial and the notes of Oliver's supervisor, who had spoken to the boy at the time. The City did not call the boy to [page87] testify. Oliver again testified on his own behalf and claimed that he had never sexually assaulted the boy.

5 The arbitrator ruled that the criminal conviction was admissible as *prima facie* but not conclusive evidence that Oliver had sexually assaulted the boy. No evidence of fraud nor any fresh evidence unavailable at trial was introduced in the arbitration. The arbitrator held that the presumption raised by the criminal conviction had been rebutted, and that Oliver had been dismissed without just cause.

III. Procedural History

A. *Superior Court of Justice (Divisional Court)* (2000), 187 D.L.R. (4th) 323

6 At Divisional Court the application for judicial review was granted and the decision of the arbitrator was quashed. The Divisional Court heard this case and *Ontario v. O.P.S.E.U.* at the same time. (*Ontario v. O.P.S.E.U.*, [2003] 3 S.C.R. 149, 2003 SCC 64, is being released concurrently by this Court.) O'Driscoll J. found that while s. 22.1 of the *Evidence Act*, R.S.O. 1990, c. E.23, applied to all the arbitrations, relitigation of the cases was barred by the doctrines of collateral attack, issue estoppel and abuse of process. The court noted that criminal convictions are valid judgments that cannot be collaterally attacked at a later arbitration (paras. 74-79). With respect to issue estoppel, under which an issue decided against a party is protected from collateral attack barring decisive new evidence or a showing of fraud, the court found that relitigation was also prevented, rejecting the appellant's argument that there had been no privity because the union, and not the grievor, had filed the grievance. The court also held that the doctrine of abuse of process, which denies a collateral attack upon a final decision of another court where the party had "a full opportunity of contesting the decision", applied (paras. 81 and 90). Finally, O'Driscoll J. found that whether the standard of review was correctness or patent unreasonableness in each [page88] case, the standard for judicial review had been met (para. 86).

B. *Court of Appeal for Ontario* (2001), 55 O.R. (3d) 541

7 Doherty J.A. for the court held that because the crux of the issue was whether the Canadian Union of Public Employees (CUPE or the union) was permitted to relitigate the issue decided in the criminal trial, and because this analysis "turned on [the arbitrator's] understanding of the common law rules and principles governing the relitigation of issues finally decided in a previous judicial proceeding", the appropriate standard of review was correctness (paras. 22 and 38).

8 Doherty J.A. concluded that issue estoppel did not apply. Even if the union was the employee's privy, the respondent City of Toronto had played no role in the criminal proceeding and had no relationship to the Crown. He also found that describing the appellant union's attempt to relitigate the employee's culpability as a collateral attack on the order of the court did not assist in determining whether relitigation could be permitted. Commenting that the phrase "abuse of process" was perhaps best limited to describe those cases where the plaintiff has instigated

litigation for some improper purpose, Doherty J.A. went on to consider what he called "the finality principle" in considerable depth.

9 Doherty J.A. dismissed the appeal on the basis of this principle. He held that the *res judicata* jurisprudence required a court to balance the importance of finality, which reduces uncertainty and inconsistency in results, and which serves to conserve the [page89] resources of both the parties and the judiciary, with the "search for justice in each individual case" (para. 94). Doherty J.A. held that the following approach should be taken when weighing finality claims against an individual litigant's claim to access to justice (at para. 100):

- Does the *res judicata* doctrine apply?
- If the doctrine applies, can the party against whom it applies demonstrate that the justice of the individual case should trump finality concerns?
- If the doctrine does not apply, can the party seeking to preclude relitigation demonstrate that finality concerns should be given paramountcy over the claim that justice requires relitigation?

10 Ultimately, Doherty J.A. dismissed the appeal, concluding that "finality concerns must be given paramountcy over CUPE's claim to an entitlement to relitigate Oliver's culpability" (para. 102). He so concluded because there was no suggestion of fraud at the criminal trial, because the underlying charges were serious enough that the employee was likely to have litigated them to the fullest, and because there was no new evidence presented at arbitration (paras. 103-108).

IV. Relevant Statutory Provisions

11 *Evidence Act*, R.S.O. 1990, c. E.23

> **22.1** (1) Proof that a person has been convicted or discharged anywhere in Canada of a crime is proof, in the absence of evidence to the contrary, that the crime was committed by the person, if,
>
> (a) no appeal of the conviction or discharge was taken and the time for an appeal has expired; or
>
> (b) an appeal of the conviction or discharge was taken but was dismissed or abandoned and no further appeal is available.
>
> [page90]
>
> (2) Subsection (1) applies whether or not the convicted or discharged person is a party to the proceeding.
>
> (3) For the purposes of subsection (1), a certificate containing the substance and effect only, omitting the formal part, of the charge and of the conviction or discharge, purporting to be signed by the officer having the custody of the records of the court at which the offender was convicted or discharged, or by the deputy of the officer, is, on proof of the identity of the person named as convicted or discharged person in the certificate, sufficient evidence of the conviction or discharge of that person, without proof of the signature or of the official character of the person appearing to have signed the certificate.

Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A

> **48.** (1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

V. Analysis

A. *Standard of Review*

12 My colleague LeBel J. discusses at length our jurisprudence on standards of review. He reviews concerns and criticisms about the three standard system of judicial review. Given that these issues were not argued before us in this case, and without the benefit of a full adversarial debate, I would not wish to comment on the desirability of a departure from our recently affirmed framework for standards of review analysis. (See this Court's unanimous

decisions of *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, and *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20.)

13 The Court of Appeal properly applied the functional and pragmatic approach as delineated in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 (see also [page91] *Dr. Q, supra*), to determine the extent to which the legislature intended that courts should review the tribunals' decisions.

14 Doherty J.A. was correct to acknowledge patent unreasonableness as the general standard of review of an arbitrator's decision as to whether just cause has been established in the discharge of an employee. However, and as he noted, the same standard of review does not necessarily apply to every ruling made by the arbitrator in the course of the arbitration. This follows the distinction drawn by Cory J. for the majority in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, where he said, at para. 39:

> It has been held on several occasions that the expert skill and knowledge which an arbitration board exercises in interpreting a collective agreement does not usually extend to the interpretation of "outside" legislation. The findings of a board pertaining to the interpretation of a statute or the common law are generally reviewable on a correctness standard.. . An exception to this rule may occur where the external statute is intimately connected with the mandate of the tribunal and is encountered frequently as a result. [Emphasis added.]

15 In this case, the reasonableness of the arbitrator's decision to reinstate the grievor is predicated on the correctness of his assumption that he was not bound by the criminal conviction. That assumption rested on his analysis of complex common law rules and of conflicting jurisprudence. The body of law dealing with the relitigation of issues finally decided in previous judicial proceedings is not only complex; it is also at the heart of the administration of justice. Properly understood and applied, the doctrines of *res judicata* and abuse of process govern the interplay between different judicial decision makers. These rules and principles call for a judicial balance between finality, fairness, efficiency and authority of judicial decisions. The application of these rules, doctrines and principles is clearly outside the sphere of expertise of a labour arbitrator who may be called to have recourse to them. In such a case, he or she [page92] must correctly answer the question of law raised. An incorrect approach may be sufficient to lead to a patently unreasonable outcome. This was reiterated recently by Iacobucci J. in *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42, at para. 21.

16 Therefore I agree with the Court of Appeal that the arbitrator had to decide correctly whether CUPE was entitled, either at common law or under a statute, to relitigate the issue decided against the grievor in the criminal proceedings.

B. *Section 22.1 of Ontario's Evidence Act*

17 Section 22.1 of the Ontario *Evidence Act* is of limited assistance to the disposition of this appeal. It provides that proof that a person has been convicted of a crime is proof, "in the absence of evidence to the contrary", that the crime was committed by that person.

18 As Doherty J.A. correctly pointed out, at para. 42, s. 22.1 contemplates that the validity of a conviction may be challenged in a subsequent proceeding, but the section says nothing about the circumstances in which such challenge is or is not permissible. That issue is determined by the application of such common law doctrines as *res judicata*, issue estoppel, collateral attack and abuse of process. Section 22.1 speaks of the admissibility of the fact of the conviction as proof of the truth of its content, and speaks of its conclusive effect if unchallenged. As a rule of evidence, the section addresses in part the hearsay rule, by making the conviction -- the finding of another court -- admissible for the truth of its content, as an exception to the inadmissibility of hearsay (D. M. Paciocco and L. Stuesser, *The Law of Evidence* (3rd ed. 2002), at p. 120; *Phipson on Evidence* (14th ed. 1990), at paras. 33-94 and 33-95).

19 Here, however, the admissibility of the conviction is not in issue. Section 22.1 renders the proof of the conviction admissible. The question is whether it can be rebutted by "evidence to the contrary". There are circumstances in which evidence will be admissible to rebut the presumption that the person convicted committed the crime, in particular where the conviction in issue is that of a non-party. There are also circumstances in which no such evidence may be tendered. If either issue estoppel or abuse of process bars the relitigation of the facts essential to the conviction, then no "evidence to the contrary" may be tendered to displace the effect of the conviction. In such a case, the conviction is conclusive that the person convicted committed the crime.

20 This interpretation is consistent with the rule of interpretation that legislation is presumed not to depart from general principles of law without an express indication to that effect. This presumption was reviewed and applied by Iacobucci J. in *Parry Sound, supra*, at para 39. Section 22.1 reflected the law established in the leading Canadian case of *Demeter v. British Pacific Life Insurance Co.* (1983), 150 D.L.R. (3d) 249 (Ont. H.C.), at p. 264, aff'd (1984), 48 O.R. (2d) 266 (C.A.), wherein after a thorough review of Canadian and English jurisprudence, Osler J. held that a criminal conviction is admissible in subsequent civil litigation as *prima facie* proof that the convicted individual committed the alleged act, "subject to rebuttal by the plaintiff on the merits". However, the common law also recognized that the presumption of guilt established by a conviction is rebuttable only where the rebuttal does not constitute an abuse of the process of the court (*Demeter* (H.C.), *supra*, at p. 265; *Hunter v. Chief Constable of the West Midlands Police*, [1982] A.C. 529 (H.L.), at p. 541; see also *Re Del Core and Ontario College of Pharmacists* (1985), 51 O.R. (2d) 1 (C.A.), at p. 22, *per* Blair J.A.). Section 22.1 does not change this; the legislature has not explicitly displaced the common law [page94] doctrines and the rebuttal is consequently subject to them.

21 The question therefore is whether any doctrine precludes in this case the relitigation of the facts upon which the conviction rests.

C. *The Common Law Doctrines*

22 Much consideration was given in the decisions below to the three related common law doctrines of issue estoppel, abuse of process and collateral attack. Each of these doctrines was considered as a possible means of preventing the union from relitigating the criminal conviction of the grievor before the arbitrator. Although both the Divisional Court and the Court of Appeal concluded that the union could not relitigate the guilt of the grievor as reflected in his criminal conviction, they took different views of the applicability of the different doctrines advanced in support of that conclusion. While the Divisional Court concluded that relitigation was barred by the collateral attack rule, issue estoppel and abuse of process, the Court of Appeal was of the view that none of these doctrines as they presently stand applied to bar the rebuttal. Rather, it relied on a self-standing "finality principle". I think it is useful to disentangle these various rules and doctrines before turning to the applicable one here. I stress at the outset that these common law doctrines are interrelated and in many cases more than one doctrine may support a particular outcome. Even though both issue estoppel and collateral attacks may properly be viewed as particular applications of a broader doctrine of abuse of process, the three are not always entirely interchangeable.

(1) Issue Estoppel

23 Issue estoppel is a branch of *res judicata* (the other branch being cause of action estoppel), which precludes the relitigation of issues previously decided [page95] in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies (*Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44, at para. 25, *per* Binnie J.). The final requirement, known as "mutuality", has been largely abandoned in the United States and has been the subject of much academic and judicial debate there as well as in the United Kingdom and, to some extent, in this country. (See G. D. Watson, " Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990), 69 *Can. Bar Rev.* 623, at pp. 648-51.) In light of the different conclusions reached by the courts below on the applicability of issue estoppel, I think it is useful to examine that debate more closely.

24 The first two requirements of issue estoppel are met in this case. The final requirement of mutuality of parties

has not been met. In the original criminal case, the *lis* was between Her Majesty the Queen in right of Canada and Glenn Oliver. In the arbitration, the parties were CUPE and the City of Toronto, Oliver's employer. It is unnecessary to decide whether Oliver and CUPE should reasonably be viewed as privies for the purpose of the application of the mutuality requirement since it is clear that the Crown, acting as prosecutor in the criminal case, is not privy with the City of Toronto, nor would it be with a provincial, rather than a municipal, employer (as in the *Ontario v. O.P.S.E.U.* case, released concurrently).

25 There has been much academic criticism of the mutuality requirement of the doctrine of issue estoppel. In his article, Professor Watson, *supra*, argues that explicitly abolishing the mutuality requirement, [page96] as has been done in the United States, would both reduce confusion in the law and remove the possibility that a strict application of issue estoppel may work an injustice. The arguments made by him and others (see also D. J. Lange, *The Doctrine of Res Judicata in Canada* (2000)), urging Canadian courts to abandon the mutuality requirement have been helpful in articulating a principled approach to the bar against relitigation. In my view, however, appropriate guidance is available in our law without the modification to the mutuality requirement that this case would necessitate.

26 In his very useful review of the abandonment of the mutuality requirement in the United States, Professor Watson, at p. 631, points out that mutuality was first relaxed when issue estoppel was used defensively:

> The defensive use of non-mutual issue estoppel is straight forward. If P, having litigated an issue with D1 and lost, subsequently sues D2 raising the same issue, D2 can rely defensively on the issue estoppel arising from the former action, unless the first action did not provide a full and fair opportunity to litigate or other factors make it unfair or unwise to permit preclusion. The rationale is that P should not be allowed to relitigate an issue already lost by simply changing defendants ... .

27 Professor Watson then exposes the additional difficulties that arise if the mutuality requirement is removed when issue estoppel is raised offensively, as was done by the United States Supreme Court in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). He describes the offensive use of non mutual issue estoppel as follows (at p. 631):

> The power of this offensive non-mutual issue estoppel doctrine is illustrated by single event disaster cases, such as an airline crash. Assume P1 sues Airline for negligence in the operation of the aircraft and in that action Airline is found to have been negligent. Offensive non-mutual issue estoppel permits P2 through P20, *etc*., now to sue Airline and successfully plead issue estoppel on the question of the airline's negligence. The rationale is that if Airline fully and fairly litigated the issue of its negligence in action #1 it has had its day in court; it has had due [page97] process and it should not be permitted to re-litigate the negligence issue. However, the court in *Parklane* realized that in order to ensure fairness in the operation of offensive non-mutual issue estoppel the doctrine has to be subject to qualifications.

28 Properly understood, our case could be viewed as falling under this second category -- what would be described in U.S. law as "non-mutual offensive preclusion". Although technically speaking the City of Toronto is not the "plaintiff" in the arbitration proceedings, the City wishes to take advantage of the conviction obtained by the Crown against Oliver in a different, prior proceeding to which the City was not a party. It wishes to preclude Oliver from relitigating an issue that he fought and lost in the criminal forum. U.S. law acknowledges the peculiar difficulties with offensive use of non-mutual estoppel. Professor Watson explains, at pp. 632-33:

> First, the court acknowledged that the effects of non-mutuality differ depending on whether issue estoppel is used offensively or defensively. While defensive preclusion helps to reduce litigation offensive preclusion, by contrast, encourages potential plaintiffs not to join in the first action. "Since a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a 'wait and see' attitude, in the hope that the first action by another plaintiff will result in a favorable judgment". Thus, without some limit, non-mutual offensive preclusion would increase rather than decrease the total amount of litigation. To meet this problem the *Parklane* court held that preclusion should be denied in action #2 "where a plaintiff could easily have joined in the earlier action".

> Second, the court recognized that in some circumstances to permit non-mutual preclusion "would be unfair to the defendant" and the court referred to specific situations of unfairness: (a) the defendant may have had little incentive to defend vigorously the first action, that [page98] is, if she was sued for small or nominal damages, particularly if future suits were not foreseeable; (b) offensive preclusion may be unfair if the judgment relied upon as a basis for estoppel is itself inconsistent with one or more previous judgments in favour of the defendant; or (c) the second action affords to the defendant procedural opportunities unavailable in the first action that could readily result in a different outcome, that is, where the defendant in the first action was forced to defend in an inconvenient forum and was unable to call witnesses, or where in the first action much more limited discovery was available to the defendant than in the second action.
>
> In the final analysis the court declared that the general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed or for other reasons, the application of offensive estoppel would be unfair to the defendant, a trial judge should not allow the use of offensive collateral estoppel.

29 It is clear from the above that American non-mutual issue estoppel is not a mechanical, self-applying rule as evidenced by the discretionary elements which may militate against granting the estoppel. What emerges from the American experience with the abandonment of mutuality is a twofold concern: (1) the application of the estoppel must be sufficiently principled and predictable to promote efficiency; and (2) it must contain sufficient flexibility to prevent unfairness. In my view, this is what the doctrine of abuse of process offers, particularly, as here, where the issue involves a conviction in a criminal court for a serious crime. In a case such as this one, the true concerns are not primarily related to mutuality. The true concerns, well reflected in the reasons of the Court of Appeal, are with the integrity and the coherence of the administration of justice. This will often be the case when the estoppel originates from a finding made in a criminal case where many of the traditional concerns related to mutuality lose their significance.

30 For example, there is little relevance to the concern about the "wait and see" plaintiff, the "free [page99] rider" who will deliberately avoid the risk of joining the original litigation, but will later come forward to reap the benefits of the victory obtained by the party who should have been his co-plaintiff. No such concern can ever arise when the original action is in a criminal prosecution. Victims cannot, even if they wanted to, "join in" the prosecution so as to have their civil claim against the accused disposed of in a single trial. Nor can employers "join in" the criminal prosecution to have their employee dismissed for cause.

31 On the other hand, even though no one can join the prosecution, the prosecutor as a party represents the public interest. He or she represents a collective interest in the just and correct outcome of the case. The prosecutor is said to be a minister of justice who has nothing to win or lose from the outcome of the case but who must ensure that a just and true verdict is rendered. (See Law Society of Upper Canada, *Rules of Professional Conduct* (2000), Commentary Rule 4.01(3), at p. 61; *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12; *Lemay v. The King*, [1952] 1 S.C.R. 232, at pp. 256-57, *per* Cartwright J.; and *R. v. Banks*, [1916] 2 K.B. 621 (C.C.A.), at p. 623.) The mutuality requirement of the doctrine of issue estoppel, which insists that only the Crown and its privies be precluded from relitigating the guilt of the accused, is hardly reflective of the true role of the prosecutor.

32 As the present case illustrates, the primary concerns here are about the integrity of the criminal process and the increased authority of a criminal verdict, rather than some of the more traditional issue estoppel concerns that focus on the interests of the parties, such as costs and multiple "vexation". For these reasons, I see no need to reverse or relax the long-standing application of the mutuality requirement in this case and I would conclude that issue estoppel has no application. I now turn to the question of whether the decision of the [page100] arbitrator amounted to a collateral attack on the verdict of the criminal court.

(2) Collateral Attack

33 The rule against collateral attack bars actions to overturn convictions when those actions take place in the wrong forum. As stated in *Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 599, the rule against collateral attack

> has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally -- and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

Thus, in *Wilson, supra*, the Court held that an inferior court judge was without jurisdiction to pass on the validity of a wiretap authorized by a superior court. Other cases that form the basis for this rule similarly involve attempts to overturn decisions in other fora, and not simply to relitigate their facts. In *R. v. Sarson*, [1996] 2 S.C.R. 223, at para. 35, this Court held that a prisoner's *habeas corpus* attack on a conviction under a law later declared unconstitutional must fail under the rule against collateral attack because the prisoner was no longer "in the system" and because he was "in custody pursuant to the judgment of a court of competent jurisdiction". Similarly, in *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706, this Court held that a mine owner who had chosen to ignore an administrative appeals process for a pollution fine was barred from contesting the validity of that fine in court because the legislation directed appeals to an appellate administrative body, not to the courts. Binnie J. described the rule against collateral attack in *Danyluk, supra*, at para. 20, as follows: "that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in [page101] subsequent proceedings except those provided by law for the express purpose of attacking it" (emphasis added).

34 Each of these cases concerns the appropriate forum for collateral attacks upon the judgment itself. However, in the case at bar, the union does not seek to overturn the sexual abuse conviction itself, but simply contest, for the purposes of a different claim with different legal consequences, whether the conviction was correct. It is an implicit attack on the correctness of the factual basis of the decision, not a contest about whether that decision has legal force, as clearly it does. Prohibited "collateral attacks" are abuses of the court's process. However, in light of the focus of the collateral attack rule on attacking the order itself and its legal effect, I believe that the better approach here is to go directly to the doctrine of abuse of process.

(3) Abuse of Process

35 Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007:

> ... abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of [page102] oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

36 The doctrine of abuse of process is used in a variety of legal contexts. The unfair or oppressive treatment of an accused may disentitle the Crown to carry on with the prosecution of a charge: *Conway, supra*, at p. 1667. In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, this Court held that unreasonable delay causing serious prejudice could amount to an abuse of process. When the *Canadian Charter of Rights and Freedoms* applies, the common law doctrine of abuse of process is subsumed into the principles of the *Charter* such that there is often overlap between abuse of process and constitutional remedies (*R. v. O'Connor*, [1995] 4 S.C.R. 411). The doctrine nonetheless continues to have application as a non-*Charter* remedy: *United States of America v. Shulman*, [2001] 1 S.C.R. 616, 2001 SCC 21, at para. 33.

37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would ... bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting

(approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:

> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
>
> [page103]
>
> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis added.]

As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. (See, for example, *Franco v. White* (2001), 53 O.R. (3d) 391 (C.A.); *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.); and *Bjarnarson v. Government of Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), aff'd (1987), 21 C.P.C. (2d) 302 (Man. C.A.).) This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is in effect non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (Watson, *supra*, at pp. 624-25).

38 It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one (Lange, *supra*, at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (Lange, *supra*, at pp. 347-48):

> The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application [page104] of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

39 The *locus classicus* for the modern doctrine of abuse of process and its relationship to *res judicata* is *Hunter, supra*, aff'g *McIlkenny v. Chief Constable of the West Midlands*, [1980] Q.B. 283 (C.A.) . The case involved an action for damages for personal injuries brought by the six men convicted of bombing two pubs in Birmingham. They claimed that they had been beaten by the police during their interrogation. The plaintiffs had raised the same issue at their criminal trial, where it was found by both the judge and jury that the confessions were voluntary and that the police had not used violence. At the Court of Appeal, Lord Denning, M.R., endorsed non-mutual issue estoppel and held that the question of whether any beatings had taken place was estopped by the earlier determination, although it was raised here against a different opponent. He noted that in analogous cases, courts had sometimes refused to allow a party to raise an issue for a second time because it was an "abuse of the process of the court", but held that the proper characterization of the matter was through non-mutual issue estoppel.

40 On appeal to the House of Lords, Lord Denning's attempt to reform the law of issue estoppel was overruled, but the higher court reached the same result via the doctrine of abuse of process. Lord Diplock stated, at p. 541:

> The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in [page105] previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

41 It is important to note that a public inquiry after the civil action of the six accused in *Hunter, supra*, resulted in the finding that the confessions of the Birmingham six had been extracted through police brutality (see *R. v. McIlkenny* (1991), 93 Cr. App. R. 287 (C.A.), at pp. 304 *et seq*.). In my view, this does not support a relaxation of the existing procedural mechanisms designed to ensure finality in criminal proceedings. The danger of wrongful convictions has been acknowledged by this Court and other courts (see *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7, at para. 1; and *R. v. Bromley* (2001), 151 C.C.C. (3d) 480 (Nfld. C.A.), at pp. 517-18). Although safeguards must be put in place for the protection of the innocent, and, more generally, to ensure the trustworthiness of court findings, continuous re-litigation is not a guarantee of factual accuracy.

42 The attraction of the doctrine of abuse of process is that it is unencumbered by the specific requirements of *res judicata* while offering the discretion to prevent relitigation, essentially for the purpose of preserving the integrity of the court's process. (See Doherty J.A.'s reasons, at para. 65; see also *Demeter* (H.C.), *supra*, at p. 264, and *Hunter, supra*, at p. 536.)

43 Critics of that approach have argued that when abuse of process is used as a proxy for issue estoppel, it obscures the true question while adding nothing but a vague sense of discretion. I disagree. At least in the context before us, namely, an attempt to relitigate a criminal conviction, I believe that abuse of process is a doctrine much more responsive to the real concerns at play. In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts. Whether it serves to disentitle the Crown from proceeding because of undue delays (see *Blencoe, supra*), or whether it prevents a civil party from using the courts for an improper purpose (see *Hunter, supra*, and *Demeter, supra*), the focus is less [page106] on the interest of parties and more on the integrity of judicial decision making as a branch of the administration of justice. In a case such as the present one, it is that concern that compels a bar against relitigation, more than any sense of unfairness to a party being called twice to put its case forward, for example. When that is understood, the parameters of the doctrine become easier to define, and the exercise of discretion is better anchored in principle.

44 The adjudicative process, and the importance of preserving its integrity, were well described by Doherty J.A. He said, at para. 74:

> The adjudicative process in its various manifestations strives to do justice. By the adjudicative process, I mean the various courts and tribunals to which individuals must resort to settle legal disputes. Where the same issues arise in various forums, the quality of justice delivered by the adjudicative process is measured not by reference to the isolated result in each forum, but by the end result produced by the various processes that address the issue. By justice, I refer to procedural fairness, the achieving of the correct result in individual cases and the broader perception that the process as a whole achieves results which are consistent, fair and accurate.

45 When asked to decide whether a criminal conviction, *prima facie* admissible in a proceeding under s. 22.1 of the Ontario *Evidence Act*, ought to be rebutted or taken as conclusive, courts will turn to the doctrine of abuse of process to ascertain whether relitigation would be detrimental to the adjudicative process as defined above. When the focus is thus properly on the integrity of the adjudicative process, the motive of the party who seeks to relitigate, or whether he or she wishes to do so as a defendant rather than as a plaintiff, cannot be decisive factors in the application of the bar against relitigation.

46 Thus, in the case at bar, it matters little whether Oliver's motive for relitigation was primarily to [page107] secure re-employment, rather than to challenge his criminal conviction in an attempt to undermine its validity. Reliance on *Hunter, supra*, and on *Demeter* (H.C.), *supra*, for the purpose of enhancing the importance of motive is misplaced. It is true that in both cases the parties wishing to relitigate had made it clear that they were seeking to impeach their earlier convictions. But this is of little significance in the application of the doctrine of abuse of process. A desire to attack a judicial finding is not in itself an improper purpose. The law permits that objective to be pursued through various reviewing mechanisms such as appeals or judicial review. Indeed reviewability is an important aspect of finality. A decision is final and binding on the parties only when all available reviews have been exhausted or

abandoned. What is improper is to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum. Therefore, motive is of little or no import.

47 There is also no reason to constrain the doctrine of abuse of process only to those cases where the plaintiff has initiated the relitigation. The designation of the parties to the second litigation may mask the reality of the situation. In the present case, for instance, aside from the technical mechanism of the grievance procedures, who should be viewed as the initiator of the employment litigation between the grievor, Oliver, and his union on the one hand, and the City of Toronto on the other? Technically, the union is the "plaintiff" in the arbitration procedure. But the City of Toronto used Oliver's criminal conviction as a basis for his dismissal. I cannot see what difference it makes, again from the point of view of the integrity of the adjudicative process, whether Oliver is labelled a plaintiff or a defendant when it comes to relitigating his criminal conviction.

48 The appellant relies on *Re Del Core, supra*, to suggest that the abuse of process doctrine only applies to plaintiffs. *Re Del Core*, however, provided no majority opinion as to whether and when public policy would preclude relitigation of issues [page108] determined in a criminal proceeding. For one, Blair J.A. did not limit the circumstances in which relitigation would amount to an abuse of process to those cases in which a person convicted sought to relitigate the validity of his conviction in subsequent proceedings which he himself had instituted (at p. 22):

> The right to challenge a conviction is subject to an important qualification. A convicted person cannot attempt to prove that the conviction was wrong in circumstances where it would constitute an abuse of process to do so.. . . Courts have rejected attempts to relitigate the very issues dealt with at a criminal trial where the civil proceedings were perceived to be a collateral attack on the criminal conviction. The ambit of this qualification remains to be determined ... . [Emphasis added.]

49 While the authorities most often cited in support of a court's power to prevent relitigation of decided issues in circumstances where issue estoppel does not apply are cases where a convicted person commenced a civil proceeding for the purpose of attacking a finding made in a criminal proceeding against that person (namely *Demeter* (H.C.), *supra*, and *Hunter, supra*; see also *Q. v. Minto Management Ltd.* (1984), 46 O.R. (2d) 756 (H.C.), *Franco, supra*, at paras. 29-31), there is no reason in principle why these rules should be limited to such specific circumstances. Several cases have applied the doctrine of abuse of process to preclude defendants from relitigating issues decided against them in a prior proceeding. See for example *Nigro v. Agnew-Surpass Shoe Stores Ltd.* (1977), 18 O.R. (2d) 215 (H.C.), at p. 218, aff'd without reference to this point (1978), 18 O.R. (2d) 714 (C.A.); *Bomac, supra*, at pp. 26-27; *Bjarnarson, supra*, at p. 39; *Germscheid v. Valois* (1989), 68 O.R. (2d) 670 (H.C.); *Simpson v. Geswein* (1995), 25 C.C.L.T. (2d) 49 (Man. Q.B.), at p. 61; *Roenisch v. Roenisch* (1991), 85 D.L.R. (4th) 540 (Alta. Q.B.), at p. 546; *Saskatoon Credit Union, Ltd. v. Central Park Enterprises Ltd.* (1988), 47 D.L.R. (4th) 431 (B.C.S.C.), at p. 438; *Canadian Tire Corp. v. Summers* (1995), 23 O.R. (3d) 106 (Gen. Div.), at p. 115; see also [page109] P. M. Perell, "Res Judicata and Abuse of Process" (2001), 24 *Advocates' Q.* 189, at pp. 196-97; and Watson, *supra*, at pp. 648-51.

50 It has been argued that it is difficult to see how mounting a defence can be an abuse of process (see M. Teplitsky, "Prior Criminal Convictions: Are They Conclusive Proof? An Arbitrator's Perspective", in K. Whitaker et al., eds., *Labour Arbitration Yearbook 2001-2002* (2002), vol. I, 279). A common justification for the doctrine of *res judicata* is that a party should not be twice vexed in the same cause, that is, the party should not be burdened with having to relitigate the same issue (Watson, *supra*, at p. 633). Of course, a defendant may be quite pleased to have another opportunity to litigate an issue originally decided against him. A proper focus on the process, rather than on the interests of a party, will reveal why relitigation should not be permitted in such a case.

51 Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue,

the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

52 In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that [page110] from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk, supra*, at para. 80.

53 The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against relitigation, either through the doctrine of *res judicata* or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision (*Danyluk, supra*, at para. 51; *Franco, supra*, at para. 55).

54 These considerations are particularly apposite when the attempt is to relitigate a criminal conviction. Casting doubt over the validity of a criminal conviction is a very serious matter. Inevitably in a case such as this one, the conclusion of the arbitrator has precisely that effect, whether this was intended [page111] or not. The administration of justice must equip itself with all legitimate means to prevent wrongful convictions and to address any real possibility of such an occurrence after the fact. Collateral attacks and relitigation, however, are not in my view appropriate methods of redress since they inordinately tax the adjudicative process while doing nothing to ensure a more trustworthy result.

55 In light of the above, it is apparent that the common law doctrines of issue estoppel, collateral attack and abuse of process adequately capture the concerns that arise when finality in litigation must be balanced against fairness to a particular litigant. There is therefore no need to endorse, as the Court of Appeal did, a self-standing and independent "finality principle" either as a separate doctrine or as an independent test to preclude relitigation.

D. *Application of Abuse of Process to Facts of the Appeal*

56 I am of the view that the facts in this appeal point to the blatant abuse of process that results when relitigation of this sort is permitted. The grievor was convicted in a criminal court and he exhausted all his avenues of appeal. In law, his conviction must stand, with all its consequent legal effects. Yet as pointed out by Doherty J.A. (at para. 84):

> Despite the arbitrator's insistence that he was not passing on the correctness of the decision made by Ferguson J., that is exactly what he did. One cannot read the arbitrator's reasons without coming to the conclusion that he was convinced that the criminal proceedings were badly flawed and that Oliver was wrongly convicted. This conclusion, reached in proceedings to which the prosecution was not even a party, could only undermine the integrity of the criminal justice system. The reasonable observer would wonder how Oliver could be found guilty beyond a reasonable doubt in one proceeding and after the Court of Appeal had affirmed that finding, be found in a separate proceeding not to have committed the very same assault. That reasonable observer would also not understand how Oliver could be found to be properly convicted of [page112] sexually assaulting the complainant and deserving of 15 months in jail and yet also be found in a separate proceeding not to have committed that sexual assault and to be deserving of reinstatement in a job which would place young persons like the complainant under his charge.

57 As a result of the conflicting decisions, the City of Toronto would find itself in the inevitable position of having a convicted sex offender reinstated to an employment position where he would work with the very vulnerable young people he was convicted of assaulting. An educated and reasonable public would presumably have to assess the likely correctness of one or the other of the adjudicative findings regarding the guilt of the convicted grievor. The authority and finality of judicial decisions are designed precisely to eliminate the need for such an exercise.

58 In addition, the arbitrator is considerably less well equipped than a judge presiding over a criminal court -- or the jury --, guided by rules of evidence that are sensitive to a fair search for the truth, an exacting standard of proof and expertise with the very questions in issue, to come to a correct disposition of the matter. Yet the arbitrator's conclusions, if challenged, may give rise to a less searching standard of review than that of the criminal court judge. In short, there is nothing in a case like the present one that militates against the application of the doctrine of abuse of process to bar the relitigation of the grievor's criminal conviction. The arbitrator was required as a matter of law to give full effect to the conviction. As a result of that error of law, the arbitrator reached a patently unreasonable conclusion. Properly understood in the light of correct legal principles, the evidence before the arbitrator could only lead him to conclude that the City of Toronto had established just cause for Oliver's dismissal.

VI. Disposition

59 For these reasons, I would dismiss the appeal with costs.

[page113]

The reasons of LeBel and Deschamps JJ. were delivered by

LeBEL J.

I. Introduction

60 I have had the benefit of reading Arbour J.'s reasons and I concur with her disposition of the case. I agree that this case is appropriately decided on the basis of the doctrine of abuse of process, rather than the narrower and more technical doctrines of either collateral attack or issue estoppel. I also agree that the appropriate standard of review for the question of whether a criminal conviction may be relitigated in a grievance proceeding is correctness. This is a question of law requiring an arbitrator to interpret not only the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, but also the *Evidence Act*, R.S.O. 1990, c. E.23, as well as to rule on the applicability of a number of common law doctrines dealing with relitigation, an issue that is, as Arbour J. notes, at the heart of the administration of justice. Finally, I agree that the arbitrator's determination in this case that Glenn Oliver's criminal conviction could indeed be relitigated during the grievance proceeding was incorrect. As a matter of law, the arbitrator was required to give full effect to Oliver's conviction. His failure to do so was sufficient to render his ultimate decision that Oliver had been dismissed without just cause -- a decision squarely within the arbitrator's area of specialized expertise and thus reviewable on a deferential standard -- patently unreasonable, according to the jurisprudence of our Court.

61 While I agree with Arbour J.'s disposition of the appeal, I am of the view that the administrative law aspects of this case require further discussion. In my concurring reasons in *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, [page114] 2002 SCC 86 , I raised concerns about the appropriateness of treating the pragmatic and functional methodology as an overarching analytical framework for substantive judicial review that must be applied, without variation, in all administrative law contexts, including those involving non-adjudicative decision makers. In certain circumstances, such as those at issue in *Chamberlain* itself, applying this methodological approach in order to determine the appropriate standard of review may in fact obscure the real issue before the reviewing court.

62 In the instant appeal and the appeal in *Ontario v. O.P.S.E.U.*, [2003] 3 S.C.R. 149, 2003 SCC 64 , released concurrently, both of which involve judicial review of adjudicative decision makers, my concern is not with the applicability of the pragmatic and functional approach itself. Having said this, I would note that in a case such as

this one, where the question at issue is so clearly a question of law that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise , it is unnecessary for the reviewing court to perform a detailed pragmatic and functional analysis in order to reach a standard of review of correctness. Indeed, in such circumstances reviewing courts should avoid adopting a mechanistic approach to the determination of the appropriate standard of review, which risks reducing the pragmatic and functional analysis from a contextual, flexible framework to little more than a *pro forma* application of a checklist of factors (see *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29, at para. 149 ; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 26; *Chamberlain, supra*, at para. 195, *per* LeBel J.).

63 The more particular concern that emerges out of this case and *Ontario v. O.P.S.E.U.* relates to what in my view is growing criticism with the ways in which the standards of review currently available within the [page115] pragmatic and functional framework are conceived of and applied. Academic commentators and practitioners have raised some serious questions as to whether the conceptual basis for each of the existing standards has been delineated with sufficient clarity by this Court, with much of the criticism directed at what has been described as "epistemological" confusion over the relationship between patent unreasonableness and reasonableness *simpliciter* (see, for example, D. J. Mullan, "Recent Developments in Standard of Review", in Canadian Bar Association (Ontario), *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners* (2000), at p. 26; J. G. Cowan, "The Standard of Review: The Common Sense Evolution?", paper presented to the Administrative Law Section Meeting, Ontario Bar Association, January 21, 2003, at p. 28; F. A. V. Falzon, "Standard of Review on Judicial Review or Appeal", in *Administrative Justice Review Background Papers: Background Papers prepared by Administrative Justice Project for the Attorney General of British Columbia* (2002), at pp. 32-33). Reviewing courts too, have occasionally expressed frustration over a perceived lack of clarity in this area, as the comments of Barry J. in *Miller v. Workers' Compensation Commission (Nfld.)* (1997), 154 Nfld. & P.E.I.R. 52 (Nfld. S.C.T.D.), at para. 27, illustrate:

> In attempting to follow the court's distinctions between "patently unreasonable", "reasonable" and "correct", one feels at times as though one is watching a juggler juggle three transparent objects. Depending on the way the light falls, sometimes one thinks one can see the objects. Other times one cannot and, indeed, wonders whether there are really three distinct objects there at all.

64 The Court cannot remain unresponsive to sustained concerns or criticism coming from the legal community in relation to the state of Canadian jurisprudence in this important part of the law. It is true that the parties to this appeal made no submissions putting into question the standards of review jurisprudence. Nevertheless, at times, an in-depth discussion or review of the state of the law may become necessary despite the absence of particular [page116] representations in a specific case. Given its broad application, the law governing the standards of review must be predictable, workable and coherent. Parties to litigation often have no personal stake in assuring the coherence of our standards of review jurisprudence as a whole and the consistency of their application. Their purpose, understandably, is to show how the positions they advance conform with the law as it stands, rather than to suggest improvements of that law for the benefit of the common good. The task of maintaining a predictable, workable and coherent jurisprudence falls primarily on the judiciary, preferably with, but exceptionally without, the benefit of counsel. I would add that, although the parties made no submissions on the analysis that I propose to undertake in these reasons, they will not be prejudiced by it.

65 In this context, this case provides an opportunity to reevaluate the contours of the various standards of review, a process that in my view is particularly important with respect to patent unreasonableness. To this end, I review below:

- the interplay between correctness and patent unreasonableness both in the instant case and, more broadly, in the context of judicial review of adjudicative decision makers generally, with a view to elucidating the conflicted relationship between these two standards; and,
- the distinction between patent unreasonableness and reasonableness *simpliciter*, which, despite a number of attempts at clarification, remains a nebulous one.

66 As the analysis that follows indicates, the patent unreasonableness standard does not currently provide sufficiently clear parameters for reviewing courts to apply in assessing the decisions of administrative adjudicators. From the beginning, patent unreasonableness at times shaded uncomfortably into what should presumably be its antithesis, the correctness review. Moreover, it is increasingly difficult to distinguish from what is ostensibly its less [page117] deferential counterpart, reasonableness *simpliciter*. It remains to be seen how these difficulties can be addressed.

II. Analysis

A. *The Two Standards of Review Applicable in This Case*

67 Two standards of review are at issue in this case, and the use of correctness here requires some preliminary discussion. As I noted in brief above, certain fundamental legal questions -- for instance, constitutional and human rights questions and those involving civil liberties, as well as other questions that are of central importance to the legal system as a whole, such as the issue of relitigation -- typically fall to be decided on a correctness standard. Indeed, in my view, it will rarely be necessary for reviewing courts to embark on a comprehensive application of the pragmatic and functional approach in order to reach this conclusion. I would not, however, want either my comments in this regard or the majority reasons in this case to be taken as authority for the proposition that correctness is the appropriate standard whenever arbitrators or other specialized administrative adjudicators are required to interpret and apply general common law or civil law rules. Such an approach would constitute a broad expansion of judicial review under a standard of correctness and would significantly impede the ability of administrative adjudicators, particularly in complex and highly specialized fields such as labour law, to develop original solutions to legal problems, uniquely suited to the context in which they operate. In my opinion, in many instances the appropriate standard of review in respect of the application of general common or civil law rules by specialized adjudicators should not be one of correctness, but rather of reasonableness. I now turn to a brief discussion of the rationale behind this view.

[page118]

(1) The Correctness Standard of Review

68 This Court has repeatedly stressed the importance of judicial deference in the context of labour law. Labour relations statutes typically bestow broad powers on arbitrators and labour boards to resolve the wide range of problems that may arise in this field and protect the decisions of these adjudicators by privative clauses. Such legislative choices reflect the fact that, as Cory J. noted in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 35, the field of labour relations is "sensitive and volatile" and "[i]t is essential that there be a means of providing speedy decisions by experts in the field who are sensitive to the situation, and which can be considered by both sides to be final and binding" (see also *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 ("*PSAC*"), at pp. 960-61; and *Ivanhoe inc. v. UFCW, Local 500*, [2001] 2 S.C.R. 565, 2001 SCC 47, at para. 32). The application of a standard of review of correctness in the context of judicial review of labour adjudication is thus rare.

69 While in this case and in *Ontario v. O.P.S.E.U.* I agree that correctness is the appropriate standard of review for the arbitrator's decision on the relitigation question, I think it necessary to sound a number of notes of caution in this regard. It is important to stress, first, that while the arbitrator was required to be correct on this question of law, this did not open his decision as a whole to review on a correctness standard (see *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48). The arbitrator was entitled to deference in the determination of whether Oliver was dismissed without just cause. To say that, in the circumstances of this case, the arbitrator's incorrect decision on the question of law affected the overall reasonableness of his decision, is very different from saying that the arbitrator's finding on the ultimate [page119] question of just cause had to be correct. To fail to make this distinction would be to risk "substantially expand[ing] the scope of reviewability of administrative decisions, and unjustifiably so" (see *Canadian Broadcasting Corp., supra*, at para. 48).

70 Second, it bears repeating that the application of correctness here is very much a product of the nature of this

particular legal question: determining whether relitigating an employee's criminal conviction is permissible in an arbitration proceeding is a question of law involving the interpretation of the arbitrator's constitutive statute, an external statute, and a complex body of common law rules and conflicting jurisprudence. More than this, it is a question of fundamental importance and broad applicability, with serious implications for the administration of justice as a whole. It is, in other words, a question that engages the expertise and essential role of the courts. It is not a question on which arbitrators may be said to enjoy any degree of relative institutional competence or expertise. As a result, it is a question on which the arbitrator must be correct.

71 This Court has been very careful to note, however, that not all questions of law must be reviewed under a standard of correctness. As a prefatory matter, as the Court has observed, in many cases it will be difficult to draw a clear line between questions of fact, mixed fact and law, and law; in reality, such questions are often inextricably intertwined (see *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 37; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 , at para. 37). More to the point, as Bastarache J. stated in *Pushpanathan, supra*, "even pure questions of law may be granted a wide degree of deference where other factors of the pragmatic and functional analysis suggest that such deference is the legislative intention" [page120] (para. 37). The critical factor in this respect is expertise.

72 As Bastarache J. noted in *Pushpanathan, supra*, at para. 34, once a "broad relative expertise has been established", this Court has been prepared to show "considerable deference even in cases of highly generalized statutory interpretation where the instrument being interpreted is the tribunal's constituent legislation": see, for example, *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, and *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324. This Court has also held that, while administrative adjudicators' interpretations of external statutes "are generally reviewable on a correctness standard", an exception to this general rule may occur, and deference may be appropriate, where "the external statute is intimately connected with the mandate of the tribunal and is encountered frequently as a result": see *Toronto (City) Board of Education, supra*, at para. 39; *Canadian Broadcasting Corp., supra*, at para. 48. And, perhaps most importantly in light of the issues raised by this case, the Court has held that deference may be warranted where an administrative adjudicator has acquired expertise through its experience in the application of a general common or civil law rule in its specialized statutory context: see *Ivanhoe, supra*, at para. 26; L'Heureux-Dubé J. (dissenting) in *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at pp. 599-600, endorsed in *Pushpanathan, supra*, at para. 37.

73 In the field of labour relations, general common and civil law questions are often closely intertwined with the more specific questions of labour law. Resolving general legal questions may thus be an important component of the work of some administrative adjudicators in this field. To subject all such decisions to correctness review would be to expand the scope of judicial review considerably beyond what the legislature intended, fundamentally undermining the ability of labour adjudicators to develop [page121] a body of jurisprudence that is tailored to the specialized context in which they operate.

74 Where an administrative adjudicator must decide a general question of law in the course of exercising its statutory mandate, that determination will typically be entitled to deference (particularly if the adjudicator's decisions are protected by a privative clause), inasmuch as the general question of law is closely connected to the adjudicator's core area of expertise. This was essentiality the holding of this Court in *Ivanhoe, supra*. In *Ivanhoe*, after noting the presence of a privative clause, Arbour J. held that, while the question at issue involved both civil and labour law, the labour commissioners and the Labour Court were entitled to deference because "they have developed special expertise in this regard which is adapted to the specific context of labour relations and which is not shared by the courts" (para. 26; see also *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890). This appeal does not represent a departure from this general principle.

75 The final note of caution that I think must be sounded here relates to the application of two standards of review in this case. This Court has recognized on a number of occasions that it may, in certain circumstances, be appropriate to apply different standards of deference to different decisions taken by an administrative adjudicator in a single case (see *Pushpanathan, supra*, at para. 49 ; *Macdonell v. Quebec (Commission d'accès à l'information)*, [2002] 3 S.C.R. 661, 2002 SCC 71, at para. 58, *per* Bastarache and LeBel JJ., dissenting). This case provides an

example of one type of situation where this may be the proper approach. It involves a fundamental legal question falling outside the arbitrator's area of expertise. This legal question, though foundational to the decision as a whole, is easily differentiated from a second question on which the arbitrator was entitled to deference: the determination of whether there was just cause for Oliver's dismissal.

76 However, as I have noted above, the fact that the question adjudicated by the arbitrator in this case can [page122] be separated into two distinct issues, one of which is reviewable on a correctness standard, should not be taken to mean that this will often be the case. Such cases are rare; the various strands that go into a decision are more likely to be inextricably intertwined, particularly in a complex field such as labour relations, such that the reviewing court should view the adjudicator's decision as an integrated whole.

(2) The Patent Unreasonableness Standard of Review

77 In these reasons, I explore the way in which patent unreasonableness is currently functioning, having regard to the relationships between this standard and both correctness and reasonableness *simpliciter*. My comments in this respect are intended to have application in the context of judicial review of adjudicative administrative decision making.

(a) *The Definitions of Patent Unreasonableness*

78 This Court has set out a number of definitions of "patent unreasonableness", each of which is intended to indicate the high degree of deference inherent in this standard of review. There is some overlap between the definitions and they are often used in combination. I would characterize the two main definitional strands as, first, those that emphasize the magnitude of the defect necessary to render a decision patently unreasonable and, second, those that focus on the "immediacy or obviousness" of the defect, and thus the relative invasiveness of the review necessary to find it.

79 In considering the leading definitions, I would place in the first category Dickson J.'s (as he then was) statement in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp*., [1979] 2 S.C.R. 227 ("*CUPE*"), that a decision will only be patently unreasonable if it "cannot be rationally supported by the relevant legislation" (p. 237). Cory J.'s characterization in *PSAC, supra*, of patent unreasonableness as a "very strict test", [page123] which will only be met where a decision is "clearly irrational, that is to say evidently not in accordance with reason" (pp. 963-64), would also fit into this category (though it could, depending on how it is read, be placed in the second category as well).

80 In the second category, I would place Iacobucci J.'s description in *Southam, supra*, of a patently unreasonable decision as one marred by a defect that is characterized by its "immediacy or obviousness": "If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable" (para. 57).

81 More recently, in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, Iacobucci J. characterized a patently unreasonable decision as one that is "so flawed that no amount of curial deference can justify letting it stand", drawing on both of the definitional strands that I have identified in formulating this definition. He wrote, at para. 52:

> In *Southam, supra*, at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted "in the immediacy or obviousness of the defect". Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at pp. 963-64, *per* Cory J.; *Centre communautaire juridique de l'Estrie v. Sherbrooke (City)*, [1996] 3 S.C.R. 84, at paras. 9-12, *per* Gonthier J.). A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

[page124]

82 Similarly, in *C.U.P.E. v. Ontario, supra*, Binnie J. yoked together the two definitional strands, describing a patently unreasonable decision as "one whose defect is 'immedia[te] and obviou[s]' (*Southam, supra*, at para. 57), and so flawed in terms of implementing the legislative intent that no amount of curial deference can properly justify letting it stand (*Ryan, supra*, at para. 52)" (para. 165 (emphasis added)).

83 It has been suggested that the Court's various formulations of the test for patent unreasonableness are "not independent, alternative tests. They are simply ways of getting at the single question: What makes something patently unreasonable?" (*C.U.P.E. v. Ontario, supra*, at para. 20, *per* Bastarache J., dissenting). While this may indeed be the case, I nonetheless think it important to recognize that, because of what are in some ways subtle but nonetheless quite significant differences between the Court's various answers to this question, the parameters of "patent unreasonableness" are not as clear as they could be. This has contributed to the growing difficulties in the application of this standard that I discuss below.

(b) *The Interplay Between the Patent Unreasonableness and Correctness Standards*

84 As I observed in *Chamberlain, supra*, the difference between review on a standard of correctness and review on a standard of patent unreasonableness is "intuitive and relatively easy to observe" (*Chamberlain, supra*, at para. 204, *per* LeBel J.). These standards fall on opposite sides of the existing spectrum of curial deference, with correctness entailing an exacting review and patent unreasonableness leaving the issue in question to the near exclusive determination of the decision maker (see *Dr. Q, supra*, at para. 22). Despite the clear conceptual boundary between these two standards, however, the distinction between them is not always as readily discernable in practice as one would expect.

[page125]

(i) Patent Unreasonableness and Correctness in Theory

85 In terms of understanding the interplay between patent unreasonableness and correctness, it is of interest that, from the beginning, there seems to have been at least some conceptual uncertainty as to the proper breadth of patent unreasonableness review. In *CUPE, supra*, Dickson J. offered two characterizations of patent unreasonableness that tend to pull in opposite directions (see D. J. Mullan, *Administrative Law* (2001), at p. 69; see also H. W. MacLauchlan, "Transforming Administrative Law: The Didactic Role of the Supreme Court of Canada" (2001), 80 *Can. Bar Rev.* 281, at pp. 285-86).

86 Professor Mullan explains that, on the one hand, Dickson J. rooted review for patent unreasonableness in the recognition that statutory provisions are often ambiguous and thus may allow for multiple interpretations; the question for the reviewing court is whether the adjudicator's interpretation is one that can be "rationally supported by the relevant legislation" (*CUPE, supra*, at p. 237). On the other hand, Dickson J. also invoked an idea of patent unreasonableness as a threshold defined by certain nullifying errors, such as those he had previously enumerated in *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382 ("*Nipawin*") , at p. 389, and in *CUPE, supra*, at p. 237:

> ... acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting provisions of the Act so as to embark on an inquiry or answer a question not remitted to it.

87 Curiously, as Mullan notes, this list "repeats the list of 'nullifying' errors that Lord Reid laid out in the landmark House of Lords' judgment" in *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147. [page126] *Anisminic* "is usually treated as the foundation case in establishing in English law the reviewability of all issues of law on a correctness basis" (emphasis added), and, indeed, the Court "had cited with approval this portion of Lord Reid's judgment and deployed it to justify judicial intervention in a case described as the 'high water mark of activist' review in Canada: *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*", [1970]

S.C.R. 425 (see Mullan, *Administrative Law, supra*, at pp. 69-70; see also *National Corn Growers, supra*, at p. 1335, *per* Wilson J.).

88 In characterizing patent unreasonableness in *CUPE*, then, Dickson J. simultaneously invoked a highly deferential standard (choice among a range of reasonable alternatives) and a historically interventionist one (based on the presence of nullifying errors). For this reason, as Mullan acknowledges, "it is easy to see why Dickson J.'s use of [the quotation from *Anisminic*] is problematic" (Mullan, *Administrative Law, supra*, at p. 70) .

89 If Dickson J.'s reference to *Anisminic* in *CUPE, supra*, suggests some ambiguity as to the intended scope of "patent unreasonableness" review, later judgments also evidence a somewhat unclear relationship between patent unreasonableness and correctness in terms of establishing and, particularly, applying the methodology for review under the patent unreasonableness standard. The tension in this respect is rooted, in part, in differing views of the premise from which patent unreasonableness review should begin. A useful example is provided by *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983 ("*Paccar*").

90 In *Paccar*, Sopinka J. (Lamer J. (as he then was) concurring) described the proper approach under the patent unreasonableness standard as [page127] one in which the reviewing court first queries whether the administrative adjudicator's decision is correct: "curial deference does not enter the picture until the court finds itself in disagreement with the tribunal. Only then is it necessary to consider whether the error (so found) is within or outside the boundaries of reasonableness" (p. 1018). As Mullan has observed, this approach to patent unreasonableness raises concerns in that it not only conflicts "with the whole notion espoused by Dickson J. in [*CUPE, supra*] of there often being no single correct answer to statutory interpretation problems but it also assumes the primacy of the reviewing court over the agency or tribunal in the delineation of the meaning of the relevant statute" (Mullan, "Recent Developments in Standard of Review", *supra*, at p. 20).

91 In my view, this approach presents additional problems as well. Reviewing courts may have difficulty ruling that "an error has been committed but ... then do[ing] nothing to correct that error on the basis that it was not as big an error as it could or might have been" (see Mullan, "Recent Developments in Standard of Review", *supra*, at p. 20; see also D. J. Mullan, "Of Chaff Midst the Corn: American Farm Bureau Federation v. Canada (Canadian Import Tribunal) and Patent Unreasonableness Review" (1991), 45 Admin. L.R. 264, at pp. 269-70). Furthermore, starting from a finding that the adjudicator's decision is incorrect may colour the reviewing court's subsequent assessment of the reasonableness of competing interpretations (see M. Allars, "On Deference to Tribunals, With Deference to Dworkin" (1994), 20 Queen's L.J. 163, at p. 187). The result is that the critical distinction between that which is, in the court's eyes, "incorrect" and that which is "not rationally supportable" is undermined.

92 The alternative approach is to leave the "correctness" of the adjudicator's decision undecided (see Allars, *supra*, at p. 197). This is essentially the approach that La Forest J. (Dickson C.J. [page128] concurring) took to patent unreasonableness in *Paccar, supra*. He wrote, at pp. 1004 and 1005:

> The courts must be careful to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it.
>
> ...
>
> I do not find it necessary to conclusively determine whether the decision of the Labour Relations Board is "correct" in the sense that it is the decision I would have reached had the proceedings been before this Court on their merits. It is sufficient to say that the result arrived at by the Board is not patently unreasonable.

93 It is this theoretical view that has, at least for the most part, prevailed. As L'Heureux-Dubé J. observed in *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793 ("*CUPE, Local 301*"), "this Court has stated repeatedly, in assessing whether administrative action is patently unreasonable, the goal is not to review the decision or action on its merits but rather to determine whether it is patently unreasonable, given the statutory provisions governing the particular body and the evidence before it" (para. 53). Patent unreasonableness review, in other words, should not "become an avenue for the court's substitution of its own view" (*CUPE, Local*

301, supra, at para. 59; see also *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, at pp. 771 and 774-75).

94 This view was recently forcefully rearticulated in *Ryan, supra*. Iacobucci J. wrote, at paras. 50-51:

> [W]hen deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been... . The standard of reasonableness does not imply that a decision maker is merely afforded a "margin of error" around what the court believes is the correct result.
>
> [page129]
>
> ... Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness... . Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.

Though Iacobucci J.'s comments here were made in relation to reasonableness *simpliciter*, they are also applicable to the more deferential standard of patent unreasonableness.

95 I think it important to emphasize that neither the case at bar, nor the companion case of *Ontario v. O.P.S.E.U.*, should be misinterpreted as a retreat from the position that in reviewing a decision under the existing standard of patent unreasonableness, the court's role is not to identify the "correct" result. In each of these cases, there were two standards of review in play: there was a fundamental legal question on which the adjudicators were subject to a standard of correctness -- whether the employees' criminal convictions could be relitigated -- and there was a question at the core of the adjudicators' expertise on which they were subject to a standard of patent unreasonableness -- whether the employees had been dismissed for just cause. As Arbour J. has outlined, the adjudicators' failure to decide the fundamental relitigation question correctly was sufficient to lead to a patently unreasonable outcome. Indeed, in circumstances such as those at issue in the case at bar, this cannot but be the case: the adjudicators' incorrect decisions on the fundamental legal question provided the entire foundation on which their legal analyses, and their conclusions as to whether the employees were dismissed with just cause, were based. To pass a review for patent unreasonableness, a decision must be one that can be "rationally supported"; this standard cannot be met where, as here, what supports the adjudicator's decision -- indeed, what that decision is wholly premised on -- is a legal determination that the adjudicator was required, but failed, to decide correctly. To say, however, that in such circumstances a decision will be patently unreasonable -- a conclusion that flows from the applicability of two separate standards of review -- is very different from suggesting [page130] that a reviewing court, before applying the standard of patent unreasonableness, must first determine whether the adjudicator's decision is (in)correct or that in applying patent unreasonableness the court should ask itself at any point in the analysis what the correct decision would be. In other words, the application of patent unreasonableness itself is not, and should not be, understood to be predicated on a finding of incorrectness, for the reasons that I discussed above.

(ii) Patent Unreasonableness and Correctness in Practice

96 While the Court now tends toward the view that La Forest J. articulated in *Paccar*, at p. 1004 -- "courts must be careful [under a standard of patent unreasonableness] to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it" -- the tension between patent unreasonableness and correctness has not been completely resolved. Slippage between the two standards is still evident at times in the way in which patent unreasonableness is applied.

97 In analyzing a number of recent cases, commentators have pointed to both the intensity and the underlying character of the review in questioning whether the Court is applying patent unreasonableness in a manner that is in fact deferential. In this regard, the comments of Professor Lorne Sossin on the application of patent unreasonableness in *Canada Safeway Ltd. v. RWDSU, Local 454*, [1998] 1 S.C.R. 1079, are illustrative:

> Having established that deference was owed to the statutory interpretation of the Board, the Court proceeded to dissect its interpretation. The majority was of the view that the Board had misconstrued the term "constructive lay-off" and had failed to place sufficient emphasis on the terms of the collective

> agreement. The majority reasons convey clearly why the Court would adopt a different approach to the Board. They are less clear as to why the Board's approach lacked a rational foundation. Indeed, [page131] there is very little evidence of the Court according deference to the Board's interpretation of its own statute, or to its choice as to how much weight to place on the terms of the collective agreement. *Canada Safeway* raises the familiar question of how a court should demonstrate its deference, particularly in the labour relations context.
>
> (L. Sossin, "Developments in Administrative Law: The 1997-98 and 1998-99 Terms" (2000), 11 S.C.L.R. (2d) 37, at p. 49)

98 Professor Ian Holloway makes a similar observation with regard to *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644:

> In her judgment, [McLachlin J. (as she then was)] quoted from the familiar passages of *CUPE*, yet she ... reached her decision on the basis of a review of the case law. She did not ask whether, despite the fact that it differed from holdings in other jurisdictions, the conclusion of the Newfoundland Labour Relations Board could be "rationally supported" on the basis of the wording of the successorship provisions of the *Labour Relations Act*. Instead, she looked at whether the Board had reached the correct legal interpretation of the Act in the same manner that a court of appeal would determine whether a trial judge had made a correct interpretation of the law. In other words, she effectively *equated patent unreasonability with correctness at law.*
>
> (I. Holloway, "'A Sacred Right': Judicial Review of Administrative Action as a Cultural Phenomenon" (1993), 22 Man. L.J. 28, at pp. 64-65 (emphasis in original); see also Allars, *supra*, at p. 178.)

99 At times the Court's application of the standard of patent unreasonableness may leave it vulnerable to criticism that it may in fact be doing implicitly what it has rejected explicitly: intervening in decisions that are, in its view, incorrect, rather than limiting any intervention to those decisions that lack a rational foundation. In the process, what should be an indelible line between correctness, on the one hand, and patent unreasonableness, on the other, becomes blurred. It may very well be that review [page132] under any standard of reasonableness, given the nature of the intellectual process it involves, entails such a risk. Nevertheless, the existence of two standards of reasonableness appears to have magnified the underlying tension between the two standards of reasonableness and correctness.

(c) *The Relationship Between the Patent Unreasonableness and Reasonableness Simpliciter Standards*

100 While the conceptual difference between review on a correctness standard and review on a patent unreasonableness standard may be intuitive and relatively easy to observe (though in practice elements of correctness at times encroach uncomfortably into patent unreasonableness review), the boundaries between patent unreasonableness and reasonableness *simpliciter* are far less clear, even at the theoretical level.

(i) <u>The Theoretical Foundation for Patent Unreasonableness and Reasonableness *Simpliciter*</u>

101 The lack of sufficiently clear boundaries between patent unreasonableness and reasonableness *simpliciter* has its origins in the fact that patent unreasonableness was developed prior to the birth of the pragmatic and functional approach (see *C.U.P.E. v. Ontario, supra*, at para. 161) and, more particularly, prior to (rather than in conjunction with) the formulation of reasonableness *simpliciter* in *Southam, supra*. Because patent unreasonableness, as a posture of curial deference, was conceived in opposition only to a correctness standard of review, it was sufficient for the Court to emphasize in defining its scope the principle that there will often be no one interpretation that can be said to be correct in interpreting a statute or otherwise resolving a legal dispute, and that specialized administrative adjudicators may, in many circumstances, be better equipped than courts to choose between the possible interpretations. Where this is the case, provided that the adjudicator's decision is one that can be "rationally supported on a construction which the relevant legislation may reasonably be considered to bear", [page133] the reviewing court should not intervene (*Nipawin, supra*, at p. 389).

102 Upon the advent of reasonableness *simpliciter*, however, the validity of multiple interpretations became the underlying premise for this new variant of reasonableness review as well. Consider, for instance, the discussion of reasonableness *simpliciter* in *Ryan*, that I cited above:

> Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness... . Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.
>
> (*Ryan, supra*, at para. 51; see also para. 55.)

It is difficult to distinguish this language from that used to describe patent unreasonableness not only in the foundational judgments establishing that standard, such as *Nipawin, supra*, and *CUPE, supra*, but also in this Court's more contemporary jurisprudence applying it. In *Ivanhoe, supra*, for instance, Arbour J. stated that "the recognition by the legislature and the courts that there are many potential solutions to a dispute is the very essence of the patent unreasonableness standard of review, which would be meaningless if it was found that there is only one acceptable solution" (para. 116).

103 Because patent unreasonableness and reasonableness *simpliciter* are both rooted in this guiding principle, it has been difficult to frame the standards as analytically, rather than merely semantically, distinct. The efforts to sustain a workable distinction between them have taken, in the main, two forms, which mirror the two definitional strands of patent unreasonableness that I identified above. One of these forms distinguishes between patent unreasonableness and reasonableness *simpliciter* on the basis of the relative magnitude of the defect. The other looks to the "immediacy or obviousness" of the defect, and thus the relative invasiveness of the review necessary to [page134] find it. Both approaches raise their own problems.

(ii) The Magnitude of the Defect

104 In *PSAC, supra*, at pp. 963-64, Cory J. described a patently unreasonable decision in these terms:

> In the Shorter Oxford English Dictionary "patently", an adverb, is defined as "openly, evidently, clearly". "Unreasonable" is defined as "[n]ot having the faculty of reason; irrational... . Not acting in accordance with reason or good sense". Thus, based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction.

While this definition may not be inherently problematic, it has become so with the emergence of reasonableness *simpliciter*, in part because of what commentators have described as the "tautological difficulty of distinguishing standards of rationality on the basis of the term 'clearly'" (see Cowan, *supra*, at pp. 27-28; see also G. Perrault, *Le contrôle judiciaire des décisions de l'administration: De l'erreur juridictionnelle à la norme de contrôle* (2002), at p. 116; S. Comtois, *Vers la primauté de l'approche pragmatique et fonctionnelle: Précis du contrôle judiciaire des décisions de fond rendues par les organismes administratifs* (2003), at pp. 34-35; P. Garant, *Droit administratif* (4th ed. 1996), vol. 2, at p. 193).

105 Mullan alludes to both the practical and the theoretical difficulties of maintaining a distinction based on the magnitude of the defect, i.e., the degree of irrationality, that characterizes a decision:

> ... admittedly in his judgment in *PSAC*, Cory J. did attach the epithet "clearly" to the word "irrational" in delineating a particular species of patent unreasonableness. However, I would be most surprised if, in so doing, he was using the term "clearly" for other than rhetorical effect. Indeed, I want to suggest ... that to maintain a position that it is only the "clearly irrational" that will cross the threshold of patent unreasonableness while irrationality simpliciter will not is to make a nonsense [page135] of the law. Attaching the adjective "clearly" to irrational is surely a tautology. Like "uniqueness", irrationality either exists or it does not. There cannot be shades of irrationality. In other words, I defy any judge or lawyer to provide a concrete example of the difference between the merely irrational and the clearly irrational! In any event, there have to be concerns with a regime of judicial review which would allow any irrational decision to escape rebuke even under the most deferential standard of scrutiny.

(Mullan, "Recent Developments in Standard of Review", *supra*, at pp. 24-25)

Also relevant in this respect are the comments of Reed J. in *Hao v. Canada (Minister of Citizenship and Immigration)* (2000), 184 F.T.R. 246, at para. 9:

> I note that I have never been convinced that "patently unreasonable" differs in a significant way from "unreasonable". The word "patently" means clearly or obviously. If the unreasonableness of a decision is not clear or obvious, I do not see how that decision can be said to be unreasonable.

106 Even a brief review of this Court's descriptions of the defining characteristics of patently unreasonable and unreasonable decisions demonstrates that it is difficult to sustain a meaningful distinction between two forms of reasonableness on the basis of the magnitude of the defect, and the extent of the decision's resulting deviation from the realm of the reasonable. Under both standards, the reviewing court's inquiry is focussed on "the existence of a rational basis for the [adjudicator's] decision" (see, for example, *Paccar, supra*, at p. 1004, *per* La Forest J.; *Ryan, supra*, at paras. 55-56). A patently unreasonable decision has been described as one that "cannot be sustained on any reasonable interpretation of the facts or of the law" (*National Corn Growers, supra*, at pp. 1369-70, *per* Gonthier J.), or "rationally supported on a construction which the relevant legislation may reasonably be considered to bear" (*Nipawin, supra*, at p. 389). An unreasonable decision has been described as one for which there are "no lines of reasoning supporting the decision which could reasonably lead [page136] that tribunal to reach the decision it did" (*Ryan, supra*, at para. 53).

107 Under both patent unreasonableness and reasonableness *simpliciter*, mere disagreement with the adjudicator's decision is insufficient to warrant intervention (see, for example, *Paccar, supra*, at pp. 1003-4, *per* La Forest J., and *Chamberlain, supra*, at para. 15, *per* McLachlin C.J.). Applying the patent unreasonableness standard, "the court will defer even if the interpretation given by the tribunal ... is not the 'right' interpretation in the court's view nor even the 'best' of two possible interpretations, so long as it is an interpretation reasonably attributable to the words of the agreement" (*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at p. 341). In the case of reasonableness *simpliciter*, "a decision may satisfy the ... standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling" (*Ryan, supra*, at para. 55). There seems to me to be no qualitative basis on which to differentiate effectively between these various characterizations of a rationality analysis; how, for instance, would a decision that is not "tenably supported" (and is thus "merely" unreasonable) differ from a decision that is not "rationally supported" (and is thus patently unreasonable)?

108 In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? Where the answer is no, for instance because the legislation in question cannot rationally support the adjudicator's interpretation, the error will invalidate the decision, regardless of whether the standard applied is reasonableness *simpliciter* or patent unreasonableness (see D. K. Lovett, "That Curious Curial Deference Just Gets Curiouser and Curiouser -- *Canada (Director of Investigation and Research) v. Southam Inc.*" (1997), 55 *Advocate (B.C.)* 541, at p. 545). Because the two variants of reasonableness [page137] are united at their theoretical source, the imperative for the reviewing court to intervene will turn on the conclusion that the adjudicator's decision deviates from what falls within the ambit of the reasonable, not on "fine distinctions" between the test for patent unreasonableness and reasonableness *simpliciter* (see Falzon, *supra*, at p. 33).

109 The existence of these two variants of reasonableness review forces reviewing courts to continue to grapple with the significant practical problems inherent in distinguishing meaningfully between the two standards. To the extent that a distinction is advanced on the basis of the relative severity of the defect, this poses not only practical difficulties but also difficulties in principle, as this approach implies that patent unreasonableness, in requiring "clear" rather than "mere" irrationality, allows for a margin of appreciation for decisions that are not in accordance with reason. In this respect, I would echo Mullan's comments that there would "have to be concerns with a regime of judicial review which would allow any irrational decision to escape rebuke even under the most deferential standard of scrutiny" (Mullan, "Recent Developments in Standard of Review", *supra*, at p. 25).

(iii) The "Immediacy or Obviousness" of the Defect

110 There is a second approach to distinguishing between patent unreasonableness and reasonableness *simpliciter* that requires discussion. *Southam, supra*, at para. 57, emphasized the "immediacy or obviousness" of the defect:

> The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable .

111 In my view, two lines of difficulty have emerged from emphasizing the "immediacy or obviousness" [page138] of the defect, and thus the relative invasiveness of the review necessary to find it, as a means of distinguishing between patent unreasonableness and reasonableness *simpliciter*. The first is the difficulty of determining how invasive a review is invasive enough, but not too invasive, in each case. The second is the difficulty that flows from ambiguity as to the intended meaning of "immediacy or obviousness" in this context: is it the obviousness of the defect in the sense of its transparency on the face of the decision that is the defining characteristic of patent unreasonableness review (see J. L. H. Sprague, "Another View of *Baker*" (1999), 7 *Reid's Administrative Law* 163, at pp. 163 and 165, note 5), or is it rather the obviousness of the defect in terms of the ease with which, once found, it can be identified as severe? The latter interpretation may bring with it difficulties of the sort I referred to above -- i.e., attempting to qualify degrees of irrationality. The former interpretation, it seems to me, presents problems of its own, which I discuss below.

112 Turning first to the difficulty of actually applying a distinction based on the "immediacy or obviousness" of the defect, we are confronted with the criticism that the "somewhat probing examination" criterion (see *Southam, supra*, at para. 56) is not clear enough (see D. W. Elliott, "*Suresh* and the Common Borders of Administrative Law: Time for the Tailor?" (2002), 65 *Sask. L. Rev.* 469, at pp. 486-87). As Elliott notes: "[t]he distinction between a 'somewhat probing examination' and those which are simply probing, or are less than probing, is a fine one. It is too fine to permit courts to differentiate clearly among the three standards."

113 This Court has itself experienced some difficulty in consistently performing patent unreasonableness review in a way that is less probing than the "somewhat probing" analysis that is the hallmark of reasonableness *simpliciter*. Despite the fact that a less invasive review has been described as a defining characteristic of the standard of patent unreasonableness, in a number of the Court's recent decisions, including *Toronto (City) Board of Education, supra*, [page139] and *Ivanhoe, supra*, one could fairly characterize the Court's analysis under this standard as at least "somewhat" probing in nature.

114 Even prior to *Southam* and the development of reasonableness *simpliciter*, there was some uncertainty as to how intensely patent unreasonableness review is to be performed. This is particularly evident in *National Corn Growers, supra* (see generally Mullan, "Of Chaff Midst the Corn", *supra*; Mullan, *Administrative Law, supra*, at pp. 72-73). In that case, while Wilson J. counselled restraint on the basis of her reading of *CUPE, supra*, Gonthier J., for the majority, performed quite a searching review of the decision of the Canadian Import Tribunal. He reasoned, at p. 1370, that "[i]n some cases, the unreasonableness of a decision may be apparent without detailed examination of the record. In others, it may be no less unreasonable but this can only be understood upon an in-depth analysis."

115 *Southam* itself did not definitively resolve the question of how invasively review for patent unreasonableness should be performed . An intense review would seem to be precluded by the statement that, "if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable" (para. 57). The possibility that, in certain circumstances, quite a thorough review for patent unreasonableness will be appropriate, however, is left open: "[i]f the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem" (para. 57).

116 This brings me to the second problem: in what sense is the defect immediate or obvious? *Southam* left some

ambiguity on this point. As I have outlined, on the one hand, a patently unreasonable decision is understood as one that is [page140] flawed by a defect that is evident on the face of the decision, while an unreasonable decision is one that is marred by a defect that it takes significant searching or testing to find. In other places, however, *Southam* suggests that the "immediacy or obviousness" of a patently unreasonable defect refers not to the ease of its detection, but rather to the ease with which, once detected, it can be identified as severe. Particularly relevant in this respect is the statement that "once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident" (para. 57). It is the (admittedly sometimes only tacit) recognition that what must in fact be evident -- i.e., clear, obvious, or immediate -- is the defect's magnitude upon detection that allows for the possibility that in certain circumstances "it will simply not be possible to understand and respond to a patent unreasonableness argument without a thorough examination and appreciation of the tribunal's record and reasoning process" (see Mullan, *Administrative Law, supra*, at p. 72; see also *Ivanhoe, supra*, at para. 34).

117 Our recent decision in *Ryan* has brought more clarity to *Southam*, but still reflects a degree of ambiguity on this issue. In *Ryan*, at para. 52, the Court held:

> In *Southam, supra*, at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted "in the immediacy or obviousness of the defect". Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at pp. 963-64, *per* Cory J.; *Centre communautaire juridique de l'Estrie v. Sherbrooke (City)*, [1996] 3 S.C.R. 84, at paras. 9-12, *per* Gonthier J.). A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand. [Emphasis added.]

[page141]

This passage moves the focus away from the obviousness of the defect in the sense of its transparency "on the face of the decision", to the obviousness of its magnitude once it has been identified. At other points, however, the relative invasiveness of the review required to identify the defect is emphasized as the means of distinguishing between patent unreasonableness and reasonableness *simpliciter*:

> A decision may be unreasonable without being patently unreasonable when the defect in the decision is less obvious and might only be discovered after "significant searching or testing" (*Southam, supra*, at para. 57). Explaining the defect may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did.
>
> (*Ryan, supra*, at para. 53)

118 Such ambiguity led commentators such as David Phillip Jones to continue to question in light of *Ryan* whether

> whatever it is that makes the decision "patently unreasonable" [must] appear on the face of the record ... Or can one go beyond the record to demonstrate -- "identify" -- why the decision is patently unreasonable? Is it the "immediacy and obviousness of the defect" which makes it patently unreasonable, or does patently unreasonable require outrageousness so that the decision is so flawed that no amount of curial deference can justify letting it stand?
>
> (D. P. Jones, "Notes on *Dr. Q* and *Ryan*: Two More Decisions by the Supreme Court of Canada on the Standard of Review in Administrative Law", paper originally presented at the Canadian Institute for the Administration of Justice, Western Roundtable, Edmonton, April 25, 2003, at p. 10.)

119 As we have seen, the answers to such questions are far from self-evident, even at the level of theoretical abstraction. How much more difficult must they be for reviewing courts and counsel struggling to apply not only patent unreasonableness, but also reasonableness *simpliciter*? (See, in this regard, the comments of Mullan in "Recent Developments in Standard of Review", *supra*, at p. 4.)

[page142]

120 Absent reform in this area or a further clarification of the standards, the "epistemological" confusion over the relationship between patent unreasonableness and reasonableness *simpliciter* will continue. As a result, both the types of errors that the two variants of reasonableness are likely to catch -- i.e., interpretations that fall outside the range of those that can be "reasonably", "rationally" or "tenably" supported by the statutory language -- and the way in which the two standards are applied will in practice, if not necessarily in theory, be much the same.

121 There is no easy way out of this conundrum. Whatever attempts are made to clarify the contours of, or the relationship between, the existing definitional strands of patent unreasonableness, this standard and reasonableness *simpliciter* will continue to be rooted in a shared rationale: statutory language is often ambiguous and "admits of more than one possible meaning"; provided that the expert administrative adjudicator's interpretation "does not move outside the bounds of reasonably permissible visions of the appropriate interpretation, there is no justification for court intervention" (Mullan, "Recent Developments in Standard of Review", *supra*, at p. 18). It will thus remain difficult to keep these standards conceptually distinct, and I query whether, in the end, the theoretical efforts necessary to do so are productive. Obviously any decision that fails the test of patent unreasonableness must also fall on a standard of reasonableness *simpliciter*, but it seems hard to imagine situations where the converse is not also true: if a decision is not supported by a tenable explanation (and is thus unreasonable) (*Ryan, supra*, at para. 55), how likely is it that it could be sustained on "any reasonable interpretation of the facts or of the law" (and thus not be patently unreasonable) (*National Corn Growers, supra*, at pp. 1369-70, *per* Gonthier J.)?

122 Thus, both patent unreasonableness and reasonableness *simpliciter* require that reviewing courts pay "respectful attention" to the reasons of adjudicators [page143] in assessing the rationality of administrative decisions (see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 , at para. 65, *per* L'Heureux-Dubé J., citing D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286, and *Ryan, supra*, at para. 49).

123 Attempting to differentiate between these two variants of curial deference by classifying one as "somewhat more probing" in its attentiveness than the other is unlikely to prove any more successful in practice than it has proven in the past. Basing the distinction on the relative ease with which a defect may be detected also raises a more theoretical quandary: the difficulty of articulating why a defect that is obvious on the face of a decision should present more of an imperative for court intervention than a latent defect. While a defect may be readily apparent because it is severe, a severe defect will not necessarily be readily apparent; by the same token, a flaw in a decision may be immediately evident, or obvious, but relatively inconsequential in nature.

124 On the other hand, the effect of clarifying that the language of "immediacy or obviousness" goes not to ease of detection, but rather to the ease with which, once detected (on either a superficial or a probing review), a defect may be identified as severe might well be to increase the regularity with which reviewing courts subject decisions to as intense a review on a standard of patent unreasonableness as on a standard of reasonableness *simpliciter*, thereby further eliding any difference between the two.

125 An additional effect of clarifying that the "immediacy or obviousness" of the defect refers not to its transparency on the face of the decision but rather to its magnitude upon detection is to suggest that it is feasible and appropriate for reviewing courts to attempt to qualify degrees of irrationality in assessing the decisions of administrative adjudicators: i.e., this decision is irrational enough to be unreasonable, but not so irrational as to be [page144] overturned on a standard of patent unreasonableness. Such an outcome raises questions as to whether the legislative intent could ever be to let irrational decisions stand. In any event, such an approach would seem difficult to reconcile with the rule of law.

126 I acknowledge that there are certain advantages to the framework to which this Court has adhered since its adoption in *Southam, supra*, of a third standard of review. The inclusion of an intermediate standard does appear to provide reviewing courts with an enhanced ability to tailor the degree of deference to the particular situation. In my

view, however, the lesson to be drawn from our experience since then is that those advantages appear to be outweighed by the current framework's drawbacks, which include the conceptual and practical difficulties that flow from the overlap between patent unreasonableness and reasonableness *simpliciter*, and the difficultly caused at times by the interplay between patent unreasonableness and correctness.

127 In particular, the inability to sustain a viable analytical distinction between the two variants of reasonableness has impeded their application in practice in a way that fulfils the theoretical promise of a more precise reflection of the legislature's intent. In the end, attempting to distinguish between the unreasonable and the patently unreasonable may be as unproductive as attempting to differentiate between the "illegible" and the "patently illegible". While it may be possible to posit, in the abstract, some kind of conceptual distinction, the functional reality is that once a text is illegible -- whether its illegibility is evident on a cursory glance or only after a close examination -- the result is the same. There is little to be gained from debating as to whether the text is illegible *simpliciter* or patently illegible; in either case it cannot be read.

128 It is also necessary to keep in mind the theoretical foundations for judicial review and its ultimate purpose. The purpose of judicial review is to uphold the normative legal order by ensuring that the [page145] decisions of administrative decision makers are both procedurally sound and substantively defensible. As McLachlin C.J. explained in *Dr. Q, supra*, at para. 21, the two touchstones of judicial review are legislative intent and the rule of law:

> [In *Pushpanathan*,] Bastarache J. affirmed that "[t]he central inquiry in determining the standard of review exercisable by a court of law is the legislative intent of the statute creating the tribunal whose decision is being reviewed" (para. 26). However, this approach also gives due regard to "the consequences that flow from a grant of powers" (*Bibeault, supra,* at p. 1089) and, while safeguarding "[t]he role of the superior courts in maintaining the rule of law" (p. 1090), reinforces that this reviewing power should not be employed unnecessarily. In this way, the pragmatic and functional approach inquires into legislative intent, but does so against the backdrop of the courts' constitutional duty to protect the rule of law.

In short, the role of a court in determining the standard of review is to be faithful to the intent of the legislature that empowered the administrative adjudicator to make the decision, as well as to the animating principle that, in a society governed by the rule of law, power is not to be exercised arbitrarily or capriciously.

129 As this Court has observed, the rule of law is a "highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority" (*Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, at pp. 805-6). As the Court elaborated in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 71:

> In the *Manitoba Language Rights Reference, supra*, at pp. 747-52, this Court outlined the elements of the rule of law. We emphasized, first, that the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second, we explained, at p. 749, that "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order"... . A third aspect of the rule of law is ... that "the exercise of all public [page146] power must find its ultimate source in a legal rule". Put another way, the relationship between the state and the individual must be regulated by law. Taken together, these three considerations make up a principle of profound constitutional and political significance .

"At its most basic level", as the Court affirmed, at para. 70, "the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action."

130 Because arbitrary state action is not permissible, the exercise of power must be justifiable. As the Chief Justice has noted,

> ... societies governed by the Rule of Law are marked by a certain *ethos of justification*. In a democratic society, this may well be the general characteristic of the Rule of Law within which the more specific ideals

> ... are subsumed. Where a society is marked by a culture of justification, an exercise of public power is only appropriate where it can be justified to citizens in terms of *rationality and fairness.*
>
> (See the Honourable Madam Justice B. McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998-1999), 12 *C.J.A.L.P.* 171, at p. 174 (emphasis in original) ; see also MacLauchlan, *supra*, at pp. 289-91.)

Judicial review on substantive grounds ensures that the decisions of administrative adjudicators are capable of rational justification; review on procedural grounds (i.e., does the decision meet the requirements of procedural fairness?) ensures that they are fair.

131 In recent years, this Court has recognized that both courts and administrative adjudicators have an important role to play in upholding and applying the rule of law. As Wilson J. outlined in *National Corn Growers, supra*, courts have come to accept that "statutory provisions often do not yield a single, uniquely correct interpretation" and that an expert administrative adjudicator may be "better equipped than a reviewing court to resolve the ambiguities and fill the voids in the statutory language" in a [page147] way that makes sense in the specialized context in which that adjudicator operates (p. 1336, citing J. M. Evans et al., *Administrative Law* (3rd ed. 1989), at p. 414). The interpretation and application of the law is thus no longer seen as exclusively the province of the courts. Administrative adjudicators play a vital and increasing role. As McLachlin J. helpfully put it in a recent speech on the roles of courts and administrative tribunals in maintaining the rule of law: "A culture of justification shifts the analysis from the institutions themselves to, more subtly, what those institutions are capable of doing for the rational advancement of civil society. The Rule of Law, in short, can speak in several voices so long as the resulting chorus echoes its underlying values of fairness and rationality" (McLachlin, *supra*, at p. 175).

132 In affirming the place for administrative adjudicators in the interpretation and application of the law, however, there is an important distinction that must be maintained: to say that the administrative state is a legitimate player in resolving legal disputes is properly to say that administrative adjudicators are capable (and perhaps more capable) of choosing among reasonable decisions. It is not to say that unreasonable decision making is a legitimate presence in the legal system. Is this not the effect of a standard of patent unreasonableness informed by an intermediate standard of reasonableness *simpliciter*?

133 On the assumption that we can distinguish effectively between an unreasonable and a patently unreasonable decision, there are situations where an unreasonable (i.e., irrational) decision must be allowed to stand. This would be the case where the standard of review is patent unreasonableness and the decision under review is unreasonable, but not patently so. As I have noted, I doubt that such an outcome could be reconciled with the intent of the legislature which, in theory, the pragmatic and functional analysis aims to reflect as faithfully as possible. As a matter of statutory interpretation, courts [page148] should always be very hesitant to impute to the legislature any intent to let irrational administrative acts stand, absent the most unequivocal statement of such an intent (see *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at pp. 367-68) . As a matter of theory, the constitutional principle of the primacy of the rule of law, which is an ever-present background principle of interpretation in this context, reinforces the point: if a court concludes that the legislature intended that there be no recourse from an irrational decision, it seems highly likely that the court has misconstrued the intent of the legislature.

134 Administrative law has developed considerably over the last 25 years since *CUPE*. This evolution, which reflects a strong sense of deference to administrative decision makers and an acknowledgment of the importance of their role, has given rise to some problems or concerns. It remains to be seen, in an appropriate case, what should be the solution to these difficulties. Should courts move to a two standard system of judicial review, correctness and a revised unified standard of reasonableness? Should we attempt to more clearly define the nature and scope of each standard or rethink their relationship and application? This is perhaps some of the work which lies ahead for courts, building on the developments of recent years as well as on the legal tradition which created the framework of the present law of judicial review.

III. Disposition

135 Subject to my comments in these reasons, I concur with Arbour J.'s disposition of the appeal.

Solicitors

Solicitors for the appellant: Caley & Wray, Toronto.

Solicitors for the respondent the City of Toronto: Osler, Hoskin & Harcourt, Toronto.

