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

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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

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Defendants

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Ontario Judgments

Court of Appeal for Ontario

Robins, Grange and Carthy JJ.A.

June 28, 1991

Action Nos. 357/90 and 356/90

[1991] O.J. No. 1083 | 4 O.R. (3d) 74 | 82 D.L.R. (4th) 298 | 48 O.A.C. 46 | 28 A.C.W.S. (3d) 238 | 1991 CanLII 2728

Fleming v. Reid by his litigation guardian, the Public Trustee; Fleming v. Gallagher (a.k.a. Gallacher) by his litigation guardian, the Public Trustee

Counsel

Carla McKague and Anne Molloy, for appellants.

Rosalyn Train, for respondent.

Elizabeth Goldberg, for Attorney General of Ontario, intervener.

The judgment of the court was delivered by

ROBINS J.A.

1 The central issue in these two appeals is whether the state may administer neuroleptic drugs in non- emergency situations to involuntary incompetent psychiatric patients who have, while mentally competent, expressed the wish not to be treated with such drugs.

I

2 The appellants George Reid and Kenneth Gallagher are involuntary patients at the Oak Ridge Division of the Penetanguishene Medical Health Centre under the authority of Lieutenant Governor's Warrants, having been found not guilty by reason of insanity of criminal offences. Each of the appellants has a long history of mental illness, dating, in the case of Mr. Reid, back to 1978 and, in the case of Mr. Gallagher, back to 1973. They have both been diagnosed as schizophrenic.

3 The issues raised by these appeals do not require a detailed review of the appellants' psychiatric histories or of the events which led to their committal to a psychiatric facility. Under s. 35c [en. 1987, c. 37, s. 12] of the Mental Health Act, R.S.O. 1980, c. 262, as amended (the Act), the appellants are persons detained in a psychiatric facility pursuant to the Criminal Code, R.S.C. 1985, c. C-46, and stand in the same position, and have the same rights, as other involuntary patients. Accordingly, the issues can be considered from the standpoint of involuntary patients generally.

4 The respondent, Dr. Russell Fleming, is the appellants' attending physician and, as such, is responsible for their observation, care and treatment. Dr. Fleming is a psychiatrist and the director of the Oak Ridge facility. In September 1987, he found the appellant Reid not competent to consent to psychiatric treatment which, in his view, would likely improve Mr. Reid's deteriorating mental condition. Dr. Fleming made a similar determination with regard

to Mr. Gallagher in the spring of 1988. Dr. Fleming proposed to treat Messrs. Reid and Gallagher with neuroleptic drugs, a form of medication commonly used in the treatment of mental disorders such as schizophrenia. Both of the appellants have had previous experience with these drugs and believe them to be non-beneficial or harmful. While mentally competent, both have refused to take the drugs notwithstanding their doctor's opinion that it would be in their best interests to do so.

5 The appellants challenged Dr. Fleming's finding as to their competence, as they were entitled to do under a s. 35b [en. 1987, c. 37, s. 12] of the Mental Health Act. The matter accordingly came before the review board established by s. 30 [am. 1986, c. 64, s. 33(26)] of the Act. After a full hearing in each case, the board upheld Dr. Fleming's decision. The appellants' mental competence is no longer in issue and I shall proceed on the basis that they are incompetent within the meaning of ss. 1(g) and 35(1)(b) [s. 35 am. 1986, c. 64, s. 33; rep. & sub. 1987, c. 37, s. 11] of the Act -- that is, they lack the requisite ability to understand the nature of the illness for which the treatment was proposed and the treatment proposed, and are unable to appreciate the consequences of giving or withholding consent to the treatment. Equally, it is not disputed that the appellants were competent within the meaning of ss. 1(g) and 35(1)(b) on the occasions relied on by their substitute decision-maker, the Official Guardian, as expressions of their prior competent wishes when he refused to consent to their being treated with neuroleptic drugs.

6 Our concern in this appeal is with the constitutional validity of ss. 35(2)(b)(ii) and 35a of the Act. These sections, in essence, empower the review board to make an order, as it did here, authorizing the attending physician to administer neuroleptic drugs to an involuntary incompetent psychiatric patient notwithstanding the refusal of the patient's substitute decision-maker to consent to the proposed treatment on the basis that, while apparently competent, the patient had expressed a prior competent wish not to be treated with neuroleptics. The principal challenge raised on the appeal is that the statutory scheme created by the impugned provisions deprive the appellants, and persons in like circumstances, of their right to security of the person guaranteed by s. 7 of the Canadian Charter of Rights and Freedoms.

7 An understanding of the statutory scheme pursuant to which the review board made the impugned orders is basic to an appreciation of the issues in this appeal. Accordingly, before turning to the merits, it is necessary to set out in some detail the relevant sections of the Act and the procedures designed to authorize this form of non-consensual medical treatment.

II

8 The Act is concerned essentially with two types of persons -- voluntary and involuntary patients. A voluntary patient admits and discharges himself or herself to a psychiatric facility upon his or her own volition; an involuntary patient has no such choice. The determination of a patient as voluntary or involuntary is independent of any assessment of a patient's mental competency. An involuntary patient is defined in s. 1(c) of the Act to be:

> ... a person who is detained in a psychiatric facility, under a certificate of involuntary admission or a certificate of renewal ...

"Mentally competent" is defined in s. 1(g) as:

> ... having the ability to understand the subject-matter in respect of which consent is requested and able to appreciate the consequences of giving or withholding consent ...

9 The latter definition of mental competency must be read in conjunction with s. 35(1)(b). That provision sets out the test for determining mental competency with respect to a patient's ability to consent to psychiatric treatment. Section 35(1)(b) reads:

> 35(1)(b) "having the ability to understand the subject matter in respect of which consent is requested" in the definition of "mentally competent" (i.e., s. 1(g)) means having the ability to understand the nature of the illness for which treatment is proposed and the treatment proposed ...

Section 35(2) of the Act provides that:

35(2) Psychiatric and other related medical treatment shall not be given to a patient,

(a) where the patient is mentally competent, without the voluntary, informed consent of the patient;

(b) where the patient is not mentally competent,

(i) without the consent of a person authorized by section 1a to consent on behalf of the patient,

(ii) unless the review board has made an order authorizing the giving of the specified psychiatric and other related medical treatment, or

(iii) unless a physician certifies in writing that there is imminent and serious danger to the life, a limb or a vital organ of the patient requiring immediate treatment and the physician believes that delay in obtaining consent would endanger the life, limb or a vital organ of the patient.

10 It will be observed that psychiatric treatment may not be given to a mentally competent patient without the patient's voluntary informed consent; and, further, that, apart from the emergency circumstances contemplated in s. 35(2)(b)(iii), once a patient is found to be incompetent, psychiatric treatment may not be given without the consent of the patient's substitute decision-maker unless, as s. 35(2)(b)(ii) provides, the review board authorizes the giving of the treatment. I should add that none of the emergency circumstances contemplated in s. 35(2)(b) (iii), or elsewhere in the Act, are present in this case. There is no suggestion that either appellant represents a threat of bodily harm to himself or anyone else in the facility. The orders requiring them to take anti-psychotic drugs were made solely in their best interests and not on any other ground.

11 The persons who may act as substitute decision-makers are enumerated in s. 1a(1) of the Act [s. 1a en. 1987, c. 37, s. 2]:

1a.(1) A person may give or refuse consent on behalf of a patient who is not mentally competent if the person has attained the age of sixteen years, is apparently mentally competent, is available and willing to give or refuse consent and is described in one of the following paragraphs:

1. The committee of the person appointed for the patient under the Mental Incompetency Act.
2. The patient's representative appointed under section 1b or 1c.
3. The person to whom the patient is married or the person of the opposite sex with whom the patient is living outside marriage in a conjugal relationship or was living outside marriage in a conjugal relationship immediately before being admitted to the psychiatric facility, if in the case of unmarried persons they,

i. have cohabited for at least one year,

ii. are together the parents of a child, or

iii. have together entered into a cohabitation agreement under section 53 of the Family Law Act, 1986.

4. A child of the patient.
5. A parent of the patient or a person who has lawful custody of the patient.
6. A brother or sister of the patient.
7. Any other next of kin of the patient.
8. The Official Guardian.

In this case, the Official Guardian was appointed pursuant to s. 1a(1) to consent to or refuse treatment on behalf of each of the appellants.

12 Section 1b [en. 1987, c. 37, s. 2] grants an apparently mentally competent person the right to personally appoint a representative to give or refuse consent for the purpose of para. 2 of s. 1a(1); s. 1c [en. 1987, c. 37, s. 2] similarly grants a patient who is not mentally competent the right to apply to the board for the appointment of a representative for this purpose. These sections contemplate that psychiatric patients may select representatives to

determine the course of their treatment should they become mentally incompetent within the meaning of the Act. Where such an appointment is made by a competent patient, the patient is not precluded from directing the substitute decision-maker to grant or refuse consent to the administration of neuroleptic drugs to the patient. I shall reproduce s. 1b in part:

> 1b.(1) A person who has attained the age of sixteen years and is mentally competent to do so has the right to appoint a representative who has attained the age of sixteen years and is apparently mentally competent to give or refuse consent on behalf of the person for the purpose of paragraph 2 of subsection 1a(1).
>
> . . . . .
>
> (4) The attending physician shall inform the patient in writing of the patient's right under subsection (1) within forty-eight hours after the patient is admitted or registered to the psychiatric facility.
>
> (5) As soon as practicable, the officer in charge shall inform all persons who are patients of the facility at the time of the coming into force of this section in writing of their rights under subsection (1).

13 A substitute decision-maker is obliged to give or refuse consent in accordance with s. 1a(6) of the Act. This section, which is critical to this appeal, reads:

> 1a(6) A person authorized to give or refuse consent on behalf of a patient shall do so in accordance with the wishes of the patient if the person knows that the patient expressed any such wishes when apparently mentally competent and in accordance with the best interests of the patient if the person does not know of any such wishes.

14 The latter part of s. 1a(6) makes it clear that in some cases the substitute must determine whether to give or refuse consent on the basis of the patient's "best interests". The factors governing that determination are set out in paras. (a) through (d) of s. 35(5):

> 35(5) A person authorized to give or refuse consent on behalf of a patient shall consider the following factors to determine whether a specified psychiatric treatment and other related medical treatment are in the best interests of a patient,
>
> (a) whether the mental condition of the patient will be or is likely to be substantially improved by the specified psychiatric treatment;
>
> (b) whether the mental condition of the patient will improve or is likely to improve without the specified psychiatric treatment;
>
> (c) whether the anticipated benefit from the specified psychiatric treatment and other related medical treatment outweighs the risk of harm to the patient; and
>
> (d) whether the specified psychiatric treatment is the least restrictive and least intrusive treatment that meets the requirements of clauses (a), (b) and (c).

15 However, where the patient, while apparently mentally competent, has expressed his or her wishes with respect to the proposed psychiatric treatment, the substitute is obliged by s. 1a(6) to give or refuse consent in accordance with those wishes. In short, the substitute must first determine the prior competent wishes of the patient and give or refuse consent accordingly. It is only when those wishes cannot be determined that the substitute may give or refuse consent on the basis of the patient's best interests.

16 Where a substitute refuses a consent to the proposed psychiatric treatment, the attending physician of an involuntary patient may apply under s. 35a(1) [s. 35a en. 1987, c. 37, s. 12] to the review board for an order authorizing the treatment. Under s. 35a(2), the application must be accompanied by statements of the attending physician and a psychiatrist who is not a member of the medical staff of the facility that they are of the opinion that proposed treatment is in the patient's best interests. In rendering that opinion, the physicians are similarly obliged to take into consideration the factors set out in s. 35(5). Section 35a(1) states:

> 35a.(1) The attending physician of an involuntary patient may apply to the review board for an order authorizing the giving of specified psychiatric and other related medical treatment to the patient where the patient is not mentally competent,

(a) if a person authorized under section 1a to consent to such treatment on the patient's behalf has refused to consent; or

(b) under the circumstances described in subsection 1a(4) (i.e., where there is a conflict as to whether consent should be given between persons claiming authority to act as substitutes).

17 It is significant that this review procedure is applicable only to decisions made by the substitutes of involuntary incompetent patients. The decisions of substitutes of voluntary incompetent patients are not subject to review and, it follows, those patients cannot be forced to take neuroleptic drugs contrary to their competently expressed wishes. As I have already noted, in the case of competent patients, whether voluntary or involuntary, no psychiatric treatment can be given to them without their voluntary informed consent.

18 In determining whether to grant an order authorizing the psychiatric treatment proposed by the attending physician on a s. 35a(1) application, the review board must be satisfied that the specified treatment is in accordance with the patient's best interests. Section 35a(4) sets out the criteria to be considered by the board in making this determination as follows:

35a(4) The review board by order may authorize the giving of the specified psychiatric and other related medical treatment if it is satisfied that,

(a) the mental condition of the patient will be or is likely to be substantially improved by the specified psychiatric treatment;

(b) the mental condition of the patient will not improve or is not likely to improve without the specified psychiatric treatment;

(c) the anticipated benefit from the specified psychiatric treatment and other related medical treatment outweighs the risk of harm to the patient; and

(d) the specified psychiatric treatment is the least restrictive and least intrusive treatment that meets the requirements of clauses (a), (b) and (c).

19 These factors are identical to those governing a substitute decision-maker's determination under ss. 1a(6) and 35(5) when the prior competent wishes of a patient are unknown. Significantly, however, where the patient's prior competent wishes are known, they are not a matter which may be considered by the board on a s. 35a(1) application. Under the scheme established by this legislation, it is the patient's "best interests", and not his or her "prior competent wishes", that must govern the review board in making its determination as to whether to authorize the treatment proposed by the attending physician.

20 Finally, a decision of the review board may, under s. 33f [en. R.S.O. 1980, c. 262, s. 67; am. 1986, c. 64, s. 33(43); am. 1987, c. 37, s. 10] be appealed to the District Court. Pending such an appeal, no treatment may be administered to a patient unless otherwise ordered by a judge of the court in which the appeal is pending (s. 35a(11)).

21 In the present case, the Official Guardian found that both Mr. Reid and Mr. Gallagher had, when apparently mentally competent, expressed the wish that they not receive psychiatric treatment in the nature of neuroleptic medication. Accordingly, pursuant to s. 1a(6), he refused to consent to the respondent's proposed treatment of either patient. It is agreed, as I indicated earlier, that the appellants were mentally competent at the time the wishes upon which the Official Guardian acted were expressed.

22 In light of the substitute's refusal, Dr. Fleming applied under s. 35a(1) for an order authorizing the proposed psychiatric treatment in each case. The review board granted the orders on the basis that the treatment was in the appellants' "best interests". The appellants then appealed to the District Court where Tobias D.C.J., in carefully considered reasons now reported at (1990), 73 O.R. (2d) 169, found no violation of the appellants' Charter rights and upheld the orders of the review board. The appellants, by their litigation guardian, the Public Trustee, now appeal the matter to this court.

III

23 It may be helpful to refer briefly to the nature and effects of neuroleptics. These "anti-psychotic drugs", "psychotropic drugs" or "major tranquillizers", as they are sometimes called, are the most common form of treatment for schizophrenia and related mental illnesses. Their medical efficacy stems from their ability to minimize or control psychotic episodes or the symptoms associated with schizophrenia. Not all patients are responsive to the drugs and some improve without them. However, there is no way to predict a patient's reaction to any particular medication within this class of drugs.

24 In general, anti-psychotic drugs influence chemical transmissions to the brain, affecting both activatory and inhibitory functions. Because the therapeutic effect of the drugs is to reduce the level of psychotic thinking, it is virtually undisputed that they are "mind-altering". Although neuroleptics are the drug of choice for treatment of patients diagnosed as schizophrenic, they are not a cure for the disorder but are said to work so as to have a beneficial effect on thought processes and the brain's ability to sort out and integrate perceptions and memory.

25 The use of neuroleptics in the treatment of various psychoses is generally effective in improving the mental condition of the patient by alleviating the symptoms of mental disorder. It is clear, however, that they may not be helpful in every case. Moreover, the efficacy of the drugs is complicated by a number of serious side effects which are associated with their use. These include a number of muscular side effects known as extra- pyramidal reactions: dystonia (muscle spasms, particularly in the face and arms, irregular flexing, writhing or grimacing and protrusion of the tongue); akathesia (internal restlessness or agitation, an inability to sit still); akinesia (physical immobility and lack of spontaneity); and Parkinsonisms (mask- like facial expression, drooling, muscle stiffness, tremors, shuffling gait). The drugs can also cause a number of non- muscular side effects, such as blurred vision, dry mouth and throat, weight gain, dizziness, fainting, depression, low blood pressure and, less frequently, cardiovascular changes and, on occasion, sudden death.

26 The most potentially serious side effect of anti-psychotic drugs is a condition known as tardive dyskinesia. This is a generally irreversible neurological disorder characterized by involuntary, rhythmic and grotesque movement of the face, mouth, tongue, and jaw. The patient's extremities, neck, back and torso can also become involved. Tardive dyskinesia generally develops after prolonged use of the drugs, but it may appear after short term treatment and sometimes appears even after treatment has been discontinued.

27 In short, it appears that although these drugs apparently operate so as to benefit many patients by alleviating their psychotic symptoms, they also carry with them significant, and often unpredictable, short term and long term risks of harmful side effects. See, generally, Donland's Illustrated Medical Dictionary, 26th ed. (Toronto: W.B. Sanders Co., 1981), at p. 887; Breggin, "Brain Damage Dementia and Persistent Cognitive Dysfunction Associated with Neuroleptic Drugs: Evidence, Etiology, Implications" (1990), 11 Journal of Mind and Behaviour 425; Moonasar, "Neuroleptic Malignant Syndrome" (1986), 79 South Med. J. 331; Kemna, "Current Status of Institutionalized Mental Health Patients' Right to Refuse Psychotropic Drugs" (1985), 6 Journal of Legal Medicine 107; and Brooks, "The Right to Refuse Antipsychotic Medications: Law and Policy" (1987), 39 Rutgers Law Rev. 340. See also In the Matter of Guardianship of Richard Roe, 421 N.E.2d 40 (1981).

28 With these observations in mind, I turn to the issues raised in this appeal.

IV

29 The appellants' principal submission is that ss. 35(2)(b)(ii) and 35a of the Mental Health Act, which empower the review board to compel involuntary incompetent patients, like the appellants, to take anti-psychotic drugs contrary to their competent wishes as expressed by them through their substitute decision-maker, are inconsistent with and a denial of their constitutional right to security of the person as guaranteed by s. 7 of the Charter.

30 In considering this issue, it is important to recall briefly some of the common law principles applicable to doctor-

patient relationships which this court recently had occasion to consider in Malette v. Shulman (1990), 72 O.R. (2d) 417, 67 D.L.R. (4th) 321.

31 The right to determine what shall, or shall not, be done with one's own body, and to be free from non-consensual medical treatment, is a right deeply rooted in our common law. This right underlies the doctrine of informed consent. With very limited exceptions, every person's body is considered inviolate, and, accordingly, every competent adult has the right to be free from unwanted medical treatment. The fact that serious risks or consequences may result from a refusal of medical treatment does not vitiate the right of medical self-determination. The doctrine of informed consent ensures the freedom of individuals to make choices about their medical care. It is the patient, not the doctor, who ultimately must decide if treatment -- any treatment -- is to be administered.

32 A patient, in anticipation of circumstances wherein he or she may be unconscious or otherwise incapacitated and thus unable to contemporaneously express his or her wishes about a particular form of medical treatment, may specify in advance his or her refusal to consent to the proposed treatment. A doctor is not free to disregard such advance instructions, even in an emergency. The patient's right to forgo treatment, in the absence of some overriding societal interest, is paramount to the doctor's obligation to provide medical care. This right must be honoured, even though the treatment may be beneficial or necessary to preserve the patient's life or health, and regardless of how ill-advised the patient's decision may appear to others.

33 These traditional common law principles extend to mentally competent patients in psychiatric facilities. They, like competent adults generally, are entitled to control the course of their medical treatment. Their right of self-determination is not forfeited when they enter a psychiatric facility. They may, if they wish, reject their doctor's psychiatric advice and refuse to take psychotropic drugs, just as patients suffering other forms of illness may reject their doctor's advice and refuse, for instance, to take insulin or undergo chemotherapy. The fact that these patients, whether voluntarily or involuntarily, are hospitalized in a mental institution in order to obtain care and treatment for a mental disorder does not necessarily render them incompetent to make psychiatric treatment decisions. They may be incapacitated for particular reasons but nonetheless be competent to decide upon their medical care. The Act presumes mental competency, and implicitly recognizes that a mentally ill person may retain the capacity to function competently in all or many areas of everyday life.

34 Before psychiatric treatment can be administered without the consent of the patient, the Act requires a finding of incompetency, which is made on the basis of the patient's ability to understand (1) the nature of the illness for which the psychiatric treatment is proposed; (2) the nature of the treatment proposed; and (3) the patient's ability to appreciate the consequences of giving or withholding consent. More particularly, involuntary patients, including those who, like the appellants, are being held pursuant to the Criminal Code, are taken to have the capacity to decide for themselves whether or not to receive anti-psychotic drugs. Until they are found incompetent, they hold the same rights as any other competent patient in the facility. Indeed, they hold the same rights as competent persons elsewhere in the province whose consent must be obtained before they can be the subject of medical treatment. Mentally ill persons are not to be stigmatized because of the nature of their illness or disability; nor should they be treated as persons of lesser status or dignity. Their right to personal autonomy and self-determination is no less significant, and is entitled to no less protection, than that of competent persons suffering from physical ailments.

35 In this case, the court's concern is with the rights, in non- emergency situations, of involuntary patients whose mental incompetence has been established and who are, therefore, incapable of giving or refusing consent to the proposed use of psychotropic drugs. Their inability to make a decision concerning their psychiatric treatment does not, however, extinguish their right to be free from non-consensual invasions of their person. Nor does it mean that psychiatric treatment must automatically be withheld from them. There are obviously many cases in which such treatment may be highly beneficial and should not be withheld simply because a patient cannot competently consent to the proposed treatment. Our society recognizes that the state has an obligation in these circumstances to provide care for the mentally disabled and to act in its role as parens patriae for the protection and benefit of those who, through mental disability, are unable to take care of themselves.

36 The provisions of the Mental Health Act to which I have made reference are designed to provide a mechanism whereby psychiatric treatment may be administered to patients who may need such treatment but are not mentally competent to consent to it. At the same time, the Act recognizes the civil rights of mentally ill patients by permitting them, or their substitutes acting in accordance with the patients' competent wishes, to refuse psychiatric treatment in spite of the fact that the treatment may be viewed by the mental health community as beneficial or necessary. However, in the case of an involuntary incompetent patient, the Act empowers the review board to overrule the substitute consent-giver's decision and thus the patient's competent wishes if, in the board's opinion, the psychiatric treatment is in the patient's "best interests". It is the provisions allowing this result which are at the heart of the dispute in this appeal.

V

37 This brings me to the appellants' contention that ss. 35a and 35(2)(b)(ii) authorizing the review board to override an involuntary patient's competent refusal to take anti-psychotic drugs, as expressed by the patient through his or her substitute, violate the principles of fundamental justice and contravene s. 7 of the Charter.

38 Section 7 guarantees everyone the right to life, liberty and security of the person and the right not to be deprived of that right except in accordance with the principles of fundamental justice. In determining whether the legislation is in breach of this section of the Charter, I adopt the approach set out by the Supreme Court of Canada in R. v. Beare; R. v. Higgins, [1988] 2 S.C.R. 387, 45 C.C.C. (3d) 57, at p. 401 S.C.R., p. 69 C.C.C.:

> The analysis of s. 7 of the Charter involves two steps. To trigger its operation there must first be a finding that there has been a deprivation of the right to "life, liberty and security of the person" and, secondly, that that deprivation is contrary to the principles of fundamental justice.

39 On the first branch of the analysis, it is manifest that the impugned provisions of the Act operate so as to deprive the appellants of their right to "security of the person" as guaranteed by s. 7. The common law right to bodily integrity and personal autonomy is so entrenched in the traditions of our law as to be ranked as fundamental and deserving of the highest order of protection. This right forms an essential part of an individual's security of the person and must be included in the liberty interests protected by s. 7. Indeed, in my view, the common law right to determine what shall be done with one's own body and the constitutional right to security of the person, both of which are founded on the belief in the dignity and autonomy of each individual, can be treated as co-extensive.

40 Few medical procedures can be more intrusive than the forcible injection of powerful mind-altering drugs which are often accompanied by severe and sometimes irreversible adverse side effects. To deprive involuntary patients of any right to make competent decisions with respect to such treatment when they become incompetent, and force them to submit to such medication, against their competent wishes and without the consent of their legally appointed substitute decision-makers, clearly infringes their Charter right to security of the person. To that extent, I agree with Judge Tobias' conclusion at p. 189 O.R. of his judgment that "there can be no question that the security of (the appellants') person will be affected if an order is made under the provisions of s. 35a that (they) receive specified psychiatric treatment". Reference might also be made to R. v. Rogers (1990), 61 C.C.C. (3d) 481, 2 C.R. (4th) 192, at p. 488 C.C.C., p. 201 C.R., where the British Columbia Court of Appeal, in another context, held that "a probation order which compels an accused person to take psychiatric treatment or medication is an unreasonable restraint upon the liberty and security of the accused person".

41 The second issue which must be addressed is whether the scheme of the Mental Health Act which effectively deprives an involuntary patient of the right to security of the person is contrary to the principles of fundamental justice.

42 The appellants do not attack the substitute decision-making scheme established by the Act. To the contrary, in their submission the scheme is in full accord with the principles of fundamental justice in that it takes as its basis the wishes of the patient when competent and, through the mechanism of the substitute decision-maker, allows an incompetent patient to exercise the same rights as a competent patient. Their complaint is that, under this statute,

the competent wishes of an involuntary patient who subsequently becomes incompetent are, in effect, rendered meaningless when the substitute's refusal to consent to specified treatment is challenged at the level of the review board. At that stage, to quote from the appellants' factum, "the primary criterion for the first-level decision-maker, namely, the patient's wishes expressed when competent, is no longer a criterion at all". In other words, when the attending physician makes an application under s. 35a, the only question for the board's determination is whether the proposed treatment is in accordance with the patient's best interests. In the appellants' submission, the legislative scheme vitiates the patient's right to security of the person in a manner which is inconsistent with the principles of fundamental justice insofar as it compels a patient to take neuroleptic drugs without any regard to his or her competent wishes, and also permits the patient's substitute decision-maker's refusal to consent to be overridden without regard to the patient's competent wishes.

43 Counsel for the intervener, the Attorney General, whose submissions were made also on behalf of Dr. Fleming, took the position that "the policy underlying the scheme of substituted consent and the authorization of treatment orders by the review board is not, in substance, inconsistent with the principles of fundamental justice". Counsel contended that the ultimate regard for the best interests of the patient reflected in the Act is consistent with the common law development of the parens patriae jurisdiction. In her submission, the issue is whether the prior competent wishes of the patient, as expressed through the substitute consent-giver, must govern or take precedence over the views of the attending physician and review board as to the patient's best interests. She argued that the selection of the "test" -- i.e., the "prior competent wishes" or "best interests" of the patient -- to be applied by either the substitute or the review board is a public policy matter for the legislature. The legislature made a choice between two standards, both of which have "desirable features", and either of which could have been applied in circumstances such as those presented in this case. In short, the Attorney General submitted that in selecting the "best interests" test over the "prior wishes" test, and in affording a "full array of procedural protections" to patients faced with an application for a treatment order, the legislature acted within its traditional parens patriae jurisdiction and not in violation of any of the basic tenets of our legal system.

44 In the court below, Judge Tobias accepted the position advanced by the intervener in this appeal. Although he found that the order of the review board deprives the appellants of the security of their person, he held that deprivation was not in violation of the principles of fundamental justice. The scheme of the Act permitting the review board to override prior competent wishes, the judge found, is in accord with the same common law principles that underlie the parens patriae jurisdiction of the courts. Although recognizing [p. 188 O.R.] that "the concept of individual self-determination is given priority in the Act", the judge went on to find it unreasonable to say that, because the Act does not treat consent as the "paramount issue" but chooses the alternative of considering the best interests of the patient, the impugned provisions therefore violate s. 7 of the Charter. On his view of the Act, the "paramount issue for the attending physician, for the official guardian as a substitute consent-giver, for the review board, and for this court ... is not whether ... (the patient) expressed a specific wish while he was apparently mentally competent but, rather, whether at this time ... that wish still accords with his best interests" [pp. 188-89 O.R.].

VI

45 The Mental Health Act is unquestionably consistent with the spirit underlying the state's role as parens patriae. It can readily be accepted that the scheme in issue was intended to provide beneficial care for mentally incompetent patients incapable of caring for themselves, and that ss. 35a and 35(2) (b)(ii) were enacted out of a concern for the well-being of involuntary incompetent patients. It can also be accepted, as the evidence in this appeal indicates, that the appellants are very troubled individuals and that providing care for them in the facility is a very difficult task. Nonetheless, I am compelled to the conclusion that, in authorizing the review board to override the competent wishes of such patients in the manner it does, the Act fails to meet the standards set by the Charter and violates the rights guaranteed to the appellants by s. 7.

46 In E. (Mrs.) v. Eve, [1986] 2 S.C.R. 388, 31 D.L.R. (4th) 1 sub nom. Re Eve -- a case which involved the question of whether the court might invoke its parens patriae jurisdiction to authorize the non-therapeutic sterilization of a mentally disabled woman -- the Supreme Court of Canada had occasion to examine the history and

content of the parens patriae jurisdiction of the courts. La Forest J., writing for the court, makes it clear that this is a very broad, if not unlimited, inherent jurisdiction under which the court has the right and duty to protect those who are unable to take care of themselves, and in doing so, the court has a wide discretion to do what it considers in their best interests. But he also makes it clear that the discretion to invoke this jurisdiction is not unlimited and is to be exercised only in accordance with its underlying principle -- that is, to do what is necessary for the protection of the persons for whose benefit the discretion is exercised. At p. 427 S.C.R., p. 29 D.L.R., La Forest J. states:

> Though the scope or sphere of operation of the parens patriae jurisdiction may be unlimited, it by no means follows that the discretion to exercise it is unlimited. It must be exercised in accordance with its underlying principle. Simply put, the discretion is to do what is necessary for the protection of the person for whose benefit it is exercised ...

And at p. 434 S.C.R., p. 34 D.L.R.:

> ... parens patriae jurisdiction exists for the benefit of those who cannot help themselves, not to relieve those who may have the burden of caring for them.

47 I do not read the judgment in Re Eve, or in Beson v. Director of Child Welfare (Newfoundland), [1982] 2 S.C.R. 716, 142 D.L.R. (3d) 20, another decision of the Supreme Court of Canada upon which the respondent and intervener relied, as supporting the proposition that the parens patriae jurisdiction can be invoked to deprive competent mentally ill patients of rights expressly granted by statute or to abrogate their Charter rights. The parens patriae jurisdiction was intended to operate only where a person is unable to take care of himself or herself. It cannot be exercised by the state to overrule a treatment decision made by a competent patient, who, by definition, is able to direct the course of his or her medical care, regardless of the fact that the decision may be considered, by objective standards, medically unsound or contrary to the patient's best interests. Nor, in my opinion, for the reasons I gave in Malette v. Shulman, supra, may resort be had to the parens patriae jurisdiction to authorize the medical treatment of an incompetent person who, while competent, had given instructions refusing to consent to the proposed treatment.

48 This Act acknowledges the fundamental individual rights asserted by these appellants. The legislature did not, as the intervener suggests, simply choose the "best interests" test over the "prior competent wishes" test to govern consent decisions made on behalf of involuntary incompetent patients. The Act explicitly recognizes the right of mental patients, voluntary and involuntary, to control their psychiatric treatment and, accordingly, their right to security of the person. Psychiatric treatment of competent patients without their voluntary informed consent is prohibited (s. 35(2)(a)), and the substitute consent-givers of incompetent patients are required to give or refuse consent on the basis of the patient's prior competent wishes (s. 1a(6)). Under this legislative scheme, the competent wishes of mentally disabled patients must be honoured regardless of whether or not the patients are competent when the psychiatric treatment for which consent is required is proposed. A competent patient's right to be free from non-consensual invasions of his or her person is not diminished by subsequent incompetency or subordinated to his or her "best interests" where the prior competent wishes of the patient are known. The legislature has given paramountcy to the "prior wishes" test and, in keeping with the patient's common law and constitutional rights, the "best interests" test comes into play only if the patient has no known competent wishes as to his or her psychiatric treatment.

49 In the case of involuntary incompetent patients, however, and in their case alone, the Act permits their competent wishes to be overridden by the review board on the basis that the proposed treatment order would be in the patient's best interests. Where the attending physician applies to reverse the substitute consent-giver's refusal to consent to psychiatric treatment on the basis of the patient's prior competent wishes, the review board is obliged under s. 35a to decide whether to authorize the treatment on entirely different criteria than that employed by the substitute. Whereas the substitute must apply a subjective test -- the patient's "prior competent wishes", the review board is precluded from considering any subjective criteria and must apply an objective test -- the patient's "best interests". These are separate and distinct tests founded on different values or standards, and, as such, necessarily raise different concerns or issues. The learned judge appealed from, in my respectful view, erred in merging the tests and defining the issue before the review board, as I noted earlier, as being, in effect, whether the patient's prior competent wishes still accord with his best interests. The Act is not capable of that interpretation. It was indeed

common ground in this appeal, as counsel for the intervener aptly put it, that the tests are "mutually exclusive", and must accordingly be treated as such.

50 As the legislation stands, therefore, once the matter reaches the review board, these patients may be compelled to take anti- psychotic drugs regardless of the cogency and competency of their prior wishes. The review board is in no sense engaged in a "review" of the substitute's decision; its focus is exclusively on the "best interests" criterion set out in s. 35a(4). With respect to the board's determination, the patient's competent wishes are immaterial -- indeed, the board would exceed its statutory jurisdiction in considering the prior competent wishes of the patient. When the matter reaches the board, the substitute consent-giver scheme, for all practical purposes, is rendered nugatory with respect to these patients. While they, like other psychiatric patients, are entitled to appoint and direct a substitute to give or refuse consent to their psychiatric treatment and are effectively told that their competent wishes will govern the decision of whoever may be their substitute, when such a decision is challenged by the attending physician it is of no consequence in the board's considerations. At this stage, the whole of the exercise preceding the board hearing is of no force or effect.

51 In sum, after creating a substitute system which purports to recognize the prior known competent wishes of incompetent patients and to ensure that those wishes are respected, the Act proceeds to render those competent wishes, and the substitute's decision based thereon, entirely meaningless when a treatment order is sought from the review board. The patient's wishes can be overridden without any consideration as to their currency, validity or reliability. As a result, the appellants, and patients in a like position, are denied any right to have the issue of whether they should be compelled to take neuroleptic drugs determined on the basis of their competently expressed wishes.

52 A legislative scheme that permits the competent wishes of a psychiatric patient to be overridden, and which allows a patient's right to personal autonomy and self-determination to be defeated, without affording a hearing as to why the substitute consent-giver's decision to refuse consent based on the patient's wishes should not be honoured, in my opinion, violates "the basic tenets of our legal system" and cannot be in accordance with the principles of fundamental justice: Reference re s. 94(2) of the Motor Vehicle Act (British Columbia), [1985] 2 S.C.R. 486, 23 C.C.C. (3d) 289, at p. 503 S.C.R., p. 302 C.C.C.

53 It is no answer to say that the patient has been afforded a full array of procedural protections with respect to the board's hearing when that hearing is not directed to the substitute consent-giver's decision, and the patient's competent wishes as expressed through the substitute consent- giver are irrelevant to the board's determination. In my opinion, it is plainly contrary to the principles of fundamental justice to force a patient to take anti-psychotic drugs in his or her best interests without providing the patient, or the patient's substitute, any opportunity to argue that it is not the patient's best interests but rather his or her competent wishes which should govern the course of the patient's psychiatric treatment.

54 In this case, the appellants' wishes were stated at a time when they were admittedly competent. It would appear that each of them has had extensive experience with anti-psychotic drugs and has in the past rejected this form of medication. However, it is not for this court to assess the validity of their wishes or the applicability of those wishes to their present psychiatric circumstances. No emergency is claimed here, and it is not suggested that the appellants are a threat to themselves or anyone else. In the context of this legislative scheme, the question of whether the decision of their substitute should be set aside is a matter to be determined after a hearing in which the effect or scope of the appellants' wishes, and not merely their best interests, can be properly considered in the light of all the existing circumstances.

55 In my view, no objection can be taken to procedural requirements designed to determine more accurately the intended effect or scope of an incompetent patient's prior competent wishes or instructions. As the Act now stands, the substitute consent-giver's decision must be governed by wishes which may range from an isolated or casual statement of refusal to reliable and informed instructions based on the patient's knowledge of the effect of the drug on him or her. Furthermore, there may be questions as to the clarity or currency of the wishes, their applicability to the patient's present circumstances, and whether they have been revoked or revised by subsequent wishes or a

subsequently accepted treatment program. The resolution of questions of this nature is patently a matter for legislative action. But, in my respectful view, it is incumbent on the legislature to bear in mind that, as a general proposition, psychiatric patients are entitled to make competent decisions and exercise their right to self-determination in accordance with their own standards and values and not necessarily in the manner others may believe to be in the patients' best interests.

56 In this case, as I have stated, there was no hearing before the review board, nor could there be, on the question of the effect or scope of the appellants' prior competent wishes, or their substitute consent-giver's decision based on those wishes. Accordingly, the treatment orders made by the board must be seen as arbitrary and unfair, and must be set aside. It is not for the court to rewrite the Act and vest a tribunal with jurisdiction not given it by the legislature. Nor is it for the court to determine the procedure or criteria to be followed in making treatment decisions for mentally disabled patients. These are issues which involve governmental policy. Here, the substitute consent-giver, in compliance with the Act, refused consent to the use of neuroleptics. Since, as the Act is presently framed, no provision is made for a proper review of that decision, the decision must stand.

57 In the light of this conclusion, I find it unnecessary to consider the appellants' alternative argument that the Act violates their equality rights as guaranteed by s. 15(1) of the Charter. Nor do I find it necessary to consider the appellants' further contention that the Act is also contrary to s. 7 in that it permits a review of a substitute's decision on the application of the attending physician when consent is refused, but allows no review at the behest of the patient when the substitute consents to a proposed course of psychiatric treatment. This argument has no factual foundation in this case, and I think it inappropriate to deal with the issue on a hypothetical basis.

VII

58 Having found that s. 35a and s. 35(2)(b)(ii) are inconsistent with s. 7 of the Charter to the extent that they empower the review board to authorize the psychiatric treatment of an involuntary incompetent patient contrary to the patient's competent refusal to accept such treatment as expressed through the patient's substitute consent-giver, the remaining question is whether the sections can be saved by s. 1 of the Charter. In my opinion, they cannot.

59 The impugned scheme under the Mental Health Act fails to meet the requirement of s. 7 that the principles of fundamental justice be observed with respect to involuntary incompetent patients. Those patients are arbitrarily deprived of their right to security of the person insofar as they are denied any hearing in which they may assert, through their substitute consent-givers, their competent wishes with respect to treatment and, thus, their right to be free of unwanted medical treatment. Such a violation of the principles of fundamental justice, in my opinion, can be neither "reasonable" nor "demonstrably justified in a free and democratic society".

60 The right to personal security is guaranteed as fundamental in our society. Manifestly, it should not be infringed any more than is clearly necessary. In my view, although the right to be free from non-consensual psychiatric treatment is not an absolute one, the state has not demonstrated any compelling reason for entirely eliminating this right, without any hearing or review, in order to further the best interests of involuntary incompetent patients in contravention of their competent wishes. To completely strip these patients of the freedom to determine for themselves what shall be done with their bodies cannot be considered a minimal impairment of their Charter right. Safeguards can obviously be formulated to balance their wishes against their needs and ensure that their security of the person will not be infringed any more than is necessary. Recognizing the important objective of state intervention for the benefit of mentally disabled patients, nonetheless, the overriding of a fundamental constitutional right by the means chosen in this Act to attain the objective cannot be justified under s. 1 of the Charter.

VIII

61 For these reasons, I would allow the appeal of each of the appellants and set aside the order of Tobias D.C.J. In place thereof, I would vacate the treatment orders of the review board in the case of each of the appellants. I would further declare ss. 35a and 35(2)(b)(ii) of the Mental Health Act inoperative insofar as these sections purport to

empower the review board to authorize the psychiatric treatment of incompetent patients involuntarily confined in psychiatric facilities contrary to the refusal of the patient's substitute decision-maker to consent to such treatment on the basis of the patient's prior competent wishes.

62 The appellants are entitled to their costs in this court and in the court below.

Appeals allowed.

Grant v. Cormier-Grant, [2001] O.J. No. 4428

Ontario Judgments

Ontario Court of Appeal

Toronto, Ontario

Morden, Austin and Borins JJ.A.

Heard: August 15, 2001.

Judgment: November 19, 2001.

Docket No. C35830

[2001] O.J. No. 4428 | 56 O.R. (3d) 225 | 2001 CanLII 27938

Between Scott Grant, (plaintiff/appellant), and Jenny Cormier-Grant and Patricia Cormier, (defendants/respondents)

(2 paras.)

Case Summary

On appeal from the judgment of Justice Wailan Low dated January 26, 2001.

Counsel

James C. Morton, for the appellant. Ingrid Van Weert, for the respondent.

The following judgment was delivered by

THE COURT (endorsement)

1 We have found it necessary to vary paragraph 31 of the Court's reasons for judgment released on October 3, 2001 on the basis of submissions made by counsel following the release of the reasons.

2 Accordingly, paragraph 31, as varied, is to be substituted for the former paragraph, and reads as follows:

> I would, therefore, allow the appeal, set aside the judgment dismissing the appellant's claim against Jenny Cormier-Grant and order that her motion for summary judgment be dismissed. The appeal with respect to the summary judgment in favour of Patricia Cormier was, in effect, abandoned and it is dismissed without costs. In addition, the appellant is granted leave to amend his statement of claim, if so advised. The appellant is entitled to his costs of the motion made on behalf of Jenny Cormier-Grant and the appeal from the judgment in her favour. The costs order of the motion judge in so far as it relates to Patricia Cormier shall stand.

MORDEN J.A.
AUSTIN J.A.
BORINS J.A.

Hanson v. Bank of Nova Scotia, [1994] O.J. No. 1250

Ontario Judgments

Court of Appeal for Ontario,

Morden A.C.J.O., Finlayson and Abella JJ.A.

June 10, 1994

Action No. C 10299

[1994] O.J. No. 1250 | 19 O.R. (3d) 142 | 74 O.A.C. 145 | 48 A.C.W.S. (3d) 709

Hanson v. Bank of Nova Scotia et al.

Counsel

David Stockwood, Q.C., and Christopher H. Wirth, for appellant.

William E. Pepall, for respondent, Osler, Hoskin & Harcourt.

The judgment of the court was delivered by

1 FINLAYSON J.A.: — This is an appeal from an order striking out the statement of claim against the respondent Osler, Hoskin and Harcourt ("Osler") under rule 21.01(1)(b) on the ground that it disclosed no reasonable cause of action.

2 The facts as pleaded are that the plaintiff, in his capacity as a creditor of Telfer's Tower Club (Hotels) Limited ("Telfer's"), a bankrupt, sued the Bank of Nova Scotia and Osler for damages for breach of fiduciary duty, negligence, and negligent misrepresentation arising out of the circumstances leading to the bankruptcy of Telfer's. The claim for negligent misrepresentation has been abandoned as against Osler.

3 In 1989, Telfer's was indebted to the bank in an unstated but presumably substantial amount, for which the bank held security. Telfer's was in the process of putting together a private placement offering to raise money. The bank was aware of these efforts and professed to be supportive of this initiative along with a proposed joint venture with Thornbrook International Consultants Inc. ("Thornbrook"). The private placement was designed to raise 7.8 million dollars and Wood Gundy Inc. ("Wood Gundy") was retained by Telfer's to market the offering. By August 1989, Wood Gundy had prepared and issued an offering memorandum.

4 In the meantime, and without the knowledge of Telfer's, the bank had retained Laventhol and Horwath ("Laventhol") with a view to appointing it as receiver or as trustee in bankruptcy of Telfer's. Laventhol reported back to the bank on August 8, 1989 with an analysis and comments on a possible receivership. The bank had retained Osler as its solicitors to act for it in any matter relating to the receivership or bankruptcy. Also, during August, rumours circulated in the market that Telfer's was in serious financial difficulty and was likely to go into receivership or bankruptcy. These rumours seriously jeopardized the ongoing joint venture discussions between Telfer's and Thornwood. Telfer's contacted the bank and was told categorically and falsely that Laventhol had not been retained by the bank and was not involved with Telfer's in any way.

5 Michael Judge was a salesman at Wood Gundy and his father, a senior partner at Osler, was one of his customers. He solicited his father as a potential purchaser of the Telfer's issue and asked his permission to

circulate the offering to other members of the Osler firm. A special presentation was arranged for Osler and another law firm for September 6, 1989. This date was cancelled because Judge Sr. advised his son that the Osler firm had been retained by the bank in the matter of Telfer's and that the bank would be acting on its security on September 15, 1989. Judge Sr. told his son that one of his partners had been a participant in meetings with the bank involving the retainer of Laventhol, and that he, Judge Sr., and his partners had been advised against making any investment in the Telfer's offering. This information was conveyed by Wood Gundy to Telfer's. When Telfer's contacted the bank for confirmation, the bank, once again and falsely, denied any involvement by Laventhol.

6 In overview, it is the position of the plaintiff that Osler became privy to confidential information about Telfer's financial circumstances through their retainer as solicitors for the bank, that they were aware of Telfer's vulnerability in the financial markets and that they disclosed this confidential information to the underwriters of Telfer's under circumstances in which it was foreseeable that Telfer's would suffer harm, thereby causing damage to Telfer's by undermining its efforts to raise public moneys.

7 The respondent Osler submits that the facts as pleaded do not create, as between Osler and Telfer's, a fiduciary relationship that is now known to the law and accordingly, Telfer's cannot assert a claim against Osler for breach of confidence. The respondent also submits that the facts as pleaded do not create a duty of care by Osler to Telfer's as would form the basis of an action in negligence. Further, with respect to both causes of action, it is submitted that there is no causal connection between the disclosure of the alleged confidential information and the ultimate failure of Telfer's.

8 In my opinion, none of the above conclusions should be made at this stage of the proceedings. The threshold for sustaining a pleading under rule 21.01(1)(b) is not a high one. Much of the argument before us was directed to the lack of a factual underpinning for the causes of action alleged, particularly as to the damages issue. This is a matter to be resolved on the evidence called at the trial: see Temilini v. Ontario Provincial Police (Commissioner) (1990), 73 O.R. (2d) 664, 38 O.A.C. 270 (C.A.). It is also accepted that the fact that a cause of action could be a novel one is not a bar to its proceeding to trial: see Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321. The categories of relationships giving rise to fiduciary duties are not closed nor are the categories of negligence in which a duty of care is owed: see Guerin v. R., [1984] 2 S.C.R. 335 at p. 383, 13 D.L.R. (4th) 321 at p. 341; International Corona Resources Ltd. v. LAC Minerals Ltd., [1989] 2 S.C.R. 574 at pp. 596-97, 61 D.L.R. (4th) 14 at p. 61, and 34 Halsbury's Laws of England, 4th ed. (1980), para. 5 at p. 8.

9 Accordingly, I would allow the appeal, set aside the order under appeal and dismiss the respondent's motion. The appellant is entitled to its costs here and below in any event of the cause.

Appeal allowed.

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

Supreme Court Reports

Supreme Court of Canada

Present: Lamer C.J.* and Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier and Cory JJ.

1990: February 22 / 1990: October 4.

File Nos.: 21508, 21536.

[1990] 2 S.C.R. 959 | [1990] 2 R.C.S. 959 | [1990] S.C.J. No. 93 | [1990] A.C.S. no 93

Carey Canada Inc., formerly known as Carey-Canadian Mines Ltd., National Gypsum Co., Atlas Turner Inc., Asbestos Corporation Limited, Bell Asbestos Mines Limited and Lac d'amiante du Québec Ltée, formerly known as Lake Asbestos Company Ltd.; appellants; v. George Ernest Hunt, respondent, and T & N, P.L.C. and Flintkote Mines Limited; respondents. And between Flintkote Mines Limited, National Gypsum Co., Atlas Turner Inc., Asbestos Corporation Limited, Bell Asbestos Mines Limited and Lac d'amiante du Québec Ltée, formerly known as Lake Asbestos Company Ltd., appellants; v. George Ernest Hunt, respondent, and T & N, P.L.C. and Carey Canada Inc., formerly known as Carey-Canadian Mines Ltd., respondents.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA (57 paras.)

* Chief Justice at the time of judgment.

Case Summary

Practice — Motion to strike — Action brought by person suffering from disease allegedly caused by exposure to asbestos fibres — Allegation of conspiracy to withhold information of potential health risks — Allegations of other nominate torts — Circumstances in which a statement of claim (or portions of it) could be struck out — Whether allegations based on the tort of [page960] conspiracy should be struck out — Rules of Court [British Columbia], Rule 19(24).

Respondent Hunt, a retired electrician, brought an action alleging that he had contracted mesothelioma because of exposure to asbestos fibres over the course of his employment. The defendants had been involved in the mining of asbestos and the production and supply of a variety of asbestos products between 1940 and 1967. It was alleged that they knew from 1934 that asbestos fibres could cause disease in those exposed to the fibres. Atlas Turner, Babcock, Caposite, Holmes, Johns-Manville and T & N, P.L.C. were sued not only in negligence but also for their alleged conspiracy to withhold information about the dangers associated with asbestos which ultimately resulted in Mr. Hunt's contracting mesothelioma. Flintkote Mines Limited and T & N, P.L.C. were named as respondents to the appeal in the Court of Appeal by order of the British Columbia Court of Appeal.

Carey Canada Inc. successfully applied to have the action against it struck for want of a reasonable claim. (The action had been based solely on allegations of conspiracy.) The Court of Appeal allowed an appeal from that decision. The issues here dealt with the circumstances in which a statement of claim (or portions of it) could be struck out, and whether the allegations based on the tort of conspiracy should be struck out.

Held: The appeals should be dismissed.

The test to be applied is whether it is "plain and obvious" that the plaintiff's statement of claim discloses no reasonable claim. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

Here, it was not "plain and obvious" that the plaintiff's statement of claim failed to disclose a reasonable claim, given this Court's most recent pronouncement on the circumstances in which the law of torts will recognize such a claim of conspiracy. Nor was it plain and obvious that allowing this action to proceed would amount to an abuse of process. Whether or not there is good reason to extend the tort to the present context is for the trial judge to consider in light of the evidence.

[page961]

It is not for this Court on a motion to strike to reach a decision as to the plaintiff's chances of success. It is enough that the plaintiff has some chance of success. Whether or not a predominant purpose had been established and whether or not Quebec's Business Concerns Records Act limited the range of information that the defendants could produce at trial was not relevant to whether the plaintiff's statement of claim disclosed a reasonable claim. Striking out cannot be justified because a pleading reveals "an arguable, difficult or important point of law". On the contrary, it may well be critical that the action be allowed to proceed.

Alleging the tort of conspiracy is not precluded by the allegation of another tort. While it may be arguable that if one succeeds under a distinct nominate tort against an individual defendant, then an action in conspiracy should not be available against that defendant, it is far from clear that the mere fact that a plaintiff alleges that a defendant committed other torts is a bar to pleading the tort of conspiracy. Whether the plaintiff should be barred from recovery under the tort of conspiracy can only be determined when the question of whether it has established that the defendant did in fact commit the other alleged torts has been decided.

Cases Cited

Considered: Dyson v. Attorney-General, [1911] 1 K.B. 410; Drummond-Jackson v. British Medical Association, [1970] 1 All E.R. 1094; Ross v. Scottish Union and National Insurance Co. (1920), 47 O.L.R. 308; Attorney General of Canada v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735; Lonrho Ltd. v. Shell Petroleum Co. (No. 2), [1982] A.C. 173; Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd., [1983] 1 S.C.R. 452; distinguished: Frame v. Smith, [1987] 2 S.C.R. 99; referred to: Metropolitan Bank, Ltd. v. Pooley, [1881-85] All E.R. 949; Republic of Peru v. Peruvian Guano Co. (1887), 36 Ch. D. 489; Hubbuck & Sons, Ltd. v. Wilkinson, Heywood & Clark, Ltd., [1899] 1 Q.B. 86; Attorney-General of the Duchy of Lancaster v. London & North Western Railway Co., [1892] 3 Ch. 274; Evans v. Barclays Bank and Galloway, [1924] W.N. 97; Kemsley v. Foot, [1951] 1 T.L.R. 197; Nagle v. Feilden, [1966] 2 Q.B. 633; Rex ex rel. Tolfree v. Clark, [1943] O.R. 501; Gilbert Surgical Supply Co. v. F. W. Horner Ltd., [1960] O.W.N. 289; Minnes v. Minnes (1962), 39 W.W.R. 112; McNaughton and McNaughton v. Baker (1988), 25 B.C.L.R. (2d) 17; Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441; Dumont v. Canada (Attorney General), [1990] 1 S.C.R. 279; [page962] Metall und Rohstoff A.G. v. Donaldson, Lufkin & Jenrette Inc., [1989] 3 W.L.R. 563; Mogul Steamship Co. v. McGregor, Gow & Co. (1889), 23 Q.B.D. 598.

Statutes and Regulations Cited

Business Concerns Records Act, R.S.Q. 1977, c. D-12. Rules of Civil Procedure, O. Reg. 560/84, Rule 21.01. Rules of Court [British Columbia], Rule 19(24). Rules of the Supreme Court [England], R.S.C. 1883, O. 25, r. 4 [rep. & sub. R.S.C. (Revision) 1962, O. 18, r. 19]. Supreme Court of Judicature Act, 1873, (Eng.) 36 & 37 Vict., c. 66.

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ed. Vancouver: Butterworths, 1979. Milsom, S. F. C. Historical Foundations of the Common Law, 2nd ed. Toronto: Butterworths, 1981.

APPEALS from a judgment of the British Columbia Court of Appeal reversing the judgment of Hollinrake J. dismissing the action against Carey Canada Inc. on the basis that it disclosed no reasonable claim. Appeals dismissed.
Jack Giles, Q.C., and Robert McDonell, for Carey Canada Inc. D. M. M. Goldie, Q.C., for Lac d'amiante du Québec Ltée. Marvyn Koenigsberg, for National Gypsum Co. David Martin and Michael P. Maryn, for Atlas Turner Inc., Asbestos Corporation Limited and Bell Asbestos Mines Limited. James A. Macaulay, c.r., and K. N. Affleck, for T & N, P.L.C.

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Robert Ward and S. E. Fraser, for Flintkote Mines Limited. J. J. Camp, Q.C., and P. G. Foy, for George Ernest Hunt.

[Quicklaw note: Please see complete list of solicitors appended at the end of the judgment.]

The judgment of the Court was delivered by

WILSON J.

1 The issue raised in these appeals is whether it is open to the respondent to proceed with an action against the appellants for the tort of conspiracy. In particular, the appeals raise the question whether those portions of the respondent [Hunt's] statement of claim in which he alleges that the appellants conspired to withhold information concerning the effects of asbestos fibres disclose a reasonable claim within the meaning of Rule 19(24)(a) of the British Columbia Rules of Court.

1. The Facts

2 The respondent, George Hunt, is a retired electrician who alleges that he was exposed to asbestos fibres over the course of his employment. Mr. Hunt has brought an action against Atlas Turner Inc., Asbestos Corporation Limited, The Asbestos Institute, Babcock & Wilcox Industries Ltd., Bell Asbestos Mines Limited, Caposite Insulations Ltd., Carey Canada Inc., Flintkote Mines Limited, Holmes Insulations Ltd., Johns-Manville Amiante Canada Inc., Lac d'amiante du Québec Ltée., National Asbestos Mines Limited, The Quebec Asbestos Mining Association and T & N, P.L.C. ("the defendants").

3 Mr. Hunt alleges that the defendants were involved in the mining of asbestos and the production and supply of a variety of asbestos products between 1940 and 1967. He alleges that after 1934 the defendants knew that asbestos fibres could cause disease in those exposed to the fibres. In addition to suing Atlas Turner, Babcock, Caposite, Holmes, Johns-Manville and T & N in negligence, Mr. Hunt alleges that all of the defendants conspired to withhold information about the dangers associated with asbestos and that as a result of that conspiracy he contracted mesothelioma.

[page964]

4 The relevant portions of Mr. Hunt's statement of claim read as follows:

> 16. At various times, the particulars of which are well known to the defendants, including the period between 1940 and 1967, the defendants mined and processed asbestos and designed, manufactured, packaged, advertised, promoted, distributed and sold a variety of products containing asbestos fibres (the "Products"), the particulars of which are also well known to the defendants.

17. After about 1934 the defendants knew or ought to have known that the asbestos fibres contained in the Products could cause diseases, including cancer and asbestosis, in those who worked with or were otherwise exposed to those fibres.

18. After about 1934, some or all of the defendants conspired with each other with the predominant purpose of injuring the plantiff [sic] and others who would be exposed to the asbestos fibres in the Products, by preventing this knowledge becoming public knowledge and, in particular, by preventing it reaching the plaintiff and others who would be exposed to the asbestos fibres in the Products.

19. Alternatively, after about 1934, some or all of the defendants conspired with each other to prevent by unlawful means this knowledge becoming public knowledge and, in particular, to prevent it reaching the plaintiff and others who would be exposed to the asbestos fibres in the Products, in circumstances where the defendants knew or ought to have known that injury to the plaintiff and others who would be exposed to the asbestos fibres in the Products would result from the defendants' acts.

20. The defendants' acts in furtherance of the conspiracy referred to in paragraphs 18 and 19 include:

    (a) fraudulently, deceitfully or negligently suppressing, distorting and misrepresenting the results of medical and scientific research on the disease-causing effects of asbestos;

    (b) fraudulently, deceitfully or negligently misrepresenting the disease-causing effects of asbestos by disseminating incorrect, incomplete, outdated, misleading and distorted information about those effects;

    (c) fraudulently, deceitfully or negligently attempting to discredit doctors and scientists who claimed that asbestos caused disease;

[page965]

    (d) fraudulently, deceitfully or negligently marketing and promoting the Products without any or adequate warning of the dangers they posed to those exposed to them; and

    (e) fraudulently, deceitfully or negligently attempting to influence to their benefit government regulation of the use of asbestos and the Products.

5 Carey Canada Inc. brought an application before the Supreme Court of British Columbia under Rule 19(24)(a) of the British Columbia Rules of Court seeking to have the action against it, which was based solely on the allegations of conspiracy, dismissed on the basis that it disclosed no reasonable claim. Rule 19(24) provides:

> 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 or defence as the case may be, or
>
> (b) it is unnecessary, scandalous, frivolous, or vexatious, or
>
> (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 may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as between solicitor and client.

2. The Courts Below

(a) Supreme Court of British Columbia

6 Hollinrake J. accepted Carey Canada's submission that the only damage that could be the subject of a conspiracy action was "direct damage". Although counsels' memorandum summarizing Hollinrake J.'s oral reasons for judgment does not explain precisely what he understood the term "direct damage" to mean, it would appear that he meant damage suffered by a plaintiff that flows directly from acts aimed specifically at that plaintiff. Hollinrake J. stated:

[page966]

> Dealing with the issue of direct or indirect damage, in the first kind of conspiracy Estey, J. refers to the "predominant purpose" of the defendants' conduct [see: Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd., [1983] 1 S.C.R. 452, at p. 471]. I think this does import direct damage. The second type of conspiracy refers to conduct "directed towards the plaintiff". I think this imports direct damage. I think these conclusions are justified by what happened in Canada Cement LaFarge Ltd.

Hollinrake J. therefore allowed the motion and dismissed the action against Carey Canada as disclosing no reasonable claim.

(b) British Columbia Court of Appeal

7 By order of the British Columbia Court of Appeal (dated March 30, 1989), Flintkote Mines Limited and T & N, P.L.C. were named as respondents to the appeal in the Court of Appeal.

8 Anderson J.A. (Macfarlane and Esson JJ.A. concurring) allowed the appeal and set aside Hollinrake J.'s order. Anderson J.A. explained his reasons:

(1) The cases relied upon by counsel for the respondent Carey Canada Inc. and the learned trial judge to the effect that there is no such tort as a conspiracy to injure by unlawful means where the damage is indirect, all relate to the area of competition in the marketplace and to labour-management disputes. They may not be applicable to the very different circumstances alleged in this case and to very different social considerations.

(2) The arguments as to law and fact are intricate and complex and should be dealt with at trial after all the evidence is adduced. At this stage of the proceedings it is impossible to reach the conclusion that there is no cause of action in fact or law. (See Minnes v. Minnes (1962), 39 W.W.R. 112 at 122).

9 Esson J.A. (Anderson and MacFarlane JJ.A. agreeing) gave additional reasons stressing that the "language of predominant purpose and direct damage" in Canada Cement LaFarge Ltd. had arisen in cases that involved competition and pure economic loss. In Mr. Hunt's case, however, the context was very different. Mr. Hunt had suffered [page967] personal injury and claimed that by conspiring to suppress information the defendants had created a foreseeable risk of causing him the harm which he in fact suffered. It was not possible at this stage in the proceedings to determine that the damage was not sufficiently direct to be able to support an action rooted in the tort of conspiracy. Esson J.A. specifically declined to embark upon a detailed consideration of the law of conspiracy, noting:

> It has not generally been part of our tradition and, given the complexity and novelty of some of the issues raised in this case, it would I think be particularly undesirable to render a such decisions [sic], as it were, in a vacuum. For those reasons, as well as the reasons given by Mr. Justice Anderson, I agree in allowing the appeal.

3. The Issues

10 The issues that arise in this appeal are:

1. In what circumstances may a statement of claim (or portions of it) be struck out?
2. Should Mr. Hunt's allegations based on the tort of conspiracy be struck out?

4. Analysis

(1) In What Circumstances May a Statement of Claim be Struck Out?

11 Carey Canada's motion to have the action dismissed was made pursuant to Rule 19(24)(a) of the British Columbia Rules of Court. This rule stipulates that a court may strike out any part of a statement of claim that

"discloses no reasonable claim". The rules of practice with respect to striking out a statement of claim are similar in other provinces. In Ontario, for example, Rule 21.01 of the Rules of Civil Procedure, O. Reg. 560/84, states:

> 21.01 (1) A party may move before a judge,
>
> [page968]
>
> (a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or
>
> (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,
>
> and the judge may make an order or grant judgment accordingly.
>
> (2) No evidence is admissible on a motion,
>
> (a) under clause (1)(a), except with leave of a judge or on consent of the parties;
>
> (b) under clause (1)(b). [Emphasis added.]

12 Rule 19(24) of the British Columbia Rules of Court and analogous provisions in other provinces are the result of a "codification" of the court's power under its inherent jurisdiction to stay actions that are an abuse of process or that disclose no reasonable cause of action: see McLachlin and Taylor, British Columbia Practice (2nd. ed. 1979), vol. 1, pp. 19-71. This process of codification first took place in England shortly after the Supreme Court of Judicature Act, 1873, (Eng.) 36 & 37 Vict., c. 66, was enacted. It is therefore of some interest to review the interpretation the courts in England have given to their rules relating to the striking out of a statement of claim.

(a) England:

13 In Metropolitan Bank, Ltd. v. Pooley, [1881-85] All E.R. 949 (H.L.), the Lord Chancellor explained at p. 951 that before the Supreme Court of Judicature Act, 1873, courts were prepared to stay a "manifestly vexatious suit which was plainly an abuse of the authority of the court" even although there was no written rule stating that courts could do so. The Lord Chancellor noted, at p. 951, that "The power seemed to be inherent in the jurisdiction of every court of justice to protect itself from the abuse of its procedure". That is, it was open to courts to ensure that their process was [page969] not used simply to harass parties through the initiation of actions that were obviously without merit.

14 Before the advent of the Supreme Court of Judicature Act, 1873 and the new Rules of the Supreme Court (enacted in 1883) it had been open to parties to use a "demurrer" to challenge a statement of claim. That is, it had been open to a defendant to admit all the facts that the plaintiff's pleadings alleged and to assert that these facts were not sufficient in law to sustain the plaintiff's case. When a demurrer was pleaded the question of law that was thereby raised was immediately set down for argument and decision: see Halsbury's Laws of England (4th ed. 1981), vol. 36, para. 2, n. 7 and para. 35, n. 5; Milsom, Historical Foundations of the Common Law (2nd ed. 1981), at p. 72; and Baker, An Introduction to English Legal History (2nd ed. 1979), at p. 69. But a formal and technical practice eventually grew up around demurrer and judges were notoriously reluctant to provide definitive answers to the points of law that were thereby raised. As the Lord Chancellor explained in Pooley, it was eventually thought best to replace demurrers with an easier summary process for getting rid of an action that was on its face manifestly groundless. It was with this objective in mind that O. 25, r. 4 of the 1883 Rules of the Supreme Court came into force:

> 4. The court or a judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.

Commenting on the relative merits of demurrers and the new rule, Chitty J. observed in Republic of Peru v. Peruvian Guano Co. (1887), 36 Ch. D. 489, at p. 496:

[page970]

> Having regard to the terms of rule 4, and to the decisions on it, I think that this rule is more favourable to the pleading objected to than the old procedure by demurrer. Under the new rule the pleading will not be struck out unless it is demurrable and something worse than demurrable. If, notwithstanding defects in the pleading, which would have been fatal on a demurrer, the Court sees that a substantial case is presented the Court should, I think, decline to strike out that pleading; but when the pleading discloses a case which the Court is satisfied will not succeed, then it should strike it out and put a summary end to the litigation.

15 One of the most important points advanced in the early decisions dealing with O. 25, r. 4 was the proposition that the rule was derived from the courts' power to ensure both that they remained a forum in which genuine legal issues were addressed and that they did not become a vehicle for "vexatious" actions without legal merit designed solely to harass another party. In Pooley, supra, at p. 954, Lord Blackburn asserted that the new rule "considerably extends the power of the court to act in such a manner as I have stated, and enables it to stay an action on further grounds than those on which it could have been stayed at common law." Nonetheless, as Chitty J. subsequently observed in Peruvian Guano Co., the rule was not intended to prevent a "substantial case" from coming forward. Its summary procedures were only to be used where it was apparent that allowing the case to go forward would amount to an abuse of the court's process.

16 In one of the better-known decisions concerning the circumstances in which resort should be had to the rule Lindley M.R. stated:

> The second and more summary procedure is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks. The use of the expression "reasonable cause of action" in rule 4 shews that the summary procedure there introduced is only intended to [page971] be had recourse to in plain and obvious cases. [Emphasis added.]

[See: Hubbuck & Sons, Ltd. v. Wilkinson, Heywood & Clark, Ltd., [1899] 1 Q.B. 86 (C.A), at p. 91.]

Lindley M.R.'s observations made clear that even if the rule expanded the court's power to stay actions, courts were to use the rule only in those exceptional instances where it was "plain and obvious" that, even if one accepted the version of the facts put forward in the statement of claim, the plaintiff's case did not disclose a reasonable cause of action. The question was not whether the plaintiff could succeed since this was a matter properly left for determination at trial. The question was simply whether the plaintiff was advancing a "reasonable" argument that could properly form the subject matter of a trial.

17 The Master of the Rolls had made this very point some six years earlier:

> Then the Vice-Chancellor says: "The questions raised upon this application are of such importance and such difficulty that I cannot say that this pleading discloses no reasonable cause of action, or that there is anything frivolous or vexatious; therefore, I should let the parties plead in the usual way". It appears to me that this is perfectly right. To what extent is the Court to go on inquiring into difficult questions of fact or law in the exercise of the power which is given it under Order XXV., rule 4? It appears to me that the object of the rule is to stop cases which ought not to be launched -- cases which are obviously frivolous or vexatious, or obviously unsustainable; and if it will take a long time, as is suggested, to satisfy the Court by historical research or otherwise that the County Palatine has no jurisdiction, I am clearly of opinion that such a motion as this ought not to be made. There may be an application in Chambers to get rid of vexatious actions; but to apply the rule to a case like this appears to me to misapply it altogether. [Emphasis added.]

[See: Attorney-General of the Duchy of Lancaster v. London and North Western Railway Co., [1892] 3 Ch. 274 (C.A.), at pp. 276-77.]

[page972]

Thus, the fact that the plaintiff's case was a complicated one could not justify striking out the statement of claim. Complex matters that disclosed substantive questions of law were most appropriately addressed at trial where evidence concerning the facts could be led and where arguments about the merits of a plaintiff's case could be made.

18 The requirement that it be "plain and obvious" that some or all of the statement of claim discloses no reasonable cause of action before it can be struck out, as well as the proposition that it is singularly inappropriate to use the rule's summary procedure to prevent a party from proceeding to trial on the grounds that the action raises difficult questions, has been affirmed repeatedly in the last century: see Dyson v. Attorney-General, [1911] 1 K.B. 410 (C.A.); Evans v. Barclays Bank and Galloway, [1924] W.N. 97 (C.A.); Kemsley v. Foot, [1951] 1 T.L.R. 197 (C.A.); and Nagle v. Feilden, [1966] 2 Q.B. 633 (C.A.). Lord Justice Fletcher Moulton's observations in Dyson, supra, at pp. 418-19, are particularly instructive:

> Now it is unquestionable that, both under the inherent power of the Court and also under a specific rule to that effect made under the Judicature Act, the Court has a right to stop an action at this stage if it is wantonly brought without the shadow of an excuse, so that to permit the action to go through its ordinary stages up to trial would be to allow the defendant to be vexed under the form of legal process when there could not at any stage be any doubt that the action was baseless. But from this to the summary dismissal of actions because the judge in chambers does not think they will be successful in the end lies a wide region, and the Courts have properly considered that this power of arresting an action and deciding it without trial is one to be very sparingly used, and rarely, if ever, excepting in cases where the action is an abuse of legal procedure. They have laid down again and again that this process is not intended to take the place of the old demurrer by which the defendant challenged the validity of the plaintiff's claim as a matter of law. Differences of law, just as differences of fact, are normally to be decided by trial after hearing in Court, and not to be refused a hearing in Court by an order of the judge in chambers. Nothing more clearly indicates this to be the intention of the rule than the fact that the plaintiff has no appeal as of right from the decision of the judge at chambers in the case of [page973] such an order as this. So far as the rules are concerned an action may be stopped by this procedure without the question of its justifiability ever being brought before a Court. To my mind it is evident that our judicial system would never permit a plaintiff to be "driven from the judgment seat" in this way without any Court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad. [Emphasis added.]

19 A more recent and no less instructive discussion of these principles may be found in Lord Pearson's reasons in Drummond-Jackson v. British Medical Association, [1970] 1 All E.R. 1094 (C.A.). I note that in Drummond-Jackson the Court of Appeal dealt with Rules of the Supreme Court, O. 18, r. 19 (the provision that replaced R.S.C. O. 25, r. 4 in 1962), a provision very similar to the rules that now govern the striking out of pleadings in Canada:

> 19. -- (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that --
>
> (a) it discloses no reasonable cause of action or defence, as the case may be; or
>
> (b) it is scandalous, frivolous or vexatious; or
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the court;
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> (2) No evidence shall be admissible on an application under paragraph (1)(a).

20 Responding to Lord Denning's suggestion that the potential length and complexity of a trial should be taken into account when considering whether to strike out a statement of claim, Lord Pearson (with whom Sir Gordon Willmer concurred in separate reasons) reaffirmed the proposition that Lord Justice Lindley had advanced some [page974]

eighty years earlier in Attorney-General of the Duchy of Lancaster: length and complexity were not appropriate factors to consider when deciding whether a statement of claim should be struck out. Lord Pearson said at pp. 1101-02:

> Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases.
>
> ...
>
> In my opinion the traditional and hitherto accepted view -- that the power should only be used in plain and obvious cases -- is correct according to the evident intention of the rule for several reasons. First, there is in r 19 (1) (a) the expression 'reasonable cause of action' to which Sir Nathaniel Lindley MR called attention in Hubbuck & Sons Ltd v. Wilkinson, Heywood and Clark Ltd. No exact paraphrase can be given, but I think 'reasonable cause of action' means a cause of action with some chance of success, when (as required by r 19 (2)) only the allegations in the pleading are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out. In Nagle v Feilden Danckwerts LJ said:
>
> > 'The summary remedy which has been applied to this action is one which is only to be applied in plain and obvious cases, when the action is one which cannot succeed or is in some way an abuse of the process of the court'.
>
> Salmon LJ said:
>
> > 'It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable'.
>
> Secondly, r 19 (1) (a) takes some colour from its context in r 19 (1) (b) -- 'scandalous, frivolous and vexatious' -- r 19 (1) (c) -- 'prejudice, embarrass or delay the fair trial of the action' -- and r. 19 (1) (d) -- otherwise an abuse of the process of the court'. The defect referred to in r 19 (1) (a) is a radical defect ranking with those referred to in the other paragraphs. Thirdly, an application for the statement of claim to be struck out under this rule is made at a very early stage of the action when there is only the statement of claim without any other pleadings and without any evidence at all. The plaintiff should not [page975] be 'driven from the judgment seat' at this very early stage unless it is quite plain that his alleged cause of action has no chance of success. [Emphasis added.]

Lord Pearson concluded at p. 1102:

> That is the basis of the rule and practice on which one has to approach the question whether the plaintiff's statement of claim in the present case discloses any reasonable cause of action. It is not permissible to anticipate the defence or defences -- possibly some very strong ones -- which the defendants may plead and be able to prove at the trial, nor anything which the plaintiff may plead in reply and seek to rely on at the trial. [Emphasis added.]

21 In England, then, the test that governs an application under R.S.C. O. 18, r. 19 has always been and remains a simple one: 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? Is there a defect in the statement of claim that can properly be characterized as a "radical defect" ranking with the others listed in O. 18, r. 19? If it is plain and obvious that the action is certain to fail because it contains some such radical defect, then the relevant portions of the statement of claim may properly be struck out. To allow such an action to proceed, even although it was certain to fail, would be to permit the defendant to be "vexed" and would therefore amount to the very kind of abuse of the court's process that the rule was meant to prevent. But if there is a chance that the plaintiff might succeed, then that plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues of law and fact that might have to be addressed nor the potential for the defendant to present a strong defence should prevent a plaintiff from proceeding with his or her case. Provided that the plaintiff can present a "substantive" case, that case should be heard.

[page976]

(b) Canada

(c) Ontario and British Columbia Courts of Appeal

22 In Canada, provincial courts of appeal have long had to grapple with the very same issues concerning the rules with respect to statements of claim that courts in England have dealt with for over a century. As noted earlier, the rules of practice in this country are to a large extent modelled on England's rules of practice. It comes as no surprise, therefore, that the test Canadian courts of appeal have adopted is in essence the same one that the courts in England favour.

Ontario

23 In Ontario, for example, the Court of Appeal dealt with Rule 124 (the predecessor to Rule 21.01) in Ross v. Scottish Union and National Insurance Co. (1920), 47 O.L.R. 308 (C.A.). The rule followed closely the wording of England's R.S.C. 1883, O. 25, r. 4 and read as follows:

> 124. A judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shown to be frivolous or vexatious, may order the action to be stayed or dismissed, or judgment to be entered accordingly.

24 In Ross, Magee J.A. embraced the "plain and obvious" test developed in England, stating at p. 316:

> That inherent jurisdiction is partly embodied in our Rule 124, which allows pleadings to be struck out if disclosing no reasonable cause of action or defence, and thereby, in such case, or if the action or defence is shewn to be vexatious or frivolous, the action may be stayed or dismissed or judgment be entered accordingly. The Rule has only been acted upon in plain and obvious cases, and it should only be so when the Court is satisfied that the case is one beyond doubt, and that there is no reasonable cause of action or defence. [Emphasis added.]

Magee J.A. went on to note at p. 317:

> To justify the use of Rule 124, a statement of claim should not be merely demurrable, but it should be [page977] manifest that it is something worse, so that it will not be curable by amendment: Dadswell v. Jacobs (1887), 34 Ch. D. 278, 281; Republic of Peru v. Peruvian Guano Co. (1887), 36 Ch. D. 489; and it is not sufficient that the plaintiff is not likely to succeed at the trial: Boaler v. Holder (1886), 54 L.T.R. 298.

25 At an early date, then, the Ontario Court of Appeal had modelled its approach to Rule 124 on the approach that had been consistently favoured in England. And over time the Ontario Court of Appeal has gone on to show the same concern that statements of claim not be struck out in anything other than the clearest of cases. As Laidlaw J.A. put it in Rex ex rel. Tolfree v. Clark, [1943] O.R. 501 (C.A.), at p. 515:

> The power to strike out proceedings should be exercised with great care and reluctance. Proceedings should not be arrested and a claim for relief determined without trial, except in cases where the Court is well satisfied that a continuation of them would be an abuse of procedure: Evans v. Barclay's Bank et al., [1924] W.N. 97. But if it be made clear to the Court that an action is frivolous or vexatious, or that no reasonable cause of action is disclosed, it would be improper to permit the proceedings to be maintained.

26 More recently, in Gilbert Surgical Supply Co. v. F. W. Horner Ltd., [1960] O.W.N. 289 (C.A.), at pp. 289-90, Aylesworth J.A. observed that the fact that an action might be novel was no justification for striking out a statement of claim. The court would still have to conclude that "the plaintiff's action could not possibly succeed or that clearly and beyond all doubt, no reasonable cause of action had been shown".

27 Thus, the Ontario Court of Appeal has firmly embraced the "plain and obvious" test and has made clear that it too is of the view that the test is rooted in the need for courts to ensure that their process is not abused. The fact

that the case the plaintiff wishes to present may involve complex issues of fact and law or may raise a novel legal proposition should not prevent a plaintiff from proceeding with his action.

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British Columbia

28 In British Columbia the Court of Appeal has approached the matter in a similar way. The predecessor to the rule that Carey Canada invokes in this appeal was worded in exactly the same way as England's R.S.C. 1883, O. 25, r. 4. Not surprisingly the British Columbia Court of Appeal's treatment of that rule has been similar to that taken in England and Ontario. For example, in Minnes v. Minnes (1962), 39 W.W.R. 112 (B.C.C.A.), Tysoe J.A. observed at p. 122:

> In my respectful view it is only in plain and obvious cases that recourse should be had to the summary process under O. 25, R. 4, and the power given by the Rule should be exercised only where the case is absolutely beyond doubt. So long as the statement of claim, as it stands or as it may be amended, discloses some question fit to be tried by a judge or jury, the mere fact that the case is weak or not likely to succeed is no ground for striking it out. If the action involves investigation of serious questions of law or questions of general importance, or if facts are to be known before rights are definitely decided, the Rule ought not to be applied. [Emphasis added.]

For his part Norris J.A. noted at p. 116 (agreeing with Tysoe J.A.):

> I might add that upon the motion, with respect, it was not for the learned trial judge as it is not for this court to consider the issues between the parties as they would be considered on trial. All that was required of the plaintiff on the motion was that she should show that on the statement of claim, accepting the allegations therein made as true, there was disclosed from that pleading with such amendments as might reasonably be made, a proper case to be tried. [Emphasis added.]

The law as stated in Minnes v. Minnes was recently reaffirmed in McNaughton and McNaughton v. Baker (1988), 25 B.C.L.R. (2d) 17 (C.A.), at p. 23, per McLachlin J.A. Similarly, Anderson and Esson JJ.A. relied on Minnes v. Minnes in this appeal.

29 Once again then the "plain and obvious" test has been firmly embraced. The British Columbia [page979] Court of Appeal has confirmed that the summary proceedings available under the rule in question do not afford an appropriate forum in which to engage in a detailed examination of the strengths and weaknesses of the plaintiff's case. The sole question is whether, assuming that all the facts the plaintiff alleges are true, the plaintiff can present a question "fit to be tried". The complexity or novelty of the question that the plaintiff wishes to bring to trial should not act as a bar to that trial taking place.

(ii) Supreme Court of Canada

30 While this Court has had a somewhat limited opportunity to consider how the rules regarding the striking out of a statement of claim are to be applied, it has nonetheless consistently upheld the "plain and obvious" test. Justice Estey, speaking for the Court in Attorney General of Canada v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735, stated at p. 740:

> 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.

31 I had occasion to affirm this proposition in Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441. At pages 486-87 I provided the following summary of the law in this area (with which the rest of the Court concurred):

> The law then would appear to be clear. The facts pleaded are to be taken as proved. When so taken, the question is do they disclose a reasonable cause of action, i.e. a cause of action "with some chance of

> success" (Drummond-Jackson v. British Medical Association, [1970] 1 All E.R. 1094) or, as Le Dain J. put it in Dowson v. Government of Canada (1981), 37 N.R. 127 (F.C.A.), at p. 138, is it "plain and obvious that the action cannot succeed?"

And at p. 477 I observed:

> It would seem then that as a general principle the Courts will be hesitant to strike out a statement of claim as disclosing no reasonable cause of action. The fact that [page980] reaching a conclusion on this preliminary issue requires lengthy argument will not be determinative of the matter nor will the novelty of the cause of action militate against the plaintiffs. [Emphasis added.]

32 Most recently, in Dumont v. Canada (Attorney General), [1990] 1 S.C.R. 279, I made clear at p. 280 that it was my view that the test set out in Inuit Tapirisat was the correct test. The test remained whether the outcome of the case was "plain and obvious" or "beyond reasonable doubt".

33 Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia Rules of Court is the same as the one that governs an application under R.S.C. O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

34 The question therefore to which we must now turn in this appeal is whether it is "plain and obvious" that the plaintiff's claims in the tort of conspiracy disclose no reasonable cause of action or whether the plaintiff has presented a case that is "fit to be tried", even although it may call for a complex or novel application of the tort of conspiracy.

(2) Should Mr. Hunt's Allegations Based on the Tort of Conspiracy Be Struck from his Statement of Claim?

35 In the last decade the tort of conspiracy has received a considerable amount of attention. In [page981] England, for example, both the House of Lords and the Court of Appeal have recently had occasion to review the tort in some detail. These decisions have made clear that the tort of conspiracy may apply in at least two situations: (i) where the defendants agree to use lawful means to harm the plaintiff and (ii) where the defendants use unlawful means to harm the plaintiff. The law with respect to the first situation is not in doubt:

> If A and B agree to commit acts which would be lawful if done by either of them alone but which are done in combination and cause damage to C, no tortious conspiracy actionable at the suit of C exists unless the predominant purpose of A and B in making the agreement and carrying out the acts which cause the damage is to injure C and not to protect the lawful commercial interests of A and B. This proposition is established by five decisions at the highest level: Mogul Steamship Co. Ltd. v. McGregor, Gow & Co. [1892] A.C. 25; Quinn v. Leathem, [1901] A.C. 495; Sorrell v. Smith, [1925] A.C. 700; Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch, [1942] A.C. 435 and Lonrho Ltd. v. Shell Petroleum Co. Ltd. (No. 2), [1982] A.C. 173. [See: Metall und Rohstoff A.G. v. Donaldson, Lufkin & Jenrette Inc., [1989] 3 W.L.R. 563, at p. 593, per Slade L.J.] [Emphasis added.]

Courts in England have, however, encountered greater difficulty in stating with precision the applicable principles governing situations in which unlawful means are employed. In particular, they have struggled to decide whether the plaintiff must establish, not just that the defendants used means that were unlawful and resulted in harm to the plaintiff, but also that the defendants actually intended to harm the plaintiff.

36 In Lonrho Ltd. v. Shell Petroleum Co. (No. 2), [1982] A.C. 173, the House of Lords dealt with a consultative case

stated by arbitrators in which it was asked to consider whether the tort of conspiracy could be extended to embrace a situation where the agreement in question resulted in a contravention of penal law (unlawful means) but did not include an intention to injure the plaintiff. [page982] In the process of deciding whether the tort should be so extended Lord Diplock noted at pp. 188-89:

> My Lords, conspiracy as a criminal offence has a long history. It consists of "the agreement of two or more persons to effect any unlawful purpose, whether as their ultimate aim, or only as a means to it, and the crime is complete if there is such agreement, even though nothing is done in pursuance of it." I cite from Viscount Simon L.C.'s now classic speech in Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch, [1942] A.C. 435, 439. Regarded as a civil tort, however, conspiracy is a highly anomalous cause of action. The gist of the cause of action is damage to [page983] the plaintiff; so long as it remains unexecuted the agreement which alone constitutes the crime of conspiracy, causes no damage; it is only acts done in execution of the agreement that are capable of doing that. So the tort, unlike the crime, consists not of agreement but of concerted action taken pursuant to agreement.

37 Lord Diplock went on to observe that he was of the view that the rationale that had apparently fuelled the development of the tort in the late-nineteenth and early-twentieth centuries, namely that "a combination may make oppressive or dangerous that which if proceeded only from a single person would be otherwise" (see: Mogul Steamship Co. v. McGregor, Gow & Co. (1889), 23 Q.B.D. 598, at p. 616, per Bowen L.J.) was somewhat anachronistic in light of modern commercial developments. Nevertheless he did not feel that this meant that the tort could now be dispensed with. He said at p. 189:

> But to suggest today that acts done by one street-corner grocer in concert with a second are more oppressive and dangerous to a competitor than the same acts done by a string of supermarkets under a single ownership or that a multinational conglomerate such as Lonrho or oil company such as Shell or B.P. does not exercise greater economic power than any combination of small businesses, is to shut one's eyes to what has been happening in the business and industrial world since the turn of the century and, in particular, since the end of World War II. The civil tort of conspiracy to injure the plaintiff's commercial interests where that is the predominant purpose of the agreement between the defendants and of the acts done in execution of it which caused damage to the plaintiff, must I think be accepted by this House as too well-established to be discarded however anomalous it may seem today. It was applied by this House 80 years ago in Quinn v. Leathem, [1901] A.C. 495, and accepted as good law in the Crofter case [1942] A.C. 435, where it was made clear that injury to the plaintiff and not the self-interest of the defendants must be the predominant purpose of the agreement in execution of which the damage-causing acts were done.

38 Having set out this groundwork and having thereby confirmed that the tort of conspiracy was applicable in circumstances where the defendants entered into an agreement the predominant purpose of which was to injure the plaintiff, Lord Diplock turned to the question whether the tort should be extended beyond these confines. He concluded at p. 189:

> This House, in my view, has an unfettered choice whether to confine the civil action of conspiracy to the narrow field to which alone it has an established claim or whether to extend this already anomalous tort beyond those narrow limits that are all that common sense and the application of the legal logic of the decided cases require.
>
> My Lords, my choice is unhesitatingly the same as that of Parker J. and all three members of the Court of Appeal. I am against extending the scope of the civil tort of conspiracy beyond acts done in execution of an agreement entered into by two or more persons for the purpose not of protecting their own interests but of injuring the interests of the plaintiff.

39 Lord Diplock's observations made clear that in order to succeed with the tort of conspiracy in England a plaintiff would have to demonstrate that the purpose for which parties acted in accordance with their agreement was to harm the plaintiff. The English Court of Appeal has recently had an opportunity to consider Lord Diplock's judgment in Lonrho (see: Metall und Rohstoff A.G. v. Donaldson, Lufkin & Jenrette Inc., supra) and has confirmed at p. 604 that "the House plainly intended the presence of a predominant intention to injure to be the touchstone of an actionable conspiracy". The Court of Appeal continued:

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> Where the predominant intention to injure is absent but the defendants pursuant to agreement commit torts against the plaintiff, the House held, we conclude, that common sense and the legal logic of the decided cases are satisfied if the plaintiff is denied a remedy in conspiracy and left to sue on the substantive torts.

Thus, regardless of whether the alleged conspirators used lawful or unlawful means, the law in England required the plaintiff to establish that the defendants entered into the agreement with the predominant purpose of injuring the plaintiff.

40 Although Canadian jurisprudence has taken note of the developments in England, the law governing the tort of conspiracy in Canada is not in all respects the same as the law set out in Lonrho. Indeed, this Court had occasion to consider both the tort of conspiracy and Lord Diplock's observations in Lonrho in Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd., [1983] 1 S.C.R. 452. Justice Estey stated at p. 468:

> The question which must now be considered is whether the scope of the tort of conspiracy in this country extends beyond situations in which the defendants' predominant purpose is to cause injury to the plaintiff, and includes cases in which this intention to injure is absent but the conduct of the defendants is by itself unlawful, and in fact causes damage to the plaintiff.

41 This passage made clear that this Court agreed with the House of Lords that where a plaintiff alleges that the defendants entered into an agreement whose predominant purpose was to injure the plaintiff and where the plaintiff alleges that he or she has in fact suffered damage as a result of the agreement, then regardless of the lawfulness of the means that the defendants are alleged to have used to implement the agreement the plaintiff will have made out a cognizable claim in the tort of conspiracy.

42 But what of situations in which the plaintiff alleges that there was an agreement that involved the use of unlawful means and that resulted in the plaintiff's suffering damage? Must the plaintiff also establish that the predominant purpose of the [page985] agreement was to injure him or her? It is in answering this question that Estey J. chose to follow a somewhat different path from Lord Diplock. Estey J. was of the view that it was not appropriate to go as far as the House of Lords had gone in precluding the action. He said at pp. 471-72:

> Although the law concerning the scope of the tort of conspiracy is far from clear, I am of the opinion that whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them 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. [Emphasis added.]

43 Estey J.'s summary of the law in Canada suggests that in cases falling into the second category it may not be necessary to prove actual intent. As Fridman has noted in The Law of Torts in Canada, vol. 2, at p. 265:

> The difference between the English and Canadian formulations of the tort of conspiracy lies in the way the intent of the defendants is expressed. The language of Lord Diplock seems to indicate that the necessary intent should be actual. That of Estey J. suggests that it may be possible for a court to infer an intent to injure from the circumstances even if the defendants deny they acted with any such intent.

Fridman goes on to observe at pp. 265-66

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> In modern Canada, therefore, conspiracy as a tort comprehends three distinct situations. In the first place there will be an actionable conspiracy if two or more persons agree and combine to act unlawfully with the predominating purpose of injuring the plaintiff. Second, there will be an actionable conspiracy if the defendants combine to act lawfully with the predominating purpose of injuring the plaintiff. Third, an actionable conspiracy will exist if defendants combine to act unlawfully, their conduct is directed towards the plaintiff (or the plaintiff and others), and the likelihood of injury to the plaintiff is known to the defendants or should have been known to them in the circumstances.

In my view, this passage provides a useful summary of the current state of the law in Canada with respect to the tort of conspiracy. Whether it is "good law", it seems to me, it is not for the Court to consider in this proceeding where the issue is simply whether the plaintiff's pleadings disclose a reasonable cause of action. I agree completely with Esson J.A. that it is not appropriate at this stage to engage in a detailed analysis of the strengths and weaknesses of Canadian law on the tort of conspiracy.

44 I note that in this appeal Mr. Hunt was clearly fully aware of Estey J.'s observation in Canada Cement LaFarge Ltd. when he prepared paragraphs 18 and 19 of his statement of claim. Paragraph 18 of his statement of claim follows faithfully the first proposition that Estey J. put forward at p. 471, alleging that some or all of the defendants "conspired with each other with the predominant purpose of injuring" Mr. Hunt. Paragraph 19 of the statement of claim presents an alternative argument that is faithful to the wording of Estey J.'s second proposition, alleging that "some or all of the defendants conspired with each other to prevent by unlawful means this knowledge becoming public knowledge and, in particular, to prevent it reaching the plaintiff and others who would be exposed to the asbestos fibres in the Products, in circumstances where the defendants knew or ought to have known that injury to the plaintiff" would result. If there is a defect in Mr. Hunt's statement of claim, it is certainly not that paragraphs 18 or 19 fail to follow the language of this Court's most [page987] recent pronouncement on the conditions that must be met in order to ground a claim in the tort of conspiracy. In other words, given this Court's most recent pronouncement on the circumstances in which the law of torts will recognize such a claim, it is not "plain and obvious" that the plaintiff's statement of claim fails to disclose a reasonable claim.

45 The defendants contend, however, that this Court's recent pronouncements, as well as those of courts in England, make clear that the tort of conspiracy cannot be invoked outside a commercial law context and that it certainly cannot be invoked in personal injury litigation. They point out that in Lonrho, supra, at p. 189, Lord Diplock was not prepared to extend the tort to cover the facts of the case before him. They emphasize that Estey J. displayed a measure of sympathy for Lord Diplock's reluctance to extend the scope of the tort when he stated at p. 473 of Canada Cement LaFarge Ltd.:

> The tort of conspiracy to injure, even without the extension to include a conspiracy to perform unlawful acts where there is a constructive intent to injure, has been the target of much criticism throughout the common law world. It is indeed a commercial anachronism as so aptly illustrated by Lord Diplock in Lonrho, supra, at pp. 188-89. In fact, the action may have lost much of its usefulness in our commercial world, and survives in our law as an anomaly. Whether that be so or not, it is now too late in the day to uproot the tort of conspiracy to injure from the common law world. No doubt the reaction of the courts in the future will be to restrict its application for the very reasons that some now advocate its demise.

46 Finally, the defendants point to my observations in Frame v. Smith, [1987] 2 S.C.R. 99, where I had occasion to consider whether the tort of conspiracy might be extended to cover a case in which [page988] a father was suing his former wife for denying him access to his children. Although I was in dissent in the final result, the Court agreed with my observations about the tort of conspiracy (see La Forest J. at p. 109). The defendants place a good deal of weight on my suggestion, at p. 124, that "the criticisms which have been levelled at the tort give good reason to pause before extending it beyond the commercial context". I concluded that even although the tort could in theory be extended to the facts of Frame, it was not desirable to extend the tort to the custody and access context.

47 Not surprisingly, the defendants contend that it would be equally inappropriate to extend the tort of conspiracy to

cover the facts of this case. The difficulty I have, however, is that in this appeal we are asked to consider whether the allegations of conspiracy should be struck from the plaintiff's statement of claim, not whether the plaintiff will be successful in convincing a court that the tort of conspiracy should extend to cover the facts of this case. In other words, the question before us is simply whether it is "plain and obvious" that the statement of claim contains a radical defect.

48 Is it plain and obvious that allowing this action to proceed amounts to an abuse of process? I do not think so. While there has clearly been judicial reluctance to extend the scope of the tort beyond the commercial context, I do not think this Court has ever suggested that the tort could not have application in other contexts. While Estey J. expressed the view in Canada Cement LaFarge Ltd., supra, at p. 473, that the action had lost much of its usefulness, and while I noted in Frame v. Smith, supra, at pp. 124-25, that some have even suggested that consideration should be given to abolishing the tort entirely (see: Burns, "Civil Conspiracy: An Unwieldy Vessel Rides a Judicial Tempest" (1982), 16 U.B.C. L. Rev. 229, at p. 254), we both affirmed the ongoing existence of the tort at the date of these judgments. In my view, it would be highly inappropriate for this Court to deny a litigant who is capable of fitting his allegations into Estey J.'s two-pronged summary of the law on civil conspiracy the opportunity [page989] to persuade a court that the facts are as alleged and that the tort of conspiracy should be held to apply on these facts. While courts should pause before extending the tort beyond its existing confines, careful consideration might conceivably lead to the conclusion that the tort has a useful role to play in new contexts.

49 I note that in Frame v. Smith, supra, at p. 125, I was not prepared to extend the tort of conspiracy to the custody and access context both because such an extension was not in the best interests of children and because such an extension would not have been consistent with the rationale that underlies the tort of conspiracy: "namely that the tort be available where the fact of combination creates an evil which does not exist in the absence of combination". But in the appeal now before us it seems to me much less obvious that a similar conclusion would necessarily be reached. If the facts as alleged by the plaintiff are true, and for the purposes of this appeal we must assume that they are, then it may well be that an agreement between corporations to withhold information about a toxic product might give rise to harm of a magnitude that could not have arisen from the decision of just one company to withhold such information. There may, accordingly, be good reason to extend the tort to this context. However, this is precisely the kind of question that it is for the trial judge to consider in light of the evidence. It is not for this Court on a motion to strike out portions of a statement of claim to reach a decision one way or the other as to the plaintiff's chances of success. As the law that spawned the "plain and obvious" test makes clear, it is enough that the plaintiff has some chance of success.

50 The issues that will arise at the trial of the plaintiff's action in conspiracy will unquestionably be difficult. The plaintiff may have to make complex submissions about whether the evidence [page990] establishes that the defendants conspired either with a view to causing him harm or in circumstances where they should have known that their actions would cause him harm. He may well have to make novel arguments concerning whether it is enough that the defendants knew or ought to have known that a class of which the plaintiff was a member would suffer harm. The trial judge might conclude, as some of the defendants have submitted, that the plaintiff should have sued the defendants as joint tortfeasors rather than alleging the tort of conspiracy. But this Court's statements in Inuit Tapirisat of Canada and Operation Dismantle Inc., as well as decisions such as Dyson and Drummond-Jackson, make clear that none of these considerations may be taken into account on an application brought under Rule 19(24) of the British Columbia Rules of Court.

51 In my view, Anderson and Esson JJ.A. were entirely correct in suggesting that it should be left to the trial judge to ascertain whether the plaintiff can establish that the predominant purpose of the alleged conspiracy was to injure the plaintiff. It seems to me that they were also correct in suggesting that it should be left to the trial judge to consider the merits of any arguments that may be advanced to the effect that the "predominant purpose" test should be modified in the context of this case. Similarly, it seems to me that the argument that some of the defendants advanced, to the effect that Quebec's Business Concerns Records Act, R.S.Q. 1977, c. D-12, might limit the range of information that the defendants could produce at trial, is a matter that is not relevant to the question whether the plaintiff's statement of claim discloses a reasonable claim.

52 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 [page991] we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.

53 Finally, the defendants also submit that a cause of action in conspiracy is not available when a plaintiff has available another cause of action. Since the plaintiff has alleged in paragraph 20 of his statement of claim that the defendants engaged in various tortious acts, the defendants contend that it is not open to the plaintiff to proceed with his claim in conspiracy.

54 In my view, there are at least two problems with this submission. First, while it may be arguable that if one succeeds under a distinct nominate tort against an individual defendant, then an action in conspiracy should not be available against that defendant, it is far from clear that the mere fact that a plaintiff alleges that a defendant committed other torts is a bar to pleading the tort of conspiracy. It seems to me that one can only determine whether the plaintiff should be barred from recovery under the tort of conspiracy once one ascertains whether he has established that the defendant did in fact commit the other alleged torts. And while on a motion to strike we are required to assume that the facts as pleaded are true, I do not think that it is open to us to assume that the plaintiff will necessarily succeed in persuading the court that these facts establish the commission of the other alleged nominate torts. Thus, even if one were to accept the appellants' (defendants) submission that "upon proof of the commission of the tortious acts alleged" in paragraph 20 of the plaintiff's statement of claim "the conspiracy merges with the tort", one simply could not decide whether this "merger" had taken place without first deciding whether the plaintiff had proved that the other tortious acts had been committed.

55 This brings me to the second difficulty I have with the defendants' submission. It seems to me totally inappropriate on a motion to strike out a [page992] statement of claim to get into the question whether the plaintiff's allegations concerning other nominate torts will be successful. This a matter that should be considered at trial where evidence with respect to the other torts can be led and where a fully informed decision about the applicability of the tort of conspiracy can be made in light of that evidence and the submissions of counsel. If the plaintiff is successful with respect to the other nominate torts, then the trial judge can consider the defendants' arguments about the unavailability of the tort of conspiracy. If the plaintiff is unsuccessful with respect to the other nominate torts, then the trial judge can consider whether he might still succeed in conspiracy. Regardless of the outcome, it seems to me inappropriate at this stage in the proceedings to reach a conclusion about the validity of the defendants' claims about merger. I believe that this matter is also properly left for the consideration of the trial judge.

56 In the result the appellants have not demonstrated that those portions of the respondent's statement of claim which allege the tort of conspiracy fail to disclose a reasonable claim. They should not therefore be struck out under Rule 19(24)(a) of the British Columbia Rules of Court.

5. Disposition

57 The appeal should be dismissed with costs.

Solicitors for Carey Canada Inc.: Farris, Vaughan, Wills & Murphy, Vancouver. Solicitors for Lac d'amiante du Québec Ltée: Davis & Co., Vancouver. Solicitors for National Gypsum Co.: Koenigsberg & Russell, Vancouver. Solicitors for Atlas Turner Inc., Asbestos Corporation Limited and Bell Asbestos Mines Limited: Douglas, Symes & Brissenden, Vancouver.

Solicitors for T & N, P.L.C.: Macaulay & Company, Vancouver. Solicitors for Flintkote Mines Limited: Edwards, Kenny & Bray, Vancouver. Solicitors for George Ernest Hunt: Ladner Downs, Vancouver.

J.N. v. C.G., [2022] O.J. No. 793

Ontario Judgments

Ontario Superior Court of Justice

A. Pazaratz J.

Heard: February 18, 2022.

Judgment: February 22, 2022.

Court File No. 987/18

[2022] O.J. No. 793 | 2022 ONSC 1198

Between J.N., Applicant, and C.G., Respondent

(94 paras.)

Counsel

J.N.: Self-Represented.

Jesse Herman, Counsel, for the Respondent.

JUDGMENT

A. PAZARATZ J.

1 When did it become illegal to ask questions? *Especially in the courtroom?*

2 And when did it become unfashionable for judges to receive answers? *Especially when children's lives are at stake?*

3 How did we lower our guard and let the words "unacceptable beliefs" get paired together? *In a democracy? On the Scales of Justice?*

4 Should judges sit back as the concept of "Judicial Notice" gets hijacked from a *rule* of evidence to a *substitute* for evidence

5 And is "misinformation" even a real word? Or has it become a crass, self-serving tool to pre-empt scrutiny and discredit your opponent? To de-legitimize questions and strategically avoid giving answers. Blanket denials are almost never acceptable in our adversarial system. Each party always has the onus to prove their case and yet "misinformation" has crept into the court lexicon. A childish - but sinister - way of saying *"You're so wrong, I don't even have to explain why you're wrong."*

6 What does *any* of this have to do with family court? Sadly, these days it has *everything* to do with family court.

7 Because when society demonizes and punishes anyone who disagrees - or even dares to ask really important questions - the resulting polarization, disrespect, and simmering anger can have devastating consequences for the mothers, fathers and children I deal with on a daily basis.

8 It's becoming harder for family court judges to turn enemies into friends -- when governments are so recklessly turning friends into enemies.

9 The motion before me is a typical - and frightening - example of how far we are drifting from cherished values.

10 The father wants two children ages 12 and 10 to receive COVID vaccinations. The mother is opposed.

11 Now, answer honestly. Did the previous paragraph give you enough information to form an opinion about how this case should turn out?

12 We're all weary. We all wish COVID would just go away. But pandemic fatigue is no excuse for short-cuts and lowering our standards. We all have to guard against the unconscious bias of thinking *"Why won't these people just do what the government tells them to do?"*

13 We have to decide on the basis of the best interests of each particular child in each particular fact situation.

14 We have to rely on - and insist upon - evidence.

15 In this case the evidence provided more questions than answers.

a. The father filed two affidavits.

b. The mother filed one.

c. They both relied extensively on unsworn "exhibits", which were basically internet downloads.

d. In addition, the father relied on numerous downloads from the mother's social media accounts.

e. They both consented to my receiving these materials, to demonstrate the sources of information which each of them is relying on in formulating their respective parenting position.

16 The basic facts are not disputed:

a. The mother is 34 years old. The father is 35.

b. They were married on November 24, 2007 and separated on June 1, 2014.

c. They have three children, a 14 year old son C.B.G.; a 12 year old daughter L.E.G.; and a ten year old son M.D.G..

d. C.B.G. resides primarily with the father. L.E.G. and M.D.G. reside primarily with the mother.

e. Pursuant to final order based on minutes of settlement signed October 5, 2021, the father has sole decision-making authority with respect to the oldest child. The mother has sole decision-making authority with respect to the two children who are the subject of this motion. The order requires the parties to consult with each other prior to making major decisions for the children.

f. When the parties signed the minutes of settlement, they already knew that they disagreed about the issue of vaccinations. The minutes of settlement specified: *"The issue of the children L.E.G. and M.D.G. receiving a COVID-19 vaccine shall remain a live issue and shall be determined at a later date. The child C.B.G. can determine whether or not he wants to be vaccinated now."*

g. In fact, earlier in the pandemic the father went to court complaining the mother was being *too protective* of the children when it came to COVID. In August 2020 the father brought a motion trying to compel the children to attend school in person for the 2020-2021 school year. The mother argued that the risk of COVID exposure was too high; she was particularly concerned about the oldest child's medical vulnerability as a result of his history of asthma; and she proposed remote learning for the children until the pandemic risk subsided. On September 23,

2020 Justice Bale issued a lengthy endorsement dismissing the father's motion, and confirming that the mother's position was appropriate and in the best interests of the children.

h. In 2020 the father alleged the mother was being *too* protective about COVID. Now he's saying she's not protective enough. He brought a motion dated January 25, 2022 requesting that L.E.G. and M.D.G. receive the COVID vaccine and all recommended booster vaccines. He also asks that he be permitted to arrange the vaccinations and attend with the children, because he doesn't trust that the mother will comply even if she is ordered to do so.

i. Meanwhile, soon after the parties signed Minutes in October 2021 the older child C.B.G. elected to be vaccinated. Both parents supported his decision. He's had two shots, and the parents agree he has exhibited no adverse effects.

j. The mother insists the father is misrepresenting her position. She is not opposed to vaccines. She is offended by the pejorative term "anti-vaxxer". She has always ensured that the three children received all of their regular immunizations. She says she's open minded to vaccinating both younger children if safety concerns can be better addressed. But she says her extensive research has left her with well-founded concerns that the potential benefit of the current COVID vaccines for L.E.G. and M.D.G. is outweighed by the serious potential risks. She says there are too many unknowns, and she worries that "once children are vaxed, they can't be unvaxed."

k. The mother notes that both children have already had COVID - with minimal symptoms - and they have recovered completely. She refers to medical research which says that since they have already recovered from COVID, the children now have greater protection from future infection.

l. Both parents agree L.E.G. and M.D.G. are in excellent health, with no special medical needs or vulnerabilities.

m. Neither parent provided any evidence from a medical professional about any potential positive or negative considerations with respect to *these* children receiving COVID vaccines.

17 The mother's evidence focused entirely on the medical and scientific issues.

18 In contrast, the father focussed extensively on labelling and discrediting the mother as a person, in a dismissive attempt to argue that her views aren't worthy of consideration.

a. This odious trend is rapidly corrupting modern social discourse: Ridicule and stigmatize your opponent as a person, rather than dealing with the ideas they want to talk about.

b. It seems to be working for politicians.

c. But is this really something we want to tolerate in a court system where parental conduct and beliefs are irrelevant except as they impact on a parent's ability to meet the needs of a child?

19 For example, the father's affidavits included the following:

a. "I am aware that the Applicant has political affiliations with the People's Party of Canada. The Applicant is entitled to her personal beliefs and ideologies, but I am very fearful that it is having a direct, negative impact on the children, especially when it comes to this vaccine issue."

b. "I searched the Applicant's recent Facebook postings and was alarmed to see just how involved the Applicant is at perpetuating COVID-related conspiracy theories and vaccine hesitancy."

c. He attached "a collection of some of the Applicant's Facebook postings ..... which I believe are indicative of her personal views."

d. "The Applicant is a self-proclaimed 'PPC founding member'. In my opinion, she is openly promoting very dangerous beliefs. Surely, these thoughts and feelings are also being promoted in her household, which is where L.E.G. and M.D.G. primarily reside."

e. "I looked up what the PPC stance is on the COVID-19 vaccine and was not surprised to read under its website's "FACTS" section that "lockdowns, mask mandates, school closures and other authoritarian sanitary measures have not had any noticeable effect on the course of the pandemic." Unfortunately, no facts are actually provided."

f. He attaches a copy of the PPC's COVID Policy taken from its website.

g. "I am alarmed that the children are being exposed to the Applicant's unsupported views on the issue of the pandemic, and in particular the efficacy of the available and Government-recommended vaccines."

h. "The Applicant's anti-vaccination stance is much more severe than that of a regular concerned parent, who is unsure whether or not she wants the children to receive a relatively new vaccine. Rather, the Applicant is leading the charge, attending anti-vaccine rallies and refusing to follow COVID protocols."

i. He attaches a Facebook posting of the mother not wearing a mask "in a crowd of 10,000 people at a rally."

j. He makes other references to the mother's Facebook account, and attaches numerous pictures of her social media pages.

k. He attaches photographs of PPC leader Maxime Bernier addressing an audience.

20 Where to begin.

a. How is any of this relevant?

b. Have we reached the stage where parental rights are going to be decided based on what political party you belong to?

c. Is being seen with Maxime Bernier - or anyone, for that matter - the kiss of death, as far as your court case is concerned?

d. Can you simply utter the words "conspiracy theorist" and do a mic drop?

e. If you allege that someone is "openly promoting very dangerous beliefs", shouldn't you provide a few details. A bit of proof, maybe?

f. And if you presume that a parent believes things they shouldn't believe - can you go one step further and also presume that the parent must be poisoning their children's minds with these horrible unspecified ideas? ("*Surely, these thoughts and feelings are also being promoted in her household...")*

g. The father criticizes the mother for something she didn't say. He presumes she doubts the effectiveness of school closures, and then criticizes her for providing no evidence. But on this motion she didn't raise the issue. And back in 2020 *she* was the one who wanted to keep the children out of school, and *he* fought (unsuccessfully) for them to attend. As with other allegations, the father provides no evidence of his own, and fails to address the fact that vigorous community debate led to school closures being abandoned.

h. How far are we willing to take "guilt by association"? If you visit a website, read a book, or attend a meeting -- are you permanently tarnished by something someone else wrote or said? At what point do the "thought police" move in?

i. And really, how fine is the line between "vaccine hesitancy" and "not taking any chances with your kid"? All of the caselaw says judges have to act with the utmost caution and consider all

> relevant evidence in determining the best interests of the child. How can we then impose a lesser standard on a demonstrably excellent parent?

21 It is of little consequence that an individual litigant chooses to advance such dubious and offensive arguments. Even though the father may not admit it, this is still a free country and people can say what they want*. Including him.*

22 But there's a bigger problem here. An uglier problem.

23 We're seeing more and more of this type of intolerance, vilification and dismissive character assassination in family court. Presumably we're seeing it inside the courtroom because it's rampant outside the courtroom. It now appears to be socially acceptable to denounce, punish and banish anyone who doesn't agree with you.

24 A chilling example: I recently had a case where a mother tried to cut off an equal-time father's contact with his children, primarily because he was "promoting anti-government beliefs." And in Communist China, that request would likely have been granted.

25 But this is Canada and our judicial system has an obligation to keep it Canada.

26 I won't belabor the point, because I still have to get to my real job: determining what's in the best interests of these two children. But the word needs to get out that while the court system won't *punish* intolerance, it certainly won't reward it either.

27 All parenting issues - including health issues - must be determined based upon the best interests of the child. Last year's amendments to the *Divorce Act* (applicable in this case) and the *Children's Law Reform Act* make it mandatory for the court to include consideration of a child's views and preferences to the extent that those views can be ascertained.

28 As Justice Mandhane stated in *E.M.B. v. M.F.B*. 2021 ONSC 4264 (SCJ):

> 60. The requirement in s. 16(3)(e) to consider the "child's views and preferences" is new and is consistent with Article 12 of the *Child Rights Convention*. In the Legislative Background to the *Divorce Act* amendments, the Department of Justice explains that:
>
> Under Article 12 of the United Nations *Convention on the Rights of the Child,* children who are capable of forming their own views have the right to participate in a meaningful way in decisions that affect their lives, and parenting decisions made by judges and parents affect child directly. The weight to be given to children's views will generally increase with their age and maturity. However, in some cases, it may not be appropriate to involve the children, for example if they are too young to meaningfully participate.
>
> See also: *Official Report of Debates (Hansard)*, 42nd Parl., 1st Sess., No. 326 (26 September 2018) at p. 21866 (Hon. Jody Wilson-Raybould).
>
> 61. A human rights-based approach fundamentally recognizes children as subjects of law rather than objects of their parents. Making children more visible in legal proceedings that affect their rights is fundamentally important in Canada because children are not guaranteed legal representation in family law proceedings. Therefore, in my view, even where there is no direct evidence about the child's views and preferences, s. 16(3)(e) still requires the court should make a reasonable effort to glean and articulate the child's views and preferences wherever possible, considering the child's age and maturity and all the other evidence before it.

29 In this case, the children's views have been *independently* ascertained -- *they both don't want to receive the COVID vaccines* - but the father is asking me to ignore how they feel and force them to be vaccinated against their will. The background:

a. In 2021, in an effort to resolve parenting issues, the parties enlisted a well-respected local social worker, Michelle Hayes, to prepare a "Voice of the Child Report". The father filed Hayes' comprehensive seven-page report dated June 22, 2021.

b. For purposes of that report the children were each interviewed twice - once in the care of each parent.

c. During the interview period the mother and father had clearly identified their respective positions on vaccination. The report specifically addressed each child's views on the topic.

d. L.E.G. advised that she had discussed vaccinations with each parent privately. She knew her father favoured getting the shot and her mother didn't. L.E.G. specifically explained to Hayes the reasons why she didn't want to receive the COVID vaccines. She explained herself in some detail.

e. Similarly, M.D.G. had discussed vaccinations with each parent privately. He also knew his father promoted vaccination and his mother didn't. M.D.G. not only told Hayes he didn't want to be vaccinated, but he said he was "fearful that his father would make him." Indeed, M.D.G. told Hayes that "he wanted the judge to know his thoughts about his parenting schedule as well as the vaccine."

f. The mother says her children are mature and intelligent, and that they have come to their own conclusions without being pressured by either parent. She feels it is important to respect their clear wishes, comfort level and anxieties. She says she adopted the same position for her older son C.B.G., and when he decided he wanted to be vaccinated she was fully supportive.

g. The father says at ages 12 and 10 the children are too young to make an informed decision about this. He admits both children have expressed fear of the COVID vaccine. He suggests the younger child's views are wavering. But he's opposed to either child being interviewed again. No matter what the children say, he doesn't think the court should listen, because he feels the mother has planted these ideas in their minds. But he offered no proof of any coaching, manipulation or inappropriate statement by the mother.

h. Hayes' June 22, 2021 report was actually a follow-up to an earlier report she prepared on March 3, 2020. She has worked with the family for a long time and got to know the children quite well. The social worker expressed no concerns or suspicions about either child being manipulated or pressured by either parent. In her summary she stated: *"As in the original report, each of the children presented confidently and thoughtfully for both interviews. As they reviewed their thoughts, they each showed consistency in their views and preferences in each interview."*

30 While I agree with the father that these two children are not old enough to decide this complicated issue for themselves, I disagree with his suggestion that we should completely ignore how they feel about what they experience and what their bodies are subjected to. Rather than simplistically accept or reject what children say they want, the court must engage in a complex and sensitive analysis of the weight to be attributed to each child's stated views.

31 In *Decaen v. Decaen*, 2013 ONCA 218 the Court of Appeal set out the factors to consider when assessing a child's wishes:

a. Whether both parents are able to provide adequate care;

b. How clear and unambivalent the wishes are;

c. How informed the expression is;

d. The age of the child;

e. The maturity level;

f. The strength of the wish;

g. The length of time the preference has been expressed;

h. Practicalities;

i. The influence of the parent(s) on the expressed wish or preference;

j. The overall context; and

k. The circumstances of the preferences from the child's point of view.

32 With respect to L.E.G. and M.D.G.:

a. They have received all their regular immunizations. At ages 12 and 10 they understand the experience of getting needles. And they understand the purpose of vaccinations is to create a long-term medical consequence in their body.

b. They understand the magnitude of the COVID pandemic, and the personal and community health issues involved.

c. They understand the extended and ongoing discussion about the COVID vaccine.

d. They have both clearly and consistently stated their objection to receiving the COVID vaccine.

e. They have both outlined very specific reasons for their decision. Those reasons do not appear to be frivolous, superficial or poorly thought out.

f. Both children have sufficient age, intelligence, maturity and independence of thought to understand the issue and formulate their own views, feelings, comfort level, questions, *and fears* about what should or should not happen to their bodies.

g. They hold these views very strongly.

h. They have maintained these views for an extended period of time.

i. Despite the father's speculation, there is no evidence that the mother has inappropriately drawn the children into any sort of personal or political agenda. *Both* parents have equally engaged in appropriate and necessary discussions with the children about the many aspects of the pandemic - including vaccinations. Both parents have answered the children's questions, provided information, and stated their own beliefs. The social worker's report gives no suggestion that either parent has pressured, manipulated, or unduly influenced either child. Nor did Hayes express any concern about internal inconsistencies or ambiguities with respect to either child's strongly stated views.

33 For the past two years *all* children have been bombarded with all sorts of information about the pandemic. It has become an inescapable, oppressive part of their daily lives. Mental health experts regularly warn us that we need to be mindful of the emotional impact of this scary new world on the young mind.

34 In this case, the father doesn't like what the children are saying, so he submits their views aren't worthy of consideration - just as he submits the mother's views aren't worthy of consideration. *There's a bit of a pattern here.*

35 But when a ten-year-old child says he's afraid he'll be forced to take the vaccine - *and he specifically wants the judge to know it* - I don't think that's something the court can or should ignore.

36 Children may not have wisdom. But they have Charter rights and undeniable emotions.

37 Any best interests analysis must take into account all relevant factors, including the impact on a child's mental health if their legitimate and powerful feelings and anxieties are ignored; and if they perceive they are being violated.

38 A number of recent court decisions have grappled with this new "COVID vaccine" issue, and in particular with the issue of the weight to be given to children's views on the subject. In most of those cases the children were younger than L.E.G. and M.D.G., so "views and preferences" were either unascertainable or less relevant because of the child's lack of maturity.

39 In *McDonald v. Oates* 2022 ONSC 394 (SCJ) the court disregarded a ten-year-old's views, concluding that the child was unable to make an informed choice due to the contradictory information the child was receiving from his parents.

a. But unlike the situation with 10-year-old M.D.G., in *McDonald* there was no independent information as to the nature or strength of the child's views, and the court declined to order a Voice of the Child Report, to avoid delay.

b. Here I had the benefit of a thorough and highly informative Voice of the Child Report.

c. And unlike *McDonald*, as discussed below, I find that the objecting parent's concerns cannot be dismissed as frivolous or uninformed.

d. More to the point I find that there is no evidence that either M.D.G. or L.E.G. have been unduly influenced by either their pro-vaccine or anti-vaccine parent. I am satisfied that they came to their own conclusions, for understandable reasons.

40 In *Saint-Phard v. Saint-Phard* 2021 ONSC 6910 (SCJ) the court overruled a 13-year-old's opposition to vaccinations, as conveyed through the child's lawyer.

a. Again, the child's situation was quite different from L.E.G. and M.D.G..

b. In *Saint-Phard* the child had made inconsistent and ambiguous statements; he had been misinformed by a physician; and the court concluded he was incapable of making an informed decision.

41 In *Rouse v. Howard* 2022 ONCJ 23 (OCJ) Justice Hilliard provided a thoughtful analysis of facts more similar to the case at bar - even though the child in question was only nine.

> 17 Although Fiona is only 9, there is evidence before me that she is, at present, opposed to receiving the COVID-19 vaccine. In A.C. v. L.L., [2021] O.J. No. 4992, Justice Charney considered section 4 of the Health Care Consent Act, 1996, S.O. 1996, c. 2 (HCCA), in his analysis as to whether the mother's consent was even required for the children to be vaccinated. Justice Charney noted that the HCCA does not provide any minimum age for capacity to make medical treatment decisions. That finding accords with the Supreme Court of Canada's decision in A.C. v Manitoba (Director of Child and Family Services), 2009 SCC 30, wherein Justice Abella explained the common law "mature minor" doctrine at paragraph 47:
>
> The doctrine addresses the concern that young people should not automatically be deprived of the right to make decisions affecting their medical treatment. It provides instead that the right to make those decisions varies in accordance with the young person's level of maturity, with the degree to which maturity is scrutinized intensifying in accordance with the severity of the potential consequences of the treatment or of its refusal.
>
> 18 Unlike in A.C. **,** where the children wanted to be vaccinated, and Saint-Phard where the child only expressed opposition to being vaccinated after the influence of the mother and her doctor, Fiona's views about vaccination appear to be long-standing and in accordance with her mother's beliefs about vaccines in general. An order granting Mr. Rouse decision-making authority would result in Mr. Rouse having the ability to override Fiona's right to withhold her consent to vaccination which may have negative emotional and/or psychological consequences.

42 The determination of any child's best interests is a fact-specific exercise, based on the evidence presented -

and tested - in each case. As stated, an important - but not determinative - part of the analysis consideration of each child's views and preferences.

a. In each of the recent cases where a child's stated opposition to being vaccinated was overridden, the court made unfavourable findings with respect to the objecting parent's rationale and their inappropriate influence over the child.

b. The court concluded that the pro-vaccine parent had presented more reasonable information to the child, and more compelling arguments to the court in relation to the science.

c. In each case the court was left with more confidence in the pro-vaccine parent's parental judgment and insight on the issue of vaccinations.

43 But that's not at all what I'm dealing with in this case.

a. Despite the father's relentless campaign to dismiss the mother as some sort of lunatic, the reality is that the mother presented all her evidence and made all her oral submissions in a calm, mature, articulate, analytical, extensively researched, and entirely child-focussed manner. She is to be commended for her skillful and professional presentation as a self-represented party.

b. In contrast, the father came across as somewhat dogmatic, intolerant and paternalistic. He focussed more on discrediting the mother's ideas rather than explaining his own. And his shameless efforts to vilify the mother by ridiculing her personal beliefs bordered on hysterical.

c. I mention this to further explain why I have confidence that the mother has not inappropriately influenced the children to adopt their current views.

d. If the mother explained herself to the children the way she explained herself to me...and if the father explained himself to the children the way he explained himself to me...then I have absolutely no doubt about which of the parents communicated with the children in a more responsible manner.

44 Finally, we have the other "evidence" filed by the parents. And here we have to think carefully about what constitutes proper or sufficient evidence - and how we should apply it.

45 As with all the other recent COVID vaccine cases, the mother and the father attached dozens of pages of internet downloads to their affidavits. The fact that they both consented to my receiving all this unsworn material doesn't make it properly admissible. But at the very least, it informs me as to the type and quality of research each parent conducted in formulating their respective positions.

46 Included among the father's downloads from the internet:

a. November 23, 2021 seven page "Position Statement" from the Canadian Paediatric A Society.

b. A January 2022 five page "Caring for Kids" information sheet from the Canadian Paediatric Society.

c. A December 17, 2021 nine-page "Vaccines for Children: COVID 19" information sheet from the Government of Canada.

d. A September 24, 2021 five-page "Post COVID-19 Condition" information sheet from the Government of Canada.

e. A May 18, 2021 seven-page "Vaccines for children: Deciding to Vaccinate" information sheet from the Government of Canada.

f. A May 6, 2021 three-page "The Facts About COVID-19 Vaccines" information sheet from the Government of Canada.

g. A January 20, 2022 four-page article entitled "Vaccinated kids half as likely to get Omicron but protection fades fast" from The Times of Israel.

h. A January 14, 2022 five page article entitled "COVID-19 Cases and Hospitalizations Surge Among Children" from the Canada Communicable Disease Report.

47 Included among the mother's downloads from the internet:

a. A June 25, 2021 eight-page "Fact Sheet" issued by Pfizer, the manufacturer of one of the vaccines being proposed by the father.

b. An August 26, 2021 three-page article from the journal "Science" entitled "Having SARRS-CoV-2 once confers much greater immunity than a vaccine - but vaccination remains vital."

c. A January 31, 2012 13-page PLOS One peer-reviewed article entitled "Immunization with SARS Coronavirus Vaccines Leads to Pulmonary Immunopathology on Challenge with

the SARS virus."

d. A July 10, 2021 five-page article in the medical journal "Total Health" entitled "Are people getting full facts on COVID vaccine risks?"

e. A September 26, 2018 15 page article in the medical journal "Contagion Live" entitled "High Rates of Adverse Events Linked with 2009 H1N1 Pandemic vaccine".

f. A May 28, 2021 two-page article from the Centers for Disease Control and Prevention (CDC) entitled "Clinical Considerations: Myocarditis and Pericarditis after Receipt of mRNA COVID-19 Vaccines Among Adolescents and Young Adults."

g. An August 1, 2020 29 page research paper published by eClinicalMedicine entitled "A country level analysis measuring the impact of government actions, country preparedness and socioeconomic factors on COVID -19 mortality and related health outcomes."

h. A June 9, 2021 10 page open letter from The Evidence-Based Medicine Consultancy Ltd. research organization entitled "Urgent Preliminary report of Yellow Card data up to May 26, 2021".

i. A June 22, 2021 14 page article from the World Health Organization entitled "COVID-19 advise for the public: Get vaccinated".

48 Information obtained from the internet can be admissible if it is accompanied by indicia of reliability, including, but not limited to:

a. Whether the information comes from an official website from a well-known organization;

b. Whether the information is capable of being verified;

c. Whether the source is disclosed so that the objectivity of the person or organization posting the material can be assessed.

ITV Technologies Inc. v. WIC Television Ltd. 2003 FC 1056; *Sutton v. Ramos* 2017 ONSC 3181 (SCJ)

49 Where the threshold of "admissibility" is met, it is still up to the trier of fact to weigh and assess the information to determine the relevance, if any, with respect to the issues to be decided.

50 And since this is a motion proceeding by affidavit, we have the further limitation that even to the extent that the internet downloads are admissible, there is no opportunity for cross-examination or testing.

51 To simplify matters, the mother does not deny the authenticity or integrity of the website information submitted by the father.

a. It's mostly statements by the Government of Canada and the Canadian Pediatric Society recommending that children should receive COVID vaccinations.

b. These are the same types of downloads which courts have considered in other recent COVID vaccine cases.

c. The mother doesn't deny that these are reputable organizations. Nor does she deny that the statements and information have been prepared by qualified persons in a responsible, professional manner.

d. She doesn't deny that the father has accurately presented *one side of the story*.

e. All she asks is that the court equally consider the other side of the story. That the court allow both sides of the story to be equally presented, tested and considered. Before making an irreversible decision for her children.

52 *Evidence* and *both sides of the story*. We're in deep trouble if those become antiquated concepts.

53 In almost all cases where COVID vaccinations have been ordered the court has made a finding that, on the face of it, the internet materials presented by the objecting parent have been grossly deficient, unreliable and - at times - dubious. This lack of an equally credible counter-point to government recommendations may well have been determinative in those earlier cases.

54 But what if the objecting parent presents evidence which potentially raises some serious questions or doubts about the necessity, benefits or potential harm of COVID vaccines for children?

a. Clearly we shouldn't be too quick to embrace the naysayers.

b. But should we banish them? Without hearing from them?

c. Should we stifle and forbid a reasonable opportunity to present and test evidence, and make submissions?

d. There are obvious public policy reasons to avoid recklessly undermining confidence in public health measures.

e. But that has to be weighed against our unbridled obligation to leave no stone unturned, when it comes to protecting children.

55 For example, the mother presented a detailed fact sheet from Pfizer. This isn't one of the fringe websites dismissed in the other cases. *It's Pfizer!* The people who make the vaccine.

56 Under the heading "What Are The Risks of the Pfizer-BioNTech COVID-19 Vaccine", the company says:

> There is a remote chance that the Pfizer-BioNTech COVID-19 Vaccine could cause a severe allergic reaction. A severe allergic reaction would usually occur within a few minutes to one hour after getting a dose of the Pfizer-BioNTech COVID-19 Vaccine. For this reason, your vaccination provider may ask you to stay at the place where you received your vaccine for monitoring after vaccination. Signs of a severe allergic reaction can include:
>
> * Difficulty breathing
>
> * Swelling of your face and throat
>
> * A fast heartbeat
>
> * A bad rash all over your body

* Dizziness and weakness

Myocarditis (inflammation of the heart muscle) and pericarditis (inflammation of the lining outside the heart) have occurred in some people who have received the Pfizer-BioNTech COVID-19 Vaccine. In most of these people, symptoms began within a few days following receipt of the second dose of the Pfizer-BioNTech COVID-19 Vaccine. The chance of having this occur is very low. You should seek medical attention right away if you have any of the following symptoms after receiving the Pfizer-BioNTech COVID-19 Vaccine:

* Chest pain

* Shortness of breath

* Feelings of having a fast-beating, fluttering, or pounding heart.

Side effects that have been reported with the Pfizer-BioNTech COVID-19 Vaccine include:

* severe allergic reactions

* non-severe allergic reactions such as rash, itching, hives, or swelling of the face

* myocarditis (inflammation of the heart muscle)

* pericarditis (inflammation of the lining outside the heart)

* injection site pain

* tiredness

* headache

* muscle pain

* chills

* joint pain

* fever

* injection site swelling

* injection site redness

* nausea

* feeling unwell

* swollen lymph nodes (lymphadenopathy)

* diarrhea

* vomiting

* arm pain

These may not be all the possible side effects of the Pfizer-BioNTech COVID-19 Vaccine. Serious and unexpected side effects may occur. Pfizer-BioNTech COVID-19 Vaccine is still being studied in clinical trials.

57 It's very hard to fault a parent for being worried about such an ominous list of potentially very serious side effects.

58 Several of the earlier decisions requiring children to be vaccinated have noted that the evidence presented by the objecting parent was not reliable because the authors' credentials were either not-established or non-existent.

59 But in this case, none of the materials presented by the mother are from fringe organizations or dubious authors. To the contrary, the mother quotes extensively from leaders in the medical and scientific community.

60 For example, the article submitted by the mother "Are People Getting Full Facts on COVID Vaccine Risks?" quotes Dr. Robert W. Malone, the inventor of the mRNA vaccine. Whether he is right or wrong about the current use of COVID vaccines is a matter for discussion and determination. But with his credentials, he can hardly be dismissed as a crackpot or fringe author. The mother referred to the following excerpt from the article:

> The original inventor of the mRNA vaccine (and DNA vaccine) core platform technology currently used to create the vaccines is Dr Robert W Malone. Dr Malone has been expressing serious concerns about how therapeutic approaches that are still in the research phase are being imposed on an ill-informed public. He says that public health leadership has, "stepped over the line and is now violating the bedrock principles which form the foundation upon which the ethics of clinical research are built".
>
> Dr Malone asks why health leaders seem to be so afraid of sharing the adverse event data. He says, "Why is it necessary to suppress discussion and full disclosure of information concerning mRNA reactogenicity and safety risks?"
>
> He goes onto say that we should be analysing the safety data and risks vigorously. Again he asks, "Is there information or patterns that can be found, such as the recent finding of the cardiomyopathy signals, or the latent virus reactivation signals? We should be enlisting the best biostatistics and machine learning experts to examine these data, and the results should -- no must -- be made available to the public promptly".
>
> For any drug it has always been important to have systems in place for monitoring adverse events. However, for an experimental, genetic modifying approach that has not been fully tested, and where the public are effectively the guinea pigs, this information should be immediately and readily available. As previously reported...the fact that it is so difficult to access and make sense of ...reporting systems - along with low reporting simply raises further concern about what is actually happening.

... .

> Dr Malone says, " .. what is being done by suppressing open disclosure and debate concerning the profile of adverse events associated with these vaccines violates fundamental bioethical principles for clinical research".

> With regard to the use and abuse of misinformation, the inventor of these vaccines says that the public have to be given accurate information to allow informed consent. He says, "The suppression of information, discussion, and outright censorship concerning these current COVID vaccines which are based on gene therapy technologies cast a bad light on the entire vaccine enterprise. It is my opinion that the adult public can handle information and open discussion. Furthermore, we must fully disclose any and all risks associated with these experimental research products".

> In short, it is simply not possible to arrive at a position of informed consent unless you have access to the full facts around your options and the associated risks and benefits.

61 The same article outlines other serious concerns about COVID vaccines expressed by Dr. Bret Weinstein, Dr. Peter McCullough, Dr. Tess Lawrie, Professor Stanley S. Levinson (medicine, endocrinology, diabetes and

metabolism) and Professor Sucharit Bhakdi (awarded the Order of Merit for medical microbiology). These are well-known leaders in their fields.

62 Several other articles presented by the mother outline similar expressions of concern about the COVID vaccines from equally qualified and reputable sources worldwide.

63 For clarity:

a. I am not for one moment suggesting that we should presume the mother's experts are *right*.

b. But once we determine they're not crackpots and charlatans, how can we presume that they are *wrong*? Or that they couldn't possibly be right about any of their warnings?

c. When children's lives are at stake, how can we ignore credible warnings?

64 The following paragraphs from *Saint-Phard v. Saint-Phard* 2021 ONSC 6910 (SCJ) illustrate the approach which has been taken in a number of cases in which COVID vaccinations were approved by the court.

> 4 The decision to be made is governed by the best interests of the child: A.C. v. L.L, 2021 ONSC 6530. It is required to be based on findings of fact made from admissible evidence before the court: O.M.S. v. E.J.S, 2021 CarswellSask 547 (Q.B.); B.C.J.B. v. E.-R.R.R., 2021 CarswellOnt 13242 (S.C.J.).
>
> Judicial notice may be taken
>
> 5 Facts may be found by taking judicial notice: B.C.J.B. v. E.-R.R.R., A.P. v. L.K, 2021 ONSC 150, and A.C. v. L.L Each of these cases include findings related to the safety and efficacy of publicly funded vaccines on the basis of judicial notice. For example, in A.C. v. L.L at paragraphs 21, 23 and 25 the court made the following findings by taking judicial notice under the public documents' exception to the hearsay rule:
>
> * The COVID-19 vaccination has been approved for children aged 12-17.
>
> * All levels of government have been actively promoting vaccination against COVID-19 and expending significant resources to make it available to the public.
>
> * The safety and efficacy of the COVID-19 vaccine has been endorsed by governments and public health agencies.
>
> * The Ontario Ministry of Health website states that Pfizer-BioNTech vaccine is now licensed by Health Canada for adolescents aged 12 years and older, has been proven to be safe in clinical trials and provided excellent efficacy in adolescents, and that NACI continues to strongly recommend a complete series with an MNRA vaccine for all eligible individuals in Canada, including those 12 years of age and older, as the known and potential benefits outweigh the known and potential risks.
>
> 6 Elyon's father relied on statements made by Dr. Tam, Chief Officer of Health for Canada on the Canadian Government website recommending COVID-19 vaccinations for those between the ages of 12 and 17, stating that thorough testing has determined the vaccines to be safe and effective at preventing severe illness, hospitalization, and death from COVID-19. Dr. Kieran Moore is the Chief Medical Officer for Ontario. The father tendered his recommendation to vaccinate all youth ages 12 to 17 against COVID-19 as set out in a publication by the Ontario COVID-19 Science Advisory Table. Elyon's school is administered under the Ottawa Catholic School Board. That Board

> released a notice advising that all students over age 12 are eligible to be vaccinated for COVID-19 and stating that the vaccine is key in protecting schools from the virus.
>
> 7 Relying on these public documents and the authority of the court in A.C. v. L.L, I find that the applicable government authorities have concluded that the COVID-19 vaccination is safe and effective for children ages 12-17 to prevent severe illness from COVID-19 and have encouraged eligible children to be vaccinated.

65 And that's really what many of these cases come down to: After considering all the evidence - or often, the lack of evidence - can the court just fill in the blanks and take judicial notice of the fact that all children should get vaccinated?

a. Because if the answer is "yes", then we're wasting a lot of time and judicial resources.

b. If judges just "know" that all children should be vaccinated, then we should clearly say that that's what we're doing.

c. But equally, if that's *not* what we're supposed to be doing....then we shouldn't do it.

66 In *R.S.P. v. H.L.C.* 2021 ONSC 8362 (SCJ) Justice Breithaupt Smith recently set out a timely warning about the danger of applying judicial notice to cases where expert opinion is unclear or in dispute. It's a warning I whole heartedly adopt:

> 56 Unfortunately, the recent case of Saint-Phard v. Saint-Phard[14] does not assist in navigating medical treatment for minors because of its fatal flaw regarding judicial notice. In that case, the Court wrote: "Facts may be found by taking judicial notice. [citations omitted] Each of these cases include findings related to the safety and efficacy of publicly funded vaccines on the basis of judicial notice." This shows a misunderstanding of the purpose of taking judicial notice, which, according to the Supreme Court's definitive decision in R. v. Find 2001 SCC 32 (CanLII) (at paragraph 48) is intended to avoid unnecessary litigation over 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.
>
> 57 Judicial notice of the facts contained in government publications are "capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy." Such facts could include, for example, that there are two time zones in the Province of Ontario or that there were two deaths and 39 Intensive Care Unit admissions among Ontario children from January 15, 2020 to June 30, 2021 connected with SARS-CoV-2.
>
> 58 Judicial notice cannot be taken of expert opinion evidence. Chief Justice McLachlin for the unanimous Court in R. v. Find underscored that: "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" (at paragraph 49).
>
> 59 The acceptance of government-issued statements as evidence renders the facts published by the government agency (presumed to be a source of indisputable accuracy) admissible. Public Health Ontario's statement that two children died of SARS-CoV-2 between January 15, 2020 and June 30, 2021 is therefore admissible as fact. Public Health Ontario's publicly accessible document is admissible as proof of the truth of its contents. In contrast, a statement concerning the safety and efficacy of any medication in the prevention or treatment of any condition is, in and of itself, an opinion. Judicial notice cannot be taken of the opinion of any expert or government official that a medical treatment is "safe and effective." As judicial notice cannot be taken of expert opinion

evidence, it is illogical to reason, as was done at paragraph 12 of Saint-Phard , that an expert's "objections raised against the vaccine were directly countered by the judicial notice taken that the vaccine is safe and effective and provides beneficial protection against the virus to those in this age group." To compound the problem, this statement draws a conclusion that is overbroad (i.e. that the vaccine provides beneficial protection to all children and ought therefore to be received by the child in question) without having considered the comparative analysis of the factors in A.C. v. Manitoba 2009 SCC 30 (CanLII). As a result, reliance upon this reasoning would be misguided.

60 In submissions, I was also referred to the case of A.C. v. L.L. 2021 ONSC 6530 (SCJ) in which both parents agreed that each of their three teenage children would be permitted to make his or her own decision with respect to the COVID-19 vaccination. Two of the three children chose to have it administered and one did not. While the Court made many very concerning and overly broad comments, all are obiter dicta. None were relevant to the result ultimately reached, namely that both parents acknowledged each child's maturity in choosing whether or not to participate in the medical procedure and agreed to allow each child to make his or her own choice. With the parents having agreed upon that point, the Court was no longer obligated to make any finding as to whether receipt of the COVID-19 vaccine was in the best interests of any of the children. As the parents had agreed to respect the decisions made by their children, one of whom declined the COVID-19 vaccine, is that child now in breach of the Court's determination, at paragraph 32, that vaccination is in that child's best interests? Of what utility is the declaration in the Order portion of the decision that "[all three] children ... shall be entitled to receive the COVID-19 vaccine"? In family litigation, unsolicited judicial opinions on parenting questions already solved by the parents serve no one. I am reminded of Justice Abella's warning that: "[the analysis of a child's maturity in making medical decisions] does not mean ... that the standard is a license for the indiscriminate application of judicial discretion" A.C. v. Manitoba (paragraphs 90-91). Thus, while I commend the parents in A.C. v. L.L. for resolving the issue of each child's ability to make his or her own decision, the case itself does not assist this Court.

67 Why should we be so reluctant to take judicial notice that the government is always right?

a. Did the Motherisk inquiry teach us nothing about blind deference to "experts"? Thousands of child protection cases were tainted - and lives potentially ruined - because year after year courts routinely accepted and acted upon substance abuse testing which turned out to be incompetent.

b. What about the Residential School system? For decades the government assured us that taking Indigenous children away - and being wilfully blind to their abuse - was the right thing to do. We're still finding children's bodies.

c. How about sterilizing Eskimo women? The same thing. The government knew best.

d. Japanese and Chinese internment camps during World War Two? The government told us it was an emergency and had to be done. Emergencies can be used by governments to justify a lot of things that later turn out to be wrong.

e. Few people remember Thalidomide. It was an experimental drug approved by Canada and countries throughout the world in the late 1950's. It was supposed to treat cancer and some skin conditions. Instead it caused thousands of birth defects and dead babies before it was withdrawn from the market. But for a period of time government experts said it was perfectly safe.

f. On social issues the government has fared no better. For more than a century, courts took judicial notice of the fact that it was ridiculous to think two people of the same sex could get married. At any given moment, how many active complaints are before the courts across the Country, alleging government breaches of Charter Rights? These are vitally important debates which need to be fully canvassed.

g. The list of grievous government mistakes and miscalculations is both endless and notorious. Catching and correcting those mistakes is one of the most important functions of an independent judiciary.

h. And throughout history, the people who held government to account have always been regarded as heroes - not subversives.

i. When our government serially pays out billions of dollars to apologize for unthinkable historic violations of human rights and security - how can we possibly presume that today's government "experts" are infallible?

j. Nobody is infallible.

k. And nobody who controls other people's lives - *children's lives* - should be beyond scrutiny, or impervious to review.

68 As well, how can you take judicial notice of a moving target?

a. During the past two years of the pandemic, governments around the world - and within Canada - have constantly changed their health directives about what we should or shouldn't be doing. What works and what doesn't.

b. And the changes and uncertainty are accelerating with each passing newscast. Not a day goes by that we don't hear about COVID policies changing and restrictions being lifted.

c. Government experts sound so sure of themselves in recommending the current vaccines.

d. But they were equally sure when they told us to line up for AstraZeneca. Now they don't even mention that word.

e. Even Pfizer has changed its mind. It recently approved vaccines for kids under five. Then more recently the company changed its mind.

f. None of this is meant a criticism. Everyone is doing their best with a new and constantly evolving health crisis.

g. But how can judges take judicial notice of "facts" where there's no consensus or consistency?

69 And then we have the issue of delegation.

a. As with almost all these vaccine motions, the father asks for an order that his children receive the current COVID vaccine *"and all recommended booster vaccines."*

b. Which recommended booster vaccines?

c. When?

d. How many?

e. What will they contain?

f. Who will decide?

g. Will there be any opportunity for future judicial oversight, or will this simply be a forever commitment controlled by the government.

h. What are the health implications if children receive the current vaccine, but skip some or all of the boosters?

i. What future COVID variant will the boosters guard against? We already seem to be using the Delta vaccine to fight the Omicron variant. Will future boosters continue our pattern of using old medicine to fight new viruses?

j. These are all valid questions, requiring answers which are currently unavailable.

k. It is improper for the court to pre-determine future medical treatments at unknown times, in unknown circumstances, with decision making authority delegated to unknown persons.

l. If you can't take judicial notice of the *present,* you can't take judicial notice of the *future*.