Solicitor for the intervener: Attorney General of Ontario, Toronto.

Toronto (City) v. Ontario (Attorney General), [2021] S.C.J. No. 34

Supreme Court of Canada Judgments

Supreme Court of Canada

Present: R. Wagner C.J. and R.S. Abella, M.J. Moldaver, A. Karakatsanis, S. Côté, R. Brown, M. Rowe, S.L. Martin and N. Kasirer JJ.

Heard: March 16, 2021;

Judgment: October 1, 2021.

File No.: 38921.

[2021] S.C.J. No. 34 | [2021] A.C.S. no 34 | 2021 SCC 34 | 2021EXP-2378

City of Toronto, Appellant; v. Attorney General of Ontario, Respondent, and Attorney General of Canada, Attorney General of British Columbia, Toronto District School Board, Cityplace Residents' Association, Canadian Constitution Foundation, International Commission of Jurists (Canada), Federation of Canadian Municipalities, Durham Community Legal Clinic, Centre for Free Expression at Ryerson University, Canadian Civil Liberties Association, Art Eggleton, Barbara Hall, David Miller, John Sewell, David Asper Centre for Constitutional Rights, Progress Toronto, Métis Nation of Ontario, Métis Nation of Alberta and Fair Voting British Columbia, Interveners

(186 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Case Summary

Constitutional law — Canadian constitution — Unwritten conventions and practices — Appeal by City of Toronto from judgment of Ontario Court of Appeal that held Better Local Government Act, 2018, was constitutional dismissed — During City's municipal election campaign, Province enacted Better Local Government Act, 2018, which reduced size of City's Council — City challenged constitutionality of Act — Application judge found legislation violated s. 2(b) of the Charter, which Court of Appeal overturned — Province had acted constitutionally — Act imposed no limit on freedom of expression — Unwritten constitutional principle of democracy could not be used to narrow provincial authority under s. 92(8) of Constitution Act, 1867 or to read municipalities into s. 3 of Charter — Better Local Government Act, 2018.

Constitutional law — Constitutional validity of legislation — Level of government — Provincial or territorial legislation — Interpretive and constructive doctrines — Appeal by City of Toronto from judgment of Ontario Court of Appeal that held Better Local Government Act, 2018, was constitutional dismissed — During City's municipal election campaign, Province enacted Better Local Government Act, 2018, which reduced size of City's Council — City challenged constitutionality of Act — Application judge found legislation violated s. 2(b) of the Charter, which Court of Appeal overturned — Province had acted constitutionally — Act imposed no limit on freedom of expression — Unwritten constitutional principle of democracy could not be used to narrow provincial authority under s. 92(8) of Constitution Act, 1867 or to read municipalities into s. 3 of Charter — Better Local Government Act, 2018.

Constitutional law — Division of powers — Provincial jurisdiction — Provincial powers (Constitution Act, 1867, s. 92) — Municipal institutions — Appeal by City of Toronto from judgment of Ontario Court of Appeal that held Better Local Government Act, 2018, was constitutional dismissed — During City's municipal

election campaign, Province enacted Better Local Government Act, 2018, which reduced size of City's Council — City challenged constitutionality of Act — Application judge found legislation violated s. 2(b) of the Charter, which Court of Appeal overturned — Province had acted constitutionally — City was advancing a positive rights claim, to which the Baier framework applied — City failed to demonstrate a substantial interference with freedom of expression — Unwritten constitutional principle of democracy could not be used to narrow provincial authority under s. 92(8) of Constitution Act, 1867 or to read municipalities into s. 3 of Charter — Better Local Government Act, 2018.

Constitutional law — Canadian Charter of Rights and Freedoms — Fundamental freedoms — Freedom of thought, belief, opinion and expression — Freedom of expression — Democratic rights — Right to vote and hold elected office — Appeal by City of Toronto from judgment of Ontario Court of Appeal that held Better Local Government Act, 2018, was constitutional dismissed — During City's municipal election campaign, Province enacted Better Local Government Act, 2018, which reduced size of City's Council — City challenged constitutionality of Act — Application judge found legislation violated s. 2(b) of the Charter, which Court of Appeal overturned — Province had acted constitutionally — City was advancing a positive rights claim, to which the Baier framework applied — City failed to demonstrate a substantial interference with freedom of expression — Unwritten constitutional principle of democracy could not be used to narrow provincial authority under s. 92(8) of Constitution Act, 1867 or to read municipalities into s. 3 of Charter — Better Local Government Act, 2018.

Municipal law — Government — Council members — Wards — Appeal by City of Toronto from judgment of Ontario Court of Appeal that held Better Local Government Act, 2018, was constitutional dismissed — During City's municipal election campaign, Province enacted Better Local Government Act, 2018, which reduced size of City's Council — City challenged constitutionality of Act — Application judge found legislation violated s. 2(b) of the Charter, which Court of Appeal overturned — Province had acted constitutionally — City was advancing a positive rights claim, to which the Baier framework applied — City failed to demonstrate a substantial interference with freedom of expression — Unwritten constitutional principle of democracy could not be used to narrow provincial authority under s. 92(8) of Constitution Act, 1867 or to read municipalities into s. 3 of Charter — Better Local Government Act, 2018.

Appeal by the City of Toronto from a judgment of the Ontario Court of Appeal that held that the Better Local Government Act, 2018, was constitutional. During the City of Toronto's municipal election campaign, the Province of Ontario enacted the Better Local Government Act, 2018, which reduced the size of Toronto City Council from 47 wards to 25. The City challenged the constitutionality of the legislation and applied for orders restoring the 47-ward structure. The application judge found the Act limited municipal candidates' right to freedom of expression and municipal voters' right to effective representation under s. 2(b) of the Charter. He found the limits could not be justified under s. 1 of the Charter and set aside the impugned provisions of the Act. The Court of Appeal granted a stay of the judgment. The municipal election proceeded on the basis of the 25-ward structure established by the Act. The Court of Appeal subsequently allowed Ontario's appeal, finding no limit on freedom of expression.
HELD: Appeal dismissed.

The Province had acted constitutionally. The City was advancing a positive rights claim, to which the framework established in Baier v. Alberta applied. The Baier framework set an elevated threshold for positive claims, requiring "substantial interference" with freedom of expression. The applicable factors could usefully be distilled to a single core question: was the claim grounded in the fundamental Charter freedom of expression, such that, by denying access to a statutory platform or by otherwise failing to act, the government had either substantially interfered with freedom of expression, or had the purpose of interfering with freedom of expression? The City had failed to demonstrate a substantial interference with freedom of expression. The change in ward structure did not prevent electoral participants from engaging in further political expression on election issues under the new ward structure. The Act imposed no limit on freedom of expression and did not violate s. 2(b) of the Charter. Despite their value as interpretive aids, unwritten constitutional principles could not be used as a basis for invalidating legislation. There was no freestanding right to effective representation outside s. 3 of the Charter. The unwritten constitutional

principle of democracy could not be used to narrow provincial authority under s. 92(8) of the Constitution Act, 1867 or to read municipalities into s. 3 of the Charter. Dissenting reasons were provided.

Statutes, Regulations and Rules Cited:

Better Local Government Act, 2018, S.O. 2018, c. 11, Sch. 3, s. 1

By-law to amend By-law 267-2017, being a by-law to re-divide the City of Toronto's Ward Boundaries, to correct certain minor errors, City of Toronto By-law No. 464-2017, April 28, 2017

By-law to re-divide the City of Toronto's Ward Boundaries, City of Toronto By-law No. 267-2017, March 29, 2017

Canada Evidence Act, R.S.C. 1985, c. C-5

Canadian Charter of Rights and Freedoms, 1982, s. 1, s. 2(b), s. 2(d), s. 3, s. 7, s. 11(d), s. 15, s. 33

City of Toronto Act, 2006, S.O. 2006, c. 11, Sch. A, s. 128(1)

Constitution Act, 1867, Preamble, s. 91, s. 92, s. 92(8), s. 92(14), s. 96, s. 100, s. 101, s. 129

Constitution Act, 1982, s. 52, s. 52(1)

Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221

Human Rights Act 1998 (U.K.), 1998, c. 42, s. 4

Magna Carta (1215)

Municipal Elections Act 1996, S.O. 1996, c. 32, Sch., s. 10.1(8)

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Constitutional law -- Charter of Rights -- Freedom of expression -- Municipal elections -- Province enacting legislation redrawing municipality's electoral ward boundaries and reducing number of wards during election campaign -- Whether legislation limits electoral participants' right to freedom of expression and, if so, whether limitation justified -- Canadian Charter of Rights and Freedoms, ss. 1, 2(b) -- Better Local Government Act, 2018, S.O. 2018, c. 11.

Constitutional law -- Unwritten constitutional principles -- Democracy -- Province enacting legislation redrawing municipality's electoral ward boundaries and reducing number of wards during election campaign -- Whether legislation unconstitutional for violating unwritten constitutional principle of democracy.

Court Summary:

On May 1, 2018, the City of Toronto municipal election campaign commenced and nominations opened in preparation for an election day on October 22, 2018. On July 27, 2018, the closing day for nominations, Ontario announced its intention to introduce legislation reducing the size of Toronto City Council. On August 14, 2018, the *Better Local Government Act, 2018*, came into force, reducing the number of wards from 47 to 25.

The City and two groups of private individuals challenged the constitutionality of the *Act* and applied for orders restoring the 47-ward structure. The application judge found that the *Act* limited the municipal candidates' right to freedom of expression under s. 2(b) of the *Charter* and municipal voters' s. 2(b) right to effective representation. He held that these limits could not be justified under s. 1 of the *Charter* and set aside the impugned provisions of the *Act*. Ontario appealed and moved to stay the judgment pending appeal. The Court of Appeal granted the stay and, on October 22, 2018, the municipal election proceeded on the basis of the 25-ward structure created by the *Act*. The Court of Appeal later allowed the appeal, finding no limit on freedom of expression. The majority held that the City had advanced a positive rights claim, which was not properly grounded in s. 2(b) of the *Charter*, and concluded that the application judge had erred in finding that the *Act* substantially interfered with the candidates' freedom of expression and in finding that the right to effective representation applies to municipal elections and bears any influence over the s. 2(b) analysis. The majority also held that unwritten constitutional principles do not confer upon the judiciary power to invalidate legislation that does not otherwise infringe the *Charter*, nor do they limit provincial legislative authority over municipal institutions.

Held (Abella, Karakatsanis, Martin and Kasirer JJ. dissenting): The appeal should be dismissed.

Per **Wagner** C.J. and Moldaver, Côté, **Brown** and Rowe JJ.: Ontario acted constitutionally. The *Act* imposed no limit on freedom of expression. Further, unwritten constitutional principles cannot be used as bases for invalidating legislation, nor can the unwritten constitutional principle of democracy be used to narrow provincial authority under s. 92(8) of the *Constitution Act, 1867*, or to read municipalities into s. 3 of the *Charter*.

A purposive interpretation of *Charter* rights must begin with, and be rooted in, the text and not overshoot the purpose of the right but place it in its appropriate linguistic, philosophic and historical contexts. Section 2(b) of the *Charter*, which provides that everyone has the fundamental freedoms of thought, belief, opinion and expression, including freedom of the press and other media of communication, has been interpreted as generally imposing a negative obligation rather than a positive obligation of protection or assistance. A claim is properly characterized as negative where the claimant seeks freedom from government legislation or action suppressing an expressive activity in which people would otherwise be free to engage. Such claims of right under s. 2(b) are considered under the framework established in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.

However, as explained in *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673, s. 2(b) may, in certain circumstances, impose positive obligations on the government to facilitate expression. Many constitutional rights have both positive and negative dimensions and this is so for s. 2(b). Central to whether s. 2(b) has been limited is, therefore, the appropriate characterization of the claim as between a negative and positive claim of right.

In the context of positive claims under s. 2(b), where a claimant seeks to impose an obligation on the government (or legislature) to provide access to a particular statutory or regulatory platform for expression, the applicable framework is that of *Baier*. As held in *Baier*, to succeed, a positive claim must satisfy the following three factors first set forth in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016: (1) the claim should be grounded in freedom of expression, rather than in access to a particular statutory regime; (2) the claimant must demonstrate that lack of access to a statutory regime has the effect of a substantial interference with freedom of expression, or has the purpose of infringing freedom of expression; and (3) the government must be responsible for the inability to exercise the fundamental freedom. These factors set an elevated threshold for positive claims and can usefully be distilled to a single core question: is the claim grounded in the fundamental *Charter* freedom of expression, such that, by denying access to a statutory platform or by otherwise failing to act, the government has either substantially interfered with freedom of expression, or had the purpose of interfering with freedom of expression? This single question, a salutary clarification of the *Baier* test, emphasizes the elevated threshold in the second *Dunmore* factor while encompassing the considerations of the first and third factors. Substantial interference with freedom of expression occurs where lack of access to a statutory platform has the effect of radically frustrating expression to such an extent that meaningful expression is effectively precluded. While meaningful expression need not be rendered absolutely impossible, effective preclusion represents an exceedingly high bar that would be met only in extreme and rare cases.

In the present case, the City has not established a limit on s. 2(b). The City's claim is a claim for access to a particular statutory platform, and is thus, in substance, a positive claim. The *Baier* framework therefore applies, and the City had to show that the *Act* radically frustrated the expression of election participants such that meaningful expression was effectively precluded. The candidates and their supporters had 69 days to re-orient their messages and freely express themselves according to the new ward structure. The *Act* imposed no restrictions on the content or meaning of the messages that participants could convey. Many of the challengers who continued to campaign ultimately had successful campaigns, raising significant amounts of money and receiving significant numbers of votes. This would not have been possible had their s. 2(b) rights been so radically frustrated so as to effectively preclude meaningful expression. Some of the candidates' prior expression may have lost its relevance, but something more than diminished effectiveness is required under the *Baier* framework. In the context of a positive claim, only extreme government action that extinguishes the effectiveness of expression may rise to the level of a substantial interference with freedom of expression. Section 2(b) is not a guarantee of the effectiveness or continued relevance of a message, or that campaign materials otherwise retain their usefulness throughout the campaign.

Furthermore, the unwritten constitutional principle of democracy cannot be used as a device for invalidating otherwise valid provincial legislation such as the impugned provisions of the *Act*. Unwritten principles are part of the law of the Constitution, in the sense that they form part of the context and backdrop to the Constitution's written terms. Their legal force lies in their representation of general principles within which the constitutional order operates and, therefore, by which the Constitution's written terms -- its provisions -- are to be given effect. In practical terms, unwritten constitutional principles may assist courts in only two distinct but related ways.

First, they may be used in the interpretation of constitutional provisions. Where the constitutional text is not itself sufficiently definitive or comprehensive to furnish the answer to a constitutional question, a court may use unwritten constitutional principles as interpretive aids. When applied to *Charter* rights, unwritten principles assist with purposive interpretation, informing the character and the larger objects of the *Charter* itself, the language chosen to articulate the specific right or freedom, and the historical origins of the concepts enshrined. Where unwritten constitutional principles are used as interpretive aids, their substantive legal force must arise by necessary implication from the Constitution's text. Secondly, and relatedly, unwritten principles can be used to develop structural doctrines unstated in the written Constitution *per se*, but necessary to the coherence of, and flowing by implication from, its architecture. Structural doctrines can fill gaps and address important questions on which the text of the Constitution is silent.

Neither of these functions support the application of unwritten constitutional principles as an independent basis for invalidating legislation. On the contrary, unwritten constitutional principles, such as democracy, a principle by which the Constitution is to be understood and interpreted, strongly favour upholding the validity of legislation that conforms to the text of the Constitution. Subject to the *Charter*, a province, under s. 92(8) of the *Constitution Act, 1867*, has absolute and unfettered legal power to legislate with respect to municipalities. This plenary jurisdiction is unrestricted by any constitutional principle.

As for s. 3 of the *Charter*, it guarantees citizens the right to vote and run for office in provincial and federal elections, and includes a right to effective representation. The text of s. 3 makes clear, however, that it does not extend to municipal elections. Effective representation is not a principle of s. 2(b) of the *Charter*, nor can the concept be imported wholesale into s. 2(b). Section 3 and its requirement of effective representation also cannot be made relevant to the current case by using the democratic principle. Section 3 democratic rights were not extended to candidates or electors to municipal councils. The absence of municipalities in the constitutional text is not a gap to be addressed judicially; rather, it is a deliberate omission. The text of the Constitution makes clear that municipal institutions lack constitutional status, leaving no open question of constitutional interpretation to be addressed and, accordingly, no role to be played by the unwritten principles.

Per **Abella**, Karakatsanis, Martin and Kasirer JJ. (dissenting): The appeal should be allowed and the application

judge's declaration that the timing of the *Act* unjustifiably infringed s. 2(b) of the *Charter* restored. Changing the municipal wards in the middle of an ongoing municipal election was unconstitutional.

When a democratic election takes place in Canada, including a municipal election, freedom of expression protects the rights of candidates and voters to meaningfully express their views and engage in reciprocal political discourse on the path to voting day. That is at the core of political expression, which in turn is at the core of what is protected by s. 2(b) of the *Charter*. The right to disseminate and receive information connected with elections has long been recognized as integral to the democratic principles underlying freedom of expression, and as a result, has attracted robust protection.

A stable election period is crucial to electoral fairness and meaningful political discourse. As such, state interference with individual and collective political expression in the context of an election strikes at the heart of the democratic values that freedom of expression seeks to protect, including participation in social and political decision-making.

A two-part test for adjudicating freedom of expression claims was established in *Irwin Toy*. The first asks whether the activity is within the sphere of conduct protected by freedom of expression. If the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee. The second asks whether the government action, in purpose or effect, interfered with freedom of expression.

The legal framework set out in *Baier*, which was designed to address under inclusive statutory regimes, only applies to claims placing an obligation on government to provide individuals with a particular platform for expression. Claims of government interference with expressive rights that attach to an electoral process are the kind of claims governed by the *Irwin Toy* framework.

The distinction between positive and negative rights is an unhelpful lens for adjudicating *Charter* claims. All rights have positive dimensions since they exist within, and are enforced by, a positive state apparatus. They also have negative dimensions because they sometimes require the state not to intervene. A unified purposive approach has been adopted to rights claims, whether the claim is about freedom from government interference in order to exercise a right, or the right to governmental action in order to get access to it. The threshold does not vary with the nature of the claim to a right. Each right has its own definitional scope and is subject to the proportionality analysis under s. 1 of the *Charter*. There is therefore no reason to superimpose onto the constitutional structure the additional hurdle of dividing rights into positive and negative ones for analytic purposes.

In the present case, the s. 2(b) claim is about government interference with the expressive rights that attach to the electoral process and it is precisely the kind of claim that is governed by the *Irwin Toy* framework. Applying that framework, it is clear that the timing of the legislation, by interfering with political discourse in the middle of an election, violated s. 2(b) of the *Charter*. By radically redrawing electoral boundaries during an active election that was almost two-thirds complete, the legislation interfered with the rights of all participants in the electoral process to engage in meaningful reciprocal political discourse. The *Act* eradicated nearly half of the active election campaigns, and required candidates to file a change of ward notification form to continue in the race. The redrawing of ward boundaries meant that candidates needed to reach new voters with new priorities. Voters who had received campaign information, learned about candidates' mandates and engaged with them based on the 47-ward structure had their democratic participation put into abeyance. The timing of the *Act* breathed instability into the election, undermining the ability of candidates and voters in their wards to meaningfully discuss and inform one another of their views on matters of local concern.

The limitation on s. 2(b) rights in this case was the *timing* of the legislative changes. Ontario offered no explanation, let alone a pressing and substantial one, for why the changes were made in the middle of an ongoing election. In the absence of any evidence or explanation for the timing of the *Act*, no pressing and substantial objective exists for this limitation and it cannot, therefore, be justified in a free and democratic society.

As for the role of unwritten constitutional principles, there is disagreement with the majority's observations circumscribing their scope and power in a way that reads down the Court's binding jurisprudence. Unwritten

constitutional principles may be used to invalidate legislation. The precedential Constitution of the United Kingdom is not a written document, but is comprised of unwritten norms, Acts of Parliament, Crown prerogative, conventions, custom of Parliament, and judicial decisions, among other sources. Canada's Constitution, as a result, embraces unwritten as well as written rules. Unwritten constitutional principles have been held to be the lifeblood of the Constitution and the vital unstated assumptions upon which the text is based. They are not merely "context" or "backdrop" to the text. On the contrary, they are the Constitution's most basic normative commitments from which specific textual provisions derive. The specific written provisions are elaborations of the underlying, unwritten, and organizing principles found in the preamble to the *Constitution Act, 1867*. Constitutional text emanates from underlying principles, but it will not always be exhaustive of those principles.

Apart from written provisions of the Constitution, principles deriving from the Constitution's basic structure may constrain government action. Those principles exist independently of and, as in the case of implied fundamental rights before the promulgation of the *Charter*, prior to the enactment of express constitutional provisions. The legislative bodies in Canada must conform to these basic structural imperatives and can in no way override them. Accordingly, unwritten principles may be used to invalidate legislation if a case arises where legislation elides the reach of any express constitutional provision but is fundamentally at odds with the Constitution's internal architecture or basic constitutional structure. This would undoubtedly be a rare case; however, to foreclose the possibility that unwritten principles can be used to invalidate legislation in all circumstances is imprudent. It not only contradicts the Court's jurisprudence, it is fundamentally inconsistent with the case law confirming that unwritten constitutional principles can be used to review legislation for constitutional compliance. Reviewing legislation for constitutional compliance means upholding, revising or rejecting it.

Unwritten constitutional principles are the foundational organizing principles of the Constitution and have full legal force. They serve to give effect to the structure of the Constitution and function as independent bases upon which to attack the validity of legislation since they have the same legal status as the text. Unwritten constitutional principles not only give meaning and effect to constitutional text and inform the language chosen to articulate the specific right or freedom, they assist in developing an evolutionary understanding of the rights and freedoms guaranteed in the Constitution, which have long been described as a living tree capable of growth and expansion. Unwritten constitutional principles are a key part of what makes the tree grow. They are also substantive legal rules in their own right. In appropriate cases, they may well continue to serve, as they have done in the past, as the basis for declaring legislation unconstitutional.

Cases Cited

By Wagner C.J. and Brown J.

Applied: *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673; **distinguished:** *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; **considered:** *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31; *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3; **referred to:** *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, 2000 SCC 45, [2000] 2 S.C.R. 409; *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 S.C.R. 470; *Ontario Public School Boards' Assn. v. Ontario (Attorney General)* (1997), 151 D.L.R. (4th) 346; *East York (Borough) v. Ontario* (1997), 36 O.R. (3d) 733; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016; *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141; *Haig v. Canada*, [1993] 2 S.C.R. 995; *Greater Vancouver Transportation Authority v. Canadian Federation of Students -- British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815; *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827; *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569; *Thomson*

Newspapers Co. v. Canada (Attorney General), [1998] 1 S.C.R. 877; *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158; *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753; *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725; *R. (on the application of Miller) v. Prime Minister*, [2019] UKSC 41, [2020] A.C. 373; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2; *R. v. Poulin*, 2019 SCC 47; *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289; *Huson v. The Township of South Norwich* (1895), 24 S.C.R. 145; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Haida Nation v. British Columbia (Minister of Forests*), 2004 SCC 73, [2004] 3 S.C.R. 511; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214; *Reference re Alberta Statutes*, [1938] S.C.R. 100; *Switzman v. Elbling*, [1957] S.C.R. 285.

By Abella J. (dissenting)

Di Ciano v. Toronto (City), 2017 CanLII 85757; *Natale v. City of Toronto*, 2018 ONSC 1475, 1 O.M.T.R. 349; *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241; *Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13, [2000] 1 S.C.R. 342; *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231; *Reference re Alberta Statutes*, [1938] S.C.R. 100; *Switzman v. Elbling*, [1957] S.C.R. 285; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *R. v. Bryan*, 2007 SCC 12, [2007] 1 S.C.R. 527; *R. v. Butler*, [1992] 1 S.C.R. 452; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120; *Greater Vancouver Transportation Authority v. Canadian Federation of Students -- British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295; *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084; *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141; *Haig v. Canada*, [1993] 2 S.C.R. 995; *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627; *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610; *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569; *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815; *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *B.C. Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, 2017 SCC 6, [2017] 1 S.C.R. 93; *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016; *Health Services and Support -- Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *Fraser v. Canada (Attorney General)*, 2020 SCC 28; *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *R. (on the application of Miller) v. Prime Minister*, [2019] UKSC 41, [2020] A.C. 373; *R. (on the application of Jackson) v. Attorney General*, [2005] UKHL 56, [2006] 1 A.C. 262; *R. (Privacy International) v. Investigatory Powers Tribunal*, [2019] UKSC 22, [2020] A.C. 491; *AXA General Insurance Ltd. v. HM Advocate*, [2011] UKSC 46, [2012] 1 A.C. 868; *Brandy v. Human Rights and Equal Opportunity Commission* (1995), 183 C.L.R. 245; *Kable v. Director of Public Prosecutions (NSW)* (1996), 189 C.L.R. 51; *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997), 190 C.L.R. 410; *Lange v. Australian Broadcasting Corporation* (1997), 189 C.L.R. 520; *Roach v. Electoral*

Commissioner, [2007] HCA 43, 233 C.L.R. 162; *South African Association of Personal Injury Lawyers v. Heath*, [2000] ZACC 22, 2001 (1) S.A. 883; *Fedsure Life Assurance Ltd. v. Greater Johannesburg Transitional Metropolitan Council*, [1998] ZACC 17, 1999 (1) S.A. 374; *Elfes Case*, BVerfG, 1 BvR 253/56, Decision of January 16, 1957 (Germany); *Kesavananda v. State of Kerala*, A.I.R. 1973 S.C. 1461; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2; *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753; *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3; *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326; *Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] S.C.R. 31; *Reference re Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54; *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Ontario (Attorney General) v. G*, 2020 SCC 38; *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473.

Statutes and Regulations Cited

Better Local Government Act, 2018, S.O. 2018, c. 11, Sch. 3, s. 1.

By-law to amend By-law 267-2017, being a by-law to re-divide the City of Toronto's Ward Boundaries, to correct certain minor errors, City of Toronto By-law No. 464-2017, April 28, 2017.

By-law to re-divide the City of Toronto's Ward Boundaries, City of Toronto By-law No. 267-2017, March 29, 2017.

Canadian Charter of Rights and Freedoms, ss. 1, 2(b), (d), 3, 7, 15, 33.

City of Toronto Act, 2006, S.O. 2006, c. 11, Sch. A, s. 128(1).

Constitution Act, 1867, preamble, ss. 91, 92.

Constitution Act, 1982, preamble, s. 52.

Human Rights Act 1998 (U.K.), 1998, c. 42, s. 4.

Magna Carta (1215).

Municipal Elections Act, 1996, S.O. 1996, c. 32, Sch., s. 10.1(8).

Treaties and Other International Instruments

Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 [the *European Convention on Human Rights*].

Authors Cited

Bhagwat, Ashutosh, and James Weinstein. "Freedom of Expression and Democracy", in Adrienne Stone and Frederick Schauer, eds., *The Oxford Handbook of Freedom of Speech*. Oxford: Oxford University Press, 2021, 82.

Bobbitt, Philip. *Constitutional Fate: Theory of the Constitution*. New York: Oxford University Press, 1982.

Canada. House of Commons. *House of Commons Debates*, vol. X, 1st Sess., 32nd Parl., June 15, 1981, p. 10585.

Canadian Urban Institute. *Draw the Line: Toronto Ward Boundary Review Project Work Plan, Civic Engagement & Public Consultation Strategy*, April 28, 2014 (online: https://www.toronto.ca/legdocs/mmis/2014/ex/bgrd/backgroundfile- 69434.pdf; archived version: https://www.scc-csc.ca/cso-dce/2021SCC-CSC34_1_eng.pdf).

Chan, Kathryn. "Constitutionalizing the Registered Charity Regime: Reflections on *Canada Without Poverty*" (2020), 6 *C.J.C.C.L.* 151.

Courtney, John C. *Commissioned Ridings: Designing Canada's Electoral Districts*. Montréal: McGill-Queen's University Press, 2001.

Dawood, Yasmin. "The Right to Vote and Freedom of Expression in Political Process Cases Under the Charter" (2021), 100 S.C.L.R. (2d) 105.

Elliot, Robin. "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001), 80 *Can. Bar Rev.* 67.

Flynn, Alexandra. "Operative Subsidiarity and Municipal Authority: The Case of Toronto's Ward Boundary Review" (2019), 56 Osgoode Hall L.J. 271.

Fredman, Sandra. "Human Rights Transformed: Positive Duties and Positive Rights", [2006] *P.L.* 498.

Good, Kristin R. *Municipalities and Multiculturalism: The Politics of Immigration in Toronto and Vancouver*. Toronto: University of Toronto Press, 2009.

Hogg, Peter W., and Wade K. Wright. *Constitutional Law of Canada*, 5th ed. Supp. Toronto: Thomson Reuters, 2021 (updated 2021, release 1).

Johnson, (Alyn) James. "The *Judges Reference* and the *Secession Reference* at Twenty: Reassessing the Supreme Court of Canada's Unfinished Unwritten Constitutional Principles Project" (2019), 56 Alta. L. Rev. 1077.

Kreimer, Seth F. "Allocational Sanctions: The Problem of Negative Rights in a Positive State" (1984), 132 U. Pa. L. Rev. 1293.

Leclair, Jean. "Canada's Unfathomable Unwritten Constitutional Principles" (2002), 27 Queen's L.J. 389.

Macklem, Patrick. "Aboriginal Rights and State Obligations" (1997), 36 Alta. L. Rev. 97.

Moon, Richard. *The Constitutional Protection of Freedom of Expression*. Toronto: University of Toronto Press, 2000.

Newman, Dwight. "Canada's Notwithstanding Clause, Dialogue, and Constitutional Identities", in Geoffrey Sigalet, Grégoire Webber and Rosalind Dixon, eds., *Constitutional Dialogue: Rights, Democracy, Institutions*. New York: Cambridge University Press, 2019, 209.

Oliver, Peter C. "'A Constitution Similar in Principle to That of the United Kingdom': The Preamble, Constitutional Principles, and a Sustainable Jurisprudence" (2019), 65 McGill L.J. 207.

Ontario. Greater Toronto Area Task Force. *Greater Toronto*. Toronto, 1996.

Ontario. Legislative Assembly. *Official Report of Debates (Hansard)*, No. 14, 1st Sess., 42nd Parl., August 2, 2018, p. 605.

Ontario. Office of the Premier. *Ontario's Government for the People Announces Reforms to Deliver Better Local Government*, July 27, 2018 (online: https://news.ontario.ca/en/release/49795/ontarios-government-for-the-people-announces-reforms-to-deliver-better-local- government; archived version: https://www.scc-csc.ca/cso-dce/2021SCC-CSC34_2_eng.pdf).

Pal, Michael. "The Unwritten Principle of Democracy" (2019), 65 McGill L.J. 269.

Rawls, John. *Political Liberalism*, Expanded ed. New York: Columbia University Press, 2005.

Roach, Kent, and David Schneiderman. "Freedom of Expression in Canada" (2013), 61 S.C.L.R. (2d) 429.

Rowe, Malcolm, and Nicolas Déplanche. "Canada's Unwritten Constitutional Order: Conventions and Structural Analysis" (2020), 98 *Can. Bar Rev.* 430.

Sen, Amartya. *The Idea of Justice*. Cambridge, Mass.: Belknap Press of Harvard University Press, 2009.

Siegel, David. "Ontario", in Andrew Sancton and Robert Young, eds., *Foundations of Governance: Municipal Government in Canada's Provinces*. Toronto: University of Toronto Press, 2009, 20.

Toronto Ward Boundary Review. *Additional Information Report*, August 2016 (online: https://static1.squarespace.com/static/53bc0914e4b0eb57996e4dee/ t/57b5cc06b3db2b7747f917c3/1471532043560/TWBR.AdditionalInformat ionReport-AUG2016FINAL.pdf; archived version: https://www.scc-csc.ca/cso-dce/2021SCC-CSC34_3_eng.pdf).

Toronto Ward Boundary Review. *Final Report*. Toronto, 2016.

Toronto Ward Boundary Review. *Options Report*. Toronto, 2015.

Urbinati, Nadia. "Free Speech as the Citizen's Right", in Robert C. Post, *Citizens Divided: Campaign Finance Reform and the Constitution*. Cambridge, Mass.: Harvard University Press, 2014, 125.

Walters, Mark D. "Written Constitutions and Unwritten Constitutionalism", in Grant Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory*. New York: Cambridge University Press, 2008 (2010 reprint), 245.

Weinrib, Jacob. "What is the Purpose of Freedom of Expression?" (2009), 67 U.T. Fac. L. Rev. 165.

Zhou, Han-Ru. "Legal Principles, Constitutional Principles, and Judicial Review" (2019), 67 Am. J. Comp. L. 889.

Zipkin, Saul. "The Election Period and Regulation of the Democratic Process" (2010), 18 *Wm. & Mary Bill Rts. J.* 533.

History and Disposition:

APPEAL from a judgment of the Ontario Court of Appeal (MacPherson, Tulloch, Miller, Nordheimer and Harvison Young JJ.A.), 2019 ONCA 732, 146 O.R. (3d) 705, 439 D.L.R. (4th) 292, 442 C.R.R. (2d) 348, 92 M.P.L.R. (5th) 1, [2019] O.J. No. 4741 (QL), 2019 CarswellOnt 14847 (WL Can.), setting aside a decision of Belobaba J., 2018 ONSC 5151, 142 O.R. (3d) 336, 416 C.R.R. (2d) 132, 80 M.P.L.R. (5th) 1, [2018] O.J. No. 4596 (QL), 2018 CarswellOnt 14928 (WL Can.). Appeal dismissed, Abella, Karakatsanis, Martin and Kasirer JJ. dissenting.

Counsel

Glenn K. L. Chu and *Diana W. Dimmer*, for the appellant.

Robin K. Basu and *Yashoda Ranganathan*, for the respondent.

Michael H. Morris, for the intervener the Attorney General of Canada.

Mark Witten, for the intervener the Attorney General of British Columbia.

Paul Koven, for the intervener the Toronto District School Board.

Selwyn A. Pieters, for the intervener the Cityplace Residents' Association.

Adam Goldenberg, for the intervener the Canadian Constitution Foundation.

Guy Régimbald, for the intervener the International Commission of Jurists (Canada).

Stéphane Émard-Chabot, for the intervener the Federation of Canadian Municipalities.

Omar Ha-Redeye, for the intervener the Durham Community Legal Clinic.

Jamie Cameron, for the intervener the Centre for Free Expression at Ryerson University.

Geetha Philipupillai, for the intervener the Canadian Civil Liberties Association.

Christine Davies, for the interveners Art Eggleton, Barbara Hall, David Miller and John Sewell.

Alexi N. Wood, for the intervener the David Asper Centre for Constitutional Rights.

Donald K. Eady, for the intervener Progress Toronto.

Jason Madden, for the interveners the Métis Nation of Ontario and the Métis Nation of Alberta.

Nicolas M. Rouleau, for the intervener Fair Voting British Columbia.

TABLE OF CONTENTS

The judgment of Wagner C.J. and Moldaver, Côté, Brown and Rowe JJ. was delivered by

R. WAGNER C.J. and R. BROWN J.

I. Introduction

1 While cast as a claim of right under s. 2(b) of the *Canadian Charter of Rights and Freedoms*, this appeal, fundamentally, concerns the exercise of provincial legislative authority over municipalities. The issue, simply put, is whether and how the Constitution of Canada restrains a provincial legislature from changing the conditions by and under which campaigns for elected municipal councils are conducted.

2 Section 92(8) of the *Constitution Act, 1867* assigns to provinces exclusive legislative authority regarding "Municipal Institutions in the Province". Municipalities incorporated under this authority therefore hold delegated provincial powers; like school boards or other creatures of provincial statute, they do not have independent constitutional status (*Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, 2000 SCC 45, [2000] 2 S.C.R. 409, at paras. 33-34). The province has "absolute and unfettered legal power to do with them as it wills" (*Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 S.C.R. 470, at para. 58, quoting with approval Campbell J. in *Ontario Public School Boards' Assn. v. Ontario (Attorney General)* (1997), 151 D.L.R. (4th) 346 (Ont. C.J. (Gen. Div.)), at p. 361). No constitutional norms or conventions prevent a province from making changes to municipal institutions without municipal consent (*East York (Borough) v. Ontario* (1997), 36 O.R. (3d) 733 (C.A.), at pp. 737-38, per Abella J.A.). And "it is not for this Court to create constitutional rights in respect of a third order of government where the words of the Constitution read in context do not do so" (*Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673, at para. 39).

3 Aside from one reference to s. 92(8) -- and an acknowledgement that the Province of Ontario had constitutional authority to act as it did in this case -- our colleague Abella J. all but ignores this decisive constitutional context (para. 112). And yet, these considerations loom large here. After the closing of a nomination period for elections to the Toronto City Council, the Province legislated a new, reduced ward structure for the City of Toronto and a correspondingly reduced Council. The City says that doing so was unconstitutional, because it limited the s. 2(b) *Charter* rights of electoral participants and violated the unwritten constitutional principle of democracy. It also, says the City, ran afoul of the constitutional requirements of effective representation, which it says flow from s. 2(b) of the *Charter* and s. 92(8) of the *Constitution Act, 1867* by virtue of that same unwritten constitutional principle of democracy.

4 None of these arguments have merit, and we would dismiss the City's appeal. In our view, the Province acted constitutionally. As to the s. 2(b) claim, the City seeks access to a statutory platform which must be considered under the framework stated in *Baier*. The change to the ward structure did not prevent electoral participants from engaging in further political expression on election issues under the new ward structure in the 69 days between the *Act* coming into force and the election day. There was no substantial interference with the claimants' freedom of expression and thus no limitation of s. 2(b).

5 Nor did the *Act* otherwise violate the Constitution. Unwritten constitutional principles cannot in themselves ground a declaration of invalidity under s. 52(1) of the *Constitution Act, 1982*, and there is no freestanding right to effective representation outside s. 3 of the *Charter*. Further, the unwritten constitutional principle of democracy cannot be used to narrow provincial authority under s. 92(8), or to read municipalities into s. 3.

II. Background

6 In 2013, the City of Toronto engaged consultants to conduct the Toronto Ward Boundary Review of Toronto's then 44-ward structure. They recommended an expanded 47-ward structure, which the City adopted in 2016.

7 On May 1, 2018, the City of Toronto campaign commenced and nominations opened in preparation for an election day on October 22, 2018. By the close of nominations on July 27, 2018, just over 500 candidates had registered to run in the 47 wards. That same day, the Government of Ontario announced its intention to introduce legislation reducing the size of Toronto City Council to 25 wards. On August 14, 2018, the *Better Local Government Act, 2018*, S.O. 2018, c. 11 ("*Act*"), came into force, reducing the number of wards from 47 to 25 (based on the boundaries of the federal electoral districts), and extending the nomination period to September 14.

8 The City and two groups of private individuals applied on an urgent basis to the Ontario Superior Court of Justice challenging the constitutionality of these measures and seeking orders restoring the 47-ward structure. They argued that the *Act* breached *Charter* guarantees of freedom of expression, freedom of association, and equality, and that it violated the unwritten constitutional principles of democracy and the rule of law.

9 The application judge agreed, finding two limits on s. 2(b) of the *Charter* (2018 ONSC 5151, 142 O.R. (3d) 336). First, he found that the *Act* limited the municipal candidates' s. 2(b) right to freedom of expression, a conclusion largely tied to the timing of the *Act*, enacted as it was during the election campaign. Secondly, he found that the *Act* limited municipal voters' s. 2(b) right to effective representation -- despite the fact that effective representation is a principle of s. 3 (and not s. 2(b)) of the *Charter* - - due to his conclusion that the ward population sizes brought about by the *Act* were too large to allow councillors to effectively represent their constituents. Neither of these limits could, he further held, be justified under s. 1 and he set aside the impugned provisions of the *Act*. As a result, the election was to proceed on the basis of the 47-ward system.

10 The Province appealed and moved to stay the judgment pending appeal. The Court of Appeal for Ontario granted the stay on September 19, 2018, concluding that there was a strong likelihood that the Province's appeal would be successful and, on October 22, 2018, the Toronto municipal election proceeded on the basis of the 25-ward structure created by the *Act* (2018 ONCA 761, 142 O.R. (3d) 481). No issue is taken with the integrity of the election or the results thereof.

11 When the Court of Appeal decided the Province's appeal on its merits, it divided. While the dissenters would have invalidated the *Act* as unjustifiably limiting freedom of expression, the majority allowed the appeal, finding no such limit (2019 ONCA 732, 146 O.R. (3d) 705). The City had advanced a positive rights claim -- that is, a claim for a particular platform and not protection from state interference with the conveyance of a message. Consistent with the *Baier* framework governing such claims, the majority applied the factors stated in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, to conclude that the claim was not properly grounded in s. 2(b) of the *Charter*, and that the application judge had erred in finding that the *Act* substantially interfered with the candidates' freedom of expression. Further, he had erred in finding that the right to effective representation -- guaranteed by s. 3 -- applies to municipal elections and bears any influence over the s. 2(b) analysis. Finally, the majority held that unwritten constitutional principles do not confer upon the judiciary power to invalidate legislation that does not otherwise infringe the *Charter*; nor do they limit provincial legislative authority over municipal institutions. Though unwritten constitutional principles are sometimes used to fill gaps in the Constitution, no such gap exists here.

12 The Court of Appeal appears to have granted the City public interest standing to argue the appeal (para. 28). The City's standing was not challenged before this Court.

III. Issues

13 Two issues arise from the foregoing. First, did the *Act* limit (unjustifiably or at all) the freedom of expression of candidates and/or voters participating in the 2018 Toronto municipal election? And secondly, can the unwritten constitutional principle of democracy be applied, either to narrow provincial legislative authority over municipal institutions or to require effective representation in those institutions, so as to invalidate the *Act*?

IV. Analysis

A. *Freedom of Expression*

(1) Principles of *Charter* Interpretation in the Context of Section 2(b)

14 This appeal hinges on the scope of s. 2(b) of the *Charter*, which provides that everyone has the fundamental freedoms "of thought, belief, opinion and expression, including freedom of the press and other media of communication". A purposive interpretation of *Charter* rights must begin with, and be rooted in, the text (*Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, at paras. 8-10) and not overshoot the purpose of the right but place it in its appropriate linguistic, philosophic and historical contexts (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344). Yet, it is undeniable that s. 2(b) has traditionally been interpreted expansively (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 976; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at pp. 765-67). Indeed, s. 2(b) has been interpreted so broadly that the framework has been criticized for setting too low a bar for establishing a s. 2(b) limitation, such that any consideration of its substantive reach and

bounds is generally consigned to the limitations analysis under s. 1 (K. Chan, "Constitutionalizing the Registered Charity Regime: Reflections on *Canada Without Poverty*" (2020), 6 *C.J.C.C.L.* 151, at p. 174, citing M. Plaxton and C. Mathen, "Developments in Constitutional Law: The 2009-2010 Term" (2010), 52 S.C.L.R. (2d) 65). Following *Irwin Toy*, then, if an activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of "expression" (p. 969). Further, if the purpose or effect of the impugned governmental action is to control attempts to convey meaning through that activity, a limit on expressive freedom will be shown (p. 972).

15 Freedom of expression is not, however, presently recognized as being without internal limits. Activities may fall outside the scope of s. 2(b) where the method of the activity itself -- such as violence -- or the location of that activity is not consonant with *Charter* protection (*Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, at paras. 60 and 62).

16 Further, and of particular significance to this appeal, s. 2(b) has been interpreted as "generally impos[ing] a negative obligation ... rather than a positive obligation of protection or assistance" (*Baier*, at para. 20 (emphasis added), citing *Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1035). A claim is properly characterized as negative where the claimant seeks "freedom from government legislation or action suppressing an expressive activity in which people would otherwise be free to engage" (*Baier*, at para. 35 (emphasis added)). Such claims of right under s. 2(b) are considered under this Court's *Irwin Toy* framework.

17 In *Baier*, however, this Court explained that s. 2(b) may, in certain circumstances, impose positive obligations on the government to facilitate expression. Put differently, while s. 2(b) typically "prohibits gags", it can also, in rare and narrowly circumscribed cases, "compel the distribution of megaphones" (para. 21, quoting *Haig*, at p. 1035). Hence the Court of Appeal's statement in this case that "[f]reedom of expression is respected, in the main, if governments simply *refrain* from actions that would be an unjustified interference with it", and that positive claims under s. 2(b) may be recognized in only "exceptional and narrow" circumstances (paras. 42 and 48 (emphasis in original)).

18 Central to whether s. 2(b) was limited by the Province here is, therefore, the appropriate characterization of the claim as between a negative and positive claim of right. In *Baier*, this Court shielded positive claims from the *Irwin Toy* framework and subjected them to an elevated threshold. This is necessary, given the ease with which claimants can typically show a limit to free expression under the *Irwin Toy* test. An elevated threshold for positive claims narrows the circumstances in which a government or legislature must legislate or otherwise act to support freedom of expression. To consider positive claims under *Irwin Toy* would be to force the government to justify, under s. 1, any decisions *not* to provide particular statutory platforms for expression.

19 The *Baier* framework is therefore not confined, as our colleague suggests, "to address[ing] underinclusive statutory regimes" (para. 148). This Court could not have been clearer in *Baier* that it applies "where a government defending a *Charter* challenge alleges, or the *Charter* claimant concedes, that a positive rights claim is being made under s. 2(*b*)" (para. 30). Were it otherwise -- that is, were *Baier*'s application limited to cases of underinclusion -- claims seeking the creation or extension of a statutory platform for expression would be considered under *Baier* while claims seeking the preservation of that same platform would be considered under *Irwin Toy*. This is illogical. *Baier*'s reach extends beyond cases of underinclusion or exclusion, and categorically limits the "obligation[s] on government to provide individuals with a particular platform for expression" (*Greater Vancouver Transportation Authority v. Canadian Federation of Students -- British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295, at para. 35). This reflects the separation of powers; choices about whether and how to design a statutory or regulatory platform are best left to the elected orders of the state.

20 We should not be taken as suggesting that s. 2(b) is to be understood as conferring a right that is wholly positive or wholly negative. Many constitutional rights have both positive and negative dimensions and the *Baier* framework explicitly recognizes that this is so for s. 2(b). But the distinction between those positive and negative dimensions remains important when considering the nature of *the obligation* that the claim seeks to impose upon the state: a "right's positive dimensions require government to act in certain ways, whereas its negative dimensions require government to refrain from acting in other ways" (P. Macklem, "Aboriginal Rights and State Obligations"

(1997), 36 Alta. L. Rev. 97, at p. 101; see also A. Sen, *The Idea of Justice* (2009), at p. 282). For instance, would the claim, if accepted, require government action, or is the claim concerned with restrictions on the content or meaning of expression? And, were the claim rejected, would it deny the claimant access to a particular platform for expression on a subject, or would it preclude altogether the possibility of conveying expression on that subject? While in *Haig*, L'Heureux-Dubé J. correctly noted that the distinction between positive and negative entitlements is "not always clearly made, nor ... always helpful", she nevertheless distinguished typical negative claims from those that might require "positive governmental action" (p. 1039). This is the distinction with which we concern ourselves here.

21 This appeal therefore presents an opportunity to affirm and clarify the application of *Baier* to positive claims under s. 2(b). *Baier* remains good law in the context of s. 2(b). It adopts a framework for analysis first set forth in *Dunmore*, which itself decided a claim under s. 2(d) (freedom of association). We need not decide here whether *Dunmore* remains applicable to s. 2(d) claims (an open question, given the decisions of this Court in *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, and *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3). It suffices here for us to affirm *Baier* as a useful and necessary framework in the context of positive s. 2(b) claims (although, as we will explain, we would simplify the framework).

(2) The *Baier* Framework

22 The *Baier* framework applies if a claimant seeks to impose an obligation on the government (or legislature) to provide access to a particular statutory or regulatory platform for expression (para. 30; *Greater Vancouver Transportation Authority*, at para. 35). Here, therefore, if the City's claim would require the government or legislature to enact legislation or promulgate regulations, or otherwise act to provide a particular statutory or regulatory platform, it is advancing a positive claim (*Baier*, at para. 35).

23 In *Baier*, this Court held that, to succeed, a positive claim must satisfy the three *Dunmore* factors: (1) Is the claim grounded in freedom of expression, rather than in access to a particular statutory regime? (2) Has the claimant demonstrated that lack of access to a statutory regime has the effect of a substantial interference with freedom of expression, or has the purpose of infringing freedom of expression? (3) Is the government responsible for the inability to exercise the fundamental freedom?

24 These factors set an elevated threshold for positive claims. The first factor asks what the claimant is really seeking -- in other words, whether the claim is grounded in freedom of expression or whether it merely seeks access to a statutory regime. Likewise, the second factor -- which requires that the claimant establish a *substantial* interference with freedom of expression -- sets a higher threshold than that stated in *Irwin Toy*, which asks only whether "the purpose or effect of the government action in question was to restrict freedom of expression" (p. 971; see also *Baier*, at paras. 27-28 and 45).

25 So understood, these factors can usefully be distilled to a single core question: is the claim grounded in the fundamental *Charter* freedom of expression, such that, by denying access to a statutory platform or by otherwise failing to act, the government has either substantially interfered with freedom of expression, or had the purpose of interfering with freedom of expression? This is, to be clear, a single question which emphasizes the elevated threshold in the second *Dunmore* factor while encompassing the considerations of the first and third factors. Given what we see as the significant overlap among the factors -- particularly between the first and second -- this is, in our view, a salutary clarification of the *Baier* test, entirely consistent with this Court's approach in *Baier* and *Greater Vancouver Transportation Authority*. To be clear, s. 2(b) does not remove the authority that a legislature has to create or modify statutory platforms, because it does not include the right to access any statutory platform in particular. However, when a legislature chooses to provide such a platform, then it must comply with the *Charter* (*Haig*, at p. 1041).

26 If, therefore, a claimant can demonstrate that, by denying access to a statutory platform, the government has substantially interfered with freedom of expression or acted with the purpose of doing so, the claim may proceed.

Despite being a positive claim, the claimant has demonstrated a limit to its s. 2(b) right, and -- subject to justification of such limit under s. 1 -- government action or legislation may be required.

27 There is no suggestion here that the Province acted *with the purpose* of interfering with freedom of expression, and we therefore confine our observations here to the claim presented -- that is, a claim that a law has had *the effect* of substantially interfering with freedom of expression. In our view, a substantial interference with freedom of expression occurs where lack of access to a statutory platform has the effect of radically frustrating expression to such an extent that meaningful expression is "effectively preclude[d]" (*Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, at para. 33). While meaningful expression need not be rendered absolutely impossible, we stress that effective preclusion represents an exceedingly high bar that would be met only in extreme and rare cases (*Baier*, at para. 27; *Dunmore*, at para. 25). For example, a statutory reduction of the length of an election campaign to two days may well, as a practical matter, be shown to have the effect of constituting a substantial interference with freedom of expression. In such a case, meaningful expression may very well be found to be effectively precluded.

28 The height of this bar of effective preclusion is demonstrated by *Baier*. There, legislation was amended to prohibit school employees from running for election as school trustees, and the Court -- applying the *Dunmore* factors - - concluded that no substantial interference with freedom of expression was demonstrated. The claim was grounded merely in access to a particular statutory platform governing school trusteeship, rather than a substantial interference with freedom of expression. And, in any event, there was no interference, substantial or otherwise, with the appellants' ability to express views on matters relating to the education system. Their exclusion from the statutory scheme deprived them only of one particular *means* of such expression (paras. 44 and 48).

(3) Application

(a) *Nature of the Claim*

29 The first question to answer in deciding this appeal is whether the City advances a positive claim. There are two ways in which the City's claim can be understood. Each leads to the conclusion that the claim is, in substance, a positive claim that must, therefore, show a substantial interference with freedom of expression.

30 The first possible view of the City's claim is that of *restoring an earlier statutory platform*, specifically the 47-ward structure. That this is so is evident from the City's requested disposition, which asks that the next municipal election be conducted under the previous framework (A.F., at para. 152). The City, then, would have the Province act (either by enacting new legislation or repealing the impugned provisions of the *Act*) to restore the previous statutory platform. This reveals a straightforward positive claim. The fact that the City and the participants in the election had previously enjoyed access to the 47-ward structure is of no legal significance. In *Baier*, this Court viewed a claim for restoring the status quo as a positive claim, equating it with a demand to legislate a framework for the first time. Such an approach is necessary to prevent fettering; "[t]o hold otherwise would mean that once a government had created a statutory platform, it could never change or repeal it without infringing s. 2(*b*)" (para. 36).

31 The second possible view of the City's claim is that of *maintaining an existing statutory platform*. The City frames its claim as asking the Province, once a municipal election period commences, to ensure access to whatever election platform existed at that time. In the City's view, what is otherwise political expression becomes what it calls "electoral expression" during an election period (A.F., at para. 54). Protection of this "electoral expression", it says, requires the maintenance of the particular electoral framework that was in place at the beginning of the electoral period. Framed thusly, the City's claim that the impugned provisions of the *Act* limited s. 2(b) turns squarely on the *timing* of the *Act*. Indeed, at the hearing of this appeal, the City conceded that barring any other potential issues, the Province was constitutionally permitted to enact this same legislation in the week *following* the election. Further, the City requested -- in the event that this Court finds only that the timing of the *Act* was unconstitutional -- a declaration to that effect, rather than a remedy that would restore the previous 47-ward structure.

32 The City's focus on the timing of the *Act* cannot, however, convert its positive claim into a negative one. While

its claim is couched in language of non-interference -- something that superficially resembles a negative claim to be considered under the *Irwin Toy* framework -- the City does not seek protection of electoral participants' expression from restrictions tied to content or meaning (as was the case, for example, in *Greater Vancouver Transportation Authority*); rather, it seeks a particular platform (being whatever council structure existed at the outset of the campaign) by which to channel, and around which to structure, that expression.

33 So understood, the claim is akin to that rejected in *Baier*. The only point of distinction is that *Baier* involved a request for a specific type of legislative regime (i.e., one that permitted school employees to run for and serve as school board trustees), while the claim in this case is for temporary protection -- that is, for the duration of the campaign -- of whatever particular type of election structure existed at the outset of the election period. But, for the purposes of deciding constitutionality, there is no difference between the present case and a hypothetical scenario in which the Province were to scrap the ongoing election and replace it with a completely new platform with a different structure and a reasonable campaign period altogether. Here, the City is able to frame its claim only in terms of non-interference because the *Act* modified the existing structure without scrapping it. But the ultimate result is the same. The City's claim is still a claim for access to a particular statutory platform; the precise disposition requested simply depends on whatever electoral framework is in place at the outset of the election process. It is thus a positive claim. Because municipal elections are merely statutory platforms without a constitutional basis, provinces can -- subject to the elevated threshold of a substantial interference -- change the rules as they wish.

34 To hold otherwise would be to contemplate an unprecedented statutory freeze on provincial jurisdiction under s. 92(8), temporarily constitutionalizing a particular statutory platform for the duration of an election. What would normally be considered a positive claim under s. 2(b) would effectively transform into a negative claim for that period of time. This is constitutionally dubious, nonsensical, and even futile since the duration of such a freeze would depend entirely on the length of the election, over which the Province itself has ultimate authority. With respect, our colleague Abella J. ignores these concerns in holding that *Irwin Toy* ought to apply to a claim such as this. Provincial authority to legislate a change to Toronto's ward structure is accepted, but on our colleague's understanding this authority is operative only some of the time (para. 112). Combined with her broad articulation of the *Irwin Toy* threshold in this context -- whether legislation "destabiliz[es] the opportunity for meaningful reciprocal discourse" -- such an understanding would effectively freeze legislative authority to even tangentially affect a municipal election for the duration of the campaign (para. 115). Such a freeze sits awkwardly with the plenary authority that provinces enjoy under s. 92(8) of the *Constitution Act, 1867*.

35 In sum, the City advances a positive claim and the *Baier* framework applies.

(b) *Application of Baier*

36 As explained above, the *Baier* framework asks whether the claimant demonstrated that, by denying access to a statutory regime, the government has substantially interfered with freedom of expression. To repeat, this is a demanding threshold, requiring the City to show that the *Act* radically frustrated the expression of election participants such that meaningful expression was effectively precluded. In our view, the City cannot do so and therefore has not established a limit on s. 2(b).

37 Here, the candidates and their supporters had 69 days -- longer than most federal and provincial election campaigns -- to re-orient their messages and freely express themselves according to the new ward structure. (Our colleague Abella J. is simply incorrect to suggest, at para. 104, that only one month of the campaign remained. It was twice that.) The *Act* did not prevent candidates from engaging in further political speech under the new structure. Candidates continued to campaign vigorously, canvassing and debating about issues unrelated to the impugned provisions, the size of council or the ward boundaries. And even had they not, nothing in the *Act* prevented them from doing so. It imposed no restrictions on the content or meaning of the messages that participants could convey. Many of the challengers who continued to campaign ultimately had, by any measure, successful campaigns, raising significant amounts of money and receiving significant numbers of votes. This would

not have been possible had their s. 2(b) rights been so radically frustrated so as to effectively preclude meaningful expression.

38 It is of course likely that some of the candidates' prior expression may have lost its relevance; pamphlets or other campaign paraphernalia with an old ward designation on them, for instance, had to be revised or discarded. But, with the new ward structure -- and larger ward populations -- came higher campaign expenditure limits, so candidates were able to raise more funds over the 69 days they had left in the campaign. This is, therefore, a complaint that the prior expression of the candidates was no longer meaningful or helpful in their project to secure election. It is, at its root, a complaint about diminished *effectiveness*.

39 While diminished effectiveness might be enough to amount to a limit of s. 2(b) in its traditional negative orientation -- see, for instance, *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, at para. 15, per McLachlin C.J. and Major J., dissenting in part, but not on this point, and *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569 -- more is required under the *Baier* framework. In the context of a positive claim, only extreme government action that extinguishes the effectiveness of expression -- for instance, instituting a two-day electoral campaign -- may rise to the level of a substantial interference with freedom of expression; such an act may effectively preclude meaningful expression in the context of the election. That is simply not what happened here. Section 2(b) is not a guarantee of the effectiveness or continued relevance of a message, or that campaign materials otherwise retain their usefulness throughout the campaign.

40 Even accepting that the change in structure diminished the effectiveness of the electoral candidates' prior political speech by rendering some of their 47-ward campaign communications less relevant, this does not rise to the level of substantial interference. Again, the campaign that took place over 69 days following the imposition of the 25-ward system was vigorously contested by candidates whose freedom of expression was clearly not radically frustrated. We acknowledge that the application judge found a substantial interference with freedom of expression (para. 32). There are, however, three problems with his finding. First, this finding was made in the context of legal error, since he erroneously applied the *Irwin Toy* framework for a negative claim. Secondly, and relatedly, the reasons of the judge make clear that this finding was tied to the diminished effectiveness of the candidates' expression, something that, as explained, is simply insufficient to show a limit on freedom of expression under the *Baier* framework. Finally, given the truncated timelines of the matter at first instance, the judge was required to make this finding on a limited factual record. With the benefit of fresh evidence adduced by the Province and admitted at this Court, it is clear that the candidates were not effectively precluded from expressing themselves in the context of the campaign. They conducted vigorous, hard-fought campaigns about the issues that mattered to them.

41 The City says that the expression at issue here -- again, what it calls "electoral expression" -- is uniquely connected to, and dependent on, the framework of the election itself. Therefore, it says, the scope of s. 2(b) encompasses not only the expression itself but also the structure of the election. Put thusly, however, the claim is not dissimilar to the "unique role" of school trusteeship claimed by the appellants, and rejected by the Court, in *Baier*. Claiming a unique role or dependence on a statutory platform is not the same as claiming a fundamental freedom (*Baier*, at para. 44). Doing so is simply to seek access to that statutory platform. That is what the City seeks here.

42 In sum, the *Baier* threshold is not met here. The *Act* imposed no limit on freedom of expression.

43 Having found no limit to s. 2(b), we need not consider s. 1. We note, however, that our colleague Abella J. decides s. 1 against the Province on the basis that it "offered no explanation, let alone a pressing and substantial one, for why the changes were made in the middle of an ongoing election" (para. 161). This ignores the Province's written and oral submissions that the newly elected government proceeded expeditiously so as to be able to implement these changes within the time constraints of its own elected mandate, rather than wait four years until the next municipal election (R.F., at para. 149; transcript, at pp. 111-12).

(c) *Effective Representation*

44 The City also says that the impugned provisions of the *Act* infringe "effective representation", an incident of the guarantee contained in s. 3 of the *Charter* which, the City says, can be imported into s. 2(b).

45 Section 3 guarantees citizens the right to vote and run for office in provincial and federal elections, and includes a right to effective representation. The text of s. 3 makes clear, however, that it guarantees "only the right to vote in elections of representatives of the federal and the provincial legislative assemblies" (*Haig*, at p. 1031 (emphasis added)) and "does not extend to municipal elections" (p. 1031 (emphasis added), citing P. W. Hogg, *Constitutional Law of Canada* (3rd ed. 1992), vol. 2, at p. 42-2). Simply put, ss. 2(b) and 3 record distinct rights which must be given independent meaning (*Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at paras. 79-80; *Harper*, at para. 67). Effective representation is not a principle of s. 2(b), nor can the concept be imported wholesale from a different *Charter* right.

46 In any event, effective representation connotes *voter parity* which, while not exhaustive of the requirements of effective representation, is the overarching concern and the condition of "prime importance" (*Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at p. 184). What matters is the *relative population* of the wards, *not* their *absolute size*. To hold otherwise implies keeping the population of wards relatively constant by increasing the number of councillors to keep pace with population growth, a notion unknown to Canadian law (in s. 3 or elsewhere) and which would not be without its own difficulties, including potentially unwieldly growth in the size of Toronto City Council (M. Pal, "The Unwritten Principle of Democracy" (2019), 65 McGill L.J. 269, at pp. 298-99; J. C. Courtney, *Commissioned Ridings: Designing Canada's Electoral Districts* (2001), at pp. 15 and 19).

47 And *even were* effective representation to apply as a consideration here, we would not find that the principle has been violated due only to the larger population sizes of the wards created by the *Act*. It is not disputed that the 25-ward structure of the *Act* enhanced voter parity, relative to the 47-ward structure preferred by the City (which was not even designed to achieve voter parity until 2026) (A.F., at para. 150; R.F., at paras. 35, 38, 133, 143 and 148). Indeed, the Toronto Ward Boundary Review's reasoning for having rejected the 25-ward structure was criticized on this very basis (R.R. (short), vol. II, at pp. 65, 69, 72-73 and 77-78). While the principle of effective representation encompasses more than simple voter parity, those who rely upon the principle of effective representation here fail to identify any other factors -- geography, community history, community interests and minority representation -- that could conceivably justify a departure from parity (see *Reference re Prov. Electoral Boundaries (Sask.)*, at p. 184).

B. *Democracy*

48 The second issue on appeal is whether the impugned provisions of the *Act* are unconstitutional for violating the unwritten constitutional principle of democracy. Specifically, the City argues that the change in ward structure violated the unwritten principle of democracy by denying voters effective representation and disrupting the election process (A.F., at para. 105). It therefore asks the Court to use the democratic principle as a basis for invalidating otherwise valid provincial legislation. It says this is made possible by drawing from this Court's s. 3 jurisprudence and from the concept of effective representation, and by viewing the principle as limiting provincial competence under s. 92(8). Conversely, and echoing the Court of Appeal on this point, the Attorney General of Ontario says that the unwritten constitutional principle of democracy cannot be used as a device for invalidating legislation, independently of written constitutional provisions and the law governing them. For the reasons that follow, the Attorney General is correct.

(1) Interpretive and Gap-Filling Roles of Unwritten Constitutional Principles

49 The Constitution of Canada embodies written and unwritten norms. This Court has recognized that our Constitution describes an architecture of the institutions of state and of their relationship to citizens that connotes certain underlying principles (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 93; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 50-51). These principles, such as democracy and the rule of law, "infuse our Constitution" (*Secession Reference*, at para. 50).

Although not recorded outside of "oblique reference[s]" in the preamble to the *Constitution Act, 1867* and to the *Constitution Act, 1982* (para. 51), these principles are "foundational" (para. 49), without which "it would be impossible to conceive of our constitutional structure" (para. 51). These principles have "full legal force" and may give rise to substantive legal obligations (para. 54, quoting *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, at p. 845). "[L]ike all principles of political morality, [they] can guide and constrain the decision-making of the executive and legislative branches" (C.A. reasons, at para. 84, citing *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 52).

50 Unwritten principles are therefore part of *the law* of our Constitution, in the sense that they form part of the context and backdrop to the Constitution's written terms. Our colleague Abella J. seizes upon a statement from a dissenting opinion in *Reference re Resolution to Amend the Constitution* to support the proposition that "full legal force" necessarily includes the power to invalidate legislation. But the complete passage in *Reference re Resolution to Amend the Constitution*, and the jurisprudence cited therein, demonstrates that Martland and Ritchie JJ. are discussing *federalism—* and, while specific aspects of federalism may be unwritten and judicially developed, it is indisputable that federalism has a strong textual basis. Nor does our colleague's reliance upon *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 (at para. 176), support the capacity of unwritten constitutional principles to invalidate legislation, since the finding there was that granting exclusive jurisdiction to the youth court would infringe ss. 96 to 101 and 129 of the *Constitution Act, 1867*. Regardless, any uncertainty on the question of whether unwritten constitutional principles may invalidate legislation that may have remained after the *Reference re Resolution to Amend the Constitution* and the *Secession Reference* was, as we will explain, fully put to rest in *Imperial Tobacco*.

51 Further, the authorities she cites as "recogniz[ing] that unwritten constitutional principles have full legal force and can serve as substantive limitations on all branches of government" (para. 166) do not support the proposition that unwritten constitutional principles can be applied to invalidate legislation. Indeed, it is quite the contrary -- for example, in *R. (on the application of Miller) v. Prime Minister*, [2019] UKSC 41, [2020] A.C. 373, at para. 41, the Supreme Court of the United Kingdom stated that the constitutional principle of parliamentary sovereignty means that *legislation itself* ("laws enacted by the Crown in Parliament"), under the Constitution of the United Kingdom, remains "the supreme form of law". While courts in the United Kingdom may find primary legislation to be inconsistent with the *European Convention on Human Rights*, 213 U.N.T.S. 221, they may only issue a declaration of incompatibility (*Human Rights Act 1998* (U.K.), 1998, c. 42, s. 4); they have not used unwritten constitutional principles to invalidate legislation.

52 Our colleague is concerned about the "rare case" where "legislation [that] elides the reach of any express constitutional provision ... is fundamentally at odds with our Constitution's 'internal architecture' or 'basic constitutional structure'" and recourse must be had to unwritten constitutional principles (para. 170, quoting *Secession Reference*, at para. 50, and *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 57). But it is inconceivable that legislation which is repugnant to our "basic constitutional structure" would not infringe the Constitution itself. And that structure, recorded in the Constitution's text (as we discuss below), is interpreted with the aid of unwritten constitutional principles. This is clear from the context of Martland and Ritchie JJ.'s statement that unwritten principles have "full legal force in the sense of being employed to strike down legislative enactments" (*Reference re Resolution to Amend the Constitution*, at p. 845). As noted above, that case was about federalism, as was the jurisprudence cited in support of their statement; Martland and Ritchie JJ. were describing the "constitutional requirements that are derived from the federal character of Canada's Constitution" (pp. 844-45 (emphasis added)). And this is precisely the point — while the specific aspects of federalism at issue there may not have been found in the express terms of the Constitution, *federalism is*.

53 To explain, federalism is fully enshrined *in the structure* of our Constitution, because it is enshrined *in the text* that is constitutive thereof — particularly, but not exclusively, in ss. 91 and 92 of the *Constitution Act*, *1867*. Structures are not comprised of unattached externalities; they are embodiments of their constituent, conjoined parts. The structure of our Constitution is identified by way of its actual provisions, recorded in its text. This is why our colleague can offer no example of legislation that would undermine the structure of the Constitution that cannot be addressed as we propose, which is via purposive textual interpretation. It is also why, once "constitutional

structure" is properly understood, it becomes clear that, when our colleague invokes "constitutional structure", she is in substance inviting judicial invalidation of legislation in a manner that is wholly untethered from that structure.

54 Ultimately, what "full legal force" means is dependent on the particular context. Any legal instrument or device, such as a contract or a will or a rule, has "full legal force" within its proper ambit. Our colleague's position -- that because unwritten constitutional principles have "full legal force", they must necessarily be capable of invalidating legislation -- assumes the answer to the preliminary but essential question: what *is* the "full legal force" of *unwritten constitutional principles*? And in our view, *because* they are unwritten, their "full legal force" is realized *not* in *supplementing* the written text of our Constitution as "provisions of the Constitution" with which no law may be inconsistent and remain of "force or effect" under s. 52(1) of the *Constitution Act, 1982*. Unwritten constitutional principles are not "provisions of the Constitution". Their legal force lies in their representation of general principles within which our constitutional order operates and, therefore, by which the Constitution's written terms -- its *provisions* -- are to be given effect. In practical terms, this means that unwritten constitutional principles may assist courts in only two distinct but related ways.

55 First, they may be used in the interpretation of constitutional provisions. Indeed, that is the "full legal force" that this Court described in *Secession Reference* (para. 54). In this way, the unwritten constitutional principles of judicial independence and the rule of law have aided in the interpretation of ss. 96 to 100 of the *Constitution Act, 1867*, which have come to safeguard the core jurisdiction of the courts which fall within the scope of those provisions (*Provincial Court Judges Reference*, at paras. 88-89; *MacMillan Bloedel*, at paras. 10-11 and 27-28; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, at paras. 29-33). When applied to *Charter* rights, unwritten principles assist with purposive interpretation, informing "the character and the larger objects of the *Charter* itself, ... the language chosen to articulate the specific right or freedom, [and] the historical origins of the concepts enshrined" (*Quebec (Attorney General)*, at para. 7, quoting *Big M Drug Mart Ltd.*, at p. 344; see also *R. v. Poulin*, 2019 SCC 47, at para. 32).

56 Secondly, and relatedly, unwritten principles can be used to develop structural doctrines unstated in the written Constitution *per se*, but necessary to the coherence of, and flowing by implication from, its architecture. In this way, structural doctrines can fill gaps and address important questions on which the text of the Constitution is silent, such as the doctrine of full faith and credit (*Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289); the doctrine of paramountcy (*Huson v. The Township of South Norwich* (1895), 24 S.C.R. 145); the remedy of suspended declarations of invalidity (*Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721); and the obligations to negotiate that would follow a declaration of secession by a province (*Secession Reference*).

57 Neither of these functions support the proposition advanced by the City that the force of unwritten principles extends to invalidating legislation. Indeed, the truth of the matter is to the contrary. Attempts to apply unwritten constitutional principles in such a manner as an independent basis to invalidate legislation, whether alone or in combination, suffer from a normative and a practical deficiency, each related to the other, and each fatal on its own.

58 First, such attempts trespass into legislative authority to amend the Constitution, thereby raising fundamental concerns about the legitimacy of judicial review and distorting the separation of powers (*Imperial Tobacco*, at paras. 53-54, 60 and 64-67; J. Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002), 27 Queen's L.J. 389, at pp. 427-32). Our colleague's approach, which invites the use of unwritten constitutional principles in a manner that is wholly untethered from the text, ignores this fundamental concern.

59 Secondly, unwritten constitutional principles are "highly abstract" and "[u]nlike the rights enumerated in the *Charter* -- rights whose textual formulations were debated, refined and ultimately resolved by the committees and legislative assemblies entrusted with constitution-making authority -- the concep[t] of democracy ... ha[s] no canonical formulatio[n]" (C.A. reasons, at para. 85). Unlike the written text of the Constitution, then, which "promotes legal certainty and predictability" in the exercise of judicial review (*Secession Reference*, at para. 53), the nebulous nature of the unwritten principles makes them susceptible to be interpreted so as to "render many of our written constitutional rights redundant and, in doing so, undermine the delimitation of those rights chosen by our

constitutional framers" (*Imperial Tobacco*, at para. 65). Accordingly, there is good reason to insist that "protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box" (para. 66). In our view, this statement should be understood as covering all possible bases for claims of right (i.e., "unjust or unfair" *or otherwise normatively deficient*).

60 We add this. Were a court to rely on unwritten constitutional principles, in whole or in part, to invalidate legislation, the consequences of this judicial error would be of particular significance given two provisions of our *Charter*. First, s. 33 preserves a limited right of legislative override. Where, therefore, a court invalidates legislation using s. 2(b) of the *Charter*, the legislature may give continued effect to *its* understanding of what the Constitution requires by invoking s. 33 and by meeting its stated conditions (D. Newman, "Canada's Notwithstanding Clause, Dialogue, and Constitutional Identities", in G. Sigalet, G. Webber and R. Dixon, eds., *Constitutional Dialogue: Rights, Democracy, Institutions* (2019), 209, at p. 232). Were, however, a court to rely *not* on s. 2(b) but *instead* upon an unwritten constitutional principle to invalidate legislation, this undeniable aspect of the constitutional bargain would effectively be undone, since s. 33 applies to permit legislation to operate "notwithstanding a provision included in section 2 or sections 7 to 15" *only*. Secondly, s. 1 provides a basis for the state to justify limits on "the rights and freedoms set out" in the *Charter*. Unwritten constitutional principles, being *unwritten*, are not "set out" in the *Charter*. To find, therefore, that they can ground a constitutional violation would afford the state no corresponding justificatory mechanism.

61 Our colleague says that the application of s. 33 "is not directly before us" (para. 182). As the City has advanced its claim on the basis of s. 2(b), coupled with the unwritten principle of democracy, the prospect of circumventing s. 33's application to the invalidation of legislation under s. 2(b) by recourse to unwritten constitutional principles is indeed squarely before us.

62 We note an important caveat to the foregoing. The unwritten constitutional principle of the honour of the Crown is *sui generis*. As correctly noted in submissions of the interveners the Métis Nation of Ontario and the Métis Nation of Alberta, the honour of the Crown arises from the assertion of Crown sovereignty over pre-existing Aboriginal societies (*Haida Nation v. British Columbia (Minister of Forests*), 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 32), and from the unique relationship between the Crown and Indigenous peoples (*Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 385). We need not decide here whether the principle is capable of grounding the constitutional invalidation of legislation, but if it is, it is unique in this regard.

63 In sum, and contrary to the submissions of the City, unwritten constitutional principles cannot serve as bases for invalidating legislation. A careful review of the Court's jurisprudence supports this conclusion.

(a) *The Provincial Court Judges Reference*

64 In the *Provincial Court Judges Reference*, this Court considered whether judicial independence, "an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*" (para. 109), restricted the extent to which a provincial government could reduce the salaries of provincial court judges. That principle, the Court held, emerged from the reading together of s. 11(d) of the *Charter*, and the preamble and ss. 96 to 100 of the *Constitution Act*, *1867* (para. 124). For the majority, Lamer C.J. was explicit in emphasizing the merely *interpretive* role of the unwritten constitutional principle of judicial independence in supplementing the text of ss. 96 and 100:

> The point which emerges from this brief discussion is that the interpretation of ss. 96 and 100 has come a long way from what those provisions actually say. This jurisprudential evolution undermines the force of the argument that the written text of the Constitution is comprehensive and definitive in its protection of judicial independence. The only way to explain the interpretation of ss. 96 and 100, in fact, is by reference to a deeper set of unwritten understandings which are not found on the face of the document itself. [First and second emphasis added; third emphasis in original; para. 89.]

65 In other words, where the constitutional text is not itself sufficiently definitive or comprehensive to furnish the answer to a constitutional question, a court may use unwritten constitutional principles as interpretive aids. This is an approach that resorts to unwritten constitutional principles where necessary in order to give meaning and effect

to constitutional text. It is thus not dissimilar to this Court's approach to purposive constitutional interpretation, which begins with and is grounded in the text (*Quebec (Attorney General)*, at paras. 8-10); unwritten constitutional principles inform the purpose of the provisions of the text, thus guiding the purposive definition (R. Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001), 80 *Can. Bar Rev.* 67, at p. 84). To be clear, this must be a textually faithful exercise; the text remains of primordial significance to identifying the purpose of a right, being "the first indicator of purpose" (*Quebec (Attorney General)*, at para. 11), and the application of constitutional principles to the interpretive exercise may not allow a court to overshoot that purpose (paras. 4 and 10-11). More particularly, and as the Court affirmed in *Quebec (Attorney General)*, the Constitution "is not 'an empty vessel to be filled with whatever meaning we might wish from time to time'" (para. 9, quoting *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 394). Rather, constitutional interpretation "must first and foremost have reference to, and be constrained by, [its] text" (para. 9).

66 Our colleague resists this, notwithstanding the clear direction in *Quebec (Attorney General)* regarding the centrality to the interpretational exercise of constitutional text. Indeed, her approach is completely the opposite: far from being the primary element of the Constitution whose interpretation can be informed by unwritten constitutional principles, the text *itself* "emanates" from those principles, and thus it is *the principles* which are paramount (para. 168). This is entirely inconsistent with the *Provincial Court Judges Reference*, upon which she relies. Lamer C.J. applied the unwritten constitutional principle of judicial independence to guide his interpretation of the scope of provincial authority under s. 92(14) of the *Constitution Act, 1867* and to fill a gap where provincial courts dealing with non-criminal matters were concerned (paras. 107-8). None of this supports applying unwritten constitutional principles as bases for invalidating legislation.

(b) *The Secession Reference*

67 In *Secession Reference*, this Court said:

> Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have "full legal force", as we described it in [*Reference re Resolution to Amend the Constitution*], *supra*, at p. 845), which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments. [para. 54]

A faithful reading of this passage must acknowledge the force ascribed to unwritten constitutional principles. Of significance, however, is that such force was conditioned by the nature of the questions posed in the reference -- the conditions for secession of a province from Confederation -- which the Court was called upon to answer. The case combined "legal and constitutional questions of the utmost subtlety and complexity with political questions of great sensitivity" (para. 1, quoting *Reference re Manitoba Language Rights*, at p. 728) to which the Court proposed an answer (being an obligation to negotiate in some circumstances) which, while constituting a "legal framework" in the form of a set of rules to legitimize secession, was enforceable only *politically* as "it would be for the democratically elected leadership of the various participants to resolve their differences" (para. 101 (emphasis added); see also Elliot, at p. 97).

68 Of course, the Court made clear that it had identified "binding obligations under the Constitution of Canada" (para. 153), and that a breach of those obligations would occasion "serious legal repercussions" (para. 102). But the Court also acknowledged the "non-justiciability of [the] political issues" involved (para. 102), which meant that the Court could have "no supervisory role" over the political negotiations (para. 100). Recognizing that the "reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm" (para. 153), the Court fashioned rules in the event of whose breach the "appropriate recourse" would lie in "the workings of the political process rather than the courts" (para. 102). This is another instance of the separation of powers: courts do not supervise the legislature or the executive as to political process.

69 Nothing, therefore, in the *Secession Reference* supports the proposition that unwritten constitutional principles can serve as an independent basis to invalidate legislation. While the obligations for the respective parties in that

case had legal force by way of a judicial declaration, how that declaration would be given effect -- that is, *enforced* -- was deemed a question of political process, not legal process. Here again, as in the case of constitutional interpretation, the structural gap-filling role of unwritten constitutional principles was not and, we say, could not, be applied to *invalidate* legislation in the sense of declaring it under s. 52 to be of no force or effect.

(c) *Babcock and Imperial Tobacco*

70 At issue in *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3, was the constitutionality of a provision of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, that allowed for an exception to disclosure, in litigation, based on Cabinet confidence. The respondents argued that the provision was *ultra vires* Parliament due to its inconsistency with the unwritten constitutional principles of the rule of law, judicial independence, and the separation of powers (by allowing the executive to prevent disclosure of evidence of its own unconstitutional conduct). McLachlin C.J., writing for the majority, held that "[a]lthough the unwritten constitutional principles are capable of limiting government actions, ... they do not do so in this case" (para. 54 (emphasis added)). She reached this conclusion on the basis that "unwritten principles must be balanced against the principle of Parliamentary sovereignty" (para. 55), concluding:

> It is well within the power of the legislature to enact laws, even laws which some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and the other branches of government. [para. 57]

71 McLachlin C.J.'s statement that unwritten constitutional principles are "capable of limiting government actions" was later explained by this Court in *Imperial Tobacco*. There, legislation authorizing action by the Province of British Columbia against tobacco manufacturers was challenged on the basis that it was inconsistent with, *inter alia*, the unwritten constitutional principle of the rule of law. For the Court, Major J. unequivocally rejected the appellants' proposed use of the rule of law to invalidate legislation for two reasons, only one of which is of relevance here:

> ... the appellants' arguments overlook the fact that several constitutional principles other than the rule of law that have been recognized by this Court -- most notably democracy and constitutionalism -- very strongly favour upholding the validity of legislation that conforms to the express terms of the Constitution (and to the requirements, such as judicial independence, that flow by necessary implication from those terms). Put differently, the appellants' arguments fail to recognize that in a constitutional democracy such as ours, protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box. [Emphasis added; para. 66.]

72 In other words, unwritten constitutional principles are indeterminate, such that they could be in theory deployed *not only* in service of *invalidating* legislation, but of *upholding* it. Major J. continued: the recognition of an unwritten constitutional principle such as the rule of law "is not an invitation to trivialize or supplant the Constitution's written terms", nor "is it a tool by which to avoid legislative initiatives of which one is not in favour. On the contrary, it requires that courts give effect to the Constitution's text, and apply, by whatever its terms, legislation that conforms to that text" (para. 67). From this, it follows that the statement in *Babcock* that unwritten constitutional principles are "capable of limiting government actions" is to be understood in a narrow and particular sense: legislative measures are restrained by the unwritten principle of the rule of law, "but only in the sense that they must comply with legislated requirements as to manner and form (i.e., the procedures by which legislation is to be enacted, amended and repealed)" (*Imperial Tobacco*, at para. 60). Again, this understanding of unwritten constitutional principles precludes entirely their application to invalidate legislation under s. 52.

73 This, we would add, is a complete answer to our colleague Abella J.'s assertions that this Court has "never, to date, limited" the role of unwritten constitutional principles, and that their interpretive role is not "narrowly constrained by textualism" (paras. 171 and 179). Our colleague reads *Imperial Tobacco* as narrowing the use of one specific unwritten constitutional principle — the rule of law — and not unwritten constitutional principles generally. But the problem of indeterminacy would inevitably arise with the use of *any* unwritten constitutional principle to invalidate legislation. *Imperial Tobacco* thus unequivocally affirmed both a narrow interpretive role for unwritten principles, and the primacy of the text in constitutional adjudication.

(d) *Trial Lawyers Association of British Columbia*

74 In *Trial Lawyers Association of British Columbia*, this Court was called upon to decide the constitutionality of court hearing fees imposed by British Columbia that denied some people access to the courts. For the majority, McLachlin C.J. held that those fees, enacted pursuant to s. 92(14) of the *Constitution Act, 1867*, violated s. 96 of the *Constitution Act, 1867* as they impermissibly infringed on the jurisdiction of superior courts by denying some people access to the courts (paras. 1-2). In *obiter*, she added that the connection between s. 96 and access to justice was "further supported by considerations relating to the rule of law" (para. 38), as "[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice" (para. 38, quoting *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, at p. 230). This was, she said, "consistent with the approach adopted by Major J. in *Imperial Tobacco*" (para. 37):

> The legislation here at issue -- the imposition of hearing fees -- must conform not only to the express terms of the Constitution, but to the "requirements ... that flow by necessary implication from those terms" (para. 66). The right of Canadians to access the superior courts flows by necessary implication from the express terms of s. 96 of the *Constitution Act, 1867* as we have seen. It follows that the province does not have the power under s. 92(14) to enact legislation that prevents people from accessing the courts. [Emphasis added; para. 37.]

75 In our view, McLachlin C.J.'s invocation of Major J.'s "necessary implication" threshold from *Imperial Tobacco* signifies that, where unwritten constitutional principles are used as interpretive aids, their substantive legal force must arise by necessary implication from the Constitution's text. We therefore see nothing in this that is inconsistent with the *Provincial Court Judges Reference* and, in particular, with the limited scope of application of unwritten constitutional principles. The rule of law was used in *Trial Lawyers Association of British Columbia* as an interpretive aid to s. 96, which in turn was used to narrow provincial legislative authority under s. 92(14). The rule of law was not being used as an independent basis for invalidating the impugned court fees. In this way, McLachlin C.J.'s reasoning simply reflects a purposive interpretation of s. 96 informed by unwritten constitutional principles.

(2) Relevance of the Democratic Principle to Municipal Elections

76 Democracy is, in light of the foregoing, a principle by which our Constitution is to be understood and interpreted. Though not explicitly identified in the text, the basic structure of our Constitution -- including its establishment of the House of Commons and of provincial legislatures -- connotes certain freely elected, representative, and democratic political institutions(*Secession Reference*, at para. 62).

77 The democratic principle has both individual and institutional dimensions(para. 61). It embraces not only the process of representative and responsible government and the right of citizens to participate in that process at the provincial and federal levels, but also substantive goals including the promotion of self-government (paras. 64-65). So understood, the democratic principle sits alongside and indeed overlaps with other unwritten constitutional principles that this Court has recognized, including federalism and the rule of law(paras. 66-67).

78 In this case, the democratic principle is relevant as a guide to the interpretation of the constitutional text. It supports an understanding of free expression as including political expression made in furtherance of a political campaign (*Reference re Prov. Electoral Boundaries (Sask.)*; *Reference re Alberta Statutes*, [1938] S.C.R. 100; *Switzman v. Elbling*, [1957] S.C.R. 285; *OPSEU*). But it cannot be used in a manner that goes beyond this interpretive role. In particular, it cannot be used as an independent basis to invalidate legislation.

(a) *Section 92(8) of the Constitution Act, 1867*

79 The structure of neither the *Constitution Act, 1867* nor the *Constitution Act, 1982* requires by necessary implication the circumscription of provincial lawmaking authority under s. 92(8) in the manner proposed. Subject to the *Charter*, the province has "absolute and unfettered legal power" to legislate with respect to municipalities (*Ontario English Catholic Teachers' Assn.*, at para. 58). And this Court cannot grant constitutional status to a third order of government "where the words of the Constitution read in context do not do so" (*Baier*, at para. 39).

80 Indeed, the City's submissions neglect the fact, recognized in the passage from *Imperial Tobacco*, at para. 66, cited above, that unwritten constitutional principles other than the rule of law that have been recognized by this Court, including democracy and constitutionalism, strongly favour *upholding* the validity of legislation that conforms to the text of the Constitution. It follows that the unwritten constitutional principle of democracy cannot be used to narrow legislative competence under s. 92(8); as this Court has recognized, the provinces have plenary jurisdiction under this head of power, unrestricted by any constitutional principle (*Public School Boards' Assn. of Alberta*).