70 As well, there is a systemic issue common to most of these COVID vaccine cases.

a. The father presented his expert evidence.

b. The mother then presented her expert evidence.

c. The father responded that the mother's theories have already been "debunked" - so we shouldn't waste time talking about them.

d. Alleging that your opponent's position has already been debunked is a common tactic these days.

e. And quite effective.

f. Because unlike *stare decisis* - the doctrine of precedent which requires judges to follow specifically cited earlier court decisions - there is no such formality to the concept of debunking.

g. All you have to do is make the blanket assertion that an opposing view has already been debunked - without providing any details - and hope that nobody asks for proof.

h. In this case, I reject the father's claim that all of the mother's concerns about COVID vaccines have already been properly considered and disproven, in a process adhering to natural justice, conducted by an appropriate judicial body.

i. Quite to the contrary, I have not been able to find any indication - in the father's evidence or in the body of COVID vaccine case law - that allegedly debunked theories have ever been properly considered or tested. In any court. Anywhere.

71 In a complex, important, and emotional case like this, it is important to remember the court's mandate:

a. I am not being asked to make a scientific determination. I am being asked to make a parenting determination.

b. I am not being asked to decide whether vaccines are good or bad.

c. I am not being asked to decide if either *parent* is good or bad.

d. My task is to determine which parent is to have decision-making authority over L.E.G. and M.D.G. with respect to the very specific and narrow issue of COVID vaccinations. Each parent has clearly identified how they would exercise such decision-making authority.

72 Pursuant to the recent, final, consent order, the two children reside primarily with the mother.

a. She has sole decision-making authority on all issues - with the exception that the parties deferred the issue of decision-making in relation to COVID vaccinations.

b. The father suggests there should be an inference that the mother was deliberately deprived of authority over this particular issue, because she could not be trusted to make the right decision.

c. I am not prepared to make any such an inference.

d. Both parents showed commendable maturity and insight in negotiating comprehensive minutes of settlement on all but one of the issues.

e. I interpret the minutes of settlement as leaving it open for the court to consider vaccinations as a stand-alone issue, to be determined solely based on the best interests of the children, and without either parent having any presumptive advantage or disadvantage in the determination.

73 With respect to the mother and father:

a. I find that they are both excellent parents.

b. The father has shown excellent parenting skills and familiarity with respect to the oldest child C.B.G. who is doing well in his care.

c. The mother has shown excellent parenting skills and familiarity with respect to L.E.G. and M.D.G. who are doing well in her care.

74 With respect to the children L.E.G. and M.D.G.:

a. I find that they are both intelligent, mature, articulate and insightful with respect to their place both within the family and within the community.

b. Both children are healthy. Their medical needs have always been properly addressed.

c. I received no professional or other evidence to suggest that there are any specific medical condition or issue which either favours or disfavours vaccination.

d. I find that both children have very specific, strongly held and independently formulated views about COVID vaccinations. Those views have been verified independently by an experienced social worker who would be alive to the possibility of parental influence or interference.

e. While the mother has strongly held views on the subject, the father has equally strongly held views. It is both understandable and appropriate that each parent has discussed the issue with

each child. I find that while each parent has expressed their preference and view on the topic, neither parent has pressured or manipulated the children.

f. I am confident that each child's view has been clear, consistent, thoughtful, and entirely understandable in all the circumstances.

75 Section16(1) of the *Divorce Act* provides that the court shall take into consideration only the best interests of a child when making a parenting order or a contact order.

76 Section 16(2) says when considering best interest factors, primary consideration is to be given to the child's physical, emotional and psychological safety, security and well-being. *Pierre v. Pierre*, 2021 ONSC 5650 (SCJ).

77 Section 16(3) sets out a list of factors for the court to consider in considering the circumstances of a child and determining best interests:

16(3) Factors to be considered

In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including

(a) the child's needs, given the child's age and stage of development, such as the child's need for stability;

(b) the nature and strength of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;

(c) each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;

(d) the history of care of the child;

(e) the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;

(f) the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;

(g) any plans for the child's care;

(h) the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;

(i) the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;

(j) any family violence and its impact on, among other things,

(i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and

(ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and

(k) any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.

78 I find that the combination of sections 16(2) ("the child's physical, emotional and psychological safety, security and well-being") and 16(3)(e) ("the child's views and preferences...") require that significant weight should be given

to each child's stated views and requests. I would be very concerned that any attempt to ignore either child's views on such a deeply personal and invasive issue would risk causing serious emotional harm and upset.

79 With respect to the positions advanced by each parent.

a. I respect the father's decision to be guided by government and health protocols.

b. I think the father did himself a disservice by focussing so much of his case on dismissive personal attacks on the mother. Those attacks are not only misguided and mean-spirited. They raise doubts about his insight with respect to the vaccine issue - and they also raise doubts about his appreciation of the nature and quality of the important relationship between the mother (as primary resident parent) and the children.

c. I equally respect the mother's decision to make exhaustive efforts to inform herself about the vaccination issue.

d. I find that the mother took a reasonable approach in acknowledging the strengths of the pro-vaccine materials, while at the same time attempting to reconcile them with contrary viewpoints and warnings issued by equally competent and credible medical professionals.

e. I find that the mother's position is more reasonable and helpful in that she invites discussion and exploration of both sides of the story, while the father seeks to suppress it.

f. I find that the father has inaccurately and somewhat unfairly characterized both the mother's position and her evidence.

g. The father has attempted to dismiss the mother as some sort of crazy anti-vaxxer. Nothing could be further from the truth. The mother's materials and submissions actually addressed the important and complex issues in more detail and with more comprehension than conveyed by the father. She has made it very clear that she has not completely rejected COVID vaccinations for L.E.G. and M.D.G.. She is simply concerned that in her view there is overwhelming evidence of unresolved safety concerns with respect to the current vaccines being administered. She has come to the conclusion that at this time the risks associated with the vaccines outweigh the benefits.

h. As well, the mother's statement that she believes "in personal choice, knowledge, understanding and informed consent" is to be viewed in a reassuring context. She has gone to extraordinary lengths to inform herself, to maintain an open mind, and to discuss the issue with her children in a balanced, enlightened, and dispassionate manner.

i. The father has attempted to dismiss the mother's supporting materials as unreliable and less persuasive than his own materials. Once again, I find his attack to be misguided and inaccurate.

j. Pro-vaccine parents have consistently (and effectively) attempted to frame the issue as a contest between reputable government experts versus a lunatic fringe consisting of conspiracy theorists, and socially reprehensible extremists. This was absolutely the wrong case to attempt that strategy. The professional materials filed by the mother were actually more informative and more thought-provoking than the somewhat repetitive and narrow government materials filed by the father.

80 This is not the kind of case where the court can say that either side is necessarily correct. Nor that the same determinations should apply for every child, no matter the circumstances.

81 With the mother's materials satisfying me that a legitimate and highly complex debate exists on the efficacy and utilization of COVID vaccines, I am not prepared to apply judicial notice as a method of resolving the issue. Anyone reading even some of the articles presented by the mother would likely conclude that these are complicated and evolving issues, and there can be no simplistic presumption that one side is right and that the other side is comprised of a bunch of crackpots. That's why the court should require evidence rather than conclusory statements.

82 The father insists the mother's views have been debunked, but he provides no example of any such determination actually having been made. It would be helpful if, once and for all, the competing positions and science could be properly explored and tested in a public trial.

83 On balance, I am satisfied that that mother's request for a cautious approach is compelling, and reinforced by the children's views and preferences which are legitimate and must be respected. The mother has consistently made excellent decisions throughout the children's lives. Her current concerns about the vaccines are entirely understandable, given the credible warnings and commentary provided by reputable sources who are specifically acquainted with this issue.

84 The mother has consistently made excellent, informed, and child-focussed decisions. In every respect she is an exemplary parent, fully attuned to her children's physical and emotional needs. She has demonstrated a clear understanding of the science. She has raised legitimate questions and concerns. I have confidence that she will continue to seek out answers to safeguard the physical and emotional health of her children.

85 She is not a bad parent - *and no one is a bad citizen* - simply by virtue of asking questions of the government.

86 At a certain point, where you have absolute confidence in a parent's insight and decision-making, you have to step back and acknowledge that they love their child; they have always done the right thing for their child...*and they will continue to do the right thing for their child*.

87 The father's motion is dismissed.

88 The mother shall have sole decision-making authority with respect to the issue of administering COVID vaccines for the children L.E.G. and M.D.G.

89 If any issues other than costs need to be addressed, counsel should arrange with the Trial Co-ordinator a time for this matter to be spoken to. This should be arranged within 10 days.

90 If only costs need to be determined, the parties should serve and file written submissions on the following timelines:

a. Mother's materials (not to exceed three pages of narrative, and not to be more than 12 pages in total including offers, with cases to be hyperlinked) by March 18, 2022.

b. Father's materials (not to exceed three pages of narrative, and not to be more than 12 pages in total including offers, with cases to be hyperlinked) by April 1, 2022.

c. Any reply by mother (not to exceed two pages) by April 11, 2022.

POSTSCRIPT:

91 It's irrelevant to my decision and it's none of anyone's business.

92 But I am fully vaccinated. My choice.

93 I mention this because I am acutely aware of how polarized the world has become.

94 We should all return to discussing *the issues* rather than making presumptions about one another.

A. PAZARATZ J.

Supreme Court of India
Jacob Puliyel vs Union Of India on 2 May, 2022
Author: L. Nageswara Rao
Bench: L. Nageswara Rao, B.R. Gavai

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
Writ Petition (Civil) No. 607 of 2021

JACOB PULIYEL ..PETITIONER

Versus

UNION OF INDIA & ORS. ..RESPONDENTS

JUDGMENT

L. NAGESWARA RAO, J.

1. The Petitioner was a member of the National Technical Advisory Group on Immunization (NTAGI) and was advising the Government of India on vaccines. He has filed this Writ Petition in public interest seeking the following reliefs:

> (a) Direct the respondents to release the entire segregated trial data for each of the phases of trials that have been undertaken with respect to the vaccines being administered in India; and
>
> (b) Direct the respondent No 2 to disclose the detailed minutes of the meetings of the Subject Expert Committee and the NTGAI with regard to the vaccines as directed by the 59th Parliamentary Standing Committee Report and the members who constituted 1 | Page the committee for the purpose of each approval meeting; and
>
> (c) Direct the respondent No.2 to disclose the reasoned decision of the DCGI granting approval or rejecting an application for emergency use authorization of vaccines and the documents and reports submitted to the DCGI in support of such application; and
>
> (d) Direct the respondents to disclose the post vaccination data regarding adverse events, vaccinees who got infected with Covid, those who needed hospitalization and those who died after such infection post vaccination and direct the respondents to widely publicize the data collection of such adverse event through the advertisement of toll free telephone numbers where such complaints can be registered; and

(e) Declare that vaccine mandates, in any manner whatsoever, even by way of making it a precondition for accessing any benefits or services, is a violation of rights of citizens and unconstitutional; and

(f) Pass any other orders as this Hon'ble Court deems fit.

2. In the Writ Petition, the Petitioner highlighted the adverse consequences of emergency approval of vaccines in India, the need for transparency in publishing segregated clinical trial data of vaccines, the need for disclosure of clinical data, lack of transparency in regulatory approvals, minutes and constitution of the expert bodies, imperfect evaluation of Adverse Events Following Immunisation (AEFIs) 2 | Page and vaccine mandates in the absence of informed consent being unconstitutional. The Petitioner further stated in the Writ Petition that coercive vaccination would result in interfering with the principle of informed self-determination of individuals, protected by Article 21 of the Constitution of India.

3. Notice was issued in the Writ Petition on 09.08.2021. An additional affidavit was filed by the Petitioner on 03.09.2021 raising additional grounds. It was averred in the additional affidavit that natural immunity is long-lasting and robust in comparison to vaccine immunity and that vaccines do not prevent infection or transmission of COVID-19. The Petitioner further stated that vaccines are not effective in preventing against infection from new variants of COVID-19. The Petitioner relied on news articles on the fourth nationwide serological survey conducted by Indian Council of Medical Research (ICMR) in June and July, 2021, according to which up to two-thirds of the Indian population above the age of 6 years had already been infected with COVID-19 and had antibodies specific to the SARS-CoV-2 virus. The Petitioner relied upon other news articles and research studies conducted to state that there had been breakthrough infections even amongst vaccinated people. Urging that 3 | Page research has shown that vaccinated people also transmit the virus, the Petitioner contended that vaccine mandates are meaningless.

4. The Petitioner filed an Interlocutory Application seeking a direction to restrain all authorities and institutions, public and private, from mandating the vaccine in any manner whatsoever, on a precondition of accessing any service or on pain of any penalty. The Petitioner has drawn the attention of this Court to various restrictions that were placed by State Governments, other employers and educational institutions on unvaccinated individuals. The Petitioner contended that mandating vaccination for access to resources, public places and means of earning livelihood would be in violation of their fundamental rights, especially so, when scientific studies have shown that unvaccinated persons do not pose more danger of transmission of the virus when compared to vaccinated persons.

5. Respondent No. 1, the Union of India, has raised a preliminary objection regarding the maintainability of the Writ Petition. The Union of India has further contended that the serious threat posed by the unprecedented pandemic which had devastating effects on the entire world called for emergency measures. It is accepted world over that 4 | Page vaccination for COVID-19 is necessary to avoid infection. India was one of the few countries in the world which succeeded in manufacturing vaccines for protection from COVID-19, one of which was COVAXIN, Indias

indigenous vaccine and the other being COVISHIELD, which was manufactured by Serum Institute of India with technology transfer from AstraZeneca / Oxford University. The country started one of the largest inoculation programmes in the world in larger public interest, while tackling challenges of vaccine hesitancy, effect of the second wave of the pandemic and other such adverse circumstances. The Union of India expressed serious doubts about the intention of the Petitioner in filing this Writ Petition. As we have not seen the end of the pandemic caused due to the COVID-19 virus, any interference with the steps taken by the Union on the basis of the advice given by the NTAGI and other expert bodies would provide impetus to the already prevailing vaccine hesitancy in certain sections of the society. In their counter-affidavit, the Union of India reminded us that decisions of domain experts should not normally be interfered with in judicial review and that this Court should not sit in appeal over a scientific process undertaken by domain experts on a subject which is not the expertise of any judicial forum. The long-

5 | Page drawn procedure for making applications for issuance of licenses for manufacturing vaccines and the statutory regime governing the same have been referred to in the counter- affidavit to emphasize that the Union of India has not been remiss in grant of emergency licences. There is a detailed procedure for approval with checks at every stage which has been followed for grant of emergency approval. In so far as disclosure of clinical trial data is concerned, the Union of India referred to the National Ethical Guidelines for Biomedical and Health Research involving Human Participants published by the ICMR, which require privacy and confidentiality of human participants to be maintained. Accordingly, the Union of India contended that such details pertaining to identity and records of the participants in the clinical trial data cannot be disclosed to the public as per the prevailing statutory regime. It was asserted by the Union of India that the remaining data has already been made available in the public domain.

6. On the subject of monitoring of AEFIs, the Union of India brought to our attention established procedures and protocols in place for surveillance of AEFIs established under the National Adverse Event Following Immunisation Surveillance Guideline. Further, the multi-tier structure 6 | Page comprising AEFI Committees at the state and national levels, providing guidance, carrying out investigation and causality assessment was elaborated upon. Details of the procedures followed in accordance with globally accepted practices were highlighted in the counter-affidavit. According to the Union of India, all cases of serious and severe AEFI, including reported deaths, are subjected to scientific and technical review process with causality assessments done at the state and national levels by trained experts to ascertain whether a particular AEFI can be attributed to the vaccine. In the counter-affidavit, it was also made clear that COVID-19 vaccination is voluntary and that the Government of India encourages all individuals to take vaccination in the interest of public health, as the individuals ill health has a direct effect on the society. It was also made clear that COVID-19 vaccination is not linked to any benefits or services.

7. Counter-affidavits have been filed by other Respondents as well. The vaccine manufacturers, i.e., Respondents Nos. 4 and 5, have brought to the notice of this Court that approval to their vaccines was granted after strict compliance of the procedure prescribed. The States of Tamil Nadu, Maharashtra, Delhi and Madhya Pradesh have also filed counter-affidavits, justifying the restrictions that were 7 | Page placed on unvaccinated persons in public interest. The details of the

restrictions have been discussed later.

8. We have heard Mr. Prashant Bhushan, learned counsel for the Petitioner, Mr. Tushar Mehta, learned Solicitor General of the Union of India, Mr. S. Guru Krishnakumar, learned Senior Counsel for Respondent No. 4, Mr. Amit Anand Tiwari, learned Additional Advocate General for the State of Tamil Nadu, Mr. Rahul Chitnis, learned counsel for the State of Maharashtra, Ms. Mrinal Gopal Elker, learned counsel for the State of Madhya Pradesh and Ms. Shyel Trehan, learned counsel for Respondent No. 5.

Preliminary Issues I. Maintainability

9. The learned Solicitor General raised a preliminary objection as to the maintainability of the Writ Petition which is filed in public interest. He stated that this Writ Petition, if entertained, would harm public interest, as any observation made by this Court against vaccination would result in potential threat of vaccine hesitancy.

10. The Petitioner is a paediatrician, who was a member of the NTAGI earlier. It has been stated in the Writ Petition that he has a number of publications in internationally peer- reviewed medical journals to his credit. The Petitioner 8 | Page strongly believes that there cannot be coercive vaccination, especially of inadequately tested vaccines, which amounts to an intrusion into the individuals personal autonomy. He is also of the firm opinion that an individual is deprived of the opportunity to give informed consent in the absence of availability of segregated data of clinical trials of the vaccines. He has also aired further grievances pertaining to poor evaluation and reporting of AEFIs.

11. This Court is entitled to entertain a public interest litigation moved by a person having knowledge in the subject-matter of the lis and, thus, having an interest therein, as contradistinguished from a busybody, in the welfare of people1. The Union of India has objected to the maintainability of the Writ Petition on the ground that the questions raised by the Petitioner may result in raising doubts in the minds of the citizenry about the vaccination, adding to the already existing vaccine hesitancy in the country. The consequence would be a debilitating effect on public health and therefore, the petition cannot be said to be in public interest. In other words, the maintainability of the Writ Petition is raised on the ground that the sensitive issue of vaccination should not be dealt with by this Court, as it 1 Indian Banks Association, Bombay v. Devkala Consultancy Service (2004) 11 SCC 1 9 | Page has the propensity of fuelling doubts about the efficacy of the vaccines.

12. From the rejoinder affidavit submitted by the Petitioner, we note that a petition had been filed by the Petitioner earlier, during his tenure as a member of the NTAGI, with respect to the Rotavac vaccine claiming that adequate data from the clinical trials had not been provided to the NTAGI. The rejoinder affidavit further states that the petition was dismissed by this Court, on the ground that the Petitioner could not have filed the said petition while being a member of the NTAGI. The enthusiasm of the Petitioner in approaching this Court has not gone unobserved. However, as the issues raised by the Petitioner have a bearing on public health and pertain to the fundamental rights

of the countrys populace, we are of the opinion that they warrant due consideration by this Court. Therefore, we are not inclined to entertain the challenge mounted by the Union of India to the maintainability of the Writ Petition. II. Judicial review of executive decisions based on expert opinion

13. Yet another ground taken by the Union of India is that this Court has to yield to executive decision and action in the matter of administration of drugs / vaccines. The existence 10 | P a g e of any other possible view cannot enable this Court to interfere in matters relating to opinion of domain experts by sitting in appeal over such decisions, while adjudicating a writ petition filed under Article 32 of the Constitution. The learned Solicitor General supported the stand of the Union of India with reference to the law laid down by this Court in Academy of Nutrition Improvement v. Union of India 2, G. Sundarrajan v. Union of India 3 and Shri Sitaram Sugar Company Ltd. v. Union of India 4. Further, the learned Solicitor General relied upon the judgments of the Supreme Court of the United States (hereinafter, the US Supreme Court) in Henning Jacobson v.

Commonwealth of Massachusetts5, Zucht v. King6 and in Docket No. 21A240 titled Joseph R. Biden v. Missouri dated 13.01.2022 and the judgment of the Supreme Court of New South Wales (hereinafter, the NSW Supreme Court) in Kassam v. Hazzard; Henry v. Hazzard 7 to bolster his submissions that courts should not lightly interfere with matters of policy concerning the safety and health of the people and it is not the courts function to determine the 2 (2011) 8 SCC 274 3 (2013) 6 SCC 620 4 (1990) 3 SCC 223 5 197 US 11 (1905) 6 260 US 174 (1922) 7 [2021] NSWSC 1320 11 | P a g e merits of the exercise of power by the executive. The learned Solicitor General was joined by Mr. Amit Anand Tiwari, learned Additional Advocate General for the State of Tamil Nadu, in emphasising the limited scope of judicial review in matters of policy framed on the basis of expert opinion.

14. In opposition, the Petitioner argued that matters of public importance involving invasion of fundamental rights of individuals cannot be brushed aside by this Court on the ground that they are beyond the jurisdiction of this Court. This Court has a duty to safeguard the fundamental rights of individuals and issues raised herein are of seminal importance which ought to be decided after assessing the relevant material placed before this Court by both sides. Mr. Bhushan referred to the judgement of the High Court of New Zealand in Ryan Yardley v. Minister for Workplace Relations and Safety8 in support of his submission that the scientific data and evidence that was produced before the High Court of New Zealand was assessed to adjudge the efficacy of vaccines in preventing transmission of the COVID- 19 virus.

8 [2022] NZHC 291 12 | P a g e

15. It was further argued by Mr. Bhushan that the judgments relied upon by the Union of India are not applicable to the facts of this case. He relied upon the judgments of this Court in Delhi Development Authority v. Joint Action Committee, Allottee of SFS Flats 9, Directorate of Film Festivals v. Gaurav Ashwin Jain 10 and an order of this Court in Distribution of Essential Supplies and Services During Pandemic, In re 11 and submitted that policy decisions taken by the executive are not beyond the scope of judicial review, if they are manifestly arbitrary or unreasonable.

16. Before examining the parameters of judicial review in this case, it is profitable to refer to judgments from beyond our borders which have dealt with the scope of judicial review in matters relating to public health and vaccinations, in particular. Compulsory vaccination against small pox was the subject-matter of Jacobson (supra) decided in 1905. The US Supreme Court was of the opinion that the mandate of the local government for compulsory vaccination was binding on every individual. The safety and health of the people has to be protected by the government and the judiciary is not 9 (2008) 2 SCC 672 10 (2007) 4 SCC 737 11 (2021) 7 SCC 772 13 | P a g e competent to interfere with decisions taken in the interest of public health. The Court can interfere by way of judicial review of legislative action in matters of public health only when there is no real or substantial relation to the object of the legislation or when there is plain, palpable invasion of rights secured by fundamental law and thereby, give effect to the Constitution.

17. In the wake of the COVID-19 pandemic, restrictions on attendance at religious services in areas classified as red or orange zones were imposed by an executive order issued by the Governor of New York. The said restrictions were challenged on the ground that they violate the free exercise clause of the First Amendment of the Constitution of the United States. By a majority of 6:3, the US Supreme Court in Roman Catholic Diocese v. Cuomo12 granted injunctive relief on being satisfied that the executive order struck at the very heart of the First Amendments guarantee of religious liberty. While doing so, the US Supreme Court observed that the members of the Court are not public health experts and they should respect the judgment of those with special expertise and responsibility in this area. However, the Constitution cannot be put away and forgotten even in a 12 141 S. Ct. 63 (2020) 14 | P a g e pandemic. Gorsuch, J., who wrote a concurring opinion, observed that Jacobson (supra) hardly supports cutting the Constitution loose during a pandemic. Jacobson (supra) was distinguished by Gorsuch, J., who held that the Court did not interfere with the challenged law in Jacobson (supra) only because it did not contravene the Constitution of the United States or infringe any right granted or secured by it. A word of caution sounded by Gorsuch, J. is to the effect that the Court cannot stay out of the way in times of crisis, when the Constitution is under attack. In his dissent, Roberts, C.J. held that the injunction sought would not be in public interest, especially when it concerns public health and safety needs which calls for swift government action in everchanging circumstances. He relied upon the earlier order passed by the US Supreme Court in South Bay United Pentecostal Church v. Newsom 13 wherein it was recognised that courts must grant elected representatives broad discretion when they undertake to act in areas fraught with medical and scientific uncertainties.

18. Biden v. Missouri (supra) related to vaccine mandates for healthcare providers. The Secretary of Health and Human Services issued a rule on being convinced that vaccination of 13 140 S. Ct. 1613 (2020) 15 | P a g e healthcare workers in facilities in the Medicare and Medicaid Programs against COVID19 was necessary for the health and safety of individuals to whom care and services are furnished. The said rule was challenged and the US District Courts for the Western District of Louisiana and the Eastern District of Missouri each entered preliminary injunctions against its enforcement. The appeals filed against the said injunction were rejected by the Fifth Circuit in Louisiana and the Eighth Circuit in Missouri. Aggrieved thereby, the Government moved the US Supreme Court seeking for a stay on the preliminary injunctions passed by the US District Courts. While granting stay of the preliminary injunctions, by its plural opinion the US Supreme Court held

that the role of courts in reviewing decisions taken by the executive should be to ensure that the executive has acted within a zone of reasonableness.

19. Having been aggrieved by certain orders of the Minister for Health and Medical Research that required people working in the construction, aged care and education sectors to be compulsorily vaccinated, Al-Munir Kassam and three others, along with Natasha Henry and five others, approached the NSW Supreme Court challenging the 16 | P a g e constitutional validity of the decision. While considering the grounds of challenge, the NSW Supreme Court in Kassam v. Hazzard (supra) was of the view that it is not the Courts function to determine the merits of the exercise of the power by the Minister to make the impugned orders, much less for the court to choose between plausible responses to the risks to the public health posed by the Delta variant . The NSW Supreme Court further observed that it is not the courts function to conclusively determine the effectiveness of some of the alleged treatments for those infected or the effectiveness of COVID-19 vaccines, especially their capacity to inhibit the spread of the disease, which are all matters of merits, policy and fact for the decision maker and not the court. The NSW Supreme Court emphasised that its only function is to determine the legal validity of the impugned orders. The said view of the NSW Supreme Court was approved by the New South Wales Court of Appeal in Kassam v. Hazzard; Henry v. Hazzard14.

20. The Minister for Workplace Relations and Safety passed COVID-19 Public Health Response (Specified Work Vaccinations) Order 2021, by which it was determined that work carried out by certain police and defence force 14 [2021] NSWCA 299 17 | P a g e personnel could only be undertaken by workers who have been vaccinated. Three police and defence force workers who did not wish to be vaccinated sought judicial review of the said order before the High Court of New Zealand (hereinafter, the NZ High Court). While adjudicating the dispute, the NZ High Court in Ryan Yardley (supra) expressed its opinion that the choices made by governments on their response to COVID-19 involve wide policy questions, including decisions on the use of border closures, lockdowns, isolation requirements, vaccine mandates and many other measures, which are decisions for the elected representatives to make. The NZ High Court made it clear that the Court addresses narrower legal questions and the Courts function is not to address the wider policy questions. While referring to the evidence of experts, the NZ High Court stressed on the institutional limitations on the Courts ability to reach definitive conclusions but clarified that the Court must exercise its constitutional responsibility to ensure that decisions are made lawfully. While relying upon a judgment of the Court of Appeal of New Zealand in Ministry of Health v. Atkinson15, the NZ High Court held that the Crown has the burden to demonstrate that a limitation of a fundamental 15 [2012] NZCA 184 18 | P a g e right is demonstrably justified. We have come to know that in the time since the judgment in this matter was reserved, the decision of the NZ High Court in Ryan Yardley (supra) has been appealed by the Government of New Zealand before the New Zealand Court of Appeal.

21. We shall now proceed to analyse the precedents of this Court on the ambit of judicial review of public policies relating to health. It is well settled that the Courts, in exercise of their power of judicial review, do not ordinarily interfere with the policy decisions of the executive unless the policy can be faulted on grounds of mala fide, unreasonableness, arbitrariness or unfairness etc. Indeed,

arbitrariness, irrationality, perversity and mala fide will render the policy unconstitutional16. It is neither within the domain of the courts nor the scope of judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are the courts inclined to strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical17. Courts do not and cannot act as 16 Ugar Sugar Works Ltd. v. Delhi Administration (2001) 3 SCC 635 17 Villianur Iyarkkai Padukappu Maiyam v. Union of India (2009) 7 SCC 561 19 | P a g e appellate authorities examining the correctness, suitability and appropriateness of a policy, nor are courts advisors to the executive on matters of policy which the executive is entitled to formulate. The scope of judicial review when examining a policy of the Government is to check whether it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution, or opposed to any statutory provision or manifestly arbitrary 18.

22. This Court in a series of decisions has reiterated that courts should not rush in where even scientists and medical experts are careful to tread. The rule of prudence is that courts will be reluctant to interfere with policy decisions taken by the Government, in matters of public health, after collecting and analysing inputs from surveys and research. Nor will courts attempt to substitute their own views as to what is wise, safe, prudent or proper, in relation to technical issues relating to public health in preference to those formulated by persons said to possess technical expertise and rich experience19. Where expertise of a complex nature is expected of the State in framing rules, the exercise of that power not demonstrated as arbitrary must be presumed to 18 Directorate of Film Festivals v. Gaurav Ashwin Jain (2007) 4 SCC 737 19 Academy of Nutrition Improvement v. Union of India (2011) 8 SCC 274 20 | P a g e be valid as a reasonable restriction on the fundamental right of the citizen and judicial review must halt at the frontiers. The Court cannot re-weigh and substitute its notion of expedient solution. Within the wide judge-proof areas of policy and judgment open to the government, if they make mistakes, correction is not in court but elsewhere. That is the comity of constitutional jurisdictions in our jurisprudence. We cannot evolve a judicial policy on medical issues. All judicial thought, Indian and Anglo-American, on the judicial review power where rules under challenge relate to a specialised field and involve sensitive facets of public welfare, has warned courts of easy assumption of unreasonableness of subordinate legislation on the strength of half-baked studies of judicial generalists aided by the ad- hoc learning of counsel. However, the Court certainly is the constitutional invigilator and must act to defend the citizen in the assertion of his fundamental rights against executive tyranny draped in disciplinary power.20

23. There is no doubt that this Court has held in more than one judgment that where the decision of the authority is in regard to a policy matter, this Court will not ordinarily interfere since decisions on policy matters are taken based 20 Pyarali K. Tejani v. Mahadeo Ramchandra Dange (1974) 1 SCC 167 21 | P a g e on expert knowledge of the persons concerned and courts are normally not equipped to question the correctness of a policy decision. However, this does not mean that courts have to abdicate their right to scrutinise whether the policy in question is formulated keeping in mind all the relevant facts and the said policy can be held to be beyond the pale of discrimination or unreasonableness, bearing in mind the material on record.21 In Delhi Development Authority (supra), this Court held that an executive order termed as a policy decision is not beyond the pale of judicial review. Whereas the superior courts may not interfere with the nitty- gritty of the policy, or

substitute one by the other but it will not be correct to contend that the court shall lay its judicial hands off, when a plea is raised that the impugned decision is a policy decision. Interference therewith on the part of the superior court would not be without jurisdiction as it is subject to judicial review. It was further held therein that the policy decision is subject to judicial review on the following grounds:

a) if it is unconstitutional;

b) if it is dehors the provisions of the Act and the regulations;

21 Union of India v. Dinesh Engineering Corporation (2001) 8 SCC 491 22 | P a g e

c) if the delegatee has acted beyond its power of delegation;

d) if the executive policy is contrary to the statutory or a larger policy.

24. During the second wave of COVID-19 pandemic, this Court in Distribution of Essential Supplies & Services during Pandemic (supra), to which one of us was a party (L Nageswara Rao, J.), dealt with issues of vaccination policy, pricing and other connected issues. While doing so, this Court held that policy-making continues to be the sole domain of the executive and the judiciary does not possess the authority or competence to assume the role of the executive. It was made clear that the Court cannot second guess the wisdom of the executive when it chooses between two competing and efficacious policy measures. However, it continues to exercise jurisdiction to determine if the chosen policy measure conforms to the standards of reasonableness, militates against manifest arbitrariness and protects the right to life of all persons.

25. There can be no ambiguity in the principles of law relating to judicial review laid down by this Court. A perusal of the judgments referred to above would clearly show that this Court would be slow in interfering with matters of policy, 23 | P a g e especially those connected to public health. There is also no doubt that wide latitude is given to executive opinion which is based on expert advice. However, it does not mean that this Court will not look into cases where violation of fundamental rights is involved and the decision of the executive is manifestly arbitrary or unreasonable. It is true that this Court lacks the expertise to arrive at conclusions from divergent opinions of scientific issues but that does not prevent this Court from examining the issues raised in this Writ Petition, especially those that concern violation of Article 21 of the Constitution of India.

26. Identifying the issues in the present matter, they can be divided as follows:

I. Vaccine mandates being violative of Article 21 of the Constitution of India.

II. Non-disclosure of segregated clinical trial data in public domain.

III. Improper collection and reporting of AEFIs.

IV. Vaccination of children.

I. Vaccine Mandates

A. Submissions

27. Mr. Bhushan submitted that there is nothing wrong in the Government encouraging the people to get vaccinated. However, coercive vaccination from the pain of denial of essential services is plainly unconstitutional, being violative 24 | P a g e of the principle of bodily autonomy and the right to access ones means of livelihood. Though the Union of India has made a categorical submission that vaccines are voluntary, the State Governments have been placing restrictions on unvaccinated people by denying them access to public places and services. He referred to: (i) an order passed by the Government of NCT of Delhi on 08.10.2021 by which government employees, including frontline workers and healthcare workers, as well as teachers and staff working in schools and colleges were not to be allowed to attend their respective offices and institutions without the first dose of vaccination with effect from 16.10.2021; (ii) a directive issued by the Government of Madhya Pradesh on 08.11.2021 stating that it was mandatory to be vaccinated with two doses of the vaccine to get food grains at fair price shops;

(iii) an order passed by the Government of Maharashtra dated 27.11.2021 requiring persons to be fully vaccinated if they are connected with any program, event, shop, establishment, mall and for utilising public transport; (iv) an order issued by the Government of Tamil Nadu dated 18.11.2021 permitting only vaccinated people into open, public places, schools, colleges, hostels, boarding houses, factories and shops; and other instances where students in 25 | P a g e the age group of 15 to 18 years were not permitted to appear for their examinations without being vaccinated.

28. Mr. Bhushan contended that there is need to balance individuals rights with public interest concerning health. According to him, vaccine mandates can be on the basis of efficacy and safety of vaccination and prevention of transmission. He submitted that there is sufficient evidence to the effect that natural immunity acquired from a COVID-19 infection is long-lasting and robust in comparison to vaccine immunity. Studies also indicate that vaccines do not prevent infection from the virus or transmission amongst people. Vaccines are also ineffective in preventing infection from new variants. According to serological studies, 75 per cent of the Indian population has already been infected and is seropositive and, therefore, they have better immunity to infection than what is provided by the vaccines. The vaccines which are being administered in this country are only authorised for emergency use and the procedure for clinical trials of such vaccines has not been fully complied with. In view of the lack of transparency in disclosure of trial data resulting in absence of informed consent, any vaccine mandate would be unconstitutional. Mr. Bhushan contended that every individual has personal autonomy and cannot be 26 | P a g e forced to be vaccinated against his will. For the said proposition, he relied on the judgments of Common Cause (A Registered Society) v. Union of India 22, Aruna Ramachandra Shanbaug v. Union of India 23 and K. S. Puttaswamy v. Union of India24. Imposing restrictions on the rights of persons who are unvaccinated is totally unwarranted as there is no basis for discriminating against unvaccinated persons. He relied upon scientific studies, opinions of experts and news articles to contend that vaccinated people are also prone to infection and there is no difference between a vaccinated individual and an unvaccinated person with respect to transmission of the virus. As there is no

serious threat of spread of the virus by an unvaccinated person in comparison to a vaccinated person, placing restrictions on unvaccinated persons is meaningless.

29. Per contra, the learned Solicitor General of India contended that more than 180 crore doses had been administered, resulting in a substantial number of individuals in the country being vaccinated. He submitted that the vaccines have proved to be effective and safe and any indulgence by this Court would result in vaccine hesitancy. 22 (2018) 5 SCC 1 23 (2011) 4 SCC 454 24 (2017) 10 SCC 1 27 | P a g e The Government had taken extra care to appoint various committees to examine the efficacy, safety, immunogenicity, pharmacodynamics of the vaccines before granting approvals. Some of the material placed before this Court to bolster the Union of Indias submissions have been listed below:

(a) Science Brief: SARS-CoV-2 Infection-induced and Vaccine-induced immunity of the United States Centers for Disease Control and Prevention (CDC) updated as on 29.10.2021, which in its conclusion states that: Numerous immunologic studies and a growing number of epidemiologic studies have shown that vaccinating previously infected individuals significantly enhances their immune response and effectively reduces the risk of subsequent infection, including in the setting of increased circulation of more infectious variants. Although the Delta variant and some other variants have shown increased resistance to neutralization by both post-infection and post-vaccination sera in laboratory studies, observed reduction in effectiveness has been modest, with continued strong protection against hospitalization, severe disease and death. 28 | P a g e

(b) A study conducted by researchers of Christian Medical College, Vellore25, wherein it has been concluded as follows: Among symptomatic COVID-19 patients, prior vaccination with either Covishield or Covaxin® impacted the severity of illness and reduced mortality when compared with unvaccinated patients. Full vaccination conferred a substantially higher protective effect over partial vaccination. The results of the study also indicate that compared with unvaccinated patients, partially vaccinated patients had milder disease, reduced requirement of oxygen, hospital admission, ICU admission and mortality. Again, when fully vaccinated patients were compared with unvaccinated individuals, full vaccination was associated with significantly less disease severity, requirement of respiratory supports, hospital admission, ICU admission and mortality. The study further showed that majority of the patients screened who required hospitalisation were unvaccinated.

25 Abhilash, Kundavaram Paul Prabhakar et al. Impact of prior vaccination with CovishieldTM and Covaxin® on mortality among symptomatic COVID-19 patients during the second wave of the pandemic in South India during April and May 2021: a cohort study. Vaccine vol. 40,13 (2022): 2107-2113 29 | P a g e

(c) A study conducted by researchers of All India Institute of Medical Sciences (AIIMS), New Delhi26, which states that: We evaluated the association between COVID-19 vaccination status (the number of vaccine shots received and time interval since the last dose) and the vaccines clinical efficacy in India in preventing the disease and its severity. This study has several noteworthy findings. Firstly, both the Indian vaccines provided a significant protective role in preventing the disease among people who had a clinical suspicion of COVID-19. Secondly, These vaccines protected

from progression to a severe form of the disease among the patients who turned RT- PCR positive despite getting vaccinated. The probability of hospitalisation was about eight times less, and ICU admission/death was about fourteen times lesser among fully vaccinated patients in comparison to unvaccinated RT-PCR positive patients. Thirdly, the protective efficacy of the vaccines had a dose-dependent effect. The effectiveness is maximum among individuals who 26 Aakashneel Bhattacharya, Piyush Ranjan, Tamoghna Ghosh, Harsh Agarwal, Sukriti Seth, Ganesh Tarachand Maher, Ashish Datt Upadhyay, Arvind Kumar, Upendra Baitha, Gaurav Gupta, Bindu Prakash, Sada Nand Dwivedi, Naveet Wig Evaluation of the dose- effect association between the number of doses and duration since the last dose of COVID-19 vaccine, and its efficacy in preventing the disease and reducing disease severity: A single centre, cross-sectional analytical study from India Diabetes & Metabolic Syndrome: Clinical Research & Reviews Volume 15, Issue 5 (2021), 102238 30 | P a g e received both doses of vaccination at least two weeks before the onset of their symptoms.

(d) A study conducted by researchers of AIIMS, Patna 27, which concludes as follows: COVID-19 vaccination was found to be effective in infection prevention. One out of two and four out of five individuals were found to be protected against SARS-CoV-2 infection following partial and full vaccination, respectively. The vaccinated individuals had lesser LOS compared to unvaccinated ones. Additionally, the fully vaccinated individuals were less likely to develop severe disease. LOS herein refers to the length of hospital stays.

30. On behalf of the State of Tamil Nadu, Mr. Amit Anand Tiwari, learned Additional Advocate General, submitted that the restrictions placed by way of the circular dated 18.11.2021 are within the competence of the State in exercise of its powers under the Disaster Management Act, 2005 (hereinafter, the DM Act) and the Tamil Nadu Public Health Act, 1939. Section 76(2)(b) thereof empowers the State Government to make vaccinations compulsory, in the event of a declaration by the Government of an outbreak of a 27 Singh C, Naik BN, Pandey S, et al. Effectiveness of COVID-19 vaccine in preventing infection and disease severity: a case-control study from an Eastern State of India. Epidemiology and Infection. 2021;149:e224 31 | P a g e notified disease. He submitted that the restrictions placed by the circular dated 18.11.2021 are in larger public interest and cannot be said to be unreasonable restrictions, as these were an essential facet of the precautionary approach adopted by the State of Tamil Nadu in dealing with the unprecedented pandemic. According to Mr. Tiwari, these restrictions were in furtherance of the State realising the importance of curtailing the spread of COVID-19. The unchecked spread of the virus could lead to further dangerous mutations. While referring to opinions of experts in the field of health, including that of the World Health Organization (WHO), the United Nations International Childrens Emergency Fund (UNICEF) and the Oxford Vaccine group, as well as scientific studies published in the New England Journal of Medicine, the Lancet and the International Journal of Scientific Studies, it was submitted on behalf of the State of Tamil Nadu that vaccination prevents severe disease and significantly reduces hospitalisation and mortality and that vaccines continued to be highly effective in preventing severe disease and death. The measures were justified on the ground that they were not only aimed for the safety of a particular individual but also served a greater purpose of ensuring safety of the community at large.

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31. Mr. Rahul Chitnis, learned counsel appearing for the State of Maharashtra, referred to the information provided by the WHO to contend that vaccines save infected individuals from life threatening complications, and consequential untimely death and therefore, vaccine mandate issued by the State of Maharashtra is in the interest of general public. The restrictions that are imposed are reasonable and cannot be said to manifestly arbitrary as they are issued only for a temporary period with exclusions and are reviewed periodically by the State to assess if relaxations can be granted. He submitted that there is no compulsion to get vaccinated, however, in view of the serious threat that not being vaccinated poses to the right of life and personal liberty of the larger population, certain unavoidable restrictions have been imposed, especially given that strict adherence to social distancing and masking is significantly compromised in bigger cities.

32. The complaint of the Petitioner in relation to prevention of access to essential resources in the State of Madhya Pradesh pertains to ration not being provided to unvaccinated persons through the public distribution system. We were informed by the learned counsel for the State of 33 | P a g e Madhya Pradesh that the order dated 08.11.2021, by which vaccination was made mandatory for receiving ration from fair price shops, was not implemented and was eventually withdrawn on 07.01.2022.

33. In the counter-affidavit filed on behalf of the Government of NCT of Delhi, it was submitted that the order dated 08.10.2021 was issued by the Delhi Disaster Management Authority after due application of mind, to control the spread of COVID-19 and mitigate its effects. Under Section 6(2)(i) of the DM Act, the National Disaster Management Authority has been issuing orders from time to time directing State Governments and Union Territories, amongst other authorities, to take effective measures to prevent the spread of COVID-19, and in furtherance of this, also permitted States to impose further local restrictions. The Delhi Disaster Management Authority, in a meeting held on 29.09.2021, decided to ensure 100 per cent vaccination of all Government employees, frontline workers, healthcare workers as well as teachers and staff working in schools and colleges, on the advice of medical and other experts. It was considered necessary as these individuals have frequent interaction with the general public and vulnerable sections of the society and therefore, pose greater risk of spreading the 34 | P a g e virus. While an individual may have a right to decide against getting vaccinated, the State, however, has a statutory duty to regulate the interaction of unvaccinated persons within the society in the interest of public health.

34. In his rejoinder, Mr. Bhushan, while reiterating his submissions, took exception to the contradictory stand taken by the Union of India on COVID-19 vaccination being voluntary and not mandatory. On one hand, the Union of India made it clear in the counter-affidavit that vaccination is voluntary and on the other, a series of advisories and material had been filed by the Union of India, supporting the claim of vaccination being mandatory. Mr. Bhushan submitted that the Union of India has not provided any material to the Court contrary to what has been supplied by the Petitioner furthering his scientific and legal contention that unvaccinated people pose no greater danger than vaccinated individuals in the matter of transmission of the COVID-19 virus, and therefore, there is no public health rationale in vaccine mandates. In addition to the various points raised in his submissions, the learned counsel for the Petitioner relied upon the opinion of Dr. Aditi Bhargava, who is a professor at University of California, San Francisco and a molecular biologist

with 33 years of research experience, 35 | P a g e from her presentation made before the US Senate on 02.11.2021. Her opinion is to the effect that vaccines do not prevent infection and transmission. She is of the further belief that natural immunity is the gold standard. According to Dr. Bhargava, there has been no documented case of a naturally immune person getting reinfected with severe disease or hospitalised, despite the first case reported nearly two years ago, whereas, there have been thousands of cases of severe infection, hospitalisation, and deaths in fully vaccinated people. Mr. Bhushan concluded by submitting that any restrictions placed on personal autonomy of individuals would be violative of Article 21, unless the criteria laid down in K. S. Puttaswamy (supra) is met. B. Evolution of COVID-19 and vaccines

35. COVID-19 emerged in late 2019. The WHO officially declared the novel coronavirus outbreak as a pandemic on 11.03.2020. The virus was detected in the country in the last week of January, 2020 and spread rapidly. As the threat of infections from the virus loomed large, an unprecedented national lockdown was announced on 24.03.2020, which extended for a few months, with restrictions being removed thereafter in a phased manner. India was not alone in this;

36 | P a g e several countries imposed lockdowns to arrest the spread of the deadly disease, which has led to a drastic loss of human life worldwide and presented a threat of extraordinary proportions to public health, food systems, economic and social conditions. Scientific studies and research for manufacture of vaccines to prevent severe infections were undertaken on an emergency basis. Towards the end of 2020, emergency vaccines came to be administered in the western part of the world. However, by then, the spread of COVID-19 around the globe was considerable. Around the same period, a variant called B.1.1.7 was found in the United Kingdom. The said variant was renamed as Alpha, as per the naming scheme recommended by the expert group convened by the WHO, which also includes scientists from the WHOs Technical Advisory Group on Virus Evolution (TAG- VE). Another variant, called B.1.351 and later renamed as Beta, was found to be linked to a second wave of infections in South Africa. Both these variants were identified as Variants of Concern (VOC) by the WHO on 18.12.2020, meaning that they were variants with genetic changes that would affect virus characteristics such as transmissibility, disease severity or immune escape and through a comparative assessment, are found to be associated with an 37 | P a g e increase of transmission or increase in virulence or decrease in effectiveness of public health measures such as vaccines, therapeutics etc. Soon thereafter, the highly transmissible variant called Gamma was found in Brazil and was identified as a VOC by the WHO on 11.01.2021.28

36. In the first half of 2021, the Delta variant was identified as the predominant variant in India and was believed to be 60 per cent more transmissible than the Alpha variant. Thereafter, Delta rapidly spread beyond the borders to other countries. Another variant, Omicron, surfaced in November, 2021, whose spread was much more accelerated than earlier variants, including that of Delta. On the basis of the evidence available as on 21.01.2022, the WHO was of the opinion that the Omicron has a significant growth advantage over Delta, leading to rapid spread in the community with higher levels of incidence than previously seen in the pandemic. It was further observed that despite a lower risk of severe disease and death following infection, the very high levels of transmission nevertheless have resulted in significant increases in hospitalisation and continue to pose overwhelming demands on health care systems in most 28 Tracking SARS-CoV-2 variants, World

Health Organization, available at https://www.who.int/en/activities/tracking-SARS-CoV-2-variants/ (last accessed on 01.05.2022) 38 | Page countries. It was found that because of the 26-32 mutations that it has in the spike protein, Omicron has infected even those who have been previously infected or vaccinated. 29 Though the infections and transmission from Omicron at present within the country are not as serious as they were in the first two months of 2022, expert opinion is to the effect that Omicron might not be the last of the variants, as we have since witnessed.

37. The WHO established the Technical Advisory Group on COVID-19 Vaccine Composition (TAG-CO-VAC) in September, 2021. According to the statement made by the said group on 11.01.2022 in the context of circulation of the Omicron variant, the group reviews and assesses the public health implications of emerging VOCs on the performance of COVID- 19 vaccines and provides recommendations on COVID-19 vaccine composition. The said group is developing a framework to analyse the evidence on emerging VOCs in the context of criteria that would trigger a recommendation to change COVID-19 vaccine strain composition and will advise the WHO on updated vaccine compositions, as required. The group has spelt out in their statement that at present, with 29 Statement by Dr Hans Henri P. Kluge, WHO Regional Director for Europe, 11.01.2011, available at https://www.euro.who.int/en/media-centre/sections/statements/2022/statement-update-on-covid-19-omicron-wave-threatening-to-overcome-health-workforce (last accessed on 01.05.2022) 39 | Page the available COVID-19 vaccines, the focus is on reducing severe disease and death, as well as protecting health systems. According to the TAG-CO-VAC, vaccines, which have received WHO Emergency Use Listing across several vaccine platforms, provide a high level of protection against severe disease and death caused by VOCs. The group takes note of data which indicates that vaccine effectiveness will be reduced against symptomatic disease caused by the Omicron variant but at the same time, it was of the opinion that protection against severe disease is more likely to be preserved. Along with the Strategic Advisory Group of Experts on Immunization (SAGE) and its Working Group on COVID-19 vaccines, TAG-CO-VAC has recommended COVID- 19 vaccines for priority populations worldwide to provide protection against severe disease and death globally and, in the longer term, to mitigate the emergence and impact of new VOCs by reducing the burden of infection.30

38. With the outbreak of the devastating pandemic, as many as 5,23,843 lives have been lost in this country, as per the latest data available on the website of the Ministry of 30 Interim Statement on COVID-19 vaccines in the context of the circulation of the Omicron SARS-CoV-2 Variant from the WHO Technical Advisory Group on COVID-19 Vaccine Composition (TAG-CO-VAC), 11.01.2022, available at https://www.who.int/news/item/11-01-2022-interim-statement-on-covid-19-vaccines-in-the-context-of-the-circulation-of-the-omicron-sars-cov-2-variant-from-the-who-technical-advisory-group-on-covid-19-vaccine-composition (last accessed on 01.05.2022) 40 | Page Health and Family Welfare (MoHFW). Initially, efforts made by the Government of India were to protect people by arresting serious infection. With treatment protocol and clinical management protocol for COVID-19 being revised periodically as more and more data and research on the virus came to be known, persons affected by the virus were treated with the information that was available at the point. Using whatever little was known about the virus in the initial stages, dedicated

efforts have been made to save countless lives in this country. With the approval of vaccines on an emergency basis in January, 2021, there was some hope about preventing infections from the virus. Inoculation, which commenced slowly in view of the non-availability of sufficient doses of vaccines, gained pace with the increase in manufacture by Respondent Nos. 4 and 5. With the Government embarking upon extensive awareness drives encouraging vaccination, more than 189 crore doses of vaccine have been administered within the country till date, as per the data available on the website of the MoHFW.

39. With the introduction of vaccines, it was understood that vaccines would aid in preventing infections. To protect their populace from infection, countries worldwide promoted 41 | P a g e vaccination as, needless to say, an uninfected person will not transmit the disease. Thereafter, with the mutation of the virus eventually resulting in multiple VOCs, breakthrough infections were noticed. Vaccinated people were found to be infected with the virus and could also act as carriers, transmitting the virus to others. Even in such a situation, there is no question of whether vaccination for COVID-19 should be continued. The recommendations of the WHOs TAG-CO-VAC and SAGE make it amply clear that vaccines, which have received emergency use approvals, provide strong protection against serious illness, hospitalisation and death and getting vaccinated is one of the most crucial steps towards protecting oneself from COVID-19, stopping new variants from emerging and helping end the pandemic. It should be noted that the advice of the WHO with respect to COVID-19 has been consistent since the time vaccines became available, even after recognising that it was still possible to get infected and spread the infection to others despite being vaccinated, as is evident from the latest version of the WHOs COVID-19 advice for the public: Getting vaccinated as of 13.04.2022 31. The Union of India has placed considerable material on record in terms of 31 Available at https://www.who.int/emergencies/diseases/novel-coronavirus-2019/covid-19-vaccines/advice (last accessed on 01.05.2022) 42 | P a g e scientific briefs and published studies which stand testimony to the significance of vaccination as a crucial public health intervention in this pandemic and its continued benefits to individual health as well as public health infrastructure. Vaccination of a majority of the population of this country has undoubtedly been instrumental in preventing severe disease, hospitalisation and deaths, and benefited the community at large, especially those members with co-morbidities, the elderly and sick persons. Even the Petitioner is not opposed to the vaccination programme and does not challenge the vaccination drive of the Government of India, as has been reiterated by him during the course of his arguments. Exception to the vaccination programme taken by the Petitioner is only to coercive vaccination through vaccine mandates, which place unjustifiable restrictions on those who wish to not be vaccinated.

40. In light of the virulent mutations of the COVID-19 virus and advice of experts from the WHO as well as common findings of several studies on this subject, the vaccination drive that is being undertaken by the Government of India in the interest of public health cannot be faulted with. C. Personal autonomy and public health 43 | P a g e

41. Before dealing with the issue of coercive vaccination, it is necessary to consider whether the right of privacy of individuals can override public health, more so, when the submission on behalf of the Respondents is that steps taken to restrict the rights of individuals are in the larger interest of public

health. It is true that to be vaccinated or not is entirely the choice of the individual. Nobody can be forcefully vaccinated as it would result in bodily intrusion and violation of the individuals right to privacy, protected under Article 21 of the Constitution of India. Personal autonomy was read into Article 21 by this Court in Common Cause (supra), by placing reliance on National Legal Services Authority v. Union of India 32, and Aruna Ramachandra Shanbaug (supra). This Court, in Common Cause (supra), emphasized the right of an individual to choose how he should live his own life, without any control or interference by others. It recognised the right of an individual to refuse unwanted medical treatment and to not be forced to take any medical treatment that is not desired. In view of the categoric statement of the Union of India that vaccination of COVID-19 is voluntary, the question of any intrusion into bodily integrity does not arise for consideration in this case. 32 (2014) 5 SCC 438 44 | P a g e However, the Petitioner has asserted that limitations placed on access to public places and public resources for unvaccinated persons result in coercive vaccination, and therefore, limit the right of unvaccinated persons to refuse medical treatment.

42. Disclosure of data of a patient suffering from AIDS was the subject matter of a decision of this Court in X v. Hospital Z33. Placing reliance on Kharak Singh v State of U.P.34, Gobind v. State of M.P.35 and a judgment of the US Supreme Court in Jane Roe v. Henry Wade36, this Court held that though non-disclosure of medical information of an individual can be traced to the right to privacy protected under Article 21, it is not absolute and is subject to action lawfully taken for protection of health or morals or protection of rights and freedoms of others.

43. In Association of Medical Super Speciality Aspirants and Residents v. Union of India 37, to which one of us was a party (L Nageswara Rao, J.), this Court, while considering validity of service bonds to be executed at the time of admission to postgraduate and superspeciality courses in medical science, held as follows: 33 (1998) 8 SCC 296 34 (1964) 1 SCR 332 35 (1975) 2 SCC 148 36 410 US 113 (1973) 37 (2019) 8 SCC 607 45 | P a g e 33. The above discussion leads us to the conclusion that right to life guaranteed by Article 21 means right to life with human dignity. Communitarian dignity has been recognised by this Court. While balancing communitarian dignity vis-à-vis the dignity of private individuals, the scales must tilt in favour of communitarian dignity. The laudable objective with which the State Governments have introduced compulsory service bonds is to protect the fundamental right of the deprived sections of the society guaranteed to them under Article 21 of the Constitution of India. The contention of the appellants that their rights guaranteed under Article 21 of the Constitution of India have been violated is rejected.

44. Strong reliance was placed by the Petitioner on the judgment of the High Court of New Zealand in Ryan Yardley (supra). The principal contention of the applicants therein was that the impugned order, requiring police and defence force personnel to be vaccinated, placed unjustified limitation on the rights protected by the New Zealand Bill of Rights Act 1990 (hereinafter, the NZ Bill of Rights), particularly the right to refuse to undergo medical treatment, the right to manifest religion, the right to be free from discrimination and other rights under Section 28 of the said Act (including the right to work, and of minority groups to enjoy their culture and practice their religion). The purpose of 46 | P a g e the order, as clarified by the Minister by way of an amendment order in February, 2022 is as below:

(a) avoid, mitigate, or remedy the actual or potential adverse effects of the COVID-19 outbreak (whether direct or indirect); and

(b) ensure continuity of services that are essential for public safety, national defence, or crisis response; and

(c) maintain trust in public services.

45. Considering the submissions of the applicants therein that the order placed unjustified limitations on fundamental rights protected by the NZ Bill of Rights, the NZ High Court held that the impugned order limits the right of affected workers to refuse to undergo a medical treatment as well as the right (or significant interest) to retain employment. While examining the question of whether the limitation of the said rights was justified, the NZ High Court noted that the order mandating vaccinations for the police and defence personnel was imposed to ensure the continuity of services that are essential for public safety, national defence, or crisis response, and to promote public confidence in those services, rather than to stop the spread of COVID-19. The NZ High Court further took note of the fact that by October, 2021, 83.1 per cent of police personnel had received at least one or more doses of the vaccination, and 70.1 per cent had received both doses. By the time the order took effect on 47 | P a g e 17.01.2022, there were only 164 unvaccinated staff members in an overall workforce of 15,682 staff. It was found that the position within the New Zealand Defence Forces (NZDF) was similar. From a total of 15,480 NZDF personnel, 3,048 are civil staff. As on 01.02.2022, 99.2 per cent of the regular forces were fully vaccinated, leaving aside 75 members and 98.7 per cent of the civil staff were fully vaccinated, leaving 40 who were not. The NZ High Court was of the view that the relatively low number of unvaccinated police and NZDF personnel impacted by the order may not, by itself, mean that the order was not a reasonable limit on rights that can be demonstrably justified, if there was evidence to establish that the presence of unvaccinated personnel, even in small numbers, created a materially higher risk to the remaining workforce. While observing that the evidence on this issue is sparse, the NZ High Court referred to the evidence of Dr. Petrovsky, who deposed that vaccination has potential benefit in reducing the severity of disease, even with the Omicron variant. However, in his view, mandatory vaccination did not assist in preventing workers in affected roles from contracting COVID- 19, or transmitting it to others. The NZ High Court further considered the evidence of Dr. Town, the Ministrys Chief 48 | P a g e Science Adviser, who, according to the NZ High Court, did not directly respond to Dr. Petrovskys analysis of the effectiveness of the vaccine to inhibit the spread of COVID-19 in a workforce, but instead provided his more generalised opinions. In his evidence, Dr. Town stated that vaccines show reduced effectiveness compared with Delta in terms of becoming infected with and transmitting Omicron.

46. After weighing the evidence, the NZ High Court was of the view that vaccination may still be effective in limiting infection and transmission, but at a significantly lower level than was the case with the earlier variants. It was further concluded that vaccination does not prevent persons contracting and spreading COVID-19, particularly with the Omicron variant. The NZ High Court referred to an earlier judgment in Four Aviation Security Service Employees v. Minister of COVID-19 Response 38, where the precautionary principle had been applied, to make the point that

even a modest vaccination protection on a modest number of personnel needs to be considered in the context of potential effects of a pandemic. The NZ High Court referred to a judgment of the Federal Court of Ontario in 38 [2021] NZHC 3012 49 | P a g e Spencer v. Attorney General of Canada 39 to elaborate on the precautionary principle, as a foundational approach to decision-making under uncertainty, that points to the importance of acting on the best available information to protect the health of the citizens. In Four Aviation Security Service Employees (supra), which dealt with restrictions placed on aviation security workers, the NZ High Court held that even though the applicants therein were not being forcibly treated, they were required to be vaccinated as a condition of their employment, refusal of which led to termination. Observing that a right does not need to be taken away in its entirety before it is regarded as having been limited, the NZ High Court opined that the level of pressure in that case was significant and amounted to coercion, and therefore, the applicants right to refuse to undergo medical treatment was limited. However, the said limitation was held to be justified. From the evidence adduced before the NZ High Court, it concluded that the vaccine was effective at reducing the transmission of the earlier variants of the virus and that it was also effective at reducing symptomatic infection and detrimental effects of the Delta variant. As the applicants were border workers 39 [2021] FC 361 50 | P a g e interacting with international travellers who may be carrying the virus and given the likelihood of vaccines contributing to preventing the risk of transmission, the NZ High Court held that a precautionary approach, in doing everything that can be reasonably done to minimise risk of the outbreak or spread in strong public interest, is justified. Further, the curtailment of the right to refuse to undergo medical treatment was found to be proportionate to the objective, as the applicants, who worked as aviation workers, were situated in a key location where COVID-19 might enter New Zealand.

47. In Ryan Yardley (supra), the NZ High Court held that the principle in Four Aviation Security Service Employees (supra) is not directly applicable as the order was not promulgated to contain the spread of the virus but for the purpose of ensuring continuity of, and confidence in, essential services. Additionally, there was no evidence of a threat to the continuity of the police and NZDF services, which would enable the NZ High Court to give the benefit of the doubt to the New Zealand Crown in imposing measures to address that risk. Placing reliance on the evidence adduced as well as the public health advice which was to the 51 | P a g e effect that vaccine mandates were not considered necessary for addressing the risk of the outbreak or spread of COVID- 19, the High Court made it clear that while vaccination significantly improved the prospects of avoiding illness and death even with the Omicron variant, given the variants propensity to break through vaccination barriers, it concluded that there was no real threat to the continuity of these essential services that the impugned order sought to address. Further, finding that suspension of the unvaccinated would address any potential problems, the terminations arising from the order in light of the temporary, albeit significant, period of peak impact of the infection, were found to be disproportionate and unjustified. While the Petitioner has sought support from this judgment to demonstrate how courts in other jurisdictions have struck down vaccine mandates taking into account Omicrons impact on the effectiveness of vaccines in addressing spread, we believe that this judgment may not be of much assistance to us for determining the issue at hand for two reasons. First, the judgment expressly recognised that the impugned vaccine mandate was not brought about to suppress the spread of the virus but to ensure continuity of, and confidence in, essential services, such as the police and the 52

| P a g e defence personnel, which we are not concerned with in the present case. Second, while the NZ High Court looked into depositions of expert witnesses to come to its own conclusion on efficacy of vaccines vis-à-vis the Omicron variant, the scope of our review does not entail assessment of competing scientific opinions, as the judiciary is not equipped to decide issues of medical expertise and epidemiology.

48. The crucial point that requires to be considered by us is whether limitations placed by the Government on personal autonomy of an individual can be justified in the interest of public health in the wake of the devastating COVID-19 pandemic. As stated, personal autonomy has been recognized as a critical facet of the right to life and right to self-determination under Article 21 of the Constitution, by this Court in Common Cause (supra). In K.S. Puttaswamy (supra), this Court laid down three requirements to be fulfilled by the State while placing restraints on the right to privacy to protect legitimate State interests. It was held:

> 310. The first requirement that there must be a law in existence to justify an encroachment on privacy is an express requirement of Article 21. For, no person can be deprived of his life or personal liberty except in accordance with the procedure established by law. The 53 | P a g e existence of law is an essential requirement. Second, the requirement of a need, in terms of a legitimate State aim, ensures that the nature and content of the law which imposes the restriction falls within the zone of reasonableness mandated by Article 14, which is a guarantee against arbitrary State action. The pursuit of a legitimate State aim ensures that the law does not suffer from manifest arbitrariness. Legitimacy, as a postulate, involves a value judgment. Judicial review does not reappreciate or second guess the value judgment of the legislature but is for deciding whether the aim which is sought to be pursued suffers from palpable or manifest arbitrariness. The third requirement ensures that the means which are adopted by the legislature are proportional to the object and needs sought to be fulfilled by the law. Proportionality is an essential facet of the guarantee against arbitrary State action because it ensures that the nature and quality of the encroachment on the right is not disproportionate to the purpose of the law. Hence, the threefold requirement for a valid law arises out of the mutual interdependence between the fundamental guarantees against arbitrariness on the one hand and the protection of life and personal liberty, on the other. The right to privacy, which is an intrinsic part of the right to life and liberty, and the freedoms embodied in Part III is subject to the same restraints which apply to those freedoms. While the judgment is in context of the right to privacy, the analysis with respect to the threefold requirement for curtailment of such right is on the anvil of the protection guaranteed to fundamental freedoms under Article 21, and 54 | P a g e therefore, would also be the litmus test for invasion of an individuals bodily autonomy under Article 21.

49. The upshot of the above discussion leads to the following conclusions:

> a) Bodily integrity is protected under Article 21 of the Constitution of India and no individual can be forced to be vaccinated.

b) Personal autonomy of an individual involves the right of an individual to determine how they should live their own life, which consequently encompasses the right to refuse to undergo any medical treatment in the sphere of individual health.

c) Persons who are keen to not be vaccinated on account of personal beliefs or preferences, can avoid vaccination, without anyone physically compelling them to be vaccinated. However, if there is a likelihood of such individuals spreading the infection to other people or contributing to mutation of the virus or burdening of the public health infrastructure, thereby affecting communitarian health at large, protection of which is undoubtedly a legitimate State aim of paramount significance in this collective battle against the pandemic, the Government can regulate such public 55 | P a g e health concerns by imposing certain limitations on individual rights that are reasonable and proportionate to the object sought to be fulfilled.

50. The submission made on behalf of the Petitioner is that the Delta and Omicron variants have shown breakthrough infections and it is clear from the scientific data that, an unvaccinated person does not pose a greater risk than a vaccinated person in terms of transmission of the infection. While this submission has been dealt with subsequently, we believe that as long as there is a risk of spreading the disease, there can be restrictions placed on individuals rights in larger public interest. Further, extensive material from experts has been placed before this Court, which extol the benefits of vaccination in tackling the severe and life- threatening impact of the infection, specifically in terms of reduction in oxygen requirement, hospitalisation, ICU admissions and mortality, thereby easing the disproportionate burden from the upsurge of severe cases on the health infrastructure, which has already been witnessed by the country during the second wave of the pandemic where resources were woefully inadequate to stem the impact of the Delta variant on a then scarcely vaccinated population. We hasten to add that restrictions that are 56 | P a g e placed by the Government should not be unreasonable and are open to scrutiny by constitutional courts. It is difficult for us to envisage the myriad situations in dealing with the evolving pandemic that may call for restraint on individual rights in larger public interest and therefore, as and when such limitations are challenged, they can be assessed by constitutional courts to see whether they meet the threefold requirement laid down in K.S. Puttaswamy (supra). D. Assessment of the vaccine mandates imposed by State Governments

51. The grievance of the Petitioner pertains to the vaccine mandates imposed by various State Governments and private organisations, resulting in restrictions on fundamental freedoms of persons who have chosen not to be vaccinated. The Petitioner has alleged duality in the stand of the Respondents, as on one hand, the Union of India has categorically stated that vaccines are voluntary and on the other, the State Governments have imposed and defended restrictions on access to public places and resources for persons who are unvaccinated. The Petitioner contested the vaccine mandates on the following grounds:

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(a) Natural immunity acquired from COVID-19 infection is more long-lasting and robust as compared to vaccine immunity.

(b) Serological studies show that more than 75 per cent of the Indian population has already been infected and is seropositive and therefore, has better immunity to the infection than that which can be provided by the vaccine.

(c) Vaccines do not prevent infection from or transmission of COVID-19 and are especially ineffective in preventing against infection from new variants.

52. In support of the above grounds, other than on the aspect of transmission of the virus, the Petitioner has relied on individual opinions of doctors and other advisors, news articles and findings from research studies, some of which are preprints meaning they have not been peer-reviewed and report new medical research which has yet to be evaluated and therefore, should not be used to guide clinical practice, as explained by medRxiv, a platform where several preprint articles in the field of health sciences are published. Some of the material relied on by the Petitioner has been listed below:

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(a) An article in the scientific journal Nature40, which states that studies have shown that memory plasma cells secreted antibody specific for the spike protein encoded in SARS-CoV-2 even 11 months after the infection and further that, immune memory to many viruses is stable over decades, if not for a lifetime.

(b) A study published in the European Journal of Epidemiology41, which has analysed data from 68 countries available as of 03.09.2021 and has found that at the country level, there appears to be no discernible relationship between percentage of population fully vaccinated and new COVID-19 cases. It is further stated therein that in fact higher percentage of population fully vaccinated have higher COVID-19 per 1 million people.

(c) The United Kingdoms COVID-19 vaccine surveillance report, Week 40, which appears to indicate negative efficacy against infection amongst all ages above 30 years, on the basis of data between week 36 and week 39 in 2021.

40 Andreas Radbruch and Hyun-Dong Chang, A long-term perspective on immunity to Covid Nature 595, 359-360 (2021) 41 Subramanian, S.V., Kumar, A. Increases in COVID-19 are unrelated to levels of vaccination across 68 countries and 2947 counties in the United States Eur J Epidemiol 36, 12371240 (2021) 59 | P a g e

53. While we are aware that courts cannot decide whether natural immunity is more resilient as compared to vaccine- acquired immunity and we do not seek to substitute our own views in matters of differences in scientific opinion, we cannot help but notice that in the first article referred to above, published in Nature, it has been noted that immunity in convalescent individuals (i.e., those who have recovered from COVID-19) can be boosted further by vaccinating them after a year. According to the said article, this results in the generation of more plasma cells, together with an increase in the level of SARS-CoV-2 antibodies that was up to 50 times greater than before

vaccination. In the second article referred to above, published in the European Journal of Epidemiology, it has been mentioned therein that the interpretation of the findings should be as follows: The sole reliance on vaccination as a primary strategy to mitigate COVID-19 and its adverse consequences needs to be re- examined, especially considering the Delta (B.1.617.2) variant and the likelihood of future variants. Other pharmacological and non-pharmacological interventions may need to be put in place alongside increasing vaccination rates. We do not see how these conclusions and interpretations are in favour of an argument that natural 60 | P a g e immunity has proven to be better in protection against COVID-19 infection, as compared to vaccine-acquired immunity.

54. In any event, what we have to assess, in accordance with the law laid down by this Court, is whether the Union of India has taken note of scientific and medical inputs and research findings in putting together its policy advocating vaccination for the entire eligible population. Article 47 of the Constitution of India imposes an obligation on the Union of India to improve public health. It is the obligation of the State to ensure the creation and the sustaining of conditions congenial to good health. From the several obligations of the State enshrined in Part IV of the Constitution, maintenance and improvement of public health rank high as these are indispensable to the very physical existence of the community.42

55. It should be noted that the submission made on behalf of the Petitioner championing natural immunity is from the perspective of a healthy person. Even the Petitioner does not dispute the fact that the same standard is not applicable to persons with co-morbidities, the sick and elderly people. A cursory glance at the data recorded in the India Fact Sheet 42 Vincent Panikurlangara v. Union of India (1987) 2 SCC 165 61 | P a g e on the basis of the National Family Health Survey 5 (2019-

21) shows that (i) in the age group of 15-49 years, 57 per cent of women and 25 per cent of men are anaemic, (ii) amongst individuals aged above 15 years, 13.5 per cent of women and 15.6 per cent of men have high or very high blood sugar level or take medicines to control blood sugar level, (iii) amongst individuals aged above 15 years, 21.3 per cent of women and 24 per cent of men have hypertension or elevated blood pressure or take medicines to control blood pressure. Further, as per the 75 th Round National Sample Survey (NSS), conducted from July 2017 to June 2018, the average age of the elderly population in India was 67.5 years, with 67.1 per cent of Indias elderly living in rural areas. A study was conducted 43 on the basis of the data from the NSS, aiming to highlight the vulnerability of the aged amidst the COVID-19 pandemic. According to the study, out of every 100 elderly, 27.7 persons reported ailments during the previous 15 days, with cardiovascular conditions including hypertension (32.0%), endocrine conditions including diabetes (22.5%), musculoskeletal conditions (13.9%), infectious diseases (10.0%), and 43 Ranjan, A., Muraleedharan, V.R. Equity and elderly health in India: reflections from 75th round National Sample Survey, 201718, amidst the COVID-19 pandemic Global Health 16, 93 (2020) 62 | P a g e respiratory ailments (7.3%) being the top five conditions for seeking outpatient care among the elderly in the preceding 15 days. The Constitution, through Article 41, mandates the State to make available to the elderly the right to live with dignity and to provide the elderly, ill and disabled with assistance, medical facilities and geriatric care 44.

56. Surely, the Union of India is justified in centering its vaccination policy around the health of the population at large, with emphasis on insulating the weaker and more vulnerable sections from the risk of severe infection and its consequences, as opposed to basing its decision keeping in mind the interests of a healthy few. Given the considerable material filed before this Court reflecting the near-unanimous views of experts on the benefits of vaccination in dealing with severe disease, reduction in oxygen requirement, hospital and ICU admissions and mortality and stopping new variants from emerging, this Court is satisfied that the current vaccination policy of the Union of India, formulated in the interest of public health, is informed by relevant considerations and cannot be said to be unreasonable. Whether there is contrasting scientific opinion supporting the argument of natural immunity offering better protection 44 Ashwani Kumar v. Union of India (2019) 2 SCC 636 63 | P a g e against infection from COVID-19 and whether these scientific opinions can be substantiated are not pertinent for determination of the issue before this Court.

57. We now come to the crux of the challenge against coercive vaccine mandates, with respect to which the Petitioner has argued that they amount to restrictions on the fundamental rights of unvaccinated individuals and cannot be said to be proportionate, as according to the Petitioner, with the prevalence of the Omicron variant, unvaccinated people pose no greater danger to the transmission of the virus in comparison to vaccinated persons. It was claimed by the Petitioner that even if the vaccines reduced the severity of the disease, it was up to the individual to decide whether they wanted to be the beneficiary of vaccines. The States lookout was the protection of larger public health and with both the vaccinated and unvaccinated posing nearly equal risks in transmission of the infection to others around them, the State cannot impose restrictions targeting only the unvaccinated and impeding their right to access public resources. The Petitioner has thus, alleged discrimination against the unvaccinated, who in the present situation, are placed more or less on the same footing as vaccinated individuals with respect to the transmission of the virus. In 64 | P a g e support of his submissions, the Petitioner has relied on scientific studies and reports, some of which are listed below:

(a) A letter published in the Lancet, Regional Health45, which states: In the UK it was described that secondary attack rates among household contacts exposed to fully vaccinated index cases was similar to household contacts exposed to unvaccinated index cases (25% for vaccinated vs 23% for unvaccinated). 12 of 31 infections in fully vaccinated household contacts (39%) arose from fully vaccinated epidemiologically linked index cases. Peak viral load did not differ by vaccination status or variant type.The US Centres for Disease Control and Prevention (CDC) identifies four of the top five counties with the highest percentage of fully vaccinated population (99.984.3%) as high transmission counties. Many decisionmakers assume that the vaccinated can be excluded as a source of transmission. It appears to be grossly negligent to ignore the vaccinated population as a possible and relevant source of transmission when deciding about public health control measures. 45 Gunter Kampf, Letter titled The Epidemiological relevance of the COVID-19 vaccinated population is increasing Lancet Regional Health Vol. 11, 100272, December 01, 2021 65 | P a g e

(b) A study conducted on breakthrough infection in Massachusetts in July, 2021 and reported in the Morbidity and Mortality Weekly Report46, which investigated 469 COVID-19 cases that had been identified among the Massachusetts residents who had travelled to a town where multiple large

public events had been held and 346 cases, i.e., 74 per cent of the infections occurred in fully vaccinated individuals. Findings from the investigation suggest that even jurisdictions without substantial or high COVID-19 transmission might consider expanding prevention strategies, including masking in indoor public settings regardless of vaccination status, given the potential risk of infection during attendance at large public gatherings that include travelers from many areas with differing levels of transmission.

The Petitioner has also cited various news articles reporting instances of breakthrough infections in fully vaccinated people, carrying as much virus as those who were unvaccinated, abroad as well as within India. 46 Brown CM, Vostok J, Johnson H, et al. Outbreak of SARS-CoV-2 Infections, Including COVID-19 Vaccine Breakthrough Infections, Associated with Large Public Gatherings Barnstable County, Massachusetts, July 2021. MMWR Morb Mortal Wkly Rep 2021;70:1059-1062 66 | P a g e

58. We have already referred to the material placed by the Union of India and the States appearing before this Court. While there is abundant data to show that getting vaccinated continues to be the dominant expert advice even in the face of new variants, no submission nor any data has been put forth to justify restrictions only on unvaccinated individuals when emerging scientific evidence appears to indicate that the risk of transmission of the virus from unvaccinated individuals is almost on par with that from vaccinated persons. To put it differently, neither the Union of India nor the State Governments have produced any material before this Court to justify the discriminatory treatment of unvaccinated individuals in public places by imposition of vaccine mandates. No doubt that when COVID-19 vaccines came into the picture, they were expected to address, and were indeed found to be successful in dealing with, the risk of infection from the variants in circulation at the time. However, with the virus mutating, we have seen more potent variants surface which have broken through the vaccination barrier to some extent. While vaccination mandates in the era of prevalence of the variants prior to the Delta variant may have withstood constitutional scrutiny, in light of the data presented by the Petitioner, which has not been 67 | P a g e controverted by the Union of India as well as the State Governments, we are of the opinion that the restrictions on unvaccinated individuals imposed through vaccine mandates cannot be considered to be proportionate, especially since both vaccinated and unvaccinated individuals presently appear to be susceptible to transmission of the virus at similar levels.

59. Details of the vaccine mandates passed by the States of Maharashtra, Tamil Nadu, Madhya Pradesh and Delhi have been discussed earlier. It has come to our knowledge that since the judgment in this matter was reserved, the National Disaster Management Authority took a decision that there may not be any further need to invoke provisions of the DM Act for COVID-19 containment measures, taking into consideration the overall improvement in the situation. Further, the States of Maharashtra and Tamil Nadu, taking into account the present situation in which near-normalcy has been restored, have rolled back the restrictions placed on unvaccinated persons. The State of Madhya Pradesh had withdrawn the restrictions imposed on unvaccinated individuals in terms of withholding distribution of food grains from fair price shops and had notified this Court of the same during the hearing. Till the infection rate and spread 68 | P a g e remains low, as it is currently, and any new development or research finding comes to light which provides the

Government due justification to impose reasonable and proportionate restrictions on the rights of unvaccinated individuals in furtherance of the continuing efforts to combat this pandemic, we suggest that all authorities in this country, including private organisations and educational institutions, review the relevant orders and instructions imposing restrictions on unvaccinated individuals in terms of access to public places, services and resources.

60. While we appreciate that it is the domain of the executive to determine how best to encourage vaccination without unduly encroaching into the fundamental rights of unvaccinated individuals, we wish to highlight the mechanism of the health pass employed in France, as an apt example of a proportionate measure intended to cope with the perils of the spread of the virus. We understand that a health pass may take the form of either the results of a viral screening test not concluding that a person has been infected with COVID-19, or proof of vaccination status, or a certificate of recovery following an infection. In a referral by the Prime Minister to review the law on managing the public health state of emergency, the Constitutional 69 | P a g e Council in France, in Decision no. 2021-824 DC dated 05.08.2021, determined that the health pass did not infringe the right to personal privacy guaranteed by Article 2 of the Declaration of Human and Civic Rights of 1789 as the requirement did not introduce an obligation to vaccinate.

61. Having expressed our opinion on the vaccine mandates in the prevailing context, we reiterate that vaccines effectively address severe disease arising from COVID-19 infections, are instrumental in reducing oxygen requirement, hospital and ICU admissions and mortality and continue to be the solution to stopping new variants from emerging, as per the advice of the WHO. Since the time arguments were heard in the matter, we have come to know of more variants that have now come into circulation. Given the rapidly- changing nature of the virus and the clear purpose served by the approved vaccines in terms of restoration and protection of public health, our suggestions with respect to review of vaccine mandates are limited to the present situation alone. This judgment is not to be construed as impeding, in any manner, the lawful exercise of power by the executive to take suitable measures for prevention of infection and transmission of the virus in public interest, which may also take the form of restrictions on unvaccinated people in the 70 | P a g e future, if the situation so warrants. Such restrictions will be subject to constitutional scrutiny to examine if they meet the threefold requirement for intrusion into rights of individuals, as discussed earlier.

II. Non-disclosure of segregated clinical trial data in public domain

62. It is the complaint of the Petitioner that the COVID-19 vaccines, manufactured by Respondent Nos. 4 and 5, have been given restricted emergency approval by the Drugs Controller General of India (DCGI) in a hurried and opaque manner. Mr. Bhushan argued that clinical trials in respect of the vaccines had not been completed and at present, the vaccines are only authorised for emergency use. According to the Petitioner, while clinical trials are scheduled to be completed in the year 2023, even the full dataset from the interim analysis conducted has not been made public. The disclosure of segregated data of clinical trials is essential to determine the adverse effects, if any, across various age groups and diverse populations and accordingly, enable individuals to make more informed decisions on whether to be vaccinated. Reliance was placed on an order of this Court in Aruna Rodrigues (4) v. Union of India 47 and a 47 (2011) 12 SCC 481 71 | P a g e judgment of the Delhi

High Court dated 15.01.2019 in W.P. (C) No. 343 of 2019 titled Master Hridaan Kumar (minor) v. Union of India with respect to the importance of disclosure of relevant technical data and informed consent. Additionally, the last amended version of the Declaration of Helsinki Ethical principles from medical research involving human subjects (hereinafter, the Declaration of Helsinki) and a statement by the WHO dated 09.04.2015 on public disclosure of clinical trial results (hereinafter, the WHO Statement on Clinical Trials) were pressed into service to establish the significance of disclosure of data of clinical trials, so as to enable the data to be assessed independently, and not only by the vaccine manufacturer who has a commercial interest in production of the vaccines. Mr. Bhushan submitted that there would be no invasion of privacy of individuals, if personal identification data and past medical history of the trial participants was redacted and the raw data pertaining to clinical trials is made public. The further grievance of the Petitioner pertained to lack of transparency in regulatory approvals, minutes of meetings and constitution of expert bodies. The Petitioner has sought for clear detailing of the information furnished before, and evidence relied on by, the expert bodies such as the NTAGI 72 | P a g e and the Subject Expert Committee (SEC), the body which sends recommendations to the Central Drugs Standard Control Organisation, while deliberating on the applications and data of the vaccine manufacturers, and the names and institutional relationships of the experts who participated in each of these meetings. Mr. Bhushan relied on the 59 th Report of the Parliamentary Standing Committee on Health and Family Welfare, in support of his submission on a need for transparency in the decision-making of the CDSCO and other regulatory authorities.

63. In response, the Union of India submitted that the procedure prescribed under the statutory regime was scrupulously followed before granting emergency approval of the vaccines manufactured by Respondent Nos. 4 and 5. As per the extant statutory regime, permission to import or manufacture new drugs including vaccines or to undertake clinical trials is granted by the Central Drugs Standard Control Organisation (CDSCO). The CDSCO, in consultation with the SEC, evaluates the applications for grant of such permission, which are to be accompanied with data as required under the Second Schedule to the New Drugs and Clinical Trials Rules, 2019 (hereinafter, the 2019 Rules) framed under the Drugs and Cosmetics Act, 1940. The SEC 73 | P a g e is a statutory body, constituted by the CDSCO under Rule 100 of the 2019 Rules, comprising group of experts with specialisation in relevant fields. According to the Union of India, the SEC looks into the details of trials and results presented before it and examines them, interacts with the developers of the vaccines and gives them appropriate directions and eventually makes recommendations in writing, by way of a resolution, reflecting the collective opinion of all the domain experts. We were informed that the trials have been registered on the database of the Clinical Trials Registry India, which is hosted at the ICMRs National Institute of Medical Statistics. The provisions in relation to Accelerated Approval Process under the Second Schedule to the 2019 Rules were pointed out to this Court, which stipulate that accelerated approval process may be allowed to a new drug for a disease or condition taking into account its severity, rarity, or prevalence and the availability or lack of alternative treatments, provided that there is a prima facie case of the product being of meaningful therapeutic benefit over the existing treatment. It is further stated that After granting accelerated approval for such drug, the post marketing trials shall be required to validate the anticipated clinical benefit . It was submitted that applying these provisions on 74 | P a g e Accelerated Approval Process, the CDSCO, in detailed consultation with the SEC and after examining the efficacy of the

vaccine and its effects, granted permission for restricted emergency use of COVAXIN and COVISHIELD, as manufactured by Respondent Nos. 4 and 5, respectively.

64. As regards COVAXIN (Whole Virion Inactivated Corona Virus Vaccine), the Union of India stated that application for permission to manufacture the vaccine was made by Bharat Biotech on 23.04.2020. The CDSCO, in consultation with the SEC, granted permission to Bharat Biotech for conducting Phase I/II clinical trials on 29.06.2020 and Phase III clinical trials on 23.10.2020. Respondent No. 4 submitted interim safety and immunogenicity data of Phase I and Phase II clinical trials carried out in the country, along with safety data, including Serious Adverse Events data, of the ongoing Phase III clinical trial in the country. The data provided by Respondent No.4 from the various phases were evaluated and analysed by the SEC, which consisted of eminent experts from the fields of microbiology, medicine, pulmonary medicine, paediatrics and immunology and immunogenetics. The resolutions of the various meetings of the SEC, which also required the presence of the developer / manufacturer with the necessary information, have been put up on the 75 | P a g e website of the MoHFW at every stage. In its meeting dated 02.01.2021, observing that on receiving further updated data, justification and request for consideration of the proposal in the wake of a new mutation of the COVID-19 virus, and on recognising that the data generated till then showed that the vaccine had the potential to target mutated coronavirus strains, the SEC recommended for grant of permission for restricted use in emergency situation in public interest in clinical trial mode, as an abundant precaution. While granting such permission, Respondent No. 4 was directed to continue the ongoing Phase III clinical trial and submit data from the trial, as and when available. Approval for restricted use in emergency situation in clinical trial mode with various conditions / restrictions was granted by the CDSCO to Respondent No. 4 to manufacture COVAXIN on 03.01.2021.

65. Thereafter, Respondent No. 4 submitted the interim safety and efficacy data of Phase III clinical trial, which was reviewed by the SEC in meetings held periodically. In its meeting conducted on 10.03.2021, the SEC, after detailed deliberation on the updated interim safety and efficacy data of the phase III clinical trial, recommended omission of the condition of the use of the vaccine in clinical trial mode.

76 | P a g e However, it was recommended that the vaccine be continued to be used under restricted use in emergency situation condition. Following expansion of the Governments vaccination drive to include individuals in the age group of 18-45 years, in its meeting held on 23.04.2021, the SEC considered Bharat Biotechs proposal to unblind the trial participants in the said age group. After detailed deliberations, the SEC recommended the unblinding of the participants in the said age group, upon the request of the participants or the principal investigator after completion of two months from the second dose. Eventually, on consideration of relevant data of Phase I and Phase II clinical trials along with safety data of 6 months Phase III clinical trial, including data of serious adverse events till the date, the SEC in its meeting dated 19.01.2022 noted that there had been no safety issues and the vaccine maintained its efficacy, specially to avoid hospitalisation and severe infections in the existing situation as well. Accordingly, the SEC recommended that the status of approval of COVAXIN from the restricted use in emergency situation to the New Drug permission be updated, along with the condition that the firm shall continue to submit data of ongoing clinical

trial and monitor AEFIs. The Union of India pointed out that 77 | P a g e Phase I and Phase II clinical trial reports were published in the Lancet Infectious Diseases Journal, which was publicly available. Further, to the knowledge of the Union of India, Phase III trial publication had been submitted to the Lancet journal by Respondent No. 4 on 02.07.2021, a copy of the manuscript of which has been provided to this Court.

66. COVISHIELD (ChAdOx1 nCoV-19 Corona Virus Vaccine (Recombinant)) manufactured by Respondent No. 5 was developed by the Serum Institute of India in collaboration with Oxford University and AstraZeneca under technology transfer. As the clinical development of the said vaccine, including Phase I clinical trial, was conducted in other countries, Phase II / III clinical trials were conducted by Respondent No. 5 in the country. Application for permission to manufacture COVISHIELD for test, examination and analysis was first made by Respondent No. 5 on 03.05.2020. The safety, immunogenicity and efficacy data of Phase II / III clinical trials of the AstraZeneca vaccine carried out in the United Kingdom, Brazil and South Africa were submitted to the SEC, along with the safety and immunogenicity data from the ongoing Phase II / III clinical trials in India. On reviewing this data as well as the approval dated 30.12.2020 granted by the United Kingdoms Medicines and Healthcare Products 78 | P a g e Regulatory Authority (hereinafter, the UK-MHRA) for the AstraZeneca vaccine along with its conditions / restrictions, the SEC, in its meeting dated 01.01.2021, noted that the safety and immunogenicity data from the Indian study was comparable with that of the overseas clinical trial data. After detailed deliberation and taking into account the emerging situation, the SEC recommended grant of permission for restricted emergency use of the vaccine, subject to various regulatory provisions and conditions, including requirement to submit relevant data from the ongoing clinical trials nationally and internationally at its earliest. Eventually, in its meeting dated 19.01.2022, the SEC considered the request of Respondent No. 5 to grant permission to manufacture the vaccine, excluding the conditions for restricted use in emergency situation and other conditions, on the lines of Marketing Authorisation by the UK-MHRA for the parent vaccine. After detailed deliberation and consideration of safety, immunogenicity and efficacy data from Indian and overseas clinical trials, amongst other data, the SEC recommended grant of New Drug permission or regular approval, with conditions that data of ongoing clinical trials and vaccine shall continue to be supplied and AEFIs shall continue to be monitored.

79 | P a g e

67. We were directed to Rule 25 of the 2019 Rules, framed under the Drugs and Cosmetics Act, 1940, which provides that the clinical trial shall be conducted in accordance with approved clinical trial protocol and other related documents as per the requirements of Good Clinical Practices (GCP) guidelines and the other rules. The expert committee set up by the CDSCO under Rule 25(vi) in consultation with clinical experts formulated the GCP guidelines for generation of data on drugs. The Ethical Principles, which are part of the said guidelines, protect principles of privacy and confidentiality of human subjects of research. The learned Solicitor General also relied upon para 2.4.4 of the GCP guidelines, which require safeguarding of the confidentiality of research data that might lead to identification of individual subjects. He further referred to the important role played by the Ethics Committee under Rule 11 of the 2019 Rules, which includes safeguarding the rights,

safety and well-being of trial subjects in accordance with the said rules. The 2019 Rules also empower the Ethics Committee to discontinue or suspend the clinical trial in case it concludes that the trial is likely to compromise the right, safety or well-being of the trial subject. As per the ICMRs National Ethical Guidelines 80 | P a g e for Biomedical and Health Research involving Human Participants, the four basic ethical principles for conducting biomedical and health research are (i) respect for persons (autonomy), (ii) beneficence, (iii) non-malfeasance and (iv) justice. These four basic principles have been expanded into 12 general principles, including the principle of ensuring privacy and confidentiality which requires maintaining the privacy of potential participants, her / his identity and records, with access given to only those authorised. As regards transparency of functioning of expert bodies, it was submitted by the Union of India that recommendations of the SEC in all its meetings are uploaded on the website of the CDSCO. Additionally, the detailed minutes of NTAGI meetings were already available in public domain, which can be downloaded from both the ICMR and the MoHFW websites.

68. The contention of Respondent No. 4 is that COVAXIN has undergone all clinical trials. In Phase III, trials revealed a 77.8% efficacy against symptomatic COVID-19 disease. The findings of the clinical trials have been published in reputed peer-reviewed journals and are readily available on the website of Respondent No.4. A reference was made by Respondent No. 4 to the WHO Statement on Clinical Trials, to submit that it is only the key outcomes and findings which 81 | P a g e are required to be made publicly available. It was contended that Respondent No. 4 is in compliance with the WHO Statement on Clinical Trials as the key outcomes and results of the Phase III clinical trial have been published in the Lancet. On behalf of Respondent No. 5, it was submitted that the clinical data generated during the trials had been submitted to the regulatory authorities for obtaining permissions / licences etc. Further, the peer-reviewed study of the partial clinical data of Phase II / III trials had already been published in reputed scientific journals, which included all the information necessary for safeguarding the public as well as informing them of the credibility and efficacy of the vaccine. According to Respondent No. 5, the raw data of the clinical trials served no greater public purpose than the data which was already available in the public domain. All applicable medico-legal, scientific and ethical requirements had been strictly adhered to by Respondent No. 5.

69. In rejoinder, the learned counsel for the Petitioner argued that there is no transparency in the process of approvals of vaccines and relevant data is not always placed before the NTAGI. He referred to a news article in The Wire, according to which Jayaprakash Muliyil, a member of the NTAGI had stated that the NTAGI had not recommended 82 | P a g e vaccination of children in the age group of 12-14 years. He also drew the attention of this Court to non-supply of relevant data to the NTAGI at the time of approval of the Rotavac vaccine against rotavirus. The Petitioner further complained of the haste shown in grant of emergency approval to Respondent No. 4. The Petitioner has sought support of a decision of the United States District Court for the Northern District of Texas dated 06.01.2022 in Public Health and Medical Professionals for Transparency v. Food and Drug Administration, which highlighted the need for transparency in disclosure of clinical trial data. It was reiterated by the Petitioner that privacy of individuals would not be at risk as their personal identification data can be redacted before disclosing segregated data of clinical trials.

70. It is settled law that courts cannot take judicial notice of facts stated in a news item published in a newspaper. A statement of fact contained in a newspaper is merely hearsay and therefore, inadmissible in evidence, unless proved by the maker of the statement appearing in court and deposing to have perceived the fact reported. 48 In the absence of anything on record in the present case to substantiate the statement made by Mr. Jayaprakash Muliyil, 48 Laxmi Raj Shetty v. State of Tamil Nadu (1988) 3 SCC 319 83 | P a g e member of the NTAGI, we are not inclined to take judicial notice of the news article reported in The Wire, even more so in light of the affidavit filed on behalf of the Union of India stating that the relevant data was examined by the expert bodies at all stages before granting emergency use approval to the vaccines. We are also of the opinion that the evidence relating to the approval process of the Rotavac vaccine has no relevance to the dispute in this case. On the basis of the said two incidents, it cannot be concluded that the emergency use approval to COVISHIELD and COVAXIN recommended by the SEC are not in accordance with the statutory regime.

71. At this stage, it is worthwhile to refer to the statutory regime in place. According to Rule 19 of the 2019 Rules, no person, institution or organisation shall conduct clinical trial of a new drug or investigational new drug, except in accordance with the permission granted by the Central Licensing Authority (i.e., the CDSCO) and without following the protocol approved by the Ethics Committee for clinical trial, registered in accordance with the provisions of Rule 8. Rule 19 (2) of the 2019 Rules provides that every person associated with the conduct of clinical trial of a new drug or investigational new drug shall follow the general principles 84 | P a g e and practices as specified in the First Schedule. The methodology to be adopted in a clinical trial is provided for in the First Schedule to the 2019 Rules, relevant clauses of which are as under: -

> GENERAL PRINCIPLES AND PRACTICES FOR CLINICAL TRIAL
>
> 1. General Principles. (1) The principles and guidelines for protection of trial subjects as described in Third Schedule as well as Good Clinical Practices guidelines shall be followed in conduct of any clinical trial. xxx
>
> 4. Conduct of Clinical Trial. Clinical trial should be conducted in accordance with the principles as specified in Third Schedule. Adherence to the clinical trial protocol is essential and if amendment of the protocol becomes necessary the rationale for the amendment shall be provided in the form of a protocol amendment. Serious adverse events shall be reported during clinical trial in accordance with these Rules.

xxx

6. Reporting. Report of clinical trial shall be documented in accordance with the approaches specified in Table 6 of the Third Schedule. The report shall be certified by the principal investigator or if no principal investigator is designated then by each of the participating investigators of the study. It is clear from the above, that there are stringent statutory requirements which have to be complied with by the manufacturers of vaccines and other participants, during different stages of clinical trials of vaccines. Further, we also 85 | P a g e note that the GCP guidelines are statutorily

required to be followed.

72. The GCP guidelines further elaborate on the role of the Ethics Committee. According to the GCP guidelines, the Ethics Committee is an independent review board or a committee comprising of medical / scientific and non-medical / non-scientific members, whose responsibility it is to verify the protection of the rights, safety and well-being of human subjects involved in a study. The independent review provides public reassurance by objectively, independently and impartially reviewing and approving the Protocol, the suitability of the investigator(s), facilities, methods and material to be used for obtaining and documenting Informed Consent of the study subjects and adequacy of confidentiality safeguards. Para 2.4 of the GCP guidelines deal with ethical and safety considerations, which provide that all research involving human subjects should be conducted in accordance with the ethical principles contained in the current version of the Declaration of Helsinki, as annexed to the guidelines. Amongst the principles to be followed, the GCP guidelines require adherence to the principles of accountability and transparency and principles of public domain:

86 | P a g e Principles of accountability and transparency, whereby the research or experiment will be conducted in a fair, honest, impartial and transparent manner, after full disclosure is made by those associated with the Study of each aspect of their interest in the Study, and any conflict of interest that may exist; and whereby, subject to the principles of privacy and confidentiality and the rights of the researcher, full and complete records of the research inclusive of data and notes are retained for such reasonable period as may be prescribed or considered necessary for the purposes of post-research monitoring, evaluation of the research, conducting further research (whether by the initial researcher or otherwise) and in order to make such records available for scrutiny by the appropriate legal and administrative authority, if necessary. xxx Principles of public domain, whereby the research and any further research, experimentation or evaluation in response to, and emanating from such research is brought into the public domain so that its results are generally made known through scientific and other publications subject to such rights as are available to the researcher and those associated with the research under the law in force at that time.

73. The GCP guidelines have been formulated following the Declaration of Helsinki. The relevant portion of the said Declaration is as follows: -

> Privacy and Confidentiality
>
> 24. Every precaution must be taken to protect the privacy of research subjects and the confidentiality of their personal information.

87 | P a g e Research Registration and Publication and Dissemination of Results

36. Researchers, authors, sponsors, editors and publishers all have ethical obligations with regard to the publication and dissemination of the results of research. Researchers have a duty to make publicly available the results of their research on human subjects and are accountable for the completeness and accuracy of their reports. All parties should adhere to accepted guidelines for

ethical reporting. Negative and inconclusive as well as positive results must be published or otherwise made publicly available. Sources of funding, institutional affiliations and conflicts of interest must be declared in the publication. Reports of research not in accordance with the principles of this Declaration should not be accepted for publication. It is profitable to refer to the relevant portion of the WHO Statement on Clinical Trials, which is as under: -

> Reporting timeframes for clinical trials Clinical trial results are to be reported according to the timeframes outlined below. Reporting is to occur in BOTH of the following two modalities.
>
> 1. The main findings of clinical trials are to be submitted for publication in a peer reviewed journal within 12 months of study completion and are to be published through an open access mechanism unless there is a specific reason why open access cannot be used, or otherwise made available publicly at most within 24 months of study completion.

2. In addition, the key outcomes are to be made publicly available within 12 months of study completion by posting to the results section of the primary clinical trial 88 | P a g e registry. Where a registry is used without a results database available, the results should be posted on a free-to-access, publicly available, searchable institutional website of the Regulatory Sponsor, Funder or Principal Investigator.

74. The GCP guidelines are being scrupulously followed, according to the Union of India. The principles of public domain in the GCP guidelines provide for research, experimentation or evaluation in response to the research to be brought into the public domain. The results of the clinical trials are generally to be made known through scientific and other publications. The requirement of publication, according to the WHO, also relates to the main findings of clinical trials to be published in a peer-reviewed journal and the key outcomes to be made publicly available, within 12 months of study completion. The Petitioner complains of opaqueness in clinical trials as the general public do not have access to, and the opportunity to be aware of, all the necessary details by segregated clinical trial data (primary datasets) not being available. There is no challenge by the Petitioner to the GCP guidelines. As required by the WHO Statement on Clinical Trials and the GCP guidelines, findings of the clinical trials and the key outcomes of the trials have been published. In light of the existing statutory regime, we do not see it fit to 89 | P a g e mandate the disclosure of primary clinical trial data, when the results and key findings of such clinical trials have already been published.

75. After examining the judgment of the United States District Court for the Northern District of Texas (hereinafter, the US District Court), we are afraid that the said decision cannot be said to be relevant for adjudication of the dispute in the present case. The grievance of the plaintiff in the said case pertained to all data and information for the Pfizer vaccine, enumerated under the relevant provisions of the Freedom of Information Act, not being provided by the United States Food and Drug Administration. The US District Court referred to the Freedom of Information Act to hold that the citizenry has a right to be provided with the relevant information pertaining to the Pfizer vaccine

and that such information is often useful only if it is timely. The US District Court directed expeditious completion of the plaintiffs request after concluding that the request under the Freedom of Information Act was of paramount importance. We note that with respect to COVAXIN and COVISHIELD, results of clinical trials have been published in accordance with our statutory regime in place. Reliance placed by the Petitioner on European Medicines Agency policy on 90 | P a g e publication of clinical data for medicinal products for human use is also not relevant as the GCP guidelines relating to the disclosure of clinical trial data, framed under the 2019 Rules, currently govern the field of disclosure of clinical trial data in India.

76. An analysis of the submissions made by the learned counsel appearing for the parties and a close scrutiny of the material placed on record would show that there is a strict statutory regime in force for grant of approvals to vaccines. Specialist bodies established under the provisions of the Drugs and Cosmetics Act, 1940 and the rules framed thereunder comprise of domain experts in the relevant field, who conduct a thorough scrutiny of the material produced by the manufacturers before granting approval. The information provided on behalf of the Union of India substantiates that the data provided by the vaccine manufacturers was considered by the SEC over a period of time and several conditions were imposed at the time of recommending approvals, which have been modified or lifted subsequently on availability of further data arising from the clinical trials before the SEC, as can be seen from the minutes of the meetings of the SEC, available on the website of the MoHFW.

91 | P a g e We do not agree with the submission on behalf of the Petitioner that emergency approvals to the vaccines were given in haste, without properly reviewing the data from clinical trials. We are also of the opinion that the Parliamentary Standing Committee report relied upon by Mr. Bhushan is not relevant and the lapses pointed out therein pertain to the year 2011, which have no obvious connection to the grant of approval to Respondent Nos. 4 and 5 for the restricted emergency use of their respective vaccines. As long as the relevant information relating to the minutes of the meetings of the regulatory bodies and the key outcomes and findings of the trials are available in public domain, the Petitioner cannot contend that every minute detail relating to clinical trials be placed in public domain to enable an individual to take an informed, conscious decision to be vaccinated or not. Given the widespread affliction caused by the virus, there was an imminent need of manufacturing vaccines which would keep the infection at bay. We would like to highlight that both the vaccines have been approved by the WHO as well. A perusal of the material placed on record would show that there is material compliance with the procedure prescribed under the Drugs and Cosmetics Act, 1940 and the 2019 Rules, before grant of approval for the 92 | P a g e emergency use of the two vaccines. However, it is made clear that subject to the protection of privacy of individual subjects and to the extent permissible by the 2019 Rules, the relevant data which is required to be published under the statutory regime and the WHO Statement on Clinical Trials shall be made available to the public without undue delay, with respect to the ongoing post-marketing trials of COVAXIN and COVISHIELD as well as ongoing clinical trials or trials that may be conducted subsequently for approval of other COVID- 19 vaccines / vaccine candidates.

III. Improper collection and reporting of AEFIs

77. The contention of the Petitioner is that there have been several adverse effects from vaccines, including deaths. The Petitioner has sought to fault the Governments mechanisms in place for handling of the adverse events. According to the Petitioner, during Phase III trials, where small controlled trials of a limited number of participants are conducted, a significant increase in adverse events may not be seen. But after licensure, when the vaccines are administered to the masses, rare reactions show up, which is why Phase IV post-marketing trials are legally mandated. It was pointed out by the Petitioner that there has been a 93 | P a g e revision of the rules by the WHO for classifying AEFIs in 2018. As per the revised mechanism, only reactions that are previously acknowledged to be caused by the vaccine are classified as vaccine-related reactions. Reactions observed during post-marketing surveillance are not considered as consistent with causal association with vaccine, if a significant increase in such reactions during Phase III trials had not been recorded. According to the Petitioner, this acquires significance in the context of trials conducted in this country, as the control trial in Phase III did not go on in the manner intended, with several members of the original control group prematurely unblinded and offered the vaccine. The Petitioner contends that owing to dilution of Phase III control trials prematurely, there are no controls to compare against, making it difficult to ascertain which adverse events are caused by the vaccine. Therefore, reactions which are not known reactions to the vaccine are not considered AEFIs. In light of this, it is necessary for the authorities to carefully monitor all vaccine recipients and publicly record all adverse events.

78. Taking this argument further, the Petitioner contended that the adverse events reporting system in India is not transparent, with obscure investigation and follow-up of 94 | P a g e deaths and other serious adverse events after COVID-19 vaccination. The Petitioner relied on a letter published in The Hindu on 17.03.2021, written by a group of experts in public health, ethics, medicine, law, and journalism to the Minister for Health & Family Welfare and the DCGI, appealing for time-bound and transparent investigation following deaths and serious adverse effects after COVID-19 vaccination. A presentation made by the National AEFI Committee in a meeting held on 31.03.2021 was referred to by the Petitioner to claim that complete documentation was not available for all the severe and serious adverse events (including deaths) that had occurred till the time. Additionally, it was contended that no data pertaining to the AEFIs already classified nor any analysis of the same had been published publicly till date. The Petitioner also drew the attention of this Court to the Vaccine Adverse Event Reporting System (VAERS) in place in the United States, which published all vaccine injury reports every Friday, received till about a week prior to the release date. It was brought to the notice of this Court that 77,314 adverse events have been reported in India as on 12.03.2022, amounting to 0.004% of the total vaccination. The Petitioner has pointed out that the percentage of adverse events 95 | P a g e reported in Europe is much larger than the percentage identified in India, which would show that correct figures are not being published by the Government.

79. On behalf of the Union of India, the procedures and protocols for monitoring of adverse event following immunisation under the National Adverse Event Following Immunisation Surveillance Guideline were elaborated upon. The National Adverse Event Following Immunisation Surveillance Secretariat, established in the Immunisation Technical Support Unit in 2012, had staff dedicated for managing Adverse Event Following Immunisation surveillance system. It was further strengthened

by the National Adverse Event Following Immunisation Surveillance Technical Collaborating Centre, comprising of experts from Lady Hardinge Medical College and Allied Hospitals in New Delhi. Adverse Event Following Immunisation Committees were formed at the national and state levels to provide guidance to the National AEFI Surveillance and carry out documentation, investigation and causality assessment, besides training and orientation of health care workers and others involved in AEFI. According to the Union of India, a foolproof protocol for reporting and causality assessment for any AEFI with Universal Immunisation Program (UIP) and 96 | P a g e Non-UIP vaccines has been established. The National AEFI Committee gets periodical reports regarding minor AEFIs, severe AEFIs and serious AEFIs. Online reporting of all serious and severe AEFIs at the district level to be communicated to relevant authorities at the state / national level is done on a web-based portal, SAFEVAC (Surveillance and Action for Events Following Vaccination). All serious and severe adverse events following vaccination even at district level are uploaded online on SAFEVAC. It was submitted on behalf of the Union of India that case details, scanned copies of reports are uploaded on SAFEVAC, which also has facilities for generating dashboards and line-lists at different levels.

80. Further, a similar feature of reporting of all AEFIs (including minor) by the vaccinator was made available on the Co-WIN portal. District Immunisation Officers (DIOs) were given the facility to report AEFI cases about which they have information from such individuals who do not have access to Co-WIN. Departmental orders and standard operating procedures have been issued for further investigations and sharing of hospital records by the DIOs through Co-WIN. The Union of India has brought to the notice of this Court that an alignment with the Pharmacovigilance Programme of India (PvPI) under Indian 97 | P a g e Pharmacopoeia Commission has been developed for receipt of information regarding AEFI cases from around 300 Adverse Drug Reaction Monitoring Centers in medical colleges and large hospitals. The Union of India has highlighted that information from the PvPI and the CDSCO are collated and studied, in case of any new, previously unknown events identified through AEFI surveillance. A press release of the MoHFW dated 17.02.2017 titled Maximum Possible Marks to Indian NRA in WHO Assessment has been placed before this Court to state that the AEFI Surveillance System in India (which is in use for COVID-19 vaccination) has been approved by global experts in an assessment conducted by the WHO in 2017. Given the novel nature of the virus, membership of the National AEFI Committee has been expanded to include neurologists, cardiologists, respiratory medicine specialists and medical specialists, with even States / Union Territories requested to expand their AEFI Committees on a similar scale to strengthen AEFI surveillance for COVID-19 vaccines. Causality assessment of AEFI cases is conducted at the state and the national levels by experts trained as per the causality assessment checklist, based on the definition and algorithm developed by the WHO. Once approved by experts of the National AEFI Committee, results of causality 98 | P a g e assessment of AEFI cases are made available in the public domain and are shared with the CDSCO, amongst other authorities, for appropriate regulatory action.

81. As regards the present status of AEFI surveillance for COVID-19 vaccination, it was submitted that as the causality assessment of reported AEFI cases is a time-consuming process, a method of rapid review and assessment had been initiated at the national level to quickly review available information in each case and look for trends in reporting of specific events or unusual cases

requiring further early investigation and assessment. All cases of serious and severe AEFIs, including reported deaths, are subjected to rapid reviews, analysis and causality assessment done by a team of trained subject experts. It was clarified that mere reporting of AEFI case should not be attributed to the vaccine unless proved by the causality assessment analysis. The National Expert Group on Vaccine Administration for COVID- 19 (NEGVAC), an additional body of experts, is also involved in providing guidance on vaccine safety and surveillance, thus, aiding in the prompt identification of AEFIs for the purpose of identifying and understanding evolving trends in the disease and taking prompt action. 2,116 serious and severe AEFIs have been reported from 1,19,38,44,741 doses 99 | P a g e of COVID-19 vaccine administered till 24.11.2021. While a report of rapid review and analysis completed for 495 cases had been submitted, a further report of 1,356 serious and severe AEFI cases had been presented to the NEGVAC and the rapid review and analysis of balance cases was underway. Press releases around a report on bleeding and clotting events following COVID-19 vaccination being submitted to the MoHFW by the National AEFI Committee and on clarification on deaths following vaccination and process of causality assessment were placed before this Court. Therefore, the Union of India submitted that there was continuous monitoring and examination of AEFI cases in India and there is no basis for the allegations around AEFIs not being properly collected and lack of transparency in their investigation.

82. From the material placed before us, we note that the National AEFI Surveillance Secretariat has been functioning for 10 years and as has been pointed out, there is a well- established protocol in place for identification and monitoring of AEFIs. The website of the MoHFW carries the results of causality assessment of AEFI cases, from which the public can obtain relevant information pertaining to AEFIs. We have been informed that a thorough causality assessment analysis 100 | P a g e of AEFIs is carried out by experts and not every severe disease and death can be attributed to vaccination. Reactions are examined by experts specifically trained to undertake causality analysis before notifying such reactions as adverse events arising from vaccination. There is a well- defined mechanism for collection of data relating to adverse events that occur due to COVID-19 vaccines and the Government of India has taken steps to direct all concerned medical professionals at the ground level to report adverse events. Even medical practitioners at private hospitals are associated with reporting of adverse events. Therefore, we are not inclined to accept the broad-strokes challenge mounted by the Petitioner that the surveillance system of AEFIs in this country is faulty and the correct figures of those who have suffered any side effects, severe reactions or deaths post-inoculation have not been disclosed.

83. As regards the contention of the Petitioner on abandoning of Phase III trials, we note that unblinding of participants during the Phase III trial was done on the recommendation of the SEC. The Union of India has emphasized that at every stage, the deliberations of domain experts, which involved discussions with the manufacturers, focused on safety and immunogenicity of the vaccines and it 101 | P a g e was only when there was consensus among domain experts that it was safe to extend the immunisation drive beyond the category of healthcare workers / frontline workers, the appropriate decisions were taken. In doing so, the available trial data, trajectory of the pandemic, evidence, future contingencies and several other factors have always been heeded. There is no challenge to the decision of the SEC, a body of domain experts, as being unreasonable or arbitrary, nor have we been called upon to determine whether adequate time was devoted to recognise all

relevant reactions as vaccine-related reactions prior to such unblinding. What the Petitioner seeks is the monitoring of all adverse events and publication of the results of investigation. The Union of India has painstakingly taken this Court through the details of the procedure followed to closely monitor, review and escalate the incidence of AEFIs to appropriate authorities. As regards previously unknown / unidentified reactions seen during the monitoring of AEFIs at the time of vaccine administration, the Union of India has elaborated on the role of the PvPI and the CDSCO, which collate and study such reactions. We believe this adequately addresses the Petitioners concerns, as this Court has been informed that previously unidentified events are also being 102 | P a g e taken into consideration and investigated. We trust the Union of India to have the appropriate authorities ensure that this leg of the AEFI surveillance system is not compromised with while meeting the requirements of the rapid review and assessment system followed at the national level.

84. The Petitioner had taken issue with the present system to the extent it allows only DIOs or the vaccinators to report AEFIs. According to the Petitioner, the repository of AEFIs should be as detailed as the VAERS in the United State of America. The Petitioner further submitted that individuals and doctors must be able to report adverse events, with the reporter being given a unique identification number and the reports being openly accessible. The response of the Union of India on this issue is that the DIOs have been instructed to set up a network with private hospitals to report AEFIs. Training has been provided to state officers, medical officers, private practitioners and frontline health workers on their role in AEFI surveillance. Even auxiliary nurse midwives have been instructed to notify all AEFIs. However, we are in agreement with the suggestion made by the Petitioner that there should be a mechanism by which individuals and private doctors should be permitted to report suspected 103 | P a g e adverse events. Information relating to adverse effects following immunisation is crucial for the purpose of understanding the safety of the vaccines that are being administered, apart from being instrumental in further scientific studies around the pandemic. There is an imminent need for collection of requisite data of adverse events and wider participation of people in reporting the adverse events is necessary for the purpose of gathering correct information. Thus, the Union of India is directed to facilitate the reporting of suspected adverse events by individuals and private doctors on a virtual platform and the reports so made shall be publicly accessible after being given unique identification numbers, without listing any personal or confidential data of the persons reporting. All necessary steps to create awareness of, and to navigate, this platform for self-reporting shall be effectuated by the Government, roping in and training relevant participants right from the ground level of vaccine administration.

IV. Vaccination of Children

85. The opinion of the Petitioner is that children are at almost no risk from COVID-19 and instances of previously healthy children requiring hospitalisation due to COVID-19 are exceedingly rare. While referring to articles in the Nature 104 | P a g e and the Lancet, the Petitioner contended that scientific evidence shows that risk of administering vaccines to children outweigh the benefits offered by the vaccine in children. The Petitioner further submitted that serological studies would show that a large number of children have already acquired antibodies to COVID-19. The Petitioner has highlighted the risk of myocarditis associated with the mRNA vaccines, on the basis of which, several European countries have recently stopped the use of Moderna vaccines for those under the

age of 30. He has also pointed out that these risks had not been identified in the initial vaccine trials as the trial size was too small to uncover rare risks, which were discovered after mass vaccination. The Petitioner has sought for results as well as the primary data of clinical trials conducted on the paediatric population to be made public.

86. In response thereto, the Union of India contended that paediatric vaccination is advised by global agencies such as the WHO, the UNICEF and the CDC. Expert opinion in India is in tune with global consensus in favour of vaccination of children. We are informed that 8,91,39,455 doses of COVAXIN have been administered to individuals in the age group of 15 to 18 years as on 12.03.2022. The AEFIs 105 | P a g e reported are 1,739 minor complaints, 81 serious complaints and 6 severe. According to the Union of India, the said data would show that the vaccine does not pose threat to the safety of children. As regards the clinical trials, para 2.4.6.2 of the GCP guidelines were relied on to show that children are not required to be involved in research that could be carried out equally well with adults and further that, for the clinical evaluation of a new drug, study in children should be carried out after the Phase III clinical trials in adults. It has been stated that paediatric vaccination was considered at a stage where more than substantial data on safety and immunogenicity of COVAXIN in adults was available. To avoid any risks, clinical trials were also conducted on a limited number of children as per the protocol approved by domain experts. Having found no serious adverse event in the said trials, paediatric vaccination was initiated in a phased manner, starting from the eldest paediatric age group of 15 to 18 years. On 12.05.2021, on the basis of recommendations of the SEC, the CDSCO granted permission to Respondent No. 4 to conduct Phase II / Phase III clinical trials of COVAXIN for the age group of 2 to 18 years. Thereafter, Respondent No. 4 had submitted an application for grant of permission to manufacture COVAXIN paediatric 106 | P a g e vaccines for emergency use, which was subsequently granted by the CDSCO. It was argued on behalf of the Union of India that expert opinion is to the effect that paediatric vaccinations are always preventive in nature and are administered to avoid any risk of infection and of prolonged clinical symptoms.

87. This Court cannot sit in judgment of leading scientific analysis relating to the safety of paediatric vaccination. Experts in science may themselves differ in their opinions while taking decisions on matters related to safety and allied aspects, but that does not entitle the Court to second-guess expert opinion, on the basis of which the Government has drawn up its policies. The decision taken by the Union of India to vaccinate paediatric population in this country is in tune with global scientific consensus and expert bodies like the WHO, the UNICEF and the CDC have also advised paediatric vaccination. It would not only be beyond our jurisdiction but also hazardous if this Court were to examine the accuracy of such expert opinion, based on competing medical opinions. As already stated, the scope of judicial review does not entail the Court embarking upon such misadventures. Therefore, we reject the contention of the 107 | P a g e Petitioner that this Court has to intervene in paediatric vaccination on the ground that it is unscientific.

88. With respect to results of clinical trials, we note that the Union of India has stated that the results of clinical trials of COVAXIN for paediatric population have already been published. We also note that for the age group of 12 to 14 years, Biological Es Corbevax is being administered. Keeping in line with the WHO Statement on Clinical Trials, the Declaration of Helsinki and the GCP

guidelines, we direct the Union of India to ensure that key findings and results of the clinical trials of Corbevax be published at the earliest, if not already done. Neither vaccine is an mRNA vaccine and to this extent, the apprehensions of the Petitioner with respect to the associated risks of mRNA vaccines are unfounded in the present situation.

Conclusion

89. In conclusion, we have summarised our findings on the various issues considered by us, below:

(i) Given the issues urged by the Petitioner have a bearing on public health and concern the fundamental rights of individuals in this country, we are not inclined to 108 | P a g e entertain any challenge to the maintainability of the Writ Petition.

(ii) As far as judicial review of policy decisions based on expert opinion is concerned, there is no doubt that wide latitude is provided to the executive in such matters and the Court does not have the expertise to appreciate and decide on merits of scientific issues on the basis of divergent medical opinion. However, this does not bar the Court from scrutinising whether the policy in question can be held to be beyond the pale of unreasonableness and manifest arbitrariness and to be in furtherance of the right to life of all persons, bearing in mind the material on record.

(iii) With respect to the infringement of bodily integrity and personal autonomy of an individual considered in the light of vaccines and other public health measures introduced to deal with the COVID-19 pandemic, we are of the opinion that bodily integrity is protected under Article 21 of the Constitution and no individual can be forced to be vaccinated. Further, personal autonomy of an individual, which is a recognised facet of the protections guaranteed under Article 21, encompasses the right to refuse to undergo any medical treatment in 109 | P a g e the sphere of individual health. However, in the interest of protection of communitarian health, the Government is entitled to regulate issues of public health concern by imposing certain limitations on individual rights, which are open to scrutiny by constitutional courts to assess whether such invasion into an individuals right to personal autonomy and right to access means of livelihood meets the threefold requirement as laid down in K.S. Puttaswamy (supra), i.e., (i) legality, which presupposes the existence of law; (ii) need, defined in terms of a legitimate State aim; and (iii) proportionality, which ensures a rational nexus between the objects and the means adopted to achieve them.

(iv) On the basis of substantial material filed before this Court reflecting the near-unanimous views of experts on the benefits of vaccination in addressing severe disease from the infection, reduction in oxygen requirement, hospital and ICU admissions, mortality and stopping new variants from emerging, this Court is satisfied that the current vaccination policy of the Union of India is informed by relevant considerations and cannot be said to be unreasonable or manifestly arbitrary. Contrasting scientific opinion coming forth from certain quarters to 110 | P a g e the effect that natural immunity offers better protection against COVID-19 is not pertinent for determination of the issue before us.

(v) However, no data has been placed by the Union of India or the States appearing before us, controverting the material placed by the Petitioner in the form of emerging scientific opinion which appears to indicate that the risk of transmission of the virus from unvaccinated individuals is almost on par with that from vaccinated persons. In light of this, restrictions on unvaccinated individuals imposed through various vaccine mandates by State Governments / Union Territories cannot be said to be proportionate. Till the infection rate remains low and any new development or research finding emerges which provides due justification to impose reasonable and proportionate restrictions on the rights of unvaccinated individuals, we suggest that all authorities in this country, including private organisations and educational institutions, review the relevant orders and instructions imposing restrictions on unvaccinated individuals in terms of access to public places, services and resources, if not already recalled. It is clarified that in the context of the rapidly-evolving situation presented 111 | P a g e by the COVID-19 pandemic, our suggestion to review the vaccine mandates imposed by States / Union Territories, is limited to the present situation alone and is not to be construed as interfering with the lawful exercise of power by the executive to take suitable measures for prevention of infection and transmission of the virus. Our suggestion also does not extend to any other directions requiring maintenance of COVID-appropriate behaviour issued by the Union or the State Governments.

(vi) As regards non-disclosure of segregated clinical data, we find that the results of Phase III clinical trials of the vaccines in question have been published, in line with the requirement under the statutory regime in place, the GCP guidelines and the WHO Statement on Clinical Trials. The material provided by the Union of India, comprising of minutes of the meetings of the SEC, do not warrant the conclusion that restricted emergency use approvals had been granted to COVISHIELD and COVAXIN in haste, without thorough review of the relevant data. Relevant information relating to the meetings of the SEC and the NTAGI are available in public domain and therefore, challenge to the procedures adopted by the expert 112 | P a g e bodies while granting regulatory approval to the vaccines on the ground of lack of transparency cannot be entertained. However, we reiterate that subject to the protection of privacy of individual subjects, with respect to ongoing clinical trials and trials that may be conducted subsequently for COVID-19 vaccines, all relevant data required to be published under the extant statutory regime must be made available to the public without undue delay.

(vii) We do not accept the sweeping challenge to the monitoring system of AEFIs being faulty and not reflecting accurate figures of those with severe reactions or deaths from vaccines. We note that the role of the Pharmacovigilance Programme of India and the CDSCO, as elaborated upon by the Union of India, collates and studies previously unknown reactions seen during monitoring of AEFIs at the time of vaccine administration and we trust the Union of India to ensure that this leg of the AEFI surveillance system is not compromised with, while meeting the requirements of the rapid review and assessment system followed at the national level for AEFIs.

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(viii) We are also of the opinion that information relating to adverse effects following immunisation is crucial for creating awareness around vaccines and their efficacy, apart from being instrumental

in further scientific studies around the pandemic. Recognising the imperative need for collection of requisite data of adverse events and wider participation in terms of reporting, the Union of India is directed to facilitate reporting of suspected adverse events by individuals and private doctors on an accessible virtual platform. These reports shall be made publicly accessible, without compromising on protecting the confidentiality of the persons reporting, with all necessary steps to create awareness of the existence of such a platform and of the information required to navigate the platform to be undertaken by the Union of India at the earliest.

(ix) On paediatric vaccination, we recognise that the decision taken by the Union of India to vaccinate children in this country is in tune with global scientific consensus and expert bodies like the WHO, the UNICEF and the CDC and it is beyond the scope of review for this Court to second-guess expert opinion, on the basis of which the Government has drawn up its policy. Keeping in line with 114 | P a g e the WHO Statement on Clinical Trials and the extant statutory regime, we direct the Union of India to ensure that key findings and results of the relevant phases of clinical trials of vaccines already approved by the regulatory authorities for administration to children, be made public at the earliest, if not already done.

90. We express our gratitude to the learned counsel on either side for their able assistance in enabling this Court to reach the above conclusion.

91. The Writ Petition is disposed of accordingly.

.....J. [L. NAGESWARA RAO] .....J. [B. R. GAVAI] New Delhi, May 2, 2022 115 | P a g e

M.A. v. De Villa, [2021] O.J. No. 2900

Ontario Judgments

Ontario Superior Court of Justice

E.M. Morgan J.

Heard: By written submissions.

Judgment: May 27, 2021.

Court File No.: CV-21-661284

[2021] O.J. No. 2900 | 2021 ONSC 3828

RE: M.A. and L.A. (Minors represented by their Litigation Guardian Renata Dziak), E.P. and R.P. (Minors represented by their Litigation Guardian Catherine Braund-Pereira), L.S. (Minor represented by his Litigation Guardian Bojan Sajlovic), N.K. (Minor represented by his Litigation Guardian Helena Kosin) (Students at the Toronto District School Board), Nancy O'Brien (Toronto District School Board Teacher); G.M., W.M., J.M., and L.M. (Minors represented by their Litigation Guardian Scarlett Martyn), M.D. (Minor represented by Litigation Guardian Lindsay Denike) (Students at the Durham District School Board), Katrina Wiens (Teacher at Durham District School Board); M.L.J. and M.G.J. (Minors represented by their Litigation Guardian Angela Johnston), C.V., E.W., and M.V. (Minors represented by their Litigation Guardian Jeff Varcoe) (Students at the Halton District School Board), David Sykes (Teacher, Resource Consultant for the Deaf, Provincial Schools Authority); N.M. (Minor represented by his Litigation Guardian Lorie Lewis) J.R.B. (Minor represented by his Litigation Guardian Jocelyne Bridle), Children's Health Defence (Canada), and Educators for Human Rights, Applicants, and Eileen De Villa, (Chief Medical Officer, City of Toronto Public Health), City of Toronto, Dr. Lawrence Loh, (Chief Medical Officer for Peel Public Health), Hamidah Meghani, (Chief Medical Officer for Halton Public Health), Robert Kyle, (Chief Medical Officer for Durham Public Health), Dr. Nicola Mercer, (Chief Medical Officer for Wellington-Dufferin-Guelph Public Health), Dr. David Williams (Ontario Chief Medical Officer of Health), The Attorney General for Ontario, The Minister of Education, The Minister of Health and Long-Term Care, The Toronto District School Board, The Halton District School Board, The Durham District School Board, Robert Hochberg, Principal at Runnymede Public School, Superintendent Debbie Donsky of Toronto District School Board, Johns and Janes Does (Officials of the Defendants Minister of Education, Health and Long-Term Care and School Boards), Respondents

(6 paras.)

Counsel

Rocco Galati, for the Applicants.

Padriac Ryan, for the Respondents.

ENDORSEMENT

E.M. MORGAN J.

1 Counsel for the Attorney General of Ontario has written to the Court asking for a ruling in writing for this Application to be dismissed as being frivolous and vexatious. The Applicants bring a Charter challenge against

numerous public officials alleging that the formulation and implementation of various public health policies and measures relating to the ongoing COVID 19 pandemic violate the rights of Canadians.

2 I do not have before me a full record. I only have the Notice of Application issued April 9, 2021, setting out the grounds for the Application and the remedies sought.

3 The grounds described in the Notice are wide-ranging and, perhaps, a tad outlandish in content and tone. Without the benefit of a complete record and full legal argument, however, I would not want to opine on whether the Application promises to be a success or failure. Counsel for the Attorney General obviously believes that the entire litigation is problematic. But the Notice of Application does cite known grounds of Charter challenge while at the same time it seems to stretch existing legal concepts in an effort to perhaps make new law.

4 It strikes me that there are serious legal challenges awaiting the Applicants, not the least of which is that some of their claims at first blush appear to be potentially in the jurisdiction of Divisional Court rather than this Court. But those questions require the Court to have before it an Application Record, and not just a Notice. They also require the input of counsel. As it is, I only have a letter from counsel for the Attorney General and it does not appear that counsel for the Applicants has had notice of the Attorney General's request.

5 For the moment, I can only repeat the words of the Court of Appeal in *Khan v. Krylov & Company*, 2017 ONCA 625, at para. 12: "Rule 2.1 is an extremely blunt instrument. It is reserved for the clearest of cases, where the hallmarks of frivolous, vexatious, or abusive litigation are plainly evident on the face of the pleading. Rule 2.1 is not meant to be an easily accessible alternative to a pleadings motion, a motion for summary judgment, or a trial." The Notice of Application does not meet this test. I cannot say that the Application is frivolous and vexatious within the meaning of Rule 2.1.01 of the *Rules of Civil Procedure*.

6 This Application is in need of some case management, and the sooner the better. Counsel for the Attorney General and counsel for the Applicants are to be in touch with my assistant in order to schedule a case conference prior to any responding materials being served.

E.M. MORGAN J.

Manitoba Metis Federation Inc. v. Canada (Attorney General), [2013] 1 S.C.R. 623

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and LeBel, Deschamps,* Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

Heard: December 13, 2011;

Judgment: March 8, 2013.

File No.: 33880.

[2013] 1 S.C.R. 623 | [2013] 1 R.C.S. 623 | [2013] S.C.J. No. 14 | [2013] A.C.S. no 14 | 2013 SCC 14

Manitoba Metis Federation Inc., Yvon Dumont, Billy Jo De La Ronde, Roy Chartrand, Ron Erickson, Claire Riddle, Jack Fleming, Jack McPherson, Don Roulette, Edgar Bruce Jr., Freda Lundmark, Miles Allarie, Celia Klassen, Alma Belhumeur, Stan Guiboche, Jeanne Perrault, Marie Banks Ducharme and Earl Henderson, Appellants; v. Attorney General of Canada and Attorney General of Manitoba, Respondents, and Attorney General for Saskatchewan, Attorney General of Alberta, Métis National Council, Métis Nation of Alberta, Métis Nation of Ontario, Treaty One First Nations and Assembly of First Nations, Interveners.

(303 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Case Summary

Subsequent History:

* Editor's Note: Deschamps J. took no part in the judgment.

Catchwords:

Aboriginal law — Métis — Crown law — Honour of the Crown — Canadian government agreeing in 1870 to grant Métis children shares of 1.4 million acres of land and to recognize existing Métis landholdings — Promises set out in ss. 31 and 32 of the Manitoba Act, 1870, a constitutional document — Errors and delays interfering with division and granting of land among eligible [page624] recipients — Whether Canada failing to comply with the honour of the Crown in the implementation of ss. 31 and 32 of the Manitoba Act, 1870.

Aboriginal law — Métis — Fiduciary duty — Canadian government agreeing in 1870 to grant Métis children shares of 1.4 million acres of land and to recognize existing Métis landholdings — Promises set out in ss. 31 and 32 of the Manitoba Act, 1870, a constitutional document — Errors and delays interfering with division and granting of land among eligible recipients — Whether Canada in breach of fiduciary duty to Métis.

Limitation of actions — Declaration — Appellants seeking declaration in the courts that Canada breached obligations to implement promises made to the Métis people in the Manitoba Act, 1870 — Whether statute

of limitations can prevent courts from issuing declarations on the constitutionality of Crown conduct — Whether claim for declaration barred by laches.

Civil procedure — Parties — Standing — Public interest standing — Manitoba Act, 1870, providing for individual land entitlements — Whether federation advancing collective claim on behalf of Métis people should be granted public interest standing.

Summary:

After Confederation, the first government of Canada embarked on a policy aimed at bringing the western territories within the boundaries of Canada, and opening them up to settlement. Canada became the titular owner of Rupert's Land and the Red River Settlement; however, the French-speaking Roman Catholic Métis, the dominant demographic group in the Red River Settlement, viewed with alarm the prospect of Canadian control leading to a wave of English-speaking Protestant settlers that would threaten their traditional way of life. In the face of armed resistance, Canada had little choice but to adopt a diplomatic approach. The Red River settlers agreed to become part of Canada, and Canada agreed to grant 1.4 million acres of land to the Métis children (subsequently set out in s. 31 of the *Manitoba Act*) and to recognize existing landholdings (subsequently set out in s. 32 of the *Manitoba Act*). The Canadian government began the process of implementing s. 31 in early [page625] 1871. The land was set aside, but a series of errors and delays interfered with dividing the land among the eligible recipients. Initially, problems arose from errors in determining who had a right to a share of the land promised. As a result, two successive allotments were abandoned; the third and final allotment was not completed until 1880. The lands were distributed randomly to the eligible Métis children living within each parish.

While the allotment process lagged, speculators began acquiring the Métis children's yet-to-be granted interests in the s. 31 lands, aided by a range of legal devices. During the 1870s and 1880s, Manitoba passed five statutes, now long spent and repealed, dealing with the technical requirements to transfer interests in s. 31 lands. Initially, Manitoba moved to curb speculation and improvident sales of the children's interests, but in 1877, it changed course, allowing sales of s. 31 entitlements.

Eventually, it became apparent that the number of eligible Métis children had been underestimated. Rather than starting a fourth allotment, the Canadian government provided that remaining eligible children would be issued with scrip redeemable for land. The scrip was based on 1879 land prices; however, when the scrip was delivered in 1885, land prices had increased so that the excluded children could not acquire the same amount of land granted to other children. In the decades that followed, the position of the Métis in the Red River Settlement deteriorated. White settlers soon constituted a majority in the territory and the Métis community began to unravel.

The Métis sought a declaration that (1) in implementing the *Manitoba Act*, the federal Crown breached fiduciary obligations owed to the Métis; (2) the federal Crown failed to implement the *Manitoba Act* in a manner consistent with the honour of the Crown; and (3) certain legislation passed by Manitoba affecting the implementation of the *Manitoba Act* was *ultra vires*. The trial judge dismissed the claim for a declaration on the ground that ss. 31 and 32 of the *Manitoba Act* gave rise to neither a fiduciary duty nor a duty based on the honour of the Crown. He also found that the challenged Manitoba [page626] statutes were constitutional, and, in any event, the claim was barred by limitations and the doctrine of laches. Finally, he found that the Manitoba Metis Federation Inc. ("MMF") should not be granted standing in the action, since the individual plaintiffs were capable of bringing the claims forward. A five-member panel of the Manitoba Court of Appeal dismissed the appeal.

Held (Rothstein and Moldaver JJ. dissenting): The appeal should be allowed in part. The federal Crown failed to implement the land grant provision set out in s. 31 of the *Manitoba Act, 1870* in accordance with the honour of the Crown.

Per McLachlin C.J. and LeBel, Fish, Abella, Cromwell and Karakatsanis JJ.: The MMF should be granted standing. The action advanced is a collective claim for declaratory relief for the purposes of reconciling the descendants of

the Métis people of the Red River Valley and Canada. It merits allowing the body representing the collective Métis interest to come before the court.

The obligations enshrined in ss. 31 and 32 of the *Manitoba Act* did not impose a fiduciary duty on the government. In the Aboriginal context, a fiduciary duty may arise in two ways. First, it may arise as a result of the Crown assuming discretionary control over specific Aboriginal interests. Where the Crown administers lands or property in which Aboriginal peoples have an interest, such a duty may arise if there is (1) a specific or cognizable Aboriginal interest, and (2) a Crown undertaking of discretionary control over that interest. The interest must be a communal Aboriginal interest in land that is integral to the nature of the Métis distinctive community and their relationship to the land. It must be predicated on historic use and occupation, and cannot be established by treaty or by legislation. Second, and more generally, a fiduciary duty may arise if there is (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary; (2) a defined person or class of persons vulnerable to a fiduciary's control; and (3) a legal or substantial practical interest of the beneficiary that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

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Although the Crown undertook discretionary control of the administration of the land grants under ss. 31 and 32 of the *Manitoba Act*, the Métis are Aboriginal, and they had an interest in the land, the first test for fiduciary duty is not made out because neither the words of s. 31 nor the evidence establish a pre-existing communal Aboriginal interest held by the Métis. Their interests in land arose from their personal history, not their shared distinct Métis identity. Nor was a fiduciary duty established on the basis of an undertaking by the Crown. While s. 31 shows an intention to benefit the Métis children, it does not demonstrate an undertaking to act in their best interests, in priority to other legitimate concerns. Indeed, the discretion conferred by s. 31 to determine "such mode and on such conditions as to settlement and otherwise" belies a duty of loyalty and an intention to act in the best interests of the beneficiary, forsaking all other interests. Section 32 simply confirmed the continuance of different categories of landholdings in existence shortly before or at the creation of the new province. It did not constitute an undertaking on the part of the Crown to act as a fiduciary in settling the titles of the Métis landholders.

However, the Métis are entitled to a declaration that the federal Crown failed to act with diligence in implementing the land grant provision set out in s. 31 of the *Manitoba Act*, in accordance with the honour of the Crown. The ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Aboriginal societies with the assertion of Canadian sovereignty. Where this is at stake, it requires the Crown to act honourably in its dealings with the Aboriginal peoples in question. This flows from the guarantee of Aboriginal rights in s. 35(1) of the Constitution. The honour of the Crown is engaged by an explicit obligation to an Aboriginal group enshrined in the Constitution. The Constitution is not a mere statute; it is the very document by which the Crown asserted its sovereignty in the face of prior Aboriginal occupation. An explicit obligation to an Aboriginal group in the Constitution engages the honour of the Crown.

The honour of the Crown speaks to *how* obligations that attract it must be fulfilled, so the duties that flow from it vary with the situation. In the context of the implementation of a constitutional obligation to an Aboriginal people, the honour of the Crown requires that [page628] the Crown: (1) take a broad purposive approach to the interpretation of the promise; and (2) act diligently to fulfill it. The question is whether, viewing the Crown's conduct as a whole in the context of the case, it acted with diligence to pursue the fulfillment of the purposes of the obligation. The duty to act diligently is a narrow and circumscribed duty. Not every mistake or negligent act in implementing a constitutional obligation to an Aboriginal people brings dishonour to the Crown, and there is no guarantee that the purposes of the promise will be achieved. However, a persistent pattern of errors and indifference that substantially frustrates the purposes of a solemn promise may amount to a betrayal of the Crown's duty to act honourably in fulfilling its promise.

Section 31 of the *Manitoba Act* is a solemn constitutional obligation to the Métis people of Manitoba, an Aboriginal people, and it engaged the honour of the Crown. Its immediate purpose was to give the Métis children a head start over the expected influx of settlers from the east. Its broader purpose was to reconcile the Métis' Aboriginal

interests in the Manitoba territory with the assertion of Crown sovereignty over the area that was to become the province of Manitoba. By contrast, s. 32 was a benefit made generally available to all settlers and did not engage the honour of the Crown.

Although the honour of the Crown obliged the government to act with diligence to fulfill s. 31, it acted with persistent inattention and failed to act diligently to achieve the purposes of the s. 31 grant. This was not a matter of occasional negligence, but of repeated mistakes and inaction that persisted for more than a decade, substantially defeating a purpose of s. 31. This was inconsistent with the behaviour demanded by the honour of the Crown: a government sincerely intent on fulfilling the duty that its honour demanded could and should have done better.

None of the government's other failures -- failing to prevent Métis from selling their land to speculators, issuing scrip in place of land, and failing to cluster family allotments -- were in themselves inconsistent with the honour of the Crown. That said, the impact of these measures was exacerbated by the delay inconsistent with [page629] the honour of the Crown: it increased improvident sales to speculators; it meant that when the children received scrip, they obtained significantly less than the 240 acres provided to those who took part in the initial distribution, because the price of land had increased in the interim; and it made it more difficult for Métis to trade grants amongst themselves to achieve contiguous parcels.

It is unnecessary to consider the constitutionality of the implementing statutes because they are moot.

The Métis claim based on the honour of the Crown is not barred by the law of limitations. Although claims for personal remedies flowing from unconstitutional statutes may be time-barred, the Métis seek no personal relief and make no claim for damages or for land. Just as limitations acts cannot prevent the courts from issuing declarations on the constitutionality of legislation, limitations acts cannot prevent the courts from issuing a declaration on the constitutionality of the Crown's conduct. So long as the constitutional grievance at issue here remains outstanding, the goals of reconciliation and constitutional harmony remain unachieved. In addition, many of the policy rationales underlying limitations statutes do not apply in an Aboriginal context. A declaration is a narrow remedy and, in some cases, may be the only way to give effect to the honour of the Crown.

Nor is the claim barred by the equitable doctrine of laches. Given the context of this case, including the historical injustices suffered by the Métis, the imbalance in power that followed Crown sovereignty, and the negative consequences following delays in allocating the land grants, delay on the part of the appellants cannot, by itself, be interpreted as some clear act which amounts to acquiescence or waiver. It is rather unrealistic to suggest that the Métis sat on their rights before the courts were prepared to recognize those rights. Furthermore, Canada has not changed its position as a result of the delay. This suffices to find that the claim is not barred by laches. However, it is difficult to see how a court, in its role as guardian of the Constitution, could apply an equitable doctrine to defeat a claim for a declaration that a Constitutional provision has not been fulfilled as required by the honour of the Crown.

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Per Rothstein and Moldaver JJ. (dissenting): There is agreement with the majority that there was no fiduciary duty here, that no valid claims arise from s. 32 of the *Manitoba Act*, that any claims that might have arisen from the now repealed Manitoba legislation on the land grants are moot, that the random allocation of land grants was an acceptable means for Canada to implement the s. 31 land grants, and that the MMF has standing to bring these claims. However, the majority proposes a new common law constitutional obligation derived from the honour of the Crown. The courts below did not consider this issue and the parties did not argue it before this Court. This is an unpredictable expansion of the scope of the duties engaged under the honour of the Crown. The claim based on the honour of the Crown is also barred by both limitations periods and laches.