(b) *Section 3 of the Charter*

81 Nor can the democratic principle be used to make s. 3 of the *Charter* -- including its requirement of effective representation -- relevant to the current case. There is no open question of constitutional interpretation here. Section 3 democratic rights were not extended to candidates or electors to municipal councils. This is not a gap to be addressed judicially. The absence of municipalities in the constitutional text is, on the contrary, a deliberate omission (*Imperial Tobacco*, at para. 65). As the intervener the Federation of Canadian Municipalities argues, municipalities (or at least chartered towns) predate the *Magna Carta* (1215). Their existence and importance would have been known to the framers in 1867. The constitutional status of municipalities, and whether they ought to enjoy greater independence from the provinces, was a topic of debate during patriation (*House of Commons Debates*, vol. X, 1st Sess., 32nd Parl., June 15, 1981, at p. 10585). In the end, municipalities were not constitutionalized, either in amendments to the *Constitution Act, 1867* or by reference in the democratic rights enshrined in the *Charter*.

82 Unlike in the *Provincial Court Judges Reference*, therefore, there is no textual basis for an underlying constitutional principle that would confer constitutional status on municipalities, or municipal elections. The entitlement to vote in elections to bodies not mentioned in s. 3 is therefore a matter for Parliament and provincial legislatures (*Haig*, at p. 1033; *Baier*, at para. 39). Again, and like the school boards at issue in *Baier*, municipalities are mere creatures of statute who exercise whatever powers, through officers appointed by whatever process, that provincial legislatures consider fit. Were the unwritten democratic principle applied to require *all* elections to conform to the requirements of s. 3 (including municipal elections, and not just elections to the House of Commons or provincial legislatures), the text of s. 3 would be rendered substantially irrelevant and redundant (*Imperial Tobacco*, at para. 65). To repeat: the withholding of constitutional status for municipalities, and their absence from the text of s. 3, was the product of a deliberate omission, not a gap. The City's submissions ignore that application of the democratic principle is properly applied to *interpreting* constitutional text, and not *amending* it or *subverting* its limits by ignoring "the primordial significance assigned by this Court's jurisprudence to constitutional text in undertaking purposive interpretation"(*Quebec (Attorney General)*, at para. 4). It is not for the Court to do by "interpretation" what the framers of our Constitution chose not to do by enshrinement, or their successors by amendment.

(3) Conclusion on the Democratic Principle

83 Even had the City established that the *Act* was inconsistent with the principle of democracy, it follows from the foregoing discussion that a court could not rely on that inconsistency to find the *Act* unconstitutional. The *Act* was enacted pursuant to a valid legislative process and the Province had no obligation to consult with the City before it introduced the legislation, or to introduce the legislation at a particular time. (As the application judge correctly noted, the *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sch. A, does not impose an immutable obligation to consult since the Province could enact the *Act* and overrule its previous enactment. Moreover, the related *Toronto-Ontario Cooperation and Consultation Agreement* did not bind the Province in law.)

84 In short, and despite their value as interpretive aids, unwritten constitutional principles cannot be used as bases for invalidating legislation, nor can they be applied to support recognizing a right to democratic municipal elections by narrowing the grant to provinces of law-making power over municipal institutions in s. 92(8) of the *Constitution Act, 1867*. Nor can they be applied to judicially amend the text of s. 3 of the *Charter* to require municipal elections or particular forms thereof. The text of our Constitution makes clear that municipal institutions lack constitutional

status, leaving no open question of constitutional interpretation to be addressed and, accordingly, no role to be played by the unwritten principles.

V. Conclusion

85 We would dismiss the appeal.

The reasons of Abella, Karakatsanis, Martin and Kasirer JJ. were delivered by

R.S. ABELLA J. (dissenting)

86 Elections are to democracy what breathing is to life, and fair elections are what breathe life into healthy democracies. They give the public a voice into the laws and policies they are governed by, and a chance to choose who will make those laws and policies. It is a process of reciprocal political discourse.

87 The rules of an election, including the electoral boundaries and the timelines for campaigns, structure the process of reciprocal dialogue between candidates and voters in their electoral districts. The final act of voting, itself a form of political expression, is the culmination of the process of deliberative engagement throughout an election period. The stability of the electoral process is therefore crucial not only to political legitimacy, but also to the rights of candidates and voters to meaningfully engage in the political discourse necessary for voters to cast an informed vote, and for those elected to govern in response to the expressed views of the electorate.

88 The 2018 Toronto municipal election had been underway for three and a half months when the Province of Ontario enacted legislation that radically redrew the City of Toronto's electoral ward boundaries by reducing the number of wards from 47 to 25. Nominations had closed, campaigns were in full swing, and voters had been notified of who wanted to represent them and why.

89 The issue in this appeal is not whether the Province had the legal authority to change the municipal wards. It is whether the Province could do so in the middle of an ongoing municipal election, thereby destabilizing the foundations of the electoral process and interfering with the ability of candidates and voters to engage in meaningful political discourse during the period leading up to voting day.

90 Completely revamping the electoral process in the middle of an election was unprecedented in Canadian history. The question is whether it was also unconstitutional. In my respectful view, it was.

Background

91 In June 2013, City Council approved a Toronto Ward Boundary Review under its authority to establish, change or dissolve wards (*City of Toronto Act, 2006*, S.O. 2006, c. 11, Sch. A, s. 128(1)). The mandate of the Boundary Review was "to bring a recommendation to Toronto City Council on a ward boundary configuration that respects the principle of 'effective representation'" (Canadian Urban Institute, *Draw the Line: Toronto Ward Boundary Review Project Work Plan, Civic Engagement & Public Consultation Strategy*, April 28, 2014 (online), at p. 1). At the time, there were 44 wards in the City of Toronto.

92 Over the next nearly four years, the Boundary Review conducted research, held public hearings, and consulted extensively. External consultants were hired who developed recommendations, organized extensive stakeholder consultations, held meetings with City Council and the Mayor's staff, and individually interviewed members of the 2010-2014 City Council and new 2014-2018 members. Altogether, they held over 100 face-to-face meetings with City Council, school boards and other stakeholders, as well as 24 public meetings and information sessions.

93 The four year process resulted in seven reports. A draft of each report was reviewed by an outside five-person Advisory Panel. The Boundary Review's *Options Report*, in August 2015, analyzed eight options for drawing new ward boundaries, concluding that five options met the requirement of effective representation. Of particular

significance to this appeal, one of the rejected options was redesigning the wards to mirror the 25 federal electoral districts.

94 The Boundary Review's *Final Report*, in May 2016, recommended *increasing* the number of wards from 44 to 47.

95 At the direction of the Executive Committee of City Council, two further reports were prepared by the Boundary Review in 2016, one in August and one in October. Among other options, the 25 federal electoral district proposal was again examined. Those reports again recommended the 47-ward structure, concluding that applying the boundaries of the 25 federal electoral districts would not achieve effective representation or resolve significant population imbalances, in part, since they were based on the 2011 census and were expected to be redrawn after the 2021 census. The Boundary Review, on the other hand, was based on population estimates for 2026 "to ensure that any new ward structure will last for several elections and constant ward boundary reviews are not required" (*Additional Information Report*, August 2016 (online), at p. 10).

96 City Council adopted the 47-ward structure in November 2016, which was enacted through By-laws Nos. 267-2017 and 464-2017 in March and April 2017. The goal was to create a stable electoral framework for multiple elections. The By-laws were intended to govern the City of Toronto's municipal elections from 2018 to 2026, and, possibly, 2030.

97 The 47-ward structure was appealed to the Ontario Municipal Board by various individuals, including those seeking to have the city divided into wards that mirrored the 25 federal electoral districts. After seven days of hearings, a majority of the Board rejected the appeals and approved the By-laws on December 15, 2017 (*Di Ciano v. Toronto (City)*, 2017 CanLII 85757). In its decision, the Board explained why it found the By-laws to be reasonable:

> The Board finds that the work undertaken by the [Boundary Review] culminating in the By-laws setting out a 47-ward structure was comprehensive. The ward structure delineated in the By-laws provides for effective representation and corrects the current population imbalance amongst the existing 44 wards. The decision made by Council to adopt the By-laws was defensible, fair and reasonable. The decision by Council to implement a 47-ward structure does not diverge from the principles of voter equity and effective representation. In this regard, there is nothing unreasonable in the decision of Council. [para. 51]

98 An application was made to the Divisional Court for leave to appeal the Board's decision by two individuals who had unsuccessfully argued before the Board that the 25 federal electoral districts should be implemented. On March 6, 2018, the motion was dismissed (*Natale v. City of Toronto*, 2018 ONSC 1475, 1 O.M.T.R. 349). Swinton J. concluded that the Board applied the correct governing principle, namely, "effective representation":

> Setting electoral boundaries is an exercise that requires a weighing of many policy considerations. The Board heard from a number of expert witnesses over the course of a seven day hearing. It considered relative voter parity as well as other factors. It concluded that communities of interest are best respected in a 47 ward structure. It also noted that a 25 ward structure could increase voter population in the wards "resulting in a significant impact on the capacity to represent". [Citations omitted; para. 10.]

99 On May 1, 2018, nominations opened for candidates seeking election in Toronto's 47 wards.

100 On June 7, 2018, a new provincial government was elected. On the day that nominations for City Council closed, July 27, 2018, the Premier, Doug Ford, announced that the government intended to introduce legislation that would reduce the size of Toronto's City Council from 47 to 25 councillors.

101 The Boundary Review had researched the issue of effective representation for nearly 4 years, concluding that the 25 federal electoral districts would not achieve effective representation and would have an insignificant difference in terms of voter parity. Ontario did not conduct any redistricting studies or send the proposed legislation to Committee for consultation before it was enacted.

102 The legislation was introduced for the first reading in the Legislative Assembly on July 30, 2018 and came into force on August 14, 2018, 69 days before the scheduled election date. The election had been underway for three and a half months. By then, thousands of candidates had signed up and 509 were certified and actively campaigning in Toronto's 47 wards.

103 The nomination period was extended to September 14, 2018, but the election date remained the same -- October 22, 2018. That gave candidates, all of whom would have to seek new nominations or notify the City Clerk of their intention to continue in the race by filing a change of ward notification form, just over one month to campaign in the new wards. Until nominations closed again on September 14, 2018, candidates and voters were in legal limbo awaiting the passage of regulations for the new electoral regime and the adjudication of a constitutional challenge to the mid-election changes that gave rise to this appeal. It was only after nominations closed that voters and candidates had a full picture of which candidates were running and in what wards.

104 The new one-month campaign period was also characterized by the disruptive impact of abruptly changing the number, size and boundaries of the wards. Candidates who had been canvassing, responding to local issues, incurring expenses and developing community relationships were now faced with deciding whether and where to run. The old wards were eradicated, many of the new ones were almost twice as large, the populations were different, and there was only one month left to change wards, meet the new constituencies, learn what their concerns were, and engage with them on those issues.

105 In the absence of any notice or additional time to fundraise, many previously certified candidates could no longer afford to run in these new and larger wards. Certified candidates had until September 14, 2018 to file a change of ward notification form or else their nominations would be deemed to be withdrawn (*Better Local Government Act, 2018*, S.O. 2018, c. 11 ("*Act*"), Sch. 3, s. 1; *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sch., s. 10.1(8)). When the present constitutional challenge was decided only days before that deadline, only 293 of the 509 previously certified candidates had taken the necessary steps to continue in the race. In the end, more than half of the previously certified candidates dropped out of the race before voting day.

106 The City of Toronto and a number of candidates and electors applied to the Ontario Superior Court of Justice for an order declaring the legislation reducing the number of wards from 47 to 25 of no force or effect, pursuant to s. 52(1) of the *Constitution Act, 1982*.

107 On September 10, 2018, Belobaba J. held that the *Act* was unconstitutional, infringing the rights of both candidates and voters under s. 2(b) of the *Canadian Charter of Rights and Freedoms* (2018 ONSC 5151, 142 O.R. (3d) 336). He held that the legislation violated the expressive rights of candidates by radically redrawing ward boundaries mid-election, and that it breached the rights of voters to cast a vote that could result in effective representation by doubling the population sizes of the wards.

108 On September 19, 2018, the Ontario Court of Appeal ordered an interim stay of Belobaba J.'s order, meaning that the election would take place based on the new 25-ward structure (2018 ONCA 761, 142 O.R. (3d) 481). It took place on October 22, 2018.

109 On September 19, 2019, the Court of Appeal allowed the appeal from Belobaba J.'s order (2019 ONCA 732, 146 O.R. (3d) 705). Writing for a 3-2 majority, Miller J.A. held that Belobaba J. "impermissibly extended the scope [of] s. 2(b)" to protect the effectiveness of efforts to convey political messages and to include a right to effective representation.

110 In dissent at the Court of Appeal, MacPherson J.A. held that the timing of the *Act* infringed s. 2(b), concluding that "[b]y extinguishing almost half of the city's existing wards midway through an active election, Ontario blew up the efforts, aspirations and campaign materials of hundreds of aspiring candidates, and the reciprocal engagement of many informed voters".

111 I agree with MacPherson J.A.

Analysis

112 Under s. 92(8) of the *Constitution Act, 1867*, the provinces have exclusive jurisdiction over "Municipal Institutions in the Province". The question therefore of whether the Province has the authority to legislate a change in Toronto's ward structure is not the issue in this appeal. The issue is whether this *timing* mid-way through a municipal election was in violation of s. 2(b) of the *Charter*, which states:

> **2** Everyone has the following fundamental freedoms:
>
> ...
>
> **(b)** freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

113 The 2018 Toronto municipal election had already been underway for three and a half months when the number, size and boundaries of all the wards were changed.

114 It is entirely beside the point to observe that elected municipal councils are creatures of statute. Section 2(b) of the *Charter* applies with equal vigour to protect political discourse during a municipal election as a federal or provincial one. When a province chooses to vest certain powers in a democratic municipality, municipal elections invariably become the locus of deliberative engagement on those delegated policy issues. It is incumbent on a provincial legislature to respect the rights of its citizens to engage in meaningful dialogue on municipal issues during an election period and, in particular, the rights of candidates and voters to engage in meaningful exchanges before voting day.

115 When a democratic election takes place in Canada, including a municipal election, freedom of expression protects the rights of candidates and voters to meaningfully express their views and engage in reciprocal political discourse on the path to voting day. That is at the core of political expression, which in turn is at the core of what is protected by s. 2(b) of the *Charter*. When the state enacts legislation that has the effect of destabilizing the opportunity for meaningful reciprocal discourse, it is enacting legislation that interferes with the Constitution.

116 Municipal elections have been a part of political life in Canada since before Confederation, and municipalities are a crucial level of government. The 1996 Greater Toronto Area Task Force explained their significance, emphasizing that "services should be delivered by local municipalities to ensure maximum efficiency and responsiveness to local needs and preferences" (*Greater Toronto*, at p. 174; see also D. Siegel, "Ontario", in A. Sancton and R. Young, eds., *Foundations of Governance: Municipal Government in Canada's Provinces* (2009), 20, at p. 22; A. Flynn, "Operative Subsidiarity and Municipal Authority: The Case of Toronto's Ward Boundary Review" (2019), 56 Osgoode Hall L.J. 271, at pp. 275-76). As Professor Kristin R. Good explains, municipalities are not "mere 'creatures of the provinces'", they are

> important democratic governments in their own right. The variations in multicultural policy making in Canadian cities are evidence that local choices, policies, and politics matter. Municipalities are important vehicles of the democratic will of local communities as well as important sites of multicultural democratic citizenship.
>
> (*Municipalities and Multiculturalism: The Politics of Immigration in Toronto and Vancouver* (2009), at p. 5)

117 The democratically accountable character of municipalities is well established in our jurisprudence. In *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, La Forest J. wrote that "municipal councils are democratically elected by members of the general public and are accountable to their constituents in a manner analogous to that in which Parliament and the provincial legislatures are accountable to the electorates" (para. 51). Similarly, in *Catalyst Paper*

Corp. v. North Cowichan (District), [2012] 1 S.C.R. 5, McLachlin C.J. recognized that municipal councillors "serve the people who elected them and to whom they are ultimately accountable" (para. 19).

118 The increasing significance of municipal governance has been accompanied by an increasingly generous interpretation of municipal powers. Writing for a unanimous Court in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, Bastarache J. observed that "[t]he evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities" (para. 6). And in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, L'Heureux-Dubé J. confirmed that "law-making and implementation are often best achieved at a level of government that is ... closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity" (para. 3; see also *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342).

119 These cases built on McLachlin J.'s dissent in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, which stressed the "fundamental axiom" that

> courts must accord proper respect to the *democratic responsibilities of elected municipal officials and the rights of those who elect them*. This is important to the continued healthy functioning of democracy at the municipal level. If municipalities are to be able to respond to the needs and wishes of their citizens, they must be given broad jurisdiction to make local decisions reflecting local values. [Emphasis added; p. 245.]

120 The reciprocal relationship between the democratic responsibilities of elected municipal officials and the rights of those who elected them is crucial. It requires what Duff C.J. called "the free public discussion of affairs" so that two sets of duties can be discharged -- the duties of elected members "to the electors", and of electors "in the election of their representatives" (*Reference re Alberta Statutes*, [1938] S.C.R. 100, at p. 133; see also *Switzman v. Elbling*, [1957] S.C.R. 285, at pp. 306 and 326-27; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 583).

121 How then does all this relate to the rights in s. 2(b) of the *Charter*? Because in dealing with municipal elections, we are dealing with the political processes of democratic government and it is undeniable that s. 2(b) protects "the political discourse fundamental to democracy" (*R. v. Sharpe*, [2001] 1 S.C.R. 45, at para. 23; see also *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at p. 765).

122 In *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, this Court held that one of the three underlying principles of the s. 2(b) right is that "participation in social and political decision-making is to be fostered and encouraged" (p. 976). Professors P. W. Hogg and W. K. Wright have referred to political expression as being "at the core of s. 2(b)", and curtailed under s. 1 "only in service of the most compelling governmental interest" (*Constitutional Law of Canada* (5th ed. Supp.), at p. 43-9).

123 This brings us to the central issue in this appeal, namely, whether the timing of the legislation, in redrawing and reducing the number of wards from 47 to 25 in the middle of an election, infringed the expressive rights protected by s. 2(b) of the *Charter*.

124 *Irwin Toy* established a two-part test for adjudicating freedom of expression claims. The first asks whether the activity is within the sphere of conduct protected by freedom of expression. If the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee. The second part asks whether the government action, in purpose or effect, interfered with freedom of expression.

125 Dealing with the first part, the "activity" at the heart of this appeal is the expression of political views and the reciprocal political discourse among electoral participants during an election period, which engages the rights of both those seeking election and those deciding whom to elect. Political discourse undoubtedly has expressive content, and therefore, *prima facie* falls within the scope of the guarantee. Dickson C.J. in *R. v. Keegstra*, [1990] 3 S.C.R. 697, noted that

> *[t]he connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to*

> *democracy.* Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity. [Emphasis added; pp. 763-64.]

126 The second part of the test, namely, whether the state action interfered with the right in purpose or effect, is not, with respect, particularly complicated either. This Court's jurisprudence under s. 2(b) of the *Charter* has usually arisen in circumstances where the *purpose* of the government action was to restrict expression by regulating who can speak, what they can say or how their messages can be heard.1 The case before us, on the other hand, deals with whether the *effect* of the legislation -- redrawing the ward boundaries and cutting the number of wards nearly in half mid-election -- was to interfere with these expressive activities.

127 Freedom of expression does not simply protect the right to speak; it also protects the right to communicate with one another (R. Moon, *The Constitutional Protection of Freedom of Expression* (2000), at pp. 3-4). The words of Marshall J., in dissent, resonate with the reciprocal nature of expression:

> ... the right to speak and hear -- including the right to inform others and to be informed about public issues -- are inextricably part of [the First Amendment]. The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin. But the coin itself is the process of thought and discussion. The activity of speakers becoming listeners and listeners becoming speakers in the vital interchange of thought is the "means indispensable to the discovery and spread of political truth." [Citations omitted.]
>
> (*Kleindienst v. Mandel*, 408 U.S. 753 (1972), at p. 775)

128 In the electoral context, freedom of expression involves the rights of both candidates and voters to reciprocal deliberative engagement. The right to disseminate and receive information connected with elections has long been recognized as integral to the democratic principles underlying freedom of expression, and as a result, has attracted robust protection (see e.g. *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *R. v. Bryan*, [2007] 1 S.C.R. 527; *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827; *B.C. Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, [2017] 1 S.C.R. 93; see also K. Roach and D. Schneiderman, "Freedom of Expression in Canada" (2013), 61 S.C.L.R. (2d) 429; J. Weinrib, "What is the Purpose of Freedom of Expression?" (2009), 67 U.T. Fac. L. Rev. 165).

129 Political expression during an election period is always "taking place within and being constrained by the legal and institutional framework of an election" (Y. Dawood, "The Right to Vote and Freedom of Expression in Political Process Cases Under the Charter" (2021), 100 S.C.L.R. (2d) 105, at p. 131). In *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, this Court explained that elections and referendums are "procedural structure[s] allowing for public discussion of political issues essential to governing", which serve to ensure "a reasonable opportunity to speak and be heard" and "the right of electors to be adequately informed of all the political positions advanced by the candidates and by the various political parties" (paras. 46-47).

130 The Intervener, the David Asper Centre for Constitutional Rights, cogently explained how there are different aspects of an election, each of which requires protection:

> Election campaigns provide a special forum for voters and candidates to interact with each other. Citizens engage in the democratic process when they identify issues, test policy positions, bring incumbents to account, and assess new candidates' skills, policies and positions. All exercises of expression, at each and every stage of the electoral process -- not only the final act of voting -- must receive consistent and robust *Charter* protection. [Footnotes omitted.]
>
> (I.F., at para. 8)

131 The democratic dialogue that occurs throughout an election period is crucial to the formation of public opinion

and the ability to cast an informed vote. The process of deliberative engagement during an election period was aptly described by Professor Saul Zipkin:

> ... the electoral process is the primary site in which the representative relationship is constructed. Indeed, "[c]ampaigns ... are a main point -- perhaps *the* main point -- of contact between officials and the populace over matters of public policy." The period in which the putative representative goes before the voters for their approval is a time of creating that relationship, calling for special attention to the proper functioning of the democratic process at that time. As the representative relationship is historically a matter of constitutional concern, and is shaped by political activity and speech in the electoral setting, we might broaden the narrow focus on ballot-casting in our assessment of the democratic process. [Emphasis in original; footnotes omitted.]
>
> ("The Election Period and Regulation of the Democratic Process" (2010), 18 *Wm. & Mary Bill Rts. J.* 533, at pp. 545-46; see also A. Bhagwat and J. Weinstein, "Freedom of Expression and Democracy", in A. Stone and F. Schauer, eds., *The Oxford Handbook of Freedom of Speech* (2021), 82; N. Urbinati, "Free Speech as the Citizen's Right", in R. C. Post, *Citizens Divided: Campaign Finance Reform and the Constitution* (2014), 125.)

132 An election is a process of allowing candidates and voters, as both speakers and listeners, to participate in reciprocal discourse so that their respective views can be fully expressed and heard. It is only through this process of free public discussion and debate that an informed vote can be cast, and ultimately, those elected can be responsive to the views of the electorate.

133 State interference with individual and collective political expression in the context of an election strikes at the heart of the democratic values that freedom of expression seeks to protect, including "participation in social and political decision-making" (*Irwin Toy*, at p. 976). The *Irwin Toy* test is, as a result and as discussed later in these reasons, the appropriate legal framework for adjudicating the present claim of state interference with political expression during an election period.

134 A stable election period is crucial to electoral fairness and meaningful political discourse. Redrawing the number, size and boundaries of electoral wards during this period destabilizes the process by "[i]nterrupting an election mid-campaign to change the rules of the game, including the electoral districts upon which candidates have crafted their campaigns and voters will have their preferences channelled" (M. Pal, "The Unwritten Principle of Democracy" (2019), 65 McGill L.J. 269, at p. 302).

135 For three and a half months, candidates and voters engaged in political dialogue within the legal and institutional structure created in advance of the 2018 municipal election after years of research, public engagement and, finally, endorsement from the Ontario Municipal Board.

136 After the *Act* came into force, candidates and voters found themselves in a suddenly altered electoral landscape. The *Act* eradicated nearly half of the active election campaigns, requiring those candidates to file a change of ward notification form to continue in the race. The redrawing of ward boundaries meant that candidates needed to reach new voters with new priorities. Campaign materials such as lawn signs or advertisements for abolished wards "no longer play[ed] the function of electoral expression given the change to the underlying institutional context within which that expression [was] taking place" (Dawood, at p. 132). Voters who had received campaign information, learned about candidates' mandates and engaged with them based on the 47-ward structure had their democratic participation put into abeyance.

137 The impact on some of the candidates and voters provides illuminating metaphors. One candidate, for example, Dyanoosh Youssefi, explained that she had been canvassing, e-mailing and organizing since the beginning of the campaign for 12-15 hours per day and all of her efforts had "focused on the concerns and the needs of the approximately 55,000 residents of Ward 14" (A.R., vol. XV, at p. 80). Ward 14 was abolished by the *Act*.

138 Another candidate, Chiara Padovani, who had been campaigning in Ward 11, described the effect of combining Ward 11 and Ward 12 into a new Ward 5:

> Even before my registration as a candidate for the 2018 election, I engaged in substantial efforts to engage community members around important local issues in Ward 11 for over a one and a half year period such as flooding, road safety, and tenant rights. As a result, I ... know where residents feel there should be additional speedbumps, crosswalks, and reduction in speed limits. I do not have this type of knowledge for any other ward, including Ward 12.
>
> ...
>
> If I had notice of the change in ward boundaries prior to the commencement of the campaign, I would have been able to plan my ground strategy, and I would have attempted to gain a deeper knowledge of the local issues affecting residents in Ward 12 by actively canvassing in that ward. At this point, it will be impossible for me to carry out double the amount of canvassing that I have completed with the limited time remaining.
>
> (A.R., vol. XI, at pp. 15-16)

139 Ever since the 47-ward structure was enacted in 2017, Chris Moise, a Black and openly gay candidate, had been organizing a campaign in Ward 25. He had decided to run in Ward 25 because it encompassed the Gay Village and Yorkville. These were communities he felt he could meaningfully serve based on his experiences as a School Board Trustee for the area, an LGBTQ activist, a former police officer with an interest in police relations with the Black and LGBTQ communities in the Village, and a resident and property owner in Yorkville. When the legislation abolished Ward 25, he dropped out of the race because he could not pivot his campaign on such short notice to either the new Ward 13, which excluded Yorkville where he lived, or the new Ward 11, which had only a very small geographical overlap with the previous Ward 25 and excluded the Village where he had the most meaningful connections and policy goals.

140 Another candidate, Jennifer Hollett, explained the effect of the two week "legal limbo" (A.R., vol. XI, at p. 144) before the legislation received Royal Assent:

> Even after [the legislation] passed, my campaign team was uncertain what was going to happen to our campaign funds, and whether those funds could be transferred to a new campaign, or whether those funds could be refunded. It was only when regulations made pursuant to the Minister's powers in [the legislation] were passed that we received any direction. The effect of that uncertainty is that my team did not make any campaign expenditures after July 27.
>
> ...
>
> The voters I speak with are confused. They understand that the rules have changed, but do not understand why those rules have changed and how. Instead of discussing municipal issues in the campaign, such as transit and safer streets, residents are asking about ward boundary changes and how they affect them. [pp. 145-46]

141 Megann Wilson, another candidate and participant in the Women Win TO's training program, described the ensuing uncertainty vividly:

> Since ... the imposition of a 25-ward model, I have struggled to engage with residents on my platform, or key issues and policies in the ward. Many residents are simply tired of the changing wards, and no longer know what ward they live in -- and that is what I spend my time talking to residents about when I am canvassing. In my view, the level of confusion in my ward will make it more difficult for voters to make a good decision about what candidate to vote for since electors are not even aware of what ward they now live in let alone who the candidates are, given the sudden changes. Further, as a result of lack of communication to residents about the new ward boundaries, I have found myself having to fill that gap while canvassing residents - - a significant distraction from the municipal issues I am trying to engage residents about.

> As a result of [the legislation] I am hindered in getting to the root of municipal issues affecting electors while I am canvassing. I am now spending most of my time with voters explaining the changes to the ward boundaries, and discussing the provincial politics that led to these sudden changes. Time with prospective voters is precious for all candidates and [the legislation] has interrupted my ability to engage directly with voters about my platform and my ideas for the ward and its residents.
>
> (A.R., vol. X, at p. 132)

142 Since the *Act* did not reset campaign finance limits, new candidates entered the race with untapped campaign spending limits, while candidates who had already been campaigning lost what they had invested in now-defunct districts and continued in the race on a reduced budget. Some previously certified candidates stopped producing campaign materials entirely due to the uncertainty surrounding the transfer of campaign funds and expenditures to a new campaign. Others could not afford to compete in the new and larger wards. As one campaign volunteer described:

> We do not know whether a donor who donated the maximum amount to a Ward 23 candidacy can now make a fresh donation to a Ward 13 candidacy. This is important because funds were spent on materials for the Ward 23 candidacy that are no longer useable... . It will likely not be possible to undertake sufficient fundraising to replace all of the items that are no longer usable, particularly given the limited amount of time in the campaign. Prior donors will likely not be able or willing to donate again, and it is unlikely we will be able to find enough new donors to produce sufficient new materials for a fresh campaign for a much larger ward area, particularly compared to more well-resourced incumbents.
>
> (A.R., vol. IX, at p. 125)

143 Voters, too, were affected. One voter, Ish Aderonmu, explained the consequence of candidates dropping out of the race as "deeply disappointing ... as an elector who has been working to advance one of these campaigns, expressing myself politically for the first time" (A.R., vol. IX, at p. 124). Another voter, who had endorsed a candidate who dropped out of the race, conveyed that "his own political expression has been compromised" and that "candidates remaining in the race are dealing with making major changes to their campaigns, and are not available to discuss [important] issues with him" (A.R., vol. IX, at p. 104).

144 It is important to remember the timeline. Nominations opened on May 1, 2018, and closed on July 27, 2018. On the same day that nominations closed, the government announced that it intended to introduce new legislation, cutting the wards nearly in half and radically redrawing ward boundaries mid-election. No one knew what the impact of the new boundaries would be. Candidates did not know how the new electoral wards would affect their campaigns, and voters had no idea who their new candidates would be. All this after being in an ongoing electoral process for almost three months.

145 The new legislation came into force two weeks later on August 14, 2018. By then, candidates had been campaigning and engaging with voters for 105 days in the existing 47 wards. Candidates who had developed mandates to respond to the specific needs and interests of their wards had their campaign efforts eradicated, along with their opportunity to meaningfully engage with the right voters on those issues. Voters who had formed opinions, been persuaded on issues, refined their preferences and expressed their views to their preferred representatives had their political expression thwarted. Some candidates persevered; others dropped out of the race. Volunteers quit, campaign endorsements were rescinded and confusion ensued.

146 Nominations were extended to September 14, leaving only five weeks -- from the date that nominations closed, solidifying which candidates were running and in what wards -- for an election that was supposed to last nearly six months. More importantly, those five weeks were marred by the destabilizing impact of the timing of the legislation in the middle of an election that was technically 60 percent complete. The additional month for *new* candidates to seek nomination could not undo the damage and uncertainty that the change had created for candidates who had already been certified and voters who had already participated in three and a half months of deliberative engagement.

147 The timing of the *Act*, in the middle of an ongoing election, breathed instability into the 2018 municipal election, undermining the ability of candidates and voters in their wards to meaningfully discuss and inform one another of their views on matters of local concern. For the remaining campaign period, candidates spent more time on doorsteps discussing the confusing state of affairs with voters than the relevant political issues. The timing of the legislation, by interfering with political discourse in the middle of an election, was a clear breach of s. 2(b) of the *Charter*.

148 With respect, this leaves no role for the legal framework set out in *Baier v. Alberta*, [2007] 2 S.C.R. 673. It was designed to address underinclusive statutory regimes. The line of authority preceding *Baier* involved claims by individuals or groups seeking inclusion in an existing statutory regime, alleging that the absence of government support for them constituted a substantial interference with their exercise of a fundamental freedom.2 The *Baier* framework was originally developed for an underinclusive labour relations regime in *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, and then modified for an allegedly underinclusive school board trustee election regime in *Baier*. The framework specifically refers to "claims of underinclusion", "exclusion from a statutory regime" and "underinclusive state action" (*Dunmore*, at paras. 24-26; *Baier*, at paras. 27-30). It has no relevance to the legal or factual issues in this case.

149 The *Baier* framework was, additionally, confined to its unique circumstances by this Court's subsequent decision in *Greater Vancouver Transportation Authority v. Canadian Federation of Students -- British Columbia Component*, [2009] 2 S.C.R. 295. Writing for a 7-1 majority, Deschamps J. explained that *Baier*"summarized the criteria for identifying the limited circumstances in which s. 2(*b*) requires the government to extend an underinclusive means of, or 'platform' for, expression to a particular group or individual" (para. 30). She also cautioned against extending *Baier* beyond these narrow confines:

> ... taken out of context, [*Baier*] could be construed as transforming many freedom of expression cases into "positive rights claims". Expression in public places invariably involves some form of government support or enablement. Streets, parks and other public places are often created or maintained by government legislation or action. If government support or enablement were all that was required to trigger a "positive rights analysis", it could be argued that a claim brought by demonstrators seeking access to a public park should be dealt with under the *Baier* analysis because to give effect to such a claim would require the government to enable the expression by providing the necessary resource (i.e., the place). But to argue this would be to misconstrue *Baier*.
>
> When the reasons in *Baier* are read as a whole, it is clear that "support or enablement" must be tied to a claim requiring the government to provide a particular means of expression. In *Baier*, a *distinction* was drawn between *placing an obligation on government to provide individuals with a particular platform for expression* and *protecting the underlying freedom of expression of those who are free to participate in expression on a platform* (para. 42). [Emphasis added; paras. 34-35.]

150 The *Baier* test has no application to this appeal. As Deschamps J.'s full quote shows, it is clear that *Baier* only applies to claims "placing an obligation on government to provide individuals with a particular platform for expression". *Irwin Toy*, on the other hand, applies to claims that are about "protecting the underlying freedom of expression of those who are free to participate in expression on a platform", like the case before us.

151 None of the claimants involved in this case was excluded from participating in the 2018 Toronto municipal election, nor did they claim that s. 2(b) of the *Charter* requires the Province to provide them with a municipal election so that they can express themselves. The s. 2(b) claim in this case is about government interference with the expressive rights that attach to an electoral process. This is precisely the kind of claim that is governed by the *Irwin Toy* framework, not *Baier* (*Baier*, at para. 42; *Greater Vancouver Transportation Authority*, at para. 35; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 S.C.R. 815, at para. 31).

152 In any event, the distinction between positive and negative rights is an unhelpful lens for adjudicating *Charter* claims. During nearly four decades of *Charter* litigation, this Court has recognized that rights and freedoms have

both positive and negative dimensions. That recognition has led the Court to adopt a unified purposive approach to rights claims, whether the claim is about freedom *from* government interference in order to exercise a right, or the right *to* governmental action in order to get access to it.3 To paraphrase Gertrude Stein, a right is a right is a right. The threshold does not vary with the nature of the claim to a right. Each right has its own definitional scope and is subject to the proportionality analysis under s. 1 of the *Charter*.

153 All rights have positive dimensions since they exist within, and are enforced by, a positive state apparatus (S. Fredman, "Human Rights Transformed: Positive Duties and Positive Rights", [2006] *P.L.* 498, at p. 503; J. Rawls, *Political Liberalism* (exp. ed. 2005), at pp. 361-62; A. Sen, *The Idea of Justice* (2009), at p. 228). They also have negative dimensions because they sometimes require the state *not* to intervene. The distinction "is notoriously difficult to make ... . Appropriate verbal manipulations can easily move most cases across the line" (S. F. Kreimer, "Allocational Sanctions: The Problem of Negative Rights in a Positive State" (1984), 132 U. Pa. L. Rev. 1293, at p. 1325).

154 It is true that freedom of expression was once described by L'Heureux-Dubé J. in *Haig v. Canada*, [1993] 2 S.C.R. 995, as prohibiting "gags" but not compelling "the distribution of megaphones" (p. 1035; see also K. Chan, "Constitutionalizing the Registered Charity Regime: Reflections on *Canada Without Poverty*" (2020), 6 *C.J.C.C.L.* 151, at p. 173). But even in *Haig* -- a precursor to *Baier* -- L'Heureux-Dubé J. acknowledged that this was an artificial distinction that is "not always clearly made, nor ... always helpful" (p. 1039; see also *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627, at pp. 666-68, per L'Heureux-Dubé J., concurring).

155 There is no reason to superimpose onto our constitutional structure the additional hurdle of dividing rights into positive and negative ones for analytic purposes. Dividing the rights "baby" in half is not Solomonic wisdom, it is a jurisprudential sleight-of-hand that promotes confusion rather than rights protection.

156 The purpose of the s. 2(b) right is not merely to restrain the government from interfering with expression, but also to cultivate public discourse "as an instrument of democratic government" (Hogg and Wright, at p. 43-8; see also Weinrib). Political discourse is at the heart of s. 2(b). Protecting the integrity of reciprocal political discourse among candidates and voters during an election period is therefore integral to s. 2(b)'s purpose. Elevating the legal threshold, as the majority proposes to do by applying *Baier*, adds a gratuitous hurdle, making it harder to prove a breach of this core aspect of s. 2(b) than other expressive activities. What should be applied instead is the foundational framework in *Irwin Toy*, which simply asks whether the activity in question falls within the scope of s. 2(b) and whether the government action, in purpose or effect, interfered with that expressive activity.

157 Applying that framework, it is clear that the timing of the legislation violated s. 2(b) of the *Charter*. By radically redrawing electoral boundaries *during* an active election that was almost two-thirds complete, the legislation interfered with the rights of all participants in the electoral process to engage in meaningful reciprocal political discourse.

158 This brings us to s. 1 of the *Charter*. The purpose of the s. 1 analysis is to determine whether the state can justify the *limitation* as "demonstrably justified in a free and democratic society" (*Charter*, s. 1; *Fraser v. Canada (Attorney General)*, 2020 SCC 28, at para. 125). The limitation on s. 2(b) rights in this case was the timing of the legislative changes.

159 But rather than explaining the purpose and justification for the *timing* of the changes, Ontario relied on the pressing and substantial objectives of the changes themselves as the basis for the s. 1 analysis, saying they were to achieve voter parity, improve efficiency and save costs. This was set out in the press release announcing the proposed legislation, which stated: "We ran on a commitment to restore accountability and trust, to reduce the size and cost of government, including an end to the culture of waste and mismanagement" (Office of the Premier, *Ontario's Government for the People Announces Reforms to Deliver Better Local Government*, July 27, 2018 (online)). And at the second reading of the legislation, the Minister of Municipal Affairs and Housing, the Hon. Steve Clark, declared:

> During the recent provincial election campaign, my caucus colleagues and I heard very strongly from Ontarians that they want us to respect those taxpayers' dollars. We heard very clearly from Ontarians that government is supposed to work for them. I think Ontario sent a very clear message on June 7 that they want a government that looks after those taxpayers' dollars, and that is exactly what we're doing with this bill.
>
> So, Speaker, I want to get into some of the details of the bill, and specifically I want to talk first about the city of Toronto. The bill, if passed, would reduce the size of Toronto city council to 25 councillors from the present 47 plus the mayor. This would give the taxpayers of Toronto a streamlined, more effective council that is ready to work quickly and puts the needs of everyday people first.
>
> (Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, No. 14, 1st Sess., 42nd Parl., August 2, 2018, at p. 605)

160 Leaving aside that voter parity was hardly mentioned in the legislative debates, this Court has never found voter parity to be the electoral lodestar, asserting, on the contrary, that the values of a free and democratic society "are better met by an electoral system that focuses on effective representation than by one that focuses on mathematical parity" (*Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at p. 188).

161 But of overriding significance, the government offered no explanation, let alone a pressing and substantial one, for why the changes were made in the middle of an ongoing election. There was no hint of urgency, nor any overwhelming immediate policy need.

162 In the absence of any evidence or explanation for the *timing* of the *Act*, no pressing and substantial objective exists for this limitation and it cannot, therefore, be justified in a free and democratic society. The legislation is, as a result, an unjustified breach of s. 2(b).

163 While this dispenses with the merits of the appeal, the majority's observations circumscribing the scope and power of unwritten constitutional principles in a way that reads down this Court's binding jurisprudence warrants a response.

164 In the *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 ("*Secession Reference*"), the Court identified the unwritten constitutional principles of democracy, judicial independence, federalism, constitutionalism and the rule of law, and the protection of minorities. These principles are derived from the preamble to the *Constitution Act, 1867*, which describes our Constitution as "a Constitution similar in Principle to that of the United Kingdom" (*Secession Reference*, at paras. 44-49; see also P. C. Oliver, "'A Constitution Similar in Principle to That of the United Kingdom': The Preamble, Constitutional Principles, and a Sustainable Jurisprudence" (2019), 65 McGill L.J. 207).

165 The precedential Constitution of the United Kingdom is not a written document, but is comprised of unwritten norms, Acts of Parliament, Crown prerogative, conventions, custom of Parliament, and judicial decisions, among other sources (Oliver, at p. 216; M. Rowe and N. Déplanche, "Canada's Unwritten Constitutional Order: Conventions and Structural Analysis" (2020), 98 *Can. Bar Rev.* 430, at p. 438). Our Constitution, as a result, "embraces unwritte[n] as well as written rules" (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("*Provincial Judges Reference*"), at para. 92, per Lamer C.J.).

166 It is notable that many Parliamentary systems, notwithstanding their different constitutional arrangements, have also recognized that unwritten constitutional principles have full legal force and can serve as substantive limitations on all branches of government.4

167 Unwritten constitutional principles have been held to be the "lifeblood" of our Constitution (*Secession Reference*, at para. 51) and the "vital unstated assumptions upon which the text is based" (para. 49). They are so foundational that including them in the written text "might have appeared redundant, even silly, to the framers" (para. 62).

168 Unwritten constitutional principles are not, as the majority suggests, merely "context" or "backdrop" to the text. On the contrary, unwritten principles are our Constitution's most basic normative commitments from which specific textual provisions derive. The specific written provisions are "elaborations of the underlying, unwritten, and organizing principles found in the preamble to the *Constitution Act, 1867*" (*Provincial Judges Reference*, at para. 107; see also *Switzman*, at p. 306, per Rand J.). Constitutional text emanates from underlying principles, but it will not always be exhaustive of those principles. In other words, the text is not exhaustive of our Constitution (*New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, at p. 378, per McLachlin J.).

169 Apart from written provisions of the Constitution, principles deriving from the Constitution's basic structure may constrain government action. Those principles exist independently of and, as in the case of implied fundamental rights before the promulgation of the *Charter*, prior to the enactment of express constitutional provisions (see e.g. *Reference re Alberta Statutes*, per Duff C.J.; *Switzman*, at pp. 327-28, per Abbott J.; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 57, per Beetz J.). As Beetz J. wrote for the majority in *OPSEU*, at p. 57, "quite apart from *Charter* considerations, the legislative bodies in this country must conform to these basic structural imperatives and can in no way override them":

> There is no doubt in my mind that the basic structure of our Constitution, as established by the *Constitution Act, 1867,* contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels. In the words of Duff C.J. in *Reference re Alberta Statutes,* at p. 133, "such institutions derive their efficacy from the free public discussion of affairs ... ." and, in those of Abbott J. in *Switzman v. Elbling,* at p. 328, neither a provincial legislature nor Parliament itself can "abrogate this right of discussion and debate". Speaking more generally, I hold that neither Parliament nor the provincial legislatures may enact legislation the effect of which would be to substantially interfere with the operation of this basic constitutional structure. [p. 57]

170 This leads inescapably to the conclusion -- supported by this Court's jurisprudence until today -- that unwritten principles may be used to invalidate legislation if a case arises where legislation elides the reach of any express constitutional provision but is fundamentally at odds with our Constitution's "internal architecture" or "basic constitutional structure" (*Secession Reference*, at para. 50; *OPSEU*, at p. 57). This would undoubtedly be a rare case. But with respect, the majority's decision to foreclose the possibility that unwritten principles be used to invalidate legislation in all circumstances, when the issue on appeal does not require them to make such a sweeping statement, is imprudent. It not only contradicts our jurisprudence, it is fundamentally inconsistent with the case law confirming that unwritten constitutional principles can be used to review legislation for constitutional compliance. Reviewing legislation for constitutional compliance means upholding, revising or rejecting it. Otherwise, there is no point to reviewing it.

171 In the *Secession Reference*, a unanimous Court confirmed that "[u]nderlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have 'full legal force', as we described it in the *Patriation Reference*, *supra*, at p. 845), which constitute substantive limitations upon government action" (para. 54, quoting *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 ("*Patriation Reference*"); see also *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3, at para. 54, per McLachlin C.J.). That means they can be used to assess state action for constitutional compliance, which in turn can lead to endorsing, rejecting, limiting or expanding the acts of the executive or legislative branches of government. Again, with respect, we have never, to date, limited their role in the manner the majority proposes.

172 The Court's reference to *Patriation Reference* dispels any doubt as to what it meant when it said that these principles have "full legal force". In the passage cited approvingly from the *Patriation Reference*, Martland and Ritchie JJ., dissenting in part, explained that unwritten constitutional principles "*have been* accorded full legal force in the sense of *being employed to strike down legislative enactments*" (p. 845 (emphasis added)). While Martland and Ritchie JJ. dissented in the result in the *Patriation Reference*, they cited judgments in support of the principle of federalism that remain good law and were viewed as necessary to "preserving the integrity of the federal structure" (p. 821), notably *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326 (P.C.), and *Attorney*

General of Nova Scotia v. Attorney General of Canada, [1951] S.C.R. 31 (see also *Secession Reference*, at para. 81, citing *Reference re Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54, at p. 71). In other words, structural doctrine helps identify what the unwritten principles *are*, it does not limit their role.

173 This Court expressly endorsed the unwritten principles of democracy as the "baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated" (*Secession Reference*, at para. 62); the rule of law as "a fundamental postulate of our constitutional structure" (*Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 142, per Rand J.), "the very foundation of the *Charter*" (*B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, at p. 229, per Dickson C.J.), and the source of judicial authority to override legislative intent "where giving effect to that intent is precluded by the rule of law" (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 23); federalism as "a foundational principle of the Canadian Constitution" (*References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, at para. 3, per Wagner C.J.); and judicial independence as a "constitutional imperative" in light of "the central place that courts hold within the Canadian system of government" (*Provincial Judges Reference*, at para. 108). And of course, the unwritten constitutional principle of the honour of the Crown has been affirmed by this Court and accorded full legal force (*Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103, at para. 42, per Binnie J.; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, at para. 16, per McLachlin C.J.).

174 In the *Provincial Judges Reference*, this Court relied, in part, on the unwritten constitutional principle of judicial independence to strike down legislative provisions in various provincial statutes. The issue was whether the principle of judicial independence restricts the manner and extent to which provincial legislatures can reduce the salaries of provincial court judges. While the principle of judicial independence finds expression in s. 11(d) of the *Charter*, which guarantees the right of an accused to an independent tribunal, and ss. 96 to 100 of the *Constitution Act, 1867*, which govern superior courts in the province, the unwritten principle of judicial independence was used to fill a gap in the written text to cover provincial courts in circumstances not covered by the express provisions. Writing for the majority, Lamer C.J. held that

> [j]udicial independence is an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*. In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located. [para. 109]

175 In *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, this Court invoked the unwritten principle of the rule of law to create a novel constitutional remedy -- the suspended declaration of constitutional invalidity. The Court developed this remedy notwithstanding that the text of s. 52(1) of the *Constitution Act, 1982* states that unconstitutional laws are "of no force or effect" suggesting, when interpreted technically and in isolation from underlying constitutional principles, that declarations of invalidity can only be given immediate effect. As Karakatsanis J. wrote for the majority in *Ontario (Attorney General) v. G*, 2020 SCC 38, although s. 52(1) "does not explicitly provide the authority to suspend a declaration, in adjudicating constitutional issues, courts 'may have regard to unwritten postulates which form the very foundation of the Constitution of Canada'" (para. 120, quoting *Manitoba Language Rights*, at p. 752).

176 Beyond the Reference context, in *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, this Court used the rule of law principle to read down s. 47(2) of the *Young Offenders Act*, R.S.C. 1985, c. Y-1, which granted youth courts exclusive jurisdiction over contempt of court by a young person, so as not to oust the jurisdiction of superior courts. Writing for the majority, Lamer C.J. held that Parliament cannot remove the contempt power from a superior court without infringing "the principle of the rule of law recognized both in the preamble and in all our conventions of governance" (para. 41).

177 And in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, [2014] 3 S.C.R. 31, this Court struck down a regulation imposing hearing fees that were found to deny people access to the courts based in part on the unwritten constitutional principle of the rule of law, and relatedly, access to justice.

178 The majority's emphasis on the "primordial significance" of constitutional text is utterly inconsistent with this

Court's repeated declarations that *unwritten* constitutional principles are the foundational organizing principles of our Constitution and have full legal force. Being unwritten means there is no text. They serve to give effect to the structure of our Constitution and "function as independent bases upon which to attack the validity of legislation ... since they have the same legal status as the text" (R. Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001), 80 *Can. Bar Rev.* 67, at p. 95; see also H.-R. Zhou, "Legal Principles, Constitutional Principles, and Judicial Review" (2019), 67 Am. J. Comp. L. 889, at p. 924). By definition, an emphasis on the words of the Constitution demotes unwritten principles to a diluted role. "Full legal force" means full legal force, independent of the written text.

179 Unwritten constitutional principles do not only "give meaning and effect to constitutional text" and inform "the language chosen to articulate the specific right or freedom", they also assist in developing an evolutionary understanding of the rights and freedoms guaranteed in our Constitution, which this Court has long described as "a living tree capable of growth and expansion" (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 156, quoting *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136). Unwritten constitutional principles are a key part of what makes the tree grow (*Secession Reference*, at para. 52; *Provincial Judges Reference*, at para. 106). This Court has never held that the interpretive role of unwritten constitutional principles is narrowly constrained by textualism.

180 Unwritten constitutional principles are, additionally, substantive legal rules in their own right. As Lamer C.J. wrote in the *Provincial Judges Reference*:

> [The preamble] recognizes and affirms the basic principles which are the very source of the substantive provisions of the *Constitution Act, 1867*. As I have said above, those provisions merely elaborate those organizing principles in the institutional apparatus they create or contemplate. As such, *the preamble is not only a key to construing the express provisions of the Constitution Act, 1867, but also invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme*. It is the means by which the underlying logic of the Act can be given *the force of law*. [Emphasis added; para. 95.]

181 Professor Mark D. Walters effectively explained why the role of unwritten constitutional principles has not been limited as the majority suggests:

> The relationship between unwritten and written constitutional law in Canada may be conceived in different ways. At one point, Chief Justice Antonio Lamer observed that the role of unwritten principles is "to fill out gaps in the express terms of the constitutional scheme." This statement might suggest that judges are just reading between the lines in order to make the text complete. Or, to use another metaphor, judges are constructing bridges over the waters that separate islands of constitutional text, creating a unified and useable surface.
>
> *But the gap-filling and bridge metaphors do not capture fully the theory of unwritten constitutionalism as it has developed in the Canadian cases*... . We must alter the bridge metaphor accordingly: The textual islands are merely the exposed parts of a vast seabed visible beneath the surrounding waters, and the bridges constructed by judges between these islands are actually causeways moulded from natural materials brought to the surface from this single underlying foundation. *The constitutional text is not just supplemented by unwritten principles; it rests upon them.* [Emphasis added; footnote omitted.]
>
> ("Written Constitutions and Unwritten Constitutionalism", in G. Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory* (2008 (reprinted 2010)), 245, at pp. 264-65)

182 It is also difficult to understand the need for the majority's conclusion that using unwritten constitutional principles to strike down legislation would circumvent the legislative override power in s. 33 of the *Charter*. This question is not directly before us.

183 Finally, I see no merit to the majority's argument that courts cannot declare legislation invalid on the basis of unwritten constitutional principles because s. 52(1) of the *Constitution Act, 1982* only applies to written text. This argument extinguishes the entire jurisprudence establishing that unwritten principles have full legal force. Section 52(1) provides that "any law that is inconsistent with the *provisions* of the Constitution is ... of no force or effect".

The majority's reading of s. 52(1), like much of the rest of its analysis, is a highly technical exegetical exercise designed to overturn our binding authority establishing that unwritten constitutional principles are a full constitutional partner with the text, including for the purposes of s. 52 (*New Brunswick Broadcasting Co.*, at pp. 375-78; *Manitoba Language Rights*, at p. 752; *Ontario (Attorney General) v. G*, at para. 120).

184 It is true that in *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, the Court questioned whether the rule of law could be used to invalidate legislation based on its content, but this was based on the specific contours of one unwritten principle, not unwritten principles in general. The Court did not constrain the reach of judicial independence, the other unwritten constitutional principle raised in that case. As Major J. explained in describing the limits of the content of the rule of law:

> ... it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation such as the Act based on its content. That is because none of the principles that the rule of law embraces speak directly to the terms of legislation. The first principle requires that legislation be applied to all those, including government officials, to whom it, by its terms, applies. The second principle means that legislation must exist. And the third principle, which overlaps somewhat with the first and second, requires that state officials' actions be legally founded. See R. Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001), 80 *Can. Bar Rev.* 67, at pp. 114-15. [para. 59]

Never, however, has this Court, until now, foreclosed the possibility of *all* unwritten constitutional principles ever invalidating legislation.

185 The inevitable consequence of this Court's decades-long recognition that unwritten constitutional principles have "full legal force" and "constitute substantive limitations" on all branches of government is that, in an appropriate case, they may well continue to serve, as they have done in the past, as the basis for declaring legislation unconstitutional (*Secession Reference*, at para. 54; see also Elliot, at p. 95; (A.) J. Johnson, "The *Judges Reference* and the *Secession Reference* at Twenty: Reassessing the Supreme Court of Canada's Unfinished Unwritten Constitutional Principles Project" (2019), 56 Alta. L. Rev. 1077, at p. 1082; P. Bobbitt, *Constitutional Fate: Theory of the Constitution* (1982)). There is no need, as a result, to constrain the role of unwritten constitutional principles and newly declare that their full legal force does not include the ability, in appropriate circumstances, to declare legislation to be constitutionally invalid.

186 I would allow the appeal and restore Belobaba J.'s declaration that the timing of the *Act* unjustifiably infringed s. 2(b) of the *Charter*.

Appeal dismissed, ABELLA, KARAKATSANIS, MARTIN *and* KASIRER JJ. *dissenting.*

Solicitors:

Solicitor for the appellant: City of Toronto, Toronto.

Solicitor for the respondent: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Vancouver.

Solicitor for the intervener the Toronto District School Board: Toronto District School Board, Toronto.

Solicitor for the intervener the Cityplace Residents' Association: Selwyn A. Pieters, Toronto.

Solicitors for the intervener the Canadian Constitution Foundation: McCarthy Tétrault, Toronto.

Solicitors for the intervener the International Commission of Jurists (Canada): Gowling WLG (Canada), Ottawa.

Solicitor for the intervener the Federation of Canadian Municipalities: Federation of Canadian Municipalities, Ottawa.

Solicitor for the intervener the Durham Community Legal Clinic: Durham Community Legal Clinic, Oshawa.

Solicitor for the intervener the Centre for Free Expression at Ryerson University: Osgoode Hall Law School, York University, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Goldblatt Partners, Toronto.

Solicitors for the interveners Art Eggleton, Barbara Hall, David Miller and John Sewell: Goldblatt Partners, Toronto.

Solicitors for the intervener the David Asper Centre for Constitutional Rights: St. Lawrence Barristers, Toronto.

Solicitors for the intervener Progress Toronto: Paliare Roland Rosenberg Rothstein, Toronto.

Solicitors for the interveners the Métis Nation of Ontario and the Métis Nation of Alberta: Pape Salter Teillet, Toronto.

Solicitor for the intervener Fair Voting British Columbia: Nicolas M. Rouleau, Toronto.

---

1 This Court's jurisprudence has involved, for example, restrictions on: **publication** (*Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *R. v. Bryan*, [2007] 1 S.C.R. 527); **obscene content** (*R. v. Butler*, [1992] 1 S.C.R. 452; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120); **advertising** (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Greater Vancouver Transportation Authority v. Canadian Federation of Students - British Columbia Component*, [2009] 2 S.C.R. 295); **language** (*Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790); **harmful content** (*R. v. Sharpe*, [2001] 1 S.C.R. 45; *R. v. Keegstra*, [1990] 3 S.C.R. 697); **manner or place of expression** (*Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084; *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141); **who can participate in a statutory platform for expression** (*Haig v. Canada*, [1993] 2 S.C.R. 995; *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627; *Baier v. Alberta*, [2007] 2 S.C.R. 673); **voluntary expression** (such as mandatory letters of reference or public health warnings) (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] 2 S.C.R. 610); **expenditures on expression** (*Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569; *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827); or **access to information** (such as court proceedings or government documents) (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 S.C.R. 815). This case does not fall into any of these categories.

2 *Haig v. Canada*, [1993] 2 S.C.R. 995 (s. 2(b) challenge to exclusion of Quebec resident from federal referendum); *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627 (s. 2(b) challenge to exclusion of Native Women's Association of Canada from federal funding to present on Charlottetown Accord); *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, overruled by *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015] 1 S.C.R. 3 (s. 2(d) challenge to exclusion of RCMP members from labour relations legislation); *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016 (s. 2(d) challenge to exclusion of agricultural workers from labour relations legislation).

3 The same legal standard has applied to claims with respect to: **freedom of association under s. 2(d)** (*Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391 (right to collective

bargaining); *Ontario (Attorney General) v. Fraser*, [2011] 2 S.C.R. 3 (right to good faith bargaining); *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015] 1 S.C.R. 3 (right to statutory protections for collective bargaining)); the **right to life, liberty and security of the person under s. 7** (*Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331 (physician-assisted dying); *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (abortion); *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. 134 (safe injection facility)); and **equality under s. 15** (*Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (interpretation services for deaf hospital patients); *Vriend v. Alberta*, [1998] 1 S.C.R. 493 (legislative protection against discrimination on the basis of sexual orientation)), to name a few examples.

4 See also other jurisdictions in which unwritten constitutional principles have been accorded full legal force in the sense of being employed to invalidate legislative or executive action: **United Kingdom** (*R. (on the application of Miller) v. Prime Minister*, [2019] UKSC 41, [2020] A.C. 373 (parliamentary sovereignty and accountability); *R. (on the application of Jackson) v. Attorney General*, [2005] UKHL 56, [2006] 1 A.C. 262, at para. 102, per Lord Steyn (judicial independence); *R. (Privacy International) v. Investigatory Powers Tribunal*, [2019] UKSC 22, [2020] A.C. 491, at paras. 100 and 144, per Lord Carnwath (judicial independence and rule of law); *AXA General Insurance Ltd. v. HM Advocate*, [2011] UKSC 46, [2012] 1 A.C. 868, at para. 51, per Lord Hope (judicial independence and rule of law)); **Australia** (*Brandy v. Human Rights and Equal Opportunity Commission* (1995), 183 C.L.R. 245 (H.C.) (judicial independence); *Kable v. Director of Public Prosecutions (NSW)* (1996), 189 C.L.R. 51 (H.C.) (federalism); *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997), 190 C.L.R. 410 (H.C.) (federalism); *Lange v. Australian Broadcasting Corporation* (1997), 189 C.L.R. 520 (H.C.) (freedom of political communication); *Roach v. Electoral Commissioner*, [2007] HCA 43, 233 C.L.R. 162 (the right to vote)); **South Africa** (*South African Association of Personal Injury Lawyers v. Heath*, [2000] ZACC 22, 2001 (1) S.A. 883 (separation of powers); *Fedsure Life Assurance Ltd. v. Greater Johannesburg Transitional Metropolitan Council*, [1998] ZACC 17, 1999 (1) S.A. 374, at para. 58 (legality)); **Germany** (*Elfes Case*, BVerfG, 1 BvR 253/56, Decision of January 16, 1957 (rule of law and social welfare state)); and **India** (*Kesavananda v. State of Kerala*, A.I.R. 1973 S.C. 1461, at pp. 1899-1900 (secularism, democracy and individual freedom)).

End of Document

Willow v. Chong, [2013] B.C.J. No. 1310

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

B. Fisher J.

Heard: April 29 and May 3, 2013.

Judgment: June 19, 2013.

Docket: S-110618

Registry: Vancouver

[2013] B.C.J. No. 1310 | 2013 BCSC 1083

Between Sky Willow, Shanghai TCM College of BC Canada Ltd. and Council of Natural Medicine College of Canada, Plaintiffs, and The Honourable Ida Chong, Minister of Regional, Economic and Skills Development, The Honourable, Colin Hansen, Minister of Health Services, Her Majesty the Queen in right of the Province of British Columbia, Private Career Training Institutions Agency of British Columbia, College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia, Mary S. Watterson, Steven Harvey and Jim Wright, Defendants

(119 paras.)

Case Summary

Administrative law — Natural justice — Procedural fairness — Motion by defendants to strike claims against them allowed — Plaintiff sought damages related to closure of plaintiffs' college — Plaintiffs' claims related to fairness of regulatory process and ought to have been subject to statutory appeal or judicial review — Fact that damages were not available on judicial review was not sufficient to ground action — None of plaintiffs' claims established reasonable cause of action — Plaintiffs' claims struck as abuse of process and as disclosing no reasonable claim — Supreme Court Civil Rules, Rule 9-5(1).

Civil litigation — Civil procedure — Pleadings — Striking out pleadings or allegations — Grounds — Failure to disclose a cause of action or defence — False, frivolous, vexatious or abuse of process — Motion by defendants to strike claims against them allowed — Plaintiff sought damages related to closure of plaintiffs' college — Plaintiffs' claims related to fairness of regulatory process and ought to have been subject to statutory appeal or judicial review — Fact that damages were not available on judicial review was not sufficient to ground action — None of plaintiffs' claims established reasonable cause of action — Plaintiffs' claims struck as abuse of process and as disclosing no reasonable claim — Supreme Court Civil Rules, Rule 9-5(1).

Constitutional law — Canadian Charter of Rights and Freedoms — Mobility rights — To reside or earn a livelihood in any province — Legal rights — Protection against unreasonable search and seizure — Motion by defendants to strike claims against them allowed — Plaintiff alleged closure of college violated Charter rights — None of plaintiffs' claims established reasonable cause of action — Plaintiff did not have Charter right to pursue livelihood so as to override applicable provincial legislation — Claim of unreasonable search and seizure was essentially allegation of breach of rules of natural justice and procedural fairness, which was properly subject of judicial review proceedings — Plaintiffs' claims struck as abuse of process and as disclosing no reasonable claim — Canadian Charter of Rights and Freedoms, 1982, ss. 6(2)(b), 8.

Tort law — Practice and procedure — Pleadings — Amendment — Adding or striking out a claim — Motion by defendants to strike claims against them allowed — Plaintiff alleged misfeasance in public office, conspiracy, abuse of process and intentional inference with economic relations — Plaintiffs' claims related to fairness of regulatory process and ought to have been subject to statutory appeal or judicial review — Fact that damages were not available on judicial review was not sufficient to ground action — None of plaintiffs' claims established reasonable cause of action — Plaintiffs' claims struck as abuse of process and as disclosing no reasonable claim — Supreme Court Civil Rules, Rule 9-5(1).

Motion by defendants to strike claims against them. Following a complaint by a former student of the plaintiffs' college, the defendant regulatory agency cancelled the college's accreditation and the defendant ministers obtained an interlocutory injunction restraining the college from issuing certificates. The plaintiff alleged misfeasance in public office, conspiracy, abuse of process, intentional inference with economic relations and Charter violations. The regulatory agency sought to strike the claims against it on the grounds that the claims were an impermissible collateral attack on its administrative process, which should have been subject to statutory appeal or judicial review. The crown defendants argued that the claim disclosed no cause of action against them. The minister defendants argued that the action was a collateral attack on the injunction proceedings. The plaintiffs argued that its action was not an abuse of process because its claim for damages was not available in judicial review.
HELD: Motions allowed.

To the extent that the plaintiffs' claims against the regulatory agency related to the fairness of the administrative process, they ought to have pursued the remedies available under the legislation. The fact that damages are not available in an application for judicial review was not sufficient to ground the action where the essential complaint stemmed from dissatisfaction with the conduct and decisions of an administrative agency. The claim for damages was struck as an abuse of process. The pleadings did not support the claims of misfeasance in public office or abuse of process. The claim of intentional interference with economic relations was certain to fail. The pleadings were insufficient to ground the claim of conspiracy. The claim based on the right to earn a livelihood in any provide was certain to fail. The plaintiff did not have an independent Charter right to pursue a livelihood so as to override applicable provincial legislation. The claim of unreasonable search and seizure was essentially an allegation of a breach of the rules of natural justice and procedural fairness, which was properly the subject of judicial review proceedings. The claims against the registrar of the regulatory agency were certain to fail. The plaintiffs pleaded nothing to suggest that the registrar conducted himself in a manner that was separate from the agency or that he was acting outside the scope of his employment. The claims against the agency and the registrar constituted an impermissible collateral attack and were struck as an abuse of process. There was nothing in the claim that asserted any cause of action against the crown. The claim against the ministers made the same allegations as in the injunction proceedings. In the circumstances, it would be contrary to the interests of justice to permit the plaintiffs to make the same claim in two extant proceedings. The ministers named in the proceedings were no longer in those positions, and allegations of abuse of process could not succeed against nominal defendants. The claim against the ministers based on vicarious liability could not possibly succeed. The plaintiffs were denied leave to amend their pleadings, as it was apparent that the plaintiffs' primary issues were with the other defendants.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 6(2)(b), s. 7, s. 8

Degree Authorization Act, SBC 2002, c 24, s. 8

Health Professions Act, RSBC 1996, c 183,

Judicial Review Procedure Act, RSBC 1996, c 241,

Private Career Training Institutions Act, SBC 2003 c 79, s. 3, s. 6, s. 8, s. 9, s. 10, s. 12, s. 12(2), s. 13, s. 15, s. 16(3), s. 16(4), s. 16(5)

Supreme Court Civil Rules, Rule 9-5, Rule 9-5(1), Rule 9-5(1) (a), Rule 9-5(1)(b), Rule 9-5(1)(d), Rule 9-6, Rule 9-6(4), Rule 9-6(5)

Travel Agents Act, RSBC 1996, c 459,

Counsel

Counsel for the Plaintiffs: G. Pyper.

Counsel for the Defendants: Minister of Regional Economic and Skills Development, HMTQ of B.C., C. Hansen, I. Chong, Attorney General of B.C.: A.K. Fraser, P. Manhas.

Counsel for the Defendants: Private Career Training Institutions Agency and Jim Wright: N.T. Mitha.

Reasons for Judgment

B. FISHER J.

1 The applications before the court are by some of the defendants in this proceeding who seek to have the claims against them struck under Rule 9-5 or dismissed by way of summary judgment under Rule 9-6 of the *Supreme Court Civil Rules*.

2 The defendants Private Career Training Institutions Agency of British Columbia (PCTIA) and its Registrar, Jim Wright, seek to strike portions of the Notice of Civil Claim pertaining to them. I will refer to these defendants as the Agency defendants.

3 The defendants the Honourable Ida Chong, Minister of Regional Economic and Skills Development, the Honourable Colin Hansen, Minister of Health Services, Her Majesty the Queen in Right of the Province of British Columbia, and the Attorney General of British Columbia apply for orders striking portions of the Notice of Civil Claim and dismissing the claims against them, or alternatively staying the proceedings. These defendants also apply in the alternative for an order that the two named ministers cease to be defendants. I will refer to these defendants as the Crown defendants and to the named ministers as the Ministers.

Background

4 The plaintiff, Sky Willow, is a Ph.D. of Traditional Chinese Medicine, the principal of the plaintiff Shanghai TCM College of BC Canada Ltd. (Shanghai College) and board member of the plaintiff Council of Natural Medicine College of Canada (Council of Natural Medicine). These plaintiffs have brought claims against numerous defendants which relate to issues surrounding the closure of Shanghai College in Vancouver. They seek damages for losses associated with this closure.

5 Until October 25, 2010, Shanghai College was registered and accredited to provide career training under the *Private Career Training Institutions Act*, SBC 2003 c 79 (*PCTI Act* or the *Act*). It provided training in acupuncture and traditional Chinese medicine and was entitled to award qualifications to its students on completion of their training. The defendant PCTIA is the regulatory agency for private training institutions and it acts under the authority of the *PCTI Act.*

6 In 2009, the defendant Stephen Harvey made a complaint about Shanghai College to PCTIA after learning that he would not be able to practice acupuncture and traditional Chinese medicine by any professional title, and he sought a refund of the tuition he had paid to the College. After an investigation, PCTIA refunded the amount of the tuition fees to Mr. Harvey from a fund established under the *PCTI Act.* On September 22, 2010, PCTIA demanded

that Shanghai College pay it the amount of the fees that had been refunded to Mr. Harvey. On October 25, 2010, PCTIA searched Shanghai College's premises, seized documents, and cancelled Shanghai College's registration and accreditation under the *Act.*

7 In December 2010, the Ministers commenced an action against Shanghai College and the Council of Natural Medicine seeking an interlocutory and permanent injunction restraining them from issuing or offering to issue certificates for doctoral degrees and certificates indicating or implying that the holder is a doctor entitled to practice as a doctor (I will refer to this as the Ministers' Action). The Ministers alleged that Shanghai College was not authorized by the Minister of Regional Economic and Skills Development under the *Degree Authorization Act,* SBC 2002, c 24 to confer degrees on persons, or to sell, offer or advertise for sale degree certificates, and was not a college authorized under the *Health Professions Act*, RSBC 1996, c 183, to register a person as a member of the college entitled to use the title "doctor" in his or her work.

8 Shanghai College and the Council of Natural Medicine defended the Ministers' Action by alleging that it was commenced and continued primarily for a collateral or improper purpose that amounted to an abuse of process.

9 On February 7, 2011, an interlocutory injunction was granted in the Ministers' Action against Shanghai College and the Council of Natural Medicine. No steps have been taken in the Ministers' Action since then.

The Claims

10 This action was commenced in January 2011.

1. As against the Agency defendants

11 The claims against the Agency defendants stem from PCTIA's September 22, 2010 decision that Shanghai College pay the amount of the fees that had been refunded to Mr. Harvey and its search of Shanghai College's premises on October 25, 2010 and seizure of documents.

12 The plaintiffs allege that Jim Wright, the Registrar of PCTIA, authorized staff "to break into" Shanghai College's premises and remove documents and materials and that PCTIA and Jim Wright "acted with malice and without reasonable or probable cause or a primary purpose other than that of carrying the law into effect". They allege that the Agency defendants, with knowledge of the contractual relationship between Shanghai College and its students, "and with intent to prevent performance of the contract, wrongfully and without lawful right to do so", caused Shanghai College to be closed down after removing documents and cancelling its registration and accreditation. They say that this was done with malice and intent to injure them and that it caused them to lose the benefit of tutoring students and earning an income, resulting in a loss of profits.

13 The plaintiffs also allege that the Agency defendants, along with the Ministers, breached the principles of natural justice "motivated by malice, bad faith and wrongful interference with the economic and contractual relations" and violated s. 6(2)(b) of the *Charter*; and "the Trespass, Search and Seizure" committed by both the Ministers and the Agency defendants were unreasonable and violated s. 8 of the *Charter*.

2. As against the Crown defendants

14 The claims against the Crown defendants are primarily for abuse of process stemming from the Ministers' Action. The plaintiffs make the same allegations as in their response to the Ministers' Action. They allege that the Ministers' Action was commenced and continued by the Ministers "primarily for a collateral or improper purpose that was unrelated to the ostensible purpose" of the Action.

15 They also allege that (1) the injunctive relief sought by the Ministers is *res judicata* due to similar relief having been sought by the College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia in Federal Court; (2) the Ministers caused them damages that include "(a) financial hardship; (b) anxiety; (c) frustration, confusion and insecurity; (d) despondency; and (e) emotional trauma"; (3) the Ministers' conduct in instituting the Ministers' Action "amounts to an abuse of process which amounts to a collateral and improper

purpose other than to carry the law into effect"; and (4) the Ministers "committed a tortious act of abuse of process which amounts to a wilful misuse or perversion of the court's process for a purpose extraneous or ulterior to that which the process was designed to serve".

16 The plaintiffs make some claims against the Ministers together with PCTIA and Jim Wright on the basis that the Ministers control the training and issuing of certificates. These claims include alleged breaches of the principles of natural justice "motivated by malice, bad faith and wrongful interference with the economic and contractual relations" between the plaintiffs and their students, which violated s. 6(2)(b) of the *Charter*. They also say that PCTIA and Jim Wright acted on instructions or under the authority of the Ministers and the Ministers are vicariously liable for the conduct of the Agency defendants. Finally, they allege that "the Trespass, Search and Seizure" committed by both the Ministers and the Agency defendants were unreasonable and violated s. 8 of the *Charter*.

Applications to strike pleadings - Rule 9-5

17 Rule 9-5(1) provides:

> At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> ... or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

18 The test for striking a claim as disclosing no reasonable claim under Rule 9-5(1)(a), set out in *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959 and reiterated more recently in *R. v Imperial Tobacco Canada Ltd.*, 2011 SCC 42, is whether it is "plain and obvious," assuming the facts pleaded are true, that the claim discloses no reasonable cause of action, has no reasonable prospect of success, or if the action is "certain to fail." If there is a chance that the plaintiffs might succeed, then they should not be "driven from the judgment seat." No evidence is admissible on an application under Rule 9-5(1)(a).

19 The rule that material facts in a notice of civil claim must be taken as true does not mean that allegations based on assumption and speculation must be taken as true. This was discussed in *Operation Dismantle Inc. v The Queen*, [1985] 1 SCR 441, where Dickson J. (as he then was) stated that "[n]o violence is done to the rule where allegations, incapable of proof, are not taken as proven". In *Young v Borzoni*, 2007 BCCA 16, the court stated (at paras. 30-31) that great caution must be taken in relying on *Operation Dismantle* as a general authority that allegations in pleadings should be weighed as to their truth, but it is not fundamentally wrong to look behind allegations in some cases, and it may be appropriate to subject the allegations in the pleadings to a sceptical analysis. It was considered appropriate in *Young*, where the plaintiff made sweeping allegations of things like intolerance, deceit, harassment, intimidation and falsifying documents against the defendants, which the court concluded could only be viewed as speculation.

20 Under Rule 9-5(1)(b), a pleading is unnecessary or vexatious if it does not go to establishing the plaintiff's cause of action, if it does not advance any claim known in law, where it is obvious that an action cannot succeed, or where it would serve no useful purpose and would be a waste of the court's time and public resources: *Citizens for Foreign Aid Reform Inc. v Canadian Jewish Congress*, [1999] BCJ No. 2160 (SC); *Skender v Farley*, 2007 BCCA 629. If a pleading is so confusing that it is difficult to understand what is pleaded, it may also be unnecessary, frivolous or vexatious. An application under this sub-rule may be supported by evidence.

21 Abuse of process under Rule 9-5(1)(d) or the court's inherent discretion is a flexible doctrine. It allows the court to prevent a claim from proceeding where to do so would violate principles of judicial economy, consistency, finality

and the integrity of the administration of justice. A claim may be struck where it is a collateral attack on an administrative decision that is subject to appeal or judicial review: *Cimaco International Sales Inc. v British Columbia*, 2010 BCCA 342; *Stephen v HMTQ*, 2008 BCSC 1656; *Varzeliotis v British Columbia*, 2007 BCSC 620; *Gemex Developments Corp. v City of Coquitlam*, 2002 BCSC 412; *Berscheid v Ensign*, [1999] BCJ No. 1172 (SC). A claim may also be struck as an abuse of process where it is an attempt to re-litigate an issue that has already been decided: *Toronto (City) v Canadian Union of Public Employees (CUPE), Local 79*, 2003 SCC 63.

22 The plaintiffs have an obligation to clearly plead the material facts upon which they rely in making their claim. A material fact is a fact that is essential in formulating a complete cause of action: see *Young* at para. 20.

23 In considering an application to strike under Rule 9-5, the court should consider whether defective pleadings can be corrected by way of an amendment and whether it would be appropriate to give leave to do so: see *Greville v Convoy Supply Ltd.* (14 January 2004), Vancouver S033090 (BCSC).

Summary judgment - Rule 9-6

24 Rule 9-6(4) permits a party to apply for judgment dismissing all or part of a claim. Rule 9-6(5) provides that on hearing such an application, the court

(a) if satisfied that there is no genuine issue for trial with respect to a claim ..., must ... dismiss the claim accordingly,

(b) if satisfied that the only genuine issue is the amount to which the claiming party is entitled, may order a trial of that issue or pronounce judgment with a reference or an accounting to determine the amount,

(c) if satisfied that the only genuine issue is a question of law, may determine the question and pronounce judgment accordingly, and

(d) may make any other order it considers will further the object of these Supreme Court Civil Rules.

25 The test to be applied for summary judgment is whether there is a *bona fide* triable issue to be determined: see *Pitt v Holt*, 2007 BCSC 1555 at para. 10, citing *Serup v Board of School Trustees* (1989), 54 BCLR (2d) 258 (CA), and *Skybridge Investments Ltd. v Metro Motors Ltd.*, 2006 BCCA 500. The court must be satisfied that it is "plain and obvious" or "beyond a doubt" the action will not succeed: *Saxton v Credit Union Deposit Guarantee Corporation*, 2006 ABCA 175. The application should be dismissed if the court is left in doubt as to whether there is a triable issue: *Progressive Construction Ltd. v Newton* (1980), 25 BCLR 330 (SC).

26 In *Skybridge*, Thackray J.A. held (at para. 10) that a judge hearing an application under this rule must "examine the pleaded facts to determine which causes of action they may support; identify the essential elements required to be proved at trial in order to succeed on each cause of action; and determine if sufficient material facts have been pleaded to support each element of a given cause of action."

27 In determining whether there is a *bona fide* issue, the judge is to assume that uncontested material facts as pleaded by the plaintiff are true: *Van Den Akker v Naudi*, [1997] BCJ No. 1649 (CA).

The application of the Agency defendants

28 The Agency defendants seek to strike out the portions of the Notice of Civil Claim as it relates to them, pursuant to Rule 9-5(1).

29 Their primary submission is that the claims against them are an impermissible collateral attack on the decisions of PCTIA to order Shanghai College to pay $51,200 for the fees that had been refunded to Mr. Harvey, to search its premises and seize documents, and to cancel its registration and accreditation under the *PCTI Act.* They say that all of the allegations arise from the plaintiffs' dissatisfaction with these decisions and actions, all of which are

subject to statutory appeal or judicial review. They submit that this action is a collateral attack on the administrative process under the *PCTI Act* and should be struck in its entirety as an abuse of process under Rule 9-5(1)(d).

30 The Agency defendants also submit that the plaintiffs have based their pleadings on broad statements and allegations of unlawful conduct with insufficient material facts, and the pleadings are prolix and confusing, and as such the claims against them should be struck as disclosing no reasonable cause of action under Rule 9-5(1)(a) or as unnecessary and vexatious under Rule 9-5(1)(b).

31 The plaintiffs submit that this action is not an abuse of process because their claim for damages is not available in judicial review. They also submit that they have properly pleaded causes of action of malice in relation to misfeasance in public office, intentional interference with contractual relations, conspiracy, and violations of the *Charter*.

Abuse of process

32 I agree with the Agency defendants that the plaintiffs' claims against them stem from their dissatisfaction with how and what PCTIA decided against Shanghai College. The essence of their claim is that PCTIA breached the rules of natural justice and due process. They allege that (1) PCTIA failed to hold a hearing and breached the principle of *audi alteram partem* in deciding that Shanghai College was required to pay Mr. Harvey's tuition fees; (2) Mr. Wright improperly authorized PCTIA staff to search Shanghai College's premises and seize documents; and (3) PCTIA and Mr. Wright wrongfully caused Shanghai College to close down.

33 To these essential complaints the plaintiffs add allegations of malice, intent to interfere with contractual relations, and intent to injure. Despite these allegations, I have concluded that substantively, the plaintiffs' claims against the Agency defendants are based on alleged errors that were either appealable under the *PCTI Act* or judicially reviewable under the *Judicial Review Procedure Act,* RSBC 1996, c 241.

The role of PCTIA under the legislation

34 To view the plaintiffs' claims in the proper context, I will review the role of PCTIA and the registrar under the *PCTI Act.* Section 3 establishes that PCTIA has three objectives:

(a) to establish basic education standards for registered institutions and to provide consumer protection to the students and prospective students of registered institutions;

(b) to establish standards of quality that must be met by accredited institutions;

(c) to carry out, in the public interest, its powers, duties and functions under this Act.

35 PCTIA is operated by a board of up to 10 members. The board has authority under s. 6 to make bylaws in relation to numerous matters, including (h) requirements for registration of institutions; (k) establishing the standards of quality to be met by accredited institutions; (l) establishing requirements for renewal, suspension, cancellation or reinstatement of registration or accreditation of institutions; and (m) regulating and prohibiting advertising or types of advertising by registered or accredited institutions.

36 An institution providing career training must be registered under the *Act*. An institution may also be accredited. Accreditation, which is voluntary, permits an institution to represent itself as such and requires it to demonstrate continuous compliance with PCTIA's standards of quality. The registrar grants registration under s. 8 and accreditation under s. 9 of the *Act.* Under s. 12, the registrar may appoint inspectors for the purpose of determining whether it is appropriate to suspend or cancel a registration or accreditation or change the terms and conditions of a suspension, or whether a person has failed to comply with the *Act*, regulations, bylaws or terms and conditions of a suspension. Under s. 12(2), an inspector conducting an investigation has the authority, without warrant, to:

(a) enter business premises,

(b) examine a record or any other thing,

(c) demand that a document or any other thing be produced for inspection,

(d) remove a record or any other thing for review and copying, after providing a receipt,

(e) use data storage, information processing or retrieval devices or systems that are normally used in carrying on business in the premises to produce a record in readable form, or

(f) question a person.

37 Section 10 provides that a person who is affected by a cancellation of registration or accreditation may request a reconsideration of the decision by the registrar, who may confirm or vary the decision, and a further right of appeal to the board of PCTIA. The board may dismiss the appeal, allow the appeal and give any directions it considers appropriate, vary the decision, and set terms and conditions. If a person remains dissatisfied with the decision of the board, he or she may seek judicial review under the *Judicial Review Procedure Act*.

38 A Student Training Compensation Fund is established in s. 13 of the *Act*. This fund is administered by the board, which, under s. 15, may authorize payments to be made for a number of purposes, including:

(a.1) refunding a portion of the tuition fees a student has paid to a registered institution that, in the opinion of the board, has misled a student regarding the institution or any aspect of its operations;

39 Section 16(3) and (4) provide that the board has exclusive jurisdiction to hear and decide claims against the Fund, subject to judicial review on a question of law or excess of jurisdiction. The board also has the authority, under s. 16(5), to reconsider its own decisions.

Collateral attack

40 Neither Shanghai College nor the other plaintiffs pursued this matter by launching an appeal to the board or seeking judicial review.1 To the extent that the plaintiffs' claims relate to the fairness of the process and the basis for the decisions and actions taken by the registrar and PCTIA, they ought to have pursued the remedies available to them under the legislation. In my opinion, it is improper to pursue such claims in an action for damages. This issue had been the subject of several decisions in this court and the Court of Appeal that have many similarities with this case.

41 In *Cimaco*, the plaintiff alleged several causes of action, including misfeasance in public office against the Business Practices and Consumer Protection Authority when the Authority suspended its licence under the *Travel Agents Act,* RSBC 1996, c 459. It alleged that the Authority acted with malice and the intention to deliberately injure the plaintiff, and for an improper purpose, contrary to the duty of fairness. The plaintiff sought damages and constitutional declarations. It did not seek an order setting aside the suspension because the business had been lost.

42 The claims were struck by the Chambers judge, [2009] B.C.J. No. 1394, and this was upheld on appeal. Kirkpatrick J.A. for the court described *Cimaco's* pleadings as "prolix and unfocussed" at para. 46:

> There are many interlaced claims that make it difficult to extract discrete claims. There is an element of abuse of process throughout the claims, since Cimaco's essential complaint concerns the revocation of its license following its failure to provide security, a claim properly the subject of judicial review. When reduced to their essence, all of the claims fundamentally rest on the assertion that the Authority was wrong in its conclusion that the Regulation applied to Cimaco. However, instead of commencing judicial review proceedings, Cimaco commenced this action.
>
> [emphasis added]

43 The court went on to analyze the various causes of action set out in the plaintiff's claim and concluded that each of them was bound to fail. With respect to the claim that the Authority acted with improper purpose, without authority and contrary to the duty of fairness, the court held that this constituted an impermissible collateral attack of the Authority's decision, reasoning as follows at paras. 58 and 59:

> Clearly, this claim is properly a matter for judicial review, not a tort claim. A civil claim is not the appropriate forum for a court to consider the process of an administrative decision maker. Therefore this pleading is clearly an abuse of process.
>
> It is plain that Cimaco's core allegation is that the Authority misinterpreted the Regulation and knew it had no basis on which to suspend Cimaco's license. All of its allegations are linked to this central allegation.

44 Similar issues were addressed by this court in *Stephen*, where the plaintiff alleged various causes of action against a number of defendants, including the Human Rights Tribunal and its members. Joyce J. concluded that the plaintiff's claims stemmed from alleged errors in decisions made by the Tribunal that were all judicially reviewable and as such, a collateral attack. At para. 72 he explained:

> I agree with counsel for the Tribunal Defendants that the claims against them are an abuse of process in that the plaintiff is attempting to collaterally attack the Tribunal's decisions. The essence of the plaintiff's claims against the Tribunal Defendants is that due to some bias favouring the respondents, unfairness or breaches of natural justice in the handling of the plaintiff's human rights complaints, or errors in decision-making, or both, the Tribunal's decisions and the exercise of statutory powers and duties by the individual Tribunal members produced outcomes that were wrong.

45 In *Varzeliotis*, the plaintiff made claims against the Information and Privacy Commissioner seeking relief that was generally available under the *Judicial Review Procedure Act*, as well as special and punitive damages. Macauley J. held that a claim for damages is not available as an alternative where a party has available administrative law remedies on judicial review. He struck these claims as an abuse of process.