While a duty of diligent fulfillment may well prove to be an appropriate expansion of Crown obligations, and while a faster process would most certainly have been better, the duty crafted by the majority creates an unclear rule that is unconstrained by laches or limitation periods and immune from legislative redress, making the extent and consequences of the Crown's new obligations impossible to predict. It is not clear when an obligation rises to the

"solemn" level that triggers the duty, what types of legal documents will give rise to solemn obligations, whether an obligation with a treaty-like character imposes higher obligations than other constitutional provisions, and whether it is sufficient for the obligation to be owed to an Aboriginal group. The idea that how the government is obliged to perform a constitutional obligation depends on how closely it resembles a treaty should be rejected. It would be a significant expansion of Crown liability to permit a claimant to seek relief so long as the promise was made to an Aboriginal group, without proof of an Aboriginal interest sufficient to ground a fiduciary duty, and based on actions that would not constitute a breach of fiduciary duty.

Even if the honour of the Crown was engaged and required the diligent implementation of s. 31, and even if this duty was not fulfilled, any claims arising from such a cause of action have long been barred by statutes of limitations and the equitable doctrine of laches. [page631] Limitations and laches cannot fulfill their purposes if they are not universally applicable. Limitations periods apply to the government as they do to all other litigants both generally and in the area of Aboriginal claims. This benefits the legal system by creating certainty and predictability, and serves to protect society at large by ensuring that claims against the Crown are made in a timely fashion so that the Crown is able to defend itself adequately.

Limitations periods have existed in Manitoba continuously since 1870, and, since 1931, Manitoba limitations legislation has provided a six-year limitation period for all causes of action, whether the cause of action arose before or after the legislation came into force. Manitoba has a 30-year ultimate limitation period. The Crown is entitled to the benefit of those limitations periods. The policy rationales underlying limitations periods do not support the creation of an exemption from those periods in this case. Manitoba legislation does not contain an exception from limitations periods for declaratory judgments and no such exception should be judicially created. In this case, the risk that a declaratory judgment will lead to additional remedies is fully realized: the Métis plan to use the declaration in extra-judicial negotiations with the Crown, so the declaration exposes the Crown to an obligation long after the time when the limitations period expired.

Moreover, this Court has never recognized a general exception from limitations for constitutionally derived claims. Rather, it has consistently held that limitations periods apply to factual claims with constitutional elements. While limitations periods do not apply to prevent a court from declaring a statute unconstitutional, the Métis' claim about unconstitutional statutes is moot. The remaining declaration sought concerns factual issues and alleged breaches of obligations which have always been subject to limitation periods. In suggesting that the goal of reconciliation must be given priority in the Aboriginal context, it appears that the majority has departed from the principle that the same policy rationales that support limitations generally should apply to Aboriginal claims.

These claims are also subject to laches. Laches can be used to defend against equitable claims that have [page632] not been brought in a sufficiently timely manner, and as breaches of fiduciary duty can be subject to laches, it would be fundamentally inconsistent to permit certain claims based on the honour of the Crown to escape the imputation of laches. Both branches of laches are satisfied: the Métis have knowingly delayed their claim by over a hundred years and in so doing have acquiesced to the circumstances and invited the government to rely on that, rendering the prosecution of this action unreasonable. As to acquiescence, the trial judge found that the Métis had the required knowledge in the 1870s, and that finding has not been shown to be an error. The suggestion that it is "unrealistic" to expect someone to have enforced their claim before the courts were prepared to recognize those rights is fundamentally at odds with the common law approach to changes in the law. Delay in making the grants cannot be both the wrong alleged and the reason the Crown cannot access the defence of laches: laches are always invoked as a defence by a party alleged to have wronged the plaintiff. If assessing conscionability is reduced to determining if the plaintiff has proven the allegations, the defence of laches is rendered illusory. The imbalance in power between the Métis and the government did not undermine their knowledge, capacity or freedom to the extent required to prevent a finding of acquiescence. The inference that delays in the land grants caused the vulnerability of the Métis was neither made by the trial judge nor supported by the record. In any event, laches are imputed against vulnerable people just as limitations periods are applied against them.

As to reliance, had the claim been brought promptly, the unexplained delays referred to as evidence for the Crown

acting dishonourably may well have been accounted for, or the government might have been able to take steps to satisfy the Métis community.

Finally, while not doing so explicitly, the majority departs from the factual findings of the trial judge, absent a finding of palpable and overriding error, in two main areas: (1) the extent of the delay in distributing the land, and (2) the effect of that delay on the Métis. Manifestly, the trial judge made findings of delay. Nonetheless these findings and the evidence do not reveal a pattern of inattention, a lack of diligence, or that the purposes of the land grant were frustrated. That alone would nullify any claim the Métis might have based on a breach of duty [page633] derived from the honour of the Crown, assuming that any such duty exists.

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APPEAL from a judgment of the Manitoba Court of Appeal (Scott C.J.M. and Monnin, Steel, Hamilton and Freedman JJ.A.), 2010 MBCA 71, 255 Man. R. (2d) 167, 486 W.A.C. 167, [2010] 12 W.W.R. 599, [2010] 3 C.N.L.R. 233, 216 C.R.R. (2d) 144, 94 R.P.R. (4) 161, [2010] M.J. No. 219 (QL), 2010 CarswellMan 322, affirming a decision of MacInnes J., 2007 MBQB 293, 223 Man. R. (2d) 42, [2008] 4 W.W.R. 402, [2008] 2 C.N.L.R. 52, [2007] M.J. No. 448 (QL), 2007 CarswellMan 500. Appeal allowed in part, Rothstein and Moldaver JJ. dissenting.

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Written submissions only by *Joseph J. Arvay*, *Q.C.*, *David C. Nahwegahbow* and *Bruce Elwood*, for the intervener the Assembly of First Nations.

The judgment of McLachlin C.J. and LeBel, Fish, Abella, Cromwell and Karakatsanis JJ. was delivered by

McLACHLIN C.J. and KARAKATSANIS J.

I. Overview

1 Canada is a young nation with ancient roots. The country was born in 1867, by the consensual union of three colonies - United Canada (now Ontario and Quebec), Nova Scotia and New Brunswick. Left unsettled was whether the new nation would be expanded to include the vast territories to the west, stretching from modern Manitoba to British Columbia. The Canadian government, led by Prime Minister John A. Macdonald, embarked on a policy aimed at bringing the western territories within the boundaries of Canada, and opening them up to settlement.

2 This meant dealing with the indigenous peoples who were living in the western territories. On the prairies, these consisted mainly of two groups - the First Nations, and the descendants of unions between white traders and explorers and Aboriginal women, now known as Métis.

3 The government policy regarding the First Nations was to enter into treaties with the various bands, whereby they agreed to settlement of their lands in exchange for reservations of land and other promises.

4 The government policy with respect to the Métis population - which, in 1870, comprised 85 percent of the population of what is now Manitoba - was less clear. Settlers began pouring into the region, displacing the Métis' social and political [page638] control. This led to resistance and conflict. To resolve the conflict and assure peaceful annexation of the territory, the Canadian government entered into negotiations with representatives of the Métis-led provisional government of the territory. The result was the *Manitoba Act, 1870*, S.C. 1870, c. 3 ("*Manitoba Act*"), which made Manitoba a province of Canada.

5 This appeal is about obligations to the Métis people enshrined in the *Manitoba Act*, a constitutional document. These promises represent the terms under which the Métis people agreed to surrender their claims to govern themselves and their territory, and become part of the new nation of Canada. These promises were directed at enabling the Métis people and their descendants to obtain a lasting place in the new province. Sadly, the expectations of the Métis were not fulfilled, and they scattered in the face of the settlement that marked the ensuing decades.

6 Now, over a century later, the descendants of the Métis people seek a declaration in the courts that Canada breached its obligation to implement the promises it made to the Métis people in the *Manitoba Act*.

7 More particularly, the appellants seek a declaration that (1) in implementing the *Manitoba Act*, the federal Crown breached fiduciary obligations owed to the Métis; (2) the federal Crown failed to implement the *Manitoba Act* in a manner consistent with the honour of the Crown; and (3) certain legislation passed by Manitoba affecting the implementation of the *Manitoba Act* was *ultra vires*.

8 It is not disputed that there was considerable delay in implementing the constitutional provisions. The main issues are (1) whether Canada failed to act in accordance with its legal obligations, and (2) whether the Métis' claim is too late and thus barred by the doctrine of laches or by any [page639] limitations law, be it the English limitations law in force at the time the claims arose, or the subsequent limitations acts enacted by Manitoba: *The Limitation of*

Actions Act, 1931, S.M. 1931, c. 30; *The Limitation of Actions Act, 1931*, R.S.M. 1940, c. 121; *The Limitation of Actions Act*, R.S.M. 1970, c. L150; collectively referred to as "*The Limitation of Actions Act*".

9 We conclude that s. 31 of the *Manitoba Act* constitutes a constitutional obligation to the Métis people of Manitoba, an Aboriginal people, to provide the Métis children with allotments of land. The immediate purpose of the obligation was to give the Métis children a head start over the expected influx of settlers from the east. Its broader purpose was to reconcile the Métis' Aboriginal interests in the Manitoba territory with the assertion of Crown sovereignty over the area that was to become the province of Manitoba. The obligation enshrined in s. 31 of the *Manitoba Act* did not impose a fiduciary or trust duty on the government. However, as a solemn constitutional obligation to the Métis people of Manitoba aimed at reconciling their Aboriginal interests with sovereignty, it engaged the honour of the Crown. This required the government to act with diligence in pursuit of the fulfillment of the promise. On the findings of the trial judge, the Crown failed to do so and the obligation to the Métis children remained largely unfulfilled. The Métis claim based on the honour of the Crown is not barred by the law of limitations or the equitable doctrine of laches. We therefore conclude that the Métis are entitled to a declaration that Canada failed to implement s. 31 as required by the honour of the Crown.

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10 We agree with the courts below that the s. 32 claim is not established, and find it unnecessary to consider the constitutionality of the implementing statutes.

II. The Constitutional Promises and the Legislation

11 Section 31 of the *Manitoba Act*, known as the children's grant, set aside 1.4 million acres of land to be given to Métis children:

> **31.** And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the Province, to appropriate a portion of such ungranted lands, to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the half-breed residents, it is hereby enacted, that, under regulations to be from time to time made by the Governor General in Council, the Lieutenant-Governor shall select such lots or tracts in such parts of the Province as he may deem expedient, to the extent aforesaid, and divide the same among the children of the half-breed heads of families residing in the Province at the time of the said transfer to Canada, and the same shall be granted to the said children respectively, in such mode and on such conditions as to settlement and otherwise, as the Governor General in Council may from time to time determine.

12 Section 32 of the *Manitoba Act* provided for recognition of existing landholdings, where individuals asserting ownership had not yet been granted title:

> **32.** For the quieting of titles, and assuring to the settlers in the Province the peaceable possession of the lands now held by them, it is enacted as follows:-
>
> (1) All grants of land in freehold made by the Hudson's Bay Company up to the eighth day of March, in the year 1869, shall, if required by the owner, be confirmed by grant from the Crown.
>
> (2) All grants of estates less than freehold in land made by the Hudson's Bay Company up to the eighth day of March aforesaid, shall, if required by the owner, be converted into an estate in freehold by grant from the Crown.

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> (3) All titles by occupancy with the sanction and under the license and authority of the Hudson's Bay Company up to the eighth day of March aforesaid, of land in that part of the Province in which the Indian Title has been extinguished, shall, if required by the owner, be converted into an estate in freehold by grant from the Crown.

> (4) All persons in peaceable possession of tracts of land at the time of the transfer to Canada, in those parts of the Province in which the Indian Title has not been extinguished, shall have the right of pre-emption of the same, on such terms and conditions as may be determined by the Governor in Council.
>
> (5) The Lieutenant-Governor is hereby authorized, under regulations to be made from time to time by the Governor General in Council, to make all such provisions for ascertaining and adjusting, on fair and equitable terms, the rights of Common, and rights of cutting Hay held and enjoyed by the settlers in the Province, and for the commutation of the same by grants of land from the Crown.

13 During the 1870s and 1880s, Manitoba passed five statutes, now long spent and repealed, dealing with the technical requirements to transfer interests in s. 31 lands. The appellants seek to have the statutes declared *ultra vires* pursuant to the *Constitution Act, 1867*. Alternatively, they argue that the statutes were inoperative by virtue of federal paramountcy.

III. Judicial Decisions

14 The trial judge, MacInnes J. (as he then was), engaged in a thorough review of the facts: 2007 MBQB 293, 223 Man. R. (2d) 42. He found that while dishonesty and bad faith were not established, government error and inaction led to lengthy delay in implementing ss. 31 and 32, and left 993 Métis children who were entitled to a grant with scrip instead of land. However, he dismissed the claim for a declaration on the ground that ss. 31 and 32 of the *Manitoba Act* gave rise to neither a fiduciary duty nor a duty based on the honour of the Crown. [page642] The trial judge took the view that a fiduciary duty required proof that the Aboriginal people held the land collectively prior to 1870. Since the evidence established only individual landholdings by the Métis, their claim was "fundamentally flawed". He said of the action that "[i]t seeks relief that is in essence of a collective nature, but is underpinned by a factual reality that is individual": para. 1197.

15 The trial judge concluded that, in any event, the claim was barred by *The Limitation of Actions Act* and the doctrine of laches. He also found that Manitoba's various legislative initiatives regarding the land grants were constitutional. Finally, he held that the Manitoba Metis Federation Inc. ("MMF") should not be granted standing in the action, since the individual plaintiffs were capable of bringing the claims forward.

16 A five-member panel of the Manitoba Court of Appeal, *per* Scott C.J.M., dismissed the appeal: 2010 MBCA 71, 255 Man. R. (2d) 167. It rejected the trial judge's view that collective Aboriginal title to land was essential to a claim that the Crown owed a fiduciary duty to Aboriginal peoples. However, the court found it unnecessary to determine whether the Crown in fact owed a fiduciary duty to the Métis, since the trial judge's findings of fact concerning the conduct of the Crown did not support any breach of such a duty.

17 The Court of Appeal also rejected the assertion that the honour of the Crown had been breached. The honour of the Crown, in its view, was [page643] subsidiary to the fiduciary claim and did not itself give rise to an independent duty in this situation.

18 Finally, the court held that the Métis' claim for a declaration was, in any event, statute-barred, and that the issue of the constitutional validity of the Manitoba legislation was moot. It also declined to interfere with the trial judge's discretionary decision to deny standing to the MMF.

IV. Facts

19 This appeal concerns events that occurred over a century ago. Despite the difficulties imposed by the lack of live witnesses and distant texts, the trial judge made careful and complete findings of fact on all the elements relevant to the legal issues. The Court of Appeal thoroughly reviewed these findings and, with limited exceptions, confirmed them.

20 The completeness of these findings, which stand largely unchallenged, make it unnecessary to provide a detailed narrative of the Métis people, the Red River Settlement, and the conflict that gave rise to the *Manitoba Act* and Manitoba's entry into Canada - events that have inspired countless tomes and indeed, an opera. We content

ourselves with a brief description of the origins of the Red River Settlement and the events that give rise to the appellants' claims.

21 The story begins with the Aboriginal peoples who inhabited what is now the province of Manitoba - the Cree and other less populous nations. In the late 17th century, European adventurers and explorers passed through. The lands were claimed nominally by England which granted the Hudson's Bay Company, a company of fur traders operating out of London, control over a vast territory called Rupert's Land, which included modern Manitoba. Aboriginal peoples continued to occupy the territory. In addition to the original First Nations, a new Aboriginal group, the Métis, arose - people [page644] descended from early unions between European adventurers and traders, and Aboriginal women. In the early days, the descendants of English-speaking parents were referred to as half-breeds, while those with French roots were called Métis.

22 A large - by the standards of the time - settlement developed the forks of the Red and Assiniboine Rivers on land granted to Lord Selkirk by the Hudson's Bay Company in 1811. By 1869, the settlement consisted of 12,000 people, under the governance of the Hudson's Bay Company.

23 In 1869, the Red River Settlement was a vibrant community, with a free enterprise system and established judicial and civic institutions, centred on the retail stores, hotels, trading undertakings and saloons of what is now downtown Winnipeg. The Métis were the dominant demographic group in the Settlement, comprising around 85 percent of the population, and held leadership positions in business, church and government.

24 In the meantime, Upper Canada (now Ontario), Lower Canada (now Quebec), Nova Scotia and New Brunswick united under the *British North America Act* of 1867 (now *Constitution Act, 1867*) to become the new country of Canada. The country's first government, led by Sir John A. Macdonald, was intent on westward expansion, driven by the dream of a nation that would extend from the Atlantic to the Pacific and provide vast new lands for settlement. England agreed to cede Rupert's Land to Canada. In recognition of the Hudson's Bay Company's interest, Canada paid it GBP300,000 and allowed it to retain some of the land around its trading posts in the Northwest. In 1868, the Imperial Parliament cemented the deal with *Rupert's Land Act, 1868* (U.K.), 31 & 32 Vict., c. 105.

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25 Canada, as successor to the Hudson's Bay Company, became the titular owner of Rupert's Land and the Red River Settlement. However, the reality on the ground was more complex. The French-speaking Roman Catholic Métis viewed with alarm the prospect of Canadian control leading to a wave of English-speaking Protestant settlers that would threaten their traditional way of life. When two survey parties arrived in 1869 to take stock of the land, the matter came to a head.

26 The surveyors were met with armed resistance, led by a French-speaking Métis, Louis Riel. On November 2, 1869, Canada's proposed Lieutenant Governor of the new territory, William McDougall, was turned back by a mounted French Métis patrol. On the same day, a group of Métis, including Riel, seized Upper Fort Garry (now downtown Winnipeg), the Settlement's principle fortification. Riel called together 12 representatives of the English-speaking parishes and 12 representatives of the French-speaking Métis parishes, known as the "Convention of 24". At their second meeting, he announced the French Métis intended to form a provisional government, and asked for the support of the English. The English representatives asked for time to confer with the people of their parishes. The meeting was adjourned until December 1, 1869.

27 When the meeting reconvened, they were confronted with a proclamation made earlier that day by McDougall that the region was under the control of Canada. The group rejected the claim. The French Métis drafted a list of demands that Canada must satisfy before the Red River settlers would accept Canadian control.

28 The Canadian government adopted a conciliatory course. It invited a delegation of "at least two residents" to Ottawa to present the demands of the settlers and confer with Parliament. The provisional government responded

by delegating [page646] a priest, Father Ritchot, a judge, Judge Black, and a local businessman named Alfred Scott to go to Ottawa. The delegates - none of whom were Métis, although Riel nominated them - set out for Ottawa on March 24, 1870.

29 Canada had little choice but to adopt a diplomatic approach to the Red River settlers. As MacInnes J. found at trial:

> Canada had no authority to send troops to the Settlement to quell the French Métis insurrection. Nor did it have the necessary troops. Moreover, given the time of year, there was no access to the Settlement other than through the United States. But, at the time, there was a concern in Canada about possible annexation of the territory by the United States and hence a reluctance on the part of Canada to seek permission from the United States to send troops across its territory to quell the insurrection and restore authority. [para. 78]

30 The delegates arrived in Ottawa on April 11, 1870. They met and negotiated with Prime Minister Macdonald and the Minister of Militia and Defence, George-Étienne Cartier. The negotiations were part of a larger set of negotiations on the terms on which Manitoba would enter Canada as a province. It emerged that Canada wanted to retain ownership of public lands in the new province. This led to the idea of providing land for Métis children. The parties settled on a grant to Métis children of 1.4 million acres of land (s. 31) and recognition of existing landholdings (s. 32). Parliament, after vigorous debate and the failure of a motion to delete the section providing the children's grant, passed the *Manitoba Act* on May 10, 1870.

31 The delegates returned to the Red River Settlement with the proposal, and, on June 24, 1870, Father Ritchot addressed the Convention of 40, now called the Legislative Assembly of Assiniboia, to [page647] advocate for the adoption of the *Manitoba Act*. The Assembly was read a letter from Minister Cartier which promised that any existing land interest contemplated in s. 32 of the *Manitoba Act* could be converted to title without payment. Minister Cartier guaranteed that the s. 31 children's grants would "be of a nature to meet the wishes of the half-breed residents" and the division of grant land would be done "*in the most effectual and equitable manner*": A.R., vol. XI, at p. 196 (emphasis added). On this basis, the Assembly voted to accept the *Manitoba Act*, and enter the Dominion of Canada. Manitoba became part of Canada by Order in Council of the Imperial government effective July 15, 1870.

32 The Canadian government began the process of implementing s. 31 in early 1871. The first step was to set aside 1.4 million acres, and the second was to divide the land among the eligible recipients. A series of errors and delays interfered with accomplishing the second step in the "effectual" manner Minister Cartier had promised.

33 The first problem was the erroneous inclusion of all Métis, including heads of families, in the allotment, contrary to the terms of s. 31, which clearly provided the lands were to be divided among the children of the Métis heads of families. On March 1, 1871, Parliament passed an Order in Council declaring that all Métis had a right to a share in the 1.4 million acres promised in s. 31 of the *Manitoba Act*. This order, which would have created more grants of smaller acreage, was made over the objections raised by McDougall, then the former Lieutenant Governor of Rupert's Land, in the House of Commons. Nevertheless, the federal government began planning townships based on 140-acre lots, dividing the 1.4 million acres among approximately 10,000 recipients. This was the first allotment.

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34 In 1873, the federal government changed its position, and decided that only Métis children would be entitled to s. 31 grants. The government also decided that lands traditionally used for haying by the Red River settlers could not be used to satisfy the children's land grant, as was originally planned, requiring additional land to be set aside to constitute the 1.4 million acres. The 1873 decision was clearly the correct decision. The problem is that it took the government over three years to arrive at that position. This gave rise to the second allotment.

35 In November 1873, the government of Sir John A. Macdonald was defeated and a new Liberal government formed in early 1874. The new government, without explanation, did not move forward on the allotments until early 1875. The Liberal government finally, after questions in Parliament about the delay and petitions from several

parishes, appointed John Machar and Matthew Ryan to verify claimants entitled to the s. 31 grants. The process of verifying those entitled to grants commenced five years after the *Manitoba Act* was passed.

36 The next set of problems concerned the Machar/Ryan Commission's estimate of the number of eligible Métis children. Though a census taken in 1870 estimated 7,000 Métis children, Machar and Ryan concluded the number was lower, at 5,088, which was eventually rounded up to 5,833 to allow for even 240-acre plots. This necessitated a third and final allotment, which began in 1876, but was not completed until 1880.

37 While the allotment process lagged, speculators began acquiring the Métis children's yet-to-be granted interests in the s. 31 lands, aided by a range of legal devices. Initially, the Manitoba legislature moved to block sales of the children's interests to speculators, but, in 1877, it passed legislation [page649] authorizing sales of s. 31 interests once the child obtained the age of majority, whether or not the child had received his or her allotment, or even knew of its location. In 1878, Manitoba adopted further legislation which allowed children between 18 and 21 to sell their interests, so long as the transaction was approved by a judicial officer and the child's parents. Dr. Thomas Flanagan, an expert who testified at trial, found returns on judicial sales were the poorest of any type of s. 31 sale: C.A., at para. 152.

38 Eventually, it became apparent that the Acting Agent of Dominion Lands, Donald Codd had underestimated the number of eligible Métis children - 993 more Métis children were entitled to land than Codd had counted on. In 1885, rather than start the allotment yet a fourth time, the Canadian government provided by Order in Council that the children for whom there was no land would be issued with $240 worth of scrip redeemable for land. Fifteen years after the passage of the *Manitoba Act*, the process was finally complete.

39 The position of the Métis in the Red River Settlement deteriorated in the decades following Manitoba's entry into Confederation. White settlers soon constituted a majority in the territory and the Métis community began to unravel. Many Métis sold their promised interests in land and moved further west. Those left amounted to a small remnant of the original community.

V. Issues

40 The appellants seek numerous declarations, including: (1) in implementing the *Manitoba Act*, the federal Crown breached fiduciary obligations owed to the Métis; (2) the federal Crown failed to implement the *Manitoba Act* in a manner [page650] consistent with the honour of the Crown; and (3) certain legislation passed by Manitoba affecting the implementation of the *Manitoba Act* was *ultra vires.* These claims give rise to the following issues:

A. Does the Manitoba Metis Federation have standing in the action?

B. Is Canada in breach of a fiduciary duty to the Métis?

C. Did Canada fail to comply with the honour of the Crown in the implementation of ss. 31 and 32 of the *Manitoba Act*?

D. Were the Manitoba statutes related to implementation unconstitutional?

E. Is the claim for a declaration barred by limitations?

F. Is the claim for a declaration barred by laches?

VI. Discussion

A. *Does the Manitoba Metis Federation Have Standing in the Action?*

41 Canada and Manitoba take no issue with the private interest standing of the individual appellants. However, they argue that the MMF has no private interest in the litigation and fails the established test for public interest standing on the third step of the test set out in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, as the individual plaintiffs clearly demonstrate another reasonable and effective manner for the case to be heard.

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42 The courts below denied the MMF public interest standing to bring this action. At trial, MacInnes J. found that the MMF would fail the third step of the test set out in *Canadian Council of Churches*, on the ground that the individual plaintiffs demonstrate another reasonable and effective manner for the case to be heard. The Court of Appeal declined to interfere with MacInnes J.'s discretionary standing ruling.

43 The courts below did not have the benefit of this Court's decision in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524. In that case, the Court rejected a strict approach to the third requirement for standing. The presence of other claimants does not necessarily preclude public interest standing; the question is whether this litigation is a reasonable and effective means to bring a challenge to court. The requirements for public interest standing should be addressed in a flexible and generous manner, and considered in light of the underlying purposes of setting limits on who has standing to bring an action before a court. Even if there are other plaintiffs with a direct interest in the issue, a court may consider whether the public interest plaintiff will bring any particularly useful or distinct perspective to the resolution of the issue at hand.

44 As discussed below, the action advanced is not a series of claims for individual relief. It is rather a collective claim for declaratory relief for the purposes of reconciliation between the descendants of the Métis people of the Red River Valley and Canada. The *Manitoba Act* provided for individual entitlements, to be sure. But that does not negate the fact that the appellants advance a collective claim of the Métis people, based on a promise made to them in return for their agreement to recognize Canada's sovereignty over them. This collective claim merits allowing the body representing the collective Métis [page652] interest to come before the Court. We would grant the MMF standing.

45 For convenience, from this point forward in these reasons, we will refer to both the individual plaintiffs and the MMF collectively as "the Métis".

B. *Is Canada in Breach of a Fiduciary Duty to the Métis?*

(1) When a Fiduciary Duty May Arise

46 The Métis say that Canada owed them a fiduciary duty to implement ss. 31 and 32 of the *Manitoba Act* as their trustee. This duty, they say, arose out of their Aboriginal interest in lands in Manitoba, or directly from the promises made in ss. 31 and 32.

47 Fiduciary duty is an equitable doctrine originating in trust. Generally speaking, a fiduciary is required to act in the best interests of the person on whose behalf he is acting, to avoid all conflicts of interest, and to strictly account for all property held or administered on behalf of that person. See *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at pp. 646-47.

48 The relationship between the Métis and the Crown, viewed generally, is fiduciary in nature. However, not all dealings between parties in a fiduciary relationship are governed by fiduciary obligations.

49 In the Aboriginal context, a fiduciary duty may arise as a result of the "Crown [assuming] discretionary control over specific Aboriginal interests": *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 18. The focus is on the particular interest that [page653] is the subject matter of the dispute: *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 83. The content of the Crown's fiduciary duty towards Aboriginal peoples varies with the nature and importance of the interest sought to be protected: *Wewaykum*, at para. 86.

50 A fiduciary duty may also arise from an undertaking, if the following conditions are met:

(1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

(*Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 36)

(2) Did the Métis Have a Specific Aboriginal Interest in the Land Giving Rise to a Fiduciary Duty?

51 As discussed, the first way a fiduciary duty may arise is where the Crown administers lands or property in which Aboriginal peoples have an interest: *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 384. The duty arises if there is (1) a specific or cognizable Aboriginal interest, and (2) a Crown undertaking of discretionary control over that interest: *Wewaykum*, at paras. 79-83; *Haida Nation*, at para. 18.

52 There is little dispute that the Crown undertook discretionary control of the administration of the land grants under ss. 31 and 32 of the *Manitoba Act*, meeting the second requirement. The issue is whether the first condition is met - is there a "specific or cognizable Aboriginal interest"? The trial judge held that the Métis failed to establish a specific, cognizable interest in land. The Court of Appeal found it unnecessary to decide the point, in [page654] view of its conclusion that in any event, no breach was established.

53 The fact that the Métis are Aboriginal and had an interest in the land is not sufficient to establish an Aboriginal interest in land. The interest (title or some other interest) must be distinctly Aboriginal; it must be a communal Aboriginal interest in the land that is integral to the nature of the Métis distinctive community and their relationship to the land: see *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207, at para. 37. The key issue is thus whether the Métis *as a collective* had a specific or cognizable *Aboriginal* interest in the ss. 31 or 32 land.

54 The Métis argue that s. 31 of the *Manitoba Act* confirms that they held a pre-existing specific Aboriginal interest in the land designated by s. 31. Section 31 states that the land grants were directed "*towards the extinguishment of the Indian Title to the lands in the Province*", and that the land grant was for "*the benefit of the families of the half-breed residents*". This language, the Métis argue, acknowledges that the Métis gave the Crown control over their homeland in the Red River Settlement in exchange for a number of provisions in the *Manitoba Act*, a constitutional document. The Métis say speeches in the House of Commons by the framers of the *Manitoba Act*, Prime Minister Macdonald and George-Étienne Cartier, confirm that the purpose of s. 31 was to extinguish the "Indian Title" of the Métis. The Métis urge that the *Manitoba Act* must be read broadly in light of its purpose of bringing Manitoba peaceably into Confederation and assuring a future for the Métis as landholders and settlers in the new province: see *R. v. Blais*, 2003 SCC 44, [2003] 2 S.C.R. 236, at para. 17.

55 Canada replies that s. 31 does not establish pre-existing Aboriginal interest in land. It was an [page655] instrument directed at settling grievances, and the reference to "Indian Title" does not establish that such title actually existed. It was up to the Métis to prove that they held an Aboriginal interest in land prior to the *Manitoba Act*, and they have not done so, Canada argues. Canada acknowledges that individual Métis people held individual parcels of land, but it denies that they held the collective Aboriginal interest necessary to give rise to a fiduciary duty.

56 The trial judge's findings are fatal to the Métis' argument. He found as a fact that the Métis used and held land individually, rather than communally, and permitted alienation. He found no evidence that the Métis asserted they held Indian title when British leaders purported to extinguish Indian title, first in the Settlement belt and then throughout the province. He found that the Red River Métis were descended from many different bands. While individual Métis held interests in land, those interests arose from their personal history, not their shared Métis identity. Indeed the trial judge concluded Métis ownership practices were incompatible with the claimed Aboriginal interest in land.

57 The Métis argue that the trial judge and the Court of Appeal erred in going behind the language of s. 31 and demanding proof of a collective Aboriginal interest in land. They assert that Aboriginal title was historically uncertain, and that the Crown's practice was to accept that any organized Aboriginal group had title and to extinguish that title by treaty, or in this case, s. 31 of the *Manitoba Act*.

58 Even if this was the Crown's practice (a doubtful assumption in the absence of supporting evidence), it does not establish that the Métis held either Aboriginal title or some other Aboriginal interest in specific lands as a group. An Aboriginal interest in land giving rise to a fiduciary duty cannot be established by treaty, or, by extension, [page656] legislation. Rather, it is predicated on historic use and occupation. As Dickson J. stated in *Guerin*:

> The "political trust" cases concerned essentially the distribution of public funds or other property held by the government. In each case the party claiming to be beneficiary under a trust depended entirely on statute, ordinance or treaty as the basis for its claim to an interest in the funds in question. The situation of the Indians is entirely different. Their interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act*, or by any other executive or legislative provision. [Emphasis added; p. 379.]

59 In summary, the words of s. 31 do not establish pre-existing communal Aboriginal title held by the Métis. Nor does the evidence: the trial judge's findings of fact that the Métis had no communal Aboriginal interest in land are fatal to this contention. It follows that the argument that Canada was under a fiduciary duty in administering the children's land because the Métis held an Aboriginal interest in the land must fail. The same reasoning applies to s. 32 of the *Manitoba Act*.

(3) Did the Crown Undertake to Act in the Best Interests of the Métis, Giving Rise to a Fiduciary Duty?

60 This leaves the question of whether a fiduciary duty is established on the basis of an undertaking by the Crown. To recap, this requires:

> (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely [page657] affected by the alleged fiduciary's exercise of discretion or control.

(*Elder Advocates*, at para. 36)

61 The first question is whether an undertaking has been established. In order to elevate the Crown's obligations to a fiduciary level, the power retained by the Crown must be coupled with an undertaking of loyalty to act in the beneficiaries' best interests in the nature of a private law duty: *Guerin*, at pp. 383-84. In addition, "[t]he party asserting the duty must be able to point to a forsaking by the alleged fiduciary of the interests of all others in favour of those of the beneficiary, in relation to the specific legal interest at stake": *Elder Advocates*, at para. 31.

62 While s. 31 shows an intention to benefit the Métis children, it does not demonstrate an undertaking to act in their best interests, in priority to other legitimate concerns, such as ensuring land was available for the construction of the railway and opening Manitoba for broader settlement. Indeed, the discretion conferred by s. 31 to determine "such mode and on such conditions as to settlement and otherwise" belies a duty of loyalty and an intention to act in the best interests of the beneficiary, forsaking all other interests.

63 Nor did s. 32 constitute an undertaking on the part of the Crown to act as a fiduciary in settling the titles of the Métis landholders. It confirmed the continuance of different categories of landholdings in existence shortly before or at the creation of the new province (C.A., at paras. 673 and 717), and applied to all landholders (C.A., at para. 717; see also paras. 674 and 677).

(4) Conclusion on Fiduciary Duty

64 We conclude that Canada did not owe a fiduciary duty to the Métis in implementing ss. 31 and 32 of the *Manitoba Act*.

C. *Did Canada Fail to Comply With the Honour of the Crown in the Implementation of Sections 31 and 32 of the Manitoba Act?*

(1) The Principle of the Honour of the Crown

65 The appellants argue that Canada breached a duty owed to the Métis based on the honour of the Crown. The phrase "honour of the Crown" refers to the principle that servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign.

66 The honour of the Crown arises "from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people": *Haida Nation*, at para. 32. In Aboriginal law, the honour of the Crown goes back to the *Royal Proclamation* of 1763, which made reference to "the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection": see *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 42. This "Protection", though, did not arise from a paternalistic desire to protect the Aboriginal peoples; rather, it was a recognition of their strength. Nor is the honour of the Crown a paternalistic concept. The comments of Brian Slattery with respect to fiduciary duty resonate here:

> The sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a "weaker" or "primitive" people, as has sometimes been suggested, but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, [page659] that their rights would be better protected by reliance on the Crown than by self-help.

("Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at p. 753)

The ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty. As stated in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, at para. 24:

> The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question.

67 The honour of the Crown thus recognizes the impact of the "superimposition of European laws and customs" on pre-existing Aboriginal societies: *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 248, *per* McLachlin J., dissenting. Aboriginal peoples were here first, and they were never conquered (*Haida Nation*, at para. 25); yet, they became subject to a legal system that they did not share. Historical treaties were framed in that unfamiliar legal system, and negotiated and drafted in a foreign language: *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 52; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at pp. 142-43, *per* La Forest J. The honour of the Crown characterizes the "special relationship" that arises out of this colonial practice: *Little Salmon*, at para. 62. As explained by Brian Slattery:

> ... when the Crown claimed sovereignty over Canadian territories and ultimately gained factual control [page660] over them, it did so in the face of pre-existing Aboriginal sovereignty and territorial rights. The tension between these conflicting claims gave rise to a special relationship between the Crown and Aboriginal peoples, which requires the Crown to deal honourably with Aboriginal peoples.

("Aboriginal Rights and the Honour of the Crown" (2005), 29 S.C.L.R. (2d) 433, at p. 436)

(2) When Is the Honour of the Crown Engaged?

68 The honour of the Crown imposes a heavy obligation, and not all interactions between the Crown and Aboriginal

people engage it. In the past, it has been found to be engaged in situations involving reconciliation of Aboriginal rights with Crown sovereignty. As stated in *Badger*:

> ... the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. [para. 41]

69 This Court has also recognized that the honour of the Crown is engaged by s. 35(1) of the *Constitution Act, 1982*. In *R. v. Sparrow*, [1990] 1 S.C.R. 1075, the Court found that s. 35(1) restrains the legislative power in s. 91(24), in accordance with the "high standard of honourable dealing": p. 1109. In *Haida Nation*, this Court explained that "[i]t is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees": para. 20. Because of its connection with s. 35, the honour of the Crown has been called a "constitutional principle": *Little Salmon*, at para. 42.

70 The application of these precedents to this case indicates that the honour of the Crown is also engaged by an explicit obligation to an Aboriginal group that is enshrined in the Constitution. The [page661] Constitution is not a mere statute; it is the very document by which the "Crow[n] assert[ed its] sovereignty in the face of prior Aboriginal occupation": *Taku River*, at para. 24. See also *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911, at para. 9. It is at the root of the honour of the Crown, and an explicit obligation to an Aboriginal group placed therein engages the honour of the Crown at its core. As stated in *Haida Nation*, "[i]n all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably": para. 17 (emphasis added).

71 An analogy may be drawn between such a constitutional obligation and a treaty promise. An "intention to create obligations" and a "certain measure of solemnity" should attach to both: *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1044; *R. v. Sundown*, [1999] 1 S.C.R. 393, at paras. 24-25. Moreover, both types of promises are made for the overarching purpose of reconciling Aboriginal interests with the Crown's sovereignty. Constitutional obligations may even be arrived at after a course of consultation similar to treaty negotiation.

72 The last element under this rubric is that the obligation must be explicitly owed to an Aboriginal group. The honour of the Crown will not be engaged by a constitutional obligation in which Aboriginal peoples simply have a strong interest. Nor will it be engaged by a constitutional obligation owed to a group partially composed of Aboriginal peoples. Aboriginal peoples are part of Canada, and they do not have special status with respect to constitutional obligations owed to Canadians as a whole. But a constitutional obligation explicitly directed at an Aboriginal group invokes its "special relationship" with the Crown: *Little Salmon*, at para. 62.

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(3) What Duties Are Imposed by the Honour of the Crown?

73 The honour of the Crown "is not a mere incantation, but rather a core precept that finds its application in concrete practices" and "gives rise to different duties in different circumstances": *Haida Nation*, at paras. 16 and 18. It is not a cause of action itself; rather, it speaks to *how* obligations that attract it must be fulfilled. Thus far, the honour of the Crown has been applied in at least four situations:

(1) The honour of the Crown gives rise to a fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest (*Wewaykum*, at paras. 79 and 81; *Haida Nation*, at para. 18);

(2) The honour of the Crown informs the purposive interpretation of s. 35 of the *Constitution Act, 1982*, and gives rise to a duty to consult when the Crown contemplates an action that will affect a claimed but as of yet unproven Aboriginal interest (*Haida Nation*, at para. 25);

(3) The honour of the Crown governs treaty-making and implementation (*Province of Ontario v. Dominion of Canada* (1895), 25 S.C.R. 434, at p. 512, *per* Gwynne J., dissenting; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, at

para. 51), leading to requirements such as honourable negotiation and the avoidance of the appearance of sharp dealing (*Badger*, at para. 41); and

(4) The honour of the Crown requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples (*R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 43, referring to *The Case of The Churchwardens of St. Saviour in Southwark* (1613), 10 Co. Rep. 66b, 77 E.R. 1025, [page663] and *Roger Earl of Rutland's Case* (1608), 8 Co. Rep. 55a, 77 E.R. 555; *Mikisew Cree First Nation*, at para. 51; *Badger*, at para. 47).

74 Thus, the duty that flows from the honour of the Crown varies with the situation in which it is engaged. What constitutes honourable conduct will vary with the circumstances.

75 By application of the precedents and principles governing this honourable conduct, we find that when the issue is the implementation of a constitutional obligation to an Aboriginal people, the honour of the Crown requires that the Crown: (1) takes a broad purposive approach to the interpretation of the promise; and (2) acts diligently to fulfill it.

76 The first branch, purposive interpretation of the obligation, has long been recognized as flowing from the honour of the Crown. In the constitutional context, this Court has recognized that the honour of the Crown demands that s. 35(1) be interpreted in a generous manner, consistent with its intended purpose. Thus, in *Haida Nation*, it was held that, unless the recognition and affirmation of Aboriginal rights in s. 35 of the *Constitution Act, 1982* extended to yet unproven rights to land, s. 35 could not fulfill its purpose of honourable reconciliation: para. 27. The Court wrote, at para. 33: "When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable." A purposive approach to interpretation informed by the honour of the Crown applies no less to treaty obligations. For example, in *Marshall*, Binnie J. rejected a proposed treaty interpretation on the grounds that it was not "consistent with the honour and integrity of the Crown... . The trade arrangement must be interpreted in a manner which gives meaning and substance to the promises made by the Crown": para. 52.

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77 This jurisprudence illustrates that an honourable interpretation of an obligation cannot be a legalistic one that divorces the words from their purpose. Thus, the honour of the Crown demands that constitutional obligations to Aboriginal peoples be given a broad, purposive interpretation.

78 Second, the honour of the Crown requires it to act diligently in pursuit of its solemn obligations and the honourable reconciliation of Crown and Aboriginal interests.

79 This duty has arisen largely in the treaty context, where the Crown's honour is pledged to diligently carrying out its promises: *Mikisew Cree First Nation*, at para. 51; *Little Salmon*, at para. 12; see also *Haida Nation*, at para. 19. In its most basic iteration, the law assumes that the Crown always intends to fulfill its solemn promises, including constitutional obligations: *Badger*; *Haida Nation*, at para. 20. At a minimum, sharp dealing is not permitted: *Badger*. Or, as this Court put it in *Mikisew Cree First Nation*, "the honour of the Crown [is] pledged to the fulfilment of its obligations to the Indians": para. 51. But the duty goes further: if the honour of the Crown is pledged to the fulfillment of its obligations, it follows then that the honour of the Crown requires the Crown to endeavour to ensure its obligations are fulfilled. Thus, in review proceedings under the *James Bay and Northern Québec Agreement*, the participants are expected to "carry out their work with due diligence": *Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557, at para. 23. As stated by Binnie J. in *Little Salmon*, at para. 12: "It is up to the parties, when treaty issues arise, to act diligently to advance their respective interests. Good government requires that decisions be taken in a timely way." This duty applies whether the obligation arises in a treaty, as in the precedents outlined above, or in the Constitution, as here.

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80 To fulfill this duty, Crown servants must seek to perform the obligation in a way that pursues the purpose behind the promise. The Aboriginal group must not be left "with an empty shell of a treaty promise": *Marshall*, at para. 52.

81 It is a narrow and circumscribed duty, which is engaged by the extraordinary facts before us. This duty, recognized in many authorities, is not a novel addition to the law.

82 Not every mistake or negligent act in implementing a constitutional obligation to an Aboriginal people brings dishonour to the Crown. Implementation, in the way of human affairs, may be imperfect. However, a persistent pattern of errors and indifference that substantially frustrates the purposes of a solemn promise may amount to a betrayal of the Crown's duty to act honourably in fulfilling its promise. Nor does the honour of the Crown constitute a guarantee that the purposes of the promise will be achieved, as circumstances and events may prevent fulfillment, despite the Crown's diligent efforts.

83 The question is simply this: Viewing the Crown's conduct as a whole in the context of the case, did the Crown act with diligence to pursue the fulfillment of the purposes of the obligation?

(4) The Argument That Failure to Act Diligently in Implementing Section 31 Should Not Be Considered by This Court

84 Our colleague Rothstein J. asserts that the parties did not argue that lack of diligent implementation of s. 31 was inconsistent with the honour of the Crown, and that we should not therefore consider this possibility.

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85 We agree with our colleague that new developments in the law must be approached with caution where they have not been canvassed by the parties to the litigation. However, in our view this concern does not arise here.

86 The honour of the Crown was at the heart of this litigation from the beginning. Before the courts below and in this Court, the Métis argued that the conduct of the government in implementing s. 31 of the *Manitoba Act* breached the duty that arose from the honour of the Crown. They were supported in this contention by a number of interveners. In oral argument, the intervener the Attorney General for Saskatchewan stated that the honour of the Crown calls for "a broad, liberal, and generous interpretation", and acts as "an interpretive guide post to the public law duties ... with respect to the implementation of Section 31": transcript, at p. 67. The intervener Métis Nation of Alberta argued that s. 31 is an unfulfilled promise here, which the honour of the Crown demands be fulfilled by reconciliation through negotiation. The intervener the Métis Nation of Ontario argued that s. 31 "could not be honoured by a process that ultimately defeated the purpose of the provision": transcript, at p. 28.

87 These submissions went beyond the argument that the honour of the Crown gave rise to a fiduciary duty, raising the broader issue of whether the government's conduct generally comported with the honour of the Crown. Canada understood this: it argued in its factum that while the Crown intends to fulfill its promises, the honour of the Crown in this case does not give rise to substantive obligations to do so.

88 In short, all parties understood that the issue of what duties the honour of the Crown might raise, [page667] apart from a fiduciary duty, was on the table, and all parties presented submissions on it.

89 It is true that the Métis and the interveners supporting them did not put the argument in precisely the terms of the reasons. While they argued that the government's conduct in implementing s. 31 did not comport with the honour of the Crown, they did not express this alleged failure in terms of failure to comply with a duty of diligent implementation. However, this was implicit in their argument, given that the failure to diligently implement s. 31 lay at the heart of their grievance.

90 For these reasons, we conclude that it is not inappropriate to consider and resolve the question of what duties

the honour of the Crown gave rise to in connection with s. 31 of the *Manitoba Act*, not just as they impact on the argument that the government owed a fiduciary duty to the Métis, but more broadly.

(5) Did the Solemn Promise in Section 31 of the *Manitoba Act* Engage the Honour of the Crown?

91 As outlined above, the honour of the Crown is engaged by constitutional obligations to Aboriginal groups. Section 31 of the *Manitoba Act* is just such a constitutional obligation. Section 31 conferred land rights on yet-to-be-identified individuals - the Métis children. Yet the record leaves no doubt that it was a promise made to the Métis people collectively, in recognition of their distinct community. The honour of the Crown is thus engaged here.

92 To understand the nature of s. 31 as a solemn obligation, it may be helpful to consider its [page668] treaty-like history and character. Section 31 sets out solemn promises - promises which are no less fundamental than treaty promises. Section 31, like a treaty, was adopted with "the intention to create obligations ... and a certain measure of solemnity": *Sioui*, at p. 1044; *Sundown*. It was intended to create legal obligations of the highest order: no greater solemnity than inclusion in the Constitution of Canada can be conceived. Section 31 was conceived in the context of negotiations to create the new province of Manitoba. And all this was done to the end of reconciling the Métis Aboriginal interest with the Crown's claim to sovereignty. As the trial judge held:

> ... the evidence establishes that this [s. 31] grant, to be given on an individual basis for the benefit of the families, albeit given to the children, was given for the purpose of recognizing the role of the Métis in the Settlement both past and to the then present, for the purpose of attempting to ensure the harmonious entry of the territory into Confederation, mindful of both Britain's condition as to treatment of the settlers and the uncertain state of affairs then existing in the Settlement, and for the purpose of giving the children of the Métis and their families on a onetime basis an advantage in the life of the new province over expected immigrants. [Emphasis added; para. 544.]

93 Section 31, though, is not a treaty. The trial judge correctly described s. 31 as a constitutional provision crafted for the purpose of resolving Aboriginal concerns and permitting the creation of the province of Manitoba. When the *Manitoba Act* was passed, the Métis dominated the Red River provisional government, and controlled a significant military force. Canada had good reason to take the steps necessary to secure peace between the Métis and the settlers. Justice MacInnes wrote:

> Canada, to the knowledge of Macdonald and Cartier, was in a difficult position having to complete the steps necessary for the entry of Rupert's Land into Canada. An insurrection had occurred at Red River such that, in the view of both Canada and Britain, a void in the lawful governance of the territory existed. Canada, as a result [page669] of McDougall's conduct on December 1, 1869, had in a practical sense claimed the territory for Canada, but the legal transfer of the territory from Britain had not yet occurred. Accordingly, Canada had no lawful authority to govern the area. Furthermore, there was neither the practical ability nor the will for Canada or the Imperial Government to enforce authority and in that sense, the purpose of the discussions or negotiations between the Red River delegates and Macdonald and Cartier was to bring about in a peaceful way the entry of the territory into Canada, thereby giving Canada the opportunity to peacefully take over the territory and its governance and be able to move forward with its goal of nation building. [para. 649]

94 Section 31 is a constitutional obligation to an Aboriginal group. In accordance with the principles outlined above, the honour of the Crown is engaged by s. 31 and gives rise to a duty of diligent, purposive fulfillment.

(6) Did Section 32 of the *Manitoba Act* Engage the Honour of the Crown?

95 We agree with the Court of Appeal that the honour of the Crown was not engaged by s. 32 of the *Manitoba Act.* Unlike s. 31, it was not a promise made specifically to an Aboriginal group, but rather a benefit made generally available to all settlers, Métis and non-Métis alike. The honour of the Crown is not engaged whenever an Aboriginal person accesses a benefit.

(7) Did the Crown Act Honourably in Implementing Section 31 of the *Manitoba Act*?

96 The trial judge indicated that, although they did not act in bad faith, the government servants may have been

negligent in administering the s. 31 grant. He held that the implementation of the obligation was within the Crown's discretion and that it had a discretion to act negligently: "Mistakes, even negligence, on the part of those responsible for implementation of the grant are not sufficient to successfully attack Canada's exercise of discretion [page670] in its implementation of the grant" (para. 943 (emphasis added)). The Court of Appeal took a similar view: see para. 656.

97 Based on the arguments before them and the applicable precedents, the trial judge and the Court of Appeal did not focus on what we take as the central issue in the case: whether the government's implementation of s. 31 comported with the duty of the Crown to diligently pursue implementation of the provision in a way that would achieve its objectives. The question is whether the Crown's conduct, viewed as a whole and in context, met this standard. We conclude that it did not.

98 The broad purpose of s. 31 of the *Manitoba Act* was to reconcile the Métis community with the sovereignty of the Crown and to permit the creation of the province of Manitoba. This reconciliation was to be accomplished by a more concrete measure - the prompt and equitable transfer of the allotted public lands to the Métis children.

99 The prompt and equitable implementation of s. 31 was fundamental to the project of reconciliation and the entry of Manitoba into Canada. As the trial judge found, s. 31 was designed to give the Métis a head start in the race for land and a place in the new province. This required that the grants be made while a head start was still possible. Everyone concerned understood that a wave of settlement from Europe and Canada to the east would soon sweep over the province. Acknowledging the need for timely implementation, Minister Cartier sent a letter to the meeting of the Manitoba Legislature charged with determining whether to accept the *Manitoba Act*, assuring the Métis that the s. 31 grants would "be of a nature to meet the wishes of the half-breed residents" and that the division of land would be done "in the most effectual and equitable manner".

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100 The Métis allege Canada failed to fulfill its duties to the Métis people in relation to the children's grant in four ways: (1) inexcusably delaying distribution of the s. 31 lands; (2) distributing lands via random selection rather than ensuring family members received contiguous parcels; (3) failing to ensure s. 31 grant recipients were not taken advantage of by land speculators; and (4) giving some eligible Métis children $240 worth of scrip redeemable at the Land Titles Office instead of a direct grant of land. We will consider each in turn.

(a) *Delay*

101 Contrary to the expectations of the parties, it took over 10 years to make the allotments of land to Métis children promised by s. 31. Indeed, the final settlement, in the form not of land but of scrip, did not occur until 1885. This delay substantially defeated a purpose of s. 31.

102 A central purpose of the s. 31 grant, as found by MacInnes J., was to give "families of the Métis through their children a head start in the new country in anticipation of the probable and expected influx of immigrants": para. 655. Time was then plainly of the essence, if the goal of giving the Métis children a real advantage, relative to an impending influx of settlers from the east, was to be achieved.

103 The government understood this. Prime Minister Macdonald, on May 2, 1870, just before addressing Parliament, wrote that the land was

> to be distributed as soon as practicable amongst the different heads of half breed families according to the number of children of both sexes then existing in each [page672] family under such legislative enactments, which may be found advisable to secure the transmission and holding of the said lands amongst the half breed families. - To extinguish Indian claims - ... [Emphasis added.]

And Minister Cartier, as we know, confirmed that the "guarantee" would be effected "in the most effectual and equitable manner".

104 Yet that was not what happened. As discussed earlier in these reasons, implementation was delayed by many government actions and inactions, including: (1) starting off with the wrong class of beneficiaries, contrary to the wording of s. 31 and objections in the House of Commons; (2) taking three years to rectify this error; (3) commissioning a report in 1875 that erroneously lowered the number of eligible recipients and required yet a third allotment; (4) completing implementation only in 1885 by giving scrip to eligible Métis denied land because of mistakes in the previous three iterations of the allotment process; (5) long delays in issuing patents; and (6) unexplained periods of inaction. In the meantime, settlers were pouring in and the Manitoba Legislature was passing various acts dealing in different and contradictory ways with how Métis could sell their yet-to-be-realized interests in land.

105 The delay was noted by all concerned. The Legislative Council and Assembly of Manitoba complained of the delay on February 8, 1872, noting that new settlers had been allowed to take up land in the area. In early 1875, a number of Métis parishes sent petitions to Ottawa complaining of the delay, saying it was having a "damaging effect upon the prosperity of the Province": C.A., at para. 123. The provincial government also in that year made a request to the Governor General that the process be expedited. In 1883, the Deputy Minister of the Interior, A. M. Burgess, said this: "I am every day grieved and heartily sick when I [page673] think of the disgraceful delay ... .": A.R., vol. XXI, at pp. 123-24; see also C.A., at para. 160.

106 This brings us to whether the delay was inconsistent with the duty imposed by the honour of the Crown to act diligently to fulfill the purpose of the s. 31 obligation. The Court of Appeal did not consider this question. But like the trial judge, it concluded that inattention and carelessness were likely factors:

> With respect to those known events that contributed to the delay (prominent among them the cancellation of the first two allotments, the slow pace of the allotment process in the third and final round, the erroneous inclusion of adults as beneficiaries for the s. 31 grants, and the long delays in the issuance of patents), mistakes were made and it is difficult to avoid the inference that inattention or carelessness may have been a contributing factor. [para. 656]

107 As discussed above, a negligent act does not in itself establish failure to implement an obligation in the manner demanded by the honour of the Crown. On the other hand, a persistent pattern of inattention may do so if it frustrates the purpose of the constitutional obligation, particularly if it is not satisfactorily explained.

108 The record and findings of the courts below suggest a persistent pattern of inattention. The government was warned of the initial error of including all Métis, yet took three years to cancel the first faulty allotment and start a second. An inexplicable delay lies between the first and second allotments, from 1873 to 1875. The government had changed, to be sure. But as the Court of Appeal found, there is no explanation in the record as to "why it took the new government over a year to address the continuing delays in moving ahead with the allotments": para. 126. The Crown's obligations cannot be suspended simply because there is a change in government. The second allotment, when [page674] it finally took place, was aborted in 1876 because of a report that underestimated eligible recipients. But there is no satisfactory explanation why a third and final allotment was not completed until 1880. The explanation offered is simply that those in charge did not have adequate time to devote to the task because of other government priorities, and they did not wish to delegate the task because information about the grants might fall into the hands of speculators.

109 We take no issue with the finding of the trial judge that, with one exception, there was no bad faith or misconduct on the part of the Crown employees: paras. 1208-9. However, diligence requires more than simply the absence of bad faith. The trial judge noted that the children's grants "were not implemented or administered without error or dissatisfaction": para. 1207. Viewing the matter through the lens of fiduciary duty, the trial judge found this did not rise to a level of concern. We take a different view. The findings of the trial judge indicate consistent inattention and a consequent lack of diligence.

110 We conclude that, viewing the conduct of the Crown in its entirety and in the context of the situation, including the need for prompt implementation, the Crown acted with persistent inattention and failed to act diligently to

achieve the purposes of the s. 31 grant. Canada's argument that, in some cases, the delay secured better prices for Métis who sold is undermined by evidence that many Métis sold potential interests for too little, and, in any event, it does not absolve the Crown of failure to act as its honour required. The delay in completing the s. 31 distribution was inconsistent with the behaviour demanded by the honour of the Crown.

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(b) *Sales to Speculators*

111 The Métis argue that Canada breached its duty to the children eligible for s. 31 grants by failing to protect them from land speculators. They say that Canada should not have permitted sales before the allotments were granted to the children or before the recipients attained the age of majority.

112 Canada responds that the Crown was not obliged to impose any restraint on alienation, and indeed would have been criticized had it done so. It says that the Métis already had a history of private landholding, including buying and selling property. They say that the desire of many Métis to sell was not the result of any breach of duty by the Crown, but rather simply reflected that the amount of land granted far exceeded Métis needs, and many Métis did not desire to settle down in Manitoba.

113 The trial judge held that restricting the alienability of Métis land would have been seen as patronizing and been met with disfavour amongst the Métis. The Court of Appeal agreed, and added that, "practically speaking, next to nothing could have been done to prevent sales of and speculation in s. 31 lands in the absence of an absolute prohibition against sales of any kind": para. 631. It added that some Métis received more land than they needed, and many were leaving the settlement to follow the buffalo hunt, making the ability to sell their interests valuable.

114 We see no basis to interfere with the finding that many eligible Métis were determined to sell their lots or the conclusion that a prohibition on sales would have been unacceptable. This said, we note that the 10-year delay in implementation of the land grants increased sales to speculators. Persons concerned at the time urged that information about [page676] the location of each child's individual allotment be made public as early as possible to give potential claimants a sense of ownership and avert speculative sell-offs. This did not happen: evidence of Dr. Thomas Flanagan, A.R., vol. XXVI, at p. 53. Dr. Flanagan concluded "[t]he Metis were already selling their claims to participate in the grant, and being able to sell the right to a particular piece of land rather than a mere right to participate in a lottery would indeed have enhanced the prices they received": p. 54. Until the Métis acquired their s. 31 grants, they provided no benefit to the children, and a cash offer from a speculator would appear attractive. Moreover, as time passed, the possibility grew that the land was becoming less valuable, as the Métis could not effectively protect any timber or other resources that might exist on the plots they might someday receive from exploitation by others.

115 In 1873, the Manitoba government, aware of the improvident sales that were occurring, moved to curb speculation by passing *The Half-Breed Land Grant Protection Act*, S.M. 1873, c. 44, which permitted vendors to repudiate sales. The preamble to that legislation recognized that "very many persons entitled to participate in the said grant in evident ignorance of the value of their individual shares have agreed severally to sell their right to the same to speculators, receiving therefor only a trifling consideration". However, with *An Act to amend the Act passed in the 37th year of Her Majesty's reign, entitled "The Half-Breed Land Grant Protection Act"*, S.M. 1877, c. 5 ("*The Half-Breed Land Grant Amendment Act, 1877*"), Manitoba changed course, so that a Métis child who made a bad bargain was stuck with it. *An Act to enable certain children of Half-breed heads of families to convey their land*, S.M. 1878, c. 20 ("*The Half-Breed Land Grant Act, 1878*"), followed. It allowed Métis children between 18 and 21 years of age to sell their s. 31 entitlement with parental [page677] consent, so long as they appeared in front of one judge or two justices of the peace.

116 Dr. Flanagan found that 11 percent of the sample examined sold their lands prior to learning the location of their grant, and received "markedly lower prices" as a result: "Metis Family Study", A.R., vol. XXVII, at p. 53. The

Court of Appeal concluded that the price received by Métis who sold after allotment was about twice that received by those who sold before allotment: para. 168.

117 The honour of the Crown did not demand that the grant lands be made inalienable. However, the facts on the ground, known to all, made it all the more important to complete the allotment without delay and, in the interim, to advise Métis of what holdings they would receive. By 1874, in their recommendations as to how the allotment process should be carried out, both Codd and Lieutenant Governor Alexander Morris implicitly recognized that delay was encouraging sales at lower prices; nevertheless, allotment would not be complete for six more years. Until allotments were known and completed, delay inconsistent with the honour of the Crown was perpetuating a situation where children were receiving artificially diminished value for their land grants.

(c) *Scrip*

118 Due to Codd's underestimation of the number of eligible children, 993 Métis were left out of the 1.4 million-acre allotment in the end. Instead, they received scrip redeemable for land at a land title office. Scrip could also be sold for cash on the open market, where it was worth about half its face value: C.A., at para. 168.

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119 The Métis argue that Canada breached its duty to the children who received scrip because s. 31 demanded that land, not scrip, be distributed; and because scrip was not distributed until 1885, when at going land prices, Métis who received scrip could not acquire the 240 acres granted to other children.

120 We do not accept the Métis' first argument that delivery of scrip instead of land constituted a breach of s. 31 of the *Manitoba Act*. As long as the 1.4 million acres was set aside and distributed with reasonable equity, the scheme of the *Manitoba Act* was not offended. It was unavoidable that the land would be distributed based on an estimate of the number of eligible Métis that would be inaccurate to some degree. The issuance of scrip was a reasonable mechanism to provide the benefit to which the excluded children were entitled.

121 The Métis' second argument is that the value of scrip issued was deficient. The government decided to grant to each left-out child $240 worth of scrip, based on a rate of $1 per acre. While the Order in Council price for land was $1 an acre in 1879, by 1885, when the scrip was delivered, most categories of land were priced at $2 or $2.50 an acre at the land title office: A.R., vol. XXIV, at p. 8. The children who received scrip thus obtained a grant equivalent to between 96 and 120 acres, significantly less than the 240 acres provided to those who took part in the initial distribution. The delay resulted in the excluded children receiving less land than the others. This was a departure from the s. 31 promise that the land would be divided in a roughly equal fashion amongst the eligible children.

122 The most serious complaint regarding scrip is that Canada took too long to issue it. The process was marred by the delay and mismanagement that typified the overall implementation of the s. 31 grants. Canada recognized in 1884 that a significant number of eligible children would not receive the [page679] land to which they were entitled, yet it did nothing to provide a remedy to the excluded beneficiaries for almost a year. The trial judge observed:

> By memorandum to the Minister of the Interior dated May 1884, Deputy Minister A.M. Burgess wrote that there were about 500 claimants whose applications had been approved but whose claims were unsatisfied because the land had been "exhausted". He was unable to explain the error, but recommended that scrip be issued to the children.
>
> For whatever reason action was postponed until April 1885 when Burgess submitted another report in which he explained how this shortage occurred. Burgess recommended as equitable that the issue of scrip to each half-breed child who has since proved his or her claim should be for $240.00, the same to be accepted as in full satisfaction of such claim. The $240.00 was based upon 240 acres (being the size of the individual grant) at the rate of $1.00 per acre. [paras. 255-56]

123 We conclude that the delayed issuance of scrip redeemable for significantly less land than was provided to the

other recipients further demonstrates the persistent pattern of inattention inconsistent with the honour of the Crown that typified the s. 31 grants.

(d) *Random Allotment*

124 The Métis assert that the s. 31 lands should have been allotted so that the children's lots were contiguous to, or in the vicinity of, their parents' lots. At a minimum, they say siblings' lands should have been clustered together. They say that this was necessary to facilitate actual settlement, rather than merely sale, of the s. 31 lands, so as to establish a Métis homeland.

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125 Canada responds that it would not have been possible to settle all the Métis children on lots contiguous to their parents. Many families had a large number of children, and each child was entitled to a 240-acre lot. They argue that in the circumstances, a random allotment was reasonable.

126 The trial judge found there was no agreement to distribute the land in family blocks. He observed that while the French Métis generally wanted grants contiguous to where they were residing and were not overly concerned with the value of the land, the English Métis were interested in selecting the most valuable allotments available even if they were not adjacent to their family lots. He also observed that the lottery was not random throughout the province: each parish received an allotment of land in its area and then distributed land within that allotment randomly to the individual Métis children living in the parish. He concluded that it was difficult to conceive how the land could have been administered other than by random lottery without creating unfairness and divisiveness within each parish. Further, because of the size of the grants, it would be hard to give a family a series of 240-acre contiguous parcels without interfering with neighbouring families' ability to receive the same. Moreover, a random lottery gave each child within the parish an equal chance at receiving the best parcel available. Finally, there was little, if any, complaint about the random selection from those present at the time. The Court of Appeal agreed, noting that Lieutenant Governor Archibald attempted to accommodate Métis wishes for the placement of a parish's allotments.

127 Given the finding at trial that the grant was intended to benefit the individual children, not establish a Métis land base, we accept that random selection within each parish was an acceptable way to distribute the land consistent with the purpose of the s. 31 obligation. This said, the delay in [page681] distributing land, and the consequential sales prior to patent, may well have made it more difficult for Métis to trade grants amongst themselves to achieve contiguous parcels.

(8) Conclusion on the Honour of the Crown

128 The s. 31 obligation made to the Métis is part of our Constitution and engages the honour of the Crown. The honour of the Crown required the Crown to interpret s. 31 in a purposive manner and to diligently pursue fulfillment of the purposes of the obligation. This was not done. The Métis were promised implementation of the s. 31 land grants in "the most effectual and equitable manner". Instead, the implementation was ineffectual and inequitable. This was not a matter of occasional negligence, but of repeated mistakes and inaction that persisted for more than a decade. A government sincerely intent on fulfilling the duty that its honour demanded could and should have done better.

D. *Were the Manitoba Statutes Related to Implementation Unconstitutional?*

129 The Métis seek a declaration that the impugned eight statutes passed by Manitoba were *ultra vires* and therefore unconstitutional or otherwise inoperative by virtue of the doctrine of paramountcy.

130 Between 1877 and 1885, Manitoba passed five statutes that regulated the means by which sales of s. 31 lands could take place by private contract or court order. They dealt with the technical requirements to transfer interests in s. 31 lands. These included: permitting sales by a s. 31 allottee who was over 21 years of age (*The Half-Breed Land Grant Amendment Act, 1877*); allowing sales of grants by Métis between 18 and 21 years of age with parental

consent and consent of the child supervised [page682] by a judge or two justices of the peace (*The Half-Breed Land Grant Act, 1878*); and settling issues as to the sufficiency of documentation necessary to pass good title in anticipation of the introduction of the Torrens system (*An Act relating to the Titles of Half-Breed Lands*, S.M. 1885, c. 30). The Manitoba statutes were consolidated in the *Half-Breed Lands Act*, R.S.M. 1891, c. 67, and eventually repealed by *The Statute Law Revision and Statute Law Amendment Act, 1969*, S.M. 1969 (2nd Sess.), c. 34, s. 31.

131 In *Dumont v. Canada (Attorney General)*, [1990] 1 S.C.R. 279, a preliminary motion to strike was brought by Canada in respect of this litigation. Wilson J. stated:

> 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. [Emphasis added; p. 280.]

This statement is not a ruling or a pre-determination on whether the review of the repealed statutes in this action is moot. The *Dumont* decision recognizes that a declaration *may* be granted - in the discretion of the court - in aid of extra-judicial relief in an appropriate case. The Court simply decided that it was not "plain and obvious" or "beyond doubt" that the case would fail: p. 280.

132 These statutes have long been out of force. They can have no future impact. Their only significance is as part of the historic matrix of the Métis' claims. In short, they are moot. To consider their constitutionality would be a misuse of the Court's time. We therefore need not address this issue.

[page683]

E. *Is the Claim for a Declaration Barred by Limitations?*

133 We have concluded that Canada did not act diligently to fulfill the specific obligation to the Métis contained in s. 31 of the *Manitoba Act*, as required by the honour of the Crown. For the reasons below, we conclude that the law of limitations does not preclude a declaration to this effect.

134 This Court has held that although claims for personal remedies flowing from the striking down of an unconstitutional statute are barred by the running of a limitation period, courts retain the power to rule on the constitutionality of the underlying statute: *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3; *Ravndahl v. Saskatchewan*, 2009 SCC 7, [2009] 1 S.C.R. 181. The constitutionality of legislation has always been a justiciable question: *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, at p. 151. The "right of the citizenry to *constitutional* behaviour by Parliament" can be vindicated by a declaration that legislation is invalid, or that a public act is *ultra vires*: *Canadian Bar Assn. v. British Columbia*, 2006 BCSC 1342, 59 B.C.L.R. (4th) 38, at paras. 23 and 91, citing *Thorson*, at p. 163 (emphasis added). An "issue [that is] constitutional is always justiciable": *Waddell v. Schreyer* (1981), 126 D.L.R. (3d) 431 (B.C.S.C.), at p. 437, aff'd (1982), 142 D.L.R. (3d) 177 (B.C.C.A.), leave to appeal refused, [1982] 2 S.C.R. vii (*sub nom. Foothills Pipe Lines (Yukon) Ltd. v. Waddell*).

135 Thus, this Court has found that limitations of actions statutes cannot prevent the courts, as guardians of the Constitution, from issuing declarations on the constitutionality of legislation. By extension, limitations acts cannot prevent the courts from issuing a declaration on the constitutionality of the Crown's conduct.

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136 In this case, the Métis seek a declaration that a provision of the *Manitoba Act* - given constitutional authority by the *Constitution Act, 1871* - was not implemented in accordance with the honour of the Crown, itself a "constitutional principle": *Little Salmon*, at para. 42.

137 Furthermore, the Métis seek no personal relief and make no claim for damages or for land. Nor do they seek restoration of the title their descendants might have inherited had the Crown acted honourably. Rather, they seek a

declaration that a specific obligation set out in the Constitution was not fulfilled in the manner demanded by the Crown's honour. They seek this declaratory relief in order to assist them in extra-judicial negotiations with the Crown in pursuit of the overarching constitutional goal of reconciliation that is reflected in s. 35 of the *Constitution Act, 1982*.

138 The respondents argue that this claim is statute-barred by virtue of Manitoba's limitations legislation, which, in all its iterations, has contained provisions similar to the current one barring "actions grounded on accident, mistake or other equitable ground of relief" six years after the discovery of the cause of action: *The Limitation of Actions Act*, C.C.S.M. c. L150, s. 2(1)(k). Breach of fiduciary duty is an "equitable ground of relief". We agree, as the Court of Appeal held, that the limitation applies to Aboriginal claims for breach of fiduciary duty with respect to the administration of Aboriginal property: *Wewaykum*, at para. 121, and *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372, at para. 13.

139 However, at this point we are not concerned with an action for breach of fiduciary duty, but with a claim for a declaration that the Crown did not [page685] act honourably in implementing the constitutional obligation in s. 31 of the *Manitoba Act*. Limitations acts cannot bar claims of this nature.

140 What is at issue is a constitutional grievance going back almost a century and a half. So long as the issue remains outstanding, the goal of reconciliation and constitutional harmony, recognized in s. 35 of the *Constitution Act, 1982* and underlying s. 31 of the *Manitoba Act*, remains unachieved. The ongoing rift in the national fabric that s. 31 was adopted to cure remains unremedied. The unfinished business of reconciliation of the Métis people with Canadian sovereignty is a matter of national and constitutional import. The courts are the guardians of the Constitution and, as in *Ravndahl* and *Kingstreet*, cannot be barred by mere statutes from issuing a declaration on a fundamental constitutional matter. The principles of legality, constitutionality and the rule of law demand no less: see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 72.

141 Furthermore, many of the policy rationales underlying limitations statutes simply do not apply in an Aboriginal context such as this. Contemporary limitations statutes seek to balance protection of the defendant with fairness to the plaintiffs: *Novak v. Bond*, [1999] 1 S.C.R. 808, at para. 66, *per* McLachlin J. In the Aboriginal context, reconciliation must weigh heavily in the balance. As noted by Harley Schachter:

> The various rationales for limitations are still clearly relevant, but it is the writer's view that the goal of reconciliation is a far more important consideration and ought to be given more weight in the analysis. Arguments that provincial limitations apply of their own force, or can be incorporated as valid federal law, miss the point when aboriginal and treaty rights are at issue. They ignore the [page686] real analysis that ought to be undertaken, which is one of reconciliation and justification.

("Selected Current Issues in Aboriginal Rights Cases: Evidence, Limitations and Fiduciary Obligations", in *The 2001 Isaac Pitblado Lectures: Practising Law In An Aboriginal Reality* (2001), 203, at pp. 232-33)

Schachter was writing in the context of Aboriginal rights, but the argument applies with equal force here. Leonard I. Rotman goes even farther, pointing out that to allow the Crown to shield its unconstitutional actions with the effects of its own legislation appears fundamentally unjust: "*Wewaykum*: A New Spin on the Crown's Fiduciary Obligations to Aboriginal Peoples?" (2004), *U.B.C. L. Rev.* 219, at pp. 241-42. The point is that despite the legitimate policy rationales in favour of statutory limitations periods, in the Aboriginal context, there are unique rationales that must sometimes prevail.

142 In this case, the claim is not stale - it is largely based on contemporaneous documentary evidence - and no third party legal interests are at stake. As noted by Canada, the evidence provided the trial judge with "an unparalleled opportunity to examine the context surrounding the enactment and implementation of ss. 31 and 32 of the *Manitoba Act*": R.F., at para. 7.

143 Furthermore, the remedy available under this analysis is of a limited nature. A declaration is a narrow remedy. It is available without a cause of action, and courts make declarations whether or not any consequential relief is

available. As argued by the intervener the Assembly of First Nations, it is not awarded against the defendant in the same sense as coercive relief: factum, at para. 29, citing *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539, 193 D.L.R. (4th) 344, at paras. 11-16. In some cases, declaratory relief may be the only way to give effect to the honour of the Crown: Assembly of First Nations' factum, at para. 31. Were the Métis in this action seeking personal remedies, the [page687] reasoning set out here would not be available. However, as acknowledged by Canada, the remedy sought here is clearly not a personal one: R.F., at para. 82. The principle of reconciliation demands that such declarations not be barred.

144 We conclude that the claim in this case is a claim for a declaration of the constitutionality of the Crown's conduct toward the Métis people under s. 31 of the *Manitoba Act*. It follows that *The Limitation of Actions Act* does not apply and the claim is not statute-barred.

F. *Is the Claim for a Declaration Barred by Laches?*

145 The equitable doctrine of laches requires a claimant in equity to prosecute his claim without undue delay. It does not fix a specific limit, but considers the circumstances of each case. In determining whether there has been delay amounting to laches, the main considerations are (1) acquiescence on the claimant's part; and (2) any change of position that has occurred on the defendant's part that arose from reasonable reliance on the claimant's acceptance of the *status quo*: *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, at pp. 76-80.

146 As La Forest J. put it in *M. (K.)*, at pp. 76-77, citing *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221, at pp. 239-40:

> Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

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La Forest J. concluded as follows:

> What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches under either of its two branches. Rather, the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine. [Emphasis added; pp. 77-78.]

147 Acquiescence depends on knowledge, capacity and freedom: *Halsbury's Laws of England* (4th ed. 2003), vol. 16(2), at para. 912. In the context of this case - including the historical injustices suffered by the Métis, the imbalance in power that followed Crown sovereignty, and the negative consequences following delays in allocating the land grants - delay by itself cannot be interpreted as some clear act by the claimants which amounts to acquiescence or waiver. As explained below, the first branch of the *Lindsay* test is not met here.

148 The trial judge found that the delay in bringing this action was unexplained, in part because other constitutional litigation was undertaken in the 1890s: paras. 456-57. Two Manitoba statutes were challenged, first in the courts, and then by petition to the Governor General in Council: paras. 431-37. The trial judge inferred that many of the signatories to the petition would have been Métis: para. 435. While we do not contest this factual finding, we do question the legal inference drawn from it by the trial judge. Although many signatories were Métis, the petitioners were, in fact, a broader group, including many signatories and community leaders who were not Métis. For example, as noted by the trial judge, neither Archbishop Taché nor Father Ritchot - leaders in "the French Catholic/Métis community" - were Métis: para. 435. The actions of this large community say little, in law, about the ability of the Métis to seek a declaration based on the honour of the Crown. They do not [page689] establish acquiescence by the Métis community in the existing legal state of affairs.

149 Furthermore, in this rapidly evolving area of the law, it is rather unrealistic to suggest that the Métis sat on their

rights before the courts were prepared to recognize those rights. As it is, the Métis commenced this claim before s. 35 was entrenched in the Constitution, and long before the honour of the Crown was elucidated in *Haida Nation*. It is difficult to see how this could constitute acquiescence in equity.

150 Moreover, a court exercising equitable jurisdiction must always consider the conscionability of the behaviour of both parties: see *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612, at para. 22. Canada was aware that there would be an influx of settlers and that the Métis needed to get a head start before that transpired, yet it did not work diligently to fulfill its constitutional promise to the Métis, as the honour of Crown required. The Métis did not receive the intended head start, and following the influx of settlers, they found themselves increasingly marginalized, facing discrimination and poverty: see, e.g., trial, at para. 541; C.A., at paras. 95, 244 and 638; A.F., at para. 200. Although bad faith is neither claimed nor needed here, the appellants point to a letter written by Sir John A. Macdonald, which suggests that this marginalization may even have been desired:

> ... it will require a considerable management to keep those wild people quiet. In another year the present residents will be altogether swamped by the influx of strangers who will go in with the idea of becoming industrious and peaceable settlers.

(October 14, 1869, A.R., vol. VII, at p. 65)

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151 Be that as it may, this marginalization is of evidentiary significance only, as we cannot - and need not - unravel history and determine the precise causes of the marginalization of the Métis community in Manitoba after 1870. All that need be said (and all that is sought in the declaration) is that the central promise the Métis obtained from the Crown in order to prevent their future marginalization - the transfer of lands to the Métis children - was not carried out with diligence, as required by the honour of the Crown.

152 The second consideration relevant to laches is whether there was any change in Canada's position as a result of the delay. The answer is no. This is a case like *M. (K.)*, where La Forest J. observed that it could not be seen how the "plaintiff ... caused the defendant to alter his position in reasonable reliance on the plaintiff's acceptance of the status quo, or otherwise permitted a situation to arise which it would be unjust to disturb": p. 77, quoting R. P. Meagher, W. M. C. Gummow and J. R. F. Lehane, *Equity Doctrines and Remedies* (2nd ed. 1984), at p. 755.

153 This suffices to answer Canada's argument that the Métis claim for a declaration that the Crown failed to act in accordance with the honour of the Crown is barred by laches. We add this, however. It is difficult to see how a court, in its role as guardian of the Constitution, could apply an equitable doctrine to defeat a claim for a declaration that a provision of the Constitution has not been fulfilled as required by the honour of the Crown. We note that, in *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327, at p. 357, Lamer C.J. noted that the doctrine of laches does not apply to a constitutional division of powers question. (See also *Attorney General of Manitoba v. Forest*, [1979] 2 S.C.R. 1032.) The Constitution is the supreme law of our country, and it demands that courts be empowered to protect its substance and uphold its promises.

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VII. Disposition

154 The appeal is allowed in part. We conclude that the appellants are entitled to the following declaration:

That the federal Crown failed to implement the land grant provision set out in s. 31 of the *Manitoba Act, 1870* in accordance with the honour of the Crown.

155 The appellants are awarded their costs throughout.

The reasons of Rothstein and Moldaver JJ. were delivered by

ROTHSTEIN J. (dissenting)

I. Introduction

156 In this case, the majority has created a new common law constitutional obligation on the part of the Crown - one that, they say, is unaffected by the common law defence of laches and immune from the legislature's undisputed authority to create limitations periods. They go this far notwithstanding that the courts below did not consider the issue, and that the parties did not argue the issue before this Court. As a result of proceeding in this manner, the majority has fashioned a vague rule that is unconstrained by laches or limitation periods and immune from legislative redress, making the extent and consequences of the Crown's new obligations impossible to predict.

157 While I agree with several of the majority's conclusions, I respectfully disagree with their conclusions on the scope of the duty engaged by the honour of the Crown and the applicability of limitations and laches to this claim.

158 The appellants, herein referred to collectively as the "Métis" made four main claims before this Court. Their primary claim was that [page692] the Crown owed the Métis a fiduciary duty arising from s. 31 of the *Manitoba Act, 1870*, S.C. 1870, c. 3 ("*Manitoba Act*"), and that this duty had been breached. As evidence of the breach of fiduciary duty, the Métis pointed to several factors: the random allocation of the land grants, the delay in allocation of the land, and the allocation of scrip instead of land to some Métis children. These claims make up the bulk of the argument in the Métis' factum.

159 The Métis also raised three other claims in less detail. First, they claimed that provincial statutes were *ultra vires* or inoperative due to the doctrine of paramountcy. Second, they claimed that the Crown did not fulfill its fiduciary duty under, or simply did not properly implement, s. 32 of the *Manitoba Act*. Finally, they claimed a failure to fulfill constitutional obligations, obligations that they state engaged the honour of the Crown. However, they did not elaborate on what duties the honour of the Crown should trigger on these facts.

160 The bulk of these claims were dismissed by the Chief Justice and Justice Karakatsanis and I am in agreement with them on those claims. I agree with their conclusion that there was no fiduciary duty here and therefore the claim for breach of fiduciary duty must fail. I agree that there are no valid claims arising from s. 32 of the *Manitoba Act* and that any claims that might have arisen from the now repealed Manitoba legislation on the land grants are moot, as those acts have long since been out of force. I agree with the majority that the random allocation of land grants was an acceptable means for Canada to implement the s. 31 land grants. Finally, I accept that the Manitoba Metis Federation has standing to bring these claims.

161 However, in my view, after correctly deciding all of these issues and consequently dismissing the vast majority of the claims raised on this appeal, my colleagues nonetheless salvage one aspect of the Métis' claims by expanding the scope of the duties that are engaged under the honour of the Crown. These issues were not the [page693] focus of the parties' submissions before this Court or the lower courts. Moreover, the new duty derived from the honour of the Crown that my colleagues have created has the potential to expand Crown liability in unpredictable ways. Finally, I am also of the opinion that any claim based on honour of the Crown was, on the facts of this case, barred by both limitations periods and laches. As a result, I would find for the respondents and dismiss the appeal.

II. Facts

162 While I agree with my colleagues' broad outlines of the facts of this case, I take issue with a number of the specific inferences or conclusions that they draw from the record.

163 As in all appellate reviews, the trial judge's factual findings should not be interfered with absent palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 10). While the majority does not do so explicitly, aspects of their review and use of the facts depart from the findings of fact made by the trial judge.

However, at no point do they show that the trial judge made any palpable and overriding error in reaching his conclusions. Nor did the Métis claim that the findings I describe below were based on palpable and overriding error.

164 There are two main areas in which the majority reasons have departed from the factual findings of the trial judge, absent a finding of palpable and overriding error: (1) the extent of the delay in distributing the land, and (2) the effect of that delay on the Métis. In my view, the majority's departure from the appropriate standard of appellate review in these areas calls their analysis into question.

A. *Extent and Causes of the Delay*

165 The majority concludes that the record and findings of the courts below suggest a "persistent pattern of inattention". This pattern leads them to find that the duty of diligent fulfillment of solemn promises derived from the honour of the Crown [page694] was breached. In their view, there was a significant delay in implementing the land grants and this delay substantially defeated the purpose of s. 31. I respectfully disagree.

(1) Historical Evidence

166 Historical evidence was presented at trial and the bulk of it was accepted by the trial judge. Based on that evidence and on the reasons of the trial judge, I have summarized the process of how the land grants were distributed below. Though I accept the finding of the trial judge that there was a lengthy delay in the distribution of the land grants, this history reveals a steady and persistent effort to distribute the land grants in the face of significant administrative challenges and an unstable political environment. While a faster process would most certainly have been better, I cannot accept the majority's conclusion that this evidence reveals a pattern of inattention - a finding that is nowhere to be found in the reasons of the trial judge.

(a) *The Census*

167 The first Lieutenant Governor of Manitoba, A. G. Archibald, conducted a census which was completed on December 9, 1870. It would have been impossible to begin the allocation process without a reasonable estimate of how many Métis were owed land.

(b) *The Survey*

168 While the census was in progress, the Lieutenant Governor was also instructed to advise the government on a system for surveying the province. An order in council on April 25, 1871, adopted the survey method that Lieutenant Governor Archibald had proposed. The land needed to be surveyed before it was allocated and the Dominion lands survey was a formidable administrative challenge. The Court of Appeal acknowledged that "the evidence makes it clear that selection of the 1.4 million acres, all of which Canada was obliged [page695] to grant, would have been unworkable in the absence of a survey". The survey of the settlement belt was completed in the years 1871-74.

(c) *Selection of the Townships*

169 Once enough of the survey was complete, the Lieutenant Governor was able to take the next step in the process by selecting which townships would be distributed to the Métis. Lieutenant Governor Archibald received instructions to begin this process on July 17, 1872. The process of selecting the townships required the Lieutenant Governor to consult with the Métis of each parish to determine which areas should be selected. This consultation process took several months. Such consultation cannot be characterized as persistent inattention to the situation of the Métis.

170 While this process was taking place, there was a change in Lieutenant Governor. On December 31, 1871, Lieutenant Governor Archibald had resigned, realizing that he had lost Prime Minister Macdonald's confidence. He was not replaced, however, until the fall of 1872 when Lieutenant Governor Alexander Morris was sworn in. Archibald continued to serve until Morris took over. These types of changes in government inevitably lead to time being lost. Any such delay cannot, without more, be attributed to inattention.

171 By February 22, 1873, the preparatory work was sufficiently advanced that Lieutenant Governor Morris was able to begin drawing lots for the individual grants of 140 acres. He was able to draw lots at the rate of about 60 per hour.

(d) *Events Giving Rise to the Second Allotment*

172 Early in 1873, concern was expressed about whether it was proper for the heads of Métis families to share in the land grant. As a result, in April 1873, the federal government determined that a stricter interpretation of s. 31 should be adopted. Participation in the land grant was limited to the "children of half-breed heads of families" (trial, at [page696] para. 202). As a result of this change, the number of recipients was significantly reduced, which meant that larger allotments would be required to distribute the entire 1.4 million acres. On August 5, 1873, Lieutenant Governor Morris was instructed to cancel the previous allotments. On August 16, 1873, Morris began the second allotment.

173 This change meant that all of the drawing of the allotments up until that point had to be discarded. However, this was not the result of inattention. Rather, the federal government was taking care to make sure that the land grant was distributed correctly, to the right beneficiaries. The government had originally received advice from Lieutenant Governor Archibald that, in order to achieve the purposes of the land grant, it would be necessary to include the heads of the Métis families. While the Lieutenant Governor's interpretation was not consistent with the text of s. 31, it was an interpretation that was based on an effort to understand the purpose of the text and give meaning to the phrase "towards the extinguishment of the Indian Title to the lands". While the necessity of starting over no doubt resulted in some delay, it was not caused by inattention.

(e) *The Fall of Sir John A. Macdonald's Government*

174 On November 5, 1873, Sir John A. Macdonald's government resigned. On January 22, 1874, an election was held. The opening of Parliament under Prime Minister Alexander Mackenzie was on March 26, 1874. David Laird became Minister of the Interior responsible for Dominion Lands. In the fall of 1874, Minister Laird went to Manitoba to gather information on all phases of the land question. According to Dr. Flanagan, Laird's notebook shows that he considered the appointment of a commission "to enumerate those entitled to land rights under the *Manitoba Act*, including the children's grant under s. 31" (evidence of Dr. Thomas Flanagan, A.R., vol. XXVI, at p. 11).

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(f) *The Machar/Ryan Commission*

175 An April 26, 1875 order in council established a commission to take applications for patents from those entitled to participate in the land grants under the *Manitoba Act*. By order in council on May 5, 1875, John Machar and Matthew Ryan were appointed commissioners and went to Manitoba in the summer of 1875. By the end of 1875, the commissioners had prepared returns for all parishes. These returns were approved and constituted what was seen as an authoritative list of those entitled to share in the land grant. However, because there was a concern that this list was not in fact complete, Ryan, having become a magistrate in the North-West Territories, and Donald Codd in the Dominion Lands Office, were authorized to receive further applications by Métis children or heads of families who had not been able to appear before the commission in 1875 because they had emigrated from Manitoba.

(g) *The Patents*

176 On August 31, 1877, the first batch of patents arrived in Winnipeg. After completion of the drawings for a parish, issue of patents usually took one to two years. In the interim, posters were prepared within a few weeks of the approval of the allotment to inform recipients as to the location of their allotments. Most of the patents were issued by 1881, however allotments continued to be approved for some years thereafter. Over 6,000 patents had to be issued under s. 31 of the *Manitoba Act*, on top of over 2,500 under s. 32.

(h) *The Late Applications*

177 In order to get their share of the land grant, the Métis had to file claims with the government. Because of the migration that was already underway, a certain number of these claims were filed late. While the government had anticipated some late claims, the number had been underestimated. As a [page698] result, claims continued to be filed after the 1.4 million acres had already been allocated. On April 20, 1885, an order in council granted the Métis children scrip rather than land, for those children who had submitted late applications.

178 The deadline for filing claims to the $240 scrip for children was May 1, 1886. However, it was not strictly enforced and the late applications continued to trickle in. The government extended the deadline at least four times. In the end, 993 scrips for $240 (worth $238,320) were issued to the Métis children or their heirs.

(2) Evidence of Delay

179 My colleagues point to a number of delays including errors in determining the class of beneficiaries, errors in estimating the number of beneficiaries, long delays in issuing patents and "unexplained periods of inaction". However, these administrative issues must be placed in their proper historical context. At the time, Manitoba was a thinly settled frontier province. There was limited transportation and communications infrastructure and the federal civil service was small. The evidence of Dr. Flanagan was that

> [e]ven with an omniscient, omnicompetent government, it would have taken years to implement the *Manitoba Act*. The objective requirements of carrying out surveys, sorting out claims, and responding to political protests could not be satisfied instantaneously. But, of course, the government of Canada was neither omniscient nor omnicompetent. [p. 171]

Given this context, some "delays" in fulfilling the *Manitoba Act* appear to have been inevitable.

180 The trial judge, at para. 1055, observed that Manitoba was "a fledgling province [that] had just come into existence". Manitoba was far removed from Ottawa, which was the source of the authority for administration of the grant. The trial judge noted, at paras. 155-56, that those involved in [page699] the land grants, including the Lieutenant Governor and the Manitoba legislature, had many challenges to contend with in the establishment of the new province:

> Amongst other things, [the Lieutenant Governor] was to form a government on an interim basis which included selecting and appointing members of his Executive Council, selecting heads of departments of the government, and appointing the members of the Legislative Council. He was to organize electoral divisions, both provincially and federally. He was to undertake a census. He was to provide reports to the Federal Government as to the state of the laws and the system of taxation then existing in the province, and as to the state of the Indian tribes, their numbers, wants and claims, along with any suggestions he might have with reference to their protection and to improvement of their condition. He was to report generally on all aspects of the welfare of the province.
>
> Aside from the foregoing, he also received extensive instructions as to the undertakings which he should fulfill as Lieutenant Governor of the North-West Territories.

181 The majority attributes a three-year delay to the erroneous inclusion of the parents of the Métis children. However, much of the time before the cancellation of the first allotment was devoted to a survey that was used for all subsequent allotments. It is inappropriate to characterize this time as a delay. In my view, the delay stemming from the mistake about the beneficiaries amounts to less than a year, since the actual allocation under the first allotment did not begin until February 1873 and the allotment was cancelled on August 5, 1873.

182 My colleagues also point to an "inexplicable delay" from 1873 and 1875. This period included the time after the fall of Sir John A. Macdonald's government in November 1873. In my view, the change in government followed by the decision to proceed by way of a commission accounts for this time period. This Court must recognize the implications of such a change. Even today, changes in government have policy and practical impacts that delay implementation of government programs. Moreover, it does not [page700] constitute inattention to decide to proceed by way of commission in order to determine who was eligible to share in the land grant.

183 My colleagues criticize the failure of government officials to devote adequate time to the distribution of the allotments. However, there was no evidence tendered regarding the size of the civil service in Manitoba or in Ottawa during the 1870s and 1880s. We do not know how many federal or provincial civil servants there were or the extent of the work and functions they were required to perform. We do know that Lieutenant Governor Morris "wanted to move faster but was hampered by the limited time [Dominion Lands Agent] Donald Codd could devote to the enterprise" (Flanagan, at p. 58). Codd was only able to assist in drawing lots two days a week, until Ottawa sent someone to relieve him at the Lands Office. We have no evidence of what other obstacles there may have been impeding this process.

184 There was another changeover in the Lieutenant Governor from Morris to Joseph-Édouard Cauchon in 1877. While there was no doubt time lost as a result of the change itself, drawing of lots was also delayed as Cauchon was concerned about reports of dissatisfaction he had received. Unfortunately, over a hundred years later, the details of those reports are unclear. It is quite possible that they account for the second delay from 1878 to 1880.

185 The trial judge did not make a finding of negligence. There was also no finding of bad faith. Indeed, the trial judge concluded that there was little evidence of complaint at the time the process was being conducted. The trial judge also made no finding that the relevant government officials lacked diligence or acted with a "pattern of inattention".

186 The majority states, at para. 107, that

> a negligent act does not in itself establish failure to implement an obligation in the manner demanded by [page701] the honour of the Crown. On the other hand, a persistent pattern of inattention may do so if it frustrates the purpose of the constitutional obligation, particularly if it is not satisfactorily explained.

187 I agree, as my colleagues state, that a finding of lack of diligence requires a party to show more than just a negligent act. Here, the trial judge did not even find negligence. Despite this, the majority concludes that there was a lack of diligence. In my respectful opinion, that conclusion is inconsistent with the factual findings of the trial judge.

188 There are gaps in the record. My colleagues appear to rely on these gaps to support their view that the government failed to fulfill the obligations set out in s. 31. In my view, the government cannot, at this late date, be called upon to explain specific delays. This is an insurmountable challenge due to the passage of time and the paucity of the historical record.

189 If this land grant obligation had been made today, we would have expected a more expeditious procedure. However, the obligation was not undertaken by the present day federal government. It was undertaken by the government over 130 years ago, at a time when the government and the country were newly formed and struggling to become established. We cannot hold that government to today's standards when considering circumstances that arose under very different conditions. Indeed the need to avoid the application of a modern standard of conduct to historical circumstances has been noted by this Court in the past: *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 121. To the extent there was delay, on a fair review of the available evidence and findings of the trial judge, it cannot be said to be the result of inattention, much less a persistent pattern of inattention.

B. *Effect of the Delay on the Métis*

190 The majority attributes a number of negative consequences to the length of time that it took for the land grants to be made. In my respectful [page702] view, in so doing they have departed from the factual findings made by the trial judge and drawn inferences that are not supported by the evidence. While the length of time that it took for the land to be distributed may have been frustrating for some of the Métis, it was not the cause of every negative experience that followed for them.

(1) Departure From the Red River Settlement

191 The majority suggests that the marginalization of the Métis and their departure from the Red River Settlement may have been caused by the length of time it took to issue the land grants. This is not supported by the findings of the trial judge or the record. There were other factors at play.

192 The trial judge considered the historical evidence on this point and concluded:

> As the buffalo robe trade was developing strength, agriculture experienced several years of bad crops. From 1844 to 1848, only once, 1845, was the harvest sufficient to feed the Settlement. By the fall of 1848, the Settlement was bordering on starvation. The 1850s brought better crops, but the 1860s were again very poor. The combination of a strong buffalo robe market and very poor crops led to increased abandonment of agriculture by the Métis and some emigration from the Settlement to points west following the buffalo. By 1869, the buffalo were so far west and south of Red River that the buffalo hunt no longer originated in the Settlement. [Emphasis added; para. 50.]

193 Thus, it is clear that emigration from the Red River Settlement began before the s. 31 land grants were contemplated due to the economic forces of declining agriculture and location of the buffalo hunt. The westward retreat of the buffalo herds was a critical factor. The buffalo robe trade was the Métis' primary livelihood and one of the backbones of their economy. This indicates that the Métis' migration was motivated by economic forces, and that the government's actions or inactions were not the sole or even the predominant cause of this phenomenon.

[page703]

194 The majority also attributes to the delay the Métis' inability to trade land to obtain contiguous parcels. With respect, the trial judge concluded that there was no general intention to create a Métis land base and thus, the ability to trade land to obtain contiguous parcels was never one of the objectives of the land grant. The trial judge concluded that only some Métis wanted to obtain contiguous parcels; others preferred to obtain the best land possible. This factual finding is entitled to deference.

195 Finally, my colleagues quote Deputy Minister of the Interior, A. M. Burgess in an effort to suggest that there was general agreement about the existence of the delay and its supposed harmful consequences. Contrary to the majority's suggestions, Burgess's statements cannot be read as a general commentary on the entire land grant process in order to indict the federal government for inattention. Mr. Burgess stated that he was "heartily sick" of the "disgraceful delay which is taking place in issuing patents" (A.R., vol. XXI, at pp. 123-24 (emphasis added)). The issuing of the patents, and any delay that occurred in that process, represented only one aspect of the administrative challenge posed by the land grants. Mr. Burgess also wrote that he had been working night and day on those patents, hardly evidence of a pattern of inattention.

(2) Price Obtained for the Land

196 My colleagues conclude that what they say was a 10-year delay in implementation of the land grants increased sales to speculators. They imply that sales to speculators were harmful to Métis interests. While I accept the finding of the trial judge that some sales were made to speculators for improvident prices, not all sales were bad bargains for the Métis.

197 The trial judge also found that there was evidence of sales which occurred at market prices, sales to people who were not speculators and sales [page704] which were not the result of pressure or conduct of speculators. The trial judge held:

> Overall, while there are many examples of what appear to be individuals having been taken advantage of, it is difficult to assess at this late date whether that was so or whether the price obtained was a fair price given the vagaries of what it was that was being sold and the consequent market value of that. [para. 1057]

It appears that some Métis got higher prices and some Métis got lower prices for their land. For the Métis

community as a whole, this may have been a "zero sum game". At this stage it would be entirely speculative to conclude that there was adverse impact on the Métis community as a whole as a result of land sales.

198 My colleagues suggest that as time passed, the possibility grew that the land was becoming less valuable. In my view, this conclusion is not supported by the evidence. In fact, 1880 to 1882 were boom years, where the land would have become even more valuable. The Court of Appeal noted that the vast majority of sales took place between 1877 and 1883. It is incongruous for the Métis descendants as a group to come forward ostensibly on behalf of some of their ancestors who may have benefitted from the delay.

(3) Scrip

199 The majority acknowledges that it was unavoidable that the land would be distributed based on an estimate of the number of eligible Métis and that the estimate would be inaccurate to some degree. They also acknowledge that the issuance of scrip was a reasonable mechanism to provide the benefit to which the excluded children were entitled. However, they find that

> the delayed issuance of scrip redeemable for significantly less land than was provided to the other recipients further demonstrates the persistent pattern of inattention ... . [para. 123]

200 I cannot agree that the delayed issuance of scrip demonstrates a persistent pattern of inattention by the government. Rather, the issuance of scrip [page705] was equally if not more consistent with the late filing of applications - over which the government had little control - and the corresponding underestimate in the number of eligible recipients. That is hardly evidence of government inattention.

201 If there had been no delay and the accurate number of Métis children had been known from the outset, each child would have received less land than they actually did because the recipients of scrip would have been included in the original division. In this sense, then, Canada overfulfilled its obligations under the *Manitoba Act* by providing scrip after the 1.4 million acres were exhausted. The issuance of scrip reflected Canada's commitment to meaningful fulfillment of the obligation, not inattention.

C. *Conclusion on the Facts*

202 Manifestly, the trial judge made findings of delay. Nonetheless these findings and the evidence do not reveal a pattern of inattention. They do not reveal a lack of diligence. Nor do they reveal that the purposes of the land grant were frustrated. That alone would nullify any claim the Métis might have based on a breach of duty derived from the honour of the Crown, assuming that any such duty exists a matter to which I now turn.

III. Analysis

A. *Honour of the Crown*

203 In their reasons, my colleagues develop a new duty derived from the honour of the Crown: a duty to diligently fulfill solemn obligations. Earlier cases spoke mostly to the manner in which courts should interpret treaties and statutory provisions and not to the manner in which governments should execute them. While *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, explicitly leaves the door open to finding additional new Crown duties in the [page706] future, this is not an appropriate case to develop such a duty.

204 A duty of diligent fulfillment may well prove to be an appropriate expansion of Crown obligations. However, the duty crafted in the majority reasons is problematic. The threshold test for what constitutes a solemn obligation is unclear. More fundamentally, however, the scope and definition of this new duty created by the majority were not explored by the parties in their submissions in this Court nor were they canvassed in the courts below, making the expansion of the common law in this way inappropriate on appeal to this Court.

(1) Ambiguity as to What Constitutes a Solemn Obligation

205 In order to trigger this new duty of diligent fulfillment, there must first be a "solemn obligation". But no clear

framework is provided for when an obligation rises to this "solemn" level such that it triggers the duty of diligent implementation. Furthermore, the majority reasons are unclear as to what types of legal documents will give rise to solemn obligations: Is it only provisions in the Constitution or does it also include treaties? In para. 75, the majority appears to restrict their conclusion on diligence to constitutional obligations to Aboriginal peoples. But, in para. 79, they note that the duty applies whether the obligation arises in a treaty or in the Constitution. This further reflects the inappropriateness of fashioning new common law rights and obligations without the benefit of consideration by the trial judge or Court of Appeal and in particular without the benefit of argument before this Court.

206 This difficulty is manifested in other aspects of the majority reasons. My colleagues accept that s. 31 was a constitutional provision (para. 94). Adopting the narrowest reading of their holding as to what documents trigger solemn obligations - [page707] one limited to constitutional provisions - it would seem such obligations would be triggered here. The majority nonetheless proceeds to consider how s. 31 of the *Manitoba Act* is similar to a treaty (para. 92). It thus appears that s. 31 engages the honour of the Crown, not just because of its constitutional nature, but also because of its treaty-like character.

207 The idea that certain sections of the Constitution should be interpreted differently or should impose higher obligations on the government than other sections because some of these sections can be analogized to treaties is novel to say the least. I reject the notion that when the government undertakes a constitutional obligation, how it must perform that obligation depends on how closely it resembles a treaty.

208 Setting aside the issue of what types of legal documents might contain solemn obligations, there is also uncertainty in the majority's reasons as to which obligations contained in those documents will trigger this duty. My colleagues assert that for the honour of the Crown to be engaged, the obligation must be specifically owed to an Aboriginal group. While I agree that this is clearly a requirement for engaging the honour of the Crown, this alone cannot be sufficient. As the majority notes, in the Aboriginal context, a fiduciary duty can arise as the result of the Crown assuming discretionary control over a *specific Aboriginal interest*. Reducing honour of the Crown to a test about whether or not an obligation is owed simply to an Aboriginal group risks making claims under the honour of the Crown into "fiduciary duty-light". This new watered down cause of action would permit a claimant who is unable to prove a specific Aboriginal interest to ground a fiduciary duty, to still be able to seek relief so long as the promise was made to an Aboriginal group. Moreover, as the majority acknowledges at para. 108, this new duty can be breached as a result of actions that would not rise to the level required to constitute a breach of fiduciary duty. This new duty, with a broader scope [page708] of application and a lower threshold for breach, is a significant expansion of Crown liability.

(2) Absence of Submissions or Lower Court Decisions on This Issue

209 Even if one were not concerned with the issues identified above, this case was never argued based on this specific duty of diligent fulfillment of solemn obligations arising from the honour of the Crown. The parties made no submissions on a duty of diligent implementation of solemn obligations. The Métis never provided argument as to why the honour of the Crown should be engaged here, what duty it should impose on these facts or how that duty was not fulfilled. As a result, Canada and Manitoba have not had an opportunity to respond on any of these points. This Court does not have the benefit of the necessary opposing perspectives which lie at the heart of our adversarial system.

210 While there is no doubt that the phrase "honour of the Crown" was used in argument before this Court, no submissions of any substance were made as to what duty the honour of the Crown should have engaged on these facts beyond a fiduciary duty, nor were there any submissions on a duty of diligent implementation.

211 During the pleadings phase, honour of the Crown was not mentioned in the Métis' statement of claim and was mentioned only once in passing in their response to particulars (A.R., vol. IV, at p. 110). Before this Court, the Métis referred to honour of the Crown four times in their factum, but never alleged that there was a duty of diligent fulfillment of solemn obligations. Instead, two of the references to the honour of the Crown are contained in their summary of the points in issue and in their [page709] requested order. They also briefly assert that the honour of

the Crown required the government to take a liberal approach to interpreting s. 32 and that the honour of the Crown could be used to show one of the elements of a fiduciary obligation under s. 32. They never provided submissions as to what constitutes a solemn obligation nor did they allege specifically that the honour of the Crown required due diligence in the implementation of such solemn obligations. In oral argument before this Court, the only submissions made on honour of the Crown were supplied by the Métis Nation of Alberta and the Attorney General for Saskatchewan. Neither of these interveners, nor the Métis themselves, made submissions about diligence, a new legal test based on patterns of inattention, or solemn obligations.

212 Delineating the boundaries of new legal concepts is prudently done with the benefit of a full record from the courts below and submissions from both parties. Absent these differing perspectives and analysis by the courts below, it is perilous for this Court to embark upon the creation of a new duty under the common law. I believe this concern is manifestly made apparent by the ambiguity in the majority reasons about what legal documents can give rise to solemn obligations.

213 Moreover, it is particularly unsatisfactory to impose a new duty upon a litigant without giving that party an opportunity to make submissions as to the validity or scope of the duty. This inroad on due process is no less concerning when the party to the proceedings is the government. As a result of the majority's reasons, the government's liability to Aboriginal peoples has the potential to be expanded in unforeseen ways. The Crown has not had the opportunity to address what impact this new duty might have on its ability to enter into treaties or make commitments to Aboriginal peoples. It is inappropriate to impose duties on any party, including the government, without giving that party an opportunity to make arguments about the impact that such liability might have. In the case of the government, where the new duty is constitutionally derived and therefore cannot be refined or modified [page710] through ongoing dialogue with Parliament, it is of very serious concern.

214 This Court has always been wary of dramatic changes in the law: see *Watkins v. Olafson*, [1989] 2 S.C.R. 750, at p. 760. In that case, this Court concluded that courts are not well placed to know all of the problems with the current law and more importantly are not able to predict what problems will be associated with the proposed expansion. Courts are not always aware of all of the policy and economic consequences that might flow from the proposed expansion. While this is not a case about the appropriate role for the courts to play relative to the legislature, these same problems are apparent on the facts of this case. Without substantive submissions from the parties, it is difficult for this Court to know how this new duty will operate and what consequences might flow from it. For all these reasons, it is inappropriate to create this new duty as a result of this appeal.

B. *Limitations*

215 Even if one accepts that the honour of the Crown was engaged, that it requires the diligent implementation of s. 31, and that this duty was not fulfilled, any claims arising from such a cause of action have long been barred by statutes of limitations. The majority has attempted to circumvent the application of these limitations periods by characterizing the claim as a fundamental constitutional grievance arising from an "ongoing rift in the national fabric" (para. 140). With respect, there is no legal or principled basis for this exception to validly enacted limitations statutes adopted by the legislature. In my view, these claims must be rejected on the basis that they are time-barred.

(1) Decisions of the Courts Below

216 The present action was commenced on April 15, 1981. The trial judge held that, except for the claims related to the constitutional validity of the Manitoba statutes, there was no question that the [page711] Métis' action was outside the statutorily mandated limitation period and he would have dismissed the action on that basis.

217 The trial judge noted the applicable limitations legislation would have captured these claims. He held that the Métis at the time had knowledge of their rights under s. 31 of the *Manitoba Act* and were engaged in litigation to enforce other rights. From that he inferred that the Métis "chose not to challenge or litigate in respect of s. 31 and s.

32 knowing of the sections, of what those sections were to provide them, and of their rights to litigate" (para. 446). The trial judge concluded that the limitations legislation applied and barred the claims.

218 In the Court of Appeal, Scott C.J.M. noted the trial judge's finding that the Métis knew of their rights and their entitlement to sue more than six years prior to April 15, 1981. The Court of Appeal concluded that the trial judge's factual findings regarding the Métis' knowledge of their rights were entitled to deference. Scott C.J.M. affirmed the trial judge's ruling that the Métis' claim for breach of fiduciary duty with respect to both s. 31 and s. 32 of the Act was statute-barred on the basis that the Métis had not demonstrated that the trial judge misapplied the law or committed palpable and overriding error in arriving at this conclusion.

(2) Limitations Legislation in Manitoba

219 While limitations periods have existed in Manitoba continuously since 1870 by virtue of the application of the laws of England, Manitoba first enacted its own limitations legislation in 1931. *The Limitation of Actions Act, 1931*, S.M. 1931, c. 30, provided for a six-year limitation period for "actions grounded on accident, mistake or other equitable ground of relief" (s. 3(1)(*i*)).

220 There was also a six-year limitation period for any other action not specifically provided for in [page712] that Act or any other act (s. 3(1)(*l*)). *The Limitation of Actions Act, 1931* provided that it applied to "all causes of action whether the same arose before or after the coming into force of this Act" (s. 42). Similar provisions have been contained in every subsequent limitations statute enacted in Manitoba.

221 In my view, the effect of these provisions is that the Métis' claim, whether framed as a breach of fiduciary duty or as breach of some duty derived from honour of the Crown, has been statute-barred since at least 1937.

222 My colleagues are of the view that since this claim is no longer based on breach of fiduciary duty, s. 3(1)(*i*) of *The Limitation of Actions Act, 1931* does not apply to bar these claims. Regardless of how the claims are classified, however, the basket clause of *The Limitation of Actions Act, 1931* contained in s. 3(1)(*l*) would apply to bar the claim since that section is intended to ensure that the six-year limitation period covers any and all causes of action not otherwise provided for by the Act.

223 This claim for a breach of the duty of diligent fulfillment of solemn obligations is a "cause of action" and therefore s. 3(1)(*l*) bars it.

(3) Limitations and Constitutional Claims

224 My colleagues assert that limitations legislation cannot apply to declarations on the constitutionality of Crown conduct. They also state that limitations acts cannot bar claims that the Crown did not act honourably in implementing a constitutional obligation. With respect, these statements are novel. This Court has never recognized a general exception from limitations legislation for constitutionally derived claims. Rather, this Court has consistently held that limitations periods apply to factual claims with constitutional elements.

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225 The majority notes that limitations periods do not apply to prevent a court from declaring a statute unconstitutional, citing *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3; *Ravndahl v. Saskatchewan*, 2009 SCC 7, [2009] 1 S.C.R. 181; and *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138. While I agree, the constitutional validity of statutes is not at issue in this case. Instead, this is a case about factual issues and alleged breaches of obligations which have always been subject to limitations periods, including on the facts of *Ravndahl* and *Kingstreet*.

226 *Kingstreet* and *Ravndahl* make clear that there is an exception to the application of limitations periods where a party seeks a declaration that a statute is constitutionally invalid. Here, my colleagues have concluded that the

Métis' claim about unconstitutional statutes is moot. The remaining declaration sought by the Métis has nothing to do with the constitutional validity of a statute.

227 Instead, what the Métis seek in this case is like the personal remedies that the applicants sought in *Kingstreet* and *Ravndahl*. The Métis are asking this Court to rule on a factual dispute about how lands were distributed over 130 years ago. While they are not asking for a monetary remedy, they are asking for their circumstances and the specific facts of the land grants to be assessed. As this Court said in *Ravndahl*:

> Personal claims for constitutional relief are claims brought as an individual *qua* individual for a personal remedy. As will be discussed below, personal claims in this sense must be distinguished from claims which may enure to affected persons generally under an action for a declaration that a law is unconstitutional. [para. 16]

These claims are made by individual Métis and their organized representatives. The claims do not arise from a law which is unconstitutional. Rather, they arise from individual factual circumstances. As [page714] a result, the rule in *Kingstreet* and *Ravndahl* that individual factual claims are barred by limitations periods applies to bar suit in this case.

(4) Policy Rationale for Limitations Periods Applies to These Claims

228 The majority finds that the issue in this case is of such fundamental importance to the reconciliation of the Métis peoples with Canadian sovereignty that invoking a limitations period would be inappropriate. They further conclude that unless this claim is resolved there will be an "ongoing rift in the national fabric".

229 In my view, it is inappropriate to judicially eliminate statutory limitations periods for these claims. Limitations periods are set by the legislatures and are not discretionary. While limitations periods do not apply to claims that seek to strike down statutes as unconstitutional, as I noted above, this is not such a claim.

230 Limitations statutes are driven by specific policy choices of the legislatures. The exceptions in such statutes are also grounded in policy choices made by legislatures. To create a new judicial exception for those fundamental constitutional claims that arise from rifts in the national fabric is to engage directly in social policy, which is not an appropriate role for the courts.

231 Limitations acts have always been guided by policy. In *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, this Court identified three groups of policies underlying limitations statutes: those concerning certainty, evidentiary issues, and diligence.

232 The certainty rationale is connected with the concept of repose: "There comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations" (*M. (K.) v. M. (H.)*, at p. 29).

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233 The evidentiary issues were further expanded upon in *Wewaykum*, at para. 121:

> Witnesses are no longer available, historical documents are lost and difficult to contextualize, and expectations of fair practices change. Evolving standards of conduct and new standards of liability eventually make it unfair to judge actions of the past by the standards of today.

234 Finally, the diligence rationale encourages plaintiffs to not sleep on their rights. An aspect of this concept is the idea that "claims, which are valid, are not usually allowed to remain neglected" (*Riddlesbarger v. Hartford Insurance Co.*, 74 U.S. (7 Wall.) 386 (1868), at p. 390, cited in *United States v. Marion*, 404 U.S. 307 (1971), at p. 322, footnote 14).

235 From these three rationales, limitations law has evolved to include a variety of exceptions which reflect further

refinements in the policies that find expression in statutes of limitations. Older limitations acts contained few exceptions but modern statutes recognize certain situations where the strict application of limitations periods would lead to unfairness. For instance, while limitations acts have always included exceptions for minors, exceptions based on capacity have been expanded to recognize claimants with a variety of disabilities. Exceptions have also been created based on the principle of discoverability. However, even as those exceptions have been broadened or added, legislatures have created a counterbalance in the form of ultimate limitations periods which operate to provide final certainty and clarity. None of the legislatively created exceptions, nor their rationales, apply to this case.

(a) *Discoverability*

236 The discoverability principle has its origins in judicial interpretations of when a cause of action "accrues". Discoverability was described [page716] in the English case of *Sparham-Souter v. Town and Country Developments (Essex) Ltd.*, [1976] 1 Q.B. 858 (C.A.), at p. 868, where Lord Denning, M.R. stated:

> ... when building work is badly done and covered up the cause of action does not accrue, and time does not begin to run, until such time as the plaintiff discovers that it has done damage, or ought, with reasonable diligence, to have discovered it.

237 While this judicial discoverability rule was subsequently rejected by the House of Lords, Canadian legislatures moved to amend their limitations acts to take into account the fact that plaintiffs might not always be aware of the facts underlying a claim right away. This evolution was described by this Court in *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, at pp. 40-42, where it was noted that the British Columbia legislature had amended its limitations legislation to give effect to an earlier judicial decision which postponed "the running of time until the acquisition of knowledge or means of knowledge of the facts giving rise to the cause of action".

238 The discoverability principle is grounded in the idea that, even if there is no active concealment on the part of the defendant giving rise to other ways of tolling limitations periods, the facts underlying a cause of action may still not be accessible to the plaintiff for some time. There is a potential injustice that can arise where a claim becomes statute-barred before a plaintiff was aware of its existence (*M. (K.) v. M. (H.)*, at p. 33).

239 The discoverability principle has been applied in a variety of contexts. In *Kamloops*, the claim arose from negligent construction of the foundation of a house, where there was evidence that the defect was not visible until long after the house was completed. In *M. (K.) v. M. (H.)*, discoverability was used to toll the limitation period until such time as the victim of childhood incest was able to discover "the connection between the harm she has suffered and her childhood history" (p. 35). In *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, [page717] at para. 43, this Court delayed the start of a limitation period under Ontario's no-fault insurance scheme until the plaintiff had knowledge of the extent of injuries that would allow him to make a claim within the scheme.

240 The link in these cases is that the plaintiffs were unaware of the specific damage or were not aware of the link between the damage and the actions of the defendant. Limitations law permits exceptions grounded in lack of knowledge of the facts underlying the claim and the connection between those facts, the actions of the defendant and the harm suffered by the plaintiff.

241 The Métis can make no such claim. They were not unaware of the length of time that it took for the land to be distributed at the time that the distribution was occurring. The trial judge found that representations to the federal government by the Legislative Council and Assembly of Manitoba were made about the length of time the process was taking as early as 1872. At the time, a significant proportion of the Manitoba legislature was Métis. Nor can they claim that they were unaware of the connection between the length of time that the distribution was taking and the actions of the government, since the trial judge found that the federal government responded to this 1872 complaint by reiterating that the selection and allocation of land was within the sole control of Canada. Thus, the exception that the majority has created is not consistent even at the level of public policy with the discoverability exceptions that have been created by legislatures.

242 I would also note that while the history of the discoverability exception indicates that there is room for judicial interpretation in limitations law, that interpretation must be grounded in the actual words of the statute. In this case, the majority has not linked their new exception to any aspect of the text of the Act.

[page718]

(b) *Disability*

243 Tolling limitations periods for minors or those with disabilities is another long-standing exception to the general limitation rules. Section 6 of *The Limitation of Actions Act, 1931* provided that for certain types of claims, a person under a disability had up to two years after the end of that disability to bring an action. These provisions have grown over time. *The Limitation of Actions Act*, C.C.S.M. c. L150, currently in force in Manitoba provides for tolling where a person is a minor or where a person is "in fact incapable of the management of his affairs because of disease or impairment of his physical or mental condition" (s. 7).

244 Incapacity due to disability has also been used as the legislative framework for tolling limitations periods for victims of sexual assault by a trusted person or person in authority. The Ontario *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, s. 10(2), creates a presumption that the person claiming to have been assaulted was "incapable of commencing the proceeding earlier than it was commenced if at the time of the assault one of the parties to the assault had an intimate relationship with the person or was someone on whom the person was dependent, whether financially or otherwise". This presumption can be rebutted.

245 A victim who suffered sexual assault at the hands of a person in a position of trust, is said to be incapable of bringing a claim because of a variety of factors including

> the nature of the act (personal violation), the perpetrator's position of power over the victim and the abuse of that position act effectively to silence the victim. Moreover, until recently, many victims of sexual assault were subject to social disapproval based on the perception that they were somehow to blame.

[page719]

(Ontario, Limitations Act Consultation Group, *Recommendations for a New Limitations Act: Report of the Limitations Act Consultation Group* (1991), at p. 20)

246 If the discoverability rule has its origins in incapacity to litigate because of lack of knowledge of particular facts underlying the claim such as the damage or the relationship between the damage and the defendant, the exceptions for disability and minors are grounded in a broader view of incapacity:

> Those under legal disability are presumed not to know their rights and remedies and it would be unfair to expect them to proceed diligently in such matters.

(*Murphy v. Welsh*, [1993] 2 S.C.R. 1069, at p. 1080)

247 The Métis were never in a position where they were under a legal disability. As the trial judge found, the Métis were full citizens of Manitoba who wanted to be treated the same as other Canadians. While some sought to entail the s. 31 lands to prevent the children from selling, this view was by no means unanimous. The Métis had always owned land individually and been free to sell it. It is paternalistic to suggest from our modern perspective that the Métis of the 1870s did not know their rights and remedies. This type of paternalism would have been an anathema to the Métis of the time who sought to be treated as equals.

248 The power imbalance that justifies the presumption of incapacity for victims of certain types of sexual assaults is also inapplicable here. Section 31 was enacted *because* of the strength of the Métis community, not because the community was weak or vulnerable or subject to government abuse. While their power in Manitoba declined with the influx of settlers, it is revisionist to suggest that they were in such a weak position in relation to the federal

government that the government was able to "silence" them (as described above in para. 245). While many of the recipients of the land grants [page720] were minors, the findings of the trial judge make clear that the children's parents, adults who could have acted on their children's behalf, knew of their rights. The policy that underlies the exception for minors and those with disabilities does not track onto the experience of the Métis.

(c) *Ultimate Limitations Periods*

249 As a counterweight to newer exceptions like discoverability and expanded disability provisions, legislatures have also adopted ultimate limitations periods. The purpose of these ultimate limitations periods is to provide true repose for defendants, even against undiscovered claims. Even if a claim is not discovered, meaning that the basic limitations period has not been engaged, an ultimate limitation period can bar a claim. While basic limitations periods are often in the range of two to six years, ultimate limitations periods are usually 10 to 30 years long.

250 Manitoba has had an ultimate limitations period of 30 years since 1980 (*An Act to Amend The Limitation of Actions Act*, S.M. 1980, c. 28, s. 3). This ultimate limitation period continues in the current act as s. 14(4). Ultimate limitations periods are also in force in many other provinces. The purpose of these ultimate limitations periods was described by the Manitoba Law Reform Commission in their 2010 report on limitations:

> In order to address the important repose aspect of limitations, there must be some ability to ensure that, after a certain period of time, no action may be brought regardless of the claim's discoverability of late occurring damage.

(*Limitations* (2010), at p. 26)

251 As ultimate limitations periods were introduced, many provincial legislatures chose to effectively exempt certain types of Aboriginal claims from them by grandfathering Aboriginal claims into the former acts, which did not contain ultimate limitations periods. This was done in [page721] Alberta and Ontario, and will soon be done in British Columbia: *Limitations Act*, R.S.A. 2000, c. L-12, s. 13; Ontario *Limitations Act, 2002*, s. 2; *Limitation Act*, S.B.C. 2012, c. 13, s. 2 (not yet in force). In my view, this is evidence that legislatures are alive to the issues posed by Aboriginal claims and limitations periods and the choice of whether or not to exempt such claims from basic and ultimate limitations periods is one that belongs to the legislature.

252 There is a fine balance to be struck between expanded ways to toll limitations periods through discovery and incapacity and a strict ultimate limitations period. It is not the place of the courts to tamper with the selection that each of the legislatures and Parliament have chosen by creating a broad general exception for claims that courts find to be fundamental or serious. The type of exception proposed by my colleagues is antithetical to the careful policy development that characterizes this area of the law. The courts are ill-suited for doing this type of work which must be grounded in a clear understanding of how each aspect of the limitations regime works together to produce a fair result.

253 If Parliament or provincial legislatures wanted to exclude factual claims with a constitutional component from limitations periods, then they could do so by statute. As they have not chosen to make an exception for the type of declaration that the Métis seek in this case, it is inappropriate for this Court to do so.

(d) *Role of Reconciliation*

254 My colleagues suggest that the above rationales have little role to play in an Aboriginal context, where the goal of reconciliation must [page722] be given priority. In so doing, the majority's reasons call into question this Court's decisions in *Wewaykum*, at para. 121, and more recently in *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372. In *Lameman*, this Court specifically stated that policy rationales that support limitations periods "appl[y] as much to Aboriginal claims as to other claims" (para. 13 (emphasis added)). Without doing so explicitly, it appears that the majority has departed from the legal certainty created by *Wewaykum* and *Lameman*, in favour of an approach where "reconciliation" must be given priority.

255 Moreover, the legal framework of this claim is very different from a claim based on an Aboriginal right.

Aboriginal rights are protected from extinguishment under s. 35 of the *Constitution Act, 1982*. Aboriginal rights, therefore, constitute ongoing legal entitlements. By contrast, the claims in this case concern a constitutional obligation that was fulfilled over 100 years ago.

(5) Manitoba Legislation Does Not Exempt Declarations From Limitation Periods

256 My colleagues assert that limitations periods should not apply to claims for failure to diligently fulfill solemn obligations arising from the Constitution where the only remedy sought is a declaration. Respectfully, this is a choice to be made by the legislature. In Manitoba, limitations legislation has never contained an exception for declarations. This Court is not empowered to create one.

257 In some other provinces the legislation governing limitations periods provides for specific exceptions where the only remedy sought is a declaration without any consequential relief: Alberta *Limitations Act*, s. 1(i)(i); Ontario *Limitations Act, 2002*, s. 16(1)(a); British Columbia *Limitation Act*, s. 2(1)(d) (not yet in force).

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258 These exceptions are contained within the finely tailored legislative schemes as described above. In those provinces where recent amendments have provided for declaratory judgments to be exempt from limitations periods, the limitations legislation also contains provisions that restrict the retroactive application of those exemptions. For example, in Ontario, if a claim was not started before the exemption was enacted and the limitation period under the former act had elapsed, the creation of the new exemption from limitation periods for declaratory judgments would not revive those previously barred claims, even if the only remedy sought was a declaration: Ontario *Limitations Act, 2002*, s. 24. Thus, even where the legislature has seen fit to exempt declarations from limitation periods, it has not done so retroactively.

259 This is unsurprising since changes to limitations periods are rarely made retroactively, because to do so would prejudice those who relied upon those limitations periods in organizing their affairs. Retroactive changes to limitations law mean that potential defendants who were under the impression that claims against them were time-barred would be again exposed to the threat of litigation. In contrast, when a limitations period is changed prospectively, potential defendants were never in a position to rely on a limitation period and would always be on notice as to the possibility of litigation. In effect, if limitations periods were changed retroactively, the certainty rationale would be significantly compromised by depriving defendants of the benefit of limitations protection that they had relied upon up until the change in the law.

260 The issue of whether to exempt declaratory judgments from limitations periods is one that has been canvassed recently in Manitoba. In 2010, the Manitoba Law Reform Commission recommended that an exception be created for declaratory judgments, but this recommendation has not been implemented. In making that recommendation, the Manitoba Law Reform Commission recognized that, while declaratory judgments do not compel [page724] the Crown to act in a particular way, there is still a risk that an exception for declaratory remedies might "undermin[e] the principles that support the establishment of limitations" (*Limitations*, at p. 33). This is because obtaining a declaration can be the first step in obtaining an additional remedy, one that would otherwise be barred by a limitation period.

261 The Manitoba Law Reform Commission noted that this risk was particularly acute in the case of declarations made in respect of the Crown, since there is authority to support the proposition that the Crown does not generally ignore a court declaration (p. 32). While the Crown response to a declaration is not always satisfactory to everyone, the possibility that the declaration will lead to some additional extra-judicial remedy is real. This means that while a declaratory order without consequential relief might appear to have little impact on the certainty created by limitations periods, the result for litigants is not necessarily as benign. There is a risk that a declaratory judgment will lead to additional remedies, even when not ordered by the courts.

262 In my view, that risk is fully realized in this case. As my colleagues note, the Métis do not seek a declaration as

an end in itself. Rather, they plan to use the declaration to obtain redress in extra-judicial negotiations with the Crown. This result undermines the certainty rationale for limitation periods by exposing the Crown to an obligation long after the limitation period expired. By exempting the declaration sought by the Métis from limitation periods, the majority has inappropriately stepped into the shoes of the Manitoba legislature.

(6) Effect of Exempting These Claims From Limitations Periods

263 The majority has removed these claims by the Métis from the ordinary limitations regime by arguing that these claims are fundamental [page725] and that a failure to address them perpetuates an "ongoing rift in the national fabric". With respect, the determination that a particular historical injustice amounts to a rift in the national fabric is a political or sociological question. It is not a legally cognizable reason to exempt a claim from the application of limitations periods. Moreover, it leaves the courts in the position of having to assess whether any claim made is sufficiently fundamental to permit them to address it on its merits despite its staleness.

264 Over the course of Canadian history, there have been instances where the Canadian government has acted in ways that we would now consider inappropriate, offensive or even appalling. The policy choice of how to handle these historical circumstances depends on a variety of factors and is therefore one that is best left to Parliament or the government, which have in recent years acted in a variety of ways, including apologies and compensation schemes, to make amends for certain historical wrongs.

265 The reasons of the majority would now have the courts take on a role in respect of these political and social controversies. Where the parties ask for a declaration only and link it to some constitutional principle, the courts will now be empowered to decide those cases no matter how long ago the actions and facts that gave rise to the claim occurred. In my view, this has the potential to open the court system to a whole host of historical social policy claims. While the resolution of historical injustice is clearly an admirable goal, the creation of a judicial exemption from limitations periods for such claims is not an appropriate solution.

266 This exception creates the possibility of indeterminate liability for the Crown, since claims under this new duty will apparently be possible forever. Courts have always been wary of the possibility of indeterminate liability. In *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931), at p. 444, Cardozo C.J. expressed concern about the creation of "liability in an indeterminate amount for an indeterminate time to an indeterminate class". This [page726] concern was recognized, albeit more with respect to indeterminate amounts and classes, by this Court in *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737, at paras. 59-66. In my view, as this exception from limitations periods creates liability for an indeterminate time, it is not an appropriate step for this Court to take.

267 The exemption proposed by my colleagues is not aligned with any of the principles that underlie the limitations scheme. It is instead an exception that is virtually limitless in scope, relying, as it does, on a social policy appeal to restore our national fabric rather than accepted legal principles. It cannot be characterized as the type of incremental change that supports the development and evolution of the common law and it is therefore not an appropriate change for the courts to make.

(7) The Crown Is Entitled to the Benefit of Limitations Periods

268 Limitations periods apply to the government as they do to all other litigants. At common law, limitations periods could be used by the Crown to defend against actions, but could not be used by defendants pursued by the Crown (P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at pp. 98-99). This is no longer the case as the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, s. 32, specifically provides that provincial limitations periods apply to claims by and against the Crown:

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

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The effect of this section is that the provincial limitations legislation in Manitoba applies to the federal Crown. Moreover, even absent this Act, the common law provided that it was possible for the Crown to rely on a limitations period to defend against claims (Hogg, Monahan and Wright, at p. 99).

269 The application of limitations periods to claims against the Crown is clear from the cases generally and also specifically in the area of Aboriginal claims. For example, in both *Wewaykum* and *Lameman*, this Court applied a limitations period to bar an Aboriginal claim against the government.

270 Application of limitations periods to the Crown benefits the legal system by creating certainty and predictability. It also serves to protect society at large by ensuring that claims against the Crown are made in a timely fashion so that the Crown is able to defend itself adequately.

271 The relevance of limitations periods to claims against the Crown can clearly be seen on the facts of this case. My colleagues rely on "unexplained periods of inaction" and "inexplicable delay" to support their assertion that there is a pattern of indifference. In my view, it cannot reasonably be ruled out that, had this claim been brought in a timely fashion, the Crown might have been able to explain the length of time that it took to allocate the land to the satisfaction of a court. The Crown can no longer bring evidence from the people involved and the historical record is full of gaps. This case is the quintessential example of the need for limitations periods.

C. *Laches*

272 In addition to being barred by the limitation period, these claims are subject to laches. Laches is an equitable doctrine that requires a claimant in equity to prosecute his or her claim without undue delay. In Canada, there are two recognized branches to the doctrine of laches: delays that result from [page728] acquiescence or delays that result in circumstances that make prosecution of the action unreasonable (*M. (K.) v. M. (H.)*, at pp. 76-77, citing *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221, at pp. 239-40).

273 The majority finds that the Métis cannot have acquiesced because of their marginalized position in society and the government's role in bringing about that marginalization. They further find that the government did not alter its position in reasonable reliance on the *status quo*, nor would disturbing the current situation give rise to an injustice. Finally, they conclude that given the constitutional aspect of the Métis' claim, it would be inappropriate in any event to apply the doctrine of laches.

274 Respectfully, I cannot agree. The Métis have knowingly delayed their claim by over a hundred years and in so doing have acquiesced to the circumstances and invited the government to rely on that, rendering the prosecution of this action unreasonable. As a result, their claim cannot succeed because it is barred by both branches of the doctrine of laches.

(1) Decisions of the Courts Below

275 The trial judge held that the doctrine of laches acted as a defence to all of the Métis claims. He found that those entitled to benefits under ss. 31 and 32 of the *Manitoba Act* were, at the material time, aware of their rights under the Act and of their right to sue if they so wished. The trial judge held that there was "grossly unreasonable delay" in bringing this action in respect of those rights and the breaches that the Métis now claimed (para. 454). The majority have identified no palpable and overriding error with this conclusion.

276 There is some irony in the majority in this Court crafting its approach around the government's delay and at the same time excusing the Métis' delay in bringing their action for over 100 years.

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277 The trial judge observed that there was no evidence to explain the delay in making the claim. The only explanations offered came from counsel for the Métis and none of them provided "a justifiable explanation at law for those entitled under s. 31 and s. 32, whether individually or collectively, to have sat on their rights as they did until 1981" (para. 457). Nor, in the trial judge's view, did this delay in the exercise of their rights square with the evidence of Métis individuals and the larger community pursuing legal remedies throughout the 1890s for other claims arising from the *Manitoba Act*. The trial judge held that this amounted to acquiescence in law. Both Canada and Manitoba were prejudiced by the claim not being advanced in a timely fashion due to the incomplete nature of the evidence that was available at trial.

278 The Court of Appeal concluded that laches "may be applied to claims seeking declaratory relief whether declaratory judgments are viewed as equitable in nature or *sui generis*" (para. 342). The Court of Appeal then considered whether laches can operate to bar constitutional claims. It concluded that, while laches cannot be applied to claims based on the division of powers, the claims advanced by the Métis were not of that type. The Court of Appeal decided that it was unnecessary to determine whether laches could be applied to the types of constitutional claims advanced by the Métis because it determined that those claims were moot.

(2) Acquiescence

279 My colleagues suggest, at para. 149, that no one can acquiesce where the law has changed, since it is "unrealistic" to expect someone to have enforced their claim before the courts were prepared to recognize those rights. With respect, this conclusion is at odds with the common law approach to changes in the law. While there is no doubt that the law on Crown duties to Aboriginal people has evolved since the 1870s, defences of general application, including laches, have always applied to claimants despite such changes in the [page730] law (*In re Spectrum Plus Ltd. (in liquidation)*, 2005 UKHL 41, [2005] 2 A.C. 680, at para. 26). The applicability of general defences like limitations periods to evolving areas of the law was also recognized by this Court in *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429, at para. 101. My colleagues' approach to acquiescence is a significant change in the law of laches in Canada with potentially significant repercussions.

280 Turning to the specific requirements for the application of acquiescence, I agree with my colleagues that it depends on knowledge, capacity and freedom (*Halsbury's Laws of England* (4th ed. 2003), vol. 16(2), at para. 912). In my view, all three were present on the facts of this case.

281 Justice La Forest, in *M. (K.) v. M. (H.)*, described the required level of knowledge to apply laches:

> ... an important aspect of the concept is the plaintiff's knowledge of her rights. It is not enough that the plaintiff knows of the facts that support a claim in equity; she must also know that the facts give rise to that claim: *Re Howlett*, [1949] Ch. 767. However, this Court has held that knowledge of one's claim is to be measured by an objective standard; see *Taylor v. Wallbridge* (1879), 2 S.C.R. 616, at p. 670. In other words, the question is whether it is reasonable for a plaintiff to be ignorant of her legal rights given her knowledge of the underlying facts relevant to a possible legal claim. [Emphasis deleted; pp. 78-79.]

282 Given the trial judge's findings, the Métis had this required knowledge in the 1870s. This conclusion amounts to a finding of fact and cannot be set aside absent palpable and overriding error. The majority has not identified any such error.

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283 Instead of confronting this conclusion on knowledge, my colleagues conclude that the Métis could not acquiesce for three reasons: (1) historical injustices suffered by the Métis; (2) the imbalance in power that followed Crown sovereignty; and (3) the negative consequences following delays in allocating the land grants. I cannot agree with these conclusions.

(a) *Historical Injustices*

284 The main historical injustice discussed by the majority is the very issue of this case: delay in making the land grants. They conclude that the Métis did not receive the benefit that was intended by the land grants, and they imply that this was a cause of the Métis' subsequent marginalization. They suggest that, because laches is an equitable construct, the conscionability of both parties must be considered. While this is no doubt true, they then rely on the facts of the claim to conclude that equity does not permit the government to benefit from a laches defence. Effectively, they conclude that the very wrong that it is alleged the government committed resulted in a level of unconscionability that means they cannot access the defence of laches. With respect, this cannot be so. Laches is always invoked as a defence by a party alleged to have, in some way, wronged the plaintiff. If assessing conscionability is reduced to determining if the plaintiff has proven his or her allegations against the defendant, the defence of laches is rendered illusory.

(b) *Imbalance in Power Following Crown Sovereignty*

285 The evidence is not such that any imbalance in power between the Métis and the government was enough to undermine the knowledge, capacity and freedom of the Métis to the extent required to prevent a finding of acquiescence.

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286 At the start of the relevant time period, the Métis were a political and military force to be reckoned with. The majority notes, at para. 23 that "[t]he Métis were the dominant demographic group in the Settlement, comprising around 85 percent of the population, and held leadership positions in business, church and government." They also note that

> [w]hen the *Manitoba Act* was passed, the Métis dominated the Red River provisional government, and controlled a significant military force. Canada had good reason to take the steps necessary to secure peace between the Métis and the settlers. [para. 93]

287 Furthermore, while the power and influence of the Métis declined in the following years, there is no evidence that the Métis reached a point where the imbalance in power was so great that they lost the knowledge, capacity or freedom required to acquiesce. Indeed, throughout the 1890s, applications were brought to the courts regarding disputes over individual allotments governed by s. 31. The Attorney General of Manitoba cites three examples of such litigation: *Barber v. Proudfoot*, [1890-91] 1 W.L.T.R. 144 (Man. Q.B. *en banc*) (a Métis individual sought to have a sale set aside), *Hardy v. Desjarlais* (1892), 8 Man. R. 550 (Q.B.) (the deed of sale was executed prior to the court order approving it, the money was not paid into court until the land was sold at a higher price), and *Robinson v. Sutherland* (1893), 9 Man. R. 199 (Q.B.) (a Métis minor alleged that her father forced her to sell her land contrary to the wishes of her husband). This litigation demonstrates that individual Métis had knowledge of their rights under s. 31 during this time period and had knowledge that they could apply to court in order to enforce their rights.

288 While the power of the Métis had declined by the 1890s, there is no evidence that this prevented them from organizing in such a way as to avail themselves of the courts when they felt their rights were being threatened. Throughout the 1890s [page733] Métis individuals were involved in a series of cases related to the "Manitoba Schools Question".

289 Catholic members of the Métis community collectively appealed to the courts regarding legislation involving denominational schools and twice pursued these issues all the way to the Judicial Committee of the Privy Council (*City of Winnipeg v. Barrett*, [1892] A.C. 445; and *Brophy v. Attorney-General of Manitoba*, [1895] A.C. 202). As these cases were not successful, Archbishop Taché organized a petition, which contained 4,267 signatures, that was submitted to the Governor General. This led to a reference to this Court and a subsequent appeal to the Privy Council.

290 From this evidence the trial judge inferred "that many of the 4,267 signatories [to the petition] would have been Métis" and that it was "clear that those members of the community including their leadership certainly were alive to [their] rights ... and of the remedies they had in the event of an occurrence which they considered to be a breach"

(para. 435). My colleagues reject the second inference drawn by the trial judge, again without identifying any palpable and overriding error, stating that the actions of a larger community do not provide evidence of the Métis' ability to seek a declaration based on the honour of the Crown (para. 148). I cannot accept that conclusion. In my view, the evidence demonstrates that, when the rights of the Métis under the *Manitoba Act* were infringed by government action, the Métis were well aware of and able to access the courts for remedies.

291 The trial judge did not conclude that Archbishop Taché and Father Ritchot were Métis; he merely noted that they were leaders of a group that included some Métis and that group had accessed the courts to enforce rights contained in the *Manitoba Act*. This conclusion did not demonstrate any palpable and overriding error. It was reasonable for the trial judge to infer that by signing the petition and being aware of the litigation on denominational schools individual Métis had the [page734] knowledge required under the test described by La Forest J. in *M. (K.) v. M. (H.)*. Both the cases of individual claims under the Manitoba legislation and the cases about the denominational schools show that members of the Métis community had the capacity and freedom to pursue litigation when they saw their rights being affected. In respect of any delay in making land grants, they chose not to do anything until 100 years later. As a result, the Métis acquiesced and laches should be imputed against them.

(c) *Negative Consequences Created by Delays in Allocating the Land Grants*

292 The reasons of the majority suggest that the fact that there was delay in distributing the land is sufficient to lead to the conclusion that the Métis were rendered so vulnerable as to be unable to acquiesce. In my view, this conclusion is untenable as a matter of law. It suggests that no party that suffered injury could ever acquiesce and thus renders the first part of the laches test meaningless. While laches requires consideration of whether the plaintiff had the capacity to bring a claim, this has never been extended to except from laches all who are vulnerable. Laches is imputed against vulnerable people just as limitations periods are applied against them. These doctrines cannot fulfill their purposes if they are not universally applicable.

293 Moreover, I do not accept the implication that the marginalization of the Métis was caused by delays in the distribution of the land grants. As noted above, the Métis community was under pressure for a number of reasons during the 1870s and 1880s. To suggest, as my colleagues do, that delays in the land grants caused the vulnerability of the Métis is to make an inference that was not made by the trial judge and is not supported by the record.

294 In my view, the trial judge was correct in finding that the Métis had acquiesced and that laches could be imputed against them on that basis.

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(3) Circumstances That Make the Prosecution Unreasonable

295 Though my conclusion on acquiescence would be sufficient to result in imputing laches against the Métis, I am also of the view that the Métis' delay resulted in circumstances that make the prosecution of their claim unreasonable.

296 The majority finds that the delay did not result in circumstances that make prosecution of the claim unreasonable since they do not find that the government reasonably relied on the Métis' acceptance of the *status quo*. I cannot agree. The delay in commencing this suit was some 100 years. This delay has resulted in an incomplete evidentiary record. The unexplained delays that my colleagues refer to as evidence for the Crown acting dishonourably may well have been accounted for had the claim been brought promptly. The effect of this extraordinary delay on the evidentiary record, in a case dependent on establishing the actions of Crown officials over 100 years ago, constitutes circumstances that would make the prosecution unreasonable.

297 Moreover, we cannot know whether, if the claims had been brought at the time, the government might have been able to reallocate resources to allow the grants to be made faster or to take other steps to satisfy the Métis

community. It cannot be said that the government did not alter or refrain from altering its position in reliance on the failure of the Métis to bring a claim in a timely manner.