46 The plaintiffs submit that this case is distinguishable from *Cimaco*, *Stephen* and *Varzeliotis* because they have viable claims for damages for misfeasance in public office, intentional interference with contractual relations, conspiracy and *Charter* violations. Because damages are not available in judicial review, they say that this action against the Agency defendants is not an abuse of process.

47 It is well known that damages are not available in applications for judicial review: see, for example, *McLean v British Columbia*, 2004 BCSC 285 at paras. 47-49; *Clubb v Saanich (District)* (1995), 35 Admin LR (2d) 309 (BCSC); *Stoneman v Denman Island Local Trust Committee*, 2010 BCSC 636 at para. 86. However, that principal alone is not sufficient to ground an action for damages where the essential complaint stems from dissatisfaction with the conduct and the decisions of an administrative agency. The plaintiffs must have viable causes of action in and of themselves.

48 As I explain below, the plaintiffs' pleadings are prolix and confusing in that it is difficult to ascertain what causes of action are alleged. They make broad allegations of unlawful conduct with insufficient material facts. As pleaded, none of these claims establishes a reasonable cause of action and all of them are bound to fail. Therefore, I have concluded that the addition of a claim for damages in these circumstances constitutes an impermissible collateral attack of the decisions of PCTIA and must be struck as an abuse of process.

No reasonable causes of action

Misfeasance of public office

49 The plaintiffs' claim of misfeasance in public office is based on their allegations that PCTIA and Mr. Wright unlawfully searched Shanghai College premises and seized documents. The pleadings related to this are in paragraphs 24 to 26 of the Notice of Civil Claim, under the heading "Principle of Natural Justice - Due Process":

> 24. On or about October 25, 2010 the Defendant, Jim Wright, in a tortious act of malfeasance authorized staff of the PCTIA to break into the premises of the Plaintiff, Shanghai, and remove documents, lecturing material, personal property of the Plaintiff Sky Willow and signage of the College from the Plaintiff, Shanghai's, business premises ... (the "Trespass, Search and Seizure").
>
> 25. The Plaintiffs, Shanghai and Sky Willow, state that the Defendants, the PCTIA and Jim Wright, acted with malice and without reasonable or probable cause or a primary purpose other than that of carrying

the law into effect. The conduct of the Defendants, the PCTIA and Jim Wright, further amount to an abuse of process or malfeasance.

26. Particulars of the malice and malfeasance are *inter alia* as follows:

    (a) Attempted to gain a private collateral advantage;

    (b) Acted with spite, ill-will or vengeance;

    (c) Violated the Plaintiffs, Shanghai and Sky Willow's, autonomy and respect and status in the community;

    (d) Violated the Plaintiffs, Shanghai and Sky Willow's, right to receive a fair hearing in accordance with the principles of natural justice;

    (e) Pursuing the Plaintiff, Sky Willow, for alleged misconduct, which prosecution is clearly motivated by malice, bad faith and wrongful interference with respect to the Plaintiff, Sky Willow's, right to pursue a livelihood as stated in Section 6(2)(b) of the *Canadian Charter of Rights and Freedoms*.

50 The tort of misfeasance in public office was described in *Odhavji Estate v Woodhouse*, 2003 SCC 69 at para. 32, as an intentional tort with two distinguishing elements: (1) deliberate unlawful conduct in the exercise of public functions; and (2) awareness that the conduct is unlawful and likely to injure the plaintiff. A plaintiff must also prove the other requirements common to all torts, including causation and compensable damages.

51 The plaintiffs' pleadings confuse misfeasance in public office with abuse of process. They say nothing of deliberate conduct by these defendants or an awareness of unlawful conduct that is likely to injure the plaintiffs, nor do they provide material facts related to each of these two elements of the tort. There is simply a bare allegation of "a tortious act of malfeasance" by Mr. Wright in authorizing the search of Shanghai College and seizure of documents, and a bare allegation that the Agency defendants "acted with malice and without reasonable or probable cause or a primary purpose other than carrying the law into effect". While this latter allegation could be interpreted as deliberate unlawful conduct, none of the particulars provided constitute material facts supporting either required element of the tort. They are simply bare allegations that can only be viewed as speculation.

52 In my view, the pleadings do not adequately make out a claim for misfeasance in public office and such a claim has no reasonable prospect of success.

The tort of abuse of process

53 It is not clear if the plaintiffs allege the tort of abuse of process. Paragraph 25 of the Notice of Civil Claim states that the conduct of PCTIA and Mr. Wright, in acting with "malice and without reasonable or probable cause or a primary purpose other than carrying the law into effect", is also an abuse of process. In the legal basis for the claim, the plaintiffs claim "general damages for abuse of process and violation of the principles of natural justice".

54 The tort of abuse of process requires the following elements to be established: (1) a willful misuse or perversion of a court process for an extraneous or improper purpose; and (2) some damage resulting: *Border Enterprises Ltd. v Beazer East Inc.*, 2002 BCCA 449 at para. 51. An additional element, that some act or threat has been made in furtherance of the process, may also be required, although this is not clear in British Columbia: see *Smith v Rusk*, 2009 BCCA 96 at para. 34; *Bajwa v British Columbia Veterinary Medical Association*, 2012 BCSC 878 at paras. 178-181; and *Home Equity Development Inc. v Crow*, 2002 BCSC 1747 at para. 19. In *Home Equity*, it was held that some definite conduct in furtherance of an illegitimate purpose is essential, as there is no liability where the defendant is employing its regular process, even if it does so with bad intentions: see para. 20, citing *Guilford Industries Ltd. v Hankinson Management Services Ltd.*, [1974] 1 WWR 141.

55 The plaintiffs' pleadings appear to allege a collateral purpose but this is confusingly stated as "a primary purpose other than carrying the law into effect". Importantly, they do not provide any material facts to support this allegation, nor do they plead what act was done in furtherance of the process. It is possible that the pleading in

para. 24 regarding the search and seizure authorized by Mr. Wright could be interpreted as the act made in furtherance of the process, but nothing is pleaded clearly or in relation to PCTIA. Here again, there are only bare allegations and there is nothing to support any allegation that the Agency defendants were not acting within the authority of the *PCTI Act*.

56 The pleadings do not make out a claim in the tort of abuse of process. It appears to me that the plaintiffs have confused abuse of process with procedural fairness issues. This is exemplified in part in the particulars of the "malice and malfeasance" in paragraph 26, which include the allegation that the Agency defendants violated Shanghai College and Sky Willow's right to receive "a fair hearing in accordance with the principles of natural justice".

57 In my opinion, the plaintiffs' real complaint here relates to the fairness of the process employed by PCTIA and is not properly the subject of an action for damages. Any claim for abuse of process has no reasonable prospect of success.

Intentional interference with contractual and economic relations

58 The claims for intentional interference with contractual and economic relations are set out in paras. 27, 28 and 29 of the Notice of Civil Claim:

> 27. The conduct of the Defendants, the PCTIA and Jim Wright, further amounts to intentional interference with the contractual and economic relations between the Plaintiff, Shanghai, and its students.
>
> 28. The Defendants, the PCTIA and Jim Wright, with knowledge of the contractual relationship between the Plaintiff, Shanghai, and its students and with the intent to prevent performance of the contract, wrongfully and without lawful right to do so, caused the Plaintiffs, Shanghai and Sky Willow, to close down the Plaintiff, Shanghai's, business after the said Defendants removed the Plaintiff Shanghai's material and assets from its business premises and after cancelling the registration and accreditation as of October 25, 2010.
>
> 29. The conduct of the Defendants, the PCTIA and Jim Wright, was done with malice and with the intent to injure the Plaintiffs which conduct has the result that the Plaintiffs are losing the benefit of tutoring students and earning an income and has lost profit the Plaintiffs would otherwise have made and have been greatly injured in the Plaintiff, Shanghai's, business and have suffered and continue to suffer loss and damage.

59 The intentional tort of interference with contractual relations has five elements: (1) the existence of a valid and enforceable contract; (2) awareness of the defendants of the existence of the contract; (3) breach of the contract procured by the defendants; (4) wrongful interference; and (5) damages: *Potter v Rowe*, [1990] B.C.J. No. 2912 at para. 54. Wrongful interference was described in *D.C. Thomson & Co. Ltd. v Deakin*, [1952] Ch. 646 (CA) at 702, cited in *Potter* at para. 55:

> The tort is committed if a person without justification knowingly and intentionally interferes with a contract between two other persons. There must, therefore, be knowledge of the existence of contractual relations between others and the intentional commission, without justification, of some act which interferes with those contractual relations so as to bring about or procure or induce a breach resulting in damage.

60 The tort of unlawful interference with economic relations is similar. It has these elements:

> (1) the existence of a valid business relationship or business expectancy between the plaintiff and another party; (2) knowledge by the defendant of that business relationship or expectancy; (3) intentional interference which induces or causes a termination of the business relationship or expectancy; (4) the interference is by way of unlawful means; (5) the interference by the defendant must be the proximate cause of the termination of the business relationship or expectancy; and (6) there is a resultant loss to the plaintiff:

671122 Ontario Ltd. v Sagaz Industries Canada Inc. (1998), 40 OR (3d) 229; varied (2000), 46 OR (3d) 760, aff'd 2001 SCC 59, cited in *Reid v British Columbia (Egg Marketing Board),* 2007 BCSC 155 at para. 150.

61 In *Reid*, it was noted by H. Holmes J. that courts take a fairly broad view of the required element of "unlawful means" as an act that is not legally justified. She held that a regulatory body may act by unlawful means if it uses its powers for purposes incompatible with the purposes contemplated in its authorizing legislation: see para. 152.

62 The basis of the Agency defendants' submission is that the plaintiffs have not pleaded that they were acting by unlawful means. I do not interpret their pleadings that way. While awkwardly drafted, they do allege in paragraph 25 that the Agency defendants acted with "a primary purpose other than that of carrying the law into effect" (my emphasis). Paragraphs 27 to 29 refer to the conduct of these defendants (as described in the previous paragraphs) as constituting intentional interference with contractual and economic relations between Shanghai College and its students. All of these paragraphs, when considered together, set out the elements of these torts.

63 However, these causes of action suffer from the same problem as the others, as there are again mainly bare allegations and no material facts pleaded which support each element of these torts. The only material facts that can be discerned appear in paragraph 28, which alleges that the Agency defendants caused Shanghai College to close after they removed Shanghai College's "material and assets" from its business premises and after cancelling the registration and accreditation. This demonstrates, in my view, that the plaintiffs' complaints against the Agency defendants stem only from the actions they took and the decisions they made under the *PCTI Act*. The essential element of unlawful means is supported with only a bare allegation of "a primary purpose other than that of carrying the law into effect", which again, is speculation.

64 This is an insufficient pleading that discloses no reasonable claim and is certain to fail.

Conspiracy

65 The plaintiffs make a claim of conspiracy in paragraph 43 of the Notice of Civil Claim:

> 43. The Defendants, the CTCMA [the College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia], Mary S. Watterson, the PCTIA and Stephen Harvey (the "Conspirator Defendants") conspired with each other and with the intent to injure the Plaintiff, Shanghai, to change or amend the Bylaws of the PCTIA to enable the PCTIA to demand a refund to be paid by the Plaintiff, Shanghai, an amount of $51,200.00 to the Defendant, Stephen Harvey. The Defendant, the PCTIA, in fact amended its Bylaws to give themselves the authority to claim that the Plaintiff, Shanghai, refund the tuition fees of the Defendant, Stephen Harvey, in the amount of $51,200.00.

66 Paragraph 47 adds that the CTCMA "used the authority and power" of PCTIA to close down Shanghai College.

67 The tort of conspiracy requires three essential elements, all of which must be pleaded: (1) an agreement, including a joint plan or common intention by the defendant, to do the act which is the object of the conspiracy; (2) an overt act consequent on the agreement; and (3) resulting damage: *Kuhn v American Credit Indemnity Co.*, [1992] B.C.J. No. 953 (SC). In *Kuhn*, the court added:

> The defendants must intend to be a party to the combination. Mere knowledge of or approval of or acquiescence in the act is not sufficient to establish the existence of a common plan or design. The defendants must have intentionally participated in the act with a view to furtherance of the common design and purpose.

68 The pleadings do not contain all of the elements of a conspiracy. As against PCTIA, they allege only that it amended its bylaws to give itself authority to make the order to refund tuition fees. They say nothing about any intentional participation by PCTIA in an agreement or joint plan. This is insufficient on which to ground a claim in conspiracy and as pleaded it is certain to fail.

***Charter* violations**

69 The plaintiffs allege causes of action arising from breaches of s. 6(2)(b) and s. 8 of the *Charter*.

70 Section 6(2)(b) addresses rights to move and gain livelihood:

> Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right ...
>
> (b) to pursue the gaining of a livelihood in any province.

71 Section 8 provides that "[e]veryone has the right to be secure against unreasonable search or seizure".

72 The plaintiffs' refer to s. 6(2)(b) of the *Charter* in paras. 30 and 51 of the Notice of Civil Claim.

> 30. The Plaintiffs state that the Defendants ... the PCTIA and Jim Wright, are in breach of the principles of natural justice, motivated by malice, bad faith and wrongful interference with the economic and contractual relations the Plaintiffs had with students to pursue a livelihood as stated in Section 6(2)(b) of the *Canadian Charter of Rights and Freedoms*.
>
> ...
>
> 51. The Defendants ... the PCTIA ... further violated the Plaintiffs' rights protected under Section 6(2)(b) of the *Canadian Charter of Rights and Freedoms*.

73 They also refer to s. 6(2)(b) in the particulars of malice and misfeasance set out in para. 26(e):

> (e) Pursuing the Plaintiff, Sky Willow, for alleged misconduct, which prosecution is clearly motivated by malice, bad faith and wrongful interference with respect to the Plaintiff, Sky Willow's, right to pursue a livelihood as stated in Section 6(2)(b) of the *Canadian Charter of Rights and Freedoms*.

74 The alleged breach of s. 8 of the *Charter* is found in para. 50:

> 50. The Plaintiffs state that the Trespass, Search and Seizure committed by the Defendants, the PCTIA, Jim Wright ... were unreasonable and violated Section 8 of the *Canadian Charter of Rights and Freedoms*.

75 The plaintiffs claim general damages "for wrongful interference with the Plaintiffs' constitutional right to earn a livelihood and unreasonable search and seizure".

76 The Agency defendants submit that s. 6 of the *Charter* does not override provincial regulatory legislation to provide a right to work in a particular profession or occupation in any province. They also submit that s. 8 of the *Charter* does not apply to purely economic interests.

77 The plaintiffs submit that the court should not consider these arguments because there is nothing in the Response to Civil Claim filed by these defendants that challenges these *Charter* actions.

78 I cannot accept the submission of the plaintiffs. While the Agency defendants' Response challenges many specifics of the claims, it states generally that the entire Notice of Civil Claim discloses no reasonable cause of action against them. In bringing this application, it is open to these defendants to challenge all aspects of the legal basis for the claims, particularly in the circumstances here, where the claim is confusing and it is difficult to discern precisely what causes of action are pleaded.

79 In *Bajwa*, Armstrong J. struck out a similar claim based on a breach of s. 6(2)(b) of the *Charter* because the plaintiff had not pleaded any facts to suggest that his interprovincial mobility had been restricted in any way. He referred to *Law Society of Upper Canada v Skapinker*, [1984] 1 SCR 357, which held that s. 6(2)(b) does not establish a separate and distinct right to work divorced from the mobility provisions in the *Charter*; the two rights in

s. 6(2)(a) and (b) both relate to movement into another province, either for the taking up of residence, or to work without establishing residence.

80 The plaintiffs' claim based on a breach of s. 6(2)(b) of the *Charter* is certain to fail, as these cases establish that this section does not give the plaintiffs an independent constitutional right to pursue a livelihood in British Columbia so as to override any applicable provincial legislation, such as the *PCTI Act*.

81 With respect to s. 8, the Agency defendants referred me to *British Columbia Teachers' Federation v Vancouver School District No. 39*, 2003 BCCA 100, where the majority held that purely economic interests, which include matters related to employment, are not interests that engage the provisions of the right to life, liberty and the security of the person under s. 7 of the *Charter*. They submit that the same principle applies to the more specific deprivations of this general right such as the right to be free from unreasonable search and seizure under s. 8. In *Reference re Motor Vehicle Act (British Columbia) s. 94(2)*, [1985] 2 SCR 486, it was held that sections 8 to 14 of the *Charter* are illustrative of instances in which the right to life, liberty and security of the person would be violated in a manner that is not in accordance with the principles of fundamental justice.

82 The plaintiffs challenge this submission, noting that there was no risk of any penal sanction in the *BC Teachers' Federation* case. They submit that the underlying issue here is that PCTIA relied on s. 12 of the *PCTI Act* to authorize the search and seizure and that this was in breach of s. 8, as "it was all taken away without a hearing."

83 It is not necessary to decide this interesting issue. Whether or not the economic interests at stake in this case engage s. 8 of the *Charter*, this claim falls along with the other claims. Its essence is an allegation of a breach of the rules of natural justice and procedural fairness, which is properly the subject of judicial review proceedings. It relates primarily to paras. 24 and 25 of the Notice of Civil Claim, which contain only bare allegations of "malfeasance" by Mr. Wright in authorizing the search of Shanghai College and seizure of documents, and of the Agency defendants acting with "malice and without reasonable or probable cause or a primary purpose other than carrying the law into effect". A claim of a breach of s. 8 of the *Charter* is certain to fail because there are no material facts pleaded to support it and the complaint is one that ought to have been made in a judicial review.

Claims against Mr. Wright personally

84 Mr. Wright submits that to establish a cause of action against him personally, the plaintiffs must establish that he committed a tortious act which demonstrated an identity or interest separate from PCTIA. There is no factual basis to suggest that Mr. Wright was acting outside the scope or course of his employment and there is nothing in the pleading that alleges that he committed an act separate from those alleged against PCTIA, and on this basis Mr. Wright says that the claims against him in his personal capacity should be struck as disclosing no reasonable claim.

85 The plaintiffs submit that the claims of misfeasance and bad faith are appropriately made against Mr. Wright.

86 It is a well-accepted principle, expressed in cases such as *ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.* (1995), 26 OR (3d) 481 (SCJ), that officers and employees of corporations are protected from personal liability unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the corporation so as to make the act or conduct complained of their own: see also *Morriss v HMTQ*, 2001 BCSC 281; *Rafiki Properties Ltd. v Integrated Housing Development Ltd.* (1999), 45 BLR (2d) 316 (BCSC); *Greville v Convoy Supply Ltd.*.

87 I agree with Mr. Wright that the plaintiffs have pleaded nothing which suggests that he conducted himself in a manner that was separate from PCTIA or that he was acting outside the scope of his employment. The allegations against PCTIA and Mr. Wright are essentially the same.

88 However, in this case, s. 21 of the *PCTI Act* provides personal liability protection to Mr. Wright as an employee of PCTIA, but not where he acts in bad faith:

(1) Subject to subsection (2), no legal proceeding for damages lies or may be commenced or maintained against a board member or an officer or employee of the agency because of anything done or omitted

(a) in the performance or intended performance of any duty under this Act, or

(b) in the exercise or intended exercise of any power under this Act.

(2) Subsection (1) does not apply to a person referred to in that subsection in relation to anything done or omitted by that person in bad faith.

89 While the allegations of malice and "malfeasance" as against Mr. Wright would not be protected by s. 21, given my conclusions about these causes of action, the claims against Mr. Wright are certain to fail in any event.

Conclusion

90 For all of these reasons, it is my opinion that the pleadings do not disclose reasonable claims against either PCTIA or Mr. Wright in misfeasance of public office, abuse of process, intentional interference with contractual and economic relations, conspiracy, or violations of the *Charter*, and the plaintiffs' essential complaints against these defendants stem from alleged errors in procedure and substance within their role in a statutory, administrative process. Consequently, the plaintiffs' claim for damages cannot found a proper action sufficient to take these claims outside of the administrative law context. The essential claims constitute an impermissible collateral attack of the decisions of Mr. Wright as registrar and PCTIA, and must be struck as an abuse of process.

The applications of the Crown defendants and the Ministers (Rule 9-5(1)

91 The Ministers and the Crown defendants seek to strike out the portions of the Notice of Civil Claim as it relates to them, pursuant to Rule 9-5(1).

92 The Crown defendants say that the claim discloses no cause of action against them and should be struck on that basis.

93 The Ministers say that their only involvement in the claim arises as a result of the Ministers' Action. They submit that launching a fresh action is a collateral attack on that Action, which itself is an abuse of process, as the correct response to proceedings that are alleged to be an abuse of process is to apply to dismiss or stay those proceedings. The Ministers also say that the claim does not properly plead the elements of the tort of abuse of process.

94 The plaintiffs submit that launching this action against these defendants is not an abuse of process because they simply defended the Ministers' Action and opposed the application for an interlocutory injunction, and in this action they claim damages. They say that the claims should not be struck and that they have properly pleaded a cause of action against the Ministers and the Crown defendants.

95 I have considerable difficulty with the plaintiffs' submissions.

Crown defendants

96 I will deal with the Crown defendants first. There is nothing in the claim that asserts any cause of action against them. Mr. Fraser submitted that "presumably" they have been added because it might be alleged that the Province is liable as employer for the conduct of the Ministers but the need for the involvement of the Attorney General is unclear.

97 In my view, whatever can be presumed, the claim makes no allegations against the Crown defendants, discloses no cause of action against them, and must be struck under Rule 9-5(1)(a).

The Ministers - abuse of process (Rule 9-5(1)(b) and (d))

98 With respect to the Ministers, the claim makes the very same allegations as are contained in the plaintiffs'

Response to the Ministers' Action. Paragraphs 16, 20 and 21 of the claim make the same allegations of abuse of process as paras. 6, 7 and 8 of the Response. Paragraphs 22 to 25 and 27 to 31 of the claim make the same allegations of breaches of natural justice and due process as paragraphs 9 to 17 of the Response. Paragraph 50 of the claim makes the same allegation of a breach of s. 8 of the *Charter* as para. 18 of the Response. Paragraph 51 of the claim makes the same allegation of a breach of s. 6(2)(b) of the *Charter* as para. 19 of the Response. Paragraph 52 challenges s. 12 of the *PCTIA Act* and the same challenge appears in para. 20 of the Response.

99 Had a final decision been made in the Ministers' Action, the doctrine of issue estoppel would preclude this proceeding. As the Supreme Court of Canada held in *Toronto (City)* at para. 23, issue estoppel, which precludes the re-litigation of issues previously decided in another proceeding, has three preconditions: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same (or their privies).

100 However, on February 7, 2011, an interlocutory injunction was granted in the Ministers' Action on the same terms as those sought for a final order. This order was granted after a hearing where both sides appeared and made submissions. No steps have been taken by either side since this order was made. The Ministers submit that it would absurd to allow injunction proceedings to continue on their merits, accepting an interlocutory injunction made in those proceedings, while at the same time in another action to claim damages or injunctive relief in respect of the injunction proceedings. This, they say, is an abuse of process.

101 I agree with the Ministers. In my opinion, it is unfair and contrary to the interests of justice to permit a party to make the same claims in two extant proceedings, particularly where there is a binding interlocutory order in place in the first proceeding that, at least on a *prima facie* basis, is completely inconsistent with these claims, and where the claims in the second proceeding arise from the existence of the first one. The addition of a claim for damages in this action does not change the fact that the claims stem from the Ministers' Action itself and are based on the very same allegations that have been put in issue in the Ministers' Action.

102 In this regard, I refer to the principles expressed in *Toronto (City)* at paras. 35 and 37:

> [35] Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007:
>
> > . . . abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency ... But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.
>
> ...
>
> [37] ... the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute" ... Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice ...

103 It is my view that to allow the claims against the Ministers to proceed in the rather unique circumstances here would violate the principles of judicial economy, consistency and the integrity of the judicial process. I consider the proceedings against the Ministers in this action to be vexatious and as such, an abuse of process, justifying an order to strike the pleadings under Rule 9-5(1)(b) and (d).

The Ministers - no reasonable claim (Rule 9-5(1)(a))

104 The Ministers also submit that the claims against them should be struck as disclosing no reasonable claim, under Rule 9-5(1)(a).

The tort of abuse of process

105 The plaintiffs' primary claim against the Ministers is for the tort of abuse of process. The allegations are found at paragraphs 16 to 21 of the Notice of Civil Claim. I will reproduce the salient portions of those paragraphs:

> 16. The [Ministers' Action] was commenced by the Defendants [the Ministers] and continued by the said Defendants primarily for a collateral or improper purpose that was unrelated to the ostensible purpose of the [Ministers' Action]. Particulars of the Defendants' ... collateral or improper purpose are as follows:
>
> (a) To ruin the Plaintiffs financially;
>
> (b) To harass, victimize and traumatize the Plaintiffs;
>
> (c) To eliminate the Plaintiffs as competition for the Defendants Mary S. Watterson and the CTCMA .
>
> 17. The Defendants ... control the training and issuing of any Certificate indicating or implying that the holder has been awarded a degree in Traditional Chinese Medicine through the Defendants, the CTCMA and the PCTIA, through the *Health Professions Act* and the *Private Career Training Institutions Act.*
>
> 18. The Plaintiffs state that the injunctive relief sought against the Plaintiff [Council of Natural Medicine] is *res judicata* in that the Plaintiff in the Federal Court case, the CTCMA, requested the following relief: [a permanent injunction restraining the use of various titles associated with the practice of acupuncture and traditional Chinese medicine, and other orders] ...
>
> 19. The Defendants ... by commencing the [Ministers' Action] and engaging in the conduct described in this Notice of Civil Claim caused the Plaintiff, [Council of Natural Medicine], actual damage and thereby committed the tort of abuse of process. The damage caused in this regard are *inter alia* as follows:
>
> (a) Financial hardship;
>
> (b) Anxiety;
>
> (c) Frustration, confusion and insecurity;
>
> (d) Despondency; and
>
> (e) Emotional trauma.
>
> 20. The Plaintiffs state that the Defendants, the CTCMA and [the Ministers] conduct to institute the [Ministers' Action] amounts to an abuse of process which amounts to a collateral and improper process other than to carry the law into effect.
>
> 21. The Plaintiffs further state that the Defendants, the CTCMA, and [the Ministers], committed a tortious act of abuse of process which amounts to a willful misuse or perversion of the court's process for a purpose extraneous or ulterior to that which the process was designed to serve.

106 The Ministers submit that the plaintiffs have not pleaded sufficient material facts to support the elements of the tort of abuse of process. They say that the damages alleged may be the result of the proper enforcement of legislation, and only where such enforcement is undertaken without any genuine belief in the merits of the claim will a case of abuse of process be made out. In the absence of a pleading to this effect, the claim has no reasonable prospect of success.

107 I have already reviewed the elements of this tort. There must be a wilful misuse or perversion of a court process for an extraneous or improper purpose, and some damage resulting. The plaintiffs have pleaded these essential elements but again, provide no material facts to support their bare allegations.

108 The closest they come is in para. 18, where they allege that the injunctive relief sought against the plaintiff, Council of Natural Medicine, is *res judicata* because of Federal Court proceedings initiated by the defendant, College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia. This allegation is certain to fail as against the Ministers, as the conditions for issue estoppel (a branch of *res judicata*) requires that the parties to both proceedings must be the same. The Ministers were not parties to the Federal Court proceedings.

109 It is of some significance, in my view, that the Ministers named in this proceeding are no longer in those positions. This is because the Ministers' Action was commenced under the *Degree Authorization Act* and the *Health Professions Act* at a time when these individuals were the Ministers. Section 8 of the *Degree Authorization Act* requires an application by the minister to seek injunctive relief. The same is not required under the *Health Professions Act* (where any person may make such an application), but I am advised by counsel that the same practice is employed for consistency. Accordingly, the Ministers are nominal defendants only. None of this is disputed by the plaintiffs, who are content to amend the pleadings to include the individuals who currently hold the Ministers' positions.

110 It is difficult to conceive how allegations of abuse of process could succeed against nominal defendants in these circumstances, as the tort requires wilful acts and wilful acts require knowledge and intention.

111 Accordingly, I am of the view that the plaintiffs' claim against the Ministers for abuse of process has no reasonable chance of success and should also be struck under Rule 9-5(1)(a).

Charter violations

112 The plaintiffs also make the same claims against the Ministers as they do against PCTIA and Mr. Wright in respect of breaches of natural justice and violations of s. 6(2)(b) and s. 8 of the *Charter*. These are found in paragraphs 30, 50 and 51:

> 30. The Plaintiffs state that the Defendants [the Ministers], the PCTIA and Jim Wright, are in breach of the principles of natural justice, motivated by malice, bad faith and wrongful interference with the economic and contractual relations the Plaintiffs had with students to pursue a livelihood as stated in Section 6(2)(b) of the *Canadian Charter of Rights and Freedoms*.
>
> ...
>
> 50. The Plaintiffs state that the Trespass, Search and Seizure committed by the Defendants, the PCTIA, Jim Wright, and [the Ministers] were unreasonable and violated Section 8 of the *Canadian Charter of Rights and Freedoms*.
>
> 51. The Defendants, the CTCMA, the PCTIA, and [the Ministers], further violated the Plaintiffs' rights protected under Section 6(2)(b) of the *Canadian Charter of Rights and Freedoms*.

113 These claims should be struck as disclosing no reasonable claim for the same reasons I have expressed in relation to the Agency defendants.

Vicarious liability

114 There is one other claim against the Ministers in paragraph 31 of the Notice of Civil Claim, which asserts that they are vicariously liable for the conduct of PCTIA and Mr. Wright:

> 31. The Defendants, the PCTIA and Jim Wright, at all material times acted on instructions and/or under the authority or auspices of the Defendants [the Ministers], and the said Defendants [the Ministers] are as such vicariously liable for the conduct of the Defendants, the PCTIA and Jim Wright.

115 This claim cannot possibly succeed. It is nothing more than speculation to allege that an administrative agency, established by legislation, and its registrar, acted on instructions from Ministers who are nominal defendants, nor is there any basis to allege vicarious liability in such circumstances.

Conclusion

116 For these reasons, I have concluded that the plaintiffs' claims against the Crown defendants must be struck as disclosing no reasonable claim under Rule 9-5(1)(a) and the claims against the Ministers must be struck as both an abuse of process under Rule 9-5(1)(b) and (d) and as disclosing no reasonable claim under Rule 9-5(1)(a).

117 Given these conclusions, it is not necessary to address the Ministers' alternative application for summary judgment under Rule 9-6 or their further alternative application that they cease to be defendants.

Concluding remarks

118 I do not consider it appropriate to grant leave to the plaintiffs to amend their pleadings as they pertain to any of these defendants, due to the nature of the issues that have been raised in these applications and the breadth of the omissions of material facts. It became apparent after two days of submissions that the plaintiffs' primary issues are with the other defendants, particularly the College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia, and they pertain to a perception of unequal treatment as between Shanghai College and another College that has remained in operation.

119 The applicants will have their costs of the applications at the usual scale.

B. FISHER J.

---

1 Mr. Pyper advised me that Shanghai College did seek a reconsideration by the registrar in respect of PCTIA's decision to pay Mr. Harvey's tuition fees.

Young v. Borzoni, [2007] B.C.J. No. 105

British Columbia Judgments

British Columbia Court of Appeal

Vancouver, British Columbia

Thackray, Lowry and Chiasson JJ.A.

Heard: December 5, 2006 (Victoria).

Judgment: January 23, 2007.

Vancouver Registry No. CA32841

[2007] B.C.J. No. 105 | 2007 BCCA 16 | 277 D.L.R. (4th) 685 | 235 B.C.A.C. 220 | 64 B.C.L.R. (4th) 157 | 154 A.C.W.S. (3d) 1060 | 2007 CarswellBC 119

Between Marlene Young and Eric Young, Appellants (Plaintiffs), and Anthony R. Borzoni, The Capital Regional District, The Region Housing Corporation, Amy Jaarsma, Kate Joy, David Weeks, The Corporation of the District of Saanich, The Saanich Police Department, Chief Constable Derek Egan, Constable Philip Richmond, Constable Paul Luhowy, Constable S. Edwards (nee Taylor), and Constable Trevor Dyck, Respondents (Defendants)

(68 paras.)

Case Summary

Civil procedure — Disposition without trial — Dismissal of action — Action unfounded in law — Frivolous, vexatious or abuse of process — Appeal by Youngs from dismissal of action against lawyer acting for opponents in other litigation dismissed — Pleadings did not disclose any new evidence other than that ruled on in previous actions — Action was merely attempt to re-litigate termination of Youngs' tenancy.

Legal profession — Barristers and solicitors — Liability — Appeal by Youngs from dismissal of action against lawyer acting for opponents in other litigation dismissed — Lawyer acting for landlord and others in proceedings involving Youngs, tenants, did not have duty of care to Youngs.

Professional responsibility — Professional duties — Duties of care and negligence — Legal profession — Barristers and solicitors — Liability — Appeal by Youngs from dismissal of action against lawyer acting for opponents in other litigation dismissed — Lawyer acting for landlord and others in proceedings involving Youngs, tenants, did not have duty of care to Youngs.

Professions — Legal — Lawyers — Legal profession — Barristers and solicitors — Liability — Appeal by Youngs from dismissal of action against lawyer acting for opponents in other litigation dismissed — Lawyer acting for landlord and others in proceedings involving Youngs, tenants, did not have duty of care to Youngs.

Appeal by the Youngs from an order dismissing their action against Borzoni, a solicitor who had represented their opponents in related proceedings, on grounds that the Youngs' statement of claim disclosed no cause of action, that the action was unnecessary, frivolous, and vexatious, and that the action was an abuse of the court's process. The Youngs entered into a tenancy agreement with Capital Region to rent an apartment, and moved in on August 31, 2001. Their neighbours complained about an odour of marijuana emanating from the Youngs' apartment. Mr. Young was legally entitled to smoke marijuana because of a medical condition. The Youngs complained that their neighbours, Capital Region, and the police were harassing them. The Youngs were served with a notice terminating

their tenancy on July 10, 2002, effective August 31, 2002. The Youngs applied for arbitration by the Residential Tenancy Board. Borzoni represented Capital Region at the hearing before Arbitrator Gilbert. Gilbert held Capital Region established sufficient cause for ending the Youngs' tenancy. The Youngs applied for review of Gilbert's decision. Capital Region applied for an order of possession, which was adjourned pending the review. The review was denied by Arbitrator Katz on October 4, 2002. The Youngs commenced a court action seeking judicial review of the decisions by Gilbert and Katz. Borzoni was retained to represent Capital Region in the review. The Youngs commenced another action, naming Capital Region and the police as respondents, alleging breaches of their rights to grow and use marijuana. The actions were ordered heard together. Borzoni represented the police as well as Capital Region in the resulting action, which was dismissed June 13, 2003. In her reasons, the judge noted there was no evidence to support the Youngs' allegations of wrongdoing on the part of Borzoni. The Youngs unsuccessfully appealed from the dismissal of their Charter proceeding. Following a hearing, Capital Region was granted an order of possession for the Youngs' apartment, effective August 31, 2003. The Youngs unsuccessfully applied for an order prohibiting Capital Region from proceeding with possession. Their appeal from this decision was dismissed, and they consented to vacate the apartment by October 31, 2003. The Youngs then commenced a defamation action naming several former tenants from their apartment building who had testified in the hearing before Gilbert. They also commenced an action against Borzoni, claiming he owed them a duty of care as non-client third persons. The Youngs claimed Borzoni influenced their neighbours to intimidate them, who then engaged in a pattern of harassment under Borzoni's advice. The Youngs also alleged Borzoni wrote and commissioned affidavits he knew were false, made statements to tribunals and courts that were false, and advised Capital Region and the police to falsify documents placed before the court. They sought damages of $1 million for conduct in bad faith and with malice, $70,000 for intentional infliction of mental suffering, and $40,000 for costs. Mr. Young wrote to Borzoni, informing him the Youngs intended to have him removed as counsel of record for Capital Region and the police due to a conflict of interest. Borzoni replied he would be applying to have the Youngs' action against him dismissed. Borzoni's motion was heard first, with the Youngs' consent. The result was a decision dismissing the Youngs' action against Borzoni. The judge concluded the Youngs' action was merely an attempt to re-litigate the eviction issue, rendering the action unnecessary, scandalous, vexatious, and frivolous. He did not find the facts as alleged supported the Youngs' contention Borzoni owed them a duty of care. He found the Youngs' statement of claim did not disclose any action by Borzoni that would give rise to liability for intentionally inflicting nervous shock on the Youngs.
HELD: Appeal dismissed.

The direct allegations against Borzoni regarding false statements and affidavits were dismissed, as they had already been dealt with by the judge. As there was no way the Youngs could obtain evidence showing Borzoni had influenced his clients to place false documents before the court, these allegations were dismissed as pure speculation. The pleaded facts did not support the Youngs' position that they sustained emotional injuries caused by the alleged actions of Borzoni, since no evidence of actual psychiatric damage was provided. No material facts were pleaded which could establish there was a relationship of sufficient proximity between Borzoni and the Youngs to give rise to a duty of care. As the Youngs' action against Borzoni contained no new relevant evidence or evidence not considered in previous proceedings, it was correctly found to be unnecessary, scandalous, frivolous, and vexatious. It was also fitting for the judge to find the action was an abuse of process, where it was clearly commenced for the purpose of having Borzoni removed as counsel in the related proceeding.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982,

Rules of the Supreme Court of British Columbia, Rule 19(1), Rule 19(9.1), Rule 19(24)(a), Rule 19(24)(b), Rule 19(24)(d)

Counsel

Eric Young: In person for the Appellants

P.C. Freeman, Q.C.: Counsel for the Respondents

The judgment of the Court was delivered by

THACKRAY J.A.

1 Marlene Young and Eric Young appeal the order entered upon the judgment of Mr. Justice Bouck dismissing the action against Anthony Borzoni, a solicitor who represented the other named defendants in related proceedings, on the grounds that the statement of claim alleged no cause of action, that the action was unnecessary, frivolous, vexatious, and that the action was an abuse of the court's process. The judgment was delivered orally (10 March 2005, Victoria Registry No. 04-2367).

Background

2 The appellants entered into a tenancy agreement with the Capital Region Housing Corporation for the rental of apartment #106, Beechwood Park, 3936 Gordon Head Road, Victoria, British Columbia. They moved into the suite on or about 31 August 2001. The Corporation received complaints from other tenants regarding the odour of marijuana smoke emanating from the appellants' apartment. Mr. Young can legally smoke marijuana due to a medical condition from which he suffers.

3 The appellants also laid complaints. They alleged harassment and misconduct by their neighbours, the Corporation and the Saanich Police Department. On 10 July 2002 the appellants were served with a notice terminating the tenancy effective 31 August 2002. On 16 July 2002 the appellants filed an application for arbitration by the Residential Tenancy Board. The respondent, Mr. Borzoni, represented the Corporation at the hearing before Arbitrator Gilbert. In extensive reasons dated 29 August 2002 Mr. Gilbert held that the Corporation had established sufficient cause for ending the tenancy and dismissed the appellants' application to set aside the notice terminating the tenancy.

4 The appellants filed an application for a review of the arbitrator's decision with the Board. On 4 September 2002 the Corporation applied to the Residential Tenancy Branch for an order of possession, which was adjourned pending the Board's review decision. In written reasons dated 4 October 2002 the application for review was denied by Arbitrator Katz.

5 On 7 October 2002 the appellants commenced a court action seeking a judicial review of the decisions of Arbitrators Gilbert and Katz: ***Young v. Capital Region Housing Corporation,*** Action No. 02-4528. Mr. Borzoni was retained to represent the Corporation. On 15 November 2002 the appellants commenced Action No. 02-5145, naming The Capital Regional District and The Saanich Police Department as respondents. It alleged ***Charter*** breaches based on interference with the rights of the petitioners to grow and use marijuana. Madam Justice Dorgan ordered that the two actions be heard together commencing on 18 February 2003. Mr. Borzoni was retained to represent both respondents. Mr. Justice Macaulay dismissed the proceedings brought under both actions in reasons dated 13 June 2003, [2003] B.C.J. No. 1464.

6 Mr. Justice Macaulay said as follows regarding Mr. Borzoni:

> [114] ... During his submission Mr. Young referred several times to his concern that Mr. Borzoni, who acted as counsel for all the respondents, performed some improper function related to this allegation. There was simply no evidence to support any allegation of wrongdoing on the part of counsel.

7 Mr. Justice Macaulay held at paragraph 80 that the appellants "completely failed to offer any evidentiary foundation capable of supporting the allegations against the police and it is unnecessary for me to analyze them." He concluded as follows:

> [131] As none of the alleged *Charter* breaches were made out, the petition filed under Action 02/5145 is dismissed as against both the [Saanich Police Department] and [The Capital Region District].

8 On 10 July 2003 the appellants filed a Notice of Appeal in the ***Charter*** proceeding. The appeal was heard in April 2004. In reasons for judgment, cited as [2004] B.C.J. No. 779, 2004 BCCA 224, the appeal was dismissed. The Supreme Court of Canada dismissed an application for leave to appeal: [2004] S.C.C.A. No. 255.

9 On 15 July 2003 the Corporation applied to the Residential Tenancy Branch for an order of possession. A hearing took place in June and July 2003, before Arbitrator Pyne. He issued reasons in which he granted an order of possession effective 31 August 2003. On 21 July 2003 the appellants filed a petition for judicial review of Mr. Pyne's order: Action No. 03-3026.

10 On 19 August 2003 the appellants applied for an order prohibiting the Corporation from proceeding with possession. In oral reasons for judgment Mr. Justice Bauman dismissed the application. On 2 September 2003 the Corporation obtained a writ of possession: Action No. 03-3574. On 5 September 2003 the appellants filed a Notice of Appeal from the decision granting the writ of possession and for a stay of the order for possession. This was dismissed on 12 September 2003. The appellants consented to vacate the premises by 31 October 2003.

11 The appellants commenced defamation Action No. 04-0304 in the Supreme Court on 23 January 2004. That action named several former tenants in the Beechwood complex, some of whom had testified before Arbitrator Gilbert.

12 On 28 May 2004 the appellants commenced this action alleging that Mr. Borzoni owed a duty to care to the plaintiffs as "non-client third persons." The specifics included allegations that Mr. Borzoni influenced neighbours to intimidate the plaintiffs and that other defendants, "with and/or under advice of Defendant Mr. Borzoni" engaged in a pattern of harassment. The relief claimed against Mr. Borzoni is for aggravated and punitive damages in the amount of $1 million for acting with malice and in bad faith"; and damages in the amount of $70,000 for intentional infliction of mental suffering causing "pain and suffering", "emotional stress and mental anxiety", and "loss of enjoyment of life"; and $40,000 for "costs to trial."

13 On 13 October 2004 Mr. Young wrote to Mr. Borzoni and asked if he was "continuing to act as Counsel in [Action No. 04-0304] in light of the conflict of interest between you and your clients." On 8 November 2004 he told Mr. Borzoni that "given the nature of the scandalous allegations" made against him in Action No. 04-2366 "which amount to breaches of your professional ethics and to violations of the law, it is inappropriate for you to act as Counsel in these matters." He added that he would be seeking to have Mr. Borzoni "removed as Solicitor of Record." In a subsequent letter of the same date Mr. Young purported to delete the word "scandalous."

14 On 4 November 2004 counsel for Mr. Borzoni informed Mr. Young that she would be applying for an order dismissing the action against her client. On 5 November 2004 Mr. Young served a notice of motion to have Mr. Borzoni removed as solicitor of record in Action No. 04-0304. Agreement was reached that Mr. Young's motion would await the hearing of Mr. Borzoni's motion. Mr. Borzoni's motion was heard by Mr. Justice Bouck and it is his decision that is appealed herein.

Reasons for Judgment of Mr. Justice Bouck

15 Mr. Justice Bouck noted that Mr. Borzoni was applying for dismissal of the action as against him pursuant to Rule 19(24)(a), (b) and (d) of the Rules of the Supreme Court of British Columbia. They provide as follows:

> 19(24) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim ... ,
>
> (b) it is unnecessary, scandalous, frivolous, or vexatious,
>
> (c) it is otherwise an abuse of the process of the court,

and the court may grant judgment or order the proceedings to be stayed or dismissed and may order the costs of the application to be paid as special costs.

16 Mr. Justice Bouck said Mr. Young was a tenant on the premises "during a period of about November 2001 to April 2002" and he noted they had been evicted, resulting in litigation. The full balance of his reasons are as follows:

> [5] The plaintiffs allege Mr. Borzoni breached his professional ethics while acting for the defendants in the earlier proceedings. They also say Mr. Borzoni owed them a duty of care, his conduct was malicious, it caused them nervous shock, and severe psychological harm. They claim compensatory, aggravated, and punitive damages of $1,000,000 for Mr. Borzoni's alleged bad faith conduct while acting for the other defendants in this case.
>
> [6] I agree with the written argument advanced by counsel for Mr. Borzoni presented to me at the hearing. The plaintiffs seek to try the eviction issue all over again. While acting for the defendants in the other proceedings, the alleged facts do not support the Youngs' contention that he owed the Youngs a duty of care. A lawyer owes an ethical duty to the court to be candid and fair, but the only party to whom a lawyer owes an actionable duty is to his or her client, *Lawrence v. Sandilands*, [2003] B.C.J. No. 343 (B.C.S.C.), at paragraph 79, Wedge J..
>
> [7] If lawyers owed a duty of care to their opponents' clients then, before taking any steps in an action, lawyers on both sides would have to consult with the other lawyers' clients. They would have to ensure they would not breach their duty of care to those adversarial parties. If the effect of the proposed proceeding was adverse to those opponents, the action could not proceed, even though it was a necessary procedure to protect their own clients' interests. Our adversarial system of justice could not function in these circumstances.
>
> [8] The Youngs' statement of claim fails to plead the necessary elements of the tort of intentional infliction of nervous shock or that Mr. Borzoni acted without legal justification. The statement of claim does not establish any overt act of a flagrant and extreme nature done by Mr. Borzoni without legal justification that would give rise to his liability for intentionally inflicting nervous shock, *Linden and Klar, Remedies in Tort*, at pages 10-7 and 10-11.
>
> [9] A statement of claim can be vexatious or abusive when the grounds raised tend to be rolled forward into subsequent actions repeated and supplemented with actions brought against the lawyers who have acted against the litigants in earlier proceedings.
>
> [10] Many of the facts and issues underlying the Youngs' claim against Mr. Borzoni were previously determined in other proceedings arising out of the same set of facts. That makes the claim against Mr. Borzoni unnecessary, scandalous, vexatious, and frivolous as well as an abuse of the court's process, *Lawrence v. Sandilands, supra*, at paragraphs 95 and 96.
>
> [11] One must have deep sympathy for Mr. Young and his fight to ward off the devastating effects of multiple sclerosis. On the other hand, he seems to believe he is a person who has all the rights. In his eyes, everyone else only has responsibilities and those responsibilities are to him. Happily, most other Canadians do not possess similar selfish qualities.
>
> [12] The plaintiffs have become professional litigants. They are using the court system as a play thing to harass others they do not like. Instead of getting on with their lives, they choose to alienate others who might choose to help them.
>
> Judgment
>
> [13] For these reasons, I grant Mr. Borzoni's application to dismiss the plaintiffs' claim against him. Costs follow the event.

Analysis

17 I will analyze this case using, in altered wording, the errors that are alleged by the appellants.

1. No reasonable cause of action against Mr. Borzoni is disclosed in the statement of claim

18 Rule 19(24)(a) provides that the court may strike out the whole or any part of a pleading on the ground that it discloses no reasonable claim and may order the proceedings to be dismissed. The appellants argue that Bouck J. erred when he dismissed their claims in tort against Mr. Borzoni.

19 The Supreme Court of Canada set out in ***Odhavji Estate v. Woodhouse***, [2003] 3 S.C.R. 263 the test for striking out a statement of claim on the basis that it disclosed no reasonable claim:

> [14] ... a court may strike out a statement of claim that discloses no reasonable cause of action. The rules with respect to striking out a statement of claim are much the same in other provinces. In British Columbia, for example, Rule 19(24)(a) of the *Rules of Court*, B.C. Reg. 221/90, states that a court may strike out a pleading on the ground that it discloses no reasonable claim.
>
> [15] An excellent statement of the test for striking out a claim under such provisions is that set out by Wilson J. in *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959, at p. 980:
>
> > ... assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ... should the relevant portions of a plaintiff's statement of claim be struck out ... .
>
> The test is a stringent one. The facts are to be taken as pleaded. When so taken, the question that must then be determined is whether ... it is "plain and obvious" that the action must fail. It is only if the statement of claim is certain to fail because it contains a "radical defect" that the plaintiff should be driven from the judgment.

20 The Rules of the Supreme Court of British Columbia provide as follows:

> 19(1) A pleading should be as brief as the nature of the case will permit and must contain a statement in summary form of the material facts on which the party relies, but not the evidence by which the facts are to be proved.
>
> 19(9.1) Conclusions of law may be pleaded only if the material facts supporting them are pleaded.

"Material fact" is defined in ***Delaney & Friends Cartoon Productions Ltd. v. Radical Entertainment Inc.***, [2005] B.C.J. No. 573, 2005 BCSC 371 at paragraph 9 as, "one that is essential in order to formulate a complete cause of action. If a material fact is omitted, a cause of action is not effectively pleaded."

21 Those portions of the statement of claim that directly involve Mr. Borzoni are as follows:

1. This claim arises out of the actions of the Defendants and their parts in the events which took place, from July 2001 to April 2004, surrounding the Plaintiffs residency in apartment #106 at Beechwood Park, 3936 Gordon Head Road, Victoria, B.C.

18. Defendant Anthony R. Borzoni, partner at Randall & Company and now working at Jones Emery Hargreaves Swan, Victoria, B.C. was counsel for the Defendants CRD, CRHC, and SPD, in this matter, at the material times.

34. Defendant Mr. Borzoni owes a duty to care to the Plaintiffs as non-client third persons.

40. The Defendants were intolerant of Plaintiff Mr. Young's consumption and the Plaintiffs cultivating of cannabis for medicinal purpose and intended, in bad faith, to eradicate what they perceived to be a problem in a social housing complex managed by Defendant CRHC.

41. The Defendants knew that there was no secondhand smoke in the hallway from Plaintiff Mr. Young's medicinal consumption of cannabis.

45. The Defendants received many written and oral complaints from the Plaintiffs about the harassment the Plaintiffs were suffering at the hands of some of their neighbours while living at Beechwood Park, the conduct of the officers of Defendant SPD, and employees and/or officers of the CRD and/or CRHC.

46. The Defendants failed to stop, allowed, influenced, encouraged, coordinated, and/or supported the efforts of some of the Plaintiffs' neighbours to intimidate and disrupt the life of the Plaintiffs, over a period of more than 2 years with the intention to drive the Plaintiffs out of their subsidized home, including but not limited to, attempts to collide with the Plaintiffs' moving car, vandalism to the Plaintiffs' property, uttering threats, trespassing, and watching of the Plaintiffs and their home.

47. Employees and/or officers of Defendants CRD and/or CRHC, including but not limited to, Defendants Ms. Jaarsma, Ms. Joy, and Mr. Weeks, with and /or under advice of Defendant Mr. Borzoni, engaged in a pattern of harassment, including but not limited to, malicious written correspondence, attempts to inspect, trespassing, taking of pictures, and watching of the Plaintiffs and their home.

59. Defendants Mr. Borzoni, CRD and CRHC have not respected the Plaintiffs' right to appeal by taking legal steps without allowing for the Plaintiffs to follow the legal process.

63. The Defendants CRD, CRHC, and SPD, with and/or under advice of Defendant Mr. Borzoni, fabricated and falsified documents, including but not limited to, documents destined for RTB and for the Supreme Court of British Columbia.

64. Defendant Mr. Borzoni wrote and commissioned affidavits, in connection to litigation related to the Plaintiffs' tenancy at Beechwood Park, knowing them to be false and/or reckless to their veracity.

65. Defendant Mr. Borzoni knowingly and/or reckless to their veracity made false statements in regards to the Plaintiffs in his opening statements at the RTB, in the Supreme Court of British Columbia, and in the Court of Appeal for British Columbia.

67. Defendant Mr. Borzoni, the Officers of Defendant SPD, including but not limited to, Defendant Chief Constable Egan and the Defendant Constables, and employees and/or officers of Defendants CRD and/or CRHC, including but not limited to, Defendants Ms. Jaarsma, Ms. Joy, and Mr. Weeks, through their malicious conduct, as set out above, intended to inflict nervous shock.

83. Defendant Borzoni was negligent in his duty to care owed to the Plaintiffs as non-client third persons when he made false statements, ignored and/or assisted his clients in fabricating documents and harassing the Plaintiffs, as set out above.

84. As a consequence of the Defendants' conduct, as set out above, the Plaintiffs have lost trust in government, police forces, landlords, and communities.

85. As a result of the Defendants' conduct, as set out above, the Plaintiffs lost their sense of security, their peace and quiet enjoyment of their home, including their patio, while living at Beechwood Park and eventually lost their affordable home with all the ensuing economic and quality of life benefits.

87. The Defendants' conduct, as set out above, has caused severe emotional stress and mental anguish, and extreme despair.

Relief

The Plaintiffs claim as follows:

(c) compensatory damages against all Defendants for intent to inflict nervous shock causing severe psychological harm:

$10,000 for pain and suffering;

$40,000 for legal costs to trial;

$20,000 for emotional stress and mental anxiety;

$40,000 for loss of enjoyment of life; and general damages;

(g) aggravated and punitive damages against Defendant Mr. Borzoni for acting with malice and in bad faith:

$1,000,000 for negligence of duty to care to non-client third persons.

(o) costs

22 The appellants submit that these pleadings disclose the material facts essential in order to formulate two complete causes of action in tort against Mr. Borzoni: a) intentional infliction of nervous shock and b) breach of duty of care.

a) Intentional infliction of nervous shock/mental suffering

23 In ***Frame v. Smith***, [1987] 2 S.C.R. 99 at 127, Wilson J. (dissenting) wrote:

> ... The requirements of this cause of action [the tort of intentional infliction of mental suffering] were set out in the case of *Wilkinson v. Downton*, [1897] 2 Q.B.D. 57. In that case the defendant as a "practical joke" told the plaintiff that her husband had been involved in an accident and had broken his legs. The plaintiff believed the defendant and as a result suffered nervous shock and a number of physical consequences. In granting recovery, Wright J. stated (at p. 59):
>
> > One question is whether the defendant's act was so plainly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be imputed to the defendant, regard being had to the fact that the effect was produced on a person proved to be in an ordinary state of health and mind. I think that it was. It is difficult to imagine that such a statement, made suddenly and with apparent seriousness, could fail to produce grave effects under the circumstances upon any but an exceptionally indifferent person, and therefore an intention to produce such an effect must be imputed, and it is no answer in law to say that more harm was done than was anticipated, for that is commonly the case with all wrongs. The other question is whether the effect was, to use the ordinary phrase, too remote to be in law regarded as a consequence for which the defendant is answerable.

24 In ***Prinzo v. Baycrest Centre for Geriatric Care*** (2002), 60 O.R. (3d) 474 (C.A.), Weiler J.A. wrote:

> [48] A review of the case-law and the commentators confirms the existence of the tort of the intentional infliction of mental suffering, the elements of which may be summarized as: (1) flagrant or outrageous conduct; (2) calculated to produce harm; and (3) resulting in a visible and provable illness.

The appellants agree with this and with Mr. Justice Bouck's finding that a pleading of intentional infliction of nervous shock must include an allegation of "an overt act of a flagrant and extreme nature done by Mr. Borzoni without legal justification."

25 The appellants assert that the statement of claim contains the required material facts and that they must be taken to be true and are thus beyond scrutiny. The authority usually cited in support of this proposition is ***Hunt v. Carey Canada Inc.***, [1990] 2 S.C.R. 959 at 978 where Madam Justice Wilson referred to ***Minnes v. Minnes*** (1962), 39 W.W.R. 112 (B.C.C.A.) wherein Norris J.A. said at page 116 that what was required of the plaintiff on a motion to strike out a claim was to "show that on the statement of claim, accepting the allegations therein made as true, there was disclosed ... a proper case to be tried." Wilson J. concluded at page 991 that "on a motion to strike we are required to assume that the facts as pleaded are true."

26 A consideration of that premise was discussed in ***Operation Dismantle Inc. v. The Queen***, [1985] 1 S.C.R. 441, often referred to as the "Cruise Missile" case. Dickson J. at page 447, said the causal link between the defendant and the alleged violation of the appellants' rights was "simply too uncertain, speculative and hypothetical to sustain a cause of action." At page 449 he cited ***Attorney General of Canada v. Inuit Tapirisat of Canada***, [1980] 2 S.C.R. 735 at 740, where Estey J. said:

> As I have said, all the facts pleaded in the statement of claim must be deemed to have been proven. On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff

only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt": *Ross v. Scottish Union and National Insurance Co.* (1920), 47 O.L.R. 308 (App. Div.).

However, Dickson J. went on to say at page 455:

27. We are not, in my opinion, required by the principle enunciated in *Inuit Tapirisat, supra*, to take as true the appellants' allegations concerning the possible consequences of the testing of the cruise missile. The rule that the material facts in a statement of claim must be taken as true for the purpose of determining whether it discloses a reasonable cause of action does not require that allegations based on assumptions and speculations be taken as true. The very nature of such an allegation is that it cannot be proven to be true by the adduction of evidence. It would, therefore be improper to accept that such an allegation is true. No violence is done to the rule where allegations, incapable of proof, are not taken as proven.

[Emphasis added.]

27 In Madam Justice Wilson's concurring minority reasons, she agreed that the statement of claim should be struck out. However, she wrote at pages 477 to 479 that several of the allegations in the statement of claim were "statements of intangible fact" inviting inferences and anticipating probable consequences, and that those allegations might "be susceptible to proof by inference from real facts or by expert testimony or through the application of common sense principles'." She added:

> We may entertain serious doubts that the plaintiffs will be able to prove them by any of these means. It is not, however, the function of the Court at this stage to prejudge that question. I agree with Cattanach J. that the statement of claim contains sufficient allegations to raise a justiciable issue.

28 In ***Rogers v. Bank of Montreal*** (1985), 64 B.C.L.R. 63 (S.C.) the defendants applied to strike out the writ and statement of claim as disclosing no cause of action. Mr. Justice McKenzie said, at page 101:

> I cannot accept the allegations in the statement of claim "as true" in the sense of there being any actions of the defendants which were truly directed against the target separate from Abacus. It is true that the statement of claim says the allegations have a separate target but the reality is that they do not. I see only language, not reality. It is the same story with a different title.

29 On appeal, (1986), 9 B.C.L.R. (2d) 190 (C.A.), Mr. Justice Esson, referring to that paragraph, said at page 192:

> Insofar as that passage reflects the process which was carried out at great length by Mr. Justice McKenzie of subjecting the allegations in the pleadings to sceptical analysis in order to determine their true character, I consider that to have been an entirely appropriate procedure.

Esson J.A. added that there was a necessity to go "behind the form of the proceeding in order to get at its true nature, and that must be done even when the matter is dealt with on the pleadings." However, he said at page 193 that "it was not right to go so far as to consider the intrinsic improbability that these defendants would do what they were alleged to have done. This is an application on the pleadings and essentially must be decided upon what is alleged there." He continued:

> The approach taken by the chambers judge appears to have resulted from some of the language used by the Supreme Court of Canada in the *Cruise Missile* case [*Operation Dismantle*] and in particular certain observations to the effect that the court was not required to accept as true certain allegations that were made by the plaintiffs there. But those were allegations of a special nature; they were allegations to the effect that to allow testing of the Cruise missile would increase the likelihood of nuclear war. It was in relation to that that Chief Justice Dickson said [p. 455]:

> The very nature of such an allegation is that it cannot be proven to be true by the adduction of evidence. It would, therefore, be improper to accept that such an allegation is true. No violence is done to the rule where allegations, incapable of proof, are not taken as proven.
>
> When regard is had to the special nature of the allegations, I think it is clear that that case must be viewed with great caution as a general authority touching on the extent to which allegations in pleadings should be taken as true in proceedings of this kind.

30 It is clear that great caution must be taken in relying on ***Operation Dismantle*** as a "general authority" that allegations in pleadings should be weighed as to their truth in proceedings of this kind. However, my consideration of the above authorities leads me to the conclusion that it is not fundamentally wrong to look behind the allegations in some cases. This can be taken from the statement of Estey J. in ***Operation Dismantle*** that the "rule ... does not require that allegations based on assumptions and speculation be taken as true. ... No violence is done to the rule where allegations, incapable of proof, are not taken as proven." This is also supported by the comment of Esson J.A. in ***Rogers*** that, "the process ... of subjecting the allegations in the pleadings to sceptical analysis in order to determine their true character, I consider that to have been an entirely appropriate procedure."

31 Therefore, in my opinion, considering the circumstances, litigation history and allegations in the case at bar it is appropriate to subject them to a sceptical analysis. Paragraphs 40, 41, 45, 46 and 47 of the statement of claim allege, against all of the defendants, intolerance, deceit, harassment, intimidation, writing malicious letters, falsifying documents and, in general, in disrupting the appellants' lives. They include an allegation that all of the defendants allowed, encouraged and influenced some of the Youngs' neighbours in "attempts to collide with the Plaintiffs' moving car, vandalism to the Plaintiff's property, uttering threats, trespassing, and watching of the Plaintiffs and their home." Paragraph 63 alleges that the "corporate" defendants, "under advice of Defendant Mr. Borzoni, fabricated and falsified documents destined" for the Tribunal and the Supreme Court.

32 Most of these wide and sweeping allegations would not, even if true, ground an action for intentional infliction of nervous shock or for negligence by way of a breach of duty. However, particularly in that they are directed at all defendants, which includes a police department, a Regional District, corporations and individuals, the allegations can only be viewed as wild speculation. As said by Mr. Justice McKenzie, they are "only language, not reality." More substantively it can be said, paraphrasing from ***Operation Dismantle***, that they are but speculation and it is not required that they be taken as true.

33 Only paragraphs 64 and 65 single out Mr. Borzoni. They assert that he participated in writing and commissioning affidavits that he knew were false and that he knowingly made false statements to the Tribunal, the Supreme Court and to this Court. There was no such finding by the Tribunal, the allegations were specifically rejected by Mr. Justice Macaulay of the Supreme Court and, for my part, I reject them with respect to this Court.

34 In ***Operation Dismantle*** Madam Justice Wilson suggested at paragraph 79 that when "statements of intangible fact" are pleaded, some "invite inferences" while "others anticipate probable consequences." She said that these "may be susceptible to proof by inference from real facts or by expert testimony or through the application of common sense principles." However, the case at bar has the unique concession by Mr. Young, given at the oral hearing, that the appellants have no evidence that Mr. Borzoni counselled any inappropriate conduct on the part of his clients or participated in the events alleged. Mr. Young said that all they have is that Mr. Borzoni was seen at Beechwood Gardens. There is no possibility, particularly in that client privilege stands in the way, of the appellants ever obtaining any evidence in support of such allegations - allegations based purely on assumptions and speculation.

35 However, even if the facts are taken as pleaded to be true, I am of the opinion that the statement of claim still fails to plead the material facts necessary to complete the cause of action in the tort of intentional infliction of nervous shock. While intentional infliction of mental suffering may arise from a deliberate course of conduct over time (see ***Clark v. Canada***, [1994] 3 F.C. 323 (T.D.)), the conduct must not only be flagrant, outrageous and extreme, but also of a type calculated to cause a recognizable psychiatric illness in the plaintiff.

36 The statement of claim alleges that Mr. Borzoni's conduct resulted in a visible and provable illness and that through his alleged malicious conduct he intended to inflict nervous shock, anguish, and extreme despair. In ***Guay v. Sun Publishing Co***., [1953] 2 S.C.R. 216 at 238, Estey J., in his majority concurring judgment, set out what must be proved on the latter element in order that damages may be recovered citing the following from *Pollock on Torts*, 15th ed. at p. 37:

> A state of mind such as fear or acute grief is not in itself capable of assessment as measurable temporal damage. But visible and provable illness may be the natural consequence of violent emotion, and may furnish a ground of action against a person whose wrongful act or want of due care produced that emotion. In every case the question is whether the shock and the illness were in fact natural or direct consequences of the wrongful act or default; if they were, the illness, not the shock, furnishes the measurable damage, and there is no more difficulty in assessing it than in assessing damages for bodily injuries of any kind.

37 In my opinion the pleaded material facts do not support the proposition that the suggested injuries were caused by the alleged actions of Mr. Borzoni. Recognizable psychiatric illnesses, such as are defined in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV) for example, amount to visible and provable illnesses for the purposes of the tort of the intentional infliction of mental suffering. However, emotional stress, mental anguish and despair, the emotional states pleaded by the appellants, are not generally accepted as amounting to "visible and provable illness" for the purposes of the tort of the intentional infliction of mental suffering. In ***Mustapha v. Culligan of Canada Ltd.***, [2006] O.J. No. 4964 (C.A.), the Ontario Court of Appeal reaffirmed its earlier position with respect to liability in cases of psychiatric harm:

> In Canadian law, a plaintiff can recover for the negligent infliction of psychiatric damage if he or she establishes two propositions - first, that the psychiatric damage suffered was a foreseeable consequence of the negligent conduct; second, that the psychiatric damage was so serious that it resulted in a recognizable psychiatric illness: see Linden, *Canadian Tort Law, supra*, at pp. 389-92.

38 The principle that the psychiatric damage must be so serious that it results in a recognizable psychiatric illness is not novel: See for example: ***Topgro Greenhouses Ltd. v. Houweling***, [2006] B.C.J. No. 831, 2006 BCCA 183 at para. 62; Mackenzie J.A.'s minority concurring judgment in ***Devji v. Burnaby (District)***, [1999] B.C.J. No. 2320, 1999 BCCA 599 at paras. 79-113; ***Kalaman v. Singer Valve Co***. (1997), 93 B.C.A.C. 93 at para. 63.

39 The appellants have not, in my opinion, demonstrated any error on the part of Bouck J. in his conclusion that the "statement of claim fails to plead the necessary elements of the tort of intentional infliction of nervous shock."

40 While this aspect of the appeal is complete with the above analysis, Mr. Young spent considerable effort in the oral hearing arguing that Bouck J. "overlooked, neglected, or misapprehended" paragraphs 1, 41, 45-47 of the appellants' statement of claim. The reference to paragraph 1 is to Bouck J.'s comment that the appellants were tenants from "about November 2001", whereas they apparently moved in about 31 August 2001. At the oral hearing Mr. Young said "the main events occurred before we moved in." However, as noted by Mr. Justice Macaulay at paragraph 16 of his reasons, the appellants' difficulties commenced with the receipt of an anonymous letter on 7 October 2001. That letter was but a courteous suggestion that the appellants allow smoke to disperse outside through windows or doors, rather than into the common hallways of the building. The appellants replied with a spiteful letter. Mr. Young reported the letter he had received to the Corporation which, to that point, had not received any complaints. It was not until 20 October 2001 that complaints surfaced regarding marijuana smoke. On about 26 October 2001 a lawyer for the Youngs sent a letter to the Corporation.

41 Paragraph 46 states that the intimidation of the appellants and the disruption of their lives took place "over a period of two years." No alleged intimidation or harassment could have commenced before 7 October 2001, the date the Youngs received the anonymous letter. There is nothing to substantiate that the "main events" occurred before that date. In any event, there is no suggestion that the judge was not aware of the factual events, regardless of the dates. Nothing turns on the date of occupancy relied on by the judge.

42 Paragraph 41 states that all of the defendants "knew there was no second hand smoke in the hallway." The

appellants rely on this to say the "actions" of Mr. Borzoni "were based on known falsehoods" - namely, allegations that the appellants were "unreasonably disturbing some neighbours" - and the allegations "were without legal justification." That pleading is not capable of supporting the claim of intentional infliction of nervous shock. Even on its face it is but an innuendo of unprofessional conduct by Mr. Borzoni.

43 With respect to paragraphs 45, 46 and 47, the appellants' factum reads as follows:

> Further, the learned Chambers Judge overlooked, neglected, or misapprehended paras. 45, 46 and 47 of the Statement of Claim which plead[ed] that Respondent Mr. Borzoni gave advice to Defendants CRHC, and SPD to allow, influence, encourage, coordinate, and/or support the efforts of some of the Appellants' neighbours and staff of Defendant CRHC to intimidate and disrupt the lives of the Appellants with the intention to drive the Appellants out of their subsidized home and gave advice to ignore the Appellants' plea for assistance.

The appellants expand on this by submitting that "a reasonable person in the position of Respondent Mr. Borzoni would reasonably foresee an emotional upset on the part of the appellants who ... were being harassed by some neighbours and staff of [the Corporation]."

44 Paragraph 47 does not allege that Mr. Borzoni advised anybody to trespass, write malicious letters or engage in harassment of the appellants. It does not make an allegation that Mr. Borzoni gave advice "to drive the Appellants out of their subsidized home and [give] advice to ignore the Appellants' plea for assistance." In that Mr. Borzoni was legal counsel to defendants it follows that they were "under advice of Defendant Borzoni." That plea is not material to the claim of intentional infliction of nervous shock.

45 Bouck J. did not err in concluding that the statement of claim fails to plead the necessary elements of the tort of intentional infliction of nervous shock.

b) Breach of duty of care (negligence)

46 Writing for the Court in ***Odhavji***, Iacobucci J. stated at paragraph 44 that:

> In order for an action in negligence to succeed, a plaintiff must be able to establish three things: (i) that the defendant owed the plaintiff a duty of care; (ii) that the defendant breached that duty of care; and (iii) that damages resulted from that breach. The primary question that arises on this appeal is in respect of the first element, namely, whether the defendants owed to the appellants a duty to take reasonable care.

The same primary question arises on this appeal.

47 The appellants submit that Mr. Borzoni owed them a duty of care, that he breached that duty and that the breach inflicted loss and damage to them. They say that Bouck J. erred when he found that there was no such duty owed by Mr. Borzoni to the appellants. To merely plead that there is a duty of care is a conclusion of law which Rule 19(9.1) provides must be supported by material facts. The appellants pleaded this conclusion of law in paragraph 13 of their statement of claim, but not the material facts supporting that conclusion.

48 The following statement from ***Odhavji***is instructive:

> [45] It is a well-established principle that a defendant is not liable in negligence unless the law exacts an obligation in the circumstances to take reasonable care. As Lord Esher concluded in *Le Lievre v. Gould*, [1893] 1 Q.B. 491 (C.A.), at p. 497, "[a] man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them." Duty may therefore be defined as an obligation, recognised by law, to take reasonable care to avoid conduct that entails an unreasonable risk of harm to others.
>
> [46] It is now well established in Canada that the existence of such a duty is to be determined in accordance with the two-step analysis first enunciated by the House of Lords in *Anns v. Merton London Borough Council*, [1978] A.C. 728, at pp. 751-52:
>
> > First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable

> contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.

49 There are no material facts pleaded in the appellants' statement of claim which could establish that as between Mr. Borzoni and the Youngs there is a sufficient relationship of proximity such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter.

50 Mr. Justice Bouck stated that "the only party to whom a lawyer owes an actionable duty is to his or her client." In support he referenced ***Lawrence v. Sandilands***, [2003] B.C.J. No. 343, 2003 BCSC 211:

> [79] While a solicitor may owe an ethical duty to the court to be candid and fair, the only party to whom a solicitor owes an actionable duty is his or her client (*Jensen v. MacGregor* (1992), 65 B.C.L.R. (2d) 224 at p. 228 (B.C.S.C.)).

I raise this because I do not accept that statement of law as being absolute. In ***Garrant v. Cawood*** (1984), 40 Sask.R. 162 (Q.B.), aff'd (1985) 40 Sask.R. 155 (C.A.), Matheson J. said at paragraph 10 that "a professional person can be liable in tort to other persons than his client for breach of a duty to use reasonable care in the performance of professional activities." Matheson J. was citing ***Haig v. Bamford***, [1977] 1 S.C.R. 466, where the Supreme Court considered whether accountants might be found to owe a duty of care to third-parties not their employer or client. The majority held that a duty of care could arise in such circumstances when the accountant had actual knowledge of the limited class of persons that would use and rely on the accountant's financial statement and the auditor's report thereon. A direct analogy between accountants as discussed in ***Haig*** and lawyers as in the present case is not possible in that lawyers do not generally produce statements or reports intended to be relied on by third-parties.

51 The circumstances in ***Crooks v. Manolescu***, [1995] B.C.J. No. 17 (S.C.) are closely analogous to the case at bar. Solicitor A was alleged to have assisted a client to falsely shield assets from execution. In an action brought on behalf of persons said to have been defrauded, solicitor A was named as a defendant. Solicitor B acted for solicitor A and it was submitted that she owed to the plaintiffs "a fiduciary duty and a duty to take care in respect of the plaintiffs' interests." The allegations against her included failing to warn the plaintiffs of fraudulent acts by her client and continuing to act in circumstances where she ought to have known of fraudulent activity.

52 An application was brought to strike out portions of the statement of claim as disclosing no reasonable claim. In a well written judgment Master Bolton said:

> [8] ... The existence of a fiduciary duty or duty of care is not an allegation of fact, however, but a conclusion of law which must depend on proof (or for present purposes, allegations) of fact. And particulars of the breach of a duty are not relevant to the question of the existence of the duty. Thus, while I accept as a fact, for example, for the purposes of this hearing, that [solicitor B] filed affidavits which she ought to have known were false, that fact is of absolutely no significance to the question of the existence of a duty of care to the plaintiffs.
>
> . . .
>
> [10] ... the plaintiff's position is tantamount to an assertion that all counsel who represent litigants owe a fiduciary duty or a duty of care to the other party to the litigation. This is patently absurd, as in the course of counsel's representation of her own client, much may be done that is intentionally and necessarily directed toward injuring the opposing party's interests. On the facts as pleaded here, it is, to borrow the emphatic language of Taylor J.A. in *Kamahap Enterprises Ltd. v. Chu's Central Market Ltd*. (1990), 40 B.C.L.R. (2d) 288, impossible that [solicitor B] could owe a duty of care to Ms. Crooks.
>
> [11] The impossibility arises out of the very nature of a solicitor's duty to her own client. ...

> [12] The impossibility of the existence of a duty of care that I referred to in paragraph 10 above is an impossibility on these pleadings. Clearly, a solicitor will in some circumstances be held to owe a duty to persons other than her own client, and so may be a barrister. I do not intend to say that [solicitor B] could in no circumstances be held to owe a duty of care to Ms. Crooks. But I do say that before such a duty can be found to exist, facts must be proved in evidence - and alleged in pleadings - which describe the relationship and the circumstances from which the duty arose.

Master Bolton then cited case authorities as to the basis for the imposition of a duty of care. He concluded as follows:

> [15] It is not for me to speculate about what additional facts would support the existence of a duty of care in the case now before me. All that I can say is that on the facts as presently pleaded, no such duty could possibly be held to exist; the impugned paragraphs disclose no reasonable cause of action.

53 Those comments apply equally to the case at bar. The pleadings as presented fail to present any material fact that supports either that Mr. Borzoni had a duty of care towards the appellants or, if he did have such a duty, that he was in breach thereof. Bouck J. did not err in dismissing the appellants' claim in the tort of negligence against Mr. Borzoni.

2. The action is unnecessary, scandalous, frivolous and vexatious

54 The appellants assert that "this is a whole new case", therefore it is not unnecessary. The basis for this contention is that the earlier proceedings were based "on fraudulent evidence and [that] there is new, previously unavailable, conclusive evidence thus the claim is not unnecessary, scandalous, vexatious and frivolous." The "new evidence" advanced by the appellants is, in summary, as follows:

> Mr. Borzoni knew before the appellants took occupancy that Mr. Young had an exemption to use marijuana.
>
> Mr. Borzoni knew there was no second hand marijuana smoke in the building.
>
> Mr. Borzoni, and the other defendants, fabricated evidence for submission to the Residential Tenancy Office or to the Supreme Court of British Columbia.
>
> The appellants have suffered personal harm.

55 At paragraph 10 of his reasons Bouck J. found the action to be unnecessary, scandalous, vexatious and frivolous because "the facts and issues underlying the Youngs' claim against Mr. Borzoni were previously determined in other proceedings arising out of the same set of facts." That finding is, in my opinion, beyond denial. The reasons emanating from the various proceedings are extensive so I will only note some of the findings in the most summary way.

56 In his reasons for judgment of 13 June 2003 Mr. Justice Macaulay, at paragraph 40, commenced a review of the hearing before Arbitrator Gilbert. He noted that Arbitrator Gilbert said that the Corporation received approximately 38 complaints from residents regarding marijuana odour and identified the premises of origin as that of the appellants. The appellants filed a complaint about harassment and discrimination which was heard by Human Rights Officer Down. Macaulay J. noted at paragraph 51 that Ms. Down concluded that "the Complainant's unit is the source of marijuana smoke" and that she dismissed the appellants' complaint because there was no reasonable basis to justify referring it to the tribunal.

57 Commencing at paragraph 64 Mr. Justice Macaulay detailed the ***Charter*** issues raised in Action No. 02-5145. He said that the appellants had "taken a string of relatively benign unconnected events and forced them into a conspiracy theory." He held, at paragraph 69, that the Corporation "attempted to take reasonable steps to accommodate the petitioners, but the petitioners refused to cooperate. The [Corporation] was entitled to rely on the statute and did so in seeking to evict."

58 Macaulay J. held, at paragraph 72, that the appellants' "claims cannot possibly succeed." He then drew a number of assumptions in favour of the appellants, but said, at paragraph 78: "one key assumption that I cannot

make in the petitioners' favour is that the neighbours' complaints of marihuana smell were unfounded. The arbitrator came to the opposite conclusion based on the evidence before him, as he was entitled to do." The judge then dealt with the issues raised by the appellants against the Saanich Police Department and The Capital Regional District, during which he noted as follows:

> [114] ... During his submission, Mr. Young referred several times to his concern that Mr. Borzoni, who acted as counsel for all the respondents, performed some improper function related to this allegation. There was simply no evidence to support any allegation of wrongdoing on the part of counsel.

59 Mr. Justice Macaulay noted that the appellants contended that the decisions of Arbitrators Gilbert and Katz should be set aside. They submitted that Arbitrator Gilbert committed numerous procedural errors, misapprehended the evidence before him and was biased. Macaulay J. said, at paragraph 159, that he had reviewed the finding of Arbitrator Gilbert to determine whether there was evidence on which he could reasonably conclude that there were smells associated with the appellants' use of marijuana that adversely affected other tenants in the complex. He held that there was such evidence and concluded:

> [160] I decline to set aside the order of Arbitrator Gilbert. It follows from the foregoing that I agree with the result obtained before Arbitrator Katz on review. I also decline to set aside that order.
>
> [161] I dismiss the proceedings brought under both actions.

60 On appeal this Court, in reasons delivered orally, noted that the appellants alleged seven errors on the part of Mr. Justice Macaulay. The appeal was dismissed: ***Young et al v. Saanich Police Department***, 2004 BCCA 224.

61 The appellants further submitted that the judge "overlooked, neglected or misapprehended" paragraphs 37, 38, 63-65 of the statement of claim. Those paragraphs state that the respondents became aware on specific dates that Mr. Young legally used marijuana and that Mr. Borzoni made false statements and fabricated documents. There is no evidence that Bouck J. was unaware of those paragraphs, and an inference that he was unaware of them cannot be drawn.

62 Issues of *res judicata* and *issue estoppel* were dealt with in some detail by the respondent in his factum. I do not find it necessary in the circumstances of this case to delve into those complex legal areas. There is nothing in the proposed "new evidence" that is either relevant or was not considered in the earlier proceedings.

63 I am of the opinion that no error has been demonstrated in Bouck J.'s finding that this action against Mr. Borzoni is unnecessary, scandalous, frivolous and vexatious.

3. Abuse of process

64 Mr. Justice Bouck held that the claim was an abuse of the court's process. He stated that the appellants were "using the court system as a plaything to harass others they do not like." The appellants submit that in doing so he overlooked a significant number of paragraphs in the statement of claim. There is no substance in that submission. They also contend that they have new evidence. The "new evidence" is of no more value under this heading than it was under the previous one.

65 Bouck J. cited ***Lawrence v. Sandilands*** at paragraphs 95 and 96 in support of his finding of abuse of process. Paragraph 95 reads as follows:

> [95] When determining whether proceedings constitute an abuse of process, the court may consider whether the court process is being used dishonestly or unfairly, or for some ulterior or improper purpose. It may also consider whether there have been multiple or successive related proceedings that are likely to cause vexation or oppression (*Babavic v. Babowech*, [1993] B.C.J. No. 1802 (B.C.S.C.)).

66 I am of the opinion that in view of the multiple and successive proceedings instigated by the appellants arising out of the same facts, that it was fitting to find an abuse of process. This is supported by the submission of Mr. Freeman that the appellants' motivation for joining Mr. Borzoni as a defendant is to have him removed as counsel in

Action No. 04-0304. A series of letters from Mr. Young to Mr. Borzoni, mentioned earlier in these reasons, gives credence to that submission.

67 I would dismiss the appeal.

Costs

68 Mr. Freeman asked for special costs if this appeal is dismissed. I am of the opinion that his client is clearly so entitled. While the appellants' frivolous and vexatious litigiousness may not amount to "scandalous or outrageous" conduct, it is certainly "reprehensible," being "misconduct deserving of reproof or rebuke." ***Garcia v. Crestbrook Forest Industries Ltd.*** (1994), 45 B.C.A.C. 222 at paragraph 17 states:

> [17] ... the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, [1993] B.C.J. No. 2909, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs.

THACKRAY J.A.
LOWRY J.A.:— I agree.
CHIASSON J.A.:— I agree.

BRITISH COLUMBIA

Court Rules Act

SUPREME COURT CIVIL RULES

B.C. Reg. 168/2009

Deposited July 7, 2009 and effective July 1, 2010
Last amended April 4, 2022 by B.C. Reg. 321/2021
and includes amendments by B.C. Reg. 8/2022

Consolidated Regulations of British Columbia

This is an unofficial consolidation.

Part 3 — Proceedings Started by Filing a Notice of Civil Claim

Rule 3-1 — Notice of Civil Claim

Notice of civil claim

(1) To start a proceeding under this Part, a person must file a notice of civil claim in Form 1.

Contents of notice of civil claim

(2) A notice of civil claim must do the following:

(a) set out a concise statement of the material facts giving rise to the claim;

(b) set out the relief sought by the plaintiff against each named defendant;

(c) set out a concise summary of the legal basis for the relief sought;

(d) set out the proposed place of trial;

(e) if the plaintiff sues or a defendant is sued in a representative capacity, show in what capacity the plaintiff sues or the defendant is sued;

(f) provide the data collection information required in the appendix to the form;

(g) otherwise comply with Rule 3-7.

Rule 3-7 — Pleadings Generally

Content of Pleadings

Pleading must not contain evidence

(1) A pleading must not contain the evidence by which the facts alleged in it are to be proved.

Documents and conversations

(2) The effect of any document or the purport of any conversation referred to in a pleading, if material, must be stated briefly and the precise words of the documents or conversation must not be stated, except insofar as those words are themselves material.

When presumed facts need not be pleaded

(3) A party need not plead a fact if

(a) the fact is presumed by law to be true, or

(b) the burden of disproving the fact lies on the other party.

When performance of a condition precedent need not be pleaded

(4) A party need not plead the performance of a condition precedent necessary for the party's case unless the other party has specifically denied it in the other party's pleadings.

Matters arising since start of proceeding

(5) A party may plead a matter that has arisen since the start of the proceeding.

Inconsistent allegations

(6) A party must not plead an allegation of fact or a new ground or claim inconsistent with the party's previous pleading.

Alternative allegations

(7) Subrule (6) does not affect the right of a party to make allegations in the alternative or to amend or apply for leave to amend a pleading.

Objection in point of law

(8) A party may raise in a pleading an objection in point of law.

Pleading conclusions of law

(9) Conclusions of law must not be pleaded unless the material facts supporting them are pleaded.

Status admitted

(10) Unless the incorporation of a corporate party or the office or status of a party is specifically denied, it is deemed to be admitted.

Set-off or counterclaim

(11) A defendant in an action may set off or set up by way of counterclaim any right or claim, whether the set-off or counterclaim is for damages or not, so as to enable the court to pronounce a final judgment on all claims in the same action.

Pleading after the notice of civil claim

(12) In a pleading subsequent to a notice of civil claim, a party must plead specifically any matter of fact or point of law that

(a) the party alleges makes a claim or defence of the opposite party not maintainable,

(b) if not specifically pleaded, might take the other party by surprise, or

(c) raises issues of fact not arising out of the preceding pleading.

General relief

(13) A pleading need not ask for general or other relief.

General damages must not be pleaded

(14) If general damages are claimed, the amount of the general damages claimed must not be stated in any pleading.

Substance to be answered

(15) If a party in a pleading denies an allegation of fact in the previous pleading of the opposite party, the party must not do so evasively but must answer the point of substance.

Denial of contract

(16) If a contract, promise or agreement is alleged in a pleading, a bare denial of it by the opposite party is to be construed only as a denial of fact of the express contract, promise or agreement alleged, or of the matters of fact from which it may be implied by law, and not as a denial of the legality or sufficiency in law of that contract, promise or agreement.

Allegation of malice

(17) It is sufficient to allege malice, fraudulent intention, knowledge or other condition of the mind of a person as a fact, without setting out the circumstances from which it is to be inferred.

Particulars

When particulars necessary

(18) If the party pleading relies on misrepresentation, fraud, breach of trust, wilful default or undue influence, or if particulars may be necessary, full particulars, with dates and items if applicable, must be stated in the pleading.

Lengthy particulars

(19) If the particulars required under subrule (18) of debt, expenses or damages are lengthy, the party pleading may refer to this fact and, instead of pleading the particulars, must serve the particulars in a separate document either before or with the pleading.

Further particulars

(20) Particulars need only be pleaded to the extent that they are known at the date of pleading, but further particulars

(a) may be served after they become known, and

(b) must be served within 10 days after a demand is made in writing.

Particulars in libel or slander

(21) In an action for libel or slander,

(a) if the plaintiff alleges that the words or matter complained of were used in a derogatory sense other than their ordinary meaning, the plaintiff must give particulars of the facts and matters on which the plaintiff relies in support of that sense, and

(b) if the defendant alleges that, insofar as the words complained of consist of statements of fact, they are true in substance and in fact, and that insofar as they consist of expressions of opinion, they are fair comment on a matter of public interest, the defendant must give particulars stating which of the words complained of the defendant alleges are statements of fact and of the facts and matters relied on in support of the allegation that the words are true.

Order for particulars

(22) The court may order a party to serve further and better particulars of a matter stated in a pleading.

Demand for particulars

(23) Before applying to the court for particulars, a party must demand them in writing from the other party.

Demand for particulars not a stay of proceedings

(24) A demand for particulars does not operate as a stay of proceedings or give an extension of time, but a party may apply for an extension of time for serving a responding pleading on the ground that the party cannot answer the originating pleading until particulars are provided.