(4) Laches Applies to Equitable Claims Against the Crown

298 The doctrine of laches can be used by all parties, including the Crown, to defend against equitable claims that have not been brought in a sufficiently timely manner. In *Wewaykum*, this Court considered the application of laches to an Aboriginal claim against the Crown and concluded [page736] that laches could act to bar a claim for breach of fiduciary duty. The delay at issue in that case was at least 45 years. The Court in *Wewaykum*, at para. 110, stated that

> [t]he doctrine of laches is applicable to bar the claims of an Indian band in appropriate circumstances: *L'Hirondelle v. The King* (1916), 16 Ex. C.R. 193; *Ontario (Attorney General) v. Bear Island Foundation* (1984), 49 O.R. (2d) 353 (H.C.), at p. 447 (aff'd on other grounds (1989), 68 O.R. (2d) 394 (C.A.), aff'd [1991] 2 S.C.R. 570); *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (C.A.). There are also dicta in two decisions of this Court considering, without rejecting, arguments that laches may bar claims to aboriginal title: *Smith v. The Queen*, [1983] 1 S.C.R. 554, at p. 570; *Guerin*, *supra*, at p. 390.

299 As discussed above in relation to limitations periods, the application of the defence of laches to the Crown is beneficial for the legal system and society generally. The rationales that justify the application of laches for private litigants apply equally to the Crown.

(5) Laches Applies to Claims Under Honour of the Crown

300 The majority concludes that claims for a declaration that a provision of the Constitution was not fulfilled as required by the honour of the Crown ought never to be subject to laches. This is a broad and sweeping declaration, especially considering the conclusion of this Court in *Wewaykum* that breaches of the fiduciary duty could be subject to laches. A fiduciary duty is one duty derived from the honour of the Crown. It is fundamentally inconsistent to permit certain claims (e.g. those based on "solemn obligations" contained in Constitutional documents) derived from the honour of the Crown to escape the imputation of laches while other claims (e.g. those based on the more well-established and narrowly defined fiduciary obligation) are not given such a wide berth. Moreover, this holding will encourage litigants to reframe claims in order to bring themselves within the scope of this new, more [page737] generous exception to the doctrine of laches, which - particularly in light of the ambiguities associated with the new duty - creates uncertainty in the law.

301 My colleagues rely on the holding in *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327, to support their position. In my view, reference to that case is inapposite. Division of powers claims, such as the one considered in *Ontario Hydro*, are based on ongoing legal boundaries between federal and provincial jurisdiction. This claim based on the honour of the Crown is grounded in factual circumstances that occurred over 100 years ago. Just as *Kingstreet* and *Ravndahl* distinguish claims based on factual circumstances from those based on ongoing statutory issues in the context of limitations statutes, so too should this case be distinguished from *Ontario Hydro*.

(6) Conclusion on Laches

302 In my view, both branches of laches are satisfied. The Crown is entitled to the benefit of this equitable defence generally and specifically in relation to claims arising from the honour of the Crown in implementing constitutional provisions. As La Forest J. stated in *M. (K.) v. M. (H.)*, at p. 78, "[u]ltimately, laches must be resolved as a matter of justice as between the parties". Both the Métis and the government are entitled to justice. As a matter of justice, laches applies and precludes granting the equitable remedy sought here.

IV. Conclusion

303 I would dismiss the appeal with costs.

[page738]

Appeal allowed in part with costs throughout, ROTHSTEIN *and* MOLDAVER JJ. *dissenting.*

Solicitors:

Solicitors for the appellants: Rosenbloom Aldridge Bartley & Rosling, Vancouver.

Solicitor for the respondent the Attorney General of Canada: Attorney General of Canada, Saskatoon.

Solicitor for the respondent the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

Solicitor for the intervener the Attorney General for Saskatchewan: Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitor for the intervener the Métis National Council: Métis National Council, Ottawa.

Solicitors for the intervener the Métis Nation of Alberta: JTM Law, Toronto.

Solicitors for the intervener the Métis Nation of Ontario: Pape Salter Teillet, Vancouver.

Solicitors for the intervener the Treaty One First Nations: Rath & Company, Priddis, Alberta.

Solicitors for the intervener the Assembly of First Nations: Arvay Finlay, Vancouver; Nahwegahbow, Corbiere, Rama, Ontario.

Miller (Litigation guardian of) v. Wiwchairyk, [1997] O.J. No. 2695

Ontario Judgments

Ontario Court of Justice (General Division)

Whalen J.

July 2, 1997.

Court File No. 15864/96

[1997] O.J. No. 2695 | 34 O.R. (3d) 640 | 72 A.C.W.S. (3d) 610

Between Derek Miller, Darren Miller and Dwayne Miller, infants by their Litigation guardian Clifford Miller, Clifford Miller and Louis Miller, plaintiffs, and Nicholas Wiwchairyk, Constable Tim Carscadden, William G. Rose, Michipicoten Township Police Service, Michipicoten Police Association and The Halifax Insurance Company, defendants

(7 pp.)

Case Summary

Practice — Pleadings — Striking out pleadings — Grounds, failure to disclose a cause of action or defence.

This was an application to strike a claim and a cross-claim. The respondent, Miller, was injured in a snowmobile accident. Miller was a passenger on a snowmobile operated by Wiwchairyk. Prior to the accident, the applicant police officer, Carscadden, discovered that Wiwchairyk did not have a license to use the machine. Wiwchairyk was given a warning by Carscadden. He was not charged with operating the snowmobile without a license. Miller brought a claim against Carscadden in negligence. Miller's insurer, the respondent Halifax, brought a cross-claim against Carscadden on the same basis. Carscadden sought to strike the claims. He argued that the claims did not disclose a reasonable cause of action. He argued that there was no causal connection between his failure to charge Wiwchairyk and the accident.
HELD: The application was dismissed.

Although Miller and Halifax faced a difficult burden in proving causation, there was a valid cause of action. The complexity and difficulty of the case did not preclude the case from proceeding. Carscadden was entitled to later move for summary judgement if Miller and Halifax did not set out a genuine issue for trial.

Statutes, Regulations and Rules Cited:

Motorized Snow Vehicles Act, R.S.O. 1990, c. M-44. Ontario Rules of Civil Procedure, Rule 21.01(1)(b).

Counsel

J. Douglas Wright for defendants Constable Tim Carscadden, William G. Rose, Michipicoten Township Police Service and Michipicoten Police Association. P. Feifel for plaintiffs, Derek Miller, Darren Miller, Dwayne Miller, Clifford Miller and Louise Miller. J.G. Murphy for defendant, The Halifax Insurance Company.

Introduction

WHALEN J.

1 The defendant Carscadden (hereafter "C") and the other police defendants moved to strike the plaintiffs' claim and the cross-claim of the defendant Halifax Insurance Company pursuant to Rule 21.01(1)(b) of the Rules of Practice. The plaintiffs and Halifax responded to the motion. The defendant Wiwchairyk (hereafter "W") did not appear.

2 For the reasons that follow, the motion will be denied.

Facts

3 On February 19, 1996, the plaintiff, Derek Miller (hereafter "M"), was catastrophically injured in an accident while a passenger on a snow machine owned and operated by W. It is alleged W was driving the snow machine carelessly and at high speed, causing M to be thrown from the vehicle.

4 A month or two before the accident, C (a constable with the Michipicoten Police Service) encountered W who was operating a snow machine without a valid licence or insurance coverage, as required by the Motorized Snow Vehicles Act, R.S.O. 1990, Chapter M-44. It is alleged C advised W "of the possible ramifications to passengers who would be riding with the said defendant, if the said defendant did not have insurance...". C gave W a warning, although it is alleged he told him he should be charged. The plaintiff's say if C had charged W, rather than simply warning him, W would not "in all probability" have driven the snow machine, thereby avoiding the accident in which M was subsequently injured. Therefore, it is claimed C was negligent in failing to charge W and he thus breached a duty of care in respect of a reasonably foreseeable consequence he had in fact warned W about. It is claimed the other police defendants are vicariously liable for C's negligence. These are the facts pleaded in the impugned statement of claim.

The Law

5 Rule 21.01(1)(b) provides:

> 21.01(1) A party may move before a judge,...
>
> (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,
>
> and the judge may make an order or grant a judgement accordingly.

6 The parties appearing agreed on the applicable test, namely: assuming the facts pleaded in the statement of claim can be proved, is it "plain and obvious" that the pleading discloses no reasonable cause of action? Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959; adopted and applied in R.D. Belanger & Associates Limited v. Stadium Corp. (1991), 5 O.R. (3d) 778 (Ont. C.A.) at page 780. The same test was articulated a little differently, but with same effect in Doe v. Metro Toronto Police (1990), 74 O.R. (2d) 225 (Div. Ct.) at page 229, T-D Bank v: Deloitte, Haskens and Sells (1992), 5 O.R. (3d) 417 (O.C.G.D.) at page 419, and Sun Life Trust Co. V. Scarborough (City), [1994] O.J. No. 2447 (O.C.G.D.) at pages 4 and 5.

7 In Sun Life Trust Co., supra, it was observed the threshold for sustaining a pleading under Rule 20.01 is not a high one, and in T-D Bank v. Deloitte Haskens and Sells, supra, it was suggested the statement of claim in question should be read "generously" for the plaintiff. The action should be struck only if it is certain to fail because it contains a radical defect. Potential length and complexity, the novelty of the cause of action or an apparently strong defence should not be a bar.

8 In Hanson v. Bank of Nova Scotia (1994), 19 O.R. (3d) 142 (Ont. C.A.) at page 145, the court warned of the danger of imposing too high a threshold too early in the process by reminding that the law is a dynamic, ever-evolving process, where categories of relationships giving rise to fiduciary duties and categories of negligence in which a duty of care is owed, are never closed.

Analysis

9 The moving defendants' argument for dismissal rests heavily on the apparent lack of causal connection and proximity between C's act (or failure to act) and the accident itself. They disagreed strongly that C could or ought to have foreseen that charging W might have avoided the accident, or alternatively, that failing to charge him could have led to the accident. They contended the accident was causally too remote from C's contact with W and lacking in contemporaneity. They forcefully argued that M's injuries were the direct cause of the manner in which W had operated the snow machine, and that the injuries would have been the same whether or not W had insurance or a licence at the time. In other words, it was assumptive or speculative to conclude the accident would not have occurred had C charged W by issuing him a ticket, rather than simply giving a warning. The defendants further submitted that the private law duty of care owed by the police to individuals is very limited in such circumstances, and that foreseeability of risk must coexist with a special relationship of proximity: Doe v. Metro Toronto Police, supra, at page 230.

10 At this stage it appears the plaintiffs face a very difficult task establishing the necessary causal connection, proximity and duty of care. I am sceptical of their chances of success and find the moving defendants' submissions very compelling. The court ultimately disposing of the claim will also likely be concerned with the potential negative impact of its decision on the already difficult task of policing, not to mention a concern that police effectively and indirectly be made insurers for those whose remedies may be otherwise limited. There are large policy issues at stake. However, at this early stage in the litigation process, the court should not look beyond the pleadings to determine whether the action has any chance of success: Prete v. Ontario (1994), 16 O.R. (3d) 161 (Ont. C.A.) at pages 170 and 171. The facts in the Doe case exemplify an unusual situation in which the police did not seem at first glance to owe a private duty of care. Yet the plaintiff convinced the court of a potentially valid cause of action. So the cause exists, albeit perhaps narrow and difficult to prove.

11 If I read the pleaded allegation that W would not probably have driven the snow machine in the manner he did on the day in question as a statement of material fact, rather than as a conclusion (ie. if I read it "generously" for the plaintiffs), then it becomes a question of whether the fact can be proven, and once proven, whether it is sufficient in all of the circumstances to establish that the police defendants owed a private duty of care to M. Causation, proximity, remoteness and the existence of a special relationship will necessarily be resolved in the same context.

12 I cannot at this point imagine what the evidence may be, but that detail is not a matter for pleading, and in any event Rule 21.01(2)(b) prohibits the admission of evidence on a motion under Rule 21.01(1)(b).

13 The same may be said of the allegation concerning W's reputation as a snow machine operator, although this may also weigh against the plaintiffs in considering assumption of risk.

14 The claim may be difficult, novel, complex and reaching, but that does not disqualify it from being made.

15 Under Rule 20 the defendants may move for summary Judgment if it is determined there is no genuine issue for trial. It is in such a motion that a court may look beyond the pleadings to ascertain "chance of success". It would be dangerous at the present stage to dismiss the claim without the parties being able to offer sworn testimony so that the court might be in a position to look beyond the pleadings and therefore also assess whether there is a genuine issue for trial.

Order

16 For these reasons I conclude the plaintiffs have met the threshold required in their statement of claim, though barely so, and although I am sceptical of what lies ahead. The motion is therefore dismissed.

17 Given the closeness of the decision and the reservations expressed, this is a case where costs are best left to the discretion of the court finally disposing of the matter.

WHALEN J.

End of Document

Nash v. Ontario, [1995] O.J. No. 4043

Ontario Judgments

Court of Appeal for Ontario,

Finlayson, Carthy and Austin JJ.A.

December 22, 1995

Nos. C22206, C22998, C22185

[1995] O.J. No. 4043 | 27 O.R. (3d) 1 | 1995 CanLII 2934 | 59 A.C.W.S. (3d) 1083

Nash et al. v. The Queen in Right of Ontario et al. Nash et al. v. CIBC Trust Corporation et al. Falloncrest Financial Corporation et al. v. The Queen in Right of Ontario

Counsel

Alan J. Lenczner, Q.C., and Ronald G. Chapman, for all appellants except Falloncrest Financial Corp. and Peter Fallon, Sr.

Adrian Hill, for Peter Fallon, Sr.

Joan M. Haberman, for respondents, Attorney General of Ontario and Brian Cass.

Paul B. Schabas and Kathryn M.E. Podrebarac, for respondent, CIBC Trust Corp.

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1 BY THE COURT: -- These three appeals, Nash v. Ontario (C22206), Nash v. CIBC Trust Corp. (C22998) and Falloncrest Financial Corp. v. Ontario (C22185), were heard together. They are all from the orders of the Honourable Mr. Justice Ground, wherein he stayed all three actions and struck out portions of the statements of claim in Nash v. Ontario and Falloncrest v. Ontario. While the statements of claim plead three separate and distinct causes of action, the actions arise from the same failed investment in a shopping mall.

Facts

2 The appellants in the Nash actions ("Nash appellants") were investors in Mater's Management Limited ("Mater's"), a business property development company which raised funds by means of syndicated mortgages. The principal of Mater's was Alberto DoCouto. The appellants in the Falloncrest action ("Falloncrest appellants") are Falloncrest Financial Corp. and Falloncrest Properties Inc. ("Falloncrest Companies"), and Peter Fallon, Sr. and Peter Fallon, Jr. The two Fallons were the "directing minds" of the Falloncrest Companies, which acted as mortgage brokers for Mater's projects. The respondent in Nash v. CIBC Trust Corp. was, at material times, Morgan Trust Company of Canada ("Morgan Trust"), a trustee of funds to be invested in mortgages on properties owned or controlled by Mater's. The Nash appellants advanced moneys to Mater's through Morgan Trust.

3 On January 15, 18 and 23, 1990, the Director of the Consumer Protection Division of the Ministry of Consumer and Commercial Relations ("Director") made a series of directions under s. 26(1)(a) of the Mortgage Brokers Act, R.S.O. 1990, c. M.39 ("M.B.A."). The effect of these directions was to freeze the assets of Falloncrest Financial Corp., Peter Fallon, Jr. and Mater's. The Director also appointed Peat Marwick Thorne Inc. to investigate possible contraventions of the M.B.A. by Falloncrest Financial Corp., Peter Fallon, Jr. and Mater's, among others.

4 On January 19, 1990, Morgan Trust brought an application before the Ontario Court (General Division) seeking

the appointment of a receiver and manager of Mater's assets. It is pleaded in the Nash actions that this application was instituted on the instructions of the Director. Later in 1990, Mater's was placed in bankruptcy.

5 On January 2, 1992 and at a later date, Peter Fallon, Sr., Peter Fallon, Jr. and Alberto DoCouto were each charged with 26 criminal offences including various counts of fraud, theft and conspiracy in relation to the operations of Falloncrest Financial Corp. These charges were laid following investigations by the Ministry of Financial Institutions under the M.B.A. and by the Ontario Provincial Police. The charges are still outstanding.

6 On September 27, 1994, the Falloncrest appellants commenced an action against the Crown alleging various forms of improper conduct on the part of the Crown. On November 9, 1994, the Nash appellants also commenced an action against the Crown making similar allegations. In the latter action, Dr. Lawrence Nash is acting in three capacities: on his own behalf as an investor in mortgages; as the representative plaintiff under the Class Proceedings Act, 1992, S.O. 1992, c. 6; and as an assignee, pursuant to an order of the Registrar in Bankruptcy, of whatever claim was maintainable by Mater's. On December 14, 1994, the Nash appellants commenced a separate action against Morgan Trust, now CIBC Trust Corporation ("CIBC Trust"), for breach of duty as trustee and for breach of certain terms of the trust agreements.

7 On June 28, 1995, Ground J. struck various paragraphs from the statements of claim in Falloncrest v. Ontario and Nash v. Ontario, ordered particulars with respect to a few other paragraphs in those statements of claim, and stayed both civil actions pending the completion of criminal proceedings against the Fallons and DoCouto. On October 23, 1995, Ground J. also stayed the action Nash v. CIBC Trust Corp. The appellants appeal these rulings.

Issues on Appeal

8 The following issues were raised in this appeal:

1. in both actions against the Crown, whether Ground J. erred in striking claims for breach of statutory duty, negligent performance of a statutory duty or power, and negligent investigation;
2. in both actions against the Crown, whether Ground J. erred in striking claims for unlawful disclosure of confidential information;
3. in the Nash action against the Crown, whether Ground J. erred in striking claims based on the Crown's role and its effect with respect to Morgan Trust's motion for the appointment of a receiver; and
4. whether Ground J. erred in staying the Falloncrest action and the two Nash actions pending the completion of the criminal proceedings against Peter Fallon, Sr., Peter Fallon, Jr. and Alberto DoCouto.

9 The Falloncrest appellants raised other issues, but those are either not contested by the Crown, or were decided in the appellants' favour by Ground J. and are not cross-appealed. During the course of argument before this court, counsel for the Nash and Falloncrest appellants abandoned issue (2) relating to unlawful disclosure of confidential information.

10 With respect to all issues affecting the Nash appellants, the Crown submitted that, as an assignee of Mater's through the bankruptcy process, the Nash appellants' rights are no better than those of Mater's. The effect of this would be to tar the investor plaintiffs with whatever wrongdoing can be attributed to Mater's by reason of the alleged criminality of DoCouto, and also to restrict the plaintiffs to the same defences and arguments that Mater's could raise. Whatever merit this argument may have at trial when there is a factual underpinning to the activities of Mater's, it should not be given effect to at this stage of the proceedings. For our present purposes, we accept the allegations in the pleadings as true. This means that the Nash appellants are entitled to be treated as victims of Mater's and the Falloncrest companies. In any event, Dr. Lawrence Nash is also suing in his personal capacity and as a representative under the Class Proceedings Act, 1992, although the class has not yet been certified, and it is too early to deal with his status as a litigant.

11 We are all of the opinion that the appeals with respect to issues (1) and (3), both involving the striking of claims, should be allowed. The test for determining whether a pleading should be struck was stated by the Supreme Court of Canada in Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959 at p. 980, 74 D.L.R. (4th) 321 at p. 336:

> [T]he test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia Rules of Court is the same as the one that governs an application under R.S.C., O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case.

On a motion to strike out a pleading, the court must accept the facts alleged in the statement of claim as proven unless they are patently ridiculous or incapable of proof, and must read the statement of claim generously with allowance for inadequacies due to drafting deficiencies: Toronto-Dominion Bank v. Deloitte Haskins & Sells (1991), 5 O.R. (3d) 417 at p. 419, 8 C.C.L.T. (2d) 322 (Gen. Div.). Also, the court should not, at this stage of the proceedings, dispose of matters of law that are not fully settled in the jurisprudence: R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd. (1991), 5 O.R. (3d) 778 at p. 782 (C.A.).

12 With respect to issue (1), the law relating to breach of statutory duty, negligent performance of a statutory duty or power, and negligent investigation is not so clear that we are prepared to say that these actions must fail. Even the Crown conceded that the law in this area is "muddy". Accordingly, the motions court judge erred in holding that "it is plain, obvious and beyond doubt" that these actions cannot succeed.

13 With respect to issue (3), accepting that the Crown directed Morgan Trust to apply for the appointment of a receiver and that the Crown knew or ought to have known that Mater's would suffer loss as a result, it is not plain and obvious that no reasonable cause of action can be grounded on these facts. The cause of action may or may not be a weak one, but that should be determined at trial. The Nash appellants' claim of improper Crown influence on Morgan Trust should proceed to trial, especially since other issues arising from the same facts will be litigated in any event: Belanger, supra, at p. 782.

14 As to issue (4), no general rule in this jurisdiction requires a stay of civil cases merely because criminal charges relating to the same matter are pending. In fact, a court will normally deny a stay unless the applicant demonstrates that his or her case is an extraordinary or an exceptional one: see Stickney v. Trusz (1973), 2 O.R. (2d) 469 at p. 471, 45 D.L.R. (3d) 275 (H.C.J.), affirmed (1974), 3 O.R. (2d) 538 at p. 538, 46 D.L.R. (3d) 80 (Div. Ct.), affirmed (1974), 3 O.R. (2d) 538 at 539, 46 D.L.R. (3d) 80 at 82 (C.A.), leave to appeal refused [1974] S.C.R. xii, 28 C.R.N.S. 127n.

15 Several reported cases have suggested that the rationale underlying a stay of a civil action pending the conclusion of a related criminal prosecution is the protection of the accused's right to a fair trial: see, for example, Seaway Trust Co. v. Kilderkin Investments Ltd. (1986), 55 O.R. (2d) 545, 29 D.L.R. (4th) 456 (H.C.J.); Belanger v. Caughell (1995), 22 O.R. (3d) 741 (Gen. Div.). In the present case, however, the party moving for the stay is the Crown, and the accused's rights are not at issue. The Crown must, then, show that other extraordinary or exceptional circumstances justify a stay.

16 The cases are clear that the threshold test to be met before a stay is granted is high. The mere fact that criminal proceedings are pending at the same time as civil proceedings is not sufficient ground for a stay of the latter: Stickney v. Trusz, supra. Even the potential disclosure through the civil proceedings of the nature of the accused's defence or of self- incriminating evidence is not necessarily exceptional: see Belanger v. Caughell, supra; Stickney v. Trusz, supra; Seaway Trust Co. v. Kilderkin Investments Ltd., supra. This high threshold test should not be relaxed merely became it is the Crown that requests the stay. An applicant, whether it is the Crown or the accused, must meet the same burden of proving extraordinary or exceptional circumstances. The test is not on a balance of

convenience for the Crown and something higher for the accused. To the extent that the motions court judge held that it is, he erred.

17 In our opinion, neither Nash v. Ontario nor Nash v. CIBC Trust Corp. involve circumstances so extraordinary or exceptional as to warrant the stays of these actions. The Nash appellants and CIBC Trust are not parties in the pending criminal proceedings and the issues involved in these two actions are quite distinct from those the criminal charges raise. Falloncrest Financial Corp. v. Ontario, on the other hand, is different. The Falloncrest appellants' allegations are such that their civil claims would have little merit if the Crown successfully convicts the Fallons and DoCouto. The civil action is the reciprocal of the criminal prosecution. Furthermore, the Falloncrest appellants' motivation for instituting their action against the Crown, shortly after their committal for trial, is suspect. The appearance is that their objective in maintaining the civil action is to interfere with the criminal process and to have pre-trial access to Crown witnesses beyond that afforded on the preliminary hearing. We would not interfere with the exercise of the trial judge's discretion in this instance where he stayed these civil proceedings until the conclusion of the prosecutions.

Conclusion

18 For the above reasons, we would dispose of the issues in this appeal as follows:

1. both of the Nash and Falloncrest appellants' appeals from the striking of their claims based on the Crown's breach of statutory duty, negligent performance of a statutory duty or power and negligent investigation are allowed;
2. the Nash appellants' appeal from the striking of their claim based on the Crown's role in Morgan Trust's motion for the appointment of a receiver is allowed;
3. the Nash appellants' appeals from the stays of their actions against the Crown and CIBC are allowed; and
4. the Falloncrest appellants' appeal from the stay of their action against the Crown is dismissed.

The various orders of Ground J. are varied in order to give effect to the above dispositions.

19 The Nash appellants shall receive their costs of appeals C22206 and C22998 in any event of the cause. No other party is entitled to costs.

Order accordingly.

Nelles v. Ontario, [1989] 2 S.C.R. 170

Supreme Court Reports

Supreme Court of Canada

Present: Dickson C.J. and Beetz *, Estey *, McIntyre, Lamer, Wilson, Le Dain *, La Forest and L'Heureux-Dubé JJ.

1988: February 29 / 1989: August 14.

File No.: 19598.

[1989] 2 S.C.R. 170 | [1989] 2 R.C.S. 170 | [1989] S.C.J. No. 86 | [1989] A.C.S. no 86

Susan Nelles, appellant; v. Her Majesty The Queen in right of Ontario, the Attorney General for Ontario, John W. Ackroyd, James Crawford, Jack Press and Anthony Warr, respondents.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

* Beetz, Estey and Le Dain JJ. took no part in the judgment.

Case Summary

Crown — Immunity — Civil action — Malicious prosecution — Whether Crown, Attorney General and Crown Attorneys are immune from suit for malicious prosecution — Whether a ruling on the issue of prosecutorial immunity should be made on an appeal of a preliminary motion — Proceedings against the Crown Act, R.S.O. 1980, c. 393, s. 5(6) — Rules of Practice and Procedure, R.R.O. 1980, Reg. 540, Rule 126.

The appellant was charged with the murder of four infants and was discharged on all counts at the conclusion of the preliminary inquiry. She then brought an action against the Crown in right of Ontario, the Attorney General for Ontario, and several police officers, alleging that the Attorney General and his agents, the Crown Attorneys, counselled, aided and abetted the police in charging and prosecuting her and that the Attorney General and the Crown Attorneys were actuated by malice. Proceedings were later discontinued against the police officers and the Crown Attorneys were not named as defendants. Before trial, the respondents moved to have the action dismissed under Rule 126 of the Ontario Rules of Practice on the ground that the pleadings disclosed no reasonable cause of action and, in the alternative, for leave under Rule 124 to set down a point of law raised in the pleadings and to argue it on the return of the motion. The Supreme Court of Ontario allowed the motion and struck out the statement of claim. The Court of Appeal upheld the judgment. Both the Supreme Court of Ontario and the Court of Appeal [page171] seemed to have acted under Rule 126. This appeal is to determine whether the Crown, the Attorney General and the Crown Attorneys enjoy an absolute immunity from a suit for malicious prosecution.

Held (L'Heureux-Dubé J. dissenting in part): The appeal should be dismissed as against the Crown. The appeal should be allowed as against the Attorney General and the matter returned to the Supreme Court of Ontario for trial of the claim against the Attorney General.

The Crown enjoys absolute immunity from a suit for malicious prosecution. Section 5(6) of the Ontario Proceedings Against the Crown Act exempts the Crown from any proceedings in respect of anything done or omitted to be done by a person while discharging or purporting to discharge responsibilities of a judicial nature or responsibilities that he has in connection with the execution of judicial process. The decision to prosecute is a judicial decision vested in the Attorney General and executed on his behalf by his agents, the Crown Attorneys. The Crown Attorneys and the Attorney General in deciding to prosecute the appellant came within s. 5(6) of the Act and the Crown is thus immune from liability to the appellant.

Per Dickson C.J. and Lamer and Wilson JJ.: There is no need for a trial to permit a conclusion on the question of prosecutorial immunity. This issue, disposed of in the courts below upon a pre-trial motion under Rule 124 or Rule

126 of the Ontario Rules of Practice, should be addressed by this Court. The issue has been given careful consideration in the Court of Appeal and in argument before this Court. To send the matter back for trial without resolving the issue would not be expeditious and would add both time and cost to an already lengthy case. The rules of civil procedure should not act as obstacles to a just and expeditious resolution of a case.

The Attorney General and Crown Attorneys are not immune from suits for malicious prosecution. A review of the authorities on the issue of prosecutorial immunity reveals that the matter ultimately boils down to a question of policy. In the interests of public policy, an absolute immunity for the Attorney General and his agents, the Crown Attorneys, is not justified. An absolute immunity has the effect of negating a private right of action and in some cases may bar a remedy under the Canadian Charter of Rights and Freedoms. As such, the existence of absolute immunity is a threat to the [page172] individual rights of citizens who have been wrongly and maliciously prosecuted. While the policy considerations in favour of absolute immunity have some merit, these considerations must give way to the right of a private citizen to seek a remedy when the prosecutor acts maliciously in fraud of his duties with the result that he causes damage to the victim. The tort of malicious prosecution requires not only proof of an absence of reasonable and probable cause for commencing the proceedings but also proof of an improper purpose or motive, a motive that involves an abuse or perversion of the system of criminal justice for ends it was not designed to serve and as such incorporates an abuse of the office of the Attorney General and his agents the Crown Attorneys. The inherent difficulty in proving a case of malicious prosecution combined with the mechanisms available within the system of civil procedure to weed out meritless claims is sufficient to ensure that the Attorney General and Crown Attorneys will not be hindered in the proper execution of their important public duties. Finally, attempts to qualify prosecutorial immunity in the United States by the so-called functional approach and its many variations have proven to be unsuccessful.

Per La Forest J.: The common law position as set out by Lamer J. is accepted. The Charter implications need not be considered.

Per McIntyre J.: The state of the law relating to the immunity of the Attorney General is far from clear and a ruling on a point of this importance should not be made on an appeal of a preliminary motion. Before laying down any proposition to the effect that the Attorney General and his agents enjoy absolute immunity from civil suit, there should be a trial to permit a conclusion on the question of prosecutorial immunity and to provide -- in the event that it is decided that the immunity is not absolute -- a factual basis for a determination of whether or not in this case the conduct of the prosecution was such that the appellant is entitled to a remedy.

Furthermore, the Attorney General's immunity from judicial review, which is based on the exercise of a judicial function, does not equate with immunity from civil suit for damages for wrongful conduct in the performance of prosecutorial functions which do not involve the exercise of a judicial function. Indeed, most of the functions and acts performed by Crown Attorneys as agents of the Attorney General would fall into this category and, accordingly, the immunity may not extend [page173] to claims for damages as a result of a prosecution, however instituted, that is carried out with malice. A ruling on a preliminary motion to the effect that Attorneys General and their agents are absolutely immune from all liability for suits for malicious prosecution may be too expansive and even ill-founded.

This case, therefore, should not have been disposed of upon a pre-trial motion under Rule 126 of the Ontario Rules of Practice. Under that rule, it is only in the clearest of cases that an action should be struck out. This is not such a case.

Per L'Heureux-Dubé J. (dissenting in part): Appellant's action is completely dependent upon whether or not Attorneys General and Crown Attorneys are immune from civil suit and, as such, the matter can and should be decided by this Court in the present appeal. While, in general, important questions should not be disposed of in interlocutory fashion, this rule does not apply where the defence offered at the outset is one of law only -- namely, that the right of action is barred independently of the facts alleged. There is every advantage, in terms of saving the time and cost of a trial, to decide a question of law at the outset. This, in fact, is the very reason for the existence of Rule 126 of the Ontario Rules of Practice.

Adopting the reasons of the Ontario Court of Appeal, the Attorneys General and Crown Attorneys enjoy an absolute immunity from civil suit when they are acting within the bounds of their authority. The role of absolute immunity is not to protect the interests of the individual holding the office but rather to advance the greater public good. The Attorneys General and Crown Attorneys are often faced with difficult decisions as to whether to proceed in matters which come before them and their freedom of action is vital to the effective functioning of our criminal justice system.

Cases Cited

By Lamer J.

Considered: Imbler v. Pachtman, 424 U.S. 409 (1976); referred to: Owsley v. The Queen in Right of Ontario (1983), 34 C.P.C. 96; Richman v. McMurtry (1983), 41 O.R. (2d) 559; Levesque v. Picard (1985), 66 N.B.R. (2d) 87; Curry v. Dargie (1984), 28 C.C.L.T. 93; [page174]; German v. Major (1985), 39 Alta. L.R. (2d) 270; Wilkinson v. Ellis, 484 F. Supp. 1072 (1980); Marrero v. City of Hialeah, 625 F.2d 499 (1980), cert. denied, 450 U.S. 913 (1981); Taylor v. Kavanagh, 640 F.2d 450 (1981); Riches v. Director of Public Prosecutions, [1973] 2 All E.R. 935; Hester v. MacDonald, [1961] S.C. 370; Boucher v. The Queen, [1955] S.C.R. 16; Hicks v. Faulkner (1878), 8 Q.B.D. 167; Mitchell v. John Heine and Son Ltd. (1938), 38 S.R. (N.S.W.) 466; Bosada v. Pinos (1984), 44 O.R. (2d) 789; R. v. Groves (1977), 37 C.C.C. (2d) 429.

By McIntyre J.

Referred to: Owsley v. The Queen in right of Ontario (1983), 34 C.P.C. 96; Richman v. McMurtry (1983), 41 O.R. (2d) 559; The Queen v. Comptroller-General of Patents, Designs, and Trade Marks, [1899] 1 Q.B. 909; Curry v. Dargie (1984), 28 C.C.L.T. 93; Roncarelli v. Duplessis, [1959] S.C.R. 121; Mostyn v. Fabrigas (1774), 1 Cowp. 161, 98 E.R. 1021; Henly v. Mayor of Lyme (1828), 5 Bing. 91, 130 E.R. 995; Asoka Kumar David v. Abdul Cader, [1963] 3 All E.R. 579; Imbler v. Pachtman, 424 U.S. 409 (1976); Unterreiner v. Wilson (1982), 40 O.R. (2d) 197 (H.C.), aff'd (1983), 41 O.R. (2d) 472 (C.A.); Bosada v. Pinos (1984), 44 O.R. (2d) 789; German v. Major (1985), 39 Alta. L.R. (2d) 270; Levesque v. Picard (1985), 66 N.B.R. (2d) 87; Gregoire v. Biddle, 177 F.2d 579 (1949); Riches v. Director of Public Prosecutions, [1973] 2 All E.R. 935; Warne v. Province of Nova Scotia (1969), 1 N.S.R. (2d) 27; Re Van Gelder's Patent (1888), 6 R.P.C. 22; Morier v. Rivard, [1985] 2 S.C.R. 716; Barrisove v. McDonald, B.C.C.A., No. 490/74, November 1, 1974.

By L'Heureux-Dubé J. (dissenting in part)

Roncarelli v. Duplessis, [1959] S.C.R. 121; Morier v. Rivard, [1985] 2 S.C.R. 716; Gregoire v. Biddle, 177 F.2d 579 (1949); Imbler v. Pachtman, 424 U.S. 409 (1976); Yaselli v. Goff, 12 F.2d 396 (1926).

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 11, 24(1). Code of Civil Procedure, R.S.Q., c. C-25, art. 94. Criminal Code, R.S.C., 1985, c. C-46, ss. 122, 139(2), (3), 465(1)(b), 504, 579(1) [rep. & subs. c. 27 (1st Supp.), s. 117], 737. Crown Attorneys Act, R.S.O. 1980, c. 107. Ministry of the Attorney General Act, R.S.O. 1980, c. 271. Proceedings Against the Crown Act, R.S.O. 1980, c. 393, ss. 2(2)(d), 5(2) to (6). Rules of Civil Procedure, O. Reg. 560/84, Rules 1.04(1), 20, 21.01. [page175] Rules of Practice and Procedure, R.R.O. 1980, Reg. 540, Rules 124, 126.

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APPEAL from a judgment of the Ontario Court of Appeal (1985), 51 O.R. (2d) 513, 21 D.L.R. (4th) 103, 16 C.R.R. 320, 1 C.P.C. (2d) 113, affirming an order of Fitzpatrick J. granting respondents' application to strike out appellant's statement of claim and dismissing her action. Appeal dismissed as against the Crown and appeal allowed as against the Attorney General, L'Heureux-Dubé J. dissenting in part.
John Sopinka, Q.C., and David Brown, for the appellant. T.C. Marshall, Q.C., and L.A. Hunter, for the respondents.

Solicitors for the appellant: Stikeman, Elliott, Toronto. Solicitor for the respondents: R.F. Chaloner, Toronto.

The judgment of Dickson C.J. and Lamer and Wilson JJ. was delivered by

LAMER J.

1 I have read the reasons for judgment of my colleague McIntyre J. and I agree with his disposition of the appeal but I do so for somewhat different reasons. McIntyre J. in his reasons for judgment concludes that there must be a trial to permit a conclusion on the question of [page176] prosecutorial immunity. I am in respectful disagreement with him in this regard. I am of the opinion that the question of immunity should be addressed by this Court in this case, and that nothing prevents the Court from so doing. I set out the relevant rules of the Ontario Rules of Practice as they were at the time of the case for ease of reference:

> 124. Either party is entitled to raise by his pleadings any point of law, and by consent of the parties or by leave of a judge, the point of law may be set down for hearing at any time before the trial, otherwise it shall be disposed of at the trial.
>
> 126. A judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in the case of the action or defence being shown to be frivolous or vexatious, may order the action to be stayed or dismissed, or judgment to be entered accordingly.

2 As McIntyre J. points out the respondents moved to have the action dismissed under Rule 126 on the ground that the pleadings disclosed no reasonable cause of action and, in the alternative, for leave under Rule 124 to set down a point of law raised in the pleadings and to argue the same on the return of the motion. Both Fitzpatrick J. of the Supreme Court of Ontario and the Court of Appeal for Ontario (1985), 51 O.R. (2d) 513, in allowing the motion to strike out the statement of claim, seemed to have acted under Rule 126.

3 A review of the cases dealing with the application of Rule 124 and Rule 126 reveals the following. The difference between the two rules lies in the summary nature of Rule 126 as opposed to the more detailed consideration of issues under Rule 124. A court should strike a pleading under Rule 126 only in plain and obvious cases where the pleading is bad beyond argument. Rule 124 is designed to provide a means of determining, without deciding the issues of fact raised by the pleadings, a question of law that goes to the root of the action. I would like to point out that what is at issue here is not whether malicious [page177] prosecution is a reasonable cause of action. A suit for malicious prosecution has been recognized at common law for centuries dating back to the reign of Edward I. What is at issue is whether the Crown, Attorney General and Crown Attorneys are absolutely immune from suit for the well-established tort of malicious prosecution. This particular issue has been given careful consideration both by the Court of Appeal and in argument before this Court. The Court of Appeal for Ontario undertook a thorough review of authorities in the course of a lengthy discussion of arguments on both sides of the issue. As such it matters not in my view whether the matter was disposed of under Rule 124 or 126. To send this matter back for trial without

resolving the issue of prosecutorial immunity would not be expeditious and would add both time and cost to an already lengthy case.

4 Furthermore I am of the view that the rules of civil procedure should not act as obstacles to a just and expeditious resolution of a case. Rule 1.04(1) of the Rules of Civil Procedure in Ontario confirms this principle in stating that "[t]hese rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits."

5 In terms of whether the Crown enjoys absolute immunity from a suit for malicious prosecution, McIntyre J. concludes that s. 5(6) of the Proceedings Against the Crown Act, R.S.O. 1980, c. 393, exempts the Crown from any proceedings in respect of anything done or omitted to be done by a person while discharging or purporting to discharge responsibilities of a judicial nature or responsibilities that he has in connection with the execution of judicial process. I am of the opinion that McIntyre J. was correct in holding that the Crown is rendered immune from liability by the express terms of s. 5(6) of the Act, for the action by the Crown Attorney and the Attorney General in deciding to prosecute the appellant. I would like to point out, however, that for the reasons set out below, I am of the view that a functional approach to prosecutorial immunity at common law is inadequate. [page178] In this case the applicable legislation requires the Court to draw a distinction between prosecutorial functions in so far as Crown immunity under s. 5(6) is not available unless the function is "judicial" in nature. Therefore, although I agree with McIntyre J. that in this case the decision to prosecute is a "judicial" function for the purposes of s. 5(6), I hasten to add that in dealing with the policy considerations governing the availability of absolute immunity at common law for the Attorney General and Crown Attorneys the functional approach is not the proper test. In addition it should be noted that the constitutionality of the section was not an issue and was not addressed by counsel in this appeal. As such this issue is not before this Court, and therefore the constitutionality of s. 5(6) of the Act is still an open question.

6 Consequently, the remaining issue at hand is whether the Attorney General and his agents, the Crown Attorneys, are absolutely immune from civil liability in a suit for malicious prosecution. In resolving this question, a brief review of the situation prevailing in a few jurisdictions could be helpful and useful. While McIntyre J. in his reasons provides a detailed review of the authorities, I would like to add some further observations.

I. Different Approaches to Immunity

7 The situation in Canada is unclear and does not seem to be uniform throughout the country.

1. Absolute Immunity -- the Ontario Position

8 The Ontario Court of Appeal in the case at bar found that an absolute immunity exists, and in reaching this conclusion relied extensively on the decision by the Supreme Court of the United States in Imbler v. Pachtman, 424 U.S. 409 (1976). The Court of Appeal found the idea of an absolute immunity "troubling" but determined that it was justified by the following policy concerns. First, the rule encourages public trust in the fairness and impartiality of those who act and exercise discretion in the bringing and conducting [page179] of criminal prosecution; the rule is designed for the benefit of the public not the benefit of the individual prosecutor. Second, the threat of personal liability for tortious conduct would have a chilling effect on the prosecutor's exercise of discretion and third, to permit civil suits against prosecutors would invite a flood of litigation which would deflect a prosecutor's energies from the discharge of his public duties. In short, the absence of an absolute immunity would open the door to unmeritorious claims and would be a threat to prosecutorial independence. The Court also relied on two decisions of the Ontario High Court, Owsley v. The Queen in right of Ontario (1983), 34 C.P.C. 96 and Richman v. McMurtry (1983), 41 O.R. (2d) 559. Both these decisions rely extensively on the American position as found in Imbler, supra. The case law in Ontario therefore, uniformly stands for the proposition that the Attorney General and Crown Attorneys enjoy absolute immunity from civil liability for malicious prosecution. Outside of Ontario, the issue is somewhat more ambiguous.

2. Elsewhere in Canada -- Absolute Immunity Questioned

9 In Levesque v. Picard (1985), 66 N.B.R. (2d) 87, the New Brunswick Court of Appeal held on the authority of the

Ontario cases, especially the case at bar, that an absolute immunity shielded a provincial Crown prosecutor from suit for malicious prosecution. By contrast the appellate courts of Nova Scotia and Alberta have cast some doubts on the existence of an absolute immunity. First, in Curry v. Dargie (1984), 28 C.C.L.T. 93 (N.S.C.A.), the Crown was sued as being vicariously liable for the action of a residential tenancy officer. Hart J.A. held that while the Proceedings Against the Crown Act, R.S.N.S. 1967, c. 239, might absolve the provincial Crown from civil liability, a Crown servant could still be personally liable for misconduct. In the course of his decision [page180] Hart J.A. considered the Ontario decisions especially that of Galligan J. in Richman, supra (at p. 110):

> I am not prepared to go as far as Galligan J. in holding that an officer of the Crown cannot be liable for a proceeding commenced maliciously, but it is not necessary to consider that issue at the moment. I do not believe that in the case at bar it can be said that the respondent in laying the information against the appellant was in fact carrying out a judicial function similar to those carried out by Attorneys General and prosecutors.

10 In German v. Major (1985), 39 Alta. L.R. (2d) 270, a Crown prosecutor was sued for alleged misconduct in the preferment of a charge of tax evasion, a charge on which the accused was acquitted. Kerans J.A. speaking for the Alberta Court of Appeal assumes throughout that a suit for malicious prosecution is possible and disposes of the case on the ground that there had been "reasonable and probable cause" to initiate the prosecution. The case was dismissed pursuant to Rule 129 of the Alberta Rules of Civil Procedure, a rule similar to the old Ontario Rule 126. In this context Kerans J.A. said the following (at p. 276):

> The rule upon which I rely has much to commend it. It falls short of the absolute immunity suggested by Major and accepted by the Supreme Court of the United States in Imbler v. Pachtman ... but offers some protection from the harassment which he says would otherwise afflict prosecuting counsel because suit would not be permitted to proceed if utterly without merit. It would indeed be a curious thing if we chose a stern immunity rule in preference to an effective striking-out rule.

11 Further support for the view that Kerans J.A. is not inclined to accept the existence of an absolute immunity for prosecutors can be found in the following statements (at pp. 277 and 286):

> I will assume, for the sake of argument, that, if counsel, with malice, continues a prosecution he once thought sound but now knows is unsound, he may be sued.
>
> ...
>
> [page181]
>
> Counsel for the Attorney General who acts as his agent in the prosecution of a criminal case is not accountable in civil proceedings to the accused except possibly to the extent that it is alleged against him that he has not acted in good faith, and to that extent the allegation falls within the nominative tort of malicious prosecution ... [Emphasis added.]

12 Therefore the Canadian position ranges from a strong assertion of absolute immunity in Ontario to an acceptance of the possibility of suing the Attorney General and Crown Attorneys if bad faith or malice can be proven as evidenced by the cases from Nova Scotia and Alberta. The situation in Quebec differs in that since 1966 the Code of Civil Procedure, R.S.Q., c. C-25, specifically provides for claims against the Crown in the following terms:

> 94. Any person having a claim to exercise against the Crown, whether it be a revendication of moveable or immoveable property, or a claim for the payment of moneys on an alleged contract, or for damages, or otherwise, may exercise it in the same manner as if it were a claim against a person of full age and capacity, subject only to the provisions of this chapter.

13 No provisions in this chapter prevent a suit for malicious prosecution against the Crown. However, the substantive issue of immunity of Crown prosecutors has not been finally determined.

3. Immunity in the United States

14 A consideration of the position in respect of prosecutorial immunity in the United States is vital both because it is relied extensively upon by the Court of Appeal in the case at bar, and because it has been the source of a healthy debate in courts and among academics in that country. This position is furthermore interesting since a variety of approaches have been proposed and many critical comments have been made.

i) The Functional Approach -- Imbler v. Pachtman: "The Powell Judgment"

15 In 1972 Paul Imbler filed a claim under 42 U.S.C. s. 1983 alleging that the prosecutor and various members of the police force conspired to [page182] cause him loss of liberty by allowing a witness to give false testimony, suppressing evidence, prosecuting with knowledge of an exculpatory lie-detector test and introducing an altered police artist's sketch. Section 1983 of the Civil Rights Act creates a federal damage action against anyone who acts under colour of state law to deprive a person of his civil rights as protected by the U.S. Constitution. Powell J., speaking for five members of the Supreme Court, held that a prosecutor is absolutely immune from s. 1983 actions when the actions arise out of the prosecutor's initiation of prosecution and presentation of the State's case. In addition, the Court seemed to suggest that absolute immunity also attached to activities that "were intimately associated with the judicial phase of the criminal process" (p. 430). The Court then adopted what has become known as the "functional approach" of prosecutorial immunity.

16 The Imbler decision recognizes that prosecutors perform many functions in the course of fulfilling their duties, among them being the decision to initiate a prosecution, which witnesses to call, what other evidence to present, and obtaining, reviewing and evaluating evidence. The Court accepts that drawing a line between these functions is a difficult task but concludes that prosecutorial functions of a quasi-judicial or advocatory nature should be afforded absolute immunity. The Court refused to comment on whether a similar immunity attaches to what it called the "administrative" or "investigative" role of the prosecutor. In the course of justifying its position, the Court noted that the same policy considerations that afford absolute immunity to judges acting within the scope of their duties support a prosecutor's common law absolute immunity. The Court simply extended that line of reasoning to s. 1983 claims.

[page183]

17 The policy considerations canvassed by the Court are familiar ones and can be summarized as follows:

1. Public Confidence

"The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages."

2. Diversion from Duties

" ... if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law."

3. Balancing of Evils

" ... we find ourselves in agreement with Judge Learned Hand, who wrote of the prosecutor's immunity from actions for malicious prosecution:

> "... it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." Gregoire v. Biddle, 177 F. (2d) 579, 581 (CA2 1949) cert. denied, 339 U.S. 949 (1950)."

4. Other Available Remedies

"Even judges ... could be punished criminally for willful deprivations of constitutional rights ... The prosecutor would fare no better for his willful acts ... Moreover, a prosecutor stands perhaps unique, among

> officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers."
>
> (Imbler, supra, at pp. 424-29)

18 Therefore, Powell J. affirmed the judgment of the Court of Appeal for the Ninth Circuit and held that a prosecutor is absolutely immune from suit in initiating a prosecution and in presenting the State's case.

[page184]

ii) The Functional Approach -- Imbler v. Pachtman: "The White Judgment"

19 While concurring with the judgment of Powell J. and much of his reasoning, White J. (Brennan and Marshall JJ. joining) would carve out an exception to the rule of absolute immunity for the unconstitutional suppression of evidence. In doing so White J. examined the rationale for granting absolute immunity to prosecutors at common law (at p. 442):

> The absolute immunity ... is designed to encourage [the prosecutors] to bring information to the court which will resolve the criminal case .... Lest they withhold valuable but questionable evidence or refrain from making valuable but questionable arguments, prosecutors are protected from liability for submitting before the court information later determined to have been false to their knowledge.

20 According to White J. immunity from suit based on the unconstitutional suppression of evidence would "stand this immunity rule on its head" (p. 442) by discouraging precisely the disclosure of evidence sought to be encouraged by the rule (at p. 443):

> A prosecutor seeking to protect himself from liability for failure to disclose evidence may be induced to disclose more than is required. But this will hardly injure the judicial process. Indeed, it will help it. Accordingly, lower courts have held that unconstitutional suppression of exculpatory evidence is beyond the scope of "duties constituting an integral part of the judicial process" and have refused to extend absolute immunity to suits based on such claims. Hilliard v. Williams, 465 F. 2d 1212, 1218 (CA6), cert. denied, 409 U.S. 1029 (1972) ....

21 White J.'s position then would limit the scope of absolute immunity but would not eliminate the theoretical underpinning of the Powell majority judgment, namely the functional approach to absolute immunity.

22 The functional approach has been criticized on a number of grounds. First, there is the ever present problem of line-drawing between functions that are quasi-judicial and those that are administrative [page185] or investigative. Drawing the line is made more difficult by multi-faceted functions, functions that simultaneously serve quasi-judicial, administrative and investigative functions. (See Anthony Luppino, "Supplementing the Functional Test of Prosecutorial Immunity" (1982), 34 Stan. L. Rev. 487, at pp. 493-94.) Aside from the problem of distinguishing between [page187] prosecutorial functions, there is the conceptual difficulty in justifying differential treatment of malicious acts based on the criterion of function. If a prosecutor acts maliciously in the course of the prosecution of an accused, does it really matter whether the function being carried out is characterized as "quasi-judicial" or "administrative"?

23 An example of the difficulty with the functional approach is the disagreement in the lower courts in the United States over whether quasi-judicial absolute immunity extends to investigative functions of a prosecutor. In addition, and in light of the White concurring judgment in Imbler, there is disagreement over whether leaks of information and destruction or alteration of evidence are acts that are protected by absolute immunity: see cases cited by J. C. Filosa, "Prosecutorial Immunity: No Place for Absolutes," [1983] U. Ill. L. Rev. 977, at pp. 985-86. In my view, these disagreements demonstrate the futility of attempting to differentiate between functions of a prosecutor in a principled way. The result is often arbitrary line-drawing which leads to seemingly unresolvable conflict and the diversion of attention from the central issue, namely whether or not a prosecutor has acted maliciously.

24 Second, it has been argued that the policy rationales supporting absolute immunity for prosecutors, derived as

they are from judicial immunity, rely on an inaccurate reading of history. Filosa in his article challenges the derivation of the prosecutor's quasi-judicial immunity from s. 1983 [page186] claims from the absolute immunity of judges at common law (at pp. 980-81):

> In the sixteenth century, English judges were typically liable for their torts. Throughout the nineteenth century, judges remained liable for malicious conduct done without reasonable and probable cause. In America before Bradley v. Fisher [80 U.S. (13 Wall.) 335 (1872)], courts held many judicial officers liable for their wrongful acts .... Of the thirty-seven states in existence in 1871, thirteen had judicial immunity, six states held judges liable for malicious actions, nine had not taken a clear position, and nine had not faced the question.

25 Filosa goes on to argue that Congress could not have meant to incorporate a doctrine of absolute immunity into s. 1983 because Bradley, which firmly entrenched judicial immunity in the common law, was not decided until 1872, one year after the Civil Rights Act of 1871 that contained s. 1983.

4. Alternatives to Imbler

i) The Functional Approach Reapproached

26 The difficulties in applying the functional test have led American courts and academic commentators to suggest alternatives or reassessments of the test. One such attempt has been described by its proponent as the "functional approach reapproached". (See Note, "Delimiting the Scope of Prosecutorial Immunity from Section 1983 Damage Suits" (1977), 52 N.Y.U. L. Rev. 173, at pp. 190-91.) This approach seeks to avoid a judicial hearing to determine whether a prosecutor's action is quasi-judicial. As such the test states that "the only duties clearly not entitled to quasi-judicial immunity are those so divorced from the judicial process that they could readily be assigned to another official who could be completely independent of the prosecutor" (see Note, loc. cit., at p. 191). This approach seeks to grant to the prosecutor absolute immunity in a wider sphere of activities in the hopes of clarifying the distinction between quasi-judicial and investigative activities. In my view, this modification still has the drawback of requiring a line to be drawn between [page187] prosecutorial functions, a difficult task in itself. The modification, in seeking to make that task easier, errs on the side of including more activities within the realm of absolute prosecutorial immunity, a modification that, with respect, offers an immunity considerably wider than that given to judges from which prosecutorial immunity is allegedly derived.

ii) General Features Test: Wilkinson v. Ellis

27 In Wilkinson v. Ellis, 484 F. Supp. 1072 (E.D. Pa. 1980), the plaintiff alleged that a prosecutor destroyed a tape recorded interview with a man who admitted involvement in the alleged criminal activity, thereby exonerating the plaintiff. The prosecutor moved to dismiss the action, arguing that the destruction of evidence is a quasi-judicial act shielded by absolute immunity. The Wilkinson court refused to characterize the destruction as either investigative or quasi-judicial. Rather, it resolved the difficulty of classifying activities by asking whether the activity contained features "which generally characterize quasi-judicial activity" (p. 1083). In deciding that the destruction did not have the "general features" of quasi-judicial activity, the court identified three factors to be taken into account: (1) the activity's physical and temporal proximity to the judicial process; (2) the degree of dependence upon legal opinions and prosecutorial discretion involved in the conduct; and (3) whether the activity is primarily advocatory (p. 1080). This approach in my view, does little to get away from the inherent problems involved in categorizing prosecutorial actions.

iii) The Imbler "Umbrella"

28 This variation of the functional approach involves limiting the scope of the prosecutor's quasi-judicial function to conduct that falls within the [page188] narrowest confines of the Imbler test: in other words within the "umbrella" of coverage defined by the language of Imbler. Acts that are under the "umbrella" attract absolute immunity; all others receive at most qualified immunity. (See Marrero v. City of Hialeah, 625 F.2d 499 (5th Cir. 1980), cert. denied, 450 U.S. 913 (1981).) This approach merely re-states the categorization problem found in Imbler. The test requires a determination of what constitutes the coverage of the so-called "Imbler umbrella" and thereby takes us back to the original problem of line-drawing.

iv) The Harm Test

29 This variation of Imbler construes that decision broadly by granting absolute immunity to prosecutorial conduct that causes a defendant to "face prosecution, or to suffer imprisonment or pretrial detention". (See Taylor v. Kavanagh, 640 F.2d 450 (2d Cir. 1981), at p. 453.) The test denies absolute immunity to prosecutorial conduct that inflicts harm independent of the prosecution itself. This approach looks to the effects of prosecutorial conduct and as such purports to reduce the issue to a factual determination of harms. If the harm is unrelated to the judicial phase of the criminal justice process then the prosecutorial act causing the harm is not quasi-judicial.

v) The Supplemental Functional Approach

30 This approach involves a two-step process: first, determining what conduct normally merits absolute or qualified immunity and second, in the remaining cases, identifying the substantive values affected by conduct that is not susceptible to traditional categorization. (See Luppino, loc. cit., at p. 505.) This variation recognizes that there will be occasions when conduct does not clearly fall into one of the two traditional categories: quasi-judicial and non-quasi-judicial. When conduct does not fall into either category explicit balancing of competing interests becomes necessary. In this respect, [page189] courts should weigh the cost to the judicial system resulting from the unredressed civil wrong against the cost to the efficiency of the criminal justice system. This approach recognizes that the Imbler functional approach cannot account for all prosecutorial functions; there will be some conduct that is multi-faceted and uncategorizable. As a result the approach resorts to a consideration of first principles, namely a balancing of the policy considerations both in favour and opposed to prosecutorial immunity in the first place. In short, we have come full circle.

31 The American position, in any of its forms, demonstrates the impracticality of the functional approach to prosecutorial immunity. In my view, the functional approach leads to arbitrary line drawing between prosecutorial functions. This line drawing exercise is made nearly impossible by the reality that many prosecutorial functions are multi-faceted and cannot be neatly categorized. Further, it must be noted that however one categorizes a prosecutor's function it is still that of the prosecutor. If it can be demonstrated that a prosecutor has acted without reasonable cause and has acted with malice then does it really matter which functions he was carrying out? In my view to decide the scope of immunity on the basis of categorization of functions is an unprincipled approach that obscures the central issue, namely whether the prosecutor has acted maliciously. If immunity is to be qualified it should be done in a manner other than by the drawing of lines between quasi-judicial and other prosecutorial functions.

5. The English Position

32 The position in respect of prosecutorial immunity in England is somewhat unique in that jurisdiction owing in part to the tradition of private prosecution. Private prosecutors have always been liable to suit for malicious prosecution though few, if any, reported cases exist. The Director of Public Prosecutions, who performs the same or similar [page190] function as a Canadian provincial Attorney General, was not created until 1879. In Riches v. Director of Public Prosecutions, [1973] 2 All E.R. 935 (C.A.), the Court said the following in respect of suits against the D.P.P. (at p. 941):

> I do not wish to be taken as saying that there may never be a case where a prosecution has been initiated and pursued by the Director of Public Prosecutions in which it would be impossible for an acquitted defendant to succeed in an action for malicious prosecution, or as saying, that the existence of the Attorney General's fiat where required conclusively negates the existence of malice and conclusively proves that there was reasonable and probable cause for the prosecution. There may be cases where there has been, by even a responsible authority, the suppression of evidence which has led to a false view being taken by those who carried on a prosecution and by those who ultimately convicted.

33 The English position then, at the very least, leaves the door open for suits against the equivalent of our Attorneys General and Crown Attorneys when what is at issue is the suppression of evidence. It is apposite to note that this position is reflective of White J.'s concurring opinion in Imbler, supra, wherein he carved out an exception to the rule of absolute immunity for the unconstitutional suppression of evidence.

6. Scotland

34 It would appear that in Scotland the equivalent of our Attorney General and Crown Attorneys are absolutely immune from civil liability. In Hester v. MacDonald, [1961] S.C. 370, the court said at p. 377:

> It is, therefore, an essential element in the very structure of our criminal administration in Scotland that the Lord Advocate is protected by an absolute privilege in respect of matters in connexion with proceedings brought before a Scottish Criminal Court by way of indictment .... Never in our history has a Lord Advocate been sued for damages in connexion with such proceedings. On the contrary, our Courts have consistently affirmed the existence of such immunity on his part.

[page191]

35 The rationale underlying this comment has been disputed by Professor Edwards in The Attorney General, Politics and the Public Interest (1984) in which he argues that the Scottish rationale is based upon the idea that the Lord Advocate and his agents enjoy a constitutional trust which assumes good faith in commencing a prosecution, a rationale far removed from that invoked by the Ontario courts.

7. Australia and New Zealand

36 The position in respect of prosecutorial immunity in Australia and New Zealand is not clear. As far as I can determine, there does not seem to be any reported case on the issue.

37 Although the situation prevailing in European civil law jurisdictions is interesting, its application to the case at bar is of limited usefulness because of the wide differences between the civil law system and our common law tradition.

II. The Preferred Canadian Position

1. The Role of the Attorney General and Crown Attorney

38 Historically the Attorney General's role was that of legal adviser to the Crown and to the various departments of government. More specifically the principal function was and still is the prosecution of offenders. The appointment of Crown Attorneys as agents of the Attorney General, arose from the increasing difficulty of the Attorney General to attend effectively to all of his duties amid increases in population, and the expansion of settlement.

39 The office of the Crown Attorney has as its main function the prosecution of and supervision over indictable and summary conviction offences. The Crown Attorney is to administer justice at a local level and in so doing acts as agent for the Attorney General. Traditionally the Crown Attorney has been described as a "minister of justice" and "ought to regard himself as part of the Court rather than as an advocate". (Morris Manning, "Abuse of Power by Crown Attorneys," [1979] L.S.U.C. Lectures 571, at p. 580, quoting Henry Bull, Q.C.) As regards the proper role of the [page192] Crown Attorney, perhaps no more often quoted statement is that of Rand J. in Boucher v. The Queen, [1955] S.C.R. 16, at p. 23-24:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

40 Among the many powers of a prosecutor are the following: the power to detain in custody, the power to prosecute, the power to negotiate a plea, the power to charge multiple offences, the power of disclosure/non-disclosure of evidence before trial, the power to prefer an indictment, the power to proceed summarily or by indictment, the power to withdraw charges, and the power to appeal. (For a fuller description of the genesis and

operation of these powers see Manning, op. cit., at pp. 586-608, and P. Béliveau, J. Bellemare and J.-P. Lussier, On Criminal Procedure (1982), at pp. 69-83.)

41 With this background in mind, it is now necessary to turn to a consideration of the tort at issue, malicious prosecution, and the policy rationales in favour of an absolute immunity for the Attorney General and Crown Attorneys in respect of that tort.

2. The Tort of Malicious Prosecution

42 There are four necessary elements which must be proved for a plaintiff to succeed in an action for malicious prosecution: [page193] a) the proceedings must have been initiated by the defendant;

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

c) the absence of reasonable and probable cause;

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

(See J. G. Fleming, The Law of Torts (5th ed. 1977), at p. 598.)

43 The first two elements are straightforward and largely speak for themselves. The latter two elements require explicit discussion. Reasonable and probable cause has been defined as "an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed" (Hicks v. Faulkner (1878), 8 Q.B.D. 167, at p. 171, Hawkins J.)

44 This test contains both a subjective and objective element. There must be both actual belief on the part of the prosecutor and that belief must be reasonable in the circumstances. The existence of reasonable and probable cause is a matter for the judge to decide as opposed to the jury.

45 The required element of malice is for all intents, the equivalent of "improper purpose". It has according to Fleming, a "wider meaning than spite, ill-will or a spirit of vengeance, and includes any other improper purpose, such as to gain a private collateral advantage" (Fleming, op. cit., at p. 609). To succeed in an action for malicious prosecution against the Attorney General or Crown Attorney, the plaintiff would have to prove both the absence of reasonable and probable cause in commencing the prosecution, and malice in the form of a deliberate and improper use of the office of the Attorney General or Crown Attorney, a use inconsistent with the status of "minister of justice". [page194] In my view this burden on the plaintiff amounts to a requirement that the Attorney General or Crown Attorney perpetrated a fraud on the process of criminal justice and in doing so has perverted or abused his office and the process of criminal justice. In fact, in some cases this would seem to amount to criminal conduct. (See for example breach of trust, s. 122, conspiracy re: false prosecution s. 465(1)(b), obstructing justice s. 139(2) and (3) of the Criminal Code, R.S.C., 1985, c. C-46.)

46 Further, it should be noted that in many, if not all cases of malicious prosecution by an Attorney General or Crown Attorney, there will have been an infringement of an accused's rights as guaranteed by ss. 7 and 11 of the Canadian Charter of Rights and Freedoms.

47 By way of summary then, a plaintiff bringing a claim for malicious prosecution has no easy task. Not only does the plaintiff have the notoriously difficult task of establishing a negative, that is the absence of reasonable and probable cause, but he is held to a very high standard of proof to avoid a non-suit or directed verdict (see Fleming, op. cit., at p. 606, and Mitchell v. John Heine and Son Ltd. (1938), 38 S.R. (N.S.W.) 466, at pp. 469-71). Professor Fleming has gone so far as to conclude that there are built-in devices particular to the tort of malicious prosecution to dissuade civil suits (at p. 606):

> The disfavour with which the law has traditionally viewed the action for malicious prosecution is most clearly revealed by the hedging devices with which it has been surrounded in order to deter this kind of litigation

and protect private citizens who discharge their public duty of prosecuting those reasonably suspected of crime.

3. Policy Considerations

48 In light of what I have said regarding the role of the prosecutor in Canada, and the tort of malicious [page195] prosecution, it now is necessary to assess the policy rationales. I would begin by noting that even those decisions that have come out firmly in favour of absolute immunity have described the rule as "troubling", a "startling proposition", "strained and difficult to sustain" (see Nelles v. The Queen in right of Ontario (1985), 51 O.R. (2d) 513 (Ont. C.A.), at p. 531, and Bosada v. Pinos (1984), 44 O.R. (2d) 789 (H.C.), at p. 794).

49 It is said by those in favour of absolute immunity that the rule encourages public trust and confidence in the impartiality of prosecutors. However, it seems to me that public confidence in the office of a public prosecutor suffers greatly when the person who is in a position of knowledge in respect of the constitutional and legal impact of his conduct is shielded from civil liability when he abuses the process through a malicious prosecution. The existence of an absolute immunity strikes at the very principle of equality under the law and is especially alarming when the wrong has been committed by a person who should be held to the highest standards of conduct in exercising a public trust. (See Filosa, op. cit., at p. 982, and Marilyn L. Pilkington, "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms" (1984), 62 Can. Bar. Rev. 517, at pp. 560-61.)

50 Regard must also be had for the victim of the malicious prosecution. The fundamental flaw with an absolute immunity for prosecutors is that the wrongdoer cannot be held accountable by the victim through the legal process. As I have stated earlier, the plaintiff in a malicious prosecution suit bears a formidable burden of proof and in those cases where a case can be made out, the plaintiff's Charter rights may have been infringed as well. Granting an absolute immunity to prosecutors is akin to granting a license to subvert individual rights. Not only does absolute immunity negate a private right of action, but in addition, it seems to me, it may be that it would effectively bar the seeking of a remedy pursuant to s. 24(1) of the Charter. It seems clear that in using his office to maliciously prosecute an accused, the prosecutor would be depriving an individual of the right to [page196] liberty and security of the person in a manner that does not accord with the principles of fundamental justice. Such an individual would normally have the right under s. 24(1) of the Charter to apply to a court of competent jurisdiction to obtain a remedy that the court considers appropriate and just if he can establish that one of his Charter rights has been infringed. The question arises then, whether s. 24(1) of the Charter confers a right to an individual to seek a remedy from a competent court. In my view it does. When a person can demonstrate that one of his Charter rights has been infringed, access to a court of competent jurisdiction to seek a remedy is essential for the vindication of a constitutional wrong. To create a right without a remedy is antithetical to one of the purposes of the Charter which surely is to allow courts to fashion remedies when constitutional infringements occur. Whether or not a common law or statutory rule can constitutionally have the effect of excluding the courts from granting the just and appropriate remedy, their most meaningful function under the Charter, does not have to be decided in this appeal. It is, in any case, clear that such a result is undesirable and provides a compelling underlying reason for finding that the common law itself does not mandate absolute immunity.

51 It is also said in favour of absolute immunity that anything less would act as a "chilling effect" on the Crown Attorney's exercise of discretion. It should be noted that what is at issue here is not the exercise of a prosecutor's discretion within the proper sphere of prosecutorial activity as defined by his role as a "minister of justice". Rather, in cases of malicious prosecution we are dealing with allegations of misuse and abuse of the criminal process and of the office of the Crown Attorney. We are not dealing with merely second-guessing a Crown Attorney's judgment in the prosecution of a case but rather with the deliberate and malicious [page197] use of the office for ends that are improper and inconsistent with the traditional prosecutorial function.

52 Therefore it seems to me that the "chilling effect" argument is largely speculative and assumes that many suits for malicious prosecution will arise from disgruntled persons who have been prosecuted but not convicted of an offence. I am of the view that this "flood-gates" argument ignores the fact that one element of the tort of malicious prosecution requires a demonstration of improper motive or purpose; errors in the exercise of discretion and

judgment are not actionable. Furthermore, there exist built-in deterrents on bringing a claim for malicious prosecution. As I have noted, the burden on the plaintiff is onerous and strict. The fact that the absence of reasonable cause is a matter of law to be decided by a judge means that an action for malicious prosecution can be struck before trial as a matter of substantive inadequacy (see Rule 21.01 of the Ontario Rules of Civil Procedure for example). In fact this was the approach adopted by Kerans J.A. in German v. Major, supra. I agree with Kerans J.A. that "[i]t would indeed be a curious thing if we chose a stern immunity rule in preference to an effective striking-out rule" (p. 276). In addition most jurisdictions, including Ontario, have provisions that allow a defendant to move for summary judgment before a full-fledged trial takes place (see for example Rule 20 in Ontario). Finally, the potential that costs will be awarded to the defendant if an unmeritorious claim is brought acts as financial deterrent to meritless claims. Therefore, ample mechanisms exist within the system to ensure that frivolous claims are not brought. In fact, the difficulty in proving a claim for malicious prosecution itself acts as a deterrent. This high threshold of liability is evidenced by the small number of malicious prosecution suits brought against police officers each year. In addition, since 1966, the province of Quebec permits suits against the Attorney General and Crown prosecutors without any evidence [page198] of a flood of claims. Therefore, I find unpersuasive the claim that absolute immunity is necessary to prevent a flood of litigation.

53 As for alternative remedies available to persons who have been maliciously prosecuted, none seem to adequately redress the wrong done to the plaintiff. The use of the criminal process against a prosecutor who in the course of a malicious prosecution has committed an offence under the Criminal Code, addresses itself mainly to the vindication of a public wrong not the affirmation of a private right of action. Of special interest in this regard is s. 737 of the Criminal Code which deals with the making of a probation order. Section 737(2) stipulates that certain conditions may be prescribed in a probation order, one of them being that the convicted person "make restitution or reparation to any person aggrieved or injured by the commission of the offence for the actual loss or damage sustained by that person as a result thereof" (s. 737(2)(e)). This section would seem to be an indirect method of at least partially remedying a wrong done to an individual as a result of a malicious prosecution. However the section is only operative when an accused has been convicted of an offence and when a probation order is made. In addition, the Court's power to award compensation to a victim is limited to damages that are relatively concrete and ascertainable. (See R. v. Groves (1977), 37 C.C.C. (2d) 429 (Ont. H.C.)) As such it would seem a rather inadequate substitute for a private right of action. I do however pause to note that many cases of genuine malicious prosecution will also be offences under the Criminal Code, and it seems rather odd if not incongruous for reparation to be possible through a probation order but not through a private right of action.

54 Further, the use of professional disciplinary proceedings, while serving to some extent as punishment and deterrence, do not address the central issue of making the victim whole again. And as has already been noted, it is quite discomforting to realize that the existence of absolute immunity may bar a person whose Charter rights have been [page199] infringed from applying to a competent court for a just and appropriate remedy in the form of damages.