Rule 9-5 — Striking Pleadings

Scandalous, frivolous or vexatious matters

(1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

(a) it discloses no reasonable claim or defence, as the case may be,

(b) it is unnecessary, scandalous, frivolous or vexatious,

(c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or

(d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[am. B.C. Reg. 119/2010, Sch. A, s. 22.]

Admissibility of evidence

(2) No evidence is admissible on an application under subrule (1) (a).

Powers of registrar

(3) If, on the filing of a document, a registrar considers that the whole or any part of the document could be the subject of an order under subrule (1),

(a) the registrar may, despite any other provision of these Supreme Court Civil Rules,

(i) retain the document and all filed copies of it, and

(ii) refer the document to the court, and

(b) the court may, after a summary hearing, make an order under subrule (1).

Reconsideration of order

(4) If the court makes an order referred to in subrule (3) (b),

(a) the registrar must give notification of the order, in the manner directed by the court, to the person who filed the document,

(b) the person who filed the document may, within 7 days after being notified, apply to the court, and

(c) the court may confirm, vary or rescind the order.

Rule 14-1 — Costs

How costs assessed generally

(1) If costs are payable to a party under these Supreme Court Civil Rules or by order, those costs must be assessed as party and party costs in accordance with Appendix B unless any of the following circumstances exist:

(a) the parties consent to the amount of costs and file a certificate of costs setting out that amount;

(b) the court orders that

(i) the costs of the proceeding be assessed as special costs, or

(ii) the costs of an application, a step or any other matter in the proceeding be assessed as special costs in which event, subject to subrule (10), costs in relation to all other applications, steps and matters in the proceeding must be determined and assessed under this rule in accordance with this subrule;

(c) the court awards lump sum costs for the proceeding and fixes those costs under subrule (15) in an amount the court considers appropriate;

(d) the court awards lump sum costs in relation to an application, a step or any other matter in the proceeding and fixes those costs under subrule (15), in which event, subject to subrule (10), costs in relation to all other applications, steps and matters in the proceeding must be determined and assessed under this rule in accordance with this subrule;

(e) a notice of fast track action in Form 61 has been filed in relation to the action under Rule 15-1, in which event Rule 15-1 (15) to (17) applies;

(f) subject to subrule (10) of this rule,

(i) the only relief granted in the action is one or more of money, real property, a builder's lien and personal property and the plaintiff recovers a judgment in which the total value of the relief granted is $100 000 or less, exclusive of interest and costs, or

(ii) the trial of the action was completed within 3 days or less,

in which event, Rule 15-1 (15) to (17) applies to the action unless the court orders otherwise.

Assessment of party and party costs

(2) On an assessment of party and party costs under Appendix B, a registrar must

(a) allow those fees under Appendix B that were proper or reasonably necessary to conduct the proceeding, and

(b) consider Rule 1-3 and any case plan order.

Assessment of special costs

(3) On an assessment of special costs, a registrar must

(a) allow those fees that were proper or reasonably necessary to conduct the proceeding, and

(b) consider all of the circumstances, including the following:

(i) the complexity of the proceeding and the difficulty or the novelty of the issues involved;

(ii) the skill, specialized knowledge and responsibility required of the lawyer;

(iii) the amount involved in the proceeding;

(iv) the time reasonably spent in conducting the proceeding;

(v) the conduct of any party that tended to shorten, or to unnecessarily lengthen, the duration of the proceeding;

(vi) the importance of the proceeding to the party whose bill is being assessed, and the result obtained;

(vii) the benefit to the party whose bill is being assessed of the services rendered by the lawyer;

(viii) Rule 1-3 and any case plan order.

Assessment officer

(4) The officer before whom costs are assessed is a registrar.

Disbursements

(5) When assessing costs under subrule (2) or (3) of this rule, a registrar must

(a) determine which disbursements have been necessarily or properly incurred in the conduct of the proceeding, and

(b) allow a reasonable amount for those disbursements.

Repealed

(6) Repealed. [B.C. Reg. 44/2014, Sch. 2, s. 2.]

Directions

(7) If the court has made an order for costs,

(a) any party may, at any time before a registrar issues a certificate under subrule (27), apply for directions to the judge or master who made the order for costs,

(b) the judge or master may direct that any item of costs, including any item of disbursements, be allowed or disallowed, and

(c) the registrar is bound by any direction given by the judge or master.

Tax in respect of legal services and disbursements

(8) If tax is payable by a party in respect of legal services or disbursements, a registrar must, on an assessment under subrule (2) or (3), allow an additional amount to compensate for that tax as follows:

(a) if the tax is payable in respect of legal services, the additional amount to compensate for the tax must be determined by multiplying the percentage rate of the tax by,

(i) in the case of a judgment entered on default of response to civil claim, the costs allowed under Item 1 or 2, as the case may be, of Schedule 1 of Appendix B,

(ii) in the case of a writ of execution, a garnishing order, a subpoena to debtor in Form 56, a notice of application for committal in Form 58 or an order of committal in Form 59, the costs allowed under Item 1 or 2, as the case may be, of Schedule 2 of Appendix B, or

(iii) in any other case, the monetary value of the units assessed;

(b) if the tax is payable in respect of disbursements, the additional amount to compensate for the tax must be determined by multiplying the percentage rate of the tax by the monetary value of the disbursements as assessed.

Costs to follow event

(9) Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders.

Costs in cases within small claims jurisdiction

(10) A plaintiff who recovers a sum within the jurisdiction of the Provincial Court under the *Small Claims Act* is not entitled to costs, other than disbursements, unless the court finds that there was sufficient reason for bringing the proceeding in the Supreme Court and so orders.

Costs where party represented by an employee

(11) A party is not disentitled to costs merely because the party's lawyer is an employee of the party.

Costs of applications

(12) Unless the court hearing an application otherwise orders,

(a) if the application is granted, the party who brought the application is entitled to costs of the application if that party is awarded costs at trial or at the hearing of the petition, but the party opposing the application, if any, is not entitled to costs even though that party is awarded costs at trial or at the hearing of the petition, and

(b) if the application is refused, the party who brought the application is not entitled to costs of the application even though that party is awarded costs at trial or at the hearing of the petition, but the party opposing the application, if any, is entitled to costs if that party is awarded costs at trial or at the hearing of the petition.

When costs payable

(13) If an entitlement to costs arises during a proceeding, whether as a result of an order or otherwise, those costs are payable on the conclusion of the proceeding unless the court otherwise orders.

Costs arising from improper act or omission

(14) If anything is done or omitted improperly or unnecessarily, by or on behalf of a party, the court or a registrar may order

(a) that any costs arising from or associated with any matter related to the act or omission not be allowed to the party, or

(b) that the party pay the costs incurred by any other party by reason of the act or omission.

Costs of whole or part of proceeding

(15) The court may award costs

(a) of a proceeding,

(b) that relate to some particular application, step or matter in or related to the proceeding, or

(c) except so far as they relate to some particular application, step or matter in or related to the proceeding

and in awarding those costs the court may fix the amount of costs, including the amount of disbursements.

Costs payable from estate or property

(16) If it is ordered that any costs are to be paid out of an estate or property, the court may direct out of what portion of the estate or property the costs are to be paid.

Set-off of costs

(17) If a party entitled to receive costs is liable to pay costs to another party, a registrar may assess the costs the party is liable to pay and may adjust them by way of deduction or set-off or may delay the allowance of the costs the party is entitled to receive until the party has paid or tendered the costs the party is liable to pay.

Costs of one defendant payable by another

(18) If the costs of one defendant against a plaintiff ought to be paid by another defendant, the court may order payment to be made by one defendant to the other directly, or may order the plaintiff to pay the costs of the successful defendant and allow the plaintiff to include those costs as a disbursement in the costs payable to the plaintiff by the unsuccessful defendant.

Unnecessary expense after judgment

(19) If after pronouncement of judgment a party puts another party to unnecessary proceedings or expense, a registrar may award costs as the registrar considers appropriate against the offending party.

Form of bill of costs

(20) A bill of costs must be in Form 62 or, if the bill of costs pertains to a judgment under Rule 3-8, Form 63.

Appointment to review a bill, examine an agreement or assess costs

(21) Except as provided in subrule (26), a person who seeks a review of a bill or an examination of an agreement under the *Legal Profession Act* or who seeks to have costs assessed must

(a) obtain a date for an appointment before a registrar,

(b) file an appointment in Form 49 to which is attached

(i) the bill to be reviewed,

(ii) the agreement to be examined, or

(iii) the bill of costs to be assessed, and

(c) at least 5 days before the date of the appointment, serve a copy of the filed Form 49 appointment and any affidavit in support,

(i) in the case of a bill to be reviewed, on the lawyer whose bill is to be reviewed, on the person who is charged with the bill or on the person who has agreed to indemnify the person charged, as the case may be,

(ii) in the case of an agreement to be examined, on the lawyer who is a party to the agreement to be examined, or

(iii) in the case of a bill of costs to be assessed, in accordance with subrule (25).

Place for review or examination

(22) An appointment for review of a bill, examination of an agreement or assessment of costs must be taken out,

(a) in the case of a bill to be reviewed or an agreement to be examined,

(i) if the bill or agreement relates to a court proceeding, at the registry at which the proceeding is being conducted, or

(ii) if the bill or agreement does not relate to a court proceeding, at the registry nearest to the place of business of the lawyer concerned,

(b) in the case of a bill of costs to be assessed, at the registry at which the proceeding is being conducted, or

(c) at any other registry to which the parties to the appointment may agree.

Further particulars

(23) A registrar may order further particulars or details of

(a) a bill under review,

(b) an agreement under examination, or

(c) a bill of costs being assessed.

Assessment of sheriff's fees

(24) If a sheriff who has charged fees for services set out in Schedule 2 of Appendix C or a person affected by those fees wishes to have those fees assessed, the person seeking the assessment must

(a) obtain an appointment from a registrar in Form 49 and attach to that appointment a copy of the bill to be assessed, if available, and

(b) at least 5 days before the assessment, serve a copy of the filed appointment and any filed affidavit in support on all persons affected by the fees.

Service of appointment

(25) A person seeking an assessment of costs must serve an appointment in Form 49, to which is attached the bill of costs, and any affidavit in support on

(a) the person against whom costs are to be assessed, and

(b) every other person whose interest, whether in a fund or estate or otherwise, may be affected.

Costs on default judgment

(26) On signing a default judgment, a registrar may, without an appointment, fix the costs to which the plaintiff is entitled against the defendant in default, and set out the amount allowed in

(a) the judgment, or

(b) a separate certificate.

Certificate of costs

(27) On the conclusion of an assessment of costs, or if the party charged has consented to the amount, a registrar must, either by endorsing the original bill or by issuing a certificate of costs in Form 64, certify the amount of costs awarded, and the party assessing costs must file the certificate.

Certificate of fees

(28) On the conclusion of a review of a bill under the *Legal Profession Act*, or if the parties to the review have consented to the amount due under the bill, a registrar must, by issuing a certificate of fees in Form 65, certify the amount due, and either party to the review may file the certificate.

Review of an assessment

(29) A party who is dissatisfied with a decision of a registrar on an assessment of costs may, within 14 days after the registrar has certified the costs, apply to the court for a review of the assessment.

Form of bill in certain cases

(30) A bill for special costs or a bill under the *Legal Profession Act* may be rendered on a lump sum basis.

Description of services

(31) A lump sum bill must contain a description of the nature of the services and of the matter involved as would, in the opinion of a registrar, afford any lawyer sufficient information to advise a client on the reasonableness of the charge made.

Evidence of lawyer

(32) A party to an assessment of costs or a review of a lump sum bill may put in evidence the opinion of a lawyer as to the nature and importance of the services rendered and of the matter involved and the reasonableness of the charges made, but a party must not put in evidence the opinions of more than 2 lawyers, and a lawyer giving an opinion may be required to attend for examination and cross-examination.

Disallowance of fees and costs

(33) If the court considers that a party's lawyer has caused costs to be incurred without reasonable cause, or has caused costs to be wasted through delay, neglect or some other fault, the court may do any one or more of the following:

(a) disallow any fees and disbursements between the lawyer and the lawyer's client or, if those fees or disbursements have been paid, order that the lawyer repay some or all of them to the client;

(b) order that the lawyer indemnify his or her client for all or part of any costs that the client has been ordered to pay to another party;

(c) order that the lawyer be personally liable for all or part of any costs that his or her client has been ordered to pay to another party;

(d) make any other order that the court considers will further the object of these Supreme Court Civil Rules.

Costs may be ordered without assessment

(34) If the court makes an order under subrule (33), the court may

(a) direct a registrar to conduct an inquiry and file a report with recommendations as to the amount of costs, or

(b) subject to subrule (37), fix the costs with or without reference to the tariff in Appendix B.

Notice

(35) An order against a lawyer under subrule (33) or (34) must not be made unless the lawyer is present or has been given notice.

Order to be served

(36) A lawyer against whom an order under subrule (33) or (34) has been made must promptly serve a copy of the entered order on his or her client.

Limitation

(37) An order by the court under subrule (34) (b) in respect of the costs of an application must not exceed $1 000.

Refusal or neglect to procure assessment

(38) If a party entitled to costs fails to assess costs and prejudices another party by failing to do so, a registrar may certify the costs of the other party and certify the failure and disallow all costs of the party in default.

Referrals

(39) Unless the court otherwise orders, fees to lawyers, accountants, engineers, actuaries, valuators, merchants and other scientific persons to whom any matter or question is referred by the court must be determined by a registrar, subject to an appeal to the court.

Per Curiam

SUPREME COURT OF THE UNITED STATES

No. 20A87

ROMAN CATHOLIC DIOCESE OF BROOKLYN, NEW YORK *v.* ANDREW M. CUOMO, GOVERNOR OF NEW YORK

ON APPLICATION FOR INJUNCTIVE RELIEF

[November 25,2020]

PER CURIAM.

The application for injunctive relief presented to JUSTICE BREYER and by him referred to the Court is granted. Respondent is enjoined from enforcing Executive Order 202.68's 10- and 25-person occupancy limits on applicant pending disposition of the appeal in the United States Court of Appeals for the Second Circuit and disposition of the petition for a writ of certiorari, if such writ is timely sought. Should the petition for a writ of certiorari be denied, this order shall terminate automatically. In the event the petition for a writ of certiorari is granted, the order shall terminate upon the sending down of the judgment of this Court.

* * * * * *

This emergency application and another, Agudath Israel of America, et al. v. Cuomo, No. 20A90, present the same issue, and this opinion addresses both cases.

Both applications seek relief from an Executive Order issued by the Governor of New York that imposes very severe restrictions on attendance at religious services in areas classified as "red" or "orange" zones. In red zones, no more than 10 persons may attend each religious service, and in orange zones, attendance is capped at 25. The two applications, one filed by the Roman Catholic Diocese of Brooklyn and the other by Agudath Israel of America and affiliated

entities, contend that these restrictions violate the Free Exercise Clause of the First Amendment, and they ask us to enjoin enforcement of the restrictions while they pursue appellate review. Citing a variety of remarks made by the Governor, Agudath Israel argues that the Governor specifically targeted the Orthodox Jewish community and gerrymandered the boundaries of red and orange zones to ensure that heavily Orthodox areas were included. Both the Diocese and Agudath Israel maintain that the regulations treat houses of worship much more harshly than comparable secular facilities. And they tell us without contradiction that they have complied with all public health guidance, have implemented additional precautionary measures, and have operated at 25% or 33% capacity for months without a single outbreak.

The applicants have clearly established their entitlement to relief pending appellate review. They have shown that their First Amendment claims are likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest. See *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 20 (2008). Because of the need to issue an order promptly, we provide only a brief summary of the reasons why immediate relief is essential.

Likelihood of success on the merits. The applicants have made a strong showing that the challenged restrictions violate "the minimum requirement of neutrality" to religion. *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 533 (1993). As noted by the dissent in the court below, statements made in connection with the challenged rules can be viewed as targeting the "'ultra-Orthodox [Jewish] community.'" ___ F. 3d ___, ___, 2020 WL 6750495, *5 (CA2, Nov. 9, 2020) (Park, J., dissenting). But even if we put those comments aside, the regulations cannot be viewed

as neutral because they single out houses of worship for especially harsh treatment.[1]

In a red zone, while a synagogue or church may not admit more than 10 persons, businesses categorized as "essential" may admit as many people as they wish. And the list of "essential" businesses includes things such as acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be regarded as essential, such as all plants manufacturing chemicals and microelectronics and all transportation facilities. See New York State, Empire State Development, Guidance for Determining Whether a Business Enterprise is Subject to a Workforce Reduction Under Recent Executive Orders, https://esd.ny.gov/guidance-executive-order-2026. The disparate treatment is even more striking in an orange zone. While attendance at houses of worship is limited to 25 persons, even non-essential businesses may decide for themselves how many persons to admit.

These categorizations lead to troubling results. At the hearing in the District Court, a health department official testified about a large store in Brooklyn that could "literally have hundreds of people shopping there on any given day." App. to Application in No. 20A87, Exh. D, p. 83. Yet a nearby church or synagogue would be prohibited from allowing more than 10 or 25 people inside for a worship service. And the Governor has stated that factories and schools have contributed to the spread of COVID–19, *id.*, Exh. H, at 3; App. to Application in No. 20A90, pp. 98, 100, but they are treated less harshly than the Diocese's churches and Agudath Israel's synagogues, which have admirable safety records.

Because the challenged restrictions are not "neutral" and

---

[1] Compare *Trump* v. *Hawaii*, 585 U. S. ___, ___ (2018) (slip op., at 29) (directive "neutral on its face").

of "general applicability," they must satisfy "strict scrutiny," and this means that they must be "narrowly tailored" to serve a "compelling" state interest. *Church of Lukumi*, 508 U. S., at 546. Stemming the spread of COVID–19 is unquestionably a compelling interest, but it is hard to see how the challenged regulations can be regarded as "narrowly tailored." They are far more restrictive than any COVID–related regulations that have previously come before the Court,[2] much tighter than those adopted by many other jurisdictions hard-hit by the pandemic, and far more severe than has been shown to be required to prevent the spread of the virus at the applicants' services. The District Court noted that "there ha[d] not been any COVID–19 outbreak in any of the Diocese's churches since they reopened," and it praised the Diocese's record in combatting the spread of the disease. ___ F. Supp. 3d ___, ___, 2020 WL 6120167, *2 (EDNY, Oct. 16, 2020). It found that the Diocese had been constantly "ahead of the curve, enforcing stricter safety protocols than the State required." *Ibid.* Similarly, Agudath Israel notes that "[t]he Governor does not dispute that [it] ha[s] rigorously implemented and adhered to all health protocols and that there has been no outbreak of COVID–19 in [its] congregations." Application in No. 20A90, at 36.

Not only is there no evidence that the applicants have contributed to the spread of COVID–19 but there are many other less restrictive rules that could be adopted to minimize the risk to those attending religious services. Among other things, the maximum attendance at a religious service could be tied to the size of the church or synagogue. Almost all of the 26 Diocese churches immediately affected

[2] See *Calvary Chapel Dayton Valley* v. *Sisolak*, 591 U. S. ___ (2020) (directive limiting in-person worship services to 50 people); *South Bay United Pentecostal Church* v. *Newsom*, 590 U. S. ___ (2020) (Executive Order limiting in-person worship to 25% capacity or 100 people, whichever was lower).

by the Executive Order can seat at least 500 people, about 14 can accommodate at least 700, and 2 can seat over 1,000. Similarly, Agudath Israel of Kew Garden Hills can seat up to 400. It is hard to believe that admitting more than 10 people to a 1,000–seat church or 400–seat synagogue would create a more serious health risk than the many other activities that the State allows.

Irreparable harm. There can be no question that the challenged restrictions, if enforced, will cause irreparable harm. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U. S. 347, 373 (1976) (plurality opinion). If only 10 people are admitted to each service, the great majority of those who wish to attend Mass on Sunday or services in a synagogue on Shabbat will be barred. And while those who are shut out may in some instances be able to watch services on television, such remote viewing is not the same as personal attendance. Catholics who watch a Mass at home cannot receive communion, and there are important religious traditions in the Orthodox Jewish faith that require personal attendance. App. to Application in No. 20A90, at 26–27.

Public interest. Finally, it has not been shown that granting the applications will harm the public. As noted, the State has not claimed that attendance at the applicants' services has resulted in the spread of the disease. And the State has not shown that public health would be imperiled if less restrictive measures were imposed.

Members of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area. But even in a pandemic, the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty. Before allowing this to occur, we have a duty to conduct a serious

examination of the need for such a drastic measure.

The dissenting opinions argue that we should withhold relief because the relevant circumstances have now changed. After the applicants asked this Court for relief, the Governor reclassified the areas in question from orange to yellow, and this change means that the applicants may hold services at 50% of their maximum occupancy. The dissents would deny relief at this time but allow the Diocese and Agudath Israel to renew their requests if this recent reclassification is reversed.

There is no justification for that proposed course of action. It is clear that this matter is not moot. See *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.*, 551 U. S. 449, 462 (2007); *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 189 (2000). And injunctive relief is still called for because the applicants remain under a constant threat that the area in question will be reclassified as red or orange. See, *e.g.*, *Susan B. Anthony List* v. *Driehaus*, 573 U. S. 149, 158 (2014). The Governor regularly changes the classification of particular areas without prior notice.[3] If that occurs again, the reclassification will almost certainly bar individuals in the affected area from attending services before judicial relief can be obtained. At most Catholic churches, Mass is celebrated daily, and "Orthodox Jews pray in [Agudath Israel's] synagogues every day." Application in No. 20A90, at 4. Moreover, if reclassification occurs late in a week, as has happened in the past, there may not be time for applicants to seek and obtain relief from this Court before another Sabbath passes. Thirteen days have gone by since the Diocese filed its application, and Agudath Israel's application was filed over a week ago. While we could presumably act more

[3] Recent changes were made on the following dates: Monday, November 23; Thursday, November 19; Wednesday, November 18; Wednesday, November 11; Monday, November 9; Friday, November 6; Wednesday, October 28; Wednesday, October 21.

swiftly in the future, there is no guarantee that we could provide relief before another weekend passes. The applicants have made the showing needed to obtain relief, and there is no reason why they should bear the risk of suffering further irreparable harm in the event of another reclassification.

For these reasons, we hold that enforcement of the Governor's severe restrictions on the applicants' religious services must be enjoined.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 20A87

ROMAN CATHOLIC DIOCESE OF BROOKLYN, NEW YORK *v.* ANDREW M. CUOMO, GOVERNOR OF NEW YORK

ON APPLICATION FOR INJUNCTIVE RELIEF

[November 25, 2020]

JUSTICE GORSUCH, concurring.

Government is not free to disregard the First Amendment in times of crisis. At a minimum, that Amendment prohibits government officials from treating religious exercises worse than comparable secular activities, unless they are pursuing a compelling interest and using the least restrictive means available. See *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 546 (1993). Yet recently, during the COVID pandemic, certain States seem to have ignored these long-settled principles.

Today's case supplies just the latest example. New York's Governor has asserted the power to assign different color codes to different parts of the State and govern each by executive decree. In "red zones," houses of worship are all but closed—limited to a maximum of 10 people. In the Orthodox Jewish community that limit might operate to exclude all women, considering 10 men are necessary to establish a *minyan*, or a quorum. In "orange zones," it's not much different. Churches and synagogues are limited to a maximum of 25 people. These restrictions apply even to the largest cathedrals and synagogues, which ordinarily hold hundreds. And the restrictions apply no matter the precautions taken, including social distancing, wearing masks, leaving doors and windows open, forgoing singing, and disinfecting spaces between services.

At the same time, the Governor has chosen to impose *no* capacity restrictions on certain businesses he considers "essential." And it turns out the businesses the Governor considers essential include hardware stores, acupuncturists, and liquor stores. Bicycle repair shops, certain signage companies, accountants, lawyers, and insurance agents are all essential too. So, at least according to the Governor, it may be unsafe to go to church, but it is always fine to pick up another bottle of wine, shop for a new bike, or spend the afternoon exploring your distal points and meridians. Who knew public health would so perfectly align with secular convenience?

As almost everyone on the Court today recognizes, squaring the Governor's edicts with our traditional First Amendment rules is no easy task. People may gather inside for extended periods in bus stations and airports, in laundromats and banks, in hardware stores and liquor shops. No apparent reason exists why people may not gather, subject to identical restrictions, in churches or synagogues, especially when religious institutions have made plain that they stand ready, able, and willing to follow all the safety precautions required of "essential" businesses and perhaps more besides. The only explanation for treating religious places differently seems to be a judgment that what happens there just isn't as "essential" as what happens in secular spaces. Indeed, the Governor is remarkably frank about this: In his judgment laundry and liquor, travel and tools, are all "essential" while traditional religious exercises are not. *That* is exactly the kind of discrimination the First Amendment forbids.

Nor is the problem an isolated one. In recent months, certain other Governors have issued similar edicts. At the flick of a pen, they have asserted the right to privilege restaurants, marijuana dispensaries, and casinos over churches, mosques, and temples. See *Calvary Chapel Dayton Valley* v. *Sisolak*, 591 U. S. ___, ___ (2020) (GORSUCH,

J., dissenting). In far too many places, for far too long, our first freedom has fallen on deaf ears.

*

What could justify so radical a departure from the First Amendment's terms and long-settled rules about its application? Our colleagues offer two possible answers. Initially, some point to a solo concurrence in *South Bay Pentecostal Church* v. *Newsom*, 590 U. S. ___ (2020), in which THE CHIEF JUSTICE expressed willingness to defer to executive orders in the pandemic's early stages based on the newness of the emergency and how little was then known about the disease. *Post*, at 5 (opinion of BREYER, J.). At that time, COVID had been with us, in earnest, for just three months. Now, as we round out 2020 and face the prospect of entering a second calendar year living in the pandemic's shadow, that rationale has expired according to its own terms. Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical. Rather than apply a nonbinding and expired concurrence from *South Bay*, courts must resume applying the Free Exercise Clause. Today, a majority of the Court makes this plain.

Not only did the *South Bay* concurrence address different circumstances than we now face, that opinion was mistaken from the start. To justify its result, the concurrence reached back 100 years in the U. S. Reports to grab hold of our decision in *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905). But *Jacobson* hardly supports cutting the Constitution loose during a pandemic. That decision involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction.

Start with the mode of analysis. Although *Jacobson* predated the modern tiers of scrutiny, this Court essentially applied rational basis review to Henning Jacobson's challenge to a state law that, in light of an ongoing smallpox pandemic, required individuals to take a vaccine, pay a $5

fine, or establish that they qualified for an exemption. *Id.*, at 25 (asking whether the State's scheme was "reasonable"); *id.*, at 27 (same); *id.*, at 28 (same). Rational basis review is the test this Court *normally* applies to Fourteenth Amendment challenges, so long as they do not involve suspect classifications based on race or some other ground, or a claim of fundamental right. Put differently, *Jacobson* didn't seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so. Instead, *Jacobson* applied what would become the traditional legal test associated with the right at issue—exactly what the Court does today. Here, that means strict scrutiny: The First Amendment traditionally requires a State to treat religious exercises at least as well as comparable secular activities unless it can meet the demands of strict scrutiny—showing it has employed the most narrowly tailored means available to satisfy a compelling state interest. *Church of Lukumi*, 508 U. S., at 546.

Next, consider the right asserted. Mr. Jacobson claimed that he possessed an implied "substantive due process" right to "bodily integrity" that emanated from the Fourteenth Amendment and allowed him to avoid not only the vaccine but *also* the $5 fine (about $140 today) *and* the need to show he qualified for an exemption. 197 U. S., at 13–14. This Court disagreed. But what does that have to do with our circumstances? Even if judges may impose emergency restrictions on rights that some of them have found hiding in the Constitution's penumbras, it does not follow that the same fate should befall the textually explicit right to religious exercise.

Finally, consider the different nature of the restriction. In *Jacobson*, individuals could accept the vaccine, pay the fine, or identify a basis for exemption. *Id.*, at 12, 14. The imposition on Mr. Jacobson's claimed right to bodily integrity, thus, was avoidable and relatively modest. It easily

survived rational basis review, and might even have survived strict scrutiny, given the opt-outs available to certain objectors. *Id.*, at 36, 38–39. Here, by contrast, the State has effectively sought to ban all traditional forms of worship in affected "zones" whenever the Governor decrees and for as long as he chooses. Nothing in *Jacobson* purported to address, let alone approve, such serious and long-lasting intrusions into settled constitutional rights. In fact, *Jacobson* explained that the challenged law survived only because it did not "contravene the Constitution of the United States" or "infringe any right granted or secured by that instrument." *Id.*, at 25.

Tellingly no Justice now disputes any of these points. Nor does any Justice seek to explain why anything other than our usual constitutional standards should apply during the current pandemic. In fact, today the author of the *South Bay* concurrence even downplays the relevance of *Jacobson* for cases like the one before us. *Post*, at 2 (opinion of ROBERTS, C. J.). All this is surely a welcome development. But it would require a serious rewriting of history to suggest, as THE CHIEF JUSTICE does, that the *South Bay* concurrence never really relied in significant measure on *Jacobson*. That was the first case *South Bay* cited on the substantive legal question before the Court, it was the only case cited involving a pandemic, and many lower courts quite understandably read its invocation as inviting them to slacken their enforcement of constitutional liberties while COVID lingers. See, *e.g.*, *Elim Romanian Pentecostal Church* v. *Pritzker*, 962 F. 3d 341, 347 (CA7 2020); *Legacy Church, Inc.* v. *Kunkel*, ___ F. Supp. 3d ___, ___ (NM 2020).

Why have some mistaken this Court's modest decision in *Jacobson* for a towering authority that overshadows the Constitution during a pandemic? In the end, I can only surmise that much of the answer lies in a particular judicial impulse to stay out of the way in times of crisis. But if that impulse may be understandable or even admirable in other

circumstances, we may not shelter in place when the Constitution is under attack. Things never go well when we do.

*

That leaves my colleagues to their second line of argument. Maybe precedent does not support the Governor's actions. Maybe those actions do violate the Constitution. But, they say, we should stay our hand all the same. Even if the churches and synagogues before us have been subject to unconstitutional restrictions for months, it is no matter because, just the other day, the Governor changed his color code for Brooklyn and Queens where the plaintiffs are located. Now those regions are "yellow zones" and the challenged restrictions on worship associated with "orange" and "red zones" do not apply. So, the reasoning goes, we should send the plaintiffs home with an invitation to return later if need be.

To my mind, this reply only advances the case for intervention. It has taken weeks for the plaintiffs to work their way through the judicial system and bring their case to us. During all this time, they were subject to unconstitutional restrictions. Now, just as this Court was preparing to act on their applications, the Governor loosened his restrictions, all while continuing to assert the power to tighten them again anytime as conditions warrant. So if we dismissed this case, nothing would prevent the Governor from reinstating the challenged restrictions tomorrow. And by the time a new challenge might work its way to us, he could just change them again. The Governor has fought this case at every step of the way. To turn away religious leaders bringing meritorious claims just because the Governor decided to hit the "off" switch in the shadow of our review would be, in my view, just another sacrifice of fundamental rights in the name of judicial modesty.

Even our dissenting colleagues do not suggest this case is

moot or otherwise outside our power to decide. They counsel delay only because "the disease-related circumstances [are] rapidly changing." *Post*, at 5 (opinion of BREYER, J.). But look at what those "rapidly changing" circumstances suggest. Both Governor Cuomo and Mayor de Blasio have "indicated it's only a matter of time before [all] five boroughs" of New York City are flipped from yellow to orange. J. Skolnik, D. Goldiner, & D. Slattery, Staten Island Goes 'Orange' As Cuomo Urges Coronavirus 'Reality Check' Ahead of Thanksgiving, N. Y. Daily News (Nov. 23, 2020), https://www.nydailynews.com/coronavirus/ny-coronavirus-cuomo-thanksgiving-20201123-yyhxfo3kzbdinbfbsqos3tvrku-story-html. On anyone's account, then, it seems inevitable this dispute will require the Court's attention.

It is easy enough to say it would be a small thing to require the parties to "refile their applications" later. *Post*, at 3 (opinion of BREYER, J.). But none of us are rabbis wondering whether future services will be disrupted as the High Holy Days were, or priests preparing for Christmas. Nor may we discount the burden on the faithful who have lived for months under New York's unconstitutional regime unable to attend religious services. Whether this Court could decide a renewed application promptly is beside the point. The parties before us have already shown their entitlement to relief. Saying so now will establish clear legal rules and enable both sides to put their energy to productive use, rather than devoting it to endless emergency litigation. Saying so now will dispel, as well, misconceptions about the role of the Constitution in times of crisis, which have already been permitted to persist for too long.

It is time—past time—to make plain that, while the pandemic poses many grave challenges, there is no world in which the Constitution tolerates color-coded executive edicts that reopen liquor stores and bike shops but shutter churches, synagogues, and mosques.

SUPREME COURT OF THE UNITED STATES

No. 20A87

ROMAN CATHOLIC DIOCESE OF BROOKLYN, NEW YORK *v.* ANDREW M. CUOMO, GOVERNOR OF NEW YORK

ON APPLICATION FOR INJUNCTIVE RELIEF

[November 25, 2020]

JUSTICE KAVANAUGH, concurring.

I vote to grant the applications of the Roman Catholic Diocese of Brooklyn and Agudath Israel of America for temporary injunctions against New York's 10-person and 25-person caps on attendance at religious services. On this record, temporary injunctions are warranted because New York's severe caps on attendance at religious services likely violate the First Amendment. Importantly, the Court's orders today are not final decisions on the merits. Instead, the Court simply grants *temporary* injunctive relief until the Court of Appeals in December, and then this Court as appropriate, can more fully consider the merits.

To begin with, New York's 10-person and 25-person caps on attendance at religious services in red and orange zones (which are areas where COVID–19 is more prevalent) are much more severe than most other States' restrictions, including the California and Nevada limits at issue in *South Bay United Pentecostal Church* v. *Newsom*, 590 U. S. ___ (2020), and *Calvary Chapel Dayton Valley* v. *Sisolak*, 591 U. S. ___ (2020). In *South Bay*, houses of worship were limited to 100 people (or, in buildings with capacity of under 400, to 25% of capacity). And in *Calvary*, houses of worship were limited to 50 people.

New York has gone much further. In New York's red zones, most houses of worship are limited to 10 people; in

orange zones, most houses of worship are limited to 25 people. Those strict and inflexible numerical caps apply even to large churches and synagogues that ordinarily can hold hundreds of people and that, with social distancing and mask requirements, could still easily hold far more than 10 or 25 people.

Moreover, New York's restrictions on houses of worship not only are severe, but also are discriminatory. In red and orange zones, houses of worship must adhere to numerical caps of 10 and 25 people, respectively, but those caps do not apply to some secular buildings in the same neighborhoods. In a red zone, for example, a church or synagogue must adhere to a 10-person attendance cap, while a grocery store, pet store, or big-box store down the street does not face the same restriction. In an orange zone, the discrimination against religion is even starker: Essential businesses and many non-essential businesses are subject to no attendance caps at all.

The State's discrimination against religion raises a serious First Amendment issue and triggers heightened scrutiny, requiring the State to provide a sufficient justification for the discrimination. See *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 537–538 (1993); *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 884 (1990). But New York has not sufficiently justified treating houses of worship more severely than secular businesses.

The State argues that it has not impermissibly discriminated against religion because some secular businesses such as movie theaters must remain closed and are thus treated less favorably than houses of worship. But under this Court's precedents, it does not suffice for a State to point out that, as compared to houses of worship, *some* secular businesses are subject to similarly severe or even more severe restrictions. See *Lukumi*, 508 U. S., at 537–538; *Smith*, 494 U. S., at 884; see also *Calvary*, 591 U. S., at ___

(KAVANAUGH, J., dissenting from denial of application for injunctive relief) (slip op., at 7). Rather, once a State creates a favored class of businesses, as New York has done in this case, the State must justify why houses of worship are excluded from that favored class. Here, therefore, the State must justify imposing a 10-person or 25-person limit on houses of worship but not on favored secular businesses. See *Lukumi*, 508 U. S., at 537–538; *Smith*, 494 U. S., at 884. The State has not done so.

To be clear, the COVID–19 pandemic remains extraordinarily serious and deadly. And at least until vaccines are readily available, the situation may get worse in many parts of the United States. The Constitution "principally entrusts the safety and the health of the people to the politically accountable officials of the States." *South Bay*, 590 U. S., at ___ (ROBERTS, C. J., concurring in denial of application for injunctive relief) (slip op., at 2) (internal quotation marks and alteration omitted). Federal courts therefore must afford substantial deference to state and local authorities about how best to balance competing policy considerations during the pandemic. See *ibid.* But judicial deference in an emergency or a crisis does not mean wholesale judicial abdication, especially when important questions of religious discrimination, racial discrimination, free speech, or the like are raised.

In light of the devastating pandemic, I do not doubt the State's authority to impose tailored restrictions—even very strict restrictions—on attendance at religious services and secular gatherings alike. But the New York restrictions on houses of worship are not tailored to the circumstances given the First Amendment interests at stake. To reiterate, New York's restrictions on houses of worship are much more severe than the California and Nevada restrictions at issue in *South Bay* and *Calvary*, and much more severe than the restrictions that most other States are imposing

on attendance at religious services. And New York's restrictions discriminate against religion by treating houses of worship significantly worse than some secular businesses.

For those reasons, I agree with THE CHIEF JUSTICE that New York's "[n]umerical capacity limits of 10 and 25 people . . . seem unduly restrictive" and that "it may well be that such restrictions violate the Free Exercise Clause." *Post*, at 1. I part ways with THE CHIEF JUSTICE on a narrow procedural point regarding the timing of the injunctions. THE CHIEF JUSTICE would not issue injunctions at this time. As he notes, the State made a change in designations a few days ago, and now none of the churches and synagogues who are applicants in these cases are located in red or orange zones. As I understand it, THE CHIEF JUSTICE would not issue an injunction unless and until a house of worship applies for an injunction and is still in a red or orange zone on the day that the injunction is finally issued. But the State has not withdrawn or amended the relevant Executive Order. And the State does not suggest that the applicants lack standing to challenge the red-zone and orange-zone caps imposed by the Executive Order, or that these cases are moot or not ripe. In other words, the State does not deny that the applicants face an imminent injury *today*. In particular, the State does not deny that some houses of worship, including the applicants here, are located in areas that likely will be classified as red or orange zones in the very near future. I therefore see no jurisdictional or prudential barriers to issuing the injunctions now.

There also is no good reason to delay issuance of the injunctions, as I see it. If no houses of worship end up in red or orange zones, then the Court's injunctions today will impose no harm on the State and have no effect on the State's response to COVID–19. And if houses of worship end up in red or orange zones, as is likely, then today's injunctions will ensure that religious organizations are not subjected to

the unconstitutional 10-person and 25-person caps. Moreover, issuing the injunctions now rather than a few days from now not only will ensure that the applicants' constitutional rights are protected, but also will provide some needed clarity for the State and religious organizations.

* * *

On this record, the applicants have shown: a likelihood that the Court would grant certiorari and reverse; irreparable harm; and that the equities favor injunctive relief. I therefore vote to grant the applications for temporary injunctive relief until the Court of Appeals in December, and then this Court as appropriate, can more fully consider the merits.

SUPREME COURT OF THE UNITED STATES

No. 20A87

ROMAN CATHOLIC DIOCESE OF BROOKLYN, NEW YORK *v.* ANDREW M. CUOMO, GOVERNOR OF NEW YORK

ON APPLICATION FOR INJUNCTIVE RELIEF

[November 25, 2020]

CHIEF JUSTICE ROBERTS, dissenting.

I would not grant injunctive relief under the present circumstances. There is simply no need to do so. After the Diocese and Agudath Israel filed their applications, the Governor revised the designations of the affected areas. None of the houses of worship identified in the applications is now subject to any fixed numerical restrictions. At these locations, the applicants can hold services with up to 50% of capacity, which is at least as favorable as the relief they currently seek.

Numerical capacity limits of 10 and 25 people, depending on the applicable zone, do seem unduly restrictive. And it may well be that such restrictions violate the Free Exercise Clause. It is not necessary, however, for us to rule on that serious and difficult question at this time. The Governor might reinstate the restrictions. But he also might not. And it is a significant matter to override determinations made by public health officials concerning what is necessary for public safety in the midst of a deadly pandemic. If the Governor does reinstate the numerical restrictions the applicants can return to this Court, and we could act quickly on their renewed applications. As things now stand, however, the applicants have not demonstrated their entitlement to "the extraordinary remedy of injunction."

Nken v. *Holder*, 556 U. S. 418, 428 (2009) (internal quotation marks omitted). An order telling the Governor not to do what he's not doing fails to meet that stringent standard.

As noted, the challenged restrictions raise serious concerns under the Constitution, and I agree with JUSTICE KAVANAUGH that they are distinguishable from those we considered in *South Bay United Pentecostal Church* v. *Newsom*, 590 U. S. ___ (2020), and *Calvary Chapel Dayton Valley* v. *Sisolak*, 591 U. S. ___ (2020). See *ante,* at 1, 3–4 (concurring opinion). I take a different approach than the other dissenting Justices in this respect.

To be clear, I do not regard my dissenting colleagues as "cutting the Constitution loose during a pandemic," yielding to "a particular judicial impulse to stay out of the way in times of crisis," or "shelter[ing] in place when the Constitution is under attack." *Ante,* at 3, 5–6 (opinion of GORSUCH, J.). They simply view the matter differently after careful study and analysis reflecting their best efforts to fulfill their responsibility under the Constitution.

One solo concurrence today takes aim at my concurring opinion in *South Bay*. See *ante,* at 3–6 (opinion of GORSUCH, J.). Today's concurrence views that opinion with disfavor because "[t]o justify its result, [it] reached back 100 years in the U. S. Reports to grab hold of our decision in *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905)." *Ante,* at 3. Today's concurrence notes that *Jacobson* "was the first case *South Bay* cited on the substantive legal question before the Court," and "it was the only case cited involving a pandemic." *Ante,* at 5. And it suggests that, in the wake of *South Bay*, some have "mistaken this Court's modest decision in *Jacobson* for a towering authority that overshadows the Constitution during a pandemic." *Ibid.* But while *Jacobson* occupies three pages of today's concurrence, it warranted exactly one sentence in *South Bay*. What did that one sentence say? Only that "[o]ur Constitution principally entrusts '[t]he safety and the health of the people' to the

politically accountable officials of the States 'to guard and protect.'" *South Bay*, 590 U. S., at ___ (ROBERTS, C. J., concurring) (quoting *Jacobson*, 197 U. S., at 38). It is not clear which part of this lone quotation today's concurrence finds so discomfiting. The concurrence speculates that there is so much more to the sentence than meets the eye, invoking—among other interpretive tools—the new "first case cited" rule. But the actual proposition asserted should be uncontroversial, and the concurrence must reach beyond the words themselves to find the target it is looking for.

SUPREME COURT OF THE UNITED STATES

No. 20A87

ROMAN CATHOLIC DIOCESE OF BROOKLYN, NEW YORK *v.* ANDREW M. CUOMO, GOVERNOR OF NEW YORK

ON APPLICATION FOR INJUNCTIVE RELIEF

[November 25, 2020]

JUSTICE BREYER, with whom JUSTICE SOTOMAYOR and JUSTICE KAGAN join, dissenting.

New York regulations designed to fight the rapidly spreading—and, in many cases, fatal—COVID–19 virus permit the Governor to identify hot spots where infection rates have spiked and to designate those hot spots as red zones, the immediately surrounding areas as orange zones, and the outlying areas as yellow zones. Brief in Opposition in No. 20A87, p. 12. The regulations impose restrictions within these zones (with the strictest restrictions in the red zones and the least strict restrictions in the yellow zones) to curb transmission of the virus and prevent spread into nearby areas. *Ibid.* In October, the Governor designated red, orange, and yellow zones in parts of Brooklyn and Queens. Brief in Opposition in *Agudath Israel of America* v. *Cuomo*, O. T. 2020, No. 20A90, pp. 10–11 (Brief in Opposition in No. 20A90). Among other things, the restrictions in these zones limit the number of persons who can be present at one time at a gathering in a house of worship to: the lesser of 10 people or 25% of maximum capacity in a red zone; the lesser of 25 people or 33% of maximum capacity in an orange zone; and 50% of maximum capacity in a yellow zone. *Id.*, at 8–9.

Both the Roman Catholic Diocese of Brooklyn and Agudath Israel of America (together with Agudath Israel of

Kew Garden Hills and its employee and Agudath Israel of Madison and its rabbi) brought lawsuits against the Governor of New York. They claimed that the fixed-capacity restrictions of 10 people in red zones and 25 people in orange zones were too strict—to the point where they violated the First Amendment's protection of the free exercise of religion. Both parties asked a Federal District Court for a preliminary injunction that would prohibit the State from enforcing these red and orange zone restrictions.

After receiving evidence and hearing witness testimony, the District Court in the Diocese's case found that New York's regulations were "crafted based on science and for epidemiological purposes." ___ F. Supp. 3d ___, ___, 2020 WL 6120167, *10 (EDNY, Oct. 16, 2020). It wrote that they treated "religious gatherings . . . more favorably than similar gatherings" with comparable risks, such as "public lectures, concerts or theatrical performances." *Id.,* at *9. The court also recognized the Diocese's argument that the regulations treated religious gatherings less favorably than what the State has called "essential businesses," including, for example, grocery stores and banks. *Ibid.* But the court found these essential businesses to be distinguishable from religious services and declined to "second guess the State's judgment about what should qualify as an essential business." *Ibid.* The District Court denied the motion for a preliminary injunction. The Diocese appealed, and the District Court declined to issue an emergency injunction pending that appeal. The Court of Appeals for the Second Circuit also denied the Diocese's request for an emergency injunction pending appeal, but it called for expedited briefing and scheduled a full hearing on December 18 to address the merits of the appeal. This Court, unlike the lower courts, has now decided to issue an injunction that would prohibit the State from enforcing its fixed-capacity restrictions on houses of worship in red and orange zones while the parties await the Second Circuit's decision. I cannot agree with

that decision.

For one thing, there is no need now to issue any such injunction. Those parts of Brooklyn and Queens where the Diocese's churches and the two applicant synagogues are located are no longer within red or orange zones. Brief in Opposition in No. 20A90, at 17. Thus, none of the applicants are now subject to the fixed-capacity restrictions that they challenge in their applications. The specific applicant houses of worship are now in yellow zones where they can hold services up to 50% of maximum capacity. And the applicants do not challenge any yellow zone restrictions, as the conditions in the yellow zone provide them with more than the relief they asked for in their applications.

Instead, the applicants point out that the State might reimpose the red or orange zone restrictions in the future. But, were that to occur, they could refile their applications here, by letter brief if necessary. And this Court, if necessary, could then decide the matter in a day or two, perhaps even in a few hours. Why should this Court act now without argument or full consideration in the ordinary course (and prior to the Court of Appeals' consideration of the matter) when there is no legal or practical need for it to do so? I have found no convincing answer to that question.

For another thing, the Court's decision runs contrary to ordinary governing law. We have previously said that an injunction is an "extraordinary remedy." *Nken* v. *Holder*, 556 U. S. 418, 428 (2009) (internal quotation marks omitted). That is especially so where, as here, the applicants seek an injunction prior to full argument and contrary to the lower courts' determination. Here, we consider severe restrictions. Those restrictions limit the number of persons who can attend a religious service to 10 and 25 congregants (irrespective of mask-wearing and social distancing). And those numbers are indeed low. But whether, in present circumstances, those low numbers violate the Constitution's Free Exercise Clause is far from clear, and, in my view, the

applicants must make such a showing here to show that they are entitled to "the extraordinary remedy of injunction." *Ibid.* (internal quotation marks omitted).

COVID–19 has infected more than 12 million Americans and caused more than 250,000 deaths nationwide. At least 26,000 of those deaths have occurred in the State of New York, with 16,000 in New York City alone. And the number of COVID–19 cases is many times the number of deaths. The Nation is now experiencing a second surge of infections. In New York, for example, the 7-day average of new confirmed cases per day has risen from around 700 at the end of the summer to over 4,800 last week. Nationwide, the number of new confirmed cases per day is now higher than it has ever been. Brief in Opposition in No. 20A87, at 1; COVID in the U. S.: Latest Map and Case Count (Nov. 24, 2020), http://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html#states; New York COVID Map and Case Count (Nov. 24, 2020), http://www.nytimes.com/interactive/2020/us/new-york-coronavirus-cases.html.

At the same time, members of the scientific and medical communities tell us that the virus is transmitted from person to person through respiratory droplets produced when a person or group of people talk, sing, cough, or breathe near each other. Brief in Opposition in No. 20A87, at 3 (citing the World Health Organization); Brief of the American Medical Association as *Amici Curiae* 5–6. Thus, according to experts, the risk of transmission is higher when people are in close contact with one another for prolonged periods of time, particularly indoors or in other enclosed spaces. *Id.,* at 3–6. The nature of the epidemic, the spikes, the uncertainties, and the need for quick action, taken together, mean that the State has countervailing arguments based upon health, safety, and administrative considerations that must be balanced against the applicants' First Amendment challenges. That fact, along with others that JUSTICE SOTOMAYOR describes, means that the applicants' claim of

a constitutional violation (on which they base their request for injunctive relief) is far from clear. See *post*, p. 1 (dissenting opinion). (All of these matters could be considered and discussed in the ordinary course of proceedings at a later date.) At the same time, the public's serious health and safety needs, which call for swift government action in ever changing circumstances, also mean that it is far from clear that "the balance of equities tips in [the applicants'] favor," or "that an injunction is in the public interest." *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 20 (2008).

Relevant precedent suggests the same. We have previously recognized that courts must grant elected officials "broad" discretion when they "undertake to act in areas fraught with medical and scientific uncertainties." *South Bay United Pentecostal Church* v. *Newsom*, 590 U. S. ___, ___ (2020) (ROBERTS, C. J., concurring) (slip op., at 2) (alteration omitted). That is because the "Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States." *Ibid.* (alterations and internal quotation marks omitted). The elected branches of state and national governments can marshal scientific expertise and craft specific policies in response to "changing facts on the ground." *Id.*, at 3. And they can do so more quickly than can courts. That is particularly true of a court, such as this Court, which does not conduct evidentiary hearings. It is true even more so where, as here, the need for action is immediate, the information likely limited, the making of exceptions difficult, and the disease-related circumstances rapidly changing.

I add that, in my view, the Court of Appeals will, and should, act expeditiously. The State of New York will, and should, seek ways of appropriately recognizing the religious interests here at issue without risking harm to the health and safety of the people of New York. But I see no practical

need to issue an injunction to achieve these objectives. Rather, as I said, I can find no need for an immediate injunction. I believe that, under existing law, it ought not to issue. And I dissent from the Court's decision to the contrary.

SUPREME COURT OF THE UNITED STATES

No. 20A87

ROMAN CATHOLIC DIOCESE OF BROOKLYN, NEW YORK *v.* ANDREW M. CUOMO, GOVERNOR OF NEW YORK

ON APPLICATION FOR INJUNCTIVE RELIEF

[November 25, 2020]

JUSTICE SOTOMAYOR, with whom JUSTICE KAGAN joins, dissenting.

Amidst a pandemic that has already claimed over a quarter million American lives, the Court today enjoins one of New York's public health measures aimed at containing the spread of COVID–19 in areas facing the most severe outbreaks. Earlier this year, this Court twice stayed its hand when asked to issue similar extraordinary relief. See *South Bay United Pentecostal Church* v. *Newsom*, 590 U. S. ___ (2020); *Calvary Chapel Dayton Valley* v. *Sisolak*, 591 U. S. ___ (2020). I see no justification for the Court's change of heart, and I fear that granting applications such as the one filed by the Roman Catholic Diocese of Brooklyn (Diocese) will only exacerbate the Nation's suffering.[1]

South Bay and *Calvary Chapel* provided a clear and workable rule to state officials seeking to control the spread of COVID–19: They may restrict attendance at houses of

[1] Ironically, due to the success of New York's public health measures, the Diocese is no longer subject to the numerical caps on attendance it seeks to enjoin. See Brief in Opposition in *Agudath Israel of America* v. *Cuomo*, No. 20A90, p. 17. Yet the Court grants this application to ensure that, should infection rates rise once again, the Governor will be unable to reimplement the very measures that have proven so successful at allowing the free (and comparatively safe) exercise of religion in New York.

worship so long as comparable secular institutions face restrictions that are at least equally as strict. See *South Bay*, 590 U. S., at ___ (ROBERTS, C. J., concurring) (slip op., at 2). New York's safety measures fall comfortably within those bounds. Like the States in *South Bay* and *Calvary Chapel*, New York applies "[s]imilar or more severe restrictions . . . to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time." *Ibid.* Likewise, New York "treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods." *Ibid.* That should be enough to decide this case.

The Diocese attempts to get around *South Bay* and *Calvary Chapel* by disputing New York's conclusion that attending religious services poses greater risks than, for instance, shopping at big box stores. Application in No. 20A87, p. 23 (Application). But the District Court rejected that argument as unsupported by the factual record. ___, F. Supp. 3d ___, ___–___, 2020 WL 6120167, *8–*9 (EDNY, Oct. 16, 2020). Undeterred, JUSTICE GORSUCH offers up his own examples of secular activities he thinks might pose similar risks as religious gatherings, but which are treated more leniently under New York's rules (*e.g.*, going to the liquor store or getting a bike repaired). *Ante*, at 2 (concurring opinion). But JUSTICE GORSUCH does not even try to square his examples with the conditions medical experts tell us facilitate the spread of COVID–19: large groups of people gathering, speaking, and singing in close proximity indoors for extended periods of time. See App. to Brief in Opposition in No. 20A87, pp. 46–51 (declaration of Debra S. Blog, Director of the Div. of Epidemiology, NY Dept. of Health); Brief for the American Medical Association et al.

as *Amicus Curiae* 3–6 (Brief for AMA). Unlike religious services, which "have every one of th[ose] risk factors," Brief for AMA 6, bike repair shops and liquor stores generally do not feature customers gathering inside to sing and speak together for an hour or more at a time. *Id.*, at 7 ("Epidemiologists and physicians generally agree that religious services are among the riskiest activities"). Justices of this Court play a deadly game in second guessing the expert judgment of health officials about the environments in which a contagious virus, now infecting a million Americans each week, spreads most easily.

In truth, this case is easier than *South Bay* and *Calvary Chapel*. While the state regulations in those cases generally applied the same rules to houses of worship and secular institutions where people congregate in large groups, New York treats houses of worship far more favorably than their secular comparators. Compare, *e.g.*, *Calvary Chapel*, 591 U. S., at ___ (KAVANAUGH, J., dissenting) (slip op., at 8) (noting that Nevada subjected movie theaters and houses of worship alike to a 50-person cap) with App. to Brief in Opposition in No. 20A87, p. 53 (requiring movie theaters, concert venues, and sporting arenas subject to New York's regulation to close entirely, but allowing houses of worship to open subject to capacity restrictions). And whereas the restrictions in *South Bay* and *Calvary Chapel* applied statewide, New York's fixed-capacity restrictions apply only in specially designated areas experiencing a surge in COVID–19 cases.

The Diocese suggests that, because New York's regulation singles out houses of worship by name, it cannot be neutral with respect to the practice of religion. Application 22. Thus, the argument goes, the regulation must, *ipso facto*, be subject to strict scrutiny. It is true that New York's policy refers to religion on its face. But as I have just explained, that is because the policy singles out religious in-

stitutions for preferential treatment in comparison to secular gatherings, not because it discriminates against them. Surely the Diocese cannot demand laxer restrictions by pointing out that it is already being treated better than comparable secular institutions.[2]

Finally, the Diocese points to certain statements by Governor Cuomo as evidence that New York's regulation is impermissibly targeted at religious activity—specifically, at combatting heightened rates of positive COVID–19 cases among New York's Orthodox Jewish community. Application 24. The Diocese suggests that these comments supply "an independent basis for the application of strict scrutiny." Reply Brief in No. 20A87, p. 9. I do not see how. The Governor's comments simply do not warrant an application of strict scrutiny under this Court's precedents. Just a few Terms ago, this Court declined to apply heightened scrutiny to a Presidential Proclamation limiting immigration from Muslim-majority countries, even though President Trump had described the Proclamation as a "Muslim Ban," originally conceived of as a "'total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on.'" *Trump* v. *Hawaii*, 585 U. S. ___, ___ (2018) (slip op., at 27). If the

[2] JUSTICE KAVANAUGH cites *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 537–538 (1993), and *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 884 (1990), for the proposition that states must justify treating even noncomparable secular institutions more favorably than houses of worship. *Ante*, at 2 (concurring opinion). But those cases created no such rule. *Lukumi* struck down a law that allowed animals to be killed for almost any purpose other than animal sacrifice, on the ground that the law was a "'religious gerrymander'" targeted at the Santeria faith. 508 U. S., at 535. *Smith* is even farther afield, standing for the entirely inapposite proposition that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." 494 U. S., at 879 (internal quotation marks omitted).

President's statements did not show "that the challenged restrictions violate the 'minimum requirement of neutrality' to religion," *ante*, at 2 (quoting *Lukumi*, 508 U. S., at 533), it is hard to see how Governor Cuomo's do.

* * *

Free religious exercise is one of our most treasured and jealously guarded constitutional rights. States may not discriminate against religious institutions, even when faced with a crisis as deadly as this one. But those principles are not at stake today. The Constitution does not forbid States from responding to public health crises through regulations that treat religious institutions equally or more favorably than comparable secular institutions, particularly when those regulations save lives. Because New York's COVID–19 restrictions do just that, I respectfully dissent.

Canada (Attorney General) v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735

Supreme Court Reports

Supreme Court of Canada

Present: Laskin C.J. and Martland, Dickson, Beetz, Estey, McIntyre and Chouinard JJ.

1980: February 12 / 1980: October 7.

[1980] 2 S.C.R. 735 | [1980] 2 R.C.S. 735 | [1980] S.C.J. No. 99 | [1980] A.C.S. no 99

The Attorney General of Canada (Defendant), Appellant; and Inuit Tapirisat of Canada and the National Anti-poverty Organization (Plaintiffs), Respondents.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Case Summary

Administrative law — Decision of CRTC — Review by Governor in Council — Rules of natural justice and duty of fairness — Whether Governor in Council subject to judicial review National Transportation Act, R.S.C. 1970, c. N-17 as amended, s. 64 — Railway Act, R.S.C. 1970, c. R-2 as amended, ss. 320, 321(1) — Interpretation Act, R.S.C. 1970, c. I-23, s. 28.

After the approval by the CRTC of a new rate structure for Bell Canada, the plaintiffs-respondents appealed the CRTC decision to the Governor General in Council pursuant to s. 64(1) of the National Transportation Act. Their petitions having been denied, the respondents attacked the decisions of the Governor General in Council alleging that they had not been given a hearing in accordance with the principles of natural justice. This appeal arises from an application made in the Trial Division of the Federal Court for an order striking out the plaintiffs' statement of claim on the ground that the statement disclosed "no reasonable cause of action". The application was granted but the Federal Court of Appeal set aside the order of the Trial Division judge. Hence the appeal to this Court.

Held: The appeal should be allowed.

The substance of the question before this Court in this appeal is whether there is a duty to observe natural justice in, or at least a duty of fairness incumbent on, the Governor in Council in dealing with parties such as the respondents. upon their submission of a petition under s. 64(1) of the National Transportation Act.

Such petitions are to be contrasted with the mechanism for appeal to the Federal Court of Appeal on questions of law or jurisdiction provided in subs. (2) and following of s. 64. The courts have held that the rules of natural justice and the duty to act fairly depend on the circumstances of the case, the nature of the inquiry or investigation, the subject matter that is being dealt with, the consequences on the persons affected and so forth. The mere fact that a decision is made pursuant to a statutory power vested in the Governor in Council does not mean that it is beyond review if the latter fails to observe a condition precedent to the exercise of that power, whether such power is classified as administrative or quasi-judicial. However in this case, there is no failure to observe a condition precedent but rather the attack is directed at procedures adopted by the Governor in Council, once validly seized of the respondents' petitions. The very nature of the Governor in Council must be taken into account in assessing the technique of review which he adopted. The executive branch cannot be deprived of the right to resort to its staff, departmental personnel and ministerial members concerned with the various policy issues raised by a petition.

Under s. 64(1), the Governor in Council is not limited to varying orders made inter partes but he may act "of his motion"; he may act "at any time"; he may vary or rescind any order, decision, rule or regulation "in his discretion". Parliament has in s. 64(1) not burdened the Governor in Council with any standards or guidelines in the exercise of

its rate review function. Nor were procedural standards imposed or even implied. The discretion of the Governor in Council is complete provided he observes the jurisdictional boundaries of s. 64(1). Furthermore there is no need for the Governor in Council to give reasons for his decision, to hold any kind of hearing, or even to acknowledge the receipt of a petition. Where the executive branch has been assigned a function performable in the past by the Legislature itself and where the res or subject matter is not an individual concern, considerations different from Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police, [1979] 1 S.C.R. 311, arise. In such a circumstance the Court must fall back upon the basic jurisdictional supervisory role and in so doing construe the statute to determine whether the Governor in Council has performed its functions within the boundary of the parliamentary grant and in accordance with the terms of the parliamentary mandate.

Further, there is nothing in s. 64(1) to justify a variable yardstick for the application to that section of the principle of fairness according to the source of the information placed before the Governor in Council. Once the proper construction of the section is determined, it applies consistently throughout the proceedings before the Governor in Council.

Cases Cited

Ross v. Scottish Union and National Insurance Co. (1920), 47 O.L.R. 308; Wiseman v. Borneman, [1971] A.C. 297; Pearlberg v. Varty, [1972] 1 W.L.R. 534; Russell v. Duke of Norfolk, [1949] 1 All E.R. 109; Selvarajan v. Race Relations Board, [1976] 1 All E.R. 12; Border Cities Press Club v. Attorney General for Ontario, [1955] 1 D.L.R. 404; Martineau v. Matsqui Institution (No. 2), [1980] 1 S.C.R. 602; Re Davisville Investment Co. Ltd. and City of Toronto et al. (1977), 15 O.R. (2d) 553; Alliance des Professeurs Catholiques de Montréal v. Commission des Relations Ouvrières de la Province de Québec, [1953] 2 S.C.R. 140; Bates v. Lord Hailsham, [1972] 1 W.L.R. 1373; Essex County Council v. Minister of Housing (1967), 66 L.G.R. 23, referred to; Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police, [1979] 1 S.C.R. 311, considered.

APPEAL from a judgment of the Federal Court of Appeal [[1979] 1 F.C. 710, setting aside the order of the Trial Division. Appeal allowed and order of the Trial Division restored.
E.A. Bowie, and H.L. Molot, for the defendant, appellant. B.A. Crane, Q.C., and Andrew J. Roman, for the plaintiffs, respondents.

Solicitor for the defendant, appellant: R. Tassé, Ottawa. Solicitor for the plaintiffs, respondents: Andrew J. Roman, Toronto.

The judgment of the Court was delivered by

ESTEY J.

ESTEY J.:— This appeal relates to the proper disposition of an application made in the Trial Division of the Federal Court of Canada for an order pursuant to the rules of that Court striking out the statement of claim and dismissing this action on the grounds that the statement of claim discloses "no reasonable cause of action". Mr. Justice Marceau of the Trial Division of the Federal Court allowed the application, struck out the statement of claim, and dismissed the action. The Federal Court of Appeal set aside the order of the Trial Division although in doing so found that there was no basis for the relief sought in the statement of claim except with regard to one issue to which I will make reference later. The effect, therefore, of the disposition below is that if left undisturbed, the matter would go to trial on the basis of the pleadings as they now stand.

A brief outline of events leading up to these proceedings will be helpful. The Canadian Radio-television and Telecommunications Commission (herein for brevity referred to as the CRTC), in response to an application from Bell Canada, conducted lengthy hearings concerning a proposed increase in telephone rates to be charged to subscribers in the provinces of Ontario and Quebec and in the Northwest Territories. The plaintiffs/respondents participated in these hearings as intervenants throughout. In conducting these proceedings, the CRTC was proceeding under authority provided in the Railway Act, R.S.C. 1970, c. R-2 as amended, the National Transportation Act, R.S.C. 1970, c. N-17 as amended, and the Canadian Radio-television and Telecommunications

Commission Act, S.C. 1974-75-76, c. 49. We are not here concerned with the actual proceedings before the CRTC. The balance of the narrative can best be set out by quoting from the statement of claim which, because this is an application for dismissal, must be taken as proved.

5. On June 1st, 1977 the CRTC issued its decision in the matter, which decision denied some of the relief sought by each of the plaintiffs.

6. On June 10th, 1977 ITC [a respondent herein] appealed the decision of the CRTC to the Governor-in-Council pursuant to section 64 of the National Transportation Act, requesting the Governor-in-Council to set aside the relevant portion of the decision of the CRTC and to substitute its own order therefor. On June 29th, 1977 Bell Canada issued a reply thereto. While ITC was preparing its final reply to the reply of Bell Canada, the Governor-in-Council decided the appeal adversely to ITC. On July 14th, 1977 Order-in-Council P.C. 1977-2027 was made. ITC's final reply was never submitted.

7. On June 9th, 1977 NAPO [a respondent herein] also appealed the decision of the CRTC to the Governor-in-Council pursuant to section 64 of the National Transportation Act, to which Bell Canada prepared a reply dated June 29th, 1977. The Governor-in-Council decided this appeal adversely to NAPO without waiting to receive the final reply of NAPO. On July 14th, 1977 Order-in-Council P.C. 1977-2026 was made. NAPO's final reply was never submitted.

8. In arriving at its decision the Governor-in-Council, following customary practice, allowed no oral presentation but conducted the hearing entirely in writing. However, following the usual practice, the actual written submissions of the parties were not presented to the members of the Governor-in-Council but rather, evidence and opinions were obtained from officials of the Department of Communications as to:

   a) What that Department thought were the positions of the parties in the appeal;

   b) The position of the Department, or certain officials thereof, in relation to the facts and issues in the appeal;

   c) Whether either or both of the appeals should be allowed. None of this evidence or these opinions have ever been communicated to the appellants (plaintiffs herein).

9. The CRTC was requested by the Governor-in-Council to submit its views as to the disposition of the appeals. These views of the CRTC were neither made available to the appellants (plaintiffs herein) by the CRTC itself, nor by the Governor-in-Council.

10. The Minister of Communications, at the meeting of the Governor-in-Council at which the appeals were decided, both participated in the making of the decisions and submitted to the meeting her recommendation that the decision be that the appeals be disallowed, together with evidence and argument in support of this recommendation. The submissions of the Minister were a conduit for, were based upon, or at least included evidence, opinions and recommendations from the CRTC and from officials of her Department. Neither the content of these opinions and recommendations nor of any evidence or argument submitted in support thereof has ever been communicated to the appellants (plaintiffs herein), and hence the plaintiffs have been denied an opportunity to make a reply thereto; yet the two decisions and the resultant Orders-in-Council were made on the basis of the submissions of the Minister.

11. The plaintiffs submit that the defendant Governor-in-Council, when deciding a matter on a petition pursuant to section 64 of the National Transportation Act, is a Federal Board, Commission or other tribunal within the meaning of section 18 of the Federal Court Act.

12. The plaintiffs submit that the defendant Governor-in-Council was required to decide these appeals himself and to reach these decisions by means of a procedure which is fair and in accordance with the principles of natural justice.

13. The plaintiffs submit that in the circumstances, the Governor-in-Council held no hearing in any meaningful sense of that word, and that, therefore, the decisions and Orders-in-Council made pursuant

to them are nullities, Alternatively, it is submitted that if there was a hearing, the procedure employed did not result in a fair hearing, hence the decisions and orders resulting are nullities.

14. Accordingly, the plaintiffs pray for the following relief:

i) [This paragraph being a prayer for issuance of writ of certiorari was omitted as the respondents, after the judgment of the court of first instance was issued, no longer advanced this claim. We are now concerned only with para. 14(ii) of the prayer for relief in which a declaration is sought.]

ii) In the alternative, a declaration that the procedure employed by the Governor-in-Council in these two appeals resulted in:

a) no hearing having been held, or in the alternative,

b) such hearing as was held was not a full and fair hearing, in accordance with the principles of natural justice.

iii) Such other relief as the Court deems proper.

Paragraph 14(ii) does not, of course, when read literally, frame a proper request for declaration. There is no declaration sought with reference to any rights or obligations allegedly arising in the parties to the proceeding. The declaration is with reference to a failure to hold a hearing, or, in any case, "a full and fair hearing" without reference to any statutory or other right or duty relating to the parties. The declaration sought should have related to the inferentially alleged invalidity of the two Orders-in-Council issued by the Governor-in-Council in response to the petition of the respondents, and I proceed to dispose of this appeal on the basis that the prayer for relief was so framed.

As I have said, all the facts pleaded in the statement of claim must be deemed to have been proven. On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt": Ross v. Scottish Union and National Insurance Co. [(1920), 47 O.L.R. 308 (App. Div.).] Here Bell Canada in its statement of defence has raised the issue of law as to the position of the Governor in Council when acting under s. 64 of the National Transportation Act, supra, and the power and jurisdiction of the court in relation thereto. The issue so raised requires for its disposition neither additional pleadings nor any evidence. I therefore agree with respect with the judge of first instance that it is a proper occasion for a court to respond in the opening stages of the action to such an issue as this application raises.

The defendants other than Bell Canada comprise the occupant of the office of the Governor General of Canada at the time of the commencement of these proceedings and the then members of the federal Cabinet, collectively described in the style of cause as the Governor in Council. I note that the term is defined in the Interpretation Act, R.S.C. 1970, c. I-23, s. 28 in the following way:

> "Governor in Council", or "Governor General in Council" means the Governor General of Canada, or person administering the Government of Canada for the time being, acting by and with the advice of, or by and with the advice and consent of, or in conjunction with the Queen's Privy Council for Canada.

The more traditional procedure has been to join only the Attorney General of Canada as a party representing the Governor in Council. Exception was taken to the particular procedure in the motion for dismissal but the learned trial judge did not find it necessary to refer to the matter because he dismissed the action; and the Federal Court of Appeal did not deal with it. Because of the disposition I shall propose, the matter does not require an answer to the second request in the appellant's application wherein the applicant asks that the claim be struck out as against all named defendants other than the Attorney General of Canada.

The CRTC proceedings concerned the application by Bell Canada for approval under s. 320 of the Railway Act, supra, of those telephone tolls proposed to be charged by Bell Canada for its services in areas including the Northwest Territories. Section 321(1) of the Railway Act, supra, requires that "all tolls shall be just and reasonable ...". Subsection (2) prohibits "unjust discrimination" and subs. (3) authorizes the CRTC to determine "as a question of fact" whether or not there has been unjust discrimination or unreasonable preference. The National Transportation Act, supra, makes further provision for such hearings by the CRTC and for appeals therefrom; and

we are here principally concerned with s. 64 of that statute, as amended by R.S.C. 1970 (2nd Supp.), c. 10, s. 65 (Schedule II, Item 32). It provides as follows:

> 64. (1) The Governor in Council may at any time, in his discretion, either upon petition of any party, person or company interested, or of his own motion, and without any petition or application, vary or rescind any order, decision, rule or regulation of the Commission, whether such order or decision is made inter partes or otherwise, and whether such regulation is general or limited in its scope and application; and any order that the Governor in Council may make with respect thereto is binding upon the Commission and upon all parties.
>
> (2) An appeal lies from the Commission to the Federal Court of Appeal upon a question of law, or a question of jurisdiction, upon leave therefor being obtained from that Court upon application made within one month after the making of the order, decision, rule or regulation sought to be appealed from or within such further time as a judge of that Court under special circumstances allows, and upon notice to the parties and the Commission, and upon hearing such of them as appear and dire to be heard; and the costs of such application are in the discretion of that Court.

The foregoing statutes were enacted at a time when the approval of telephone tariffs was a function of the Canadian Transport Commission and its predecessors. By the Canadian Radio-television and Telecommunications Commission Act, supra, ss. 14, 17 and Schedule Items 2 and 5, the CRTC was assigned these responsibilities with reference to telephones and telegraphs.

The two respondent organizations participated "actively throughout the hearing" (to quote from the statement of claim) in the Bell Canada application "to increase the rates charged to customers". Not being satisfied with the decision of the CRTC, the two respondents had the alternative of appealing to the Federal Court of Appeal on a question of law or jurisdiction (s. 64(2), supra) or of filing a petition with the Governor in Council "to set aside the relevant portion of the decision of the CRTC and to substitute its own order therefor" (to quote from para. 6 of the statement of claim). The respondents elected to follow the latter course. The record does not reveal the contents of the respondents' petition and arguments, if arty, in support of their application to the Governor in Council. Paragraph 10 of the claim asserts, and I treat it for the purposes of these proceedings as factually correct, that the Governor in Council received recommendations from the Minister of Communications, together with evidence and argument in support; evidence, opinions, and recommendations from the CRTC; reports from officials of the Department of Communications; and the reply of Bell Canada to each of the respondents' petitions. The respondents did not receive from the Governor in Council the contents of the recommendations and the material described in para. 10 of the claim, supra, but apparently did receive a copy of the Bell Canada reply to the petition. The Governor in Council denied the petitions of the respondents before the respondents had filed their respective responses to Bell Canada. According to the allegations made in the statement of claim, the Governor in Council did not communicate to the respondents the substance of the material received from the Minister and other sources mentioned above and did not invite and consequently did not receive the respondents' comments on such material. No oral hearing occurred in the sense of a session at which the Governor in Council heard the petitioners and the various respondents, and indeed the respondents do not insist that such a procedure is prescribed by law and do not now press for an 'oral' hearing. Before this Court the respondents' position was principally founded on the failure of the Governor in Council (a) to receive the actual petitions of the respondents and (b) to afford the respondents the opportunity to respond to the case made against them by the Minister, the departmental officials and the CRTC. To a much lesser extent the respondents objected to the lack of opportunity to answer the response by Bell Canada to the petitions, presumably because the respondents had already encountered at length the arguments and submissions of Bell Canada during the CRTC hearings and had no doubt anticipated Bell Canada's position in their respective petitions to the Governor in Council.

In support of these objections to the course followed by the Governor in Council the respondents submit:

(a) that the Governor in Council acting under s. 64 is a quasi-judicial body or at least owes the respondents a duty of fairness;

(b) the duty includes disclosure to the respondent of submissions received from the CRTC;

(c) the respondents have the right to answer Bell Canada if it has introduced some new aspect or submission;

(d) the very minimum requirement is that the actual written submissions of the petitioners (respondents) must be placed before the Council and not a summary thereof prepared by officials;

(e) the Governor in Council is required by s. 64 to give notice to all "parties" even if it moves on its own initiative (as the subsection authorizes it to do) so as to give prior notice to all those who may be affected by the rules to be established by the Governor in Council.

I turn then to the wording of s. 64 itself. This provision finds its roots in the Railway Act, 1868, 31 Vict., c. 68, subss. 12(9) and 12(10), which gave to the Governor in Council the power to approve rates and tariffs for the haulage of freight by rail. In 1903 the task was given to the Board of Railway Commissioners. Section 64 assumed its present form in the Railway Act, 1903, 3 Edw. VII, c. 58, s. 44. All these statutes related to railway rates in the first instance and eventually were extended to cover telephone and telegraph rates. In the meantime provision had been made for telephone rates and charges in the private statutes of incorporation of the Bell Telephone Company of Canada, for example the 1892 Bell Telephone Company of Canada Act, 55-56 Vict., c. 67, s. 3:

> The existing rates shall not be increased without the consent of the Governor in Council.

In its present state, s. 64 creates a right of appeal on questions of "law or jurisdiction" to the Federal Court of Appeal and an unlimited or unconditional right to petition the Governor in Council to "vary or rescind" any "order, decision, rule or regulation" of the Commission. These avenues of review by their terms are quite different. The Governor in Council may vary any such order on his own initiative. The power is not limited to an order of the Commission but extends to its rules or regulations. The review by the Governor in Council is not limited to an order made by the Commission inter partes or to an order limited in scope. It is to be noted at once that following the grant of the right of appeal to the Court in subs. (2), there are five subsections dealing with the details of an appeal to the Court. There can be found in s. 64 nothing to qualify the freedom of action of the Governor in Council, or indeed any guidelines, procedural or substantive, for the exercise of its functions under subs. (1).

The substance of the question before this Court in this appeal is this: is there a duty to observe natural justice in, or at least a lesser duty of fairness incumbent on, the Governor in Council in dealing with parties such as the respondents upon their submission of a petition under s. 64(1)? It will be convenient first to consider briefly the nature of the duty to be fair in our law.

It has been said by Lord Reid in Wiseman v. Borneman [[1971] A.C. 297., at p. 308:

> Natural justice requires that the procedures before any tribunal which is acting judicially shall be fair in all the circumstances.

Such a broad statement depends for its validity upon the meaning to be ascribed to "any tribunal", and to the terms of its parent statute. This Court was concerned with such matters in Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police and the Attorney General for Ontario [[1979] 1 S.C.R. 311.]. A probationary constable was dismissed without being told why his services were being dispensed with and without being given an opportunity to respond or to defend his position. In the result the majority decision of this Court required in those circumstances that the probationary constable should have been treated fairly, not arbitrarily, even though he was not entitled to all the procedural protection accorded to a full constable. The Chief Justice writing for the majority stated at p. 325:

> What rightly lies behind this emergence is the realization that the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the result of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question.

The essence of the decision is found in the Chief Justice's remarks at p. 328:

> In my opinion, the appellant should have been told why his services were no longer required and given an opportunity, whether orally or in writing as the Board might determine, to respond. The Board itself, I would think, would wish to be certain that it had not made a mistake in some fact or circumstance which it deemed relevant to its determination. Once it had the appellant's response, it would be for the Board to decide on what action to take, without its decision being reviewable elsewhere, always premising good faith. Such a

> course provides fairness to the appellant, and it is fair as well to the Board's right, as a public authority to decide, once it had the appellant's response, whether a person in his position should be allowed to continue in office to the point where his right to procedural protection was enlarged. Status in office deserves this minimal protection, however brief the period for which the office is held.

The House of Lords in the earlier decision of Pearlberg v. Varty [[1972 1 W.L.R. 534.], had in effect found a presumption that the rules of natural justice apply to a tribunal entrusted with judicial or quasi-judicial functions but that no such presumption arises where the body is charged with administrative or executive functions. In the latter case courts will act on the presumption that Parliament had not intended to act unfairly and will "in suitable cases" imply an obligation in the body or person to act with fairness. See Lord Pearson at p. 547. Lord Hailsham L.C., combining the idea of fairness and natural justice, put it this way at p. 540:

> The doctrine of natural justice has come in for increasing consideration in recent years and the courts generally, and your Lordships' House in particular, have, I think rightly, advanced its frontiers considerably. But at the same time they have taken an increasingly sophisticated view of what it requires in individual cases.

Tucker L.J., thirty years earlier, came closer to our situation in this appeal when he said in Russell v. Duke of Norfolk [[1949] 1 All E.R. 109.], at p. 118:

> The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case.

The arena in which the broad rules of natural justice arose and the even broader rule of fairness now performs is described by Lord Denning M.R. in Selvarajan v. Race Relations Board [[1976] 1 All E.R. 12.] where His Lordship, after enumerating a number of authorities dealing with tribunals generally concerned with a lis inter partes in a variety of administrative fields, said at p. 19:

> In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it.

(Even in those instances the Court went on to add that such a body may adopt its own procedure, can employ staff for all preliminary work, but in the end must come to its own decision.)

Let it be said at the outset that the mere fact that a statutory power is vested in the Governor in Council does not mean that it is beyond review. If that body has failed to observe a condition precedent to the exercise of that power, the court can declare that such purported exercise is a nullity. In Wilson v. Esquimalt and Nanaimo Railway Company [[1922] 1 A.C. 202.], for example, the Privy Council considered the position of the Lieutenant-Governor of British Columbia under the Vancouver Island Settlers' Rights Act, 1904, Amendment Act, 1917, S.B.C. 1917, c. 71. The effectiveness of a Crown land grant issued by order of the Lieutenant-Governor in Council was contested on the grounds that the Lieutenant-Governor in Council had no "reasonable proof" before them that the grantees had improved the lands in question or occupied them with an intention to reside thereon. The Court of Appeal found that there was no such evidence and hence declared the Order in Council to be void. The Privy Council proceeded on the basis that before the Lieutenant-Governor in Council could make the grant in question, it must determine that the statutorily prescribed conditions had been met by the applicant for the grant. As here, the allegation was made that the owners did not have "an adequate opportunity" to show that there was no factual foundation for the grant made by the Lieutenant-Governor in Council. The Privy Council found against this submission stating at p. 213 through Duff J., sitting as a member of the Board:

> The respondents were given the fullest opportunity to present before the Lieutenant-Governor in Council everything they might to urge against the view that the depositions produced in themselves constituted "reasonable proof," and they had the fullest opportunity also of supporting their contention that the

> depositions alone, in the absence of cross-examination, ought not to be considered sufficient, and that further time should be allowed to enable them to prepare their case. The appointed authority for dealing with the matter, it must be remembered, was the Executive Government of the Province directly answerable to the Legislature, and their Lordships agree without hesitation with the majority of the Court of Appeal in holding as they explicitly decided upon the same facts in Dunlop's case, that the Lieutenant-Governor in Council was not bound to govern himself by the rules of procedure regulating proceedings in a Court of justice.
>
> It cannot be suggested that he proceeded without any regard to the rights of the respondents and the procedure followed must be presumed, in the absence of some conclusive reason to the contrary, to have been adopted in exercise of his discretion under the statute as a proper mode of discharging the duty entrusted to him. His decisions taken in the exercise of that discretion are, in their Lordships' opinion, final and not reviewable in legal proceedings.

The Privy Council also determined in the case that factual issues, including the "reasonableness" or "sufficiency" of the evidence, were exclusively for the Lieutenant-Governor whose decision would not be reviewable by a court if there was "some evidence in support of the application" (per Duff J. at p. 213).

The Ontario Court of Appeal was concerned with similar issues in Border Cities Press Club v. Attorney General for Ontario [[1955] 1 D.L.R. 404.]. The factual differences are such that it affords no direct assistance here. The statute prescribed conditions precedent to the exercise of the powers granted by the Legislature to the Lieutenant-Governor in Council in that "sufficient cause must be shown" before the letters patent in question might be cancelled. The trial court found that an unreasonable request had been made to the applicant by the province, no hearing or opportunity was afforded the applicant, and indeed no notice of the impending cancellation of the charter was given by the Lieutenant-Governor in Council. The Court of Appeal set aside the declaration that the Order in Council was void for procedural reasons applicable to the powers of the court of the first instance and for reasons not here relevant, but in doing so stated through Pickup C.J.O. at p. 412:

> I agree with the learned Judge in Weekly Court, for the reasons stated by him, that the power conferred is conditional upon sufficient cause being shown, and that without giving the respondent an opportunity of being heard, or an opportunity to show cause why the letters patent should not be forfeited, the Lieutenant-Governor in Council would not have jurisdiction under the statute to make the order complained of. In exercising the power referred to, the Lieutenant-Governor in Council is not, in my opinion, exercising a prerogative of the Crown, but a power conferred by statute, and such a statutory power can be validly exercised only by complying with statutory provisions which are, by law, conditions precedent to the exercise of such power.

It may be of interest to note that in approving the observations of the court below with respect to the statutory powers granted to the Lieutenant-Governor in Council, no express approval was given to the comment by the learned Judge in Weelky [sic] Court that in performing his function under the statute the Lieutenant-Governor in Council was required to act judicially.

However, no failure to observe a condition precedent is alleged here. Rather it is contended that, once validly seized of the respondents' petition, the Governor in Council did not fulfill the duty to be fair implicitly imposed upon him, the argument goes, by s. 64(1) of the National Transportation Act. While, after Nicholson, supra, and Martineau v. Matsqui Institution (No. 2) [[1980] 1 S.C.R. 602.], (decision of this Court handed down December 13, 1979) the existence of such a duty no longer depends on classifying the power involved as "administrative" or "quasi-judicial", it is still necessary to examine closely the statutory provision in question in order to discern whether it makes the decision-maker subject to any rules of procedural fairness.

Instructive in this regard is the decision of the Ontario Court of Appeal in Re Davisville Investment Co. Ltd. and City of Toronto et al. [(1977) 15 O.R. (2d) 553.], where judicial review of an Order in Council was sought. The applicant had unsuccessfully applied to the Ontario Municipal Board for review of an earlier Board decision. By petition the applicant sought to have the Lieutenant-Governor in Council rescind the earlier Board order and direct a public hearing by the Board "to correct the earlier denial thereof" by the Board. The statute under which the petition was filed provided that the Lieutenant-Governor in Council might confirm, vary or rescind the Board order or require the Board to hold a new hearing. Lacourciere J.A speaking on behalf of the majority, after describing the alternative

provision for appeal to the court on a question of law or jurisdiction, described the petition as "the political route to the Lieutenant-Governor in Council" and went on to state at pp. 555-56:

> The petition does not constitute a judicial appeal or review. It merely provides a mechanism for a control by the executive branch of Government applying its perception of the public interest to the facts established before the Board, plus the additional facts before the Council. The Lieutenant-Governor in Council is not concerned with matters of law and jurisdiction which are within the ambit of judicial control. But it can do what Courts will not do, namely, it can substitute its opinion on a matter of public convenience and general policy in the public interest. This is what was done by the Order in Council: if it was done without any error of law, or without defects of a jurisdictional nature, the Divisional Court had no power to interfere and properly dismissed the application before it.

At p. 557 His Lordship returns to the same point:

> Section 94 of The Ontario Municipal Board Act should not be construed restrictively as if it involved an inferior tribunal to which certain matters have been committed by the Legislature. I prefer to regard the power as one reserved by the legislative to the executive branch of Government acting on broad lines of policy. There is no reason to fetter and restrict the scope of the power by a narrow judicial interpretation.

In the Davisville proceeding the petition was treated as an appeal in writing and it may be noted that the respondent party filed a reply but no response thereto was made by the applicant. Blair J.A. dissented on the interpretation to be placed upon s. 94 as it related to the alternative courses open on such a petition to the Lieutenant-Governor in Council, but agreed with the majority of the court that the action of the Executive is reviewable only if the Lieutenant-Governor in Council acts outside the terms of the enabling statute.

It is not helpful in my view to attempt to classify the action or function by the Governor in Council (or indeed the Lieutenant-Governor in Council acting in similar circumstances) into one of the traditional categories established in the development of administrative law. The Privy Council in the Wilson case, supra, described the function of the Lieutenant-Governor as "judicial" as did the judge of first instance in the Border Cities Press proceedings, supra. However, in my view the essence of the principle of law here operating is simply that in the exercise of a statutory power the Governor in Council, like any other person or group of persons, must keep within the law as laid down by Parliament or the Legislature. Failure to do so will call into action the supervising function of the superior court whose responsibility is to enforce the law, that is to ensure that such actions as may be authorized by statute shall be carried out in accordance with its terms, or that a public authority shall not fail to respond to a duty assigned to it by statute.

I turn now to a consideration of s. 64(1) in light of those principles. Clearly the Governor in Council is not limited to varying orders made inter partes where a lis existed and was determined by the Commission. The Commission is empowered by s. 321 of the Railway Act, supra, and the section of the CRTC Act already noted to approve all charges for the use of telephones of Bell Canada. In so doing the Commission determines whether the proposed tariff of tolls is just and reasonable and whether they are discriminatory. Thus the statute delegates to the CRTC the function of approving telephone service tolls with a directive as to the standards to be applied. There is thereafter a secondary delegation of the rate-fixing function by Parliament to the Governor in Council but this function only comes into play after the Commission has approved a tariff of tolls; and on the fulfilment of that condition precedent, the power arises in the Governor in Council to establish rates for telephone service by the variation of the order, decision, rule or regulation of the CRTC. While the CRTC must operate within a certain framework when rendering its decisions, Parliament has in s. 64(1) not burdened the executive branch with any standards or guidelines in the exercise of its rate review function. Neither were procedural standards imposed or even implied. That is not to say that the courts will not respond today as in the Wilson case supra, if the conditions precedent to the exercise of power so granted to the executive branch have not been observed. Such a response might also occur if, on a petition being received by the Council, no examination of its contents by the Governor in Council were undertaken. That is quite a different matter (and one with which we are not here faced) from the assertion of some principle of law that requires the Governor in Council, before discharging its duty under the section, to read either individually or en masse the petition itself and all supporting material, the evidence taken before the CRTC and all the submissions and arguments advanced by the petitioner and responding parties. The very nature of the body must be taken into account in assessing the technique of review which has been adopted by the Governor in Council. The executive branch cannot be deprived of the right to resort to its staff, to departmental personnel concerned with

the subject matter, and above all to the comments and advice of ministerial members of the Council who are by virtue of their office concerned with the policy issues arising by reason of the petition whether those policies be economic, political, commercial or of some other nature. Parliament might otherwise ordain, but in s. 64 no such limitation had been imposed on the Governor in Council in the adoption of the procedures for the hearing of petitions under subs. (1).

This conclusion is made all the more obvious by the added right in s. 64(1) that the Governor in Council may "of his motion" vary or rescind any rule or order of the Commission. This is legislative action in its purest form where the subject matter is the fixing of rates for a public utility such as a telephone system. The practicality of giving notice to "all parties", as the respondent has put it, must have some bearing on the interpretation to be placed upon s. 64(1) in these circumstances. In these proceedings the respondent challenged the rates established by the CRTC and confirmed in effect by the Governor in Council. There are many subscribers to the Bell Canada services all of whom are and will be no doubt affected to some degree by the tariff of tolls and charges authorized by the Commission and reviewed by the Governor in Council. All subscribers should arguably receive notice before the Governor in Council proceeds with its review. The concluding words of subs. (1) might be said to support this view where it is provided that:

> ... any order that the Governor in Council may make with respect thereto is binding upon the Commission and upon all parties.

I read these words as saying no more than this: if the nature of the matter before the Governor in Council under s. 64 concerns parties who have been involved in proceedings before the administrative tribunal whose decision is before the Governor in Council by virtue of a petition, all such persons, as well as the tribunal or agency itself, will be bound to give effect to the order in council issued by the Governor in Council upon a review of the petition. Different terminology to the same effect is found in predecessor statutes and I see no basis for reading into this statute any different parliamentary intent from that which I have ascribed to these words as they are found now in s. 64(1).

It was pointed out that in the past the Governor in Council has proceeded by way of an actual oral hearing in which the petitioner and the contending parties participated (P.C. 2166 dated 24/10/23; and P.C. 1170 dated 17/6/27). These proceedings do no more than illustrate the change in growth of our political machinery and indeed the size of the Canadian community. It was apparently possible for the national executive in those days to conduct its affairs under the Railway Act, supra, through meetings or hearings in which the parties appeared before some or all of the Cabinet. The population of the country was a fraction of that today. The magnitude of government operations bears no relationship to that carried on at the federal level at present. No doubt the Governor in Council could still hold oral hearings if so disposed. Even if a court had the power and authority to so direct (which I conclude it has not) it would be a very unwise and impractical judicial principle which would convert past practice into rigid, invariable administrative procedures. Even in cases mentioned above, while the order recites it to have been issued on the recommendation of the responsible Minister, there is nothing to indicate that the parties were informed of such a recommendation prior to the conduct of the hearing.

While it is true that a duty to observe procedural fairness, as expressed in the maxim audi alteram partem, need not be express (Alliance des Professeurs Catholiques de Montréal v. Commission des Relations Ouvrières de la Province de Québec [[1953] 2 S.C.R. 140]), it will not be implied in every case. It is always a question of construing the statutory scheme as a whole in order to see to what degree, if any, the legislator intended the principle to apply. It is my view that the supervisory power of s. 64, like the power in Davisville, supra, is vested in members of the Cabinet in order to enable them to respond to the political, economic and social concerns of the moment. Under s. 64 the Cabinet, as the executive branch of government, was exercising the power delegated by Parliament to determine the appropriate tariffs for the telephone services of Bell Canada. In so doing the Cabinet, unless otherwise directed in the enabling statute, must be free to consult all sources which Parliament itself might consult had it retained this function. This is clearly so in those instances where the Council acts on its own initiative as it is authorized and required to do by the same subsection. There is no indication in subs. (1) that a different interpretation comes into play upon the exercise of the right of a party to petition the Governor in Council to exercise this same delegated function or power. The wording adopted by Parliament in my view makes this clear. The Governor in Council may act "at any time". He may vary or rescind any order, decision, rule or regulation "in his discretion". The guidelines mandated by Parliament in the case of the CRTC are not repeated expressly or by

implication in s. 64. The function applies to broad, quasi-legislative orders of the Commission as well as to inter-party decisions. In short, the discretion of the Governor in Council is complete provided he observes the jurisdictional boundaries of s. 64(1).

The procedure sanctioned by s. 64(1) has sometimes been criticized as an unjustifiable interference with the regulatory process: see Independent Administrative Agencies, Working Paper 25 of the Law Reform Commission of Canada (1980), at pp. 87-89. The Commission recommended that

> provisions for the final disposition by the Cabinet or a minister of appeals of any agency decisions except those requesting the equivalent of the exercise of the prerogative of mercy or a decision based on humanitarian grounds, should be abolished. (at p. 88)

Indeed it may be thought by some to be unusual and even counter-productive in an organized society that a carefully considered decision by an administrative agency, arrived at after a full public hearing in which many points of view have been advanced, should be susceptible of reversal by the Governor in Council. On the other hand, it is apparently the judgment of Parliament that this is an area inordinately sensitive to changing public policies and hence it has been reserved for the final application of such a policy by the executive branch of government. Given the interpretation of s. 64(1) which I adopt, there is no need for the Governor in Council to give reasons for his decision, to hold any kind of a hearing, or even to acknowledge the receipt of a petition. It is not the function of this Court, however, to decide whether Cabinet appeals are desirable or not. I have only to decide whether the requirements of s. 64(1) have been satisfied.

In reaching this conclusion concerning the procedures to be followed with reference to s. 64(1), I am assisted by the reasoning of Megarry J. in Bates v. Lord Hailsham [[1972] 1 W.L.R. 1973.] (cited by the majority judgment of this Court in Nicholson, supra). There the court was dealing with a challenge made to the legality of an order issued under the Solicitors Act abolishing a tariff of fees, on the grounds that the order should have been preceded by wider consideration by the rule enacting body. In refusing to intervene, Megarry J. stated at p. 1378:

> Let me accept that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness. Nevertheless, these considerations do not seem to me to affect the process of legislation, whether primary or delegated. Many of those affected by delegated legislation, and affected very substantially, are never consulted in the process of enacting that legislation; and yet they have no remedy ... I do not know of any implied right to be consulted or make objections, or any principle upon which the courts may enjoin the legislative process at the suit of those who contend that insufficient time for consultation and consideration has been given.

Both the Bates case, supra, and this one deal with delegated legislation, the difference being that the delegatee in this case is, in effect, the executive branch of government while in the Bates case it was a committee of judges and solicitors constituted under s. 56 of the Solicitors Act. Under s. 56(2) the committee could

> make general orders prescribing and regulating in such manner as they think fit the remuneration of solicitors in respect of non-contentious business.

The Governor in Council under s. 64(1) is entitled to vary decisions on telephone tariffs already made by another body, but this difference does not strike me as material. Nor does the fact that a citizen may invoke the review procedure of s. 64(1) via petition, while no comparable right existed under the English act, constitute a valid ground of distinction. There is only one review procedure under s. 64(1) though it may be triggered in two ways, i.e., by petition or by the Governor in Council's own motion. It is clear that the orders in question in Bates and the case at bar were legislative in nature and I adopt the reasoning of Megarry J. to the effect that no hearing is required in such cases. I realize, however, that the dividing line between legislative and administrative functions is not always easy to draw: see Essex County Council v. Minister of Housing [(1967), 66 L.R.G. 23.].

The answer is not to be found in continuing the search for words that will clearly and invariably differentiate between judicial and administrative on the one hand, or administrative and legislative on the other. It may be said that the use of the fairness principle as in Nicholson, supra, will obviate the need for the distinction in instances where the tribunal or agency is discharging a function with reference to something akin to a lis or where the agency may be described as an 'investigating body' as in the Selvarajan case, supra. Where, however, the executive branch has been assigned a function performable in the past by the Legislature itself and where the res or subject

matter is not an individual concern or a right unique to the petitioner or appellant, different considerations may be thought to arise. The fact that the function has been assigned as here to a tier of agencies (the CRTC in the first instance and the Governor in Council in the second) does not, in my view, alter the political science pathology of the case. In such a circumstance the Court must fall back upon the basic jurisdictional supervisory role and in so doing construe the statute to determine whether the Governor in Council has performed its functions within the boundary of the parliamentary grant and in accordance with the terms of the parliamentary mandate.

The precise terminology employed by Parliament in s. 64 does not reveal to me any basis for the introduction by implication of the procedural trappings associated with administrative agencies in other areas to which the principle in Nicholson, supra, was directed. The roots of that authority do not reach the area of law with which we are concerned in scanning s. 64(1).

As mentioned at the outset, the Federal Court of Appeal, speaking through Le Dain J., agreed with the trial division except with respect to the lack of opportunity for the respondents to respond to the reply forwarded to the Governor in Council by Bell Canada in the proceedings initiated by the petition of the respondents. Le Dain J. regarded this issue as being one of fact depending for its determination on the nature of Bell Canada's answer and the issues raised thereby, and on the reasonableness of the delay of two weeks before the issuance of the decision of the Governor in Council. His Lordship concluded:

> Since the question is essentially one of fact, one cannot say before the issue has been tried that the Statement of Claim does not disclose a reasonable cause of action.

For the reasons already given I am unable, with respect, to conclude that the issue of fairness arises in these proceedings on a proper construction of s. 64(1). If there were to be a distinction between rights arising with reference to submissions from government sources and rights arising with reference to the response from the rate applicant Bell Canada, more compelling reasons exist for disclosure of the intra-governmental communications as the respondents were, by this stage in these lengthy proceedings, very familiar with the application made by Bell Canada and the position taken by that company before the Commission by reason of the respondents' active participation in the hearings before the CRTC. In any case, I can discern nothing in s. 64(1) to justify a variable yardstick for the application to that section of the principle of fairness according to the source of the information placed before the Governor in Council for the disposition of the respondents' petition. The basic issue is the interpretation of this statutory provision in the context of the pattern of the statute in which it is found. In my view, once the proper construction of the section is determined, it applies consistently throughout the proceedings before the Governor in Council.

I would therefore allow the appeal and restore the order of the trial court. As to costs, the respondent has never asked for costs and the Attorney General of Canada at the hearing in this Court placed himself in the hands of the Court. In all the circumstances of these proceedings, I would not consider this to be a case for costs and I would award no costs to any party in this Court or in any of the courts below.

Appeal allowed.

Adams-Smith v. Christian Horizons, [1997] O.J. No. 2887

Ontario Judgments

Ontario Court of Justice (General Division)

Motions Court

Molloy J.

Heard: July 11, 1997.

Oral judgment: July 17, 1997.

Court File No. 97-CV- 122871

[1997] O.J. No. 2887 | 31 C.C.E.L. (2d) 238 | 14 C.P.C. (4th) 78 | 1997 CarswellOnt 3200

Between Jean Adams-Smith, plaintiff (responding party), and Christian Horizons, defendant (moving party)

(8 pp.)

Case Summary

Practice — Pleadings — Striking out pleadings — Grounds, failure to disclose a cause of action or defence — Particulars — Failure to provide, effect of.

This was an application to strike a statement of claim. The plaintiff alleged that the defendant employer breached a fiduciary duty owed to her as an employee. The defendant argued that the claim did not disclose a reasonable cause of action as the cause of action was not known to the law. It also argued that a minimum level of disclosure of particulars had not been met and that the most appropriate remedy was to strike the pleadings as a whole.
HELD: The application was dismissed.

While the plaintiff's claim was a novel argument, the area of fiduciary duty was one that was continually being developed by the courts. Therefore it could not be said that the claim could not possibly succeed at trial so as to justify the exercise of the discretion to strike under Rule 21 of the Ontario Rules of Civil Procedure. The references in the pleadings to the Occupational Health and Safety Act were not to be struck. While the plaintiff had not alleged that a cause of action as a result of a breach of the Act arose, the alleged breaches might be relevant to other causes of action and whether an appropriate standard of conduct had been met. However the pleadings as a whole were not sufficiently coherent and particularized to enable the defendant to plead to it. As the pleading as a whole needed to be amended, ordering particulars on a piece meal basis would not be sufficient. Paragraphs 8 to 23 of the claim were to be struck out with leave to amend. The plaintiff was directed to provide particulars in the amended pleadings.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rules 21, 25.06, 25.11.

Counsel

James Jagtoo, for the plaintiff (responding party). Adrian J. Miedema, for the defendant (moving party).

MOLLOY J. (orally)

1 The defendant moves to strike the Statement of Claim on various grounds. With respect to some of the claims, the allegation is that the claims do not disclose a reasonable cause of action and the motion to strike is under Rule 21. With respect to other aspects of the claim the defendant is moving under Rule 25.11 and 25.06 on the grounds that a minimum level of disclosure of particulars has not been met and that the appropriate remedy is to strike the pleading altogether, rather than to order particulars in a piecemeal fashion.

2 I will deal first with the allegations of no cause of action under Rule 21. The plaintiff alleges that the employer breached a fiduciary duty owed to her as employee. The defendant takes the position that this is a cause of action which is not known to the law, and should be struck on that basis. I agree that this is a novel argument. I am not aware of, and the parties have not been able to point me to, any case law that has recognized a breach of fiduciary duty by an employer as a cause of action. However, the Supreme Court of Canada has directed in Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959; 74 D.L.R. (4th) 321 that the power under Rule 21 to strike an action as disclosing no cause of action should be exercised with care and only in a situation where it is not possible that the claim can succeed at trial. A Statement of Claim should not be struck merely because the cause of action which is raised is novel. This is a novel cause of action. However the entire area of fiduciary duty is an emerging one and one which continues to be developed and fine tuned by the courts. We have yet to see how the concept will be affected by decisions from the Supreme Court of Canada such as the Lac Minerals v. Corona decision, [1989] 2 S.C.R. 574. Therefore I am not prepared to say that the breach of fiduciary duty cause of action cannot possibly succeed. It is possible that a cause of action can be founded on this concept. Therefore that aspect of the defendant's motion is dismissed.

3 With respect to the Occupational Health and Safety Act claim, the plaintiff is not alleging that she has a cause of action as a result of a breach of the Occupational Health and Safety Act. However, breaches of that Act are pleaded without any particular reference to how they are relevant. Counsel for the plaintiff argues that the Occupational Health and Safety Act breaches are relevant to show the standard of conduct or unacceptable level of standard of conduct by the employer. It is clear on the case law that a breach of a statute or of a statutory duty does not create a cause of action, either under the statute or at common law: See Board of Governors of Seneca College of Applied Arts and Technology v. Bhadauria (1981), 124 D.L.R. (3d) 193 (S.C.C.), see also Canada v. Saskatchewan Wheat Pool, [1983] 1 S.C.R. 205 (S.C.C.). However the breach of a statutory duty may be relevant to components of other causes of action and relevant to whether an appropriate standard of conduct has been met: See Saskatchewan Wheat Pool, supra. Therefore the defendant's motion to strike this paragraph (that is paragraph 17 of the Statement of Claim) as disclosing no cause of action is dismissed.

4 The balance of the defendant's motion to strike relates to a lack of particularity. Here I am in agreement with the position taken by counsel for the defendant, that the pleading as a whole is not sufficiently coherent and particularized to enable the defendant to plead to it. For example, breach of contract is alleged. However, in the portion of the claim that deals with particulars of the contract, a written contract is first alleged. The plaintiff then goes on to plead that this contract, and other written contracts which replaced it, are invalid and unenforceable and relies on the doctrine of non est factum. The plaintiff then goes on to plead a course of conduct in her employment which includes hours of work and hourly rates of pay which are not consistent with the written contract she has alleged nor with the schedule that she has attached showing what she was actually paid. It is not clear whether this allegation relates to an oral agreement which varies the written contract or whether it is an allegation of a breach of the written contract. Also, it is not clear whether the claim here is truly that the written contract is invalid, unconscionable or unenforceable for whatever reasons, or whether it is alleged that the written contract is binding and has been breached. It is difficult to simply order particulars of these kinds of deficiencies and still come out with a coherent and understandable pleading. It is far preferable, in my view, to strike the pleading with leave to amend, so that a logical and coherent pleading can be delivered which sets out clearly and precisely the nature of the contract, whether it was in writing or oral and the approximate dates of the contract, who the parties were, if there were oral representations, who made them, and then set out the nature of the breach, whether it is a breach of the written contract or a breach of oral amendments to the written contract, or whatever. If there are alternative claims

with respect to the contract being invalid as opposed to breached, then they should be expressed as alternative claims.

5 With respect to the breach of fiduciary duty cause of action and the unjust enrichment claims, and in this regard I am mainly referring to the breach of fiduciary duty, the main difficulty is that there is no identification of which factual allegations relate to which causes of action. It may be the case that some factual components will relate to more than one cause of action or even all of the causes of action, but this is not apparent from the pleading as it is presently constituted. It would be of great assistance if the Statement of Claim was organized in categories identifying specifically what causes of action are alleged and which facts are pleaded to support each of those causes of action.

6 The same applies to the Occupational Health and Safety Act. I have dismissed the defendant's motion based on the argument that this paragraph should be struck entirely. However it is necessary to tie the breach or alleged breach of the Occupational Health and Safety Act to some aspect of the cause of action or causes of action. Also the particular sections of the Occupational Health and Safety Act which are alleged to have been breached should be pleaded with specificity.

7 In addition to these general matters there were some items of particulars which were identified in the Notice of Motion. Initially, there was a long list of them, but counsel managed to whittle that down to five subparagraphs of paragraph 2 in the Notice of Motion.

8 In subparagraph (v), particulars of "minimum sleep" were required, as referred to in paragraph 13 of the Statement of Claim. In my view this is not necessary for the defendant to plead and can be obtained on discovery. Also this not a matter which would be easily particularized. On balance, I find that the plaintiff does not need to provide particulars of this particular allegation.

9 With respect to subparagraph (ix), the defendant seeks particulars of the "numerous complaints" referred to by the plaintiff in paragraph 15 of the Statement of Claim. I believe this point is well taken. It may well be that the plaintiff cannot remember each and every incident of complaint or that she has not kept full records of them, but she must provide particulars of the information she does have. For example, if there are written complaints, the dates of those complaints should be itemized and the person to whom they were directed. If the complaints were oral, that should be stated as well as the person to whom the complaint was directed. The plaintiff should also provide the approximate date or range of dates, and in each of those situations, whether or not there was a response and what that response was from the defendant.

10 Subparagraphs (x) and (xii) of paragraph 2 both relate to the production of documentation to substantiate allegations made in the Statement of Claim. Those documents are not required by way of particulars and are not needed for the purpose of the defendant pleading. Therefore the defendant's request for particulars of these two subparagraphs is dismissed.

11 With respect to subparagraph (xiv), the defendant seeks particulars of the allegations of "deliberate, calculated and malicious" actions by the defendant as alleged in paragraph 21 of the Statement of Claim. In my view paragraph 21 of the Statement of Claim already provides the particulars of those actions and states that the actions referred to are the defendant's leaving the plaintiff at risk to her charges, who were known to have aggressive tendencies and against whom there was no protection in law. If in fact those are the only facts relied upon with respect to the punitive damages and with respect to the allegation of deliberate calculated and malicious conduct, then the requirements for particulars is met. The paragraph is plain enough on its face.

12 As I have already said, I do not consider this to be a situation in which ordering particulars on a piece meal basis would be sufficient. The pleading as a whole needs to be amended. I am therefore striking out paragraphs 8 to 23 of the Statement of Claim with leave to amend.

13 The plaintiff is directed to provide particulars in the amended pleading of the items set out in paragraph 2 (b) (ix) of the Statement of Claim. In other respects the defendant's motion is dismissed.

MOLLOY J.

Air Canada v. British Columbia (Attorney General), [1986] 2 S.C.R. 539

Supreme Court Reports

Supreme Court of Canada

Present: Dickson C.J. and Beetz, McIntyre, Chouinard, Wilson, Le Dain and La Forest JJ.

1985: November 4 / 1986: November 27.

File No: 18089.

[1986] 2 S.C.R. 539 | [1986] 2 R.C.S. 539 | [1986] S.C.J. No. 68 | [1986] A.C.S. no 68 | 32 D.L.R. (4th) 1

Air Canada, appellant; v. The Attorney General of British Columbia, respondent.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Crown — Proceedings against the Crown — Petition of right — Fiat — Appellant seeking redress from Crown for benefits obtained pursuant to an invalid statute — Fiat refused by Lieutenant-Governor on advice of Provincial Attorney General — Whether mandamus may be issued to direct Attorney General to advise Lieutenant-Governor to grant fiat — Crown Proceeding Act, R.S.B.C. 1979, c. 86.

Appellant had in a separate action sought a declaration that the British Columbia Gasoline Tax Act was ultra vires and a declaration that it was entitled to be reimbursed all monies paid after August 1, 1974. For the monies paid before that date, however, appellant, in conformity with the Crown Proceeding Act, issued a petition of right seeking substantially the same relief. This Act preserved the traditional method of suit against the Crown by way of petition of right with respect to causes of action that arose before August 1, 1974, and required those seeking redress from the Crown to obtain a fiat. The provincial Attorney General advised the Executive Council to recommend that the Lieutenant Governor deny the fiat and he did. Appellant then applied to the Supreme Court of British Columbia pursuant to the Judicial Review Procedure Act for an order in the nature of mandamus to compel the Attorney General to consider the petition of right and then to advise the Lieutenant Governor whether to grant his fiat. The application was dismissed and the judgment affirmed by a majority of the Court of Appeal. This appeal is to determine whether an order may be issued directing a provincial Attorney General to advise the Lieutenant Governor to grant a fiat to a petition of right under which a claim is made for the return of money [page540] alleged to have been levied by the province under an unconstitutional statute.

Held: The appeal should be allowed and an order in the nature of mandamus should be issued directing the Attorney General of British Columbia to advise the Lieutenant-Governor to grant his fiat to the petition of right.

It has been established that a statute cannot permit the retention of monies obtained under an unconstitutional statute. Consequently, a similar result cannot be attained indirectly under a purported exercise of a discretion to refuse a fiat, whatever may be the legal foundation of that supposed discretion. The discretion to grant or refuse a fiat, like other executive powers, must be exercised in conformity with the dictates of the Constitution, and the Crown's advisers must govern themselves accordingly. Any other course would violate the federal structure of the Constitution. Under the British Columbia Attorney General Act, the Attorney General is the Lieutenant-Governor's principal legal adviser and the legal member of the Executive Council. Though his duty, technically, is simply to advise, the issue here was a legal one and one to which there was only one answer under the Constitution. The Attorney General was bound to advise the Lieutenant-Governor to grant his fiat, and the Executive Council was in turn bound to accept that advice.

Cases Cited

Applied: Amax Potash Ltd. v. Government of Saskatchewan [1977] 2 S.C.R. 576; referred to: Thorson v. Attorney General of Canada, [1975] 1 S.C.R. 138; British Columbia Power Corp. v. British Columbia Electric Co., [1962] S.C.R. 642; Ryves v. Duke of Wellington (1846), 9 Beav. 579, 50 E.R. 467; In Re Nathan (1884), 12 Q.B.D. 461; Orpen v. Attorney-General for Ontario, [1925] 2 D.L.R. 366; Bombay and Persia Steam Navigation Co. v. MacLay, [1920] 3 K.B. 402; Irwin v. Grey (1862), 3 F. & F. 635, 176 E.R. 290; Attorney General of Canada v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735; Teh Cheng Poh v. Public Prosecutor, Malaysia, [1980] A.C. 458; Padfield v. Minister of Agriculture, Fisheries & Food, [1968] A.C. 997.

[page541]

Statutes and Regulations Cited

Attorney General Act, R.S.B.C. 1979, c. 23, s. 2(a), (e). Crown Procedure Act R.S.B.C. 1960, c. 89 [rep. 1974, c. 24, s. 16], s. 4. Crown Proceeding Act, R.S.B.C. 1979, c. 86. Gasoline Tax Act, R.S.B.C. 1979, c. 152. Interpretation Act, R.S.B.C. 1979, c. 206, s. 29 "Lieutenant Governor", "Lieutenant Governor in Council". Judicial Review Procedure Act, R.S.B.C. 1979, c. 209.

Authors Cited

Edwards, J.Ll.J. The Law Officers of the Crown. London: Sweet & Maxwell, 1964. Halsbury's Laws of England, vol. 9, 2nd ed. London: Butterworths, 1933.

APPEAL from a judgment of the British Columbia Court of Appeal (1983), 47 B.C.L.R. 341, 150 D.L.R. (3d) 653, [1983] 6 W.W.R. 689, dismissing appellant's appeal from a judgment of Callaghan J. (1982), 41 B.C.L.R. 41, 141 D.L.R. (3d) 530, [1982] 6 W.W.R. 415, dismissing its petition presented pursuant to the Judicial Review Procedure Act of British Columbia. Appeal allowed.
D.M.M. Goldie, Q.C., and W.S. Martin, for the appellant. E.R.A. Edwards, Q.C., and Robert Vick Farley, for the respondent.

[Quicklaw note: An errata was published at [1989] 1-A S.C.R., page iv. The change indicated therein has been made to this document and the text of the errata as published in S.C.R. is appended to the judgment.]

The judgment of the Court was delivered by

LA FOREST J.

1 The issue in this case is whether an order may be issued directing a provincial Attorney General to advise the Lieutenant Governor to grant a fiat to a petition of rights under which a claim is made for the return of money alleged to have been levied by the province under an unconstitutional statute.

2 In July 1980, the appellant, Air Canada, commenced an action in the Supreme Court of British Columbia seeking a declaration that the Gasoline Tax Act, R.S.B.C. 1979, c. 152, does not apply to Air Canada or is ultra vires the province, an accounting of all monies paid under that Act by [page542] Air Canada and a declaration that the appellant is entitled to be repaid all monies paid after August 1, 1974. This action represented only a portion of Air Canada's claim. It had been paying taxes under the Act since 1937. However, as regards causes of action that arose before August 1, 1974, the Crown Proceeding Act, R.S.B.C. 1979, c. 86, preserved the traditional method of suit against the Crown by way of petition of right which requires those seeking redress from the Crown to obtain a fiat. In conformity with this procedure, Air Canada in July 1981 issued a petition of right seeking substantially the same relief as in the action described above, but for monies paid before August 1, 1974. It is with this petition of rights that we are concerned on this appeal.

3 The petition was duly served on the Provincial Secretary and a copy was forwarded to the provincial Attorney General. The Attorney General advised the Executive Council to recommend that the Lieutenant Governor deny the

fiat. The Provincial Secretary then forwarded a copy of the petition to the Lieutenant Governor along with the following advice:

> After due deliberation and on the recommendation of the Attorney General, the Executive Council humbly advises that this is not an appropriate case for the granting of a Fiat. The Executive Council has instructed me to transmit this advice.

Pursuant to this advice, the Lieutenant Governor accordingly declined to grant the fiat and the Provincial Secretary communicated this fact to Air Canada.

4 Air Canada then applied to the Supreme Court of British Columbia pursuant to the Judicial Review Procedure Act, R.S.B.C. 1979, c. 209, for:

(a) an order in the nature of mandamus compelling the Attorney General to consider the petition of right and then advise the Lieutenant-Governor whether to grant his fiat;

[page543]

(b) a declaration that the Attorney General has omitted to exercise his statutory power of decision to advise the Lieutenant-Governor and that he has a duty to do so;

(c) a direction to the Attorney General to reconsider and determine whether the Lieutenant-Governor should be advised to grant his fiat together with reasons.

5 Air Canada's application was heard by Callaghan J. who dismissed it in a judgment pronounced on October 1, 1982: 41 B.C.L.R. 41, 141 D.L.R. (3d) 530, [1982] 6 W.W.R. 415. Air Canada then appealed to the British Columbia Court of Appeal which,by majority (Taggart and Aikins JJ.A., Anderson J.A. dissenting), dismissed the appeal: (1983), 47 B.C.L.R. 341, 150 D.L.R. (3d) 653, [1983] 6 W.W.R. 689. Air Canada was then granted leave to appeal to this Court, [1983] 2 S.C.R. v.

6 In this Court, counsel for Air Canada did not press the arguments regarding judicial review of statutory powers, but essentially sought an order in the nature of mandamus, which formed the basis of the judgment of Anderson J.A., the dissenting judge in the Court of Appeal. Since I am substantially in agreement with Anderson J.A., I need not enter into a discussion of the other issues raised in the case.

7 The applicable law on this issue evolved from the well established principle that neither Parliament nor a legislature can preclude a determination of the constitutional validity of legislation. That principle was thus expressed by Laskin J. (as he then was) in Thorson v. Attorney General of Canada, [1975] 1 S.C.R. 138, at p. 151:

> The question of the constitutionality of legislation has in this country always been a justiciable question. Any attempt by Parliament or a Legislature to fix conditions precedent, as by way of requiring consent of some public officer or authority, to the determination of an issue of constitutionality of legislation cannot foreclose the Courts merely because the conditions remain unsatisfied.

[page544]

8 I cannot believe that if there was no Crown Proceeding Act permitting suits against the Crown, a court could, where the case was not frivolous, refuse access to the court to test the constitutionality of a statute simply because a fiat was refused. What is sought here, however, is more involved. The action is an attempt to obtain redress from the Crown for benefits obtained pursuant to an invalid statute.

9 This Court took an important step in that direction in British Columbia Power Corp. v. British Columbia Electric Co., [1962] S.C.R. 642. There the plaintiff sought the appointment of a receiver over property owned by a corporation whose common shares had been vested in the Crown in right of the province by a statute whose constitutional validity was contested. The Crown resisted the appointment of the receiver on the ground that this would affect its property and interests. This Court, however, rejected the Crown's contention. Kerwin C.J., giving the majority judgment, set forth the following principles at pp. 644-45:

> In a federal system, where legislative authority is divided, as are also the prerogatives of the Crown, as between the Dominion and the Provinces, it is my view that it is not open to the Crown, either in right of Canada or of a Province, to claim a Crown immunity based upon an interest in certain property, where its very interest in that property depends completely and solely on the validity of the legislation which it has itself passed, if there is a reasonable doubt as to whether such legislation is constitutionally valid. To permit it to do so would be to enable it, by the assertion of rights claimed under legislation which is beyond its powers, to achieve the same results as if the legislation were valid.

10 In Amax Potash Ltd. v. Government of Saskatchewan, [1977] 2 S.C.R. 576, this Court went further and held ultra vires a statute that prohibited the recovery of taxes paid under protest pursuant to an unconstitutional statute. Dickson J. (as he then was) succinctly put the principle in these terms at p. 592:

> The principle governing this appeal can be shortly and simply expressed in these terms: if a statute is found to be ultra vires the legislature which enacted it, legislation [page545] which would have the effect of attaching legal consequences to acts done pursuant to that invalid law must equally be ultra vires because it relates to the same subject-matter as that which was involved in the prior legislation. If a state cannot take by unconstitutional means it cannot retain by unconstitutional means.

11 Let us examine the present situation in the light of these principles. Until the passage of the Crown Proceeding Act, the traditional way to sue the Crown, we saw, was by petition of right, but no court would take cognizance of a case until the Lieutenant Governor had issued his fiat. This traditional procedure has been retained in British Columbia in respect of causes of action against the Crown that arose before August 1, 1974. The present is such an action. The Lieutenant Governor has refused his fiat. Thus, if this refusal is constitutionally permissible, what Amax declared was not possible has been effectively, if indirectly, accomplished by the exercise of the Crown's prerogative power to refuse a fiat.

12 In my view, if even a statute cannot permit the retention of monies obtained under an unconstitutional statute, that result cannot be achieved under a purported exercise of a discretion to refuse a fiat, whatever may be the legal foundation of that supposed discretion. All executive powers, whether they derive from statute, common law or prerogative, must be adapted to conform with constitutional imperatives.

13 There was considerable discussion in the courts below regarding the extent of the discretion of the Lieutenant Governor to grant or deny his fiat. There are indications in some cases that there is, in effect, a duty to grant the fiat unless a claim is frivolous; see Ryves v. Duke of Wellington (1846), 9 Beav. 579, 50 E.R. 467, at p. 475; In re Nathan (1884), 12 Q.B.D. 461, at p. 479. The fiat, Bowen L.J. states in the latter case, is granted as a matter of "invariable grace" by the Crown and it is the constitutional duty of his adviser not to advise refusal of a fiat unless the claim is frivolous. In Orpen v. Attorney General for Ontario, [1925] 2 D.L.R. 366 (Ont. H.C.) at p. 372, however, [page546] Riddell J. explained these remarks as simply reflecting the usual practice. The constitutional duty of the sovereign's advisers in such a case, he stated, is to act conscientiously in their best judgment (p. 375).

14 I need not consider which of these views should prevail in ordinary cases. For whatever discretion there may be in a non-constitutional matter, in a case like the present, the discretion must be exercised in conformity with the dictates of the Constitution, and the Crown's advisers must govern themselves accordingly. Any other course would violate the federal structure of the Constitution. Assuming there might still be a residual power to refuse a fiat in a truly frivolous case, no one can claim this is such a case, and no such contention was put forward.

15 It does not follow, as Taggart J.A. suggested, that if the foregoing constitutional position is correct, then there is no need for Air Canada to seek a fiat. The principle I have enunciated must be applied within the context of the institutional arrangements provided by law. The only machinery provided for obtaining a judgment for money against the Crown in circumstances like the present is, by virtue of the Crown Proceeding Act, by petition of rights, and to pursue a claim in that way, a fiat is necessary.

16 To achieve this result, Air Canada seeks to obtain an order by way of mandamus directing the Attorney General to advise the Lieutenant-Governor to grant a fiat because the Lieutenant-Governor acts on his advice in considering

the grant of a fiat. This power of the Attorney General is exercised in conformity with s. 2(a) and (e) of the Attorney General Act, R.S.B.C. 1979, c. 23, which read as follows:

> 2. The Attorney General
>
> [page547]
>
> (a) is the official legal adviser of the Lieutenant Governor and the legal member of the Executive Council;
>
> . . .
>
> (e) is entrusted with the powers and charged with the duties which belong to the office of the Attorney General and Solicitor General of England by law or usage, so far as the same powers and duties are applicable to the Province, and also with the powers and duties which, by the laws of Canada and of the Province to be administered and carried into effect by the government of the Province, belong to the office of the Attorney General and Solicitor General;

These provisions make the Attorney General the official legal adviser of the Lieutenant-Governor and the legal member of the Executive Council and, by s. 2(e), entrusts him with the duties of the Attorney General of England as far as these are applicable to the province. This includes the right to advise the Crown regarding the grant of a fiat; see J.Ll.J. Edwards, The Law Officers of the Crown (1964), at p. 154; In re Nathan, supra, at pp. 468, 475, 479; Halsbury's Laws of England, 2nd ed. 1933, vol. 9, para. 1180, note (c). It is true that some cases mention that in England the sovereign acted on the advice of the Secretary of State; see Bombay and Persia Steam Navigation Co. v. MacLay, [1920] 3 K.B. 402, at p. 408; Irwin v. Grey (1862), 3 F. & F. 635, 176 E.R. 290 (C.P.), at p. 291. But as is obvious from the latter case, the Secretary's duties in this area were essentially to receive petitions of right and, after seeking the opinion of the law officers thereon, to advise Her Majesty accordingly.

17 A similar position prevails in British Columbia. There the Provincial Secretary is assigned the task of receiving petitions for transmittal to the Lieutenant Governor for consideration. This is done by s. 4 of the Crown Procedure Act, R.S.B.C. 1960, c. 89, which reads as follows:

> 4. (1) The petition shall be left with the Provincial Secretary, in order that the same may be submitted to the Lieutenant-Governor for his consideration, and in [page548] order that the Lieutenant-Governor, if he thinks fit, may grant his fiat that right be done.
>
> (2) No fee or sum of money shall be payable by the suppliant on so leaving the petition, or upon his receiving back the same.

18 As Taggart and Anderson JJ.A. in the Court of Appeal explain, however, the Provincial Secretary seeks the advice of the Attorney General, the legal member of the Executive Council, before referring the matter to the Executive Council. The Executive Council then advises the Lieutenant Governor as to the manner in which he should dispose of the matter on the recommendation of the Attorney General.

19 From the foregoing, it seems to me that the appropriate officer against whom an order by way of mandamus should issue in this case is the Attorney General. He is the Lieutenant Governor's principal legal adviser, and I am inclined to agree with Anderson J.A.'s view that, by virtue of s. 2 of the Attorney General Act, he is entrusted with the sole power and duty to advise the Lieutenant Governor whether or not to issue a fiat. That was the English position, which s. 2(e) adopts. One must make a distinction here between the Lieutenant Governor and the Lieutenant-Governor in Council. The latter includes the Executive Council; the former does not; see Interpretation Act, R.S.B.C. 1979, c. 206, s. 29. It is to the Lieutenant-Governor alone that the power to issue a fiat is given by the Crown Procedure Act. That being so, as Anderson J.A. notes, there is no legal scope for the involvement of the Executive Council. The referral to the Council becomes a mere formality.

20 It is not really necessary, however, to pronounce definitively on the latter issues. Even on the assumption that under ordinary circumstances there is a meaningful role for the Executive Council to play in deciding whether or not

a fiat should issue, I would retain the same view. Technicality must be tempered with realism. The Attorney General is the Lieutenant Governor's principal legal adviser and the legal member of the Executive Council. Though his duty is technically simply to advise, the issue here is a legal one, one moreover to which under the Constitution, there is only [page549] one answer. In giving advice, the Attorney General must conform to the requirements imposed by the federal structure of the Constitution. He is bound to advise the Lieutenant-Governor to grant his fiat. I cannot accept the proposition advanced by Callaghan J. and the majority of the Court of Appeal to the effect that the Attorney General complied with his duty to advise the Lieutenant Governor when he advised him to refuse a fiat.

21 The Executive Council is in turn bound to accept the advice of the Attorney General in a case like the present. For, even if it has a right to advise the Lieutenant Governor, it, too, is under an obligation to exercise that right consistently with constitutional imperatives. In any event, one could look at the order sought as being directed to the Attorney General in a representative capacity; see Attorney General of Canada v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735.

22 Finally, I would note that there is precedent for the kind of order sought here. Teh Cheng Poh v. Public Prosecutor Malaysia, [1980] A.C. 458 (P.C.) stands for the proposition that mandamus lies to compel a minister to properly advise the executive where there has been a constitutional abuse of power by the Crown; see also Padfield v. Minister of Agriculture, Fisheries & Food, [1968] A.C. 997 (H.L.)

23 Finally, counsel for the respondent argued that a judgment along these lines would preclude the province's relying not only on Crown immunity, but also on limitation periods, retroactive remedial legislation and mutual mistake of law to retain monies collected under ultra vires legislation. While I do not wish to enter into these issues at any length, I do not think this conclusion necessarily follows. There is a difference between an executive act directly interfering with a recourse to the courts for the recovery of monies under an allegedly unconstitutional statute and relying on general principles of law like limitation periods which are aimed at different purposes, in that case, [page550] barring stale claims. The significance of this distinction is best left to be raised in the principal action when the matter, which was simply touched upon in this Court, can be examined in depth.

24 For these reasons, I would allow the appeal set aside the decision of the judge who heard the application, reverse the judgment of the Court of Appeal of British Columbia, and direct that an order in the nature of mandamus issue directing the Attorney General to advise the Lieutenant Governor to grant his fiat to the petition of right in this case.

* * * * *

Errata, published at [1989] 1-A S.C.R., page iv

[1986] 2 S.C.R. p. 539, line e-1 of the English version. Read "separate action" instead of "separation action".

End of Document

Arsenault v. Canada, [2009] F.C.J. No. 896

Federal Court Judgments

Federal Court of Appeal

Charlottetown, Prince Edward Island

Nadon, Blais and Pelletier JJ.A.

Heard: June 10, 2009.

Judgment: August 11, 2009.

Docket A-124-08

[2009] F.C.J. No. 896 | [2009] A.C.F. no 896 | 2009 FCA 242 | 395 N.R. 377 | 179 A.C.W.S. (3d) 813

Between Her Majesty the Queen, Appellant, and Robert Arsenault, Joseph Aylward, Wayne Aylward, James Buote, Richard Blanchard, Executor of the Estate of Michael Deagle, Bernard Dixon, Clifford Doucette, Kenneth Fraser, Terrance Gallant, Devin Gaudet, Peter Gaudet, Rodney Gaudet, Taylor Gaudet, Casey Gavin, Jamie Gavin, Sidney Gavin, Donald Harper, Carter Hutt, Terry Llewellyn, Ivan MacDonald, Lance MacDonald, Wayne MacIntyre, David McIsaac, Gordon MacLeod, Donald Mayhew, Austin O'Meara and Boyd Vuozzo, Respondents

(13 paras.)

Case Summary

Appeal by the Crown from an order of a motions judge setting aside a Prothonotary's order striking out the respondents' action for damages for breach of agreements respecting their snow crab fishing quotas, as result of the Minister's reallocation of the snow crab quota for other purposes. Although the respondents did not allege that this reallocation was unauthorized, they argued that they were entitled to compensation for any resulting loss in accordance with their agreements with the Minister. The Prothonotary ordered that all those portions of the respondents' pleadings that asserted their claim in contract were to be struck out, on the ground that they disclosed no reasonable cause of action since the Minister could not, by means of contract, fetter his discretion to award fishing quota. As for the balance of the claims, the Prothonotary ordered that they be stayed. The Motions Judge set aside the Prothonotary's decision striking the portions of the pleadings asserting a claim in contract on the basis that this was a complex issue of fact and law which should not be resolved on a motion to strike. With respect to the other claims asserted by the respondents, the Motions Judge was not prepared to find that it was plain and obvious that those claims would fail. The Crown argued that the claim was a collateral attack on the Minister's licensing decisions, the legality of which must first be established by means of an application for judicial review.
HELD: Appeal dismissed.

Since the respondents accepted that the Minister's decisions were validly made, the action should be allowed to proceed on that basis. Should it become apparent later that the respondents must rely upon the illegality of the Minister's decisions in order to succeed, the Crown's arguments could be dealt with at that time.

Statutes, Regulations and Rules Cited:

Federal Courts Rules, SOR/98-106, Rule 221(1)

Appeal From:

Appeal from an Order of Mr. Justice Martineau dated March 5, 2008, Docket Number T-378-07, [2008] F.C.J. No. 375.

Counsel:

Reinhold M. Endres, Q.C. and Patricia MacPhee, for the Appellant.

Kenneth L. Godfrey, for the Respondents.

The judgment of the Court was delivered by

PELLETIER J.A.

1 This is an appeal from the decision of Mr. Justice Martineau of the Federal Court (the Motions Judge), reported as *Arsenault v. Canada*, 2008 FC 299, 330 F.T.R. 8, in which the Motions Judge set aside a decision of Prothonotary Morneau. The issue in the appeal is the application of this Court's decision in *Grenier v. Canada*, 2005 FCA 348, [2006] 2 F.C.R. 287 (*Grenier*), to the facts pleaded in the respondents' statement of claim and, in particular, whether the claim should be stayed until the respondents have challenged certain decisions of the Minister of Fisheries and Oceans (the Minister) by way of judicial review.

2 The respondents are fishermen and residents of Prince Edward Island. Their allegations against the Minister are concisely set out in the Crown's memorandum of fact and law as follows:

> 4. According to the statement of claim, the Respondents allege that between 1990 and 2002 they entered into a series of agreements with the Minister (the Individual Quota Agreements) that provided them each with a certain quota out of the total allowable catch ("TAC") for Prince Edward Island for snow crab fishing.
>
> 5. In addition to the Individual Quota Agreements, the Respondents also claim to have entered into an agreement with the Minister pursuant to which First Nations would be brought into the fishery through a voluntary licence buy-back and that no increase in the number of fishing licenses or in the actual fishing effort would result from the integration of the aboriginal fishery (the "Marshall Agreement").
>
> 6. The Respondents claim that both the Individual Quota Agreements and the Marshall Agreement contained implicit promises that the appellant would compensate them for any breach of the agreements.
>
> 7. The Respondents claim that as a result of various measures taken by the Minister in May 2003, which were continued or repeated from 2004 to 2006, the agreements were broken. They claim that the Minister reallocated a portion of the snow crab quota, to which they were entitled under the Agreements, for other purposes in each of these years.

3 The respondents do not contest this statement of the facts.

4 The respondents claim that they are entitled to be compensated for the loss of quota, either as damages for breach of contract, or, if no enforceable contract is found, as damages for negligent misrepresentation. In addition, the respondents raise a number of other potential heads of recovery, but insist that their claim is first and foremost a claim for compensation from the Minister in accordance with his contractual undertaking to compensate them for loss of their share of the Total Allowable Catch (TAC).

5 The respondents do not allege that the Minister's reallocation of the TAC was unauthorized or otherwise unlawful. They agree that the Minister was entitled to exercise his discretion under the *Fisheries Act*, R.S.C. 1985, c. F-14, as he did, but say that if the exercise of that discretion caused them a loss, then they were entitled to be compensated in accordance with their agreement with the Minister.

6 In the Crown's view, the respondents' claim is, in essence, an attack upon the validity of the various decisions that the respondents claim have caused them a loss. As a result, the Crown brought a motion seeking to have the respondents' claim struck, or, in the alternative, for an order staying the respondents' claim until such time as the

validity of the ministerial orders had been determined in an application for judicial review. The Prothonotary ordered that all those portions of the respondents' pleadings that assert their claim in contract were to be struck out on the ground that they disclosed no reasonable cause of action since the Minister could not, by means of contract, fetter his discretion to award fishing quota. As for the balance of the claims, the Prothonotary ordered that they be stayed and gave the respondents time to file a motion seeking an extension of time to commence an application for judicial review.

7 The Prothonotary's decision was appealed to the Federal Court. The Motions Judge set aside the Prothonotary's decision striking the portions of the pleadings asserting a claim in contract, on the basis that this was a complex issue of fact and law which should not be resolved on a motion to strike. With respect to the other claims asserted by the respondents, the Motions Judge was not prepared to find that it was plain and obvious that those claims would fail.

8 The Crown appeals from the Motions Judge's decision on two grounds. The first is that he erred in applying the "plain and obvious" test articulated in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, as this test is not appropriate when the issue is whether to strike a claim for want of jurisdiction. The second is that, notwithstanding the respondents' protestations to the contrary, their claim is a collateral attack on the Minister's licensing decisions whose legality must first be established by means of an application for judicial review.

9 The Crown's argument with respect to the "plain and obvious" test is simply that the Court either has jurisdiction or it does not, therefore the Court must make a positive finding on that issue rather than relying on the "plain and obvious" test. The Crown says that in order to do so, the Court is entitled to look past the causes of action pleaded by the respondents and to determine the "essence" or the "substance" of the respondents' claim. In point of fact, the two arguments advanced by the Crown are but two aspects of the same argument, namely that when one looks past the words of the respondents' claims to their true nature, the respondents are mounting a collateral attack on the Minister's decisions, as a result of which the Court is in a position to make a positive finding on the jurisdictional issue.

10 In my view, for the purposes of Rule 221(1) of the *Federal Courts Rules*, SOR/98-106, the moving party must take the opposing party's pleadings as they find them, and cannot resort to reading into a claim something which is not there. The Crown cannot, by its construction of the respondents' claim, make it say something which it does not say.

11 The Crown's preoccupation with jurisdiction, at this preliminary stage, is, it seems to me, misplaced. This Court's decision in *Grenier* makes it clear that a party cannot attack the legality of an administrative decision except by means of an application for judicial review. A party derives no advantage by commencing an action based on the illegality of an administrative decision without first having had the decision declared illegal because, eventually, *Grenier* will have to be dealt with. No one has an interest in spending thousands of dollars on an action which cannot succeed. If the pleadings do not raise illegality, the Court should not strive to find it for the purposes of forcing litigants into a judicial review application which is inconsistent with the position they have taken in their action.

12 Since the respondents accept that the Minister's decisions were validly made pursuant to the *Fisheries Act*, the action should be allowed to proceed on that basis. Should it become apparent later that the respondents must rely upon the illegality of the Minister's decisions in order to succeed, the issue of the application of *Grenier* can be dealt with at that time.

13 I would dismiss the appeal with costs.

PELLETIER J.A.
NADON J.A.:— I agree.
BLAIS J.A.:— I agree.

End of Document

Canada v. Solosky, [1980] 1 S.C.R. 821

Supreme Court Reports

Supreme Court of Canada

Present: Laskin C.J. and Martland, Ritchie, Pigeon, Dickson, Beetz, Estey, Pratte and McIntyre JJ.

1979: June 13 / 1979: December 21.

[1980] 1 S.C.R. 821 | [1980] 1 R.C.S. 821

William (Billy) Solosky (Plaintiff), Appellant; and Her Majesty The Queen (Defendant), Respondent.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Case Summary

Prisons — Censorship of prisoners' mail — Right of prison inmates to communicate in confidence with their solicitors — Solicitor-client privilege — Inmate failing to establish entitlement to a declaration — Penitentiary Service Regulations, SOR/62-90 — Canadian Bill of Rights, 1960 (Can.), c. 44, ss. 1(b), (d), 2(c)(ii).

The appellant, imprisoned at Millhaven Institution, commenced an action in the Federal Court of Canada for a declaration that "properly identified items of correspondence directed to and received from his solicitor shall henceforth be regarded as privileged correspondence and shall be forwarded to their respective destinations unopened". The action was dismissed and on appeal to the Federal Court of Appeal the pleadings were amended to request a declaration "..... that henceforth all properly identified items of solicitor-client correspondence should be forwarded to their respective destinations unopened". The appeal failed, and at the opening of the appeal in this Court counsel for the appellant moved to substitute, for the prayer for relief in the statement of claim, a declaration that the order of the Director of Millhaven Institution that the appellant's mail be opened and read "insofar as it has been applied to mail originating from his solicitor David Cole, and to mail written by the Plaintiff to his solicitor David Cole, is not authorized by law".

In accordance with the Penitentiary Act, R.S.C. 1970, c. P-6, and Regulations thereunder, an institutional head of a penitentiary may order censorship of inmate correspondence to the extent considered necessary or desirable for the rehabilitation of the inmate or the security of the institution. The main ground upon which the appellant rested his case was solicitor-client privilege.

Held: The appeal should be dismissed.

Contrary to the views expressed by the Court below, the important issues raised in this case should not be determined by the particular form of wording employed in the prayer for relief, or on the basis that the question is hypothetical.

There could be no doubt that there was a real, and not a hypothetical, dispute between the parties. The declaration sought was a direct and present challenge to the censorship order of the Director of Millhaven Institute. That order, so long as it continues, from the past through the present and into the future, is in controversy. The fact that a declaration today cannot cure past ills, or may affect future rights, cannot of itself, deprive the remedy of its potential utility in resolving the dispute over the Director's continuing order. Once one accepts that the dispute is real and that the granting of judgment is discretionary, then the only further issue is whether the declaration is capable of having any practical effect in resolving the issues in the case. The determination of the right of prison inmates to correspond, freely and in confidence with their solicitors, is of great practical importance, although, admittedly, any

such determination relates to correspondence not yet written. However poorly framed the prayer for relief may be, even as twice amended, the present claim was clearly directed to the procedures for handling prison mail and the invocation in relation thereto of solicitor-client privilege.

Recent case law has taken the traditional doctrine of solicitor-client privilege and placed it on a new plane. Privilege is no longer regarded merely as a rule of evidence which acts as a shield to prevent privileged materials from being tendered in evidence in a court room. The courts, unwilling to so restrict the concept, have extended its application well beyond those limits. However, while there is no question that the Canadian courts have been moving towards a broader concept of solicitor-client privilege, the concept has not been stretched far enough to save the appellant's case. Although there has been a move away from treating solicitor-client privilege as a rule of evidence that can only be asserted at the time the privileged material is sought to be introduced as evidence, the move from rigid temporal restrictions has not gone as far as the appellant contends. The appellant's suggestion that privilege has come to be recognized as a "fundamental principle", more properly characterized as a "rule of property", was not accepted. Without the evidentiary connection, which the law now requires, the privilege cannot be invoked.

The statutory disciplinary regime, described in this case, does not derogate from the common law doctrine of solicitor and client privilege, as presently conceived, but the appellant was seeking in this appeal something well beyond the limits of the privilege, even as amplified in modern cases.

In aid of his main submission, appellant argued faintly that the Penitentiary Service Regulations and Commissioner's Directive should not be construed and applied so as to abrogate, abridge, or infringe any of the rights or freedom recognized in the Canadian Bill of Rights by s. 1(b) (the right of the individual to equality before the law and the protection of the law), 1(d) (freedom of speech) and 2(c)(ii) (the right of a person arrested or detained to retain and instruct counsel without delay). This argument also failed.

One could depart from the current concept of privilege and approach the case on the broader basis that (i) the right to communicate in confidence with one's legal adviser is a fundamental civil and legal right, founded upon the unique relationship of solicitor and client, and (ii) a person confined to prison retains all of his civil rights, other than those expressly or impliedly taken from him by law. In that context, the Court was faced with the interpretation of the Penitentiary Service Regulations and Commissioner's Directive No. 219.

It was submitted there are three alternative interpretations of the scope of Regulations 2.17 and 2.18 which may govern the extent of the authority of the institutional head in dealing with an envelope which appears to have originated from a solicitor, or to be addressed to a solicitor, in circumstances where the institutional head has reason to believe that the unrestricted and unexamined passage of mail to or from the particular inmate in question represents a danger to the safety and security of the institution. The third such interpretation was as follows: "he may order that the envelope be subject to opening and examination to the minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege". This alternative represents that interpretation of the scope of the Regulations which permits to an inmate the maximum opportunity to communicate with his solicitor through the mails that is consistent with the requirement to maintain the safety and security of the institution.

The "minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege" should be interpreted in such manner that (i) the contents of an envelope may be inspected for contraband; (ii) in limited circumstances, the communication may be read to ensure that it, in fact, contains a confidential communication between solicitor and client written for the purpose of seeking or giving legal advice; (iii) the letter should only be read if there are reasonable and probable grounds for believing the contrary, and then only to the extent necessary to determine the bona fides of the communication; (iv) the authorized penitentiary official who examines the envelope, upon ascertaining that the envelope contains nothing in breach of security, is under a duty at law to maintain the confidentiality of the communication.

Per Estey J.: As to the above item (iii) in the catalogue of considerations in the interpretation of the expression "minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege", any procedure

adopted with reference to the scrutiny of letters passing from solicitor to client should, wherever reasonably possible, recognize the solicitor-client privilege long established in the law.

Cases Cited

[Mellstrom v. Garner, [1970] 1 W.L.R. 603, distinguished; Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd., [1921] 2 A.C. 438; Pyx Granite Co. v. Ministry of Housing and Local Government, [1958] 1 Q.B. 554; Pharmaceutical Society of Great Britain v. Dickson, [1970] A.C. 403; Re Director of Investigation and Research and Shell Canada Ltd. (1975), 22 C.C.C. (2d) 70; Greenough v. Gaskell (1833), 39 E.R. 618; Anderson v. Bank of British Columbia (1876), 2 Ch. 644; Re Director of Investigation and Research and Canada Safeway Ltd. (1972), 26 D.L.R. (3d) 745; Re Presswood et al. and International Chemalloy Corp. (1975), 65 D.L.R. (3d) 228; Re Borden and Elliot and The Queen (1975), 30 C.C.C. (2d) 337; Re BX Development Inc. and The Queen (1976), 31 C.C.C. (2d) 14; Re B and The Queen (1977), 36 C.C.C. (2d) 235, referred to.]

APPEAL from a judgment of the Federal Court of Appeal [[1978] 2 F.C. 632, 86 D.L.R. (3d) 316], dismissing an appeal from a judgment of Addy J. who dismissed the appellant's application for a declaration. Appeal dismissed. Ronald Price, Q.C., and David P. Cole, for the appellant. E. Bowie and J.-Paul Malette, for the respondent.

Solicitor for the plaintiff, appellant: David P. Cole, Toronto. Solicitor for the defendant, respondent: Roger Tassé, Ottawa.

The judgment of Laskin C.J. and Martland, Ritchie, Pigeon, Dickson, Beetz, Pratte and McIntyre JJ. was delivered by

DICKSON J.

DICKSON J.:— This case concerns the censorship of prisoners' mail and the right of an inmate of a federal penitentiary to communicate in confidence with his solicitor. The appellant, imprisoned at Millhaven Institution, commenced an action in the Federal Court for a declaration that "properly identified items of correspondence directed to and received from his solicitor shall henceforth be regarded as privileged correspondence and shall be forwarded to their respective destinations unopened".

I

Prison Disciplinary Regime

The penitentiary authorities rely upon the following statutes and Regulations as authorizing restrictions upon the personal correspondence of prison inmates. Section 660(1) of the Criminal Code, R.S.C. 1970, c. C-34, provides that a sentence of imprisonment shall be served in accordance with the enactments and rules that govern the institution to which the prisoner is sentenced. Section 29(1) of the Penitentiary Act, R.S.C. 1970, c. P-6, empowers the Governor in Council to make regulations for the custody, treatment, training, employment, and discipline of inmates, and, generally, for carrying into effect the purposes and provisions of The Penitentiary Act. Section 29(3) authorizes the Commissioner of Penitentiaries to make rules, known as Commissioner's directives, for the custody, treatment, training, employment, and discipline of inmates, and the good government of penitentiaries.

Pursuant to the foregoing, Penitentiary Service Relations SOR/62-90, were passed, which provide in part, as follows:

Institutional Heads

1.12(1) The institutional head is responsible for the direction of his staff, the organization, safety and security of his institution and the correctional training of all inmates confined therein.

Visiting and Correspondence

2.17 The visiting and correspondence privileges that may, in accordance with directives, be permitted to inmates shall be such as are, in all the circumstances, calculated to assist in the reformation and rehabilitation of the inmate.

Censorship

2.18 In so far as practicable the censorship of correspondence shall be avoided and the privacy of visits shall be maintained, but nothing herein shall be deemed to limit the authority of the Commissioner to direct or the institutional head to order censorship of correspondence or supervision of visiting to the extent considered necessary or desirable for the reformation and rehabilitation of inmates or the security of the institution.

It will be observed then that the Regulations, the validity of which are not challenged by the appellant, expressly recognize the authority of the institutional head of a penitentiary to order censorship of inmate correspondence to the extent considered necessary or desirable for the security of the institution. These Regulations are implemented by Commissioner's Directive No. 219 (as amended following the date of issuance of the statement of claim in these proceedings, but prior to the date of trial). The following paragraphs are pertinent to the present inquiry:

Directive

5.a. Penitentiary staff shall promote and facilitate correspondence between inmates and their families, friends, and other individuals and agencies who can be expected to make a contribution to the inmate's rehabilitation within the institution and to assist in his subsequent and eventual return to the community.

c. Subject to the provisions of paragraph 14 every inmate shall be permitted to correspond with any person, and shall be responsible for the contents of every article of correspondence of which he is the author. There shall be no restriction to the number of letters sent or received by inmates, unless it is evident that there is mass production.

Paragraph 5 d. makes provision for inspection for contraband, in these terms:

d. Subject to the provisions of paragraph 8, every item of correspondence to or from an inmate may be opened by institutional authorities for inspection for contraband.

Censorship, dealt with in para. 7, is defined as any examination (other than for the express purpose of searching for contraband) and includes the reading, reproducing, extracting, or withdrawing of inmate correspondence. Paragraph 7 b. makes the point that censorship in any form is to be avoided, but reserves to the Commissioner of Penitentiaries and to the Institutional Director the authority to censor for one of two purposes, the rehabilitation of the inmate, or the security of the institution. Paragraph 7 b. reads:

> Censorship of correspondence in any form shall be avoided, but nothing herein shall be deemed to limit the authority of the Commissioner to direct, or the Institutional Director to order, censorship of correspondence in any form, to the extent considered necessary or desirable for the rehabilitation of the inmate or the security of the institution. (PSR 2.18). Any form of censorship shall be undertaken only with the approval of the Institutional Director.

The Directive seeks to maintain the confidentiality of the contents of correspondence. Paragraph 7 c. states that

only authorized staff shall be allowed to read inmate mail, when necessary, and further provides that no comments, other than those required for official duties, shall be made to other members of the staff on the contents of the correspondence.

Paragraph 8 of Directive 219 speaks of "privileged correspondence", defined as "properly identified and addressed items directed to and received from" any of a lengthy list of persons including, among others, members of the Senate, members of the House of Commons, members of provincial legislatures, and provincial ombudsmen. Conspicuous is the absence of any reference to inmates' legal representatives. Privileged correspondence is forwarded to the addressee unopened with the proviso that in exceptional cases, where institutional staff suspect contraband in such privileged correspondence, the Commissioner's approval shall be obtained before it is opened. Paragraph 8 clearly countenances the maintenance of uncensored channels of mail for complaints and grievances. But the restricted listing of destinations assures that the channels through which grievances pass are limited to internal procedures (Solicitor General, Commissioner of Penitentiaries, Correctional Investigator) or political outlets (Members of Parliament and Senators). Lawyers are mentioned in paragraph 10 c. of Directive No. 219, "Use of Telephone and Telegraph", which reads:

> c. In urgent cases where lawyers call their inmate clients, and wish to communicate privately with them, the institutional authorities shall ask the lawyer to leave his name and telephone number and, following verification of the lawyer's identity, a call shall originate from the institution.

For the purposes of trial, an agreed statement of facts was filed. Paragraphs 4 and 5 of the statement are in the following terms:

> 4. Pursuant to section 6 paragraph (b) [s. 7(b), as amended,] of Directive No. 219, John Dowsett, Director of Millhaven Institution has ordered that William (Billy) Solosky's mail be opened and read. This order has been applied to mail originating from his solicitor David Cole.
>
> 5. William (Billy) Solosky's mail is being read because it is John Dowsett's opinion that William (Billy) Solosky's conduct, activities and attitude cause him to believe that attention should be paid to his incoming and outgoing correspondence. Those letters which are deemed to be significant with respect to the security of the institution are being brought to the attention of John Dowsett.

Paragraph 5 of the statement of defence clarifies any obscurity in para. 5 of the agreed statement of facts. The statement of defence reads "The security of the Millhaven Institution has required that the Plaintiff's mail be opened."

II

Judicial History

Mr. Justice Addy, at trial, was of the view that solicitor and client privilege, upon which the appellant founds his case, can only be claimed document by document and that each document is privileged only to the extent it meets the criteria which would support the privilege. Whether a letter does, in fact, contain a privileged communication cannot be determined until it has been opened and read. There is no logical nor legal justification for permitting correspondence which appears to have emanated from, or to be addressed to, a solicitor to enjoy any special aura of protection. Mr. Justice Addy relied upon these propositions in dismissing the appellant's action, with costs. He buttressed his conclusion by the argument that in this situation it would be too easy for a person to obtain envelopes and letterheads bearing the name and title of a real or fictitious solicitor, and equally as easy for a prisoner to camouflage the true identity of an addressee.

The appellant appealed to the Federal Court of Appeal. In that Court, his counsel amended the pleadings to request a declaration "... that henceforth all properly identified items of solicitor-client correspondence should be forwarded to their respective destinations unopened". The revised form of declaration differs little from that appearing in the amended statement of claim. Both are defective, at least to this extent--it is not every item of correspondence passing between solicitor and client to which privilege attaches, for only those in which the client seeks the advice of counsel in his professional capacity, or in which counsel gives advice, are protected. That a

privilege may not encompass all solicitor and client communications is clearly illustrated by the correspondence exhibited in the present case. Some of the letters concerned the appellant's parole review. Others merely contained criticism of the administration, information about other inmates, and prison gossip. One letter enclosed a second letter with the request that the second letter be forwarded to a named magazine for publication.

The Federal Court of Appeal dismissed the appeal, holding that a declaration that all correspondence between the appellant and his solicitor be declared privileged would extend considerably the ambit of the solicitor-client privilege as it is generally known and understood. To grant the declaration sought would be to give to the appellant an extension of the privilege afforded to the ordinary citizen. As a second ground for rejecting the appeal, the Court held that by issuing an order relating to correspondence not yet written, the court would be granting relief on the basis of purely hypothetical issues, and in futuro. Assuming jurisdiction, the case was not one where jurisdiction should be asserted.

III

Declaratory Relief

At the opening of the appeal in this Court, counsel for the appellant moved to substitute, for the prayer for relief in the statement of claim, a declaration that the order of the Director of Millhaven Institution that the appellant's mail be opened and read "insofar as it has been applied to mail originating from his solicitor David Cole, and to mail written by the Plaintiff to his solicitor David Cole, is not authorized by law". The amended form of prayer seems to have been conceived with a view to meeting the point, taken by the Federal Court of Appeal, that the relief earlier sought would relate to letters not yet written.

With great respect for the views expressed in the Federal Court of Appeal, I do not think that the important issues raised in these proceedings should be determined by the particular form of wording employed in the prayer for relief, or on the basis that the question is hypothetical.

Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a 'real issue' concerning the relative interests of each has been raised and falls to be determined.

The principles which guide the court in exercising jurisdiction to grant declarations have been stated time and again. In the early case of Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd. [[1921] 2 A.C. 438], in which parties to a contract sought assistance in construing it, the Court affirmed that declarations can be granted where real, rather than fictitious or academic, issues are raised. Lord Dunedin set out this test (at p. 448):

> The question must be a real and not a theoretical question, the person raising it must have a real interest to raise it, he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.

In Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government [[1958] 1 Q.B. 554], (rev'd [1960] A.C. 260, on other grounds), Lord Denning described the declaration in these general terms (p. 571):

> ... if a substantial question exists which one person has a real interest to raise, and the other to oppose, then the court has a discretion to resolve it by a declaration, which it will exercise if there is good reason for so doing.

The jurisdiction of the court to grant declaratory relief was again stated, in the broadest language, in Pharmaceutical Society of Great Britain v. Dickson [[1970] A.C. 403 (H.L.), a case in which the applicant sought a declaration that a proposed motion of the pharmaceutical society, if passed, would be ultra vires its objects and in unreasonable restraint of trade. In the course of his judgment, Lord Upjohn stated, at p. 433:

> A person whose freedom of action is challenged can always come to the court to have his rights and position clarified, subject always, of course, to the right of the court in exercise of its judicial discretion to refuse relief in the circumstances of the case.

In the instant case, Mellstrom v. Garner [(1970), 1 W.L.R. 603], was cited in the Federal Court of Appeal in support of the proposition that courts will not grant declarations regarding the future. There, a chartered accountant

and former partner of the defendant sought a declaration as to the true construction of the agreement by which the partnership had been dissolved. The plaintiff asked whether, having regard to a clause in the agreement, he would be in breach were he to solicit clients or business of the 'continuing partners'. Karminski L.J. held that declarations concerning the future ought to be approached with considerable reserve. Since neither the plaintiff nor the defendants had broken the provisions of the clause in question, nor sought to do so, there was no useful purpose to be gained in granting the declaration. The application was dismissed. That is a very different case from the present one.

As Hudson suggests in his article, "Declaratory Judgments in Theoretical Cases: The Reality of the Dispute" (1977), 3 Dal.L.J. 706:

> The declaratory action is discretionary and the two factors which will influence the court in the exercise of its discretion are the utility of the remedy, if granted, and whether, if it is granted, it will settle the questions at issue between the parties.

The first factor is directed to the "reality of the dispute". It is clear that a declaration will not normally be granted when the dispute is over and has become academic, or where the dispute has yet to arise and may not arise. As Hudson stresses, however, one must distinguish, on the one hand, between a declaration that concerns "future" rights and "hypothetical" rights, and, on the other hand, a declaration that may be "immediately available" when it determines the rights of the parties at the time of the decision together with the necessary implications and consequences of these rights, known as future rights. (p. 710)

Here there can be no doubt that there is a real and not a hypothetical, dispute between the parties. The declaration sought is a direct and present challenge to the censorship order of the Director of Millhaven Institute. That order, so long as it continues, from the past through the present and into the future, is in controversy. The fact that a declaration today cannot cure past ills, or may affect future rights, cannot of itself, deprive the remedy of its potential utility in resolving the dispute over the Director's continuing order.

Once one accepts that the dispute is real and that the granting of judgment is discretionary, then the only further issue is whether the declaration is capable of having any practical effect in resolving the issues in the case.

The determination of the right of prison inmates to correspond, freely and in confidence with their solicitors, is of great practical importance, although, admittedly, any such determination relates to correspondence not yet written.

However poorly framed the prayer for relief may be, even as twice amended, the present claim is clearly directed to the procedures for handling prison mail and the invocation in relation thereto of solicitor-client privilege. It is not directed to the characterization of specific and individual items of correspondence. If the appellant is entitled to a declaration, it is within this Court's discretion to settle the wording of the declaration: see de Smith, Judicial Review of Administrative Action (3rd ed. 1973, p. 431). Further, s. 50 of the Supreme Court Act allows the Court to make amendments necessary to a determination of the "real issue", without application by the parties.

IV

Solicitor-Client Privilege

As I have indicated, the main ground upon which the appellant rests his case is solicitor-client privilege. The concept of privileged communications between a solicitor and his client has long been recognized as fundamental to the due administration of justice. As Jackett C.J. aptly stated in Re Director of Investigation and Research and Shell Canada Ltd. [(1975), 22 C.C.C. (2d) 70, [1975] F.C. 184], at pp. 78-9:

> ... the protection, civil and criminal, afforded to the individual by our law is dependent upon his having the aid and guidance of those skilled in the law untrammelled by any apprehension that the full and frank disclosure by him of all his facts and thoughts to his legal advisor might somehow become available to third persons so as to be used against him.

The history of the privilege can be traced to the reign of Elizabeth I (see Berd v. Lovelace [(1577), 21 E.R. 33] and Dennis v. Codrington [(1580), 21 E.R. 53]). It stemmed from respect for the 'oath and honour' of the lawyer, dutybound to guard closely the secrets of his client, and was restricted in operation to an exemption from testimonial compulsion. Thereafter, in stages, privilege was extended to include communications exchanged during

other litigation, those made in contemplation of litigation, and finally, any consultation for legal advice, whether litigious or not. The classic statement of the policy grounding the privilege was given by Brougham L.C. in Greenough v. Gaskell [(1833), 39 E.R. 618], at p. 620:

> The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection (though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers).
>
> But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.

The rationale was put this way by Jessel M.R. in Anderson v. Bank of British Columbia [(1976), 2 Ch. 644], at p. 649:

> The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have resource to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation.

Wigmore [8 Wigmore, Evidence (McNaughton rev. 1961) para. 2292] framed the modern principle of privilege for solicitor-client communications, as follows:

> Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to the purpose made in confidence by the client are at his instance permanently protected from disclosures by himself or by the legal adviser, except the protection be waived.

There are exceptions to the privilege. The privilege does not apply to communications in which legal advice is neither sought nor offered, that is to say, where the lawyer is not contacted in his professional capacity. Also, where the communication is not intended to be confidential, privilege will not attach, O'Shea v. Woods [[1891] P. 286], at p. 289. More significantly, if a client seeks guidance from a lawyer in order to facilitate the commission of a crime or a fraud, the communication will not be privileged and it is immaterial whether the lawyer is an unwitting dupe or knowing participant. The classic case is R. v. Cox and Railton [(1884), 14 Q.B.D. 153], in which Stephen J. had this to say (p. 167): "A communication in furtherance of a criminal purpose does not 'come in the ordinary scope of professional employment'."

Recent case law has taken the traditional doctrine of privilege and placed it on a new plane. Privilege is no longer regarded merely as a rule of evidence which acts as a shield to prevent privileged materials from being tendered in evidence in a court room. The courts, unwilling to so restrict the concept, have extended its application well beyond those limits. See Re Director of Investigation and Research and Canada Safeway Ltd. [(1972), 26 D.L.R. (3d) 745 (B.C.S.C.)]; Re Director of Investigation and Research and Shell Canada Ltd., supra: Re Presswood et al. and International Chemalloy Corp. [(1975), 65 D.L.R. (3d) 228 (Ont. N.C.)], Re Borden and Elliot and The Queen [(1975), 30 C.C.C. (2d) 337], (affirmed on other grounds [(1975), 30 C.C.C. (2d) 345 (Ont. C.A.)]; Re BX Development Inc. and The Queen [(1976), 31 C.C.C. (2d) 14 (B.C.C.A.)]; Re B and The Queen [(1977), 36 C.C.C. (2d) 235 (Ont. Prov. Ct.)].

While there is no question that the Canadian courts have

been moving towards a broader concept of solicitor-client

privilege, I do not think the concept has been stretched far

> enough to save the appellant's case. Although there has been a move away from treating solicitor-client privilege as a rule of evidence that can only be asserted at the time the privileged material is sought to be introduced as evidence, the move from rigid temporal restrictions has not gone as far as the appellant contends. In the factum of the appellant, it is suggested that the privilege has come to be recognized as a "fundamental principle", more properly characterized as a "rule of property". The cases cited in support of this proposition, however, all involved search warrants that caught documents to which the privilege unquestionably attached. In those cases, such as Re Borden & Elliot and The Queen, supra, the search warrant led to the seizure of documents believed "to afford evidence." If privilege were to attach to the documents, then such material could not afford evidence at trial and hence the evidentiary connection remained. The judgments can be rationalized as merely shifting the time at which the privilege can be asserted. As the comment by Kasting in (1978), 24 McGill L.J. 115, "Recent Developments in the Law of Solicitor-Client Privilege" suggests, the shift away from the strict rule-of-evidence-at-trial approach has taken place by logical extensions. Chassé, in his annotation at (1977), 36 C.R.N.S. 349, The Solicitor-Client Privilege and Search Warrants, asserts that the privilege is being looked upon "as more akin to a rule of property rather than merely as a rule of evidence" (p. 350), but the privilege, in my view, is not yet near a rule of property. That is what the privilege must become if the appellant is to succeed.

There is no suggestion in the materials in the case at bar that the authorities intend to employ the letters or extracts obtained therefrom as evidence in any proceeding of any kind. Much as one might well wish to analogize from the search warrant cases to the censorship order here impugned, as a form of blanket search warrant upon appellant's mail, the order cannot be characterized as being directed to obtaining or affording evidence in any proceeding. Without the evidentiary connection, which the law now requires, the appellant cannot invoke the privilege.

As Mr. Justice Addy notes, privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege--(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties. To make the decision as to whether the privilege attaches, the letters must be read by the judge, which requires, at a minimum, that the documents be under the jurisdiction of a court. Finally, the privilege is aimed at improper use or disclosure, and not at merely opening.

The complication in this case flows from the unique position of the inmate. His mail is opened and read, not with a view to its use in a proceeding, but by reason of the exigencies of institutional security. All of this occurs within prison walls and far from a court or quasi-judicial tribunal. It is difficult to see how the privilege can be engaged, unless one wishes totally to transform the privilege into a rule of property, bereft of an evidentiary basis.

In my view, the statutory disciplinary regime, which I have earlier described, does not derogate from the common law doctrine of solicitor and client privilege, as presently conceived, but the appellant is seeking in this appeal something well beyond the limits of the privilege, even as amplified in modern cases.

V

In aid of his main submission, resting upon privilege, counsel for the appellant argued faintly that the Penitentiary Service Regulations and Commissioner's Directive should not be construed and applied so as to abrogate, abridge, or infringe any of the rights or freedoms recognized in the Canadian Bill of Rights by s. 1(b) (the right of the individual to equality before the law and the protection of the law), 1(d) (freedom of speech) and 2(c)(ii) (the right of a person arrested or detained to retain and instruct counsel without delay). The authorities relied upon by counsel were, in the main, breathalyzer cases dealing with the right of a motorist to communicate with his counsel in private and without delay. These, and other cases cited, give little assistance to the resolution of the issue now before the Court, due to the difference in factual context and relevant considerations. The question in this case is whether the appellant's right to retain and instruct counsel is incompatible with the right of prison authorities to prevent threat to the security of the institution. In my view, there is no such incompatibility provided the exercise of authority is not greater than is necessary to support the security interest. This, as I read it, is precisely the effect of para. 7b. of Directive 219.

With respect to s. 1(b) of the Bill, it has been held by this Court that equality before the law does not require "that all federal statutes must apply to all individuals in the same manner. Legislation dealing with a particular class of people is valid if it is enacted for the purpose of achieving a valid federal objective": Martland J., giving the unanimous reasons of this Court in Prata v. Minister of Manpower and Immigration [[1976] 1 S.C.R. 376], at p. 382.

It is difficult to attack the validity of Penitentiary Service Regulation 2.18 or Directive 219 with a freedom of speech argument, having regard to the will of Parliament, as reflected in the Penitentiary Act and in the Penitentiary Service Regulations, which preserves a limited right of censorship by penitentiary authorities in the interests of security and, at the same time, affords inmates a right to communicate freely through uncensored channels with members of Parliament and provincial legislatures, and the many persons listed in para. 8 of Directive 219.

VI

One may depart from the current concept of privilege and approach the case on the broader basis that (i) the right to communicate in confidence with one's legal adviser is a fundamental civil and legal right, founded upon the unique relationship of solicitor and client, and (ii) a person confined to prison retains all of his civil rights, other than those expressly or impliedly taken from him by law.

In that context, the Court is faced with the interpretation of the Penitentiary Service Regulations and Commissioner's Directive No. 219. Section 2.18 of the Regulations, as earlier noted, undoubtedly reserves the authority of the institutional head to order censorship of correspondence to the extent considered necessary or desirable for the security of the institution. As a general rule, I do not think it is open to the courts to question the judgment of the institutional head as to what may, or may not, be necessary in order to maintain security within a penitentiary. On the other hand, it is to be noted that Penitentiary Service Regulation 2.18 and Commissioner's Directive No. 219 speak in general terms, in their reference to the reading of correspondence and to other forms of censorship, without express mention of solicitor-client correspondence. The right to privacy in solicitor-client correspondence has not been expressly taken away by the language of the Regulations and the Directive.

Most prisons are sufficiently remote that the mail constitutes the prime means of communication to an inmate's solicitor. Nothing is more likely to have a "chilling" effect upon the frank and free exchange and disclosure of confidences, which should characterize the relationship between inmate and counsel, than knowledge that what has been written will be read by some third person, and perhaps used against the inmate at a later date. I do not understand counsel for the Crown to dispute the importance of these considerations.

The result, as I see it, is that the Court is placed in the position of having to balance the public interest in maintaining the safety and security of a penal institution, its staff and its inmates, with the interest represented by insulating the solicitor-client relationship. Even giving full recognition to the right of an inmate to correspond freely with his legal adviser, and the need for minimum derogation therefrom, the scale must ultimately come down in favour of the public interest. But the interference must be no greater than is essential to the maintenance of security and the rehabilitation of the inmate.

The difficulty is in ensuring that the correspondence between the inmate and his solicitor, whether within the doctrine of solicitor-client privilege or not, is not cloaking the passage of drugs, weapons, or escape plans. There must be some mechanism for verification of authenticity. That seems to be generally accepted. Yet, no one has so far suggested what third party mechanism might be adopted, or by what authority the courts could impose such a mechanism upon penitentiary authorities.

Counsel for the Crown submits there are three alternative interpretations of the scope of Regulations 2.17 and 2.18 which may govern the extent of the authority of the institutional head in dealing with an envelope which appears to have originated from a solicitor, or to be addressed to a solicitor, in circumstances where the institutional head has reason to believe that the unrestricted and unexamined passage of mail to or from the particular inmate in question represents a danger to the safety and security of the institution:

(a) he may nonetheless permit the letter to be delivered unopened and unexamined to the inmate;

(b) he may suspend the inmate's privilege to receive mail, in respect of that letter, pursuant to sections 2.17 and 2.18 of the Penitentiary Service Regulations.

(c) he may order that the envelope be subject to opening and examination to the minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege.

Counsel contends that to interpret the Regulations as requiring the first of these alternatives is to leave the institutional head without the authority he requires to control the potential passage of contraband, or of correspondence which may endanger the safety of the institution, under the guise of confidential communications passing between inmate and solicitor. I agree. I would also reject the second as providing no solution. I agree that the third alternative represents that interpretation of the scope of the Regulations which permits to an inmate the maximum opportunity to communicate with his solicitor through the mails that is consistent with the requirement to maintain the safety and security of the institution.

In my view, the "minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege" should be interpreted in such manner that (i) the contents of an envelope may be inspected for contraband; (ii) in limited circumstances, the communication may be read to ensure that it, in fact, contains a confidential communication between solicitor and client written for the purpose of seeking or giving legal advice; (iii) the letter should only be read if there are reasonable and probable grounds for believing the contrary, and then only to the extent necessary to determine the bona fides of the communication; (iv) the authorized penitentiary official who examines the envelope, upon ascertaining that the envelope contains nothing in breach of security, is under a duty at law to maintain the confidentiality of the communication. Paragraph 7c. of Directive 219 underlines this point.

The appellant has failed to establish entitlement to a declaration in any of the three forms he has advanced in these proceedings. The appeal must be dismissed. The respondent is entitled to costs in this Court.

The following are the reasons delivered by

ESTEY J.

ESTEY J.:-- I have had the opportunity of reading the reasons for judgment of my brother Dickson and I concur therein. I only wish to add to item (iii) in his catalogue of considerations in the interpretation of the expression "minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege". Item (iii) reads as follows:

(iii) the letter only should be read if there are reasonable and probable grounds for believing the contrary, and then only to the extent necessary to confirm the bona fides of the communication;

In my respectful view, any procedure adopted with reference to the scrutiny of letters passing from solicitor to client should, wherever reasonably possible, recognize the solicitor-client privilege long established in the law. Any mechanics adopted for their examination should, subject only to special circumstances indicating an overriding necessity for intervention by the authorities, safeguard communications flowing under the protection of the privilege so as to ensure that the privilege is left in a practical, workable condition; for example, a covering letter from a solicitor forwarding a sealed communication which the solicitor states to be a communication of legal advice should ordinarily shield the enclosure from examination by the authorities. I would dispose of the appeal as proposed by Dickson J.

Appeal dismissed with costs.

Canada (Prime Minister) v. Khadr, [2010] 1 S.C.R. 44

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

Heard: November 13, 2009;

Judgment: January 29, 2010.

File No.: 33289.

[2010] 1 S.C.R. 44 | [2010] 1 R.C.S. 44 | [2010] S.C.J. No. 3 | [2010] A.C.S. no 3 | 2010 SCC 3

Prime Minister of Canada, Minister of Foreign Affairs, Director of the Canadian Security Intelligence Service and Commissioner of the Royal Canadian Mounted Police Appellants; v. Omar Ahmed Khadr Respondent, and Amnesty International (Canadian Section, English Branch), Human Rights Watch, University of Toronto, Faculty of Law - International Human Rights Program, David Asper Centre for Constitutional Rights, Canadian Coalition for the Rights of Children, Justice for Children and Youth, British Columbia Civil Liberties Association, Criminal Lawyers' Association (Ontario), Canadian Bar Association, Lawyers Without Borders Canada, Barreau du Québec, Groupe d'étude en droits et libertés de la Faculté de droit de l'Université Laval, Canadian Civil Liberties Association and National Council for the Protection of Canadians Abroad Interveners

(48 paras.)

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Case Summary

Catchwords:

Constitutional law — Charter of Rights — Application — Canadian citizen detained by U.S. authorities at Guantanamo Bay — Canadian officials interviewing [page45] detainee knowing that he had been subjected to sleep deprivation and sharing contents of interviews with U.S. authorities — Whether process in place at Guantanamo Bay at that time violated Canada's international human rights obligations — Whether Canadian Charter of Rights and Freedoms applies to conduct of Canadian state officials alleged to have breached detainee's constitutional rights.

Constitutional law — Charter of Rights — Right to life, liberty and security of person — Fundamental justice — Canadian citizen detained by U.S. authorities at Guantanamo Bay — Canadian officials interviewing detainee knowing that he had been subjected to sleep deprivation and sharing contents of interviews with U.S. authorities — Whether conduct of Canadian officials deprived detainee of his right to liberty and security of person — If so, whether deprivation of detainee's right is in accordance with principles of fundamental justice — Canadian Charter of Rights and Freedoms, s. 7.

Constitutional law — Charter of Rights — Remedy — Request for repatriation — Canadian citizen detained by U.S. authorities at Guantanamo Bay — Canadian officials interviewing detainee knowing that he had been subjected to sleep deprivation and sharing contents of interviews with U.S. authorities — Violation of detainee's right to liberty and security of person guaranteed by Canadian Charter of Rights and Freedoms

— Detainee seeking order that Canada request his repatriation from Guantanamo Bay — Whether remedy sought is just and appropriate in circumstances — Canadian Charter of Rights and Freedoms, s. 24(1).

Courts — Jurisdiction — Crown prerogative over foreign relations — Courts' power to review and intervene on matters of foreign affairs to ensure constitutionality of executive action.

Summary:

K, a Canadian, has been detained by the U.S. military at Guantanamo Bay, Cuba, since 2002, when he was a minor. In 2004, he was charged with war crimes, but the U.S. trial is still pending. In 2003, agents from two Canadian intelligence services, CSIS and DFAIT, questioned K on matters connected to the charges pending against him, and shared the product of these interviews with U.S. authorities. In 2004, a DFAIT official interviewed K again, with knowledge that he had been subjected by U.S. authorities to a sleep deprivation [page46] technique, known as the "frequent flyer program", to make him less resistant to interrogation. In 2008, in *Canada (Justice) v. Khadr* ("*Khadr 2008*"), this Court held that the regime in place at Guantanamo Bay constituted a clear violation of Canada's international human rights obligations, and, under s. 7 of the *Canadian Charter of Rights and Freedoms*, ordered the Canadian government to disclose to K the transcripts of the interviews he had given to CSIS and DFAIT, which it did. After repeated requests by K that the Canadian government seek his repatriation, the Prime Minister announced his decision not to do so. K then applied to the Federal Court for judicial review, alleging that the decision violated his rights under s. 7 of the *Charter*. The Federal Court held that under the special circumstances of this case, Canada had a duty to protect K under s. 7 of the *Charter* and ordered the government to request his repatriation. The Federal Court of Appeal upheld the order, but stated that the s. 7 breach arose from the interrogation conducted in 2004 with the knowledge that K had been subjected to the "frequent flyer program".

Held: The appeal should be allowed in part.

Canada actively participated in a process contrary to its international human rights obligations and contributed to K's ongoing detention so as to deprive him of his right to liberty and security of the person, guaranteed by s. 7 of the *Charter*, not in accordance with the principles of fundamental justice. Though the process to which K is subject has changed, his claim is based upon the same underlying series of events considered in *Khadr 2008*. As held in that case, the *Charter* applies to the participation of Canadian officials in a regime later found to be in violation of fundamental rights protected by international law. There is a sufficient connection between the government's participation in the illegal process and the deprivation of K's liberty and security of the person. While the U.S. is the primary source of the deprivation, it is reasonable to infer from the uncontradicted evidence before the Court that the statements taken by Canadian officials are contributing to K's continued detention. The deprivation of K's right to liberty and security of the person is not in accordance with the principles of fundamental justice. The interrogation of a youth detained without access to counsel, to elicit statements about serious criminal charges while knowing that the youth had been subjected to sleep deprivation and while knowing that the [page47] fruits of the interrogations would be shared with the prosecutors, offends the most basic Canadian standards about the treatment of detained youth suspects.

K is entitled to a remedy under s. 24(1) of the *Charter*. The remedy sought by K -- an order that Canada request his repatriation -- is sufficiently connected to the *Charter* breach that occurred in 2003 and 2004 because of the continuing effect of this breach into the present and its possible effect on K's ultimate trial. While the government must have flexibility in deciding how its duties under the royal prerogative over foreign relations are discharged, the executive is not exempt from constitutional scrutiny. Courts have the jurisdiction and the duty to determine whether a prerogative power asserted by the Crown exists; if so, whether its exercise infringes the *Charter* or other constitutional norms; and, where necessary, to give specific direction to the executive branch of the government. Here, the trial judge misdirected himself in ordering the government to request K's repatriation, in view of the constitutional responsibility of the executive to make decisions on matters of foreign affairs and the inconclusive state of the record. The appropriate remedy in this case is to declare that K's *Charter* rights were violated, leaving it to the government to decide how best to respond in light of current information, its responsibility over foreign affairs, and the *Charter*.

Cases Cited

Applied: *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125; *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3; **referred to:** *Khadr v. Canada*, 2005 FC 1076, [2006] 2 F.C.R. 505; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292; *United States of America v. Dynar*, [1997] 2 S.C.R. 462; *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *United States of America v. Jawad*, Military Commission, September 24, 2008, online: www.defense.gov/news/Ruling%20D-008.pdf; *R. v. Collins*, [1987] 1 S.C.R. 265; *Re [page48] B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *Reference as to the Effect of the Exercise of the Royal Prerogative of Mercy Upon Deportation Proceedings*, [1933] S.C.R. 269; *Black v. Canada (Prime Minister)* (2001), 199 D.L.R. (4) 228; *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441; *Air Canada v. British Columbia (Attorney General)*, [1986] 2 S.C.R. 539; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *Kaunda v. President of the Republic of South Africa*, [2004] ZACC 5, 136 I.L.R. 452; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *R. v. Gamble*, [1988] 2 S.C.R. 595.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 24(1).

Department of Foreign Affairs and International Trade Act, R.S.C. 1985, c. E-22, s. 10.

Detainee Treatment Act of 2005, Pub. L. 109-148, 119 Stat. 2739.

Military Commissions Act of 2006, Pub. L. 109-366, 120 Stat. 2600.

Authors Cited

Canada. Security Intelligence Review Committee. *CSIS's Role in the Matter of Omar Khadr.* Ottawa: The Committee, 2009.

Hogg, Peter W. *Constitutional Law of Canada*, 5 ed. Supp. Scarborough, Ont.: Thomson/Carswell, 2007 (loose-leaf updated 2009, release 1).

History and Disposition:

APPEAL from a judgment of the Federal Court of Appeal (Nadon, Evans and Sharlow JJ.A.), 2009 FCA 246, 310 D.L.R. (4) 462, 393 N.R. 1, [2009] F.C.J. No. 893 (QL), 2009 CarswellNat 2364, affirming a decision of O'Reilly J., 2009 FC 405, 341 F.T.R. 300, 188 C.R.R. (2d) 342, [2009] F.C.J. No. 462 (QL), 2009 CarswellNat 1206. Appeal allowed in part.

Counsel

Robert J. Frater, *Doreen C. Mueller* and *Jeffrey G. Johnston*, for the appellants.

Nathan J. Whitling and *Dennis Edney*, for the respondent.

Sacha R. Paul, *Vanessa Gruben* and *Michael Bossin*, for the intervener Amnesty International (Canadian Section, English Branch).

[page49]

John Norris, Brydie Bethell and Audrey MacKlin, for the interveners Human Rights Watch, the University of Toronto, Faculty of Law — International Human Rights Program and the David Asper Centre for Constitutional Rights.

Emily Chan and *Martha MacKinnon*, for the interveners the Canadian Coalition for the Rights of Children and Justice for Children and Youth.

Sujit Choudhry and *Joseph J. Arvay*, *Q.C.*, for the intervener the British Columbia Civil Liberties Association.

Brian H. Greenspan, for the intervener the Criminal Lawyers' Association (Ontario).

Lorne Waldman and *Jacqueline Swaisland*, for the intervener the Canadian Bar Association.

Simon V. Potter, *Pascal Paradis*, *Sylvie Champagne* and *Fannie Lafontaine*, for the interveners Lawyers Without Borders Canada, Barreau du Québec and Groupe d'étude en droits et libertés de la Faculté de droit de l'Université Laval.

Marlys A. Edwardh, *Adriel Weaver* and *Jessica Orkin*, for the intervener the Canadian Civil Liberties Association.

Dean Peroff, *Chris MacLeod* and *H. Scott Fairley*, for the intervener the National Council for the Protection of Canadians Abroad.

The following is the judgment delivered by

THE COURT

I. Introduction

1 Omar Khadr, a Canadian citizen, has been detained by the United States government at Guantanamo Bay, Cuba, for over seven years. The Prime Minister asks this Court to reverse the decision of the Federal Court of Appeal requiring the Canadian government to request the United States to return Mr. Khadr from Guantanamo Bay to Canada.

[page50]

2 For the reasons that follow, we agree with the courts below that Mr. Khadr's rights under s. 7 of the *Canadian Charter of Rights and Freedoms* were violated. However, we conclude that the order made by the lower courts that the government request Mr. Khadr's return to Canada is not an appropriate remedy for that breach under s. 24(1) of the *Charter*. Consistent with the separation of powers and the well-grounded reluctance of courts to intervene in matters of foreign relations, the proper remedy is to grant Mr. Khadr a declaration that his *Charter* rights have been infringed, while leaving the government a measure of discretion in deciding how best to respond. We would therefore allow the appeal in part.

II. Background

3 Mr. Khadr was 15 years old when he was taken prisoner on July 27, 2002, by U.S. forces in Afghanistan. He was alleged to have thrown a grenade that killed an American soldier in the battle in which he was captured. About three months later, he was transferred to the U.S. military installation at Guantanamo Bay. He was placed in adult detention facilities.

4 On September 7, 2004, Mr. Khadr was brought before a Combatant Status Review Tribunal which affirmed a previous determination that he was an "enemy combatant". He was subsequently charged with war crimes and held for trial before a military commission. In light of a number of procedural delays and setbacks, that trial is still pending.

5 In February and September 2003, agents from the Canadian Security Intelligence Service ("CSIS") and the Foreign Intelligence Division of the Department of Foreign Affairs and International Trade ("DFAIT") questioned Mr. Khadr on matters connected to the charges pending against him [page51] and shared the product of these interviews with U.S. authorities. In March 2004, a DFAIT official interviewed Mr. Khadr again, with the knowledge that he had been subjected by U.S. authorities to a sleep deprivation technique, known as the "frequent flyer program", in an effort to make him less resistant to interrogation. During this interview, Mr. Khadr refused to answer questions. In 2005, von Finckenstein J. of the Federal Court issued an interim injunction preventing CSIS and DFAIT agents from further interviewing Mr. Khadr in order "to prevent a potential grave injustice" from occurring: *Khadr v. Canada*, 2005 FC 1076, [2006] 2 F.C.R. 505, at para. 46. In 2008, this Court ordered the Canadian government to disclose to Mr. Khadr the transcripts of the interviews he had given to CSIS and DFAIT in Guantanamo Bay, under s. 7 of the *Charter*: *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125 ("*Khadr 2008*").

6 Mr. Khadr has repeatedly requested that the Government of Canada ask the United States to return him to Canada: in March 2005 during a Canadian consular visit; on December 15, 2005, when a welfare report noted that "[Mr. Khadr] wants his government to bring him back home" (Report of Welfare Visit, Exhibit "L" to Affidavit of Sean Robertson, December 15, 2005 (J.R., vol. IV, at p. 534)); and in a formal written request through counsel on July 28, 2008.

7 The Prime Minister announced his decision not to request Mr. Khadr's repatriation on July 10, 2008, during a media interview. The Prime Minister provided the following response to a journalist's question, posed in French, regarding whether the government would seek repatriation:

> [TRANSLATION] The answer is no, as I said the former Government, and our Government with the notification of the Minister of Justice had considered all these [page52] issues and the situation remains the same... . We keep on looking for [assurances] of good treatment of Mr. Khadr.
>
> (http: //watch.ctv.ca/news/clip65783#clip65783, at 3'3", referred to in Affidavit of April Bedard, August 8, 2008 (J.R., vol. II, at pp. 131-32).)

8 On August 8, 2008, Mr. Khadr applied to the Federal Court for judicial review of the government's "ongoing decision and policy" not to seek his repatriation (Notice of Application filed by the respondent, August 8, 2008 (J.R., vol. II, at p. 113)). He alleged that the decision and policy infringed his rights under s. 7 of the *Charter*, which 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.

9 After reviewing the history of Mr. Khadr's detention and applicable principles of Canadian and international law, O'Reilly J. concluded that in these special circumstances, Canada has a "duty to protect" Mr. Khadr (2009 FC 405, 341 F.T.R. 300). He found that "[t]he ongoing refusal of Canada to request Mr. Khadr's repatriation to Canada offends a principle of fundamental justice and violates Mr. Khadr's rights under s. 7 of the *Charter*" (para. 92). Also, he held that "[t]o mitigate the effect of that violation, Canada must present a request to the United States for Mr. Khadr's repatriation to Canada as soon as practicable" (para. 92).

10 The majority judgment of the Federal Court of Appeal (*per* Evans and Sharlow JJ.A.) upheld O'Reilly J.'s order, but defined the s. 7 breach more narrowly. The majority of the Court of Appeal found that it arose from the March 2004 interrogation conducted with the knowledge that Mr. Khadr had been subject to the "frequent flyer program", characterized by the majority as involving cruel and abusive treatment contrary to the principles of fundamental justice: 2009 FCA 246, 310 D.L.R. (4th) 462. Dissenting, Nadon J.A. reviewed the many [page53] steps the

government had taken on Mr. Khadr's behalf and held that since the Constitution conferred jurisdiction over foreign affairs on the executive branch of government, the remedy sought was beyond the power of the courts to grant.

III. The Issues

11 Mr. Khadr argues that the government has breached his rights under s. 7 of the *Charter*, and that the appropriate remedy for this breach is an order that the government request the United States to return him to Canada.

12 Mr. Khadr does not suggest that the government is obliged to request the repatriation of all Canadian citizens held abroad in suspect circumstances. Rather, his contention is that the conduct of the government of Canada in connection with his detention by the U.S. military in Guantanamo Bay, and in particular Canada's collaboration with the U.S. government in 2003 and 2004, violated his rights under the *Charter*, and requires as a remedy that the government now request his return to Canada. The issues that flow from this claim may be summarized as follows:

A. Was There a Breach of Section 7 of the *Charter*?

B. Does the *Charter* apply to the conduct of Canadian state officials alleged to have infringed Mr. Khadr's s. 7 *Charter* rights?

C. If so, does the conduct of the Canadian government deprive Mr. Khadr of the right to life, liberty or security of the person?

D. If so, does the deprivation accord with the principles of fundamental justice?

[page54]

B. Is the Remedy Sought Appropriate and Just in All the Circumstances?

13 We will consider each of these issues in turn.

A. *Was There a Breach of Section 7 of the Charter?*

1. Does the Canadian *Charter* Apply to the Conduct of the Canadian State Officials Alleged to Have Infringed Mr. Khadr's Section 7 *Charter* Rights?

14 As a general rule, Canadians abroad are bound by the law of the country in which they find themselves and cannot avail themselves of their rights under the *Charter.* International customary law and the principle of comity of nations generally prevent the *Charter* from applying to the actions of Canadian officials operating outside of Canada: *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 48, *per* LeBel J., citing *United States of America v. Dynar*, [1997] 2 S.C.R. 462, at para. 123. The jurisprudence leaves the door open to an exception in the case of Canadian participation in activities of a foreign state or its agents that are contrary to Canada's international obligations or fundamental human rights norms: *Hape*, at para. 52, *per* LeBel J.; *Khadr 2008*, at para. 18.

15 The question before us, then, is whether the rule against the extraterritorial application of the *Charter* prevents the *Charter* from applying to the actions of Canadian officials at Guantanamo Bay.

16 This question was addressed in *Khadr 2008*, in which this Court held that the *Charter* applied to the actions of Canadian officials operating at Guantanamo Bay who handed the fruits of their interviews over to U.S. authorities. This Court held, at para. 26, that "the principles of international law and comity that might otherwise preclude application of the *Charter* to Canadian officials acting abroad do not apply to the assistance they gave to U.S. authorities at Guantanamo Bay", given holdings of the Supreme Court of the United [page55] States that the military commission regime then in place constituted a clear violation of fundamental human rights protected by international law: see *Khadr 2008*, at para. 24; *Rasul v. Bush*, 542 U.S. 466 (2004), and *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). The principles of fundamental justice thus required the Canadian officials who had interrogated Mr. Khadr to disclose to him the contents of the statements he had given them. The Canadian government complied with this Court's order.

17 We note that the regime under which Mr. Khadr is currently detained has changed significantly in recent years. The U.S. Congress has legislated and the U.S. courts have acted with the aim of bringing the military processes at Guantanamo Bay in line with international law. (The *Detainee Treatment Act of 2005*, Pub. L. 109-148, 119 Stat. 2739, prohibited inhumane treatment of detainees and required interrogations to be performed according to the Army field manual. The *Military Commissions Act of 2006*, Pub. L. 109-366, 120 Stat. 2600, attempted to legalize the Guantanamo regime after the U.S. Supreme Court's ruling in *Hamdan v. Rumsfeld*. However, on June 12, 2008, in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), the U.S. Supreme Court held that Guantanamo Bay detainees have a constitutional right to *habeas corpus*, and struck down the provisions of the *Military Commissions Act of 2006* that suspended that right.)

18 Though the process to which Mr. Khadr is subject has changed, his claim is based upon the same underlying series of events at Guantanamo Bay (the interviews and evidence-sharing of 2003 and 2004) that we considered in *Khadr 2008*. We are satisfied that the rationale in *Khadr 2008* for applying the *Charter* to the actions of Canadian officials at Guantanamo Bay governs this case as well.

[page56]

2. Does the Conduct of the Canadian Government Deprive Mr. Khadr of the Right to Life, Liberty or Security of the Person?

19 The United States is holding Mr. Khadr for the purpose of trying him on charges of war crimes. The United States is thus the primary source of the deprivation of Mr. Khadr's liberty and security of the person. However, the allegation on which his claim rests is that Canada has also contributed to his past and continuing deprivation of liberty. To satisfy the requirements of s. 7, as stated by this Court in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, there must be "a sufficient causal connection between [the Canadian] government's participation and the deprivation [of liberty and security of the person] ultimately effected" (para. 54).

20 The record suggests that the interviews conducted by CSIS and DFAIT provided significant evidence in relation to these charges. During the February and September 2003 interrogations, CSIS officials repeatedly questioned Mr. Khadr about the central events at issue in his prosecution, extracting statements from him that could potentially prove inculpatory in the U.S. proceedings against him (CSIS Document, Exhibit "U" to Affidavit of Lt. Cdr. William Kuebler, November 7, 2003 (J.R., vol. II, at p. 280); Interview Summary, Exhibit "AA" to Affidavit of Lt. Cdr. William Kuebler, February 24, 2003 (J.R., vol. III, at p. 289); Interview Summary, Exhibit "BB" to Affidavit of Lt. Cdr. William Kuebler, February 17, 2003 (J.R., vol. III, at p. 292); Interview Summary, Exhibit "DD" to Affidavit of Lt. Cdr. William Kuebler, April 20, 2004 (J.R., vol. III, at p. 296)). A report of the Security Intelligence Review Committee titled *CSIS's Role in the Matter of Omar Khadr* (July 8, 2009), further indicated that CSIS assessed the interrogations of Mr. Khadr as being "highly successful, as evidenced by the quality intelligence information" elicited from Mr. Khadr (p. 13). These statements were shared with U.S. authorities and were summarized in U.S. investigative reports (Report of Investigative [page57] Activity, Exhibit "AA" to Affidavit of Lt. Cdr. William Kuebler, February 24, 2003 (J.R., vol. III, at pp. 289 ff.)). Pursuant to the relaxed rules of evidence under the U.S. *Military Commissions Act of 2006*, Mr. Khadr's statements to Canadian officials are potentially admissible against him in the U.S. proceedings, notwithstanding the oppressive circumstances under which they were obtained: see *United States of America v. Jawad*, Military Commission, September 24, 2008, D-008 Ruling on Defense Motion to Dismiss - Torture of the Detainee (online: http: //www.defense.gov/news/Ruling%20D-008.pdf). The above interrogations also provided the context for the March 2004 interrogation, when a DFAIT official, knowing that Mr. Khadr had been subjected to the "frequent flyer program" to make him less resistant to interrogations, nevertheless proceeded with the interrogation of Mr. Khadr (Interview Summary, Exhibit "DD" to Affidavit of Lt. Cdr. William Kuebler, April 20, 2004 (J.R., vol. III, at p. 296)).

21 An applicant for a *Charter* remedy must prove a *Charter* violation on a balance of probabilities (*R. v. Collins*, [1987] 1 S.C.R. 265, at p. 277). It is reasonable to infer from the uncontradicted evidence before us that the statements taken by Canadian officials are contributing to the continued detention of Mr. Khadr, thereby impacting

his liberty and security interests. In the absence of any evidence to the contrary (or disclaimer rebutting this inference), we conclude on the record before us that Canada's active participation in what was at the time an illegal regime has contributed and continues to contribute to Mr. Khadr's current detention, which is the subject of his current claim. The causal connection demanded by *Suresh* between Canadian conduct and the deprivation of liberty and security of person is established.

[page58]

3. Does the Deprivation Accord With the Principles of Fundamental Justice?

22 We have concluded that the conduct of the Canadian government is sufficiently connected to the denial of Mr. Khadr's liberty and security of the person. This alone, however, does not establish a breach of Mr. Khadr's s. 7 rights under the *Charter*. To establish a breach, Mr. Khadr must show that this deprivation is not in accordance with the principles of fundamental justice.

23 The principles of fundamental justice "are to be found in the basic tenets of our legal system": *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 503. They are informed by Canadian experience and jurisprudence, and take into account Canada's obligations and values, as expressed in the various sources of international human rights law by which Canada is bound. In *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3, at para. 46, the Court (Abella J. for the majority) restated the criteria for identifying a new principle of fundamental justice in the following manner:

(1) It must be a legal principle.

(2) There must be a consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate.

(3) It must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

24 We conclude that Canadian conduct in connection with Mr. Khadr's case did not conform to the principles of fundamental justice. That conduct may be briefly reviewed. The statements taken by CSIS and DFAIT were obtained through participation in a regime which was known at the time to have refused detainees the right to challenge the legality of detention by way of *habeas corpus.* It was also known that Mr. Khadr was 16 years old at the time [page59] and that he had not had access to counsel or to any adult who had his best interests in mind. As held by this Court in *Khadr 2008*, Canada's participation in the illegal process in place at Guantanamo Bay clearly violated Canada's binding international obligations (*Khadr 2008*, at paras. 23-25; *Hamdan v. Rumsfeld*). In conducting their interviews, CSIS officials had control over the questions asked and the subject matter of the interviews (Transcript of cross-examination on Affidavit of Mr. Hooper, Exhibit "GG" to Affidavit of Lt. Cdr. William Kuebler, March 2, 2005 (J.R., vol. III, p. 313, at p. 22)). Canadian officials also knew that the U.S. authorities would have full access to the contents of the interrogations (as Canadian officials sought no restrictions on their use) by virtue of their audio and video recording (*CSIS's Role in the Matter of Omar Khadr*, at pp. 11-12). The purpose of the interviews was for intelligence gathering and not criminal investigation. While in some contexts there may be an important distinction between those interviews conducted for the purpose of intelligence gathering and those conducted in criminal investigations, here, the distinction loses its significance. Canadian officials questioned Mr. Khadr on matters that may have provided important evidence relating to his criminal proceedings, in circumstances where they knew that Mr. Khadr was being indefinitely detained, was a young person and was alone during the interrogations. Further, the March 2004 interview, where Mr. Khadr refused to answer questions, was conducted knowing that Mr. Khadr had been subjected to three weeks of scheduled sleep deprivation, a measure described by the U.S. Military Commission in *Jawad* as designed to "make [detainees] more compliant and break down their resistance to interrogation" (para. 4).

25 This conduct establishes Canadian participation in state conduct that violates the principles of fundamental justice. Interrogation of a youth, [page60] to elicit statements about the most serious criminal charges while detained in these conditions and without access to counsel, and while knowing that the fruits of the interrogations

would be shared with the U.S. prosecutors, offends the most basic Canadian standards about the treatment of detained youth suspects.

26 We conclude that Mr. Khadr has established that Canada violated his rights under s. 7 of the *Charter.*

B. *Is the Remedy Sought Appropriate and Just in All the Circumstances?*

27 In previous proceedings (*Khadr 2008*), Mr. Khadr obtained the remedy of disclosure of the material gathered by Canadian officials against him through the interviews at Guantanamo Bay. The issue on this appeal is whether the breach of s. 7 of the *Charter* entitles Mr. Khadr to the remedy of an order that Canada request of the United States that he be returned to Canada. Two questions arise at this stage: (1) Is the remedy sought sufficiently connected to the breach? and (2) Is the remedy sought precluded by the fact that it touches on the Crown prerogative power over foreign affairs?

28 The judge at first instance held that the remedy sought was open to him. The Federal Court of Appeal held that he did not abuse his remedial discretion. On the basis of our answer to the second of the foregoing questions, we conclude that the trial judge, on the record before us, erred in the exercise of his discretion in granting the remedy sought.

29 First, is the remedy sought sufficiently connected to the breach? We have concluded that the Canadian government breached Mr. Khadr's s. 7 rights in 2003 and 2004 through its participation [page61] in the then-illegal military regime at Guantanamo Bay. The question at this point is whether the remedy now being sought -- an order that the Canadian government ask the United States to return Mr. Khadr to Canada -- is appropriate and just in the circumstances.

30 An appropriate and just remedy is "one that meaningfully vindicates the rights and freedoms of the claimants": *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 55. The first hurdle facing Mr. Khadr, therefore, is to establish a sufficient connection between the breaches of s. 7 that occurred in 2003 and 2004 and the order sought in these judicial review proceedings. In our view, the sufficiency of this connection is established by the continuing effect of these breaches into the present. Mr. Khadr's *Charter* rights were breached when Canadian officials contributed to his detention by virtue of their interrogations at Guantanamo Bay knowing Mr. Khadr was a youth, did not have access to legal counsel or *habeas corpus* at that time and, at the time of the interview in March 2004, had been subjected to improper treatment by the U.S. authorities. As the information obtained by Canadian officials during the course of their interrogations may be used in the U.S. proceedings against Mr. Khadr, the effect of the breaches cannot be said to have been spent. It continues to this day. As discussed earlier, the material that Canadian officials gathered and turned over to the U.S. military authorities may form part of the case upon which he is currently being held. The evidence before us suggests that the material produced was relevant and useful. There has been no suggestion that it does not form part of the case against Mr. Khadr or that it will not be put forward at his ultimate trial. We therefore find that the breach of Mr. Khadr's s. 7 *Charter* rights remains ongoing and that the remedy sought could potentially vindicate those rights.

[page62]

31 The acts that perpetrated the *Charter* breaches relied on in this appeal lie in the past. But their impact on Mr. Khadr's liberty and security continue to this day and may redound into the future. The impact of the breaches is thus perpetuated into the present. When past acts violate present liberties, a present remedy may be required.

32 We conclude that the necessary connection between the breaches of s. 7 and the remedy sought has been established for the purpose of these judicial review proceedings.

33 Second, is the remedy sought precluded by the fact that it touches on the Crown prerogative over foreign affairs? A connection between the remedy and the breach is not the only consideration. As stated in *Doucet-Boudreau*, an appropriate and just remedy is also one that "must employ means that are legitimate within the

framework of our constitutional democracy" (para. 56) and must be a "judicial one which vindicates the right while invoking the function and powers of a court" (para. 57). The government argues that courts have no power under the Constitution of Canada to require the executive branch of government to do anything in the area of foreign policy. It submits that the decision not to request the repatriation of Mr. Khadr falls directly within the prerogative powers of the Crown to conduct foreign relations, including the right to speak freely with a foreign state on all such matters: P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at p. 1-19.

34 The prerogative power is the "residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown": *Reference as to the Effect of the Exercise of the Royal Prerogative of Mercy Upon Deportation Proceedings*, [1933] S.C.R. 269, at p. 272, *per* Duff C.J., quoting A. V. Dicey, *Introduction to the Study [page63] of the Law of the Constitution* (8th ed. 1915), at p. 420. It is a limited source of non-statutory administrative power accorded by the common law to the Crown: Hogg, at p. 1-17.

35 The prerogative power over foreign affairs has not been displaced by s. 10 of the *Department of Foreign Affairs and International Trade Act*, R.S.C. 1985, c. E-22, and continues to be exercised by the federal government. The Crown prerogative in foreign affairs includes the making of representations to a foreign government: *Black v. Canada (Prime Minister)* (2001), 199 D.L.R. (4th) 228 (Ont. C.A.). We therefore agree with O'Reilly J.'s implicit finding (paras. 39, 40 and 49) that the decision not to request Mr. Khadr's repatriation was made in the exercise of the prerogative over foreign relations.

36 In exercising its common law powers under the royal prerogative, the executive is not exempt from constitutional scrutiny: *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441. It is for the executive and not the courts to decide whether and how to exercise its powers, but the courts clearly have the jurisdiction and the duty to determine whether a prerogative power asserted by the Crown does in fact exist and, if so, whether its exercise infringes the *Charter* (*Operation Dismantle*) or other constitutional norms (*Air Canada v. British Columbia (Attorney General)*, [1986] 2 S.C.R. 539).

37 The limited power of the courts to review exercises of the prerogative power for constitutionality reflects the fact that in a constitutional democracy, all government power must be exercised in accordance with the Constitution. This said, judicial review of the exercise of the prerogative power for constitutionality remains sensitive to the fact that the executive branch of government is responsible for decisions under this power, and that the executive is better placed to make such decisions [page64] within a range of constitutional options. The government must have flexibility in deciding how its duties under the power are to be discharged: see, e.g., *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 101-2. But it is for the courts to determine the legal and constitutional limits within which such decisions are to be taken. It follows that in the case of refusal by a government to abide by constitutional constraints, courts are empowered to make orders ensuring that the government's foreign affairs prerogative is exercised in accordance with the constitution: *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283.

38 Having concluded that the courts possess a narrow power to review and intervene on matters of foreign affairs to ensure the constitutionality of executive action, the final question is whether O'Reilly J. misdirected himself in exercising that power in the circumstances of this case (*R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, at para. 15; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at paras. 117-18). (In fairness to the trial judge, we note that the government proposed no alternative (trial judge's reasons, at para. 78).) If the record and legal principle support his decision, deference requires we not interfere. However, in our view that is not the case.

39 Our first concern is that the remedy ordered below gives too little weight to the constitutional responsibility of the executive to make decisions on matters of foreign affairs in the context of complex and ever-changing circumstances, taking into account Canada's broader national interests. For the following reasons, we conclude that the appropriate remedy is to declare that, on the record before the Court, Canada infringed Mr. Khadr's s. 7 rights, and to leave it to the government to decide how best to respond to this judgment in light of [page65] current information, its responsibility for foreign affairs, and in conformity with the *Charter*.

40 As discussed, the conduct of foreign affairs lies with the executive branch of government. The courts, however, are charged with adjudicating the claims of individuals who claim that their *Charter* rights have been or will be violated by the exercise of the government's discretionary powers: *Operation Dismantle*.

41 In some situations, courts may give specific directions to the executive branch of the government on matters touching foreign policy. For example, in *Burns*, the Court held that it would offend s. 7 to extradite a fugitive from Canada without seeking and obtaining assurances from the requesting state that the death penalty would not be imposed. The Court gave due weight to the fact that seeking and obtaining those assurances were matters of Canadian foreign relations. Nevertheless, it ordered that the government seek them.

42 The specific facts in *Burns* justified a more specific remedy. The fugitives were under the control of Canadian officials. It was clear that assurances would provide effective protection against the prospective *Charter* breaches: it was entirely within Canada's power to protect the fugitives against possible execution. Moreover, the Court noted that no public purpose would be served by extradition without assurances that would not be substantially served by extradition with assurances, and that there was nothing to suggest that seeking such assurances would undermine Canada's good relations with other states: *Burns*, at paras. 125 and 136.

43 The present case differs from *Burns*. Mr. Khadr is not under the control of the Canadian [page66] government; the likelihood that the proposed remedy will be effective is unclear; and the impact on Canadian foreign relations of a repatriation request cannot be properly assessed by the Court.

44 This brings us to our second concern: the inadequacy of the record. The record before us gives a necessarily incomplete picture of the range of considerations currently faced by the government in assessing Mr. Khadr's request. We do not know what negotiations may have taken place, or will take place, between the U.S. and Canadian governments over the fate of Mr. Khadr. As observed by Chaskalson C.J. in *Kaunda v. President of the Republic of South Africa*, [2004] ZACC 5, 136 I.L.R. 452, at para. 77: "The timing of representations if they are to be made, the language in which they should be couched, and the sanctions (if any) which should follow if such representations are rejected are matters with which courts are ill-equipped to deal." It follows that in these circumstances, it would not be appropriate for the Court to give direction as to the diplomatic steps necessary to address the breaches of Mr. Khadr's *Charter* rights.

45 Though Mr. Khadr has not been moved from Guantanamo Bay in over seven years, his legal predicament continues to evolve. During the hearing of this appeal, we were advised by counsel that the U.S. Department of Justice had decided that Mr. Khadr will continue to face trial by military commission, though other Guantanamo detainees will now be tried in a federal court in New York. How this latest development will affect Mr. Khadr's situation and any ongoing negotiations between the United States and Canada over his possible repatriation is unknown. But it signals caution in the exercise of the Court's remedial jurisdiction.

46 In this case, the evidentiary uncertainties, the limitations of the Court's institutional competence, [page67] and the need to respect the prerogative powers of the executive, lead us to conclude that the proper remedy is declaratory relief. A declaration of unconstitutionality is a discretionary remedy: *Operation Dismantle*, at p. 481, citing *Solosky v. The Queen*, [1980] 1 S.C.R. 821. It has been recognized by this Court as "an effective and flexible remedy for the settlement of real disputes": *R. v. Gamble*, [1988] 2 S.C.R. 595, at p. 649. A court can properly issue a declaratory remedy so long as it has the jurisdiction over the issue at bar, the question before the court is real and not theoretical, and the person raising it has a real interest to raise it. Such is the case here.

47 The prudent course at this point, respectful of the responsibilities of the executive and the courts, is for this Court to allow Mr. Khadr's application for judicial review in part and to grant him a declaration advising the government of its opinion on the records before it which, in turn, will provide the legal framework for the executive to exercise its functions and to consider what actions to take in respect of Mr. Khadr, in conformity with the *Charter*.

IV. Conclusion

48 The appeal is allowed in part. Mr. Khadr's application for judicial review is allowed in part. This Court declares that through the conduct of Canadian officials in the course of interrogations in 2003-2004, as established on the evidence before us, Canada actively participated in a process contrary to Canada's international human rights obligations and contributed to Mr. Khadr's ongoing detention so as to deprive him of his right to liberty and security of the person guaranteed by s. 7 of the *Charter*, contrary to the principles of fundamental justice. Costs are awarded to Mr. Khadr.

Appeal allowed in part with costs to the respondent.

[page68]

Solicitors:

Solicitor for the appellants: Department of Justice, Ottawa.

Solicitors for the respondent: Parlee McLaws, Edmonton.

Solicitors for the intervener Amnesty International (Canadian Section, English Branch): Thompson Dorfman Sweatman, Winnipeg.

Solicitors for the interveners Human Rights Watch, the University of Toronto, Faculty of Law -- International Human Rights Program and the David Asper Centre for Constitutional Rights: John Norris, Brydie Bethell and Audrey Macklin, Toronto.

Solicitor for the interveners the Canadian Coalition for the Rights of Children and Justice for Children and Youth: Justice for Children and Youth Services, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association: Arvay Finlay, Vancouver.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Greenspan Humphrey Lavine, Toronto.

Solicitors for the intervener the Canadian Bar Association: Waldman & Associates, Toronto.

Solicitors for the interveners Lawyers Without Borders Canada, Barreau du Québec and Groupe d'étude en droits et libertés de la Faculté de droit de l'Université Laval: McCarthy Tétrault, Montréal.

Solicitors for the intervener the Canadian Civil Liberties Association: Marlys Edwardh Barristers Professional Corporation, Toronto.

Solicitors for the intervener the National Council for the Protection of Canadians Abroad: Theall Group, Toronto; Amsterdam & Peroff, Toronto.

Canadian Society for the Advancement of Science in Public Policy v. British Columbia (Provincial Health Officer), [2022] B.C.J. No. 780

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

S.R. Coval J.

Heard: April 7, 2022.

Judgment: May 4, 2022.

Docket: S2110229

Registry: Vancouver

[2022] B.C.J. No. 780 | 2022 BCSC 724

IN THE MATTER CONCERNING the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241; and the Public Health Act, S.B.C. 2008, c. 28 Between Canadian Society for the Advancement of Science in Public Policy, and Kipling Warner, Petitioners, and Dr. Bonnie Henry in her capacity as Provincial Health Officer, for the Province of British Columbia, Respondent

(74 paras.)

Counsel

Counsel for the Petitioners: P.H. Furtula.

Counsel for the Respondent: J. Gibson, A.C. Bjornson.

Table of Contents

CONCLUSION

Reasons for Judgment

S.R. COVAL J.

Introduction

1 The respondent applies to dismiss this Petition on the basis that the petitioners lack legal standing. The petitioners argue, in response, that the Canadian Society for the Advancement of Science in Public Policy ("CSASPP") has public interest standing and Mr. Warner has private interest standing.

2 The Petition challenges public health orders made under the *Public Health Act*, S.B.C. 2008, c. 28 [*PHA*], requiring two COVID-19 vaccinations for healthcare providers in wide-ranging healthcare facilities across British Columbia.

3 It alleges that the impugned orders fail to provide reasonable exemptions and accommodations for persons with religious objections, vaccination risks, immunity from prior infection, and recent negative COVID-19 testing. It seeks to set aside the orders for infringing the *Charter* rights of unvaccinated healthcare workers, and as an unreasonable exercise of statutory powers contrary to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 [*JRPA*].

4 The respondent, the Provincial Health Officer, Dr. Bonnie Henry ("PHO"), submits that the orders are reasonable, precautionary public health measures. Implemented to limit transmission in higher-risk public settings, they protect public health, vulnerable populations, and functioning of the healthcare system.

5 For the reasons that follow, I find that CSASPP has public interest standing to bring the Petition. Mr. Warner does not, however, have private interest standing to do so, and his claims are therefore dismissed.

Parties

6 CSASPP is a not-for-profit society incorporated under the *Societies Act,* S.B.C. 2015, c. 18.

7 With a head-office in Vancouver, it describes itself as a non-partisan, secular organization, advocating for the development and advancement of science in the formation of public policy in British Columbia.

8 Mr. Warner, a British Columbia resident, is a software engineer and the executive director of CSASPP. He describes CSASPP's directors, officers, donors, and patrons as drawn from diverse communities across the political spectrum.

9 He deposes that, when the impugned healthcare vaccination requirements were ordered, CSASPP was contacted by more than a thousand self-identified healthcare workers in British Columbia, including many registered nurses, concerned about the medical justification for the vaccination mandates and the threat of losing their jobs.

10 As the Public Health Officer under s. 64 of the *PHA*, Dr. Henry is the Province's senior public health official. In

that role, she has led the public health response to the emergencies created by the transmission of the novel coronavirus SARS-CoV-2 and the illness known as COVID-19.

Background Facts

Emergency Powers under the PHA

11 On March 18, 2020, the Minister of Public Safety declared a state of emergency throughout British Columbia because of the COVID-19 pandemic. The declaration expired on June 30, 2021.

12 On March 17, 2020, Dr. Henry issued a notice, under s. 52(2) of the *PHA,* that the transmission of the infectious SARS-CoV-2 virus constituted a "regional event" under s. 51. The *PHA* defines "regional event" as an "immediate and significant risk to public health throughout a region or the province".

13 Under s. 52, the notice enabled the PHO to exercise the "emergency powers" in Part 5 of the *PHA*. These powers include the issuance of orders for persons to do anything that the PHO reasonably believes is necessary "to prevent or stop a health hazard, or mitigate the harm or prevent further harm from a health hazard". They include the power to prohibit a class of persons from entering a particular place (*PHA,* ss. 31(1)(b), 39(3)).

The Impugned Orders

14 The Petition challenges three sets of orders, issued and updated by the PHO under the *PHA* emergency powers (the "Impugned Orders"):

(i) *Covid-19 Vaccination Status Information and Preventative Measures* order of September 9, 2021, September 27, 2021 ("Vaccination Status Order");

(ii) *Residential Care Covid-19 Preventative Measures* order of October 21, 2021 ("Residential Care Order"); and

(iii) *Hospital and Community (Health Care and other Services) Covid-19 Vaccination Status Information and Preventative Measures* order of October 21, 2021 ("Hospital Order").

15 Broadly speaking, the Impugned Orders mandate that, as of mid-October 2021, only double-vaccinated persons may provide healthcare services in a wide-range of British Columbia healthcare settings, including long-term care facilities, hospitals and community care settings.

Reconsideration Request

16 By letter to the PHO of November 8, 2021, pursuant to s. 43 of the *PHA*, the petitioners requested a reconsideration of the Impugned Orders ("Reconsideration Request") on behalf of a broad class of healthcare workers in British Columbia.

17 Section 43(1) of the *PHA* says in part:

> **Reconsideration of orders**
>
> **43** (1) A person affected by an order, or the variance of an order, may request the health officer who issued the order or made the variance to reconsider the order or variance if the person
>
> (a) has additional relevant information that was not reasonably available to the health officer when the order was issued or varied,
>
> (b) has a proposal that was not presented to the health officer when the order was issued or varied but, if implemented, would
>
> (c) meet the objective of the order, and

(ii) be suitable as the basis of a written agreement under section 38 *[may make written agreements]*, or

(c) requires more time to comply with the order.

18 The Reconsideration Request contained a lengthy critique of the Impugned Orders from Dr. J. Kettner, Chief Medical Officer of Health and Chief Public Health Officer for the Province of Manitoba from 1999 to 2012. Arguing that the Impugned Orders failed to comply with generally accepted principles of public health governance and the *Charter*, it contained voluminous research, submissions regarding the principles governing public health orders, and examples of less restrictive measures in other jurisdictions.

19 The Reconsideration Request proposed, among other things, alternative approaches to satisfy the objectives of the Impugned Orders, including the following:

i. Natural immunity through a positive RT-PCR or rapid antigen test result demonstrating recovery from COVID-19, issued no less than 11 days and no more than 6 months after the date on which a person first tested positive (e.g. France).

ii. Negative PCR or antigen test less than 48 hours prior to attendance at a facility (e.g. Alberta).

iii. Single vaccination after contracting COVID-19 after an interval of at least 21 days following the illness (e.g. Quebec).

iv. Documentation from a physician or registered nurse providing medical reason for not being fully vaccinated (e.g. Ontario).

20 On November 9, 2021, under *PHA s.* 54(1)(h), the PHO issued a variance, with retroactive effect, halting s. 43 reconsideration requests except for medical reasons ("Reconsideration Variance").

21 The evidence filed on behalf of the PHO suggests that, due to hundreds of s. 43 requests, the Reconsideration Variance was necessary to protect public health until there was a significant reduction in transmissions, serious disease, and strain on the public health care system.

22 Section 54(1)(h) says:

General emergency powers

54 (1) A health officer may, in an emergency, do one or more of the following:

...

(h) not reconsider an order under section 43 *[reconsideration of orders]*, not review an order under section 44 *[review of orders]* or not reassess an order under section 45 *[mandatory reassessment of orders]*;

23 By letter of January 17, 2022, relying on the Reconsideration Variance, the PHO declined to respond to the Reconsideration Request because it sought exemption from the Impugned Orders on non-medical grounds ("Reconsideration Response").

The Petition

24 The Petition alleges that the materials in the Reconsideration Request demonstrate the *Charter* violations and unreasonableness of the Impugned Orders.

25 It seeks a declaration that the Impugned Orders are of no force and effect for unjustifiably infringing the following rights and freedoms of unvaccinated healthcare workers:

* section 2(a) (freedom of conscience and religion);

* section 2(b) (freedom of thought, belief, opinion and expression);

* section 7 (life, liberty and security of the person); and

* section 15(1) (equality rights).

26 It seeks orders, under the *JRPA,* quashing and setting aside the Impugned Orders, or declaring them *ultra vires*, as unreasonable or exceeding the PHO's statutory authority.

27 The petitioners also challenge the Reconsideration Response as an unreasonable refusal to consider the Reconsideration Request.

Governing Law

28 Public interest standing permits public-spirited litigants to prosecute issues of general interest and importance, thereby causing courts to fulfill their "constitutional role of scrutinizing the legality of government action, striking it down when it is unlawful and thus establishing and enforcing the rule of law" (*Council of Canadians with Disabilities v. British Columbia (Attorney General),* 2020 BCCA 241, [*CCD*], para. 2).1

29 Challenges to standing focus on whether "the public interest litigant is an appropriate party to advance a justiciable claim, not on the detail of intended trial evidence or the claim's ultimate prospect of success" (*CCD,* para. 87).

30 The litigant has the onus to demonstrate that public interest standing is warranted in the circumstances. The assessment focuses on three factors identified in *Canada (Minister of Justice) v. Borowski*, [1981] 2 S.C.R. 575 [*Borowski*]:

(i) does the claim raise a serious justiciable issue?

(ii) is the plaintiff directly affected by the action or does the plaintiff have a genuine interest in its outcome? and

(iii) is the action a reasonable and effective means to bring the claim to court?

31 The assessment should be flexible and generous, to serve the underlying purposes of upholding the legality principle and providing access to justice, particularly so for vulnerable and marginalized citizens broadly affected by legislation of questionable constitutional validity (*Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society,* 2012 SCC 45 [*Downtown Eastside*], paras. 31, 51).

32 On the other side of the balance are the limiting factors of allocation of scarce judicial resources, screening of "busybody" litigants, and obtaining the viewpoints of those who are actually most directly impacted by the issues in question. For these reasons, a party with private interest standing is generally preferred to a public interest litigant seeking to advance a duplicative claim (*Downtown Eastside*, para. 37; *CCD*, paras. 71, 79-80, 83).

Analysis and Findings

The Society's Public Interest Standing

33 I turn to consider whether the Society satisfies the *Borowski* factors.

Serious Justiciable Issue

34 A serious justiciable issue is one that is appropriate for judicial determination and clearly not frivolous.

35 Justiciability asks whether the case suits the court's place in our constitutional system of government: *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49 [*Auditor General*] at 90-

91. Ultimately, the answer "depends on the appreciation by the judiciary of its own position in the constitutional scheme" (*Auditor General* at 91).

36 So long as the pleading reveals at least one serious issue, it will usually be unnecessary to examine every pleaded claim for the purpose of standing (*Downtown Eastside,* para. 42; *CCD*, paras. 90, 94).

37 The petitioners argue that challenges such as this -- to the constitutionality and legality of legislation -- are always considered justiciable (*CCD*, para 90). They say serious issues are raised by questioning the "circumvention of the legislature ... in the name of public health," to achieve goals normally achieved through the "legislative process, which is transparent, public, and fosters democratic debate."

38 The PHO argues the Petition "discloses no adjudicative facts and so is non-justiciable". The Petition, the PHO says, is devoid of any meaningful particulars permitting the inquiry sought (*CCD,* paras. 104, 107). The PHO relies on *Beaudoin v. British Columbia*, 2021 BCSC 512 [*Beaudoin*], to argue that the Reconsideration Request raises no serious issue, as in that case a similar request for reconsideration based on similar evidence from Dr. Kettner was ruled inadmissible.

39 Regarding justiciability, the Petition challenges state action based on legislatively-delegated discretionary powers. In my view, the petitioners are correct that whether those actions comply with the *Charter* and *JRPA* are clearly questions suitable for judicial determination (*CCD*, para 90).

40 Regarding a serious issue, the Impugned Orders directly impact members of a defined and identifiable group in a serious way that, at least on the surface, relates to their *Charter* rights. CSASPP alleges that its alternative proposals reflect a superior approach, taken in other Provinces and elsewhere around the world, much less intrusive on healthcare workers' *Charter* rights. In my view, this raises substantial questions that meet the threshold of "clearly not frivolous."

41 I do not accept the PHO's argument that *Beaudoin* shows there is no serious issue to be tried regarding the Reconsideration Response. In *Beaudoin,* the reconsideration materials were ruled inadmissible because the petitioners did not challenge the reconsideration decision. In this case, however, CSASPP seeks to impugn the PHO's Reconsideration Response.2

42 In *Beaudoin*, religious leaders challenged the PHO's prohibition of certain religious gatherings, for allegedly violating the *Charter* rights of freedoms of religion, expression, assembly and association. After the petition was filed, the PHO reconsidered the impugned orders and issued a conditional variance allowing outdoor worship services subject to certain conditions.

43 The petitioners challenged only the PHO's initial orders, however, not the decision responding to their reconsideration request. Chief Justice Hinkson ruled the reconsideration materials inadmissible for that reason:

> [79] Moreover, as the religious petitioners have chosen not to amend their petition to seek judicial review of Dr. Henry's reconsideration decision, the main evidence they seek to rely on, namely the affidavits of Dr. Warren and Dr. Kettner, is not admissible on this petition because that evidence was not before Dr. Henry when she made the G&E Orders. ...
>
> [102] Had the religious petitioners amended their petition to seek judicial review of Dr. Henry's decision to grant them a variance to her G&E Orders, then the "record of proceeding" would include all of the information before Dr. Henry when she made her decision on the variance (but not before her when she issued the G&E Orders). But then the review would be of only her variance decision, not the G&E Orders.

44 Overall, the serious justiciable issue factor supports standing.

Genuine Interest

45 The genuine interest factor asks if a litigant has a real stake in the proceedings or is engaged with the issues in

question (*CCD*, para. 98). Its purpose is to achieve "concrete adverseness", and thereby ensure sharp debate, thorough argument, and economical use of judicial resources. A litigant's engagement is assessed by its reputation, continuing interest, and link with the claim (*Downtown Eastside,* paras. 29, 43).

46 CSASPP claims genuine interest, based on its membership, purposes, and Reconsideration Request. While not tracking personal information about its approximately 170 current members, it estimates at least 41 work in the healthcare field in British Columbia based on participation in its confidential forum for healthcare issues.

47 The purposes described in CSASPP's constitution of January 14, 2021 are:

> To challenge the provincial COVID-19 measures instituted in British Columbia.
>
> To advocate and promote the development and advancement of science in public policy in British Columbia.

48 Its constitution of October 12, 2021 revised the purposes to include the following:

> (a) To improve health outcomes of people by advocating for the development and implementation of government and public health policy initiatives to be based on research conducting using the scientific method;
>
> (b) To improve access to information on pandemic and epidemic threats and events;
>
> ...
>
> (d) To oppose the dissemination of information that is not based on research conducted according to the scientific method;
>
> ...
>
> (f) To promote critical thinking and public discussion that includes the widest possible expression of opinions and viewpoints in all public policy debates or discussion, regardless of the level of government of Canada or of any province or territory therein.

49 The PHO submits that CSASPP has no history of involvement in the issues raised by the Petition, and the evidence connecting its membership to healthcare is vague and weak. The PHO says CSASPP is merely a "purpose-built anti-COVID-19 measures entity".

50 The PHO relies on *Atkins v. Anmore (Village)*, 2014 BCSC 2402, a petition to quash municipal bylaws brought by a petitioner in her capacity "as a citizen of the municipality" (para. 5). Justice Williams found this insufficient for a genuine interest in the validity of the bylaws and declined public interest standing:

> [35] ... the petitioner has [not] established that she has an interest that is materially different than any other member of the community. While it may be inferred that she brings these proceedings in some role that is supported by the two councillors, that, in my view, does not provide the basis for a finding of the type of interest that the jurisprudence suggests is necessary.

51 In my view, creating a society committed to one side of an issue is not sufficient to create a genuine stake for purposes of standing. As in *Atkins,* the members of such a group are obviously interested in the issue but do not necessarily have a stake different from the community generally.

52 The genuine interest factor is concerned not just with a genuine stake in an issue, however, but also with engagement. Engagement tests for "concrete adverseness" and economical use of judicial resources (*CCD*, para. 98; *Downtown Eastside*, paras. 29, 43).

53 In my view, CSASPP's Reconsideration Request and allegations regarding the Reconsideration Response show an engaged, concrete adverseness counting in favour of standing. Also counting somewhat in favour is the

evidence, albeit vague and inferential, of CSASPP's stake based on the healthcare workers amongst its membership.

54 Overall, the genuine interest factor supports standing.

Reasonable and Effective Means

55 This third *Borowski* factor is concerned with "whether the proposed suit is, in all of the circumstances, a reasonable and effective means of bringing the matter before the court".

56 The circumstances that the court should consider in making this inquiry include (*Downtown Eastside*, paras. 51-52):

(a) The plaintiff's capacity to bring forward a claim and "whether the issue will be presented in a sufficiently concrete and well-developed factual setting";

(b) Whether the case transcends the interests of those most directly affected by the challenged law or action;

(c) Whether there are realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination; and

(d) The potential impact of the proceedings on the rights of others who are equally or more directly affected, especially where private and public interests may come into conflict.

57 The petitioners submit they have the necessary resources and expertise to prosecute the claim. They point to Dr. Kettner's report and the other materials in their Reconsideration Request. They say the importance of their case transcends the interests of individual healthcare workers and concerns society's interest in having healthcare decisions made in accordance with scientific research.

58 The PHO argues the petition is not a reasonable and effective way to bring the issue before the courts. It says that directly impacted healthcare workers are better suited to challenge the Impugned Orders. As stated by Dickson J.A. in *CCD*, "all other relevant considerations being equal, a plaintiff with private interest standing will usually be preferred over a public interest litigant seeking to advance a duplicative claim in a separate action" (para. 83).

59 As discussed in the hearing, numerous individual healthcare workers, allegedly having lost their jobs due to being unvaccinated, are challenging the Impugned Orders in another proceeding that is also in its early stages: *Tatlock v. Attorney General for the Province of British Columbia*, Vancouver Registry Court File No. S-222427.

60 Given the *Tatlock* proceedings, CSASPP's standing appears unnecessary for access to justice for impacted healthcare workers. Nevertheless, guided by Crowell J.'s flexible, purposive approach in *Downtown Eastside*, CSASPP's petition appears to be a reasonable and effective means of bringing forward the evidence and claims regarding the Reconsideration Request and Response. It appears that no similar issue is being pursued in *Tatlock*.

61 In my view, subject to the comments above about the shortcomings in its pleadings, the Petition represents a reasonable and effective means to bring forward the important and complex healthcare issues in the Reconsideration Request that transcend the interests of those directly involved.

62 Overall, the reasonable and effective means factor supports standing.

Conclusion

63 In my view, all three *Borowski* factors support CSASPP's public interest standing particularly given its role in the Reconsideration Request.

Mr. Warner's Private Interest Standing

64 Private interest standing is based on personal and direct interest in an issue by virtue of its impact on the party. It arises if the party has a private right at stake, or was specially impacted by the issue beyond the effect on the general public (*Downtown Eastside*, para. 1).

65 The PHO argues that Mr. Warner is a software engineer, without any apparent connection to healthcare, and his evidence discloses no actual personal or direct interest in the issues.

66 In argument, Mr. Warner withdrew his claim to public interest standing and argued only for private interest standing. His evidence of the personal impact of the Impugned Orders is limited to this:

> ... my ability to access medical services in a timely manner has been affected. For example, I have been on the waitlist for approximately one year for surgery related to a sports injury.

67 In my view, Mr. Warner offers no evidentiary basis, beyond this unsupported, conclusory statement, to suggest any right at stake, or any personal or special impact from the Impugned Orders. There is nothing, for example, to suggest his wait for surgery was unusual or impacted by the Impugned Orders.

68 In my view, for these reasons he does not satisfy the requirements for private interest standing.

Substitute Petitioners

69 The petitioners brought a back-up application, in case both were denied standing, to substitute, as petitioners, two healthcare workers who allege losing their jobs due to the Impugned Orders.

70 The PHO did not dispute the private interest standing of these two healthcare workers, but opposed their substitution because it fundamentally altered the pleadings and record. The PHO's position was therefore that, if standing were denied to the petitioners, the substitutes should commence new proceedings.

71 Having found CSASPP to have public interest standing, I will not decide this alternative application to substitute these two petitioners.

Conclusion

72 CSASPP is found to have public interest standing.

73 Mr. Warner is found not to have private interest standing and his claims are dismissed.

74 Costs of the application are in the cause unless the parties wish to speak to them.

S.R. COVAL J.

---

1 Leave to appeal granted by the Supreme Court of Canada, 2021 CanLII 24821.

2 At least for purposes of this application, the Reconsideration Request and Response appear central to CSASPP's case. They are prominent in the Petition, Part 2: Factual Basis, and CSASPP's evidence and argument at the hearing. The PHO acknowledged in argument that the petitioners' written submissions sought to impugn, by judicial review, the Reconsideration Response.

Having said that, I make no findings about the adequacy of CSASPP's current pleadings regarding the Reconsideration Request and Response. As the PHO points out, they are not referred to in the Petition, Part 1: Orders Sought, and are only indirectly referred to in Part 3: Legal Basis.

End of Document

Carter v. Canada (Attorney General), [2015] 1 S.C.R. 331

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ.

Heard: October 15, 2014;

Judgment: February 6, 2015.

File No.: 35591.

[2015] 1 S.C.R. 331 | [2015] 1 R.C.S. 331 | [2015] S.C.J. No. 5 | [2015] A.C.S. no 5 | 2015 SCC 5

Lee Carter, Hollis Johnson, William Shoichet, British Columbia Civil Liberties Association and Gloria Taylor, Appellants; v. Attorney General of Canada, Respondent. And Lee Carter, Hollis Johnson, William Shoichet, British Columbia Civil Liberties Association and Gloria Taylor, Appellants; v. Attorney General of Canada and Attorney General of British Columbia, Respondents, and Attorney General of Ontario, Attorney General of Quebec, Council of Canadians with Disabilities, Canadian Association for Community Living, Christian Legal Fellowship, Canadian HIV/AIDS Legal Network, HIV & AIDS Legal Clinic Ontario, Association for Reformed Political Action Canada, Physicians' Alliance against Euthanasia, Evangelical Fellowship of Canada, Christian Medical and Dental Society of Canada, Canadian Federation of Catholic Physicians' Societies, Dying With Dignity, Canadian Medical Association, Catholic Health Alliance of Canada, Criminal Lawyers' Association (Ontario), Farewell Foundation for the Right to Die, Association québécoise pour le droit de mourir dans la dignité, Canadian Civil Liberties Association, Catholic Civil Rights League, [page332] Faith and Freedom Alliance, Protection of Conscience Project, Alliance of People With Disabilities Who are Supportive of Legal Assisted Dying Society, Canadian Unitarian Council, Euthanasia Prevention Coalition and Euthanasia Prevention Coalition - British Columbia, Interveners.

(148 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Catchwords:

Constitutional law — Division of powers — Interjurisdictional immunity — Criminal Code provisions prohibiting physician-assisted dying — Whether prohibition interferes with protected core of provincial jurisdiction over health — Constitution Act, 1867, ss. 91(27), 92(7), (13), (16).

Constitutional law — Charter of Rights — Right to life, liberty and security of the person — Fundamental justice — Competent adult with grievous and irremediable medical condition causing enduring suffering consenting to termination of life with physician assistance — Whether Criminal Code provisions prohibiting physician-assisted dying infringe s. 7 of Canadian Charter of Rights and Freedoms — If so, whether infringement justifiable under s. 1 of Charter — Criminal Code, R.S.C. 1985, c. C-46, ss. 14, 241(b).

Constitutional law — Charter of Rights — Remedy — Constitutional exemption — Availability — Constitutional challenge of Criminal Code provisions prohibiting physician-assisted dying seeking declaration of invalidity of provisions and free-standing constitutional exemption for claimants — Whether

constitutional exemption [page333] under s. 24(1) of Canadian Charter of Rights and Freedoms should be granted.

Courts — Costs — Special costs — Principles governing exercise of courts' discretionary power to grant special costs on full indemnity basis — Trial judge awarding special costs to successful plaintiffs on basis that award justified by public interest, and ordering Attorney General intervening as of right to pay amount proportional to participation in proceedings — Whether special costs should be awarded to cover entire expense of bringing case before courts — Whether award against Attorney General justified.

Summary:

Section 241(*b*) of the *Criminal Code* says that everyone who aids or abets a person in committing suicide commits an indictable offence, and s. 14 says that no person may consent to death being inflicted on them. Together, these provisions prohibit the provision of assistance in dying in Canada. After T was diagnosed with a fatal neurodegenerative disease in 2009, she challenged the constitutionality of the *Criminal Code* provisions prohibiting assistance in dying. She was joined in her claim by C and J, who had assisted C's mother in achieving her goal of dying with dignity by taking her to Switzerland to use the services of an assisted suicide clinic; a physician who would be willing to participate in physician-assisted dying if it were no longer prohibited; and the British Columbia Civil Liberties Association. The Attorney General of British Columbia participated in the constitutional litigation as of right.

The trial judge found that the prohibition against physician-assisted dying violates the s. 7 rights of competent adults who are suffering intolerably as a result of a grievous and irremediable medical condition and concluded that this infringement is not justified under s. 1 of the *Charter*. She declared the prohibition unconstitutional, granted a one-year suspension of invalidity and provided T with a constitutional exemption. She awarded special costs in favour of the plaintiffs on the ground that this was justified by the public interest in resolving the legal issues raised by the case, and awarded 10 percent of the costs against the Attorney General of British Columbia in light of the full and active role it assumed in the proceedings.

[page334]

The majority of the Court of Appeal allowed the appeal on the ground that the trial judge was bound to follow this Court's decision in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, where a majority of the Court upheld the blanket prohibition on assisted suicide. The dissenting judge found no errors in the trial judge's assessment of *stare decisis*, her application of s. 7 or the corresponding analysis under s. 1. However, he concluded that the trial judge was bound by the conclusion in *Rodriguez* that any s. 15 infringement was saved by s. 1.

Held: The appeal should be allowed. Section 241(*b*) and s. 14 of the *Criminal Code* unjustifiably infringe s. 7 of the *Charter* and are of no force or effect to the extent that they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition. The declaration of invalidity is suspended for 12 months. Special costs on a full indemnity basis are awarded against Canada throughout. The Attorney General of British Columbia will bear responsibility for 10 percent of the costs at trial on a full indemnity basis and will pay the costs associated with its presence at the appellate levels on a party-and-party basis.

The trial judge was entitled to revisit this Court's decision in *Rodriguez*. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate. Here, both conditions were met. The argument before the trial judge involved a different legal conception of s. 7 than that prevailing when *Rodriguez* was decided. In particular, the law relating to the principles of overbreadth and gross disproportionality had

materially advanced since *Rodriguez*. The matrix of legislative and social facts in this case also differed from the evidence before the Court in *Rodriguez*.

[page335]

The prohibition on assisted suicide is, in general, a valid exercise of the federal criminal law power under s. 91(27) of the *Constitution Act, 1867*, and it does not impair the protected core of the provincial jurisdiction over health. Health is an area of concurrent jurisdiction, which suggests that aspects of physician-assisted dying may be the subject of valid legislation by both levels of government, depending on the circumstances and the focus of the legislation. On the basis of the record, the interjurisdictional immunity claim cannot succeed.

Insofar as they prohibit physician-assisted dying for competent adults who seek such assistance as a result of a grievous and irremediable medical condition that causes enduring and intolerable suffering, ss. 241(*b*) and 14 of the *Criminal Code* deprive these adults of their right to life, liberty and security of the person under s. 7 of the *Charter*. The right to life is engaged where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly. Here, the prohibition deprives some individuals of life, as it has the effect of forcing some individuals to take their own lives prematurely, for fear that they would be incapable of doing so when they reached the point where suffering was intolerable. The rights to liberty and security of the person, which deal with concerns about autonomy and quality of life, are also engaged. An individual's response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy. The prohibition denies people in this situation the right to make decisions concerning their bodily integrity and medical care and thus trenches on their liberty. And by leaving them to endure intolerable suffering, it impinges on their security of the person.

The prohibition on physician-assisted dying infringes the right to life, liberty and security of the person in a manner that is not in accordance with the principles of fundamental justice. The object of the prohibition is not, broadly, to preserve life whatever the circumstances, but more specifically to protect vulnerable persons from being induced to commit suicide at a time of weakness. Since a total ban on assisted suicide clearly helps achieve this object, individuals' rights are not deprived arbitrarily. However, the prohibition catches people outside the class of protected persons. It follows that the limitation on their [page336] rights is in at least some cases not connected to the objective and that the prohibition is thus overbroad. It is unnecessary to decide whether the prohibition also violates the principle against gross disproportionality.

Having concluded that the prohibition on physician-assisted dying violates s. 7, it is unnecessary to consider whether it deprives adults who are physically disabled of their right to equal treatment under s. 15 of the *Charter*.

Sections 241(*b*) and 14 of the *Criminal Code* are not saved by s. 1 of the *Charter*. While the limit is prescribed by law and the law has a pressing and substantial objective, the prohibition is not proportionate to the objective. An absolute prohibition on physician-assisted dying is rationally connected to the goal of protecting the vulnerable from taking their life in times of weakness, because prohibiting an activity that poses certain risks is a rational method of curtailing the risks. However, as the trial judge found, the evidence does not support the contention that a blanket prohibition is necessary in order to substantially meet the government's objective. The trial judge made no palpable and overriding error in concluding, on the basis of evidence from scientists, medical practitioners, and others who are familiar with end-of-life decision-making in Canada and abroad, that a permissive regime with properly designed and administered safeguards was capable of protecting vulnerable people from abuse and error. It was also open to her to conclude that vulnerability can be assessed on an individual basis, using the procedures that physicians apply in their assessment of informed consent and decisional capacity in the context of medical decision-making more generally. The absolute prohibition is therefore not minimally impairing. Given this conclusion, it is not necessary to weigh the impacts of the law on protected rights against the beneficial effect of the law in terms of the greater public good.

The appropriate remedy is not to grant a free-standing constitutional exemption, but rather to issue a declaration of invalidity and to suspend it for 12 months. Nothing in this declaration would compel physicians to provide assistance

in dying. The *Charter* rights of patients and [page337] physicians will need to be reconciled in any legislative and regulatory response to this judgment.

The appellants are entitled to an award of special costs on a full indemnity basis to cover the entire expense of bringing this case before the courts. A court may depart from the usual rule on costs and award special costs where two criteria are met. First, the case must involve matters of public interest that are truly exceptional. It is not enough that the issues raised have not been previously resolved or that they transcend individual interests of the successful litigant: they must also have a significant and widespread societal impact. Second, in addition to showing that they have no personal, proprietary or pecuniary interest in the litigation that would justify the proceedings on economic grounds, the plaintiffs must show that it would not have been possible to effectively pursue the litigation in question with private funding. Finally, only those costs that are shown to be reasonable and prudent will be covered by the award of special costs. Here, the trial judge did not err in awarding special costs in the truly exceptional circumstances of this case. It was also open to her to award 10 percent of the costs against the Attorney General of British Columbia in light of the full and active role it played in the proceedings. The trial judge was in the best position to determine the role taken by that Attorney General and the extent to which it shared carriage of the case.

Cases Cited

Distinguished: *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519; **applied:** *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; **disapproved:** *Victoria (City) v. Adams*, 2009 BCCA 563, 100 B.C.L.R. (4th) 28; **referred to:** *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793 (1997); *Pretty v. United Kingdom*, No. 2346/02, ECHR 2002-III; *Fleming v. Ireland*, [2013] IESC 19; *R. (on the application of Nicklinson) v. Ministry of Justice*, [2014] UKSC 38, [2014] 3 All E.R. 843; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 256; [page338] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Schneider v. The Queen*, [1982] 2 S.C.R. 112; *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181; *R. v. Parker* (2000), 49 O.R. (3d) 481; *Fleming v. Reid* (1991), 4 O.R. (3d) 74; *Ciarlariello v. Schacter*, [1993] 2 S.C.R. 119; *Malette v. Shulman* (1990), 72 O.R. (2d) 417; *Nancy B. v. Hôtel-Dieu de Québec* (1992), 86 D.L.R. (4th) 385; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350; *R. v. Swain*, [1991] 1 S.C.R. 933; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467; *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38; *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *Hegeman v. Carter*, 2008 NWTSC 48, 74 C.P.C. (6th) 112; *Polglase v. Polglase* (1979), 18 B.C.L.R. 294.

Statutes and Regulations Cited

Act respecting end-of-life care, CQLR, c. S-32.0001 [not yet in force].

Canadian Charter of Rights and Freedoms, ss. 1, 7, 15.

Constitution Act, 1867, ss. 91, 92.

Constitution Act, 1982, s. 52.

Criminal Code, R.S.C. 1985, c. C-46, ss. 14, 21, 22, 212(1)(*j*), 222, 241.

Authors Cited

Singleton, Thomas J. "The Principles of Fundamental Justice, Societal Interests and Section 1 of the Charter" (1995), 74 *Can. Bar Rev.* 446.

History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Finch C.J.B.C. and Newbury and Saunders JJ.A.), 2013 BCCA 435, 51 B.C.L.R. (5th) 213, [page339] 302 C.C.C. (3d) 26, 365 D.L.R. (4th) 351, 293 C.R.R. (2d) 109, 345 B.C.A.C. 232, 589 W.A.C. 232, [2014] 1 W.W.R. 211, [2013] B.C.J. No. 2227 (QL), 2013 CarswellBC 3051 (WL Can.), setting aside decisions of Smith J., 2012 BCSC 886, 287 C.C.C. (3d) 1, 261 C.R.R. (2d) 1, [2012] B.C.J. No. 1196 (QL), 2012 CarswellBC 1752 (WL Can.); and 2012 BCSC 1587, 271 C.R.R. (2d) 224, [2012] B.C.J. No. 2259 (QL), 2012 CarswellBC 3388 (WL Can.). Appeal allowed.

Counsel

Joseph J. Arvay, *Q.C.*, *Sheila M. Tucker* and *Alison M. Latimer*, for the appellants.

Robert J. Frater and *Donnaree Nygard*, for the respondent the Attorney General of Canada.

Bryant Mackey, for the respondent the Attorney General of British Columbia.

S. Zachary Green, for the intervener the Attorney General of Ontario.

Jean-Yves Bernard and *Sylvain Leboeuf*, for the intervener the Attorney General of Quebec.

David Baker and *Emily Shepard*, for the interveners the Council of Canadians with Disabilities and the Canadian Association for Community Living.

Gerald D. Chipeur, *Q.C.*, for the intervener the Christian Legal Fellowship.

Written submissions only by *Gordon Capern*, *Michael Fenrick*, *Richard Elliott* and *Ryan Peck*, for the interveners the Canadian HIV/AIDS Legal Network and the HIV & AIDS Legal Clinic Ontario.

André Schutten, for the intervener the Association for Reformed Political Action Canada.

Pierre Bienvenu, *Andres C. Garin* and *Vincent Rochette*, for the intervener the Physicians' Alliance against Euthanasia.

[page340]

Geoffrey Trotter, for the intervener the Evangelical Fellowship of Canada.

Albertos Polizogopoulos, for the interveners the Christian Medical and Dental Society of Canada and the Canadian Federation of Catholic Physicians' Societies.

Written submissions only by *Cynthia Petersen* and *Kelly Doctor*, for the intervener Dying With Dignity.

Harry Underwood and *Jessica Prince*, for the intervener the Canadian Medical Association.

Albertos Polizogopoulos and *Russell G. Gibson*, for the intervener the Catholic Health Alliance of Canada.

Marlys A. Edwardh and *Daniel Sheppard*, for the intervener the Criminal Lawyers' Association (Ontario).

Jason B. Gratl, for the interveners the Farewell Foundation for the Right to Die and Association québécoise pour le droit de mourir dans la dignité.

Christopher D. Bredt and *Margot Finley*, for the intervener the Canadian Civil Liberties Association.

Robert W. Staley, *Ranjan K. Agarwal*, *Jack R. Maslen* and *Philip H. Horgan*, for the interveners the Catholic Civil Rights League, the Faith and Freedom Alliance and the Protection of Conscience Project.

Angus M. Gunn, *Q.C.*, and *Duncan A. W. Ault*, for the intervener the Alliance of People With Disabilities Who are Supportive of Legal Assisted Dying Society.

Tim Dickson and *Ryan J. M. Androsoff*, for the intervener the Canadian Unitarian Council.

Hugh R. Scher, for the interveners the Euthanasia Prevention Coalition and the Euthanasia Prevention Coalition -- British Columbia.

[page341]

TABLE OF CONTENTS

[page342]

The following is the judgment delivered by

THE COURT

I. Introduction

1 It is a crime in Canada to assist another person in ending her own life. As a result, people who are grievously and irremediably ill cannot [page343] seek a physician's assistance in dying and may be condemned to a life of severe and intolerable suffering. A person facing this prospect has two options: she can take her own life prematurely, often by violent or dangerous means, or she can suffer until she dies from natural causes. The choice is cruel.

2 The question on this appeal is whether the criminal prohibition that puts a person to this choice violates her *Charter* rights to life, liberty and security of the person (s. 7) and to equal treatment by and under the law (s. 15). This is a question that asks us to balance competing values of great importance. On the one hand stands the

autonomy and dignity of a competent adult who seeks death as a response to a grievous and irremediable medical condition. On the other stands the sanctity of life and the need to protect the vulnerable.

3 The trial judge found that the prohibition violates the s. 7 rights of competent adults who are suffering intolerably as a result of a grievous and irremediable medical condition. She concluded that this infringement is not justified under s. 1 of the *Charter*. We agree. The trial judge's findings were based on an exhaustive review of the extensive record before her. The evidence supports her conclusion that the violation of the right to life, liberty and security of the person guaranteed by s. 7 of the *Charter* is severe. It also supports her finding that a properly administered regulatory regime is capable of protecting the vulnerable from abuse or error.

4 We conclude that the prohibition on physician-assisted dying is void insofar as it deprives a competent adult of such assistance where (1) the person affected clearly consents to the termination of life; and (2) the person has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is [page344] intolerable to the individual in the circumstances of his or her condition. We therefore allow the appeal.

II. Background

5 In Canada, aiding or abetting a person to commit suicide is a criminal offence: see s. 241(*b*) of the *Criminal Code*, R.S.C. 1985, c. C-46. This means that a person cannot seek a physician-assisted death. Twenty-one years ago, this Court upheld this blanket prohibition on assisted suicide by a slim majority: *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519. Sopinka J., writing for five justices, held that the prohibition did not violate s. 7 of the *Canadian Charter of Rights and Freedoms*, and that if it violated s. 15, this was justified under s. 1, as there was "no halfway measure that could be relied upon with assurance" to protect the vulnerable (p. 614). Four justices disagreed. McLachlin J. (as she then was), with L'Heureux-Dubé J. concurring, concluded that the prohibition violated s. 7 of the *Charter* and was not justified under s. 1. Lamer C.J. held that the prohibition violated s. 15 of the *Charter* and was not saved under s. 1. Cory J. agreed that the prohibition violated both ss. 7 and 15 and could not be justified.

6 Despite the Court's decision in *Rodriguez*, the debate over physician-assisted dying continued. Between 1991 and 2010, the House of Commons and its committees debated no less than six private member's bills seeking to decriminalize assisted suicide. None was passed. While opponents to legalization emphasized the inadequacy of safeguards and the potential to devalue human life, a vocal minority spoke in favour of reform, highlighting the importance of dignity and autonomy and the limits of palliative care in addressing suffering. The Senate considered the matter as well, issuing a report on assisted suicide and euthanasia in 1995. The [page345] majority expressed concerns about the risk of abuse under a permissive regime and the need for respect for life. A minority supported an exemption to the prohibition in some circumstances.

7 More recent reports have come down in favour of reform. In 2011, the Royal Society of Canada published a report on end-of-life decision-making and recommended that the *Criminal Code* be modified to permit assistance in dying in some circumstances. The Quebec National Assembly's Select Committee on Dying with Dignity issued a report in 2012, recommending amendments to legislation to recognize medical aid in dying as appropriate end-of-life care (now codified in *An Act respecting end-of-life care*, CQLR, c. S-32.0001 (not yet in force)).

8 The legislative landscape on the issue of physician-assisted death has changed in the two decades since *Rodriguez*. In 1993 Sopinka J. noted that no other Western democracy expressly permitted assistance in dying. By 2010, however, eight jurisdictions permitted some form of assisted dying: the Netherlands, Belgium, Luxembourg, Switzerland, Oregon, Washington, Montana, and Colombia. The process of legalization began in 1994, when Oregon, as a result of a citizens' initiative, altered its laws to permit medical aid in dying for a person suffering from a terminal disease. Colombia followed in 1997, after a decision of the constitutional court. The Dutch Parliament established a regulatory regime for assisted dying in 2002; Belgium quickly adopted a similar regime, with Luxembourg joining in 2009. Together, these regimes have produced a body of evidence about the practical and legal workings of physician-assisted death and the efficacy of safeguards for the vulnerable.

[page346]

9 Nevertheless, physician-assisted dying remains a criminal offence in most Western countries, and a number of courts have upheld the prohibition on such assistance in the face of constitutional and human rights challenges: see, e.g., *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793 (1997); *Pretty v. United Kingdom*, No. 2346/02, ECHR 2002-III; and *Fleming v. Ireland*, [2013] IESC 19. In a recent decision, a majority of the Supreme Court of the United Kingdom accepted that the absolute prohibition on assisted dying breached the claimants' rights, but found the evidence on safeguards insufficient; the court concluded that Parliament should be given an opportunity to debate and amend the legislation based on the court's provisional views (see *R. (on the application of Nicklinson) v. Ministry of Justice*, [2014] UKSC 38, [2014] 3 All E.R. 843).

10 The debate in the public arena reflects the ongoing debate in the legislative sphere. Some medical practitioners see legal change as a natural extension of the principle of patient autonomy, while others fear derogation from the principles of medical ethics. Some people with disabilities oppose the legalization of assisted dying, arguing that it implicitly devalues their lives and renders them vulnerable to unwanted assistance in dying, as medical professionals assume that a disabled patient "leans towards death at a sharper angle than the acutely ill - but otherwise non-disabled - patient" (2012 BCSC 886, 287 C.C.C. (3d) 1, at para. 811). Other people with disabilities take the opposite view, arguing that a regime which permits control over the manner of one's death respects, rather than threatens, their autonomy and dignity, and that the legalization of physician-assisted suicide will protect them by establishing stronger safeguards and oversight for end-of-life medical care.

11 The impetus for this case arose in 2009, when Gloria Taylor was diagnosed with a fatal neurodegenerative disease, amyotrophic lateral sclerosis (or ALS), which causes progressive muscle [page347] weakness. ALS patients first lose the ability to use their hands and feet, then the ability to walk, chew, swallow, speak and, eventually, breathe. Like Sue Rodriguez before her, Gloria Taylor did "not want to die slowly, piece by piece" or "wracked with pain," and brought a claim before the British Columbia Supreme Court challenging the constitutionality of the *Criminal Code* provisions that prohibit assistance in dying, specifically ss. 14, 21, 22, 222, and 241. She was joined in her claim by Lee Carter and Hollis Johnson, who had assisted Ms. Carter's mother, Kathleen ("Kay") Carter, in achieving her goal of dying with dignity by taking her to Switzerland to use the services of DIGNITAS, an assisted-suicide clinic; Dr. William Shoichet, a physician from British Columbia who would be willing to participate in physician-assisted dying if it were no longer prohibited; and the British Columbia Civil Liberties Association, which has a long-standing interest in patients' rights and health policy and has conducted advocacy and education with respect to end-of-life choices, including assisted suicide.

12 By 2010, Ms. Taylor's condition had deteriorated to the point that she required a wheelchair to go more than a short distance and was suffering pain from muscle deterioration. She required home support for assistance with the daily tasks of living, something that she described as an assault on her privacy, dignity, and self-esteem. She continued to pursue an independent life despite her illness, but found that she was steadily losing the ability to participate fully in that life. Ms. Taylor informed her family and friends of a desire to obtain a physician-assisted death. She did not want to "live in a bedridden state, stripped of dignity and independence", she said; nor did she want an "ugly death". This is how she explained her desire to seek a physician-assisted death:

> I do not want my life to end violently. I do not want my mode of death to be traumatic for my family members. I [page348] want the legal right to die peacefully, at the time of my own choosing, in the embrace of my family and friends.
>
> I know that I am dying, but I am far from depressed. I have some down time - that is part and parcel of the experience of knowing that you are terminal. But there is still a lot of good in my life; there are still things, like special times with my granddaughter and family, that bring me extreme joy. I will not waste any of my remaining time being depressed. I intend to get every bit of happiness I can wring from what is left of my life so long as it remains a life of quality; but I do not want to live a life without quality. There will come a point when I will know that enough is enough. I cannot say precisely when that time will be. It is not a question of "when I can't walk" or "when I can't talk." There is no pre-set trigger moment. I just know that, globally, there

> will be some point in time when I will be able to say - "this is it, this is the point where life is just not worthwhile." When that time comes, I want to be able to call my family together, tell them of my decision, say a dignified good-bye and obtain final closure - for me and for them.
>
> My present quality of life is impaired by the fact that I am unable to say for certain that I will have the right to ask for physician-assisted dying when that "enough is enough" moment arrives. I live in apprehension that my death will be slow, difficult, unpleasant, painful, undignified and inconsistent with the values and principles I have tried to live by... .
>
> ...
>
> ... What I fear is a death that negates, as opposed to concludes, my life. I do not want to die slowly, piece by piece. I do not want to waste away unconscious in a hospital bed. I do not want to die wracked with pain.

13 Ms. Taylor, however, knew she would be unable to request a physician-assisted death when the time came, because of the *Criminal Code* prohibition and the fact that she lacked the financial resources to travel to Switzerland, where assisted suicide is legal and available to non-residents. This [page349] left her with what she described as the "cruel choice" between killing herself while she was still physically capable of doing so, or giving up the ability to exercise any control over the manner and timing of her death.

14 Other witnesses also described the "horrible" choice faced by a person suffering from a grievous and irremediable illness. The stories in the affidavits vary in their details: some witnesses described the progression of degenerative illnesses like motor neuron diseases or Huntington's disease, while others described the agony of treatment and the fear of a gruesome death from advanced-stage cancer. Yet running through the evidence of all the witnesses is a constant theme - that they suffer from the knowledge that they lack the ability to bring a peaceful end to their lives at a time and in a manner of their own choosing.

15 Some describe how they had considered seeking out the traditional modes of suicide but found that choice, too, repugnant:

> I was going to blow my head off. I have a gun and I seriously considered doing it. I decided that I could not do that to my family. It would be horrible to put them through something like that... . I want a better choice than that.

A number of the witnesses made clear that they - or their loved ones - had considered or in fact committed suicide earlier than they would have chosen to die if physician-assisted death had been available to them. One woman noted that the conventional methods of suicide, such as carbon monoxide asphyxiation, slitting of the wrists or overdosing on street drugs, would require that she end her life "while I am still able bodied and capable of taking my life, well ahead of when I actually need to leave this life".

16 Still other witnesses described their situation in terms of a choice between a protracted or painful [page350] death and exposing their loved ones to prosecution for assisting them in ending their lives. Speaking of himself and his wife, one man said: "We both face this reality, that we have only two terrible and imperfect options, with a sense of horror and loathing."

17 Ms. Carter and Mr. Johnson described Kay Carter's journey to assisted suicide in Switzerland and their role in facilitating that process. Kay was diagnosed in 2008 with spinal stenosis, a condition that results in the progressive compression of the spinal cord. By mid-2009, her physical condition had deteriorated to the point that she required assistance with virtually all of her daily activities. She had extremely limited mobility and suffered from chronic pain. As her illness progressed, Kay informed her family that she did not wish to live out her life as an "ironing board", lying flat in bed. She asked her daughter, Lee Carter, and her daughter's husband, Hollis Johnson, to support and assist her in arranging an assisted suicide in Switzerland, and to travel there with her for that purpose. Although aware that assisting Kay could expose them both to prosecution in Canada, they agreed to assist her. In early 2010, they attended a clinic in Switzerland operated by DIGNITAS, a Swiss "death with dignity" organization. Kay

took the prescribed dose of sodium pentobarbital while surrounded by her family, and passed away within 20 minutes.

18 Ms. Carter and Mr. Johnson found the process of planning and arranging for Kay's trip to Switzerland difficult, in part because their activities had to be kept secret due to the potential for criminal sanctions. While they have not faced prosecution in Canada following Kay's death, Ms. Carter and Mr. Johnson are of the view that Kay ought to have been able to obtain a physician-assisted suicide at home, surrounded by her family and friends, rather than undergoing the stressful and expensive [page351] process of arranging for the procedure overseas. Accordingly, they joined Ms. Taylor in pressing for the legalization of physician-assisted death.

III. Statutory Provisions

19 The appellants challenge the constitutionality of the following provisions of the *Criminal Code*:

> **14.** No person is entitled to consent to have death inflicted on him, and such consent does not affect the criminal responsibility of any person by whom death may be inflicted on the person by whom consent is given.
>
> **21.** (1) Every one is a party to an offence who
>
> ...
>
> (*b*) does or omits to do anything for the purpose of aiding any person to commit it; or
>
> ...
>
> (2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.
>
> **22.** (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.
>
> (2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.
>
> (3) For the purposes of this Act, "counsel" includes procure, solicit or incite.
>
> **222.** (1) A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.
>
> [page352]
>
> (2) Homicide is culpable or not culpable.
>
> (3) Homicide that is not culpable is not an offence.
>
> (4) Culpable homicide is murder or manslaughter or infanticide.
>
> (5) A person commits culpable homicide when he causes the death of a human being,
>
> (*a*) by means of an unlawful act;
>
> ...
>
> **241.** Every one who
>
> (*a*) counsels a person to commit suicide, or
>
> (*b*) aids or abets a person to commit suicide,

> whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

20 In our view, two of these provisions are at the core of the constitutional challenge: s. 241(*b*), which says that everyone who aids or abets a person in committing suicide commits an indictable offence, and s. 14, which says that no person may consent to death being inflicted on them. It is these two provisions that prohibit the provision of assistance in dying. Sections 21, 22, and 222 are only engaged so long as the provision of assistance in dying is itself an "unlawful act" or offence. Section 241(*a*) does not contribute to the prohibition on assisted suicide.

21 The *Charter* states:

> **1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> **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.
>
> [page353]
>
> **15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

IV. Judicial History

A. *British Columbia Supreme Court, 2012 BCSC 886, 287 C.C.C. (3d) 1*

22 The action was brought by way of summary trial before Smith J. in the British Columbia Supreme Court. While the majority of the evidence was presented in affidavit form, a number of the expert witnesses were cross-examined, both prior to trial and before the trial judge. The record was voluminous: the trial judge canvassed evidence from Canada and from the permissive jurisdictions on medical ethics and current end-of-life practices, the risks associated with assisted suicide, and the feasibility of safeguards.

23 The trial judge began by reviewing the current state of the law and practice in Canada regarding end-of-life care. She found that current unregulated end-of-life practices in Canada - such as the administration of palliative sedation and the withholding or withdrawal of lifesaving or life-sustaining medical treatment - can have the effect of hastening death and that there is a strong societal consensus that these practices are ethically acceptable (para. 357). After considering the evidence of physicians and ethicists, she found that the "preponderance of the evidence from ethicists is that there is no ethical distinction between physician-assisted death and other end-of-life practices whose outcome is highly likely to be death" (para. 335). Finally, she found that there are qualified Canadian physicians who would find it ethical to assist a patient in dying if that act were not prohibited by law (para. 319).

[page354]

24 Based on these findings, the trial judge concluded that, while there is no clear societal consensus on physician-assisted dying, there is a strong consensus that it would only be ethical with respect to voluntary adults who are competent, informed, grievously and irremediably ill, and where the assistance is "clearly consistent with the patient's wishes and best interests, and [provided] in order to relieve suffering" (para. 358).

25 The trial judge then turned to the evidence from the regimes that permit physician-assisted dying. She reviewed the safeguards in place in each jurisdiction and considered the effectiveness of each regulatory regime. In each system, she found general compliance with regulations, although she noted some room for improvement. The evidence from Oregon and the Netherlands showed that a system can be designed to protect the socially vulnerable. Expert evidence established that the "predicted abuse and disproportionate impact on vulnerable populations has not materialized" in Belgium, the Netherlands, and Oregon (para. 684). She concluded that

> although none of the systems has achieved perfection, empirical researchers and practitioners who have experience in those systems are of the view that they work well in protecting patients from abuse while allowing competent patients to choose the timing of their deaths. [para. 685]

While stressing the need for caution in drawing conclusions for Canada based on foreign experience, the trial judge found that "weak inference[s]" could be drawn about the effectiveness of safeguards and the potential degree of compliance with any permissive regime (para. 683).

[page355]

26 Based on the evidence from the permissive jurisdictions, the trial judge also rejected the argument that the legalization of physician-assisted dying would impede the development of palliative care in the country, finding that the effects of a permissive regime, while speculative, would "not necessarily be negative" (para. 736). Similarly, she concluded that any changes in the physician-patient relationship following legalization "could prove to be neutral or for the good" (para. 746).

27 The trial judge then considered the risks of a permissive regime and the feasibility of implementing safeguards to address those risks. After reviewing the evidence tendered by physicians and experts in patient assessment, she concluded that physicians were capable of reliably assessing patient competence, including in the context of life-and-death decisions (para. 798). She found that it was possible to detect coercion, undue influence, and ambivalence as part of this assessment process (paras. 815, 843). She also found that the informed consent standard could be applied in the context of physician-assisted death, so long as care was taken to "ensure a patient is properly informed of her diagnosis and prognosis" and the treatment options described included all reasonable palliative care interventions (para. 831). Ultimately, she concluded that the risks of physician-assisted death "can be identified and very substantially minimized through a carefully-designed system" that imposes strict limits that are scrupulously monitored and enforced (para. 883).

28 Having reviewed the copious evidence before her, the trial judge concluded that the decision in *Rodriguez* did not prevent her from reviewing the constitutionality of the impugned provisions, because (1) the majority in *Rodriguez* did not address the right to life; (2) the principles of overbreadth and gross disproportionality had not been identified at the time of the decision in *Rodriguez* [page356] and thus were not addressed in that decision; (3) the majority only "assumed" a violation of s. 15; and (4) the decision in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, represented a "substantive change" to the s. 1 analysis (para. 994). The trial judge concluded that these changes in the law, combined with the changes in the social and factual landscape over the past 20 years, permitted her to reconsider the constitutionality on the prohibition on physician-assisted dying.

29 The trial judge then turned to the *Charter* analysis. She first asked whether the prohibition violated the s. 15 equality guarantee. She found that the provisions imposed a disproportionate burden on persons with physical disabilities, as only they are restricted to self-imposed starvation and dehydration in order to take their own lives (para. 1076). This distinction, she found, is discriminatory, and not justified under s. 1. While the objective of the prohibition - the protection of vulnerable persons from being induced to commit suicide at a time of weakness - is pressing and substantial and the means are rationally connected to that purpose, the prohibition is not minimally impairing. A "stringently limited, carefully monitored system of exceptions" would achieve Parliament's objective:

> Permission for physician-assisted death for grievously ill and irremediably suffering people who are competent, fully informed, non-ambivalent, and free from coercion or duress, with stringent and well-enforced safeguards, could achieve that objective in a real and substantial way. [para. 1243]

30 Turning to s. 7 of the *Charter*, which protects life, liberty and security of the person, the trial judge found that the prohibition impacted all three [page357] interests. The prohibition on seeking physician-assisted dying deprived individuals of liberty, which encompasses "the right to non-interference by the state with fundamentally important and personal medical decision-making" (para. 1302). In addition, it also impinged on Ms. Taylor's security of the person by restricting her control over her bodily integrity. While the trial judge rejected a "qualitative" approach to

the right to life, concluding that the right to life is only engaged by a threat of death, she concluded that Ms. Taylor's right to life was engaged insofar as the prohibition might force her to take her life earlier than she otherwise would if she had access to a physician-assisted death.

31 The trial judge concluded that the deprivation of the claimants' s. 7 rights was not in accordance with the principles of fundamental justice, particularly the principles against overbreadth and gross disproportionality. The prohibition was broader than necessary, as the evidence showed that a system with properly designed and administered safeguards offered a less restrictive means of reaching the government's objective. Moreover, the "very severe" effects of the absolute prohibition in relation to its salutary effects rendered it grossly disproportionate (para. 1378). As with the s. 15 infringement, the trial judge found the s. 7 infringement was not justified under s. 1.

32 In the result, the trial judge declared the prohibition unconstitutional, granted a one-year suspension of invalidity, and provided Ms. Taylor with a constitutional exemption for use during the one-year period of the suspension. Ms. Taylor passed away prior to the appeal of this matter, without accessing the exemption.

33 In a separate decision on costs (2012 BCSC 1587, 271 C.R.R. (2d) 224), the trial judge ordered an award of special costs in favour of the plaintiffs. The issues in the case were "complex and [page358] momentous" (para. 87) and the plaintiffs could not have prosecuted the case without assistance from pro bono counsel; an award of special costs would therefore promote the public interest in encouraging experienced counsel to take on *Charter* litigation on a pro bono basis. The trial judge ordered the Attorney General of British Columbia to pay 10 percent of the costs, noting that she had taken a full and active role in the proceedings. Canada was ordered to pay the remaining 90 percent of the award.

B. *British Columbia Court of Appeal, 2013 BCCA 435, 51 B.C.L.R. (5th) 213*

34 The majority of the Court of Appeal, per Newbury and Saunders JJ.A., allowed Canada's appeal on the ground that the trial judge was bound to follow this Court's decision in *Rodriguez*. The majority concluded that neither the change in legislative and social facts nor the new legal issues relied on by the trial judge permitted a departure from *Rodriguez*.

35 The majority read *Rodriguez* as implicitly rejecting the proposition that the prohibition infringes the right to life under s. 7 of the *Charter*. It concluded that the post-*Rodriguez* principles of fundamental justice - namely overbreadth and gross disproportionality - did not impose a new legal framework under s. 7. While acknowledging that the reasons in *Rodriguez* did not follow the analytical methodology that now applies under s. 7, the majority held that this would not have changed the result.

36 The majority also noted that *Rodriguez* disposed of the s. 15 equality argument (which only two judges in that case expressly considered) by holding that any rights violation worked by the prohibition was justified as a reasonable limit under s. 1 of the *Charter*. The decision in *Hutterian [page359] Brethren* did not represent a change in the law under s. 1. Had it been necessary to consider s. 1 in relation to s. 7, the majority opined, the s. 1 analysis carried out under s. 15 likely would have led to the same conclusion - the "blanket prohibition" under s. 241 of the *Criminal Code* was justified (para. 323). Accordingly, the majority concluded that "the trial judge was bound to find that the plaintiffs' case had been authoritatively decided by *Rodriguez*" (para. 324).

37 Commenting on remedy in the alternative, the majority of the Court of Appeal suggested the reinstatement of the free-standing constitutional exemption eliminated in *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, instead of a declaration of invalidity, as a suspended declaration presented the spectre of a legislative vacuum.

38 The majority denied the appellants their costs, given the outcome, but otherwise would have approved the trial judge's award of special costs. In addition, the majority held that costs should not have been awarded against British Columbia.

39 Finch C.J.B.C., dissenting, found no errors in the trial judge's assessment of *stare decisis*, her application of s.

7, or the corresponding analysis under s. 1. However, he concluded that the trial judge was bound by Sopinka J.'s conclusion that any s. 15 infringement was saved by s. 1. While he essentially agreed with her s. 7 analysis, he would have accepted a broader, qualitative scope for the right to life. He agreed with the trial judge that the prohibition was not minimally impairing, and concluded that a "carefully regulated scheme" could meet Parliament's objectives (para. 177); therefore, the breach of s. 7 could not be justified under s. 1. [page360] He would have upheld the trial judge's order on costs.

V. Issues on Appeal

40 The main issue in this case is whether the prohibition on physician-assisted dying found in s. 241(*b*) of the *Criminal Code* violates the claimants' rights under ss. 7 and 15 of the *Charter*. For the purposes of their claim, the appellants use "physician-assisted death" and "physician-assisted dying" to describe the situation where a physician provides or administers medication that intentionally brings about the patient's death, at the request of the patient. The appellants advance two claims: (1) that the prohibition on physician-assisted dying deprives competent adults, who suffer a grievous and irremediable medical condition that causes the person to endure physical or psychological suffering that is intolerable to that person, of their right to life, liberty and security of the person under s. 7 of the *Charter*; and (2) that the prohibition deprives adults who are physically disabled of their right to equal treatment under s. 15 of the *Charter*.

41 Before turning to the *Charter* claims, two preliminary issues arise: (1) whether this Court's decision in *Rodriguez* can be revisited; and (2) whether the prohibition is beyond Parliament's power because physician-assisted dying lies at the core of the provincial jurisdiction over health.

VI. Was the Trial Judge Bound by *Rodriguez*?

42 The adjudicative facts in *Rodriguez* were very similar to the facts before the trial judge. Ms. Rodriguez, like Ms. Taylor, was dying of ALS. [page361] She, like Ms. Taylor, wanted the right to seek a physician's assistance in dying when her suffering became intolerable. The majority of the Court, per Sopinka J., held that the prohibition deprived Ms. Rodriguez of her security of the person, but found that it did so in a manner that was in accordance with the principles of fundamental justice. The majority also assumed that the provision violated the claimant's s. 15 rights, but held that the limit was justified under s. 1 of the *Charter*.

43 Canada and Ontario argue that the trial judge was bound by *Rodriguez* and not entitled to revisit the constitutionality of the legislation prohibiting assisted suicide. Ontario goes so far as to argue that "vertical *stare decisis*" is a *constitutional* principle that requires all lower courts to rigidly follow this Court's *Charter* precedents unless and until this Court sets them aside.

44 The doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system. It provides certainty while permitting the orderly development of the law in incremental steps. However, *stare decisis* is not a straitjacket that condemns the law to stasis. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate" (*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 42).

45 Both conditions were met in this case. The trial judge explained her decision to revisit *Rodriguez* by noting the changes in both the legal framework for s. 7 and the evidence on controlling the risk of abuse associated with assisted suicide.

[page362]

46 The argument before the trial judge involved a different legal conception of s. 7 than that prevailing when *Rodriguez* was decided. In particular, the law relating to the principles of overbreadth and gross disproportionality had materially advanced since *Rodriguez*. The majority of this Court in *Rodriguez* acknowledged the argument that the impugned laws were "over-inclusive" when discussing the principles of fundamental justice (see p. 590).

However, it did not apply the principle of overbreadth as it is currently understood, but instead asked whether the prohibition was "arbitrary or unfair in that it is unrelated to the state's interest in protecting the vulnerable, and that it lacks a foundation in the legal tradition and societal beliefs which are said to be represented by the prohibition" (p. 595). By contrast, the law on overbreadth, now explicitly recognized as a principle of fundamental justice, asks whether the law interferes with some conduct that has no connection to the law's objectives (*Bedford*, at para. 101). This different question may lead to a different answer. The majority's consideration of overbreadth under s. 1 suffers from the same defect: see *Rodriguez*, at p. 614. Finally, the majority in *Rodriguez* did not consider whether the prohibition was grossly disproportionate.

47 The matrix of legislative and social facts in this case also differed from the evidence before the Court in *Rodriguez*. The majority in *Rodriguez* relied on evidence of (1) the widespread acceptance of a moral or ethical distinction between passive and active euthanasia (pp. 605-7); (2) the lack of any "halfway measure" that could protect the vulnerable (pp. 613-14); and (3) the "substantial consensus" in Western countries that a blanket prohibition is necessary to protect against the slippery slope (pp. 601-6 and 613). The record before the trial judge in this case contained evidence that, if accepted, was capable of undermining each of these conclusions (see [page363] *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, at para. 136, per Rothstein J.).

48 While we do not agree with the trial judge that the comments in *Hutterian Brethren* on the s. 1 proportionality doctrine suffice to justify reconsideration of the s. 15 equality claim, we conclude it was open to the trial judge to reconsider the s. 15 claim as well, given the fundamental change in the facts.

VII. Does the Prohibition Interfere With the "Core" of the Provincial Jurisdiction Over Health?

49 The appellants accept that the prohibition on assisted suicide is, in general, a valid exercise of the federal criminal law power under s. 91(27) of the *Constitution Act, 1867*. However, they say that the doctrine of interjurisdictional immunity means that the prohibition cannot constitutionally apply to physician-assisted dying, because it lies at the core of the provincial jurisdiction over health care under s. 92(7), (13) and (16) of the *Constitution Act, 1867*, and is therefore beyond the legislative competence of the federal Parliament.

50 The doctrine of interjurisdictional immunity is premised on the idea that the heads of power in ss. 91 and 92 are "exclusive", and therefore each have a "minimum and unassailable" core of content that is immune from the application of legislation enacted by the other level of government (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at paras. 33-34). To succeed in their argument on this point, the appellants must show that the prohibition, insofar as it extends to physician-assisted dying, impairs the "protected core" of the provincial jurisdiction over health: [page364] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 256, at para. 131.

51 This Court rejected a similar argument in *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134. The issue in that case was "whether the delivery of health care services constitutes a protected core of the provincial power over health care in s. 92(7), (13) and (16) ... and is therefore immune from federal interference" (para. 66). The Court concluded that it did not (per McLachlin C.J.):

> ... Parliament has power to legislate with respect to federal matters, notably criminal law, that touch on health. For instance, it has historic jurisdiction to prohibit medical treatments that are dangerous, or that it perceives as "socially undesirable" behaviour: *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616; *R. v. Morgentaler*, [1993] 3 S.C.R. 463. The federal role in the domain of health makes it impossible to precisely define what falls in or out of the proposed provincial "core". Overlapping federal jurisdiction and the sheer size and diversity of provincial health power render daunting the task of drawing a bright line around a protected provincial core of health where federal legislation may not tread. [para. 68]

52 The appellants and the Attorney General of Quebec (who intervened on this point) say that it is possible to describe a precise core for the power over health, and thereby to distinguish *PHS*. The appellants' proposed core is described as a power to deliver necessary medical treatment for which there is no alternative treatment capable of

meeting a patient's needs (A.F., at para. 43). Quebec takes a slightly different approach, defining the core as the power to establish the kind of health care offered to patients and supervise the process of consent required for that care (I.F., at para. 7).

[page365]

53 We are not persuaded by the submissions that *PHS* is distinguishable, given the vague terms in which the proposed definitions of the "core" of the provincial health power are couched. In our view, the appellants have not established that the prohibition on physician-assisted dying impairs the core of the provincial jurisdiction. Health is an area of concurrent jurisdiction; both Parliament and the provinces may validly legislate on the topic: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 32; *Schneider v. The Queen*, [1982] 2 S.C.R. 112, at p. 142. This suggests that aspects of physician-assisted dying may be the subject of valid legislation by both levels of government, depending on the circumstances and focus of the legislation. We are not satisfied on the record before us that the provincial power over health excludes the power of the federal Parliament to legislate on physician-assisted dying. It follows that the interjurisdictional immunity claim cannot succeed.

VIII. Section 7

54 Section 7 of the *Charter* states that "[e]veryone 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."

55 In order to demonstrate a violation of s. 7, the claimants must first show that the law interferes with, or deprives them of, their life, liberty or security of the person. Once they have established that s. 7 is engaged, they must then show that the deprivation in question is not in accordance with the principles of fundamental justice.

56 For the reasons below, we conclude that the prohibition on physician-assisted dying infringes the right to life, liberty and security of Ms. Taylor and of persons in her position, and that it does so in a manner that is overbroad and thus is not in [page366] accordance with the principles of fundamental justice. It therefore violates s. 7.

A. *Does the Law Infringe the Right to Life, Liberty and Security of the Person?*

(1) Life

57 The trial judge found that the prohibition on physician-assisted dying had the effect of forcing some individuals to take their own lives prematurely, for fear that they would be incapable of doing so when they reached the point where suffering was intolerable. On that basis, she found that the right to life was engaged.

58 We see no basis for interfering with the trial judge's conclusion on this point. The evidence of premature death was not challenged before this Court. It is therefore established that the prohibition deprives some individuals of life.

59 The appellants and a number of the interveners urge us to adopt a broader, qualitative approach to the right to life. Some argue that the right to life is not restricted to the preservation of life, but protects quality of life and therefore a right to die with dignity. Others argue that the right to life protects personal autonomy and fundamental notions of self-determination and dignity, and therefore includes the right to determine whether to take one's own life.

60 In dissent at the Court of Appeal, Finch C.J.B.C. accepted the argument that the right to life protects more than physical existence (paras. 84-89). In his view, the life interest is "intimately connected to the way a person values his or her lived experience. The point at which the meaning of life is lost, when life's positive attributes are so diminished as to render life valueless, ... is an intensely personal decision which 'everyone' has the right to make for him or herself" (para. 86). Similarly, in his dissent in *Rodriguez*, Cory J. accepted that the right to life included a right to die with dignity, on [page367] the ground that "dying is an integral part of living" (p. 630).

61 The trial judge, on the other hand, rejected the "qualitative" approach to the right to life. She concluded that the

right to life is only engaged when there is a threat of death as a result of government action or laws. In her words, the right to life is limited to a "right not to die" (para. 1322 (emphasis in original)).

62 This Court has most recently invoked the right to life in *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, where evidence showed that the lack of timely health care could result in death (paras. 38 and 50, per Deschamps J.; para. 123, per McLachlin C.J. and Major J.; and paras. 191 and 200, per Binnie and LeBel JJ.), and in *PHS*, where the clients of Insite were deprived of potentially lifesaving medical care (para. 91). In each case, the right was only engaged by the threat of death. In short, the case law suggests that the right to life is engaged where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly. Conversely, concerns about autonomy and quality of life have traditionally been treated as liberty and security rights. We see no reason to alter that approach in this case.

63 This said, we do not agree that the existential formulation of the right to life *requires* an absolute prohibition on assistance in dying, or that individuals cannot "waive" their right to life. This would create a "duty to live", rather than a "right to life", and would call into question the legality of any consent to the withdrawal or refusal of lifesaving or life-sustaining treatment. The sanctity of life is one of our most fundamental societal values. Section 7 is rooted in a profound respect for the value of human life. But s. 7 also encompasses life, liberty and security of the person during the passage to death. It is for this reason that the sanctity of [page368] life "is no longer seen to require that all human life be preserved at all costs" (*Rodriguez*, at p. 595, per Sopinka J.). And it is for this reason that the law has come to recognize that, in certain circumstances, an individual's choice about the end of her life is entitled to respect. It is to this fundamental choice that we now turn.

(2) Liberty and Security of the Person

64 Underlying both of these rights is a concern for the protection of individual autonomy and dignity. Liberty protects "the right to make fundamental personal choices free from state interference": *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at para. 54. Security of the person encompasses "a notion of personal autonomy involving ... control over one's bodily integrity free from state interference" (*Rodriguez*, at pp. 587-88, per Sopinka J., referring to *R. v. Morgentaler*, [1988] 1 S.C.R. 30) and it is engaged by state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering (*New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 58; *Blencoe*, at paras. 55-57; *Chaoulli*, at para. 43, per Deschamps J.; para. 119, per McLachlin C.J. and Major J.; and paras. 191 and 200, per Binnie and LeBel JJ.). While liberty and security of the person are distinct interests, for the purpose of this appeal they may be considered together.

65 The trial judge concluded that the prohibition on assisted dying limited Ms. Taylor's s. 7 right to liberty and security of the person, by interfering with "fundamentally important and personal medical decision-making" (para. 1302), imposing pain and psychological stress and depriving her of control over her bodily integrity (paras. 1293-94). She found that the prohibition left people like Ms. Taylor to suffer physical or psychological pain [page369] and imposed stress due to the unavailability of physician-assisted dying, impinging on her security of the person. She further noted that seriously and irremediably ill persons were "denied the opportunity to make a choice that may be very important to their sense of dignity and personal integrity" and that is "consistent with their lifelong values and that reflects their life's experience" (para. 1326).

66 We agree with the trial judge. An individual's response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy. The law allows people in this situation to request palliative sedation, refuse artificial nutrition and hydration, or request the removal of life-sustaining medical equipment, but denies them the right to request a physician's assistance in dying. This interferes with their ability to make decisions concerning their bodily integrity and medical care and thus trenches on liberty. And, by leaving people like Ms. Taylor to endure intolerable suffering, it impinges on their security of the person.

67 The law has long protected patient autonomy in medical decision-making. In *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181, a majority of this Court, per Abella J. (the dissent not

disagreeing on this point), endorsed the "tenacious relevance in our legal system of the principle that competent individuals are - and should be - free to make decisions about their bodily integrity" (para. 39). This right to "decide one's own fate" entitles adults to direct the course of their own medical care (para. 40): it is this principle that underlies the concept of "informed consent" and is protected by s. 7's guarantee of liberty and security of the person (para. 100; see also *R. v. Parker* (2000), 49 O.R. (3d) 481 (C.A.)). As noted in *Fleming v. Reid* (1991), 4 O.R. (3d) 74 [page370] (C.A.), the right of medical self-determination is not vitiated by the fact that serious risks or consequences, including death, may flow from the patient's decision. It is this same principle that is at work in the cases dealing with the right to refuse consent to medical treatment, or to demand that treatment be withdrawn or discontinued: see, e.g., *Ciarlariello v. Schacter*, [1993] 2 S.C.R. 119; *Malette v. Shulman* (1990), 72 O.R. (2d) 417 (C.A.); and *Nancy B. v. Hôtel-Dieu de Québec* (1992), 86 D.L.R. (4th) 385 (Que. Sup. Ct.).

68 In *Blencoe*, a majority of the Court held that the s. 7 liberty interest is engaged "where state compulsions or prohibitions affect important and fundamental life choices" (para. 49). In *A.C.*, where the claimant sought to refuse a potentially lifesaving blood transfusion on religious grounds, Binnie J. noted that we may "instinctively recoil" from the decision to seek death because of our belief in the sanctity of human life (para. 219). But his response is equally relevant here: it is clear that anyone who seeks physician-assisted dying because they are suffering intolerably as a result of a grievous and irremediable medical condition "does so out of a deeply personal and fundamental belief about how they wish to live, or cease to live" (*ibid.*). The trial judge, too, described this as a decision that, for some people, is "very important to their sense of dignity and personal integrity, that is consistent with their lifelong values and that reflects their life's experience" (para. 1326). This is a decision that is rooted in their control over their bodily integrity; it represents their deeply personal response to serious pain and suffering. By denying them the opportunity to make that choice, the prohibition impinges on their liberty and security of the person. As noted above, s. 7 recognizes the value of life, but it also honours the role that autonomy and dignity play at the end of that life. We therefore conclude that ss. 241(*b*) and 14 of the *Criminal Code*, insofar as they prohibit physician-assisted dying for competent adults who seek such assistance as a result of a grievous and irremediable medical condition that [page371] causes enduring and intolerable suffering, infringe the rights to liberty and security of the person.

69 We note, as the trial judge did, that Lee Carter and Hollis Johnson's interest in liberty may be engaged by the threat of criminal sanction for their role in Kay Carter's death in Switzerland. However, this potential deprivation was not the focus of the arguments raised at trial, and neither Ms. Carter nor Mr. Johnson sought a personal remedy before this Court. Accordingly, we have confined ourselves to the rights of those who seek assistance in dying, rather than of those who might provide such assistance.

(3) Summary on Section 7: Life, Liberty and Security of the Person

70 For the foregoing reasons, we conclude that the prohibition on physician-assisted dying deprived Ms. Taylor and others suffering from grievous and irremediable medical conditions of the right to life, liberty and security of the person. The remaining question under s. 7 is whether this deprivation was in accordance with the principles of fundamental justice.

B. *The Principles of Fundamental Justice*

71 Section 7 does not promise that the state will never interfere with a person's life, liberty or security of the person - laws do this all the time - but rather that the state will not do so in a way that violates the principles of fundamental justice.

72 Section 7 does not catalogue the principles of fundamental justice to which it refers. Over the course of 32 years of *Charter* adjudication, this [page372] Court has worked to define the minimum constitutional requirements that a law that trenches on life, liberty or security of the person must meet (*Bedford*, at para. 94). While the Court has recognized a number of principles of fundamental justice, three have emerged as central in the recent s. 7 jurisprudence: laws that impinge on life, liberty or security of the person must not be arbitrary, overbroad, or have consequences that are grossly disproportionate to their object.

73 Each of these potential vices involves comparison with the object of the law that is challenged (*Bedford*, at para. 123). The first step is therefore to identify the object of the prohibition on assisted dying.

74 The trial judge, relying on *Rodriguez*, concluded that the object of the prohibition was to protect vulnerable persons from being induced to commit suicide at a time of weakness (para. 1190). All the parties except Canada accept this formulation of the object.

75 Canada agrees that the prohibition is intended to protect the vulnerable, but argues that the object of the prohibition should also be defined more broadly as simply "the preservation of life" (R.F., at paras 66, 108, and 109). We cannot accept this submission.

76 First, it is incorrect to say that the majority in *Rodriguez* adopted "the preservation of life" as the object of the prohibition on assisted dying. Justice Sopinka refers to the preservation of life when discussing the objectives of s. 241(*b*) (pp. 590, 614). However, he later clarifies this comment, stating that "[s]ection 241(*b*) has as its purpose the protection of the vulnerable who might be induced in moments of weakness to commit suicide" (p. 595). Sopinka J. then goes on to note that this purpose is "grounded in the state interest in protecting life and reflects the policy of the state that human life should not be depreciated by allowing life to be taken" (*ibid.*). His remarks about the "preservation of life" in *Rodriguez* are best understood as a reference to an [page373] animating social value rather than as a description of the specific object of the prohibition.

77 Second, defining the object of the prohibition on physician-assisted dying as the preservation of life has the potential to short-circuit the analysis. In *RJR-MacDonald*, this Court warned against stating the object of a law "too broadly" in the s. 1 analysis, lest the resulting objective immunize the law from challenge under the *Charter* (para. 144). The same applies to assessing whether the principles of fundamental justice are breached under s. 7. If the object of the prohibition is stated broadly as "the preservation of life", it becomes difficult to say that the means used to further it are overbroad or grossly disproportionate. The outcome is to this extent foreordained.

78 Finally, the jurisprudence requires the object of the impugned law to be defined precisely for the purposes of s. 7. In *Bedford*, Canada argued that the bawdy-house prohibition in s. 210 of the *Code* should be defined broadly as to "deter prostitution" for the purposes of s. 7 (para. 131). This Court rejected this argument, holding that the object of the prohibition should be confined to measures directly targeted by the law (para. 132). That reasoning applies with equal force in this case. Section 241(*b*) is not directed at preserving life, or even at preventing suicide - attempted suicide is no longer a crime. Yet Canada asks us to posit that the object of the prohibition is to preserve life, whatever the circumstances. This formulation goes beyond the ambit of the provision itself. The direct target of the measure is the narrow goal of preventing vulnerable persons from being induced to commit suicide at a time of weakness.

79 Before turning to the principles of fundamental justice at play, a general comment is in order. [page374] In determining whether the deprivation of life, liberty and security of the person is in accordance with the principles of fundamental justice under s. 7, courts are not concerned with competing social interests or public benefits conferred by the impugned law. These competing moral claims and broad societal benefits are more appropriately considered at the stage of justification under s. 1 of the *Charter* (*Bedford*, at paras. 123 and 125).

80 In *Bedford*, the Court noted that requiring s. 7 claimants "to establish the efficacy of the law versus its deleterious consequences on members of society as a whole, would impose the government's s. 1 burden on claimants under s. 7" (para. 127; see also *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, at paras. 21-22). A claimant under s. 7 must show that the state has deprived them of their life, liberty or security of the person and that the deprivation is not in accordance with the principles of fundamental justice. They should not be tasked with also showing that these principles are "not overridden by a valid state or communal interest in these circumstances": T. J. Singleton, "The Principles of Fundamental Justice, Societal Interests and Section 1 of the Charter" (1995), 74 *Can. Bar Rev*. 446, at p. 449. As this Court stated in *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 977:

> It is not appropriate for the state to thwart the exercise of the accused's right by attempting to bring societal interests into the principles of fundamental justice and to thereby limit an accused's s. 7 rights. Societal interests are to be dealt with under s. 1 of the *Charter* ... .

81 In *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 (the "*Motor Vehicle Reference*"), Lamer J. (as he then was) explained that the principles of fundamental justice are derived from the essential elements of our system of justice, which is itself founded on a belief in the dignity and worth of every human person. To deprive a person of constitutional [page375] rights arbitrarily or in a way that is overbroad or grossly disproportionate diminishes that worth and dignity. If a law operates in this way, it asks the right claimant to "serve as a scapegoat" (*Rodriguez*, at p. 621, per McLachlin J.). It imposes a deprivation via a process that is "fundamentally unfair" to the rights claimant (*Charkaoui*, at para. 22).

82 This is not to say that such a deprivation cannot be *justified* under s. 1 of the *Charter*. In some cases the government, for practical reasons, may only be able to meet an important objective by means of a law that has some fundamental flaw. But this does not concern us when considering whether s. 7 of the *Charter* has been breached.

(1) Arbitrariness

83 The principle of fundamental justice that forbids arbitrariness targets the situation where there is no rational connection between the object of the law and the limit it imposes on life, liberty or security of the person: *Bedford*, at para. 111. An arbitrary law is one that is not capable of fulfilling its objectives. It exacts a constitutional price in terms of rights, without furthering the public good that is said to be the object of the law.

84 The object of the prohibition on physician-assisted dying is to protect the vulnerable from ending their life in times of weakness. A total ban on assisted suicide clearly helps achieve this object. Therefore, individuals' rights are not limited arbitrarily.

(2) Overbreadth

85 The overbreadth inquiry asks whether a law that takes away rights in a way that generally supports the object of the law, goes too far by denying the rights of some individuals in a way that bears no relation to the object: *Bedford*, at paras. 101 [page376] and 112-13. Like the other principles of fundamental justice under s. 7, overbreadth is not concerned with competing social interests or ancillary benefits to the general population. A law that is drawn broadly to target conduct that bears no relation to its purpose "in order to make enforcement more practical" may therefore be overbroad (see *Bedford*, at para. 113). The question is not whether Parliament has chosen the least restrictive means, but whether the chosen means infringe life, liberty or security of the person in a way that has no connection with the mischief contemplated by the legislature. The focus is not on broad social impacts, but on the impact of the measure on the individuals whose life, liberty or security of the person is trammelled.

86 Applying this approach, we conclude that the prohibition on assisted dying is overbroad. The object of the law, as discussed, is to protect vulnerable persons from being induced to commit suicide at a moment of weakness. Canada conceded at trial that the law catches people outside this class: "It is recognised that not every person who wishes to commit suicide is vulnerable, and that there may be people with disabilities who have a considered, rational and persistent wish to end their own lives" (trial reasons, at para. 1136). The trial judge accepted that Ms. Taylor was such a person - competent, fully informed, and free from coercion or duress (para. 16). It follows that the limitation on their rights is in at least some cases not connected to the objective of protecting *vulnerable* persons. The blanket prohibition sweeps conduct into its ambit that is unrelated to the law's objective.

87 Canada argues that it is difficult to conclusively identify the "vulnerable", and that therefore it cannot be said that the prohibition is overbroad. Indeed, Canada asserts, "every person is *potentially* vulnerable" from a legislative perspective (R.F., at para. 115 (emphasis in original)).

88 We do not agree. The situation is analogous to that in *Bedford*, where this Court concluded that the prohibition on living on the avails of prostitution in s. 212(1)(*j*) of the *Criminal Code* was overbroad. The law in that case punished everyone who earned a living through a relationship with a prostitute, without distinguishing between those who would assist and protect them and those who would be at least potentially exploitive of them. Canada there as here argued that the line between exploitative and non-exploitative relationships was blurry, and that, as a result, the provision had to be drawn broadly to capture its targets. The Court concluded that that argument is more appropriately addressed under s. 1 (paras. 143-44).

(3) Gross Disproportionality

89 This principle is infringed if the impact of the restriction on the individual's life, liberty or security of the person is grossly disproportionate to the object of the measure. As with overbreadth, the focus is not on the impact of the measure on society or the public, which are matters for s. 1, but on its impact on the rights of the claimant. The inquiry into gross disproportionality compares the law's purpose, "taken at face value", with its negative effects on the rights of the claimant, and asks if this impact is completely out of sync with the object of the law (*Bedford*, at para. 125). The standard is high: the law's object and its impact may be incommensurate without reaching the standard for *gross* disproportionality (*Bedford*, at para. 120; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 47).

90 The trial judge concluded that the prohibition's negative impact on life, liberty and security of the person was "very severe" and therefore grossly disproportionate to its objective (para. 1378). We agree that the impact of the prohibition is severe: it imposes unnecessary suffering on affected individuals, deprives them of the ability to determine what to do with their bodies and how those bodies [page378] will be treated, and may cause those affected to take their own lives sooner than they would were they able to obtain a physician's assistance in dying. Against this it is argued that the object of the prohibition - to protect vulnerable persons from being induced to commit suicide at a time of weakness - is also of high importance. We find it unnecessary to decide whether the prohibition also violates the principle against gross disproportionality, in light of our conclusion that it is overbroad.

(4) Parity

91 The appellants ask the Court to recognize a new principle of fundamental justice, the principle of parity, which would require that offenders committing acts of comparable blameworthiness receive sanctions of like severity. They say the prohibition violates this principle because it punishes the provision of physician assistance in dying with the highest possible criminal sanction (for culpable homicide), while exempting other comparable end-of-life practices from any criminal sanction.

92 Parity in the sense invoked by the appellants has not been recognized as a principle of fundamental justice in this Court's jurisprudence to date. Given our conclusion that the deprivation of Ms. Taylor's s. 7 rights is not in accordance with the principle against overbreadth, it is unnecessary to consider this argument and we decline to do so.

IX. Does the Prohibition on Assisted Suicide Violate Section 15 of the *Charter*?

93 Having concluded that the prohibition violates s. 7, it is unnecessary to consider this question.

X. Section 1

94 In order to justify the infringement of the appellants' s. 7 rights under s. 1 of the *Charter*, [page379] Canada must show that the law has a pressing and substantial object and that the means chosen are proportional to that object. A law is proportionate if (1) the means adopted are rationally connected to that objective; (2) it is minimally impairing of the right in question; and (3) there is proportionality between the deleterious and salutary effects of the law: *R. v. Oakes*, [1986] 1 S.C.R. 103.

95 It is difficult to justify a s. 7 violation: see *Motor Vehicle Reference*, at p. 518; *G. (J.)*, at para. 99. The rights

protected by s. 7 are fundamental, and "not easily overridden by competing social interests" (*Charkaoui*, at para. 66). And it is hard to justify a law that runs afoul of the principles of fundamental justice and is thus inherently flawed (*Bedford*, at para. 96). However, in some situations the state may be able to show that the public good - a matter not considered under s. 7, which looks only at the impact on the rights claimants - justifies depriving an individual of life, liberty or security of the person under s. 1 of the *Charter*. More particularly, in cases such as this where the competing societal interests are themselves protected under the *Charter*, a restriction on s. 7 rights may in the end be found to be proportionate to its objective.

96 Here, the limit is prescribed by law, and the appellants concede that the law has a pressing and substantial objective. The question is whether the government has demonstrated that the prohibition is proportionate.

97 At this stage of the analysis, the courts must accord the legislature a measure of deference. Proportionality does not require perfection: *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at para. 78. Section 1 only requires that the limits be "reasonable". This Court has emphasized that there may be a number of possible solutions to a particular social problem, and suggested that a "complex regulatory [page380] response" to a social ill will garner a high degree of deference (*Hutterian Brethren*, at para. 37).

98 On the one hand, as the trial judge noted, physician-assisted death involves complex issues of social policy and a number of competing societal values. Parliament faces a difficult task in addressing this issue; it must weigh and balance the perspective of those who might be at risk in a permissive regime against that of those who seek assistance in dying. It follows that a high degree of deference is owed to Parliament's decision to impose an absolute prohibition on assisted death. On the other hand, the trial judge also found - and we agree - that the absolute prohibition could not be described as a "complex regulatory response" (para. 1180). The degree of deference owed to Parliament, while high, is accordingly reduced.

(1) Rational Connection

99 The government must show that the absolute prohibition on physician-assisted dying is rationally connected to the goal of protecting the vulnerable from being induced to take their own lives in times of weakness. The question is whether the means the law adopts are a rational way for the legislature to pursue its objective. If not, rights are limited for no good reason. To establish a rational connection, the government need only show that there is a causal connection between the infringement and the benefit sought "on the basis of reason or logic": *RJR-MacDonald*, at para. 153.

100 We agree with Finch C.J.B.C. in the Court of Appeal that, where an activity poses certain risks, prohibition of the activity in question is a rational method of curtailing the risks (para. 175). We therefore conclude that there is a rational connection between the prohibition and its objective.

101 The appellants argue that the *absolute* nature of the prohibition is not logically connected to the object of the provision. This is another way [page381] of saying that the prohibition goes too far. In our view, this argument is better dealt with in the inquiry into minimal impairment. It is clearly rational to conclude that a law that bars all persons from accessing assistance in suicide will protect the vulnerable from being induced to commit suicide at a time of weakness. The means here are logically connected with the objective.

(2) Minimal Impairment

102 At this stage of the analysis, the question is whether the limit on the right is reasonably tailored to the objective. The inquiry into minimal impairment asks "whether there are less harmful means of achieving the legislative goal" (*Hutterian Brethren*, at para. 53). The burden is on the government to show the absence of less drastic means of achieving the objective "in a real and substantial manner" (*ibid.*, at para. 55). The analysis at this stage is meant to ensure that the deprivation of *Charter* rights is confined to what is reasonably necessary to achieve the state's object.

103 The question in this case comes down to whether the absolute prohibition on physician-assisted dying, with its heavy impact on the claimants' s. 7 rights to life, liberty and security of the person, is the least drastic means of achieving the legislative objective. It was the task of the trial judge to determine whether a regime less restrictive of life, liberty and security of the person could address the risks associated with physician-assisted dying, or whether Canada was right to say that the risks could not adequately be addressed through the use of safeguards.

104 This question lies at the heart of this case and was the focus of much of the evidence at trial. In assessing minimal impairment, the trial judge heard evidence from scientists, medical practitioners, and others who were familiar with end-of-life decision-making in Canada and abroad. She also heard extensive evidence from each of the jurisdictions where physician-assisted dying is legal or regulated. In the trial judge's view, an absolute prohibition would [page382] have been necessary if the evidence showed that physicians were unable to reliably assess competence, voluntariness, and non-ambivalence in patients; that physicians fail to understand or apply the informed consent requirement for medical treatment; or if the evidence from permissive jurisdictions showed abuse of patients, carelessness, callousness, or a slippery slope, leading to the casual termination of life (paras. 1365-66).

105 The trial judge, however, expressly rejected these possibilities. After reviewing the evidence, she concluded that a permissive regime with properly designed and administered safeguards was capable of protecting vulnerable people from abuse and error. While there are risks, to be sure, a carefully designed and managed system is capable of adequately addressing them:

> My review of the evidence in this section, and in the preceding section on the experience in permissive jurisdictions, leads me to conclude that the risks inherent in permitting physician-assisted death can be identified and very substantially minimized through a carefully-designed system imposing stringent limits that are scrupulously monitored and enforced. [para. 883]

106 The trial judge found that it was feasible for properly qualified and experienced physicians to reliably assess patient competence and voluntariness, and that coercion, undue influence, and ambivalence could all be reliably assessed as part of that process (paras. 795-98, 815, 837, and 843). In reaching this conclusion, she particularly relied on the evidence on the application of the informed consent standard in other medical decision-making in Canada, including end-of-life decision-making (para. 1368). She concluded that it would be possible for physicians to apply the informed consent standard to patients who seek assistance in dying, adding the caution that physicians should ensure that patients are properly informed of their diagnosis and prognosis and the range of available options [page383] for medical care, including palliative care interventions aimed at reducing pain and avoiding the loss of personal dignity (para. 831).

107 As to the risk to vulnerable populations (such as the elderly and disabled), the trial judge found that there was no evidence from permissive jurisdictions that people with disabilities are at heightened risk of accessing physician-assisted dying (paras. 852 and 1242). She thus rejected the contention that unconscious bias by physicians would undermine the assessment process (para. 1129). The trial judge found there was no evidence of inordinate impact on socially vulnerable populations in the permissive jurisdictions, and that in some cases palliative care actually improved post-legalization (para. 731). She also found that while the evidence suggested that the law had both negative and positive impacts on physicians, it did support the conclusion that physicians were better able to provide overall end-of-life treatment once assisted death was legalized (para. 1271). Finally, she found no compelling evidence that a permissive regime in Canada would result in a "practical slippery slope" (para. 1241).

(a) *Canada's Challenge to the Facts*

108 Canada says that the trial judge made a palpable and overriding error in concluding that safeguards would minimize the risk associated with assisted dying. Canada argues that the trial judge's conclusion that the level of risk was acceptable flies in the face of her acknowledgment that some of the evidence on safeguards was weak, and that there was evidence of a lack of compliance with safeguards in permissive jurisdictions. Canada also says the trial judge erred by relying on cultural differences between Canada and other countries in finding that problems experienced elsewhere were not likely to occur in Canada.

[page384]

109 We cannot accede to Canada's submission. In *Bedford*, this Court affirmed that a trial judge's findings on social and legislative facts are entitled to the same degree of deference as any other factual findings (para. 48). In our view, Canada has not established that the trial judge's conclusion on this point is unsupported, arbitrary, insufficiently precise or otherwise in error. At most, Canada's criticisms amount to "pointing out conflicting evidence", which is not sufficient to establish a palpable and overriding error (*Tsilhqot'in Nation*, at para. 60). We see no reason to reject the conclusions drawn by the trial judge. They were reasonable and open to her on the record.

(b) *The Fresh Evidence*

110 Rothstein J. granted Canada leave to file fresh evidence on developments in Belgium since the time of the trial. This evidence took the form of an affidavit from Professor Etienne Montero, a professor in bioethics and an expert on the practice of euthanasia in Belgium. Canada says that Professor Montero's evidence demonstrates that issues with compliance and with the expansion of the criteria granting access to assisted suicide inevitably arise, even in a system of ostensibly strict limits and safeguards. It argues that this "should give pause to those who feel very strict safeguards will provide adequate protection: paper safeguards are only as strong as the human hands that carry them out" (R.F., at para. 97).

111 Professor Montero's affidavit reviews a number of recent, controversial, and high-profile cases of assistance in dying in Belgium which would not fall within the parameters suggested in these reasons, such as euthanasia for minors or persons with psychiatric disorders or minor medical conditions. Professor Montero suggests that these cases demonstrate that a slippery slope is at work in Belgium. In his view, "[o]nce euthanasia is allowed, [page385] it becomes very difficult to maintain a strict interpretation of the statutory conditions."

112 We are not convinced that Professor Montero's evidence undermines the trial judge's findings of fact. First, the trial judge (rightly, in our view) noted that the permissive regime in Belgium is the product of a very different medico-legal culture. Practices of assisted death were "already prevalent and embedded in the medical culture" prior to legalization (para. 660). The regime simply regulates a common pre-existing practice. In the absence of a comparable history in Canada, the trial judge concluded that it was problematic to draw inferences about the level of physician compliance with legislated safeguards based on the Belgian evidence (para. 680). This distinction is relevant both in assessing the degree of physician compliance and in considering evidence with regards to the potential for a slippery slope.

113 Second, the cases described by Professor Montero were the result of an oversight body exercising discretion in the interpretation of the safeguards and restrictions in the Belgian legislative regime - a discretion the Belgian Parliament has not moved to restrict. These cases offer little insight into how a Canadian regime might operate.

(c) *The Feasibility of Safeguards and the Possibility of a "Slippery Slope"*

114 At trial Canada went into some detail about the risks associated with the legalization of physician-assisted dying. In its view, there are many possible sources of error and many factors that can render a patient "decisionally vulnerable" and thereby give rise to the risk that persons without a rational and considered desire for death will in fact end up dead. It points to cognitive impairment, depression or other mental illness, coercion, undue influence, psychological or emotional manipulation, systemic prejudice (against the elderly or people with disabilities), and the possibility of ambivalence [page386] or misdiagnosis as factors that may escape detection or give rise to errors in capacity assessment. Essentially, Canada argues that, given the breadth of this list, there is no reliable way to identify those who are vulnerable and those who are not. As a result, it says, a blanket prohibition is necessary.

115 The evidence accepted by the trial judge does not support Canada's argument. Based on the evidence regarding assessment processes in comparable end-of-life medical decision-making in Canada, the trial judge concluded that vulnerability can be assessed on an individual basis, using the procedures that physicians apply in

their assessment of informed consent and decisional capacity in the context of medical decision-making more generally. Concerns about decisional capacity and vulnerability arise in all end-of-life medical decision-making. Logically speaking, there is no reason to think that the injured, ill, and disabled who have the option to refuse or to request withdrawal of lifesaving or life-sustaining treatment, or who seek palliative sedation, are less vulnerable or less susceptible to biased decision-making than those who might seek more active assistance in dying. The risks that Canada describes are already part and parcel of our medical system.

116 As the trial judge noted, the individual assessment of vulnerability (whatever its source) is implicitly condoned for life-and-death decision-making in Canada. In some cases, these decisions are governed by advance directives, or made by a substitute decision-maker. Canada does not argue that the risk in those circumstances requires an absolute prohibition (indeed, there is currently no federal regulation of such practices). In *A.C.*, Abella J. adverted to the potential vulnerability of adolescents who are faced with life-and-death decisions about medical treatment (paras. 72-78). Yet, this Court [page387] implicitly accepted the viability of an individual assessment of decisional capacity in the context of that case. We accept the trial judge's conclusion that it is possible for physicians, with due care and attention to the seriousness of the decision involved, to adequately assess decisional capacity.

117 The trial judge, on the basis of her consideration of various regimes and how they operate, found that it is possible to establish a regime that addresses the risks associated with physician-assisted death. We agree with the trial judge that the risks associated with physician-assisted death can be limited through a carefully designed and monitored system of safeguards.

118 Canada also argues that the permissive regulatory regime accepted by the trial judge "accepts too much risk", and that its effectiveness is "speculative" (R.F., at para. 154). In effect, Canada argues that a blanket prohibition should be upheld unless the appellants can demonstrate that an alternative approach eliminates all risk. This effectively reverses the onus under s. 1, requiring the claimant whose rights are infringed to prove less invasive ways of achieving the prohibition's object. The burden of establishing minimal impairment is on the government.

119 The trial judge found that Canada had not discharged this burden. The evidence, she concluded, did not support the contention that a blanket prohibition was necessary in order to substantially meet the government's objectives. We agree. A theoretical or speculative fear cannot justify an absolute prohibition. As Deschamps J. stated in *Chaoulli*, at para. 68, the claimant "d[oes] not have the burden of disproving every fear or every threat", nor can the government meet its burden simply by asserting an adverse impact on the public. Justification under s. 1 is a process of demonstration, not intuition or [page388] automatic deference to the government's assertion of risk (*RJR-MacDonald*, at para. 128).

120 Finally, it is argued that without an absolute prohibition on assisted dying, Canada will descend the slippery slope into euthanasia and condoned murder. Anecdotal examples of controversial cases abroad were cited in support of this argument, only to be countered by anecdotal examples of systems that work well. The resolution of the issue before us falls to be resolved not by competing anecdotes, but by the evidence. The trial judge, after an exhaustive review of the evidence, rejected the argument that adoption of a regulatory regime would initiate a descent down a slippery slope into homicide. We should not lightly assume that the regulatory regime will function defectively, nor should we assume that other criminal sanctions against the taking of lives will prove impotent against abuse.

121 We find no error in the trial judge's analysis of minimal impairment. We therefore conclude that the absolute prohibition is not minimally impairing.

(3) Deleterious Effects and Salutary Benefits

122 This stage of the *Oakes* analysis weighs the impact of the law on protected rights against the beneficial effect of the law in terms of the greater public good. Given our conclusion that the law is not minimally impairing, it is not necessary to go on to this step.

123 We conclude that s. 241(*b*) and s. 14 of the *Criminal Code* are not saved by s. 1 of the *Charter*.

[page389]

XI. Remedy

A. *The Court of Appeal's Proposed Constitutional Exemption*

124 The majority at the Court of Appeal suggested that this Court consider issuing a free-standing constitutional exemption, rather than a declaration of invalidity, should it choose to reconsider *Rodriguez*. The majority noted that the law does not currently provide an avenue for relief from a "generally sound law" that has an extraordinary effect on a small number of individuals (para. 326). It also expressed concern that it might not be possible for Parliament to create a fully rounded, well-balanced alternative policy within the time frame of any suspension of a declaration of invalidity (para. 334).

125 In our view, this is not a proper case for a constitutional exemption. We have found that the prohibition infringes the claimants' s. 7 rights. Parliament must be given the opportunity to craft an appropriate remedy. The concerns raised in *Ferguson* about stand-alone constitutional exemptions are equally applicable here: issuing such an exemption would create uncertainty, undermine the rule of law, and usurp Parliament's role. Complex regulatory regimes are better created by Parliament than by the courts.

B. *Declaration of Invalidity*

126 We have concluded that the laws prohibiting a physician's assistance in terminating life (*Criminal Code*, s. 241(*b*) and s. 14) infringe Ms. Taylor's s. 7 rights to life, liberty and security of the person in a manner that is not in accordance with the principles of fundamental justice, and that the infringement is not justified under s. 1 of the *Charter*. To the extent that the impugned laws deny the s. 7 rights of people like Ms. Taylor they are void by operation of s. 52 of the *Constitution Act, 1982*. It is for Parliament and the provincial legislatures to [page390] respond, should they so choose, by enacting legislation consistent with the constitutional parameters set out in these reasons.

127 The appropriate remedy is therefore a declaration that s. 241(*b*) and s. 14 of the *Criminal Code* are void insofar as they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life; and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition. "Irremediable", it should be added, does not require the patient to undertake treatments that are not acceptable to the individual. The scope of this declaration is intended to respond to the factual circumstances in this case. We make no pronouncement on other situations where physician-assisted dying may be sought.

128 We would suspend the declaration of invalidity for 12 months.

129 We would not accede to the appellants' request to create a mechanism for exemptions during the period of suspended validity. In view of the fact that Ms. Taylor has now passed away and that none of the remaining litigants seeks a personal exemption, this is not a proper case for creating such an exemption mechanism.

130 A number of the interveners asked the Court to account for physicians' freedom of conscience and religion when crafting the remedy in this case. The Catholic Civil Rights League, the Faith and Freedom Alliance, the Protection of Conscience Project, and the Catholic Health Alliance of Canada all expressed concern that physicians who object to medical assistance in dying on moral grounds may be obligated, based on a duty to act in their patients' best interests, to participate in physician-assisted dying. They ask us [page391] to confirm that physicians and other health-care workers cannot be compelled to provide medical aid in dying. They would have the Court direct the legislature to provide robust protection for those who decline to support or participate in physician-assisted dying for reasons of conscience or religion.

131 The Canadian Medical Association reports that its membership is divided on the issue of assisted suicide. The Association's current policy states that it supports the right of all physicians, within the bounds of the law, to follow their conscience in deciding whether or not to provide aid in dying. It seeks to see that policy reflected in any legislative scheme that may be put forward. While acknowledging that the Court cannot itself set out a comprehensive regime, the Association asks us to indicate that any legislative scheme must legally protect both those physicians who choose to provide this new intervention to their patients, along with those who do not.

132 In our view, nothing in the declaration of invalidity which we propose to issue would compel physicians to provide assistance in dying. The declaration simply renders the criminal prohibition invalid. What follows is in the hands of the physicians' colleges, Parliament, and the provincial legislatures. However, we note - as did Beetz J. in addressing the topic of physician participation in abortion in *Morgentaler* - that a physician's decision to participate in assisted dying is a matter of conscience and, in some cases, of religious belief (pp. 95-96). In making this observation, we do not wish to pre-empt the legislative and regulatory response to this judgment. Rather, we underline that the *Charter* rights of patients and physicians will need to be reconciled.

XII. Costs

133 The appellants ask for special costs on a full indemnity basis to cover the entire expense of bringing this case before the courts.

[page392]

134 The trial judge awarded the appellants special costs exceeding $1,000,000, on the ground that this was justified by the public interest in resolving the legal issues raised by the case. (Costs awarded on the usual party-and-party basis would not have exceeded about $150,000.) In doing so, the trial judge relied on *Victoria (City) v. Adams*, 2009 BCCA 563, 100 B.C.L.R. (4th) 28, at para. 188, which set out four factors for determining whether to award special costs to a successful public interest litigant: (1) the case concerns matters of public importance that transcend the immediate interests of the parties, and which have not been previously resolved; (2) the plaintiffs have no personal, proprietary or pecuniary interest in the litigation that would justify the proceeding on economic grounds; (3) the unsuccessful parties have a superior capacity to bear the cost of the proceedings; and (4) the plaintiffs did not conduct the litigation in an abusive, vexatious or frivolous manner. The trial judge found that all four criteria were met in this case.

135 The Court of Appeal saw no error in the trial judge's reasoning on special costs, given her judgment on the merits. However, as the majority overturned the trial judge's decision on the merits, it varied her costs order accordingly. The majority ordered each party to bear its own costs.

136 The appellants argue that special costs, while exceptional, are appropriate in a case such as this, where the litigation raises a constitutional issue of high public interest, is beyond the plaintiffs' means, and was not conducted in an abusive or vexatious manner. Without such awards, they argue, plaintiffs will not be able to bring vital issues of importance to all Canadians before the courts, to the detriment of justice and other affected Canadians.

[page393]

137 Against this, we must weigh the caution that "[c]ourts should not seek on their own to bring an alternative and extensive legal aid system into being": *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38, at para. 44. With this concern in mind, we are of the view that *Adams* sets the threshold for an award of special costs too low. This Court has previously emphasized that special costs are only available in "exceptional" circumstances: *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17, at para. 48. The test set out in *Adams* would permit an award of special costs in cases that do not fit that description. Almost all constitutional litigation concerns "matters of public importance". Further, the criterion that asks whether the unsuccessful party has a superior capacity to bear the cost of the proceedings will always favour

an award against the government. Without more, special costs awards may become routine in public interest litigation.

138 Some reference to this Court's jurisprudence on advance costs may be helpful in refining the criteria for special costs on a full indemnity basis. This Court set the test for an award of advance costs in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371. LeBel J. identified three criteria necessary to justify that departure from the usual rule of costs:

> 1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial - in short, the litigation would be unable to proceed if the order were not made.
> 2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient [page394] merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
> 3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases. [para. 40]

139 The Court elaborated on this test in *Little Sisters*, emphasizing that issues of public importance will not in themselves "automatically entitle a litigant to preferential treatment with respect to costs" (para. 35). The standard is a high one: only "rare and exceptional" cases will warrant such treatment (para. 38).

140 In our view, with appropriate modifications, this test serves as a useful guide to the exercise of a judge's discretion on a motion for special costs in a case involving public interest litigants. First, the case must involve matters of public interest that are truly exceptional. It is not enough that the issues raised have not previously been resolved or that they transcend the individual interests of the successful litigant: they must also have a significant and widespread societal impact. Second, in addition to showing that they have no personal, proprietary or pecuniary interest in the litigation that would justify the proceedings on economic grounds, the plaintiffs must show that it would not have been possible to effectively pursue the litigation in question with private funding. In those rare cases, it will be contrary to the interests of justice to ask the individual litigants (or, more likely, pro bono counsel) to bear the majority of the financial burden associated with pursuing the claim.

141 Where these criteria are met, a court will have the discretion to depart from the usual rule on costs and award special costs.

142 Finally, we note that an award of special costs does not give the successful litigant the right [page395] to burden the defendant with any and all expenses accrued during the course of the litigation. As costs awards are meant to "encourage the reasonable and efficient conduct of litigation" (*Okanagan Indian Band*, at para. 41), only those costs that are shown to be reasonable and prudent will be covered by the award.

143 Having regard to these criteria, we are not persuaded the trial judge erred in awarding special costs to the appellants in the truly exceptional circumstances of this case. We would order the same with respect to the proceedings in this Court and in the Court of Appeal.

144 The final question is whether the trial judge erred in awarding 10 percent of the costs against the Attorney General of British Columbia. The trial judge acknowledged that it is unusual for courts to award costs against an Attorney General who intervenes in constitutional litigation as of right. However, as the jurisprudence reveals, there is no firm rule against it: see, e.g., *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *Hegeman v. Carter*, 2008 NWTSC 48, 74 C.P.C. (6th) 112; and *Polglase v. Polglase* (1979), 18 B.C.L.R. 294 (S.C.).

145 In her reasons on costs, the trial judge explained that counsel for British Columbia led evidence, cross-examined the appellants' witnesses, and made written and oral submissions on most of the issues during the course of the trial. She also noted that British Columbia took an active role in pre-trial proceedings. She held that an

Attorney General's responsibility for costs when involved in constitutional litigation as of right varies with the role the Attorney General assumes in the litigation. Where the Attorney General assumes the role of a party, the court may find the Attorney General liable for costs in the same manner as a party (para. 96). She concluded that the Attorney General of British Columbia had taken a full and active role in the proceedings and should therefore be liable for costs [page396] in proportion to the time British Columbia took during the proceedings.

146 We stress, as did the trial judge, that it will be unusual for a court to award costs against Attorneys General appearing before the court as of right. However, we see no reason to interfere with the trial judge's decision to do so in this case or with her apportionment of responsibility between the Attorney General of British Columbia and the Attorney General of Canada. The trial judge was best positioned to determine the role taken by British Columbia and the extent to which it shared carriage of the case.

XIII. Conclusion

147 The appeal is allowed. We would issue the following declaration, which is suspended for 12 months:

> Section 241(*b*) and s. 14 of the *Criminal Code* unjustifiably infringe s. 7 of the *Charter* and are of no force or effect to the extent that they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition.

148 Special costs on a full indemnity basis are awarded against Canada throughout. The Attorney General of British Columbia will bear responsibility for 10 percent of the costs at trial on a full indemnity basis and will pay the costs associated with its presence at the appellate levels on a party-and-party basis.

Appeal allowed with costs.

Solicitors:

Solicitors for the appellants: Farris, Vaughan, Wills & Murphy, Vancouver; Davis, Vancouver.

[page397]

Solicitor for the respondent the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitor for the respondent the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitors for the interveners the Council of Canadians with Disabilities and the Canadian Association for Community Living: Bakerlaw, Toronto.

Solicitors for the intervener the Christian Legal Fellowship: Miller Thomson, Calgary.

Solicitors for the interveners the Canadian HIV/AIDS Legal Network and the HIV & AIDS Legal Clinic Ontario: Paliare Roland Rosenberg Rothstein, Toronto; Canadian HIV/AIDS Legal Network, Toronto; HIV & AIDS Legal Clinic Ontario, Toronto.

Solicitor for the intervener the Association for Reformed Political Action Canada: Association for Reformed Political Action Canada, Ottawa.

Solicitors for the intervener the Physicians' Alliance against Euthanasia: Norton Rose Fulbright Canada, Montréal.

Solicitors for the intervener the Evangelical Fellowship of Canada: Geoffrey Trotter Law Corporation, Vancouver.

Solicitors for the interveners the Christian Medical and Dental Society of Canada and the Canadian Federation of Catholic Physicians' Societies: Vincent Dagenais Gibson, Ottawa.

Solicitors for the intervener Dying With Dignity: Sack Goldblatt Mitchell, Toronto.

[page398]

Solicitors for the intervener the Canadian Medical Association: Polley Faith, Toronto.

Solicitors for the intervener the Catholic Health Alliance of Canada: Vincent Dagenais Gibson, Ottawa.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Sack Goldblatt Mitchell, Toronto.

Solicitors for the interveners the Farewell Foundation for the Right to Die and Association québécoise pour le droit de mourir dans la dignité: Gratl & Company, Vancouver.

Solicitors for the intervener the Canadian Civil Liberties Association: Borden Ladner Gervais, Toronto.

Solicitors for the interveners the Catholic Civil Rights League, the Faith and Freedom Alliance and the Protection of Conscience Project: Bennett Jones, Toronto; Philip H. Horgan, Toronto.

Solicitors for the intervener the Alliance of People With Disabilities Who are Supportive of Legal Assisted Dying Society: Borden Ladner Gervais, Vancouver and Ottawa.

Solicitors for the intervener the Canadian Unitarian Council: Farris, Vaughan, Wills & Murphy, Vancouver.

Solicitors for the interveners the Euthanasia Prevention Coalition and the Euthanasia Prevention Coalition - British Columbia: Scher Law Professional Corporation, Toronto.

Dalex Co. v. Schwartz Levitsky Feldman, [1994] O.J. No. 1388

Ontario Judgments

Ontario Court of Justice - General Division

Toronto, Ontario

Epstein J.

Heard: April 14, 1994.

Judgment: June 24, 1994.

Action No. 93-CQ-43386

[1994] O.J. No. 1388 | 19 O.R. (3d) 463 | 23 C.C.L.I. (2d) 294 | 48 A.C.W.S. (3d) 1117

Between Dalex Co. Limited, Plaintiff, and Schwartz Levitsky Feldman, Michael B. Simonetta, Saul M. Muskat, Alan Page, Kai Chang and Anthony Valerie, Defendants

(21 pp.)

Case Summary

Practice — Pleadings — Striking out pleadings — Grounds — Failure to disclose a cause of action or defence — Scandalous, frivolous or vexatious — Damages — Deductions -- insurance proceeds.

Motion to strike certain paragraphs contained in the defendants' statement of defence and counter-claim. The action was against the partners of an accounting firm for damages arising from, inter alia, breach of contract and negligence. Of the four impugned paragraphs, the first two disputed the insurance benefits and tax recoveries that the plaintiff had obtained as a result of the alleged malfeasance of the defendant while the fourth one, as the foundation for a claim of punitive damages, alleged that the plaintiffs and their counsel had breached an implied undertaking not to use information obtained in the course of the action for an ulterior purpose. The plaintiffs contended that the first two paragraphs failed to disclose a reasonable defence while the other two were scandalous, frivolous and vexatious.
HELD: Motion allowed in part.

Only the paragraph pleading a reduction of the plaintiff's loss due to insurance proceeds received was struck as disclosing no reasonable defence. Payments received by the plaintiff under an insurance policy taken out and maintained by it could not be the basis for a reduction of the liability of a defendant and it was immaterial whether or not the insurer exercised its right of subrogation. However, the same did not apply for tax recoveries. The court was not satisfied that the use of the materials received by the plaintiffs from the defendants prior to the commencement of the proceedings would not be accepted by the trial judge as a factual underpinning for the defendants' claim to punitive damages.

STATUTES, REGULATIONS AND RULES CITED:

Ontario Rules of Civil Procedure, Rule 21.01(1)(b).
Kathryn L. Knight, for the Plaintiff. A. Pettingill, for the Defendants.

EPSTEIN J.

1 In this motion the plaintiff seeks to strike certain paragraphs contained in the defendants' statement of defence and counterclaim. The paragraphs under attack can generally be described as follows:

I. No Reasonable Defence

(a) a paragraph pleading that insurance benefits received by the plaintiff should be taken into consideration in determining the defendants' obligation to the plaintiff, if any (para. 68);

(b) a paragraph pleading that the plaintiff's tax treatment of the loss should be taken into consideration in determining the defendants' obligation, if any, to the plaintiff (para. 67);

II. Scandalous, Frivolous and Vexatious

(c) paragraphs referring to the involvement of plaintiff's counsel in the circumstances giving rise to the action (paras. 76-82); and

(d) paragraphs alleging that the plaintiff and its counsel have breached an implied undertaking not to use information obtained in the course of the action for an ulterior purpose (paras. 83-88 and 90).

2 The issue is: do the impugned paragraphs constitute proper pleading? Do they raise legitimate issues to be considered at trial or are they otherwise frivolous and vexatious?

3 The action is against the partners of an accounting firm for damages arising from breach of contract, negligence, negligent misrepresentation, and exemplary and punitive damages. The plaintiff is a corporation that formerly engaged the services of the defendants for its accounting and auditing needs. From 1989 into 1992, the plaintiff's controller defrauded the plaintiff of over $600,000. Simply put, the plaintiff takes the position in this action that had it not been for the defendants' failure to audit, monitor and supervise the plaintiff's financial situation, the losses from the controller's theft would and should have been discovered and prevented.

4 I start with the proposition, advanced by the defendants, that although the Court has inherent jurisdiction to strike out a pleading as disclosing no legally tenable position, such power should be exercised sparingly and only when there is no doubt that no cause of action or defence exists. In order to foreclose the consideration of an issue past the pleadings stage, the moving party must show that there is an existing bar in the form of a decided case directly on point from the same jurisdiction demonstrating that the very issue has been squarely dealt with and rejected by our Courts. Only by restricting successful attacks of this nature to the narrowest of cases can the common law have a full opportunity to be refined or extended (see: Krause v. Chrysler Canada Limited, [1970] 3 O.R. 135 (H.C.J.)).

5 It is also fairly common ground that no pleaded fact that is relevant can be scandalous. I refer to the often quoted decision of Duryea v. Kaufman (1910), 21 O.L.R. 161, where Justice Riddell stated at p. 168:

> ... No pleading can be said to be embarrassing if it alleges only facts which may be proved the opposite party may be perplexed, astonished, startled, confused, troubled, annoyed, taken aback, and worried by such a pleading but in a legal sense he cannot be 'embarrassed.' But no pleading should set out a fact which would not be allowed to be proved that is embarrassing: Stratford Gas Co. v. Gordon (1892), 14 P.R. 407; Heugh v. Chamberlain (1877), 25 W.R. 742; Knowles v. Roberts (1888), 38 Ch. D. 263. Even if a pleading set out a fact that is not necessary to be proved, still, if it can be proved, the pleading will not be embarrassing. Anything which can have any effect at all in determining the rights of the parties can be proved, and consequently can be pleaded but the Court will not allow any fact to be alleged which is wholly immaterial and can have no effect upon the result: Rock v. Pursell (1887), 84 L.T.J. 45.

6 I accept these two propositions as correct statements of the law governing challenges to pleadings on the basis of no tenable cause of action or defence or as being scandalous, frivolous or embarrassing. I proceed to examine the impugned paragraphs using these tests.

1. (a) Insurance Proceeds - No Tenable Defence

7 The paragraph of the statement of defence and counterclaim sought to be struck out is as follows:

68. The defendants further plead that there have been certain insurance monies payable to and collected by Dalex, arising out of the defalcations, which have further reduced the loss.

8 The plaintiff argues that this paragraph does not constitute a proper or relevant pleading based on the proposition that recovery in tort is dependent on the plaintiff's establishing injury and loss resulting from an act of misfeasance or nonfeasance on the part of the tortfeasor. A tortfeasor should not, and in fact cannot, benefit from the sacrifice made by a plaintiff in obtaining an insurance policy.

9 The plaintiff relies upon a recent decision of the Supreme Court of Canada in a trilogy of cases known as Cunningham v. Wheeler, [1994] 1 S.C.R. 359.

10 In the actual Cunningham v. Wheeler case, the plaintiff was injured in a car accident. While he was off work he collected disability benefits pursuant to a collective agreement. These benefits were considered part of the plaintiff's annual remuneration. Benefits received from the defendants did not have to be paid to the employer or to the disability insurer. The trial judge held that the payments received by the plaintiff as a result of his employment should not be deducted in calculating the amount payable by the defendants for the wages lost by the plaintiff due to his injuries as the plaintiff had established that he had paid for these benefits as part of his wage package.

11 The Court of Appeal reversed the judgment. It determined that since there was no subrogation right, the plan was not in the nature of private insurance and the funds received should be deducted from the damage award. The Supreme Court of Canada allowed the appeal on the basis of its finding that the benefits received were in the nature of a private insurance policy.

12 In the second case of Cooper v. Miller, the plaintiff also suffered injuries from a car accident. Under a collective agreement, she received short-term disability benefits which she funded, in part, through payroll deductions. Again, she was not obliged to repay these benefits to the employer or insurance carrier. The trial judge, Court of Appeal, and Supreme Court of Canada all held that the plaintiff's benefits should not be deducted from her recovery for lost wages from the defendant, even though there was no subrogation provision, as she had bought and partially paid for the insurance.

13 Finally, in Shanks v. McNee, another motor vehicle accident case, the plaintiff received both short-term and long-term disability benefits. There was some form of contribution by the employee to the cost of each plan. There was a subrogation clause in the long-term disability plan but not in the short-term. The benefits received by the plaintiff were not deducted from the amount the defendants were ordered to pay pursuant to the judgment at trial. The Court of Appeal reversed the trial judge only in respect of the short-term disability payments since there was no direct contribution by the employee and there was no subrogation with respect to those benefits. The Supreme Court of Canada dismissed the defendants' appeal concerning the deductibility of the long-term benefits.

14 Three principles emerge from the decision of the Supreme Court of Canada in this trilogy of cases. They are as follows:

1. The general proposition is that the plaintiff in a tort action is not entitled to a double recovery for any loss arising from an injury;
2. An exception to this general principle is the "insurance exception". To qualify, the plaintiff must show that the benefits received were in the nature of an insurance, i.e., some type of consideration must have been given up by the plaintiff in return for the benefit. Generally, subrogation is not relevant to a consideration of the deductibility of the benefits if they are found to be in the nature of insurance.
3. If the benefits do not fall within the insurance exception, then they must be deducted from the damages recovered, unless the third party who paid the benefits has the right of subrogation.

15 It is the plaintiff's submission that since the pleading itself refers to the plaintiff's recovery of insurance monies, it is clear that the case falls within the insurance exception and no deduction is permitted by law. If there is any doubt,

it is also clear that the insurance company covering the plaintiff from theft by an employee has a right of subrogation at common law and most probably contractual as well. Using the Cunningham v. Wheeler rationale, it would appear that there can be no deduction from any amount found to be owing by the defendants to take into account insurance monies received by the plaintiff.

16 The defendants argue that the ratio established by the Cunningham v. Wheeler trilogy pertains only to employment cases. Since there has been no decision strictly on point other than in the discrete area of employment situations, the door remains open for refinement or development of the law involving the deductibility of insurance benefits received by a plaintiff from damages owed by defendants in other types of cases. As a result, the defendants submit that their pleading in this respect should be allowed to stand to enable them to argue that the law as set out by the Supreme Court of Canada in Cunningham v. Wheeler should not apply to the type of fact situation in this case.

17 I cannot accept this position for two reasons. First, even though the Cunningham v. Wheeler trilogy involved only employment situations, the Court in no way indicated an intention to confine the law concerning the deductibility of insurance benefits to those types of cases. I refer to statements such as that of Cory J. at p. 400 where he says without qualification that the proceeds of insurance should not be deducted from a plaintiff's damages. This statement follows a lengthy list of Canadian cases in which that principle of law has been consistently applied, some of which involve situations other than wage loss claims (see: Dawson v. Sawatzky, [1946] 1 W.W.R. 33 (Sask. C.A.); Canadian Pacific Ltd. v. Gill Principle, [1973] S.C.R. 654.)

18 The decision in Cunningham v. Wheeler does not, admittedly, contain a specific statement that the non-deductibility of insurance benefits received by the plaintiff from the calculation of the tortfeasor's obligation applies to a non-wage loss situation. However, in my view, the overall wording of the decision and the underlying rationale for the propositions listed above present a bar to the pleading proposed by the defendants in accordance with the test set out in Krause v. Chrysler, supra.

19 The second reason I would apply Cunningham v. Wheeler to this fact situation, relates to the Supreme Court of Canada's comments on the importance of the doctrine of subrogation on these types of situations. In my opinion, to restrict the principle of nondeductibility of insurance proceeds to employment situations would effectively destroy the doctrine of subrogation in respect of other types of tort claims for losses that are covered by insurance.

20 Subrogation operates where the insured has a legally enforceable right against a party other than the insurer to recover the amount of loss. Where the insured has a right in tort to recover damages from a negligent tortfeasor, the insurer is said to be subrogated to such a right so that the insured party cannot retain both the insurance money and the damages recovered from the third party. The following principles are relevant:

1. The right of subrogation does not arise unless and until the insurers have admitted the insured's claim and have paid the sum payable under the policy.
2. The right of subrogation only arises on contracts of indemnity. Where the insured would be paid twice for the pecuniary loss, the insurer has the right of subrogation. All insurance contracts are presumed to be contracts of indemnity, unless otherwise specified.
3. The rights to which the insurers are subrogated must, as a general rule, be enforced in the name of the insured. The mere fact of subrogation does not entitle them to enforce such rights in their own names.
4. The insurer has the right to pursue the insured's rights in the insured's name against any defendant who caused the loss. If the insured has already exercised the right against the third party and recovered the value of the loss, the insurer may seek reimbursement from the insured.
5. The right of subrogation is independent of statute or the express terms of the policy, although it may be modified by the express terms of the statute or the contract: Castellain v. Preston (1883), 11 Q.B.D. 380 (C.A.); Baer, "Rethinking Basic Concepts of Insurance Law" (1987), L.S.U.C. Special Lectures, p. 210.

21 To permit a tortfeasor to advance insurance proceeds as a defence in the reduction of damages conflicts with the doctrine of subrogation. If the plaintiff's damages were reduced by the amount received from the insurer, the insurer could not recover from the defendant the monies it paid to the plaintiff because the insurer is restricted to suing in the name of the plaintiff and in respect of the plaintiff's rights. The insurer could not be reimbursed by the plaintiff because the plaintiff would only have been awarded damages after deducting the insurance proceeds.

22 The superficial answer may be to allow the case to go to trial to enable the trial judge to examine the evidence as to what was paid under the insurance policy and as to the extent that a right of subrogation was exercised. This would be consistent with the reasoning of McLachlin J. in her dissent in Cunningham v. Wheeler and the majority in the previous decision of the court in Ratych v. Bloomer (1990), 39 O.A.C. 103 (S.C.C.).

23 McLachlin J., in her dissent in Cunningham v. Wheeler, suggested that subrogation is exercised very rarely in the wage benefits context. This would explain her comments about subrogation, in the decisions which she expressly stated are restricted to the wage benefits context, at pp. 386-387:

> The argument that it makes sense for the tortfeasor to pay damages for wage losses already indemnified by others succeeds only if the employer or insurer who pays the wage benefit recovers the damages allocated to lost wages from the employee by way of subrogation. In this case there is no double recovery. The burden is properly placed on the tortfeasor rather than the employer or insurance company. The latter result, unlike the result of double payment to the plaintiff, is defensible economically and in justice. For this reason, Ratych v. Bloomer suggested that where subrogation is exercised, no deduction for double recovery need be made. (emphasis added)

And at p. 388:

> The rare exercise of the right of subrogation suggests that the best approach is a regime of deductibility of employment plan benefits, subject to the plaintiff's right to claim the benefits if it is established that they will be paid over to the subrogated third party. In that case, the plaintiff would hold the recovered monies in trust on behalf of the subrogated insurer or employer: Ratych, supra, at p. 978. (emphasis added)

24 Cory J. in Cunningham v. Wheeler takes the contrary view, at p. 415:

25 Generally, subrogation has no relevance in a consideration of the deductibility of the disability benefits, if they are found to be in the nature of insurance. ... However, if the third party who paid the benefits has a right of subrogation then there should not be any deduction. It does not matter whether the right of subrogation is exercised or not. The exercise of the right is a matter that rests solely between the plaintiff and the third party. The failure to exercise the right cannot in any way affect the defendant's liability for damages. However, different considerations might well apply in a situation where the third party has formally released its subrogation right. (emphasis added)

26 Pursuant to Cory J.'s view of subrogation in Cunningham v. Wheeler, it is irrelevant whether the insurer actually exercises its right of subrogation. If the right of subrogation is paramount whether it is exercised or not, then the defence that there has been payment under the insurance policy must be irrelevant.

27 There has been previous judicial consideration of the relevance of the insurance benefits paid to the plaintiff to the determination of the defendant's obligations. In Pickin et al. v. Hesk and Lawrence, [1954] O.R. 713 (Ont. C.A.), the court stated as follows, at pp. 724-725:

> ... The trial judge seems to have had the opinion that because there was no evidence of insurance this action would not lie. The question of insurance or no insurance was entirely irrelevant. The only issue in this action was whether the plaintiffs had been damnified by the defendants. If they have been paid under a contract of indemnity between them and their insurers then in this action they are only nominal plaintiffs and the action is brought in their names for the benefit of their insurers. If they have not been paid then they are suing in their own right. (emphasis added)

28 Where a pleading discloses no reasonable cause of action or defence it should be struck: Rule 21.01(1)(b) of

the Rules of Civil Procedure. Whether the decision in Cunningham v. Wheeler acts as a direct bar to the pleadings at issue because of the insurance proceeds exception or as a result of its comments on the doctrine of subrogation, the Supreme Court of Canada has stated the law in a way that, in my view, renders paragraph 68 of the statement of defence and counterclaim legally untenable and it therefore should be struck from the pleading.

(b) Tax Recovery

29 The paragraph that the plaintiff seeks to have struck is as follows:

> 67. The Defendants further plead that Dalex is entitled to and has made certain tax recoveries as a result of the fraudulent conduct of William Young. Such recoveries have significantly reduced the loss.

30 The plaintiff's submission is that tax recovery is a matter between the state and the individual and does not affect the damages due to the plaintiff from the defendants. If the plaintiff receives an unexpected windfall, that is a matter to be dealt with through legislation. The application of the current Income Tax Act should not affect the rights and obligations between the plaintiff and the defendants.

31 Again, the plaintiff looks to the Supreme Court of Canada trilogy of decisions in Cunningham v. Wheeler, supra, for support. In one of the trilogy of cases, Shanks v. McNee, an issue arose over the fact that damages were intended to replace lost wages but that damages, unlike wages, would not be taxed. The defendants argued that their liability to the plaintiff should be reduced in order that the plaintiff not be over-compensated.

32 In dealing with this issue, Cory J. observed that Canadian courts have consistently held that damage awards in personal injury cases should be calculated without taking into account any such tax advantage, whereas in other countries tax is taken into account. The Supreme Court of Canada used the trilogy to renew its support for ignoring the impact of tax, agreeing with the conclusion of the Ontario Law Reform Commission that "should the impact of the Income Tax Act be regarded as overgenerous to plaintiffs, the legislation may be amended by Parliament." (at pp. 417-418)

33 At first blush it would appear that paragraph 67 of the statement of defence and counterclaim should be struck on the basis of similar reasoning to that applied to the paragraph involving insurance proceeds. However, on closer examination, in my opinion, the paragraph should stand.

34 Unlike the jurisprudence involving the treatment of insurance proceed which included cases other than wage loss claims, the jurisprudence involving the tax deduction claimed by the defendants in Shanks v. McNee all appear to involve the income tax treatment of damages assessed for impairment of earning capacity. In these cases, damages were awarded to restore the plaintiff to the extent possible to the position in which he or she would have been but for the defendant's wrongdoing. Such damages would therefore represent compensation for loss of earning capacity and not for loss of earnings. In the case of personal injuries (as in each of these cases making up the trilogy), the plaintiff has lost some or all of his capital equipment necessary to earn an income and is not taxable according to the generally accepted taxation principles.

35 Since the wording of the Supreme Court of Canada in the trilogy appears to restrict the irrelevance of tax to earnings in personal injury cases and since the rationale for the decision in respect of tax cannot logically be applied to the case at bar I find that the Supreme Court of Canada has not definitively closed the door to the defendants' argument. Further, the plaintiff has not been able to refer me to any other case that clearly bars a defendant from claiming a reduction in damages payable by reason of the very business losses claimed in the action. Therefore, the defendants ought to be entitled to pursue this argument. The plaintiff's claim to have paragraph 67 of the statement of defence and counterclaim struck is dismissed.

II. (a) Retainer of the Defendants by Robert Staley - Scandalous, Frivolous and Vexatious

36 The plaintiff argued that reference in the pleading to a separate retainer of the accountants by one of the plaintiff's lawyers was vexatious and an abuse. The defendants conceded that any such references were in error and agreed to amend the pleading to correct these errors.

37 Any other reference to Mr. Staley does not fall into the category of a fact essential to the defence or counterclaim and in my view is designed to lay the foundation for a motion to remove from the record, the plaintiff's solicitors. This is an improper motive, is embarrassing and an abuse. Accordingly, the defendants must amend their pleading to remove all references to Mr. Staley.

II. (b) Breach of Undertaking Justifying Punitive Damages Scandalous, Frivolous and Vexatious

38 I finally turn to the defendants' claim in their counterclaim for punitive damages. The factual underpinning pleaded in support of this claim involves an alleged breach of an implied undertaking not to use information obtained in the course of an action for any ulterior purpose. Specifically, the defendants plead that counsel for the plaintiff requested information from their records supposedly to assist in the prosecution of the civil action against the former controller but really intending to use the data in an action against these defendants.

39 The plaintiff agrees that such a request was made but states that the materials were never provided. The plaintiff further argues that the implied undertaking applies to information and documents produced by a litigant during the discovery process and does not apply to the plaintiff's receipt of documents from its own accountant. The implied undertaking is designed to protect parties to litigation and the process itself by encouraging and facilitating full production without fear of ulterior purpose or use. At the time the request was made, the plaintiff and the defendants had no lis between them and therefore had no relationship which would give rise to an implied undertaking.

40 It is on this basis that the plaintiff urges me to find that the paragraphs in which this issue is addressed be struck as being scandalous, frivolous and vexatious, meant to embarrass the plaintiff and artificially bolster the defendants' claim for punitive damages.

41 The defendants candidly admit that the facts, as pleaded, do not come within the parameters of the law of implied undertaking as it currently exists in Ontario. However, they go on to submit that they out to be permitted to advance arguments that the law of implied undertaking ought to be extended to hold that information provided to a litigant by an expert retained to assist the litigant in an action, and which information the expert was obliged to provide to the litigant by the terms of its retainer, ought not to be used for the collateral purpose of suing that expert in a separate action.

42 I return to the words of Justice Riddell in Duryea v. Kaufman, set out earlier in this decision. Can it be said, without doubt, at this stage, that any evidence concerning the source and use of these materials would not be accepted by the trial judge as a factual underpinning for the defendants' claim to punitive damages?

43 I do not believe that this aspect of the defendants' pleading should be struck at this stage thereby precluding any opportunity for them to establish the factual basis to enable them to recover under this head of damage. Rather, I am of the view that the case should proceed to trial with this part of the pleading intact so that the issues can be determined by the evidence presented at that time.

44 It may be that there is no decided case extending the implied undertaking to the circumstances of this case. On the other hand, no decision has been brought to my attention that presents itself gas a complete bar to such a finding. I believe it would be inappropriate at this early stage to deprive the defendants of this possible opportunity.

45 Accordingly, the plaintiff's attempt to have the implied undertaking allegations struck from paragraphs 82 to 88 and 90 is dismissed.

46 The defendants will have ten days from the date of entry of this order to amend their pleading to remove paragraph 68 and to remove all references to Mr. Staley anywhere in the pleading.

47 Success has been divided. There will be no order as to costs. Costs incurred in the appearance before Master Garfield are fixed at $200.00 to be paid by the plaintiff in any event of the cause.

EPSTEIN J.

Dumont v. Canada (Attorney General), [1990] 1 S.C.R. 279

Supreme Court Reports

Supreme Court of Canada

Present: Dickson C.J. and Wilson, La Forest, Sopinka, Gonthier, Cory and McLachlin JJ.

1990: March 2.

File No.: 21063.

[1990] 1 S.C.R. 279 | [1990] 1 R.C.S. 279 | [1990] S.C.J. No. 17 | [1990] A.C.S. no 17

Yvon Dumont, Roy Chartrand, Ron Erikson, Claire Riddle, Billyjo de la Ronde, Jack Fleming, Jack McPherson, Don Roulette, Edgar Bruce Jr., Freda Lundmark, Miles Allarie, Celia Klassen, Alma Belhumeur, Stan Guiboche, Jeanne Perrault, Marie Banks Ducharme, Earl Henderson, Manitoba Metis Federation Inc., suing on their behalf and on behalf of all other descendants of Metis persons entitled to land and other rights under Sections 31 and 32 of the Manitoba Act, 1870, and the Native Council of Canada Inc., appellants; v. The Attorney General of Canada, respondent; and The Attorney General of Manitoba, defendant.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Case Summary

Practice — Pleadings — Striking out — Statement of claim seeking declaration that various federal and provincial statutes unconstitutional — Whether statement of claim properly struck out.

Cases Cited

Referred to: Attorney General of Canada v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735.

Statutes and Regulations Cited

Constitution Act, 1871, 34 & 35 Vict., c. 28 (U.K.) [reprinted in R.S.C., 1985, App. II, No. 11]. Manitoba Act, 1870, S.C. 1870, c. 3 [reprinted in R.S.C., 1985, App. II, No. 8].

APPEAL from a judgment of the Manitoba Court of Appeal (1988), 52 Man. R. (2d) 291, 52 D.L.R. (4th) 25, [1988] 5 W.W.R. 193, [1988] 3 C.N.L.R. 39, setting aside a judgment of [page280] Barkman J. (1987), 48 Man. R. (2d) 4, [1987] 2 C.N.L.R. 85, dismissing respondent's application to strike appellants' statement of claim. Appeal allowed. Thomas R. Berger and James R. Aldridge, for the appellants Dumont et al. Victor S. Savino, for the appellant the Native Council of Canada Inc. I.G. Whitehall, Q.C., and W. Burnham, for the respondent. Robert Houston, Q.C., for the Attorney General of Manitoba.

Solicitor for the appellants Dumont et al.: Thomas R. Burger, Vancouver. Solicitors for the appellant the Native Council of Canada Inc.: Savino & Company, Winnipeg. Solicitor for the respondent: John C. Tait, Ottawa.

The judgment of the Court was delivered orally by

THE CHIEF JUSTICE

1 We are all of the view that this appeal succeeds. The judgment of the Court will be delivered by Justice Wilson.

WILSON J.

2 The members of the Court are all of the view that the test laid down in Attorney General of Canada v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735, for striking out a statement of claim is not met in this case. It cannot be said that the outcome of the case is "plain and obvious" or "beyond doubt".

3 Issues as to the proper interpretation of the relevant provisions of the Manitoba Act, 1870 and the Constitution Act, 1871 and the effect of the impugned ancillary legislation upon them would appear to be better determined at trial where a proper factual base can be laid.

4 The Court is of the view also that the subject matter of the dispute, inasmuch as it involves the constitutionality of legislation ancillary to the Manitoba Act, 1870 is justiciable in the courts and that declaratory relief may be granted in the discretion of the court in aid of extra-judicial claims in an appropriate case.

5 We see no reason, therefore, why the action should not proceed to trial. The appeal is accordingly allowed and the order of the Court of Appeal [page281] striking out the appellants' claim against the Attorney General of Canada is set aside.