III. Conclusion

55 A review of the authorities on the issue of prosecutorial immunity reveals that the matter ultimately boils down to a question of policy. For the reasons I have stated above I am of the view that absolute immunity for the Attorney General and his agents, the Crown Attorneys, is not justified in the interests of public policy. We must be mindful that an absolute immunity has the effect of negating a private right of action and in some cases may bar a remedy under the Charter. As such, the existence of absolute immunity is a threat to the individual rights of citizens who have been wrongly and maliciously prosecuted. Further, it is important to note that what we are dealing with here is an immunity from suit for malicious prosecution; we are not dealing with errors in judgment or discretion or even professional negligence. By contrast the tort of malicious prosecution requires proof of an improper purpose or motive, a motive that involves an abuse or perversion of the system of criminal justice for ends it was not designed to serve and as such incorporates an abuse of the office of the Attorney General and his agents the Crown Attorneys.

56 There is no doubt that the policy considerations in favour of absolute immunity have some merit. But in my view

those considerations must give way to the right of a private citizen to seek a remedy when the prosecutor acts maliciously in fraud of his duties with the result that he causes damage to the victim. In my view the inherent difficulty in proving a case of malicious prosecution combined with the mechanisms available within the system of civil procedure to weed out meritless claims is sufficient to ensure that the Attorney General and Crown Attorneys will not be hindered in the proper execution of their important public duties. Attempts to qualify prosecutorial immunity in the United States by the so-called functional approach and its many variations have proven to be unsuccessful and unprincipled as I have previously [page200] noted. As a result I conclude that the Attorney General and Crown Attorneys do not enjoy an absolute immunity in respect of suits for malicious prosecution. I would therefore dismiss the appeal as against the Crown, there being no order as to costs. I would allow the appeal as against the Attorney General with costs and direct that the matter be returned to the Supreme Court of Ontario for trial of the claim against the Attorney General.

The following are the reasons delivered by

McINTYRE J.

57 This appeal concerns the question of the liability of the Crown and the Attorney General of the province in a suit for malicious prosecution arising out of the institution of criminal proceedings, charges of murder, brought against the appellant.

58 In March, 1981, the appellant, then a nurse at the Toronto Hospital for Sick Children, was charged with the murder of four infant patients. At the conclusion of her preliminary hearing, the Provincial Court Judge who conducted the proceedings discharged the appellant upon a finding of an absence of evidence: (1982), 16 C.C.C. (3d) 97. The appellant later commenced an action against the Crown in right of Ontario, the Attorney General for Ontario, and several police officers, alleging that the Attorney General and his agents, the Crown Attorneys, counselled, aided and abetted the police in charging and prosecuting the plaintiff, and that in so doing the Attorney General, the Crown Attorneys, and police were acting as agents for the Crown in right of Ontario. It was also alleged that in the prosecution the Attorney General and the Crown Attorneys were actuated by malice while acting as agents for the Crown. Proceedings were later discontinued against the police officers and the Crown Attorneys were not named as defendants. The Crown and the Attorney General remained the only defendants and are the respondents in this Court.

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59 Before trial, the respondents moved to have the action dismissed under Rule 126 of the Ontario Rules of Practice, on the ground that the pleadings disclosed no reasonable cause of action and, in the alternative, for leave under Rule 124 to set down a point of law raised in the pleadings and to argue the same on the return of the motion. Rule 124 and Rule 126 are set out hereunder:

> 124. Either party is entitled to raise by his pleadings any point of law, and by consent of the parties or by leave of a judge, the point of law may be set down for hearing at any time before the trial, otherwise it shall be disposed of at the trial.
>
> 126. A judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shown to be frivolous or vexatious, may order the action to be stayed or dismissed, or judgment to be entered accordingly.

The question of law for which leave was sought was in these terms:

> A defendant in a preliminary inquiry held under the provisions of the Criminal Code of Canada and discharged thereof has no cause of action based in malicious prosecution or negligence against the Crown Attorneys conducting such proceedings or as against those in law responsible for their conduct.

60 Fitzpatrick J., of the Supreme Court of Ontario, allowed the motion and struck out the statement of claim. In doing so, he seems to have acted under Rule 126. He concluded on the basis of two decisions of the Supreme Court of Ontario (Owsley v. The Queen in right of Ontario (1983), 34 C.P.C. 96 (Ont. H.C.), and Richman v. McMurtry (1983), 41 O.R. (2d) 559 (Ont. H.C.)), that the Attorney General for Ontario has an absolute immunity

from civil action while performing his duties as a public prosecutor, even if he acted maliciously. He concluded that the immunity had not been removed by the Canadian Charter of Rights and Freedoms and allowed the motion and struck out the statement of claim.

[page202]

61 An appeal was dismissed in the Ontario Court of Appeal: (1985), 51 O.R. (2d) 513. At the outset, Thorson J.A., speaking for the Court (Houlden, Thorson and Robins JJ.A.) said, at pp. 514-15:

> This Court reserved its judgment on the appeal following lengthy argument on whether, as a matter of law, any action can be asserted against the Crown or the Attorney-General, or both, in the circumstances which are found to be present in this case. My conclusion is that as a matter of law it cannot, and that the plaintiff's appeal must therefore be dismissed. The reasons for this conclusion follow.

From the foregoing, it may be somewhat doubtful whether the Court of Appeal acted under Rule 124 or 126. The record, however, does not disclose any consent by the parties or any grant of leave for the hearing of the point of law under Rule 124. Furthermore, in answer to arguments raised in the Court of Appeal in this form, at p. 518:

> At the outset of his submissions counsel for the appellant, Mr. Sopinka, contended that on an application to a judge under Rule 126 of the Rules of Practice, the judge hearing the application ought not to strike out a plaintiff's statement of claim unless he was persuaded that the claim could have no hope of succeeding, even if the facts alleged in the statement of claim were proved. In considering such an application, the facts must be taken to be as they are alleged in the statement of claim. Moreover, where the statement of claim raises a "substantial issue of law" it ought not to be struck out under Rule 126, and where an allegation is made that an executive of ministerial act has been performed in bad faith or for an improper purpose, that issue should not be dealt with on a summary application under Rule 126 but should be left to be determined by the judge at trial. Similarly, where an issue arises as to whether any conduct is unconstitutional, it is important to have the kind of factual underpinning which is needed to determine that issue and which can only be brought out at a trial in the ordinary course.

Thorson J.A. said, at pp. 518-19:

> With respect I cannot agree that Fitzpatrick J. erred in dealing with this application as one properly brought under Rule 126, albeit that the power conferred on a judge under that rule is one that ought to be used "sparingly", as noted by Dupont J. in Owsley v. The Queen in right of Ontario (1983), 34 C.P.C. 96 at p. [page203] 102. Nor can I agree with the assertion that merely because the statement of claim raises a "substantial issue of law" it ought not to be dealt with on an application under that rule. If the latter assertion were correct, it seems to me that the purpose of the rule would be largely defeated. That purpose, surely, is to make it possible for a person who has been named in an action to avoid having to go to the considerable trouble and expense of defending himself in court against a claim made in that action which has no reasonable expectation of succeeding against him, even if all the facts alleged are proved. If, in this case, the learned motions court judge had concluded that the Attorney-General, and thus by extension the Crown, did not enjoy an absolute immunity in law, it might well have been improper to decide the issue before him on an application under Rule 126 since in that event, and for the reasons explained by Linden J. in King v. Liquor Control Board of Ontario (1981), 33 O.R. (2d) 816 at p. 825, ... a "factual underpinning" for the claim would then have been necessary for its disposition, but where, as here, he concluded that the immunity was absolute, the same kind of factual underpinning was not needed, for even if the facts as alleged were proved the claim could not succeed. Accordingly, I find no error on the part of Fitzpatrick J. in acting on the application as one which could be properly considered and dealt with by him under Rule 126 ....

Therefore, I will proceed on the basis that the Court of Appeal reached its determination by the application of Rule 126. In so doing, the court concluded that there existed an absolute immunity for the Crown and the Attorney General and the Crown Attorneys against suit for all acts done in relation to criminal proceedings, even though malice be shown. If this Court should hold that the immunity asserted for the Crown and the Attorney General is clearly absolute, the action would be at an end. If, however, it should conclude that the immunity is in any way

limited or qualified or that its existence is doubtful, the matter would have to go to trial in the usual way, so that evidence could be heard on the matters of fact and the issues raised in order to provide a factual underpinning for the determination of any possible liability. In approaching the matter at this stage, it must be borne in mind that in proceedings under Rule 126 the facts alleged must be taken as true and this [page204] motion must be disposed of on the basis that the Crown Attorneys and the Attorney General acted with malice in the initiation and conduct of these proceedings.

62 There are four necessary elements which must be proved for success in an action for malicious prosecution:

A. The proceedings must have been initiated by the defendant.

B. The proceedings must have terminated in favour of the plaintiff.

C. The plaintiff must show that the proceedings were instituted without reasonable cause, and

D. The defendant was actuated by malice.

This appeal must therefore be approached on the footing that all these elements are shown.

63 It was argued on behalf of the Crown that it enjoyed a complete immunity from liability for malicious prosecution, on the basis of a common law immunity of the Attorney General and the Crown Attorneys. Any liability on the part of the Crown arising from the conduct of its servants would be vicarious. Therefore, it was contended that because the common law accorded a full immunity to the Crown's servants, the Crown itself would not be liable. It was also contended that the Crown had an absolute immunity under the provisions of the Proceedings Against the Crown Act, R.S.O. 1980, c. 393 (the Act).

64 Any consideration of Crown liability must now be based upon the Act and I do not find it necessary for the purposes of this case to consider the common law position respecting Crown immunity. The purpose of the Act, clearly discernible from its form and structure, was to remove Crown immunities and place the Crown upon the same footing as any other person before the courts, save for the exceptions which are set out in the Act. The [page205] effective sections for this purpose are ss. 2 and 5. Section 2(2)(d) was relied upon by the Crown. It provides:

2. ...

(2) Nothing in this Act

. . .

(d) subjects the Crown to proceedings under this Act in respect of anything done in the due enforcement of the criminal law or of the penal provisions of any Act of the Legislature;

It may be argued that commencing and conducting proceedings with malice against the object of the proceedings could not be considered as the "due" enforcement of the criminal law. But any opening in the wall of immunity found by the Court of Appeal would be, in my view, effectively closed by s. 5(6) of the Act, which provides:

5. ...

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

Section 5 expresses the general rule which subjects the Crown to all liabilities in tort to which, if it were a person of full age and capacity, it would be subject. Subsections (2) to (5) provide interpretative guides while subs. (6), excepts from the general rule Crown liability in respect of anything done or omitted to be done by a person, while discharging or purporting to discharge responsibilities of a judicial nature vested in him or responsibilities that he has in connection with the execution of the judicial process.

65 The claim asserted here depends upon the actions of the Crown Attorneys and the Attorney General, specifically the decision to prosecute the appellant for murder. The decision to prosecute is a judicial decision and is obviously vested in the Attorney General and executed on his behalf by his agents, the Crown Attorneys: see The Queen v. Comptroller-General of Patents, Designs, and [page206] Trade Marks, [1899] 1 Q.B. 909 (C.A.). A.L. Smith L.J. said, at pp. 913-14:

> I wish to say a word or two about the position of the Attorney-General, because in my judgment it is of importance in this case, and his position appears likely to be lost sight of. Everybody knows that he is the head of the English Bar. We know that he has had from the earliest times to perform high judicial functions which are left to his discretion to decide. For example, where a man who is tried for his life and convicted alleges that there is error on the record, he cannot take advantage of that error unless he obtains the fiat of the Attorney-General, and no Court in the kingdom has any controlling jurisdiction over him. That perhaps is the strongest case that can be put as to the position of the Attorney-General in exercising judicial functions. Another case in which the Attorney-General is pre-eminent is the power to enter a nolle prosequi in a criminal case. I do not say that when a case is before a judge a prosecutor may not ask the judge to allow the case to be withdrawn, and the judge may do so if he is satisfied that there is no case; but the Attorney-General alone has power to enter a nolle prosequi, and that power is not subject to any control. Another case is that of a criminal information at the suit of the Attorney-General -- a practice which has, I am sorry to say, fallen into disuse. The issue of such an information is entirely in the discretion of the Attorney-General, and no one can set such an information aside. There are other cases to which I could refer to be found in old and in recent statutes, but I have said enough to shew the high judicial functions which the Attorney-General performs ....

The Crown Attorneys and the Attorney General in deciding to prosecute the appellant would therefore come within s. 5(6) of the Act, and the Crown would have its statutory immunity despite any uncertainty which might arise because of an argument under s. 2(2)(d) of the Act, based on the concept of "due" enforcement of the criminal law. The Attorney General and his agents, whatever the motives underlying their conduct, were surely, in the words of s. 5(6), "discharging or purporting" to discharge responsibilities of a judicial nature. In my view, the Crown is rendered immune by the express terms of s. 5(6) of the Act from liability to the appellant.

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66 The fact of Crown immunity in this case does not necessarily mean that a similar immunity for the Attorney General and his agents follows. Any immunity that they might enjoy must find its own independent footing and the fact that the Act extends an immunity to the Crown in this case, therefore, cannot be understood as conferring or evidencing an immunity for the Attorney General and the Crown Attorneys. This point was made by Hart J.A. in the case of Curry v. Dargie (1984), 28 C.C.L.T. 93 (N.S.C.A.), where he held that, while the Proceedings Against the Crown Act, R.S.N.S. 1967, c. 239, at p. 107, might absolve the provincial Crown from liability, a Crown servant, in that case a residential tenancy officer, could still be personally liable for misconduct:

> It seems to me that we are dealing here, once again, with the immunity of the Crown and not that of a tortfeasor.
>
> It has been pointed out that the Proceedings Against the Crown Act was passed to give citizens the right to sue the Crown for the tortious acts of its officers and servants. The Act also prevents suits against the Crown for acts of its officers or servants carried out in the due enforcement of valid legislation. The Act was not designed, however, to protect the officers and servants of the Crown personally from actions arising out of torts committed by them against members of the public, whether during the course of their employment or not, which were not done solely for the due enforcement of the criminal law or the provisions of any act of the Legislature ....

What then is the nature of the immunity, if any, enjoyed by the Attorney General at common law?

67 There is clear authority in the jurisprudence of most common law, and some civil law, jurisdictions for the

proposition that public officers and officials discharging or purporting to discharge the duties and powers of their offices may be personally liable in damages for wrongful conduct. The leading case in Canada on this point is Roncarelli v. Duplessis, [1959] S.C.R. 121. The facts are well known. Roncarelli was a restaurant owner in [page208] Quebec. He was a member of a religious group, the Jehovah's Witnesses, and he supported their cause financially and in assisting members of the group who from time to time ran afoul of the law. Duplessis was the Premier of Quebec and, as well, Attorney General of the province. The policy of the Government was opposed to the Jehovah's Witnesses and Duplessis sought to eliminate Roncarelli as an opponent in his efforts to curb the Jehovah's Witnesses. He ordered the General Director of the Quebec Liquor Commission, which had the legislative authority to "grant, refuse or cancel permits for the sale of alcoholic liquors," to revoke Roncarelli's liquor licence and to forever bar him from obtaining another. This ruined his business and he brought action for damages against Duplessis for the wrongful revocation of his licence and the prohibition against his obtaining a further licence. A majority in this Court held that Duplessis was liable. The judgment of Rand J. (with whom Judson J. concurred) has been regarded as the leading judgment in the case. He saw the issue in these terms, at p. 137:

> In these circumstances, when the de facto power of the Executive over its appointees at will to such a statutory public function is exercised deliberately and intentionally to destroy the vital business interests of a citizen, is there legal redress by him against the person so acting?

He concluded that there was legal redress in the form of damages. He expressed the view that there existed a general presumption in legislation and regulation that powers given by the legislation will be exercised in good faith and without improper motives. At page 140, he said:

> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith [page209] in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.

In this context, it should be noted that in commencing and prosecuting criminal offences the Attorney General and his agents, the Crown Attorneys, are exercising statutory powers: see Ministry of the Attorney General Act, R.S.O. 1980, c. 271; Crown Attorneys Act, R.S.O. 1980, c. 107; and the Criminal Code, R.S.C. 1985, c. C-46, s. 504. Rand J. was also of the view that the acts shown to have been done by the respondent put him beyond the protection of any immunity which could attach to his office. He added, at pp. 141-42:

> The act of the respondent [Duplessis] through the instrumentality of the Commission brought about a breach of an implied public statutory duty toward the appellant; it was a gross abuse of legal power expressly intended to punish him for an act wholly irrelevant to the statute, a punishment which inflicted on him, as it was intended to do, the destruction of his economic life as a restaurant keeper within the province. Whatever may be the immunity of the Commission or its member from an action for damages, there is none in the respondent. He was under no duty in relation to the appellant and his act was an intrusion upon the functions of a statutory body. The injury done by him was a fault engaging liability within the principles of the underlying public law of Quebec: Mostyn v. Fabrigas, and under art. 1053 of the Civil Code. That, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure.

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68 It will be observed that Duplessis in the Roncarelli case purported to act not only as the Premier of Quebec but also as the Attorney General. It would appear to be clear from the majority judgments in Roncarelli that the principle that public officers of the highest rank in Canada who exercise the powers of their office in excess or in abuse of

those powers will be liable in damages for injuries resulting. This principle has been well founded in English authority: see Mostyn v. Fabrigas (1774), 1 Cowp. 161, 98 E.R. 1021, where the Governor of Minorca was held to be liable in damages in a civil action for false imprisonment of a native Minorcan. Lord Mansfield rejected the Governor's claim for immunity at p. 175 Cowp., p. 1029 E.R.:

> Therefore to lay down in an English Court of Justice such a monstrous proposition, as that a governor acting by virtue of letters patent under the Great Seal, is accountable only to God, and his own conscience; that he is absolutely despotic, and can spoil, plunder, and affect His Majesty's subjects, both in their liberty and property, with impunity, is a doctrine that cannot be maintained.

See, as well, Henly v. Mayor of Lyme (1828), 5 Bing. 91, 130 E.R. 995.

69 Another case expressing the same or a similar proposition is Asoka Kumar David v. Abdul Cader, [1963] 3 All E.R. 579 (P.C.). In that case, a licensing authority had refused a licence for the operation of a cinema and the appellant brought action alleging a malicious refusal of licence. The action was struck out in a pre-trial motion and the Court of Appeal of Ceylon supported the respondent. In the judicial committee, Viscount Radcliffe expressed the view that the case was not one which should have been the subject of a pre-trial disposition, and said, at p. 582:

> Since then [1907] the English courts have had to give much consideration to the general question of the rights of the individual dependent on the exercise of statutory powers by a public authority .... In their lordships' opinion it would not be correct today to treat it as establishing any wide general principle in this field: certainly it would not be correct to treat it as sufficient to found the proposition, as asserted here, that an applicant for a statutory licence can in no circumstances have a right to damages if there has been a malicious misuse [page211] of the statutory power to grant the licence. Much must turn in such cases on what may prove to be the facts of the alleged misuse and in what the malice is found to consist. The presence of spite or ill-will may be insufficient in itself to render actionable a decision which has been based on unexceptionable grounds of consideration and has not been vitiated by the badness of the motive. But a "malicious" misuse of authority, such as is pleaded by the appellant in his plaint, may cover a set of circumstances which go beyond the mere presence of ill-will, and in their lordships' view it is only after the facts of malice relied on by a plaintiff have been properly ascertained that it is possible to say in a case of this sort whether or not there has been any actionable breach of duty.

70 It would appear on the basis of the authorities cited that in general terms public officers are entitled to no special immunities or privileges when they act beyond the powers which are accorded to them by law in their official capacities. It would follow, then, that where a public officer, a servant of the Crown, exceeds the powers of his office or acts improperly in fraud of his duties and powers, or acts with malice in the discharge of his duties, he does not have immunity from civil suit and where, by reason of such excess of power or improper motive, he causes damage he may be civilly liable in damages. This, indeed, seems clear as far at least at it may concern public servants who act in administrative capacities. However, the question before us involves a consideration of the position of the Attorney General, acting in his capacity as the chief law officer of the Crown concerned with the commencement and prosecution of criminal proceedings against accused persons.

71 The Court of Appeal, as has been said, found an absolute immunity from civil liability on the part of the Attorney General and the Crown Attorneys, and in reaching this conclusion they placed special emphasis on Owsley v. The Queen in right of Ontario and Richman v. McMurtry, supra, in the Ontario High Court and, as well, on Imbler v. Pachtman, 424 U.S. 409 (1976). They formed the view that the absolute immunity was a clearly established feature of the common law. This issue has been considered in many Canadian cases in recent years: see Unterreiner v. Wilson (1982), 40 O.R. (2d) 197 (H.C.), per Gray J., affirmed [page212] (1983), 41 O.R. (2d) 472 (C.A.); Owsley v. The Queen in right of Ontario, supra; Richman v. McMurtry, supra; Bosada v. Pinos (1984), 44 O.R. (2d) 789 (H.C.), per Pennell J.; Curry v. Dargie, supra; German v. Major (1985), 39 Alta. L.R. (2d) 270 (C.A.); and Levesque v. Picard (1985), 66 N.B.R. (2d) 87 (C.A.), leave to appeal to the Supreme Court of Canada granted May 22, 1986, [1986] 1 S.C.R. x, notice of discontinuance filed January 7, 1987, [1987] 1 S.C.R. x.

72 These cases do not offer complete support for the position taken in the Court of Appeal. The cases decided in the Ontario courts, which are noted above, reach the conclusion that the prosecutorial immunity is absolute. In

reaching a similar conclusion in the case at bar, Thorson J.A. relied extensively on American authority with particular emphasis on the judgments of Learned Hand J. in Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), and of Powell and White JJ., of the U.S. Supreme Court, in Imbler v. Pachtman, supra. These cases adopt the view that the social need to have prosecutors who are charged with the prosecution of criminal cases freed from the threat of civil action, so that they may fearlessly and objectively conduct the prosecutions justifies the adoption of the absolute rule. Powell J. in Pachtman, supra, at p. 428, expressed agreement with the words of Learned Hand J. in Gregoire, supra, at p. 581, where he said:

> As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation ....

73 But the position respecting prosecutorial immunity is not unanimous. Other courts in other jurisdictions have indicated that they would not necessarily extend absolute immunity to those executing prosecutorial functions. In Riches v. Director of Public Prosecutions, [1973] 2 All E.R. 935 (C.A.), the plaintiff had been acquitted of a criminal charge and sought damages for malicious [page213] prosecution against the Director of Public Prosecutions. I observe, that in respect of the institution of prosecutions against individuals, the Director of Public Prosecutions is effectively performing the same function as a Canadian provincial Attorney General. In that case, although Stephenson L.J. held that the material before the Court disclosed that there had been a basis in evidence for the plaintiff's prosecution and that there was no cause of action disclosed by the statement of claim, he rejected the proposition that the Director of Public Prosecutions could never be found liable for malicious prosecution. He said, at p. 941:

> I do not wish to be taken as saying that there may never be a case where a prosecution has been initiated and pursued by the Director of Public Prosecutions in which it would be impossible for an acquitted defendant to succeed in an action for malicious prosecution, or as saying that the existence of the Attorney-General's fiat where required conclusively negates the existence of malice and conclusively proves that there was reasonable and probable cause for the prosecution. There may be cases where there has been, by even a responsible authority, the suppression of evidence which has led to a false view being taken by those who carried on a prosecution and by those who ultimately convicted. But that case is, as it seems to me, many miles from this one. There is nothing in the judgment of the Court of Criminal Appeal in this particular case which lends any support to the view that there was no case for the plaintiff to answer; and I cannot find in anything that he has said to us or in any document that has been put before us anything to suggest that there was in existence material showing that there was no basis in evidence for a prosecution of him on the conspiracy charge or on any of the three substantive charges which he had to meet at the Suffolk Assizes. In those circumstances, as it seems to me, he has failed to show that the defendant put the facts unfairly before prosecuting counsel, that there was anything like a lack of reasonable or probable cause, or malice, on the defendant's part or that there is any possibility of such material being produced.

74 In Canada, decisions in the Alberta and Nova Scotia courts cast doubt on the existence of the complete immunity. In German v. Major, supra, the plaintiff had been prosecuted under the Income Tax Act. The trial judge acquitted on the basis of [page214] a doubt as to guilt and the defendant taxpayer then sued the prosecutor for malicious prosecution. Though Kerans, J.A. considered that the material before the court disclosed that the plaintiff's case was "doomed beyond doubt to fail", for absence of proof of malice, and because there were reasonable grounds for the prosecution he also considered that the prosecutor's immunity to prosecution was not absolute. In the closing paragraph of his judgment, at p. 286, he said:

> Counsel for the Attorney General who acts as his agent in the prosecution of a criminal case is not accountable in civil proceedings to the accused except possibly to the extent that it is alleged against him that he has not acted in good faith, and to that extent the allegation falls within the nominative tort of malicious prosecution, and that cause of action has been dealt with [see p. 282]. I would therefore strike those portions of the statement of claim which deal with the remaining claims by German against Major. [Emphasis added.]

It would follow that had the prosecutor proceeded solely or principally on an improper motive: for example, malice, then coming within Kerans J.A.'s conception there would be no immunity against malicious prosecution. In Curry v.

Dargie, supra, it was held that a residential tenancy officer who had instituted proceedings against a tenant could not claim an absolute prosecutorial immunity. Relying in part on the earlier case of Warne v. Province of Nova Scotia (1969), 1 N.S.R. (2d) 27 (S.C.T.D.), where Gillis J. refused to strike out a personal claim against the provincial Minister of Agriculture, Hart J.A. explained that he was not willing to go as far as the Ontario cases had gone in extending prosecutorial immunity. Although he distinguished the case before him from a case where the Attorney General or a Crown Attorney had instituted a prosecution, he made it clear that he was not deciding the issue as to the immunity of Attorneys General and Crown Attorneys. He said, at p. 110:

> I am not prepared to go as far as Galligan J. [in Richman, supra] in holding that an officer of the Crown cannot be liable for a proceeding commenced maliciously, [page215] but it is not necessary to consider that issue at the moment. I do not believe that in the case at Bar it can be said that the respondent in laying the information against the appellant was in fact carrying out a judicial function similar to those carried out by Attorneys General and prosecutors. An information can be laid by any person and there is no obligation under the Residential Tenancies Act requiring that it be laid by the respondent. Surely a person who undertakes to swear that she has reasonable and probable cause to believe that an offence has been committed must take personal responsibility for the results of that act and cannot simply say that she was merely following instructions of her superiors. Nor can it be said that she was by her act enforcing the criminal law or the provisions of any statute. She was simply setting in motion the forces of the justice system which would enable the persons charged with its administration to perform their duties. She was in no different position from the police informant or other person who lays an information in a criminal case without reasonable and probable cause for believing that the offence had been committed and with some malicious intent. Such a person is always liable to an action for malicious prosecution. [Emphasis added.]

75 The basis upon which Hart J.A. draws the distinction between the residential tenancy officer and the Attorney General, and which erases any doubt as to the non-existence of an immunity for the residential tenancy officer, is the fact that the Attorney General exercises a "judicial function" in commencing a prosecution, whereas the residential tenancy officer does not. I have already referred to the "judicial" nature of the Attorney General's decision to prosecute: see the discussion of The Queen v. Comptroller-General of Patents, Designs, and Trade Marks, supra. But can it be said that the mere fact of the Attorney General's decision being "judicial" confers an absolute immunity? I do not think the law is decided on this point.

76 The "judicial" nature of the Attorney General's decision to prosecute does not in any way render him a "court", that is, an adjudicative entity. See on this point, Re Van Gelder's Patent (1888), 6 R.P.C. 22 (C.A.), where Lord Esher, M.R., said, at p. 27:

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> If what I have said is true, after all the Attorney-General is not a Court. He may have a judicial function to perform, but he is not a Court, and prohibition does not lie to him .... [Emphasis added.]

What is meant by the words "prohibition does not lie to him" is that the Attorney General's decision to prosecute is not reviewable by any court. As A.L. Smith L.J. noted in Comptroller-General of Patents, supra, at p. 914:

> The issue of such an [a criminal] information is entirely in the discretion of the Attorney-General, and no one can set such an information aside .... [Emphasis added.]

Hence, the law is settled that the Attorney General's exercise of his "judicial" functions, such as the commencement of criminal proceedings, the entering of a nolle prosequi, the entering of a stay under s. 579(1) of the Criminal Code, or the preferring of direct indictments in the absence of a committal for trial after a preliminary hearing, are all incapable of judicial review and to that extent, the Attorney General enjoys an absolute and total immunity on the basis that he is performing a judicial function.

77 Immunity from judicial review, however, does not equate to immunity from civil suit for damages incurred as a result of a maliciously instituted and executed prosecution. This Court has held that, in respect of adjudicative judicial decisions, there is a complete immunity from civil suit: Morier v. Rivard, [1985] 2 S.C.R. 716. In light of the reservations expressed by learned justices of the Alberta, Nova Scotia and English Courts of Appeal, however, I am

loath to make a ruling on an appeal of a preliminary motion that a similar absolute immunity exists for the benefit of the Attorney General and his agents in respect of suits for malicious prosecution. If the Court were to make such a ruling on a point of this importance in a total absence of evidence, it would, in my view, be adopting a dangerous course. Let us not forget that, when Lord Mansfield was faced with the bleak reality of a colonial governor gone awry, imprisoning innocent people without proper trials and in contravention of the law, "absolutely despotic" [page217] and "accountable only to God, and his own conscience", he felt compelled to reject any notion of immunity by virtue of the Governor's office: see Mostyn v. Fabrigas, supra. The state of the law relating to the immunity of the Attorney General is, as has been shown, far from clear. Before laying down any proposition to the effect that the Attorney General and his agents enjoy absolute immunity from civil suit, there must be a trial to permit a conclusion on the question of prosecutorial immunity and to furnish -- in the event that it is decided that the immunity is not absolute -- a factual basis for a determination of whether or not in this case the conduct of the prosecution was such that the appellant is entitled to a remedy.

78 Furthermore, the Attorney General's immunity from judicial review, based on the exercise of a judicial function, does not equate with immunity from civil suit for damages for wrongful conduct in the performance of prosecutorial functions which do not involve the exercise of a judicial function. Indeed, most of the functions and acts performed by Crown Attorneys, as agents of the Attorney General, would fall into this category and, accordingly, the immunity may not extend to claims for damages as a result of a prosecution, however instituted but carried out with malice. A ruling on a preliminary motion to the effect that Attorneys General and their agents are absolutely immune from all liability for suits for malicious prosecution may therefore be too expansive and even ill-founded.

79 Therefore, my view is that this case is not one which should have been disposed of upon a pre-trial motion under Rule 126. The law has long been settled that it is only in the clearest of cases that actions will be struck out, and this is not such a clear case. Of interest in this connection are the comments made in an unreported case in the British Columbia Court of Appeal (Barrisove v. McDonald, B.C.C.A., No. 490/74, November 1, 1974 (McFarlane, Robertson and Carrothers JJ.A.)) where an action was commenced against a county court judge for alleged misconduct in the [page218] course of the plaintiff's trial. The pleadings were struck out in the Supreme Court of British Columbia as alleging no reasonable cause of action, but an appeal was allowed, holding, in effect, that the allegations against the judge were cognizable in a civil action for damages. This case cannot now be considered as authoritative in view of the judgment in this Court in Morier v. Rivard, supra, but the comments made by Robertson J.A. in agreeing with the disposition made of the appeal are significant. He said (at p. 10):

> I agree with the disposition proposed by my brother [McFarlane] and agree substantially with what he has said. I wish, however, to guard myself against being said to have made a pronouncement on the law which will be binding on the trial judge or upon this Court if following a trial, there should be an appeal to the Court. Rather than saying categorically that the endorsement on the writ and the Statement of Claim discloses a cause of action to which there can be no defence, I prefer to put my reasons on the ground that the question is not one which should have been decided in a proceeding of the sort that was taken here. It is so far from clear that no cause of action is disclosed that, as I have indicated, that stage of the proceedings was not one at which the question should have been decided.

In view of the uncertainty of the law upon this question, it is not possible, in my view, to conclude that the appellant has not alleged a reasonable cause of action in her pleadings and, therefore, the move to strike out the pleadings and dismiss the action as against the Attorney General must fail.

80 I would therefore dismiss the appeal as against the Crown. There is no order as to costs. I would allow the appeal as against the Attorney General with costs, and direct that the matter be returned to the Supreme Court of Ontario for trial of the claim against the Attorney General.

The following are the reasons delivered by

LA FOREST J.

81 I agree with my colleague Lamer J. except that I prefer to rely solely on the common law position as set forth by

him, leaving [page219] consideration of Charter implications to another day when it becomes necessary to deal with them.

The following are the reasons delivered by

L'HEUREUX-DUBÉ J. (dissenting in part)

82 While I agree with my colleague, Justice McIntyre, that the Crown enjoys absolute immunity from suit even for malicious prosecution, I respectfully disagree with his conclusion that the Attorney General and, by extension, Crown Attorneys, may not. Consequently, I would dismiss the appeal.

83 My colleague McIntyre J. is of the view that the lower courts erred in striking out the appellant's statement of claim under Rule 126 of the Ontario Rules of Practice under circumstances where there was sufficient doubt as to the actual state of the law on the question. He finds that the law in Canada is somewhat ambiguous as to the question of the degree of immunity of Attorneys General and Crown Attorneys. For that reason, he orders the matter to proceed to trial. My point of divergence from the reasons of McIntyre J. concerns the appropriate response of this Court under the circumstances. Since, in my view, strong policy reasons exist for granting Attorneys General and Crown Attorneys absolute immunity from prosecution for actions taken in the proper exercise of their powers, I see no reason to prolong this matter any further by remitting it to trial to decide this very same issue.

84 I would like to make it clear at the outset that I am proceeding from the premise that any decisions taken or acts performed by the respondents in this case were done within the scope of their authority. I perceive the claim of the appellant to be founded on the idea that her prosecution by the respondents, though carried out within the bounds of their authority, was malicious. In this respect, I would distinguish the situation from that which arose in Roncarelli v. Duplessis, [1959] S.C.R. 121. In that case, the claim was brought on the basis that the respondent had acted outside the scope of his legitimate authority. The civil action was brought [page220] against Maurice Duplessis in his capacity as an individual, and not against Duplessis in either of his official roles as Premier of the province or as Attorney General. As Rand J. stated, at pp. 142-43:

> The office of Attorney-General traditionally and by statute carries duties that relate to advising the Executive, including here, administrative bodies, enforcing the public law and directing the administration of justice. In any decision of the statutory body in this case, he had no part to play beyond giving advice on legal questions arising. In that role his action should have been limited to advice on the validity of a revocation for such a reason or purpose and what that advice should have been does not seem to me to admit of any doubt. To pass from this limited scope of action to that of bringing about a step by the Commission beyond the bounds prescribed by the legislature for its exclusive action converted what was done into his personal act. [Emphasis added.]

And at p. 144:

> Was the act here, then, done by the respondent in the course of that exercise [of his functions]? The basis of the claim, as I have found it, is that the act was quite beyond the scope of any function or duty committed to him, so far so that it was one done exclusively in a private capacity, however much in fact the influence of public office and power may have carried over into it.

85 It may well be that a governmental authority who acts with malice acts outside of the scope of his authority. However, this is not the issue which was put before us. It is to be noted that the appellant chose to proceed against the Attorney General in his official, rather than personal, capacity. In her factum, the appellant also maintains that all of the respondents were acting, "at all material times" as agents of the Attorney General for Ontario, who "acted as an agent" of Her Majesty the Queen in right of Ontario.

86 For the purposes of Rule 126, as McIntyre J. has indicated, we must assume that all the facts alleged by the appellant in her submissions are true. The question then, to be decided before the matter is allowed to go to trial, is simply: does the appellant's claim disclose a reasonable cause of [page221] action? This is a pure question of law, and no evidence is required for its determination. In fact, there is every advantage, in terms of saving the time and

cost of a trial, to decide a question of law at the outset. This, in fact, is the very reason for the existence of Rule 126.

87 In the present case, a determination that the Attorney General and Crown Attorneys enjoy absolute immunity would settle the question definitively. Both the judge at first instance and the Court of Appeal of Ontario proceeded on this basis. I intend to do so as well. This is also the course followed in Morier v. Rivard, [1985] 2 S.C.R. 716, which came to this Court on an interlocutory question similar to the one in this case.

88 This, of course, does not mean that I disagree with McIntyre J. when he proposes that, in general, important questions should not be disposed of in interlocutory fashion. However, this, in my view, does not apply in cases such as the one before us, where the defense offered at the outset is one of law only, namely that the right of action is barred independently of the facts alleged.

89 The action brought by Nelles is completely dependent upon the answer to the question of whether Attorneys General and Crown Attorneys are immune from civil suit. As such, the matter can and should be decided by this Court in the present appeal. My answer to the question is that the immunity from civil suit enjoyed by Attorneys General and Crown Attorneys is absolute when they are acting within the bounds of their authority. I rest my reasons on the very carefully considered judgment of the unanimous Ontario Court of Appeal: Nelles v. The Queen in right of Ontario (1985), 51 O.R. (2d) 513. The Court of Appeal (Houlden, Thorson and Robins JJ.A.) undertook a thorough review of the authorities in the course of a lengthy and well reasoned discussion of the arguments on either side of the issue.

90 As Thorson J.A. put it, at p. 531:

[page222]

> ... the concept that the Attorney-General and Crown Attorneys should enjoy an absolute immunity from civil suit for their conduct in initiating and conducting criminal prosecutions is a troubling one. That it confronts thoughtful and fair-minded persons with the need to make what cannot be other than a difficult choice, is obvious.

91 Ultimately, however, "[a]s is so often the case, the answer must be found in a balance between the evils inevitable in either alternative" (Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), at p. 581).

92 While there are significant differences between the role of prosecutors in the American legal system, and the role of Crown Attorneys in Canada, it is my view that the basic principles underlying the grant of immunity to these agents are the same. These principles have been clearly elucidated in American case law. For example, in Gregoire, supra, Learned Hand J. expanded on the underlying rationale for the immunity of officials, at p. 581:

> The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardour of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors.

93 Similarly, Powell J. in Imbler v. Pachtman, 424 U.S. 409 (1976), observed, at pp. 422-23:

> The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection [page223] of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.

94 The role of absolute immunity is not to protect the interests of the individual holding the office, rather it is to advance the greater public good. Absolute immunity is based upon principles of public policy. In Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926), Rogers J. wrote, at p. 406:

> The public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the government should speak and act freely and fearlessly in the discharge of their important official functions. They should be no more liable to private suits for what they say and do in the discharge of their duties than are the judges and jurors, to say nothing of the witnesses who testify in a case.

95 Attorneys General and Crown Attorneys are often faced with difficult decisions as to whether to proceed in matters which come before them. It is unfortunate that, like all human beings, they cannot be immune from error. However, the holders of such offices can and should be immune from prosecution for any such errors which occur in the course of the exercise of their functions. The freedom of action of Attorneys General and Crown Attorneys is vital to the effective functioning of our criminal justice system. In my view, the greater public interest is best served by giving absolute immunity to these agents.

96 I would dismiss the appeal.

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

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

Heard: February 17, 2003;

Judgment: December 5, 2003.

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File No.: 28425.

[2003] 3 S.C.R. 263 | [2003] 3 R.C.S. 263 | [2003] S.C.J. No. 74 | [2003] A.C.S. no 74 | 2003 SCC 69

Estate of Manish Odhavji, deceased, Pramod Odhavji, Bharti Odhavji and Rahul Odhavji, appellants (plaintiffs); v. Detective Martin Woodhouse, Detective Constable Philip Gerrits, Officer John Doe, Officer Jane Doe, Metropolitan Toronto Chief of Police David Boothby, Metropolitan Toronto Police Services Board and Her Majesty The Queen in Right of Ontario, respondents (defendants). And between Metropolitan Toronto Chief of Police David Boothby, appellant on cross-appeal; v. Estate of Manish Odhavji, deceased, Pramod Odhavji, Bharti Odhavji and Rahul Odhavji, respondents on cross-appeal, and Attorney General of Canada, Attorney General of British Columbia, Canadian Civil Liberties Association, Urban Alliance on Race Relations, African Canadian Legal Clinic, Mental Health Legal Committee, Association in Defence of the Wrongfully Convicted and Innocence Project of Osgoode Hall Law School, interveners.

(78 paras.)

Case Summary

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Catchwords:

Practice — Motion to strike — Police officers involved in fatal shooting — Actions brought by estate and family of victim — Statement of claim alleging misfeasance in public office against police officers and chief of police and negligence against chief of police, police services board and province — Actions based on failure of police officers to cooperate in SIU investigation — Whether portions of statement of claim should be struck out as disclosing no reasonable cause of action — Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 21.01(1)(b).

Catchwords:

Torts — Tort of misfeasance in public office — Chief of police and police officers — Victim killed by police — Police officers involved in shooting not complying with statutory duty to cooperate with SIU investigation — Plaintiffs bringing actions in misfeasance in public office against police officers and chief of police — Whether tort of misfeasance in public office can arise from misconduct involving breaches of statutory duty — Whether tort limited to unlawful exercises of statutory or prerogative powers.

Catchwords:

Torts — Negligence — Duty of care — Victim killed by police — Police officers involved in shooting not complying with statutory duty to cooperate with SIU investigation — Plaintiffs bringing actions in negligence against chief of police, police services board and province — Whether they owed plaintiffs duty to take reasonable care to ensure that police officers cooperated with investigation.

Catchwords:

Costs — Court of Appeal's costs award — Plaintiffs submitting that they are public interest litigants and should not have been required to pay costs — Actions involving public authorities and raising issues of public interest insufficient to alter essential nature of litigation — Plaintiffs not falling within definition of public interest litigants — No clear and compelling reasons to interfere with Court of Appeal's decision to award costs in [page265] accordance with usual rule that successful party is entitled to costs.

Summary:

O was fatally shot by police officers. The Special Investigation Unit ("SIU") began an investigation. The police officers involved in the incident did not comply with SIU requests that they remain segregated, that they attend interviews on the same day as the shooting, and that they provide shift notes, on-duty clothing, and blood samples in a timely manner. Under s. 113(9) of the Ontario *Police Services Act*, members of the force are under a statutory obligation to cooperate with SIU investigations and, under s. 41(1), a chief of police is required to ensure that members of the force carry out their duties in accordance with the provisions of the Act. The SIU cleared the officers of any wrongdoing. O's estate and family commenced a variety of actions. The statement of claim alleged that the lack of a thorough investigation into the shooting incident had caused them to suffer mental distress, anger, depression and anxiety. They claimed that the officers' failure to cooperate with the SIU gave rise to actions for misfeasance in a public office against the officers and the Chief of Police, and to actions for negligence against the Chief, the Metropolitan Toronto Police Services Board, and the Province. The defendants brought motions under rule 21.01(1)(b) of the Ontario *Rules of Civil Procedure* to strike out the claims on the ground that they disclose no reasonable cause of action. The motions judge and the Court of Appeal struck out portions of the statement of claim. In this Court, the plaintiffs appeal against the Court of Appeal's decision to strike the claims for misfeasance in a public office against the officers and the Chief, and the claims for negligence against the Board and the Province. The Chief cross-appeals against the Court of Appeal's decision to allow an action for negligence against him to proceed.

Held: The appeal should be allowed in part and the cross-appeal dismissed. The actions in misfeasance in a public office against the police officers and the Chief and the action in negligence against the Chief should be allowed to proceed. The actions in negligence against the Board and the Province should be struck from the statement of claim.

Under rule 21.01(1)(b), a court may strike out a statement of claim for disclosing no reasonable cause of action when it is plain and obvious that the action is [page266] certain to fail because the statement of claim contains a radical defect. In this case, if the facts of the motion to strike are taken as pleaded, it is not plain and obvious that the actions for misfeasance in a public office against the police officers and the Chief must fail.

The failure of a public officer to perform a statutory duty can constitute misfeasance in a public office. Misfeasance is not limited to unlawful exercises of statutory or prerogative powers. It is an intentional tort distinguished by (1) deliberate, unlawful conduct in the exercise of public functions; and (2) awareness that the conduct is unlawful and likely to injure the plaintiff. The requirement that the defendant must have been aware that his or her unlawful conduct would harm the plaintiff establishes the required nexus between the parties. A plaintiff must also prove the requirements common to all torts, specifically, that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law.

Here, the statement of claim pleads each of the constituent elements of the tort. The officers' alleged failure to cooperate with the SIU investigation and the Chief's alleged failure to ensure that they did cooperate both constitute

unlawful breaches of statutory duties under the *Police Services Act*. The allegation that the officers' acts and omissions "represented intentional breaches of their legal duties as police officers" satisfies the requirement that the officers were aware that their conduct was unlawful and that it was intentional and deliberate. The allegation that the Chief deliberately failed to segregate the officers satisfies the requirement that he intentionally breached his legal obligation to ensure compliance with the *Police Services Act*. However, the same cannot be said of his alleged failures to ensure that the officers produced timely and complete notes, attended interviews, and provided accurate and complete accounts. A mere failure to discharge obligations of an office cannot constitute misfeasance in a public office and the plaintiffs must prove the failures were deliberate. The allegation that the officers and the Chief "ought to have known" that their misconduct would cause the plaintiffs to suffer must be struck from the statement of claim because misfeasance in a public office is an intentional tort requiring subjective awareness that harm to the plaintiff is a likely consequence of the alleged misconduct. Lastly, at the pleadings stage, it is sufficient with respect to damages that the statement of claim alleges mental distress, anger, depression and anxiety as a consequence of the alleged misconduct, but the plaintiffs [page267] will have to prove at trial that the alleged misconduct caused anxiety or depression of sufficient magnitude to warrant compensation.

To succeed with their actions in negligence against the Chief, the Board, and the Province, the plaintiffs must first establish that these defendants owed the plaintiffs a duty to take reasonable care to ensure that the police officers cooperated with the SIU investigation. To do so, the plaintiffs must demonstrate that: (1) the harm complained of is a reasonably foreseeable consequence of the alleged breach; (2) there is sufficient proximity between the parties that it would not be unjust or unfair to impose a duty of care on the defendants; and (3) there exist no policy reasons to negative or otherwise restrict that duty.

The circumstances of this case raise a *prima facie* duty of care owed by the Chief to the plaintiffs. First, it is reasonably foreseeable that the officers' failure to cooperate with the SIU investigation would harm the plaintiffs. As the Chief was responsible for ensuring that cooperation, it is reasonably foreseeable that his failure to do so would harm the plaintiffs. Second, a finding of proximity is supported by the relatively direct causal link between the alleged misconduct -- negligent supervision -- and the complained of harm, and by the fact that members of the public reasonably expect a chief of police to be mindful of the injuries that might arise as a consequence of police misconduct. The public expectation is consistent with the statutory obligations the *Police Services Act* imposes on the Chief. No broad policy considerations exist that ought to negative the *prima facie* obligation of the Chief to prevent the misconduct. With respect to damages, the same principles set out in the context of the actions in misfeasance in a public office are applicable.

The relationship between the plaintiffs and the Board and the Province, however, are not such that a duty of care may rightly be imposed. The Board is not under a private law duty to ensure that police officers, as a matter of general practice, cooperate with the SIU. There is no close causal connection between the misconduct alleged against the Board and the alleged harm. The [page268] Board does not supervise officers and is not involved in their day-to-day conduct. This weakens substantially the nexus between the Board and members of the public injured as a consequence of police misconduct. Further, the Board has no statutory obligation to ensure that police officers cooperate with the SIU. Courts should be loath to interfere with the Board's broad discretion to determine what objectives and priorities to pursue or what policies to enact, and a decision not to enact additional policies or training procedures for the purpose of ensuring cooperation under s. 113(9) does not constitute a breach of its obligation to provide adequate and effective police services.

Similarly, the Province does not have a private law obligation to institute policies and training procedures for the purpose of ensuring that police officers, as a matter of general policy, cooperate with the SIU. There is insufficient proximity between the parties to conclude that the Province is under a private law obligation to ensure that members of the force comply with an SIU investigation. The Province is too far removed from the day-to-day conduct of members of the force and the Solicitor General is not under a statutory obligation to ensure that police officers cooperate with the SIU. The Solicitor General's decision not to enact additional policies or training procedures in respect of s. 113(9) does not constitute a breach of his duty to ensure that the Board provides adequate and effective police services.

Cases Cited

Applied: Anns v. Merton London Borough Council, [1978] A.C. 728; explained: R. v. Saskatchewan Wheat Pool, [1983] 1 S.C.R. 205; referred to: Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959; Attorney General of Canada v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735; Ashby v. White (1703), 2 Ld. Raym. 938, 92 E.R. 126; Roncarelli v. Duplessis, [1959] S.C.R. 121; Powder Mountain Resorts Ltd. v. British Columbia (2001), 94 B.C.L.R. (3d) 14, 2001 BCCA 619; Alberta (Minister of Public Works, Supply and Services) v. Nilsson (2002), 220 D.L.R. (4th) 474, 2002 ABCA 283, aff'g (1999), 70 Alta. L.R. (3d) 267, 1999 ABQB 440; Northern Territory of Australia v. Mengel (1995), 129 A.L.R. 1; Henly v. Mayor of Lyme (1828), 5 Bing. 91, 130 E.R. 995; Garrett v. Attorney-General, [1997] 2 N.Z.L.R. 332; Three Rivers District Council v. Bank of England (No. 3), [2000] 2 W.L.R. 1220; Granite Power Corp. v. Ontario, [2002] O.J. No. 2188 (QL); R. v. Dytham, [1979] Q.B. 722; [page269] Uni-Jet Industrial Pipe Ltd. v. Canada (Attorney General) (2001), 156 Man. R. (2d) 14, 2001 MBCA 40; Guay v. Sun Publishing Co., [1953] 2 S.C.R. 216; Frame v. Smith, [1987] 2 S.C.R. 99; Le Lievre v. Gould, [1893] 1 Q.B. 491; Kamloops (City of) v. Nielsen, [1984] 2 S.C.R. 2; B.D.C. Ltd. v. Hofstrand Farms Ltd., [1986] 1 S.C.R. 228; Canadian National Railway Co. v. Norsk Pacific Steamship Co., [1992] 1 S.C.R. 1021; London Drugs Ltd. v. Kuehne & Nagel International Ltd., [1992] 3 S.C.R. 299; Winnipeg Condominium Corporation No. 36 v. Bird Construction Co., [1995] 1 S.C.R. 85; Cooper v. Hobart, [2001] 3 S.C.R. 537, 2001 SCC 79; Donoghue v. Stevenson, [1932] A.C. 562; Hercules Managements Ltd. v. Ernst & Young, [1997] 2 S.C.R. 165; Martel Building Ltd. v. Canada, [2000] 2 S.C.R. 860, 2000 SCC 60; B. (R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315.

Statutes and Regulations Cited

Police Services Act, R.S.O. 1990, c. P.15, ss. 3(2), 31(1), 41(1), 113(1), (9).

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rr. 21.01(1)(b), 57.01(1).

Rules of Court, B.C. Reg. 221/90, r. 19(24)(a).

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Fleming, John G. The Law of Torts, 9th ed. Sydney: LBC Information Services, 1998.

Smith, John William. A Selection of Leading Cases on Various Branches of the Law, 13th ed. Toronto: Carswell, 1929.

History and Disposition:

APPEAL and CROSS-APPEAL from a judgment of the Ontario Court of Appeal (2000), 52 O.R. (3d) 181, 194 D.L.R. (4th) 577 (sub nom. Odhavji Estate v. Toronto Metropolitan Police Force), 142 O.A.C. 149, 3 C.C.L.T. (3d) 226, [2000] O.J. No. 4733 (QL), varying a judgment of the Ontario Court (General Division), [1998] O.J. No. 5426 (QL). Appeal allowed in part and cross-appeal dismissed.

Counsel

Julian N. Falconer and Richard Macklin, for the appellants/respondents on cross-appeal.

Kevin McGivney, Cheryl Woodin and Robert W. Traves, for the respondents Woodhouse and Gerrits.

Ansuya Pachai and Kerri Kitchura, for the respondent/appellant on cross-appeal the Metropolitan Toronto Chief of Police David Boothby [page270] and the respondent the Metropolitan Toronto Police Services Board.

John P. Zarudny, Troy Harrison and James Kendik, for the respondent Her Majesty the Queen in Right of Ontario.

David Sgayias, Q.C., and Anne M. Turley, for the intervener the Attorney General of Canada.

D. Clifton Prowse and J. Gareth Morley, for the intervener the Attorney General of British Columbia.

Written submissions only by John B. Laskin and Kristine M. Di Bacco, for the intervener the Canadian Civil Liberties Association.

Written submissions only by Peter J. Pliszka and Anne C. McConville, for the intervener the Urban Alliance on Race Relations.

Written submissions only by Marie Chen and Sheena Scott, for the intervener the African Canadian Legal Clinic.

Written submissions only by Suzan E. Fraser and Najma Jamaldin, for the intervener the Mental Health Legal Committee.

Written submissions only by Sean Dewart and Louis Sokolov, for the intervener the Association in Defence of the Wrongfully Convicted.

Written submissions only by Marlys A. Edwardh and Breese Davies for the intervener the Innocence Project of Osgoode Hall Law School.

The judgment of the Court was delivered by

IACOBUCCI J.

1 This appeal concerns actions for misfeasance in a public office and negligence within the context of motions to strike the actions as disclosing no reasonable cause of action. Unlike the Court of Appeal, I would permit the actions for misfeasance in a public office to proceed. Like the Court of Appeal, I would permit the action against Metropolitan Toronto Chief of Police David Boothby to proceed, but would strike the actions for negligence against the Metropolitan Toronto Police [page271] Services Board and Her Majesty the Queen in Right of Ontario.

I. Facts

2 On September 26, 1997, Manish Odhavji was fatally shot by officers of the Metropolitan Toronto Police Service while running from his vehicle subsequent to a bank robbery. Within 25 minutes of the shooting, an assistant to Metropolitan Toronto Chief of Police David Boothby (the "Chief") notified the Special Investigations Unit of the Ministry of the Solicitor General (the "SIU") of the incident.

3 The SIU is a civilian agency statutorily mandated to conduct independent investigations of police conduct in cases of death or serious injury caused by the police. The SIU began its investigation immediately. It requested that the defendant officers remain segregated, that they make themselves available for same-day interviews, and that they provide their shift notes, on-duty clothing, and blood samples. Under s. 113(9) of the *Police Services Act*, R.S.O. 1990, c. P.15, members of the force are under a statutory obligation to cooperate with members of the SIU in the conduct of the investigation. Under s. 41(1) of the *Police Services Act*, a chief of police is required to ensure that members of the force carry out their duties in accordance with the provisions of the Act.

4 The estate of Mr. Odhavji and the members of his immediate family (the "plaintiffs") allege that the defendant officers intentionally breached their statutory obligation to cooperate fully with the SIU investigation. In particular, the plaintiffs allege that the defendant officers did not attend for interviews with the SIU until September 30, that they did not comply with the request to remain segregated, and that they failed to comply with the request for shift

notes, on-duty clothing, and blood samples in a timely manner -- and that when statements were eventually given to the SIU, they were both inaccurate and misleading. In the plaintiffs' statement of claim, the lack of a thorough investigation into the [page272] shooting incident has caused the plaintiffs to suffer mental distress, anger, depression and anxiety. The plaintiffs further allege that these damages are consequences that the defendant officers and the Chief knew or ought to have known would result from an inadequate investigation into the shooting incident.

5 The actions at issue in this appeal are not related to the allegedly wrongful death of Mr. Odhavji, but, rather, to the defendant officers' alleged failure to cooperate with the SIU. It is the plaintiffs' submission that the foregoing facts give rise to an action for misfeasance in a public office against the defendant officers and the Chief, and actions for negligence against the Chief, the Metropolitan Toronto Police Services Board (the "Board") and Her Majesty the Queen in Right of Ontario (the "Province"). More specifically, this appeal concerns: (i) the plaintiffs' appeal against the Court of Appeal's decision to strike the actions for misfeasance in a public office, and the actions for negligence against the Board and the Province, on the basis that they disclose no reasonable cause of action; and (ii) the Chief's cross-appeal against the Court of Appeal's decision to allow the action for negligence against the Chief to proceed.

II. Relevant Statutory Provisions

6 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 21

RULE 21 DETERMINATION OF AN ISSUE BEFORE TRIAL

21.01 (1) A party may move before a judge,

...

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

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

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Police Services Act, R.S.O. 1990, c. P.15

3. -- ...

(2) The Solicitor General shall,

(a) monitor police forces to ensure that adequate and effective police services are provided at the municipal and provincial levels;

(b) monitor boards and police forces to ensure that they comply with prescribed standards of service;

...

(d) develop and promote programs to enhance professional police practices, standards and training;

31. -- (1) A board is responsible for the provision of police services and for law enforcement and crime prevention in the municipality and shall, [since amended]

...

(b) generally determine, after consultation with the chief of police, objectives and priorities with respect to police services in the municipality;

(c) establish policies for the effective management of the police force;

...

(e) direct the chief of police and monitor his or her performance;

...

(4) The board shall not direct the chief of police with respect to specific operational decisions or with respect to the day-to-day operation of the police force.

41. -- (1) The duties of a chief of police include,

...

(b) ensuring that members of the police force carry out their duties in accordance with this Act and [page274] the regulations and in a manner that reflects the needs of the community, and that discipline is maintained in the police force;

113. -- (1) There shall be a special investigations unit of the Ministry of the Solicitor General.

...

(9) Members of police forces shall co-operate fully with the members of the unit in the conduct of investigations.

III. Judicial History

A. *Ontario Court (General Division)*, [1998] O.J. No. 5426 (QL)

7 According to Day J., misfeasance in a public office can be established in one of two ways: either by proof of malice with intent to injure, or by proof that the public officer intentionally engaged in acts that were *ultra vires* the scope of his or her office and that she or he could foresee with a degree of certainty that harm would be caused to the plaintiff. As applied to the facts of this case, Day J. concluded that the action against the defendant officers could proceed, but only if the cause of action for misfeasance was framed in malice. He held that it was plain and obvious that the action for misfeasance in a public office against the Chief would fail, owing to the fact that he was not directly and consciously involved in the breach of the obligation to cooperate with the SIU investigation.

8 Day J. allowed the action for negligent supervision against the Chief to proceed on the basis that he made no submissions in respect of this issue. In respect of the actions for negligent supervision against the Board and the Province, Day J. found that there was sufficient proximity between the parties to conclude that the defendants owed a duty of care to the appellants. Nonetheless, Day J. struck the action against the Board, on the basis that a duty of care is negatived in situations in which the agency's involvement was limited to establishing policy. He found that the action for negligent supervision against the Province could succeed, on the basis that a cause of action for negligence lies where the [page275] responsible Minister fails to take sufficient steps to implement a particular policy decision, in this instance the decision to establish the SIU.

B. *Ontario Court of Appeal* (2000), 52 O.R. (3d) 181

9 Borins J.A., for the majority of the court, held that the defining element of misfeasance in a public office is the unlawful exercise of a statutory or prerogative power that adheres to the defendant's office. On this view, the failure of a public officer to perform a statutory duty cannot constitute misfeasance in a public office. Consequently, Borins J.A. found it plain and obvious that neither action for misfeasance in a public office could succeed, owing to the fact that the defendants had not been engaged in the exercise of a statutory or prerogative power that adhered to their respective offices. The most that could be said was that the defendants failed to comply with the obligations imposed upon them by the *Police Services Act*.

10 In respect of the actions for negligent supervision, Borins J.A. held that the action against the Chief was based on s. 41(1)(b) of the *Police Services Act*, which imposes a duty on a chief of police to ensure that members of the police force carry out their duties in accordance with the Act and its regulations. Borins J.A. concluded that it was

not plain and obvious that the action for negligent supervision against the Chief must fail. It was, however, plain and obvious that the actions against the Board and the Province must fail. With respect to the Board, Borins J.A. agreed with Day J. that the Board's involvement was limited to establishing policy. With respect to the Province, Borins J.A. held that the *Police Services Act* does not impose a duty on the Province to control the operational conduct of the municipal police officers or to ensure that police officers comply with [page276] their obligation to cooperate with an SIU investigation.

11 Feldman J.A., dissenting, did not agree that it was plain and obvious that the actions for misfeasance in a public office must fail. In her view, the essence of the tort is the misfeasance in or misuse of the office itself; its purpose is to prevent the deliberate injuring of members of the public by the intentional disregard of official duty. Feldman J.A. thus held that there is no principled reason to distinguish between a public officer who improperly exercises a power and a public officer who deliberately fails to carry out a duty where they know or are recklessly indifferent to the fact that injury to the plaintiff is the likely result. Applied to the facts of this case, Feldman J.A. would have found that the actions for misfeasance in a public office should have been allowed to proceed.

12 Feldman J.A. also was of the view that each of the actions for negligent supervision should have been allowed to proceed. She agreed with Borins J.A. that the Province is not under an obligation to ensure that individual officers comply with their statutory obligation to cooperate with the SIU, but noted that the nature of the claim was that the Province failed to implement training procedures or other policies in order to ensure that officers, as a matter of general practice, cooperated with the SIU. Feldman J.A. was uncertain whether the *Police Services Act* imposes a statutory duty on the Province in respect of these operational matters, and thus felt it inappropriate to strike the claim at this stage of the action. In respect of the Board, Feldman J.A. found that it was not immediately clear whether the Board is under an obligation to establish policies and monitor their implementation for the purpose of ensuring that police officers comply with their statutory obligations. Thus, Feldman J.A. would have found that it was not plain and obvious that the actions for negligent supervision could not succeed.

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IV. Analysis

13 In discussing the issues in this appeal, I will begin by stating the test for striking a statement of claim on the basis that it discloses no reasonable cause of action. I will then consider that test within the context of the actions for misfeasance in a public office, and then within the context of the actions for negligence.

A. *Striking Out a Statement of Claim*

14 The defendants' motions to have the actions dismissed were made pursuant to rule 21.01(1)(b) of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Rule 21.01(1)(b) stipulates that 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 there 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 [page278] be driven from the judgment. See also *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

B. *The Actions for Misfeasance in a Public Office*

16 The essence of the Court of Appeal's decision is that the "radical defect" from which the actions for misfeasance in a public office suffer is their failure to plead the constituent elements of the tort. In particular, the Court of Appeal held that the defining element of the tort is the unlawful exercise of the statutory or prerogative powers that adhere to the defendant's office. Because the alleged misconduct involved the breach of a statutory duty rather than the improper or unlawful exercise of a statutory or prerogative power, it is "plain and obvious", on this view, that the actions for misfeasance in a public office cannot succeed.

17 Consequently, I begin by considering the Court of Appeal's conclusion that the unlawful exercise of a statutory or prerogative power is a constituent element of the tort. With respect, a review of the leading cases clearly reveals that the tort is not limited to circumstances in which the defendant officer is engaged in the unlawful exercise of a particular statutory or prerogative power. As I will discuss, the class of conduct at which the tort is targeted is not as narrow as the unlawful exercise of a particular statutory or prerogative power, but more broadly based on unlawful conduct in the exercise of public functions generally.

(1) The Defining Elements of the Tort

18 The origins of the tort of misfeasance in a public office can be traced to *Ashby v. White* (1703), 2 Ld. Raym. 938, 92 E.R. 126, in which Holt C.J. found that a cause of action lay against an elections officer who maliciously and fraudulently deprived Mr. White of the right to vote. Although the defendant possessed the power to deprive certain persons from participating in the election, he did not have the power to do so for an improper purpose. Although the original judgment suggests that he was [page279] simply applying the principle *ubi jus ibi remedium*, Holt C.J. produced a revised form of the judgment in which he stated that it was because fraud and malice were proven that the action lay: J. W. Smith, *A Selection of Leading Cases on Various Branches of the Law* (13th ed. 1929), at p. 282. Thus, in its earliest form it is arguable that misfeasance in a public office was limited to circumstances in which a public officer abused a power actually possessed.

19 Subsequent cases, however, have made clear that the ambit of the tort is not restricted in this manner. In *Roncarelli v. Duplessis*, [1959] S.C.R. 121, this Court found the defendant Premier of Quebec liable for directing the manager of the Quebec Liquor Commission to revoke the plaintiff's liquor licence. Although *Roncarelli* was decided at least in part on the basis of the Quebec civil law of delictual responsibility, it is widely regarded as having established that misfeasance in a public office is a recognized tort in Canada. See for example *Powder Mountain Resorts Ltd. v. British Columbia* (2001), 94 B.C.L.R. (3d) 14, 2001 BCCA 619; and *Alberta (Minister of Public Works, Supply and Services) v. Nilsson* (2002), 220 D.L.R. (4th) 474, 2002 ABCA 283. In *Roncarelli*, the Premier was authorized to give advice to the Commission in respect of any legal questions that might arise, but had no authority to involve himself in a decision to revoke a particular licence. As Abbott J. observed, at p. 184, Mr. Duplessis "was given no statutory power to interfere in the administration or direction of the Quebec Liquor Commission". Martland J. made a similar observation, at p. 158, stating that Mr. Duplessis' conduct involved "the exercise of powers which, in law, he did not possess at all". From this, it is clear that the tort is not restricted to the abuse of a statutory or prerogative power actually held. If that were the case, there would have been no grounds on which to find Mr. Duplessis liable.

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20 This understanding of the tort is consistent with the widespread consensus in other common law jurisdictions that there is a broad range of misconduct that can found an action for misfeasance in a public office. For example, in *Northern Territory of Australia v. Mengel* (1995), 129 A.L.R. 1 (H.C.), Brennan J. wrote as follows, at p. 25:

> The tort is not limited to an abuse of office by exercise of a statutory power. *Henly v. Mayor of Lyme* [(1828), 5 Bing. 91, 130 E.R. 995] was not a case arising from an impugned exercise of a statutory power. It arose from an alleged failure to maintain a sea wall or bank, the maintenance of which was a condition of the grant to the corporation of Lyme of the sea wall or bank and the appurtenant right to tolls. Any act or

> omission done or made by a public official in the purported performance of the functions of the office can found an action for misfeasance in public office. [Emphasis added.]

In *Garrett v. Attorney-General*, [1997] 2 N.Z.L.R. 332, the Court of Appeal for New Zealand considered an allegation that a sergeant failed to investigate properly the plaintiff's claim that she had been sexually assaulted by a police constable. Blanchard J. concluded, at p. 344, that the tort can be committed "by an official who acts or omits to act in breach of duty knowing about the breach and also knowing harm or loss is thereby likely to be occasioned to the plaintiff".

21 The House of Lords reached the same conclusion in *Three Rivers District Council v. Bank of England (No. 3)*, [2000] 2 W.L.R. 1220. In *Three Rivers*, the plaintiffs alleged that officers with the Bank of England improperly issued a licence to the Bank of Credit and Commerce International and then failed to close the bank once it became evident that such action was necessary. Forced to consider whether the tort could apply in the case of omissions, the House of Lords concluded that "the tort can be constituted by an omission by a public officer as well as by acts on his part" (*per* Lord Hutton, at p. 1267). In Australia, New Zealand and the United Kingdom, it is equally clear that the tort of misfeasance is not limited to the unlawful [page281] exercise of a statutory or prerogative power actually held.

22 What then are the essential ingredients of the tort, at least insofar as it is necessary to determine the issues that arise on the pleadings in this case? In *Three Rivers*, the House of Lords held that the tort of misfeasance in a public office can arise in one of two ways, what I shall call Category A and Category B. Category A involves conduct that is specifically intended to injure a person or class of persons. Category B involves a public officer who acts with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the plaintiff. This understanding of the tort has been endorsed by a number of Canadian courts: see for example *Powder Mountain Resorts, supra*; *Alberta (Minister of Public Works, Supply and Services)* (C.A.), *supra*; and *Granite Power Corp. v. Ontario*, [2002] O.J. No. 2188 (QL) (S.C.J.). It is important, however, to recall that the two categories merely represent two different ways in which a public officer can commit the tort; in each instance, the plaintiff must prove each of the tort's constituent elements. It is thus necessary to consider the elements that are common to each form of the tort.

23 In my view, there are two such elements. First, the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff. What distinguishes one form of misfeasance in a public office from the other is the manner in which the plaintiff proves each ingredient of the tort. In Category B, the plaintiff must prove the two ingredients of the tort independently of one another. In Category A, the fact that the public officer has acted for the express purpose of harming the plaintiff is sufficient to satisfy each ingredient of the tort, owing to the fact that a public officer does not have the authority to exercise his or her powers for an improper purpose, such [page282] as deliberately harming a member of the public. In each instance, the tort involves deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injure the plaintiff.

24 Insofar as the nature of the misconduct is concerned, the essential question to be determined is not whether the officer has unlawfully exercised a power actually possessed, but whether the alleged misconduct is deliberate and unlawful. As Lord Hobhouse wrote in *Three Rivers, supra*, at p. 1269:

> The relevant act (or omission, in the sense described) must be unlawful. This may arise from a straightforward breach of the relevant statutory provisions or from acting in excess of the powers granted or for an improper purpose.

Lord Millett reached a similar conclusion, namely, that a failure to act can amount to misfeasance in a public office, but only in those circumstances in which the public officer is under a legal obligation to act. Lord Hobhouse stated the principle in the following terms, at p. 1269: "If there is a legal duty to act and the decision not to act amounts to an unlawful breach of that legal duty, the omission can amount to misfeasance [in a public office]." See also *R. v. Dytham*, [1979] Q.B. 722 (C.A.). So, in the United Kingdom, a failure to act can constitute misfeasance in a public office, but only if the failure to act constitutes a deliberate breach of official duty.

25 Canadian courts also have made a deliberate unlawful act a focal point of the inquiry. In *Alberta (Minister of Public Works, Supply and Services) v. Nilsson* (1999), 70 Alta. L.R. (3d) 267, 1999 ABQB 440, at para. 108, the Court of Queen's Bench stated that the essential question to be determined is whether there has been deliberate misconduct on the part of a public official. Deliberate misconduct, on this view, consists of: (i) an intentional illegal act; and (ii) an intent to harm an individual or class [page283] of individuals. See also *Uni-Jet Industrial Pipe Ltd. v. Canada (Attorney General)* (2001), 156 Man. R. (2d) 14, 2001 MBCA 40, in which Kroft J.A. adopted the same test. In *Powder Mountain Resorts, supra*, Newbury J.A. described the tort in similar terms, at para. 7:

> ... it may, I think, now be accepted that the tort of abuse of public office will be made out in Canada where a public official is shown either to have exercised power for the specific purpose of injuring the plaintiff (i.e., to have acted in "bad faith in the sense of the exercise of public power for an improper or ulterior motive") or to have acted "unlawfully with a mind of reckless indifference to the illegality of his act" and to the probability of injury to the plaintiff. (See Lord Steyn in *Three Rivers*, at [1231].) Thus there remains what in theory at least is a clear line between this tort on the one hand, and what on the other hand may be called negligent excess of power -- i.e., an act committed without knowledge of (or subjective recklessness as to) its unlawfulness and the probable consequences for the plaintiff. [Emphasis in original.]

Under this view, the ambit of the tort is limited not by the requirement that the defendant must have been engaged in a particular type of unlawful conduct, but by the requirement that the unlawful conduct must have been deliberate and the defendant must have been aware that the unlawful conduct was likely to harm the plaintiff.

26 As is often the case, there are a number of phrases that might be used to describe the essence of the tort. In *Garrett, supra*, Blanchard J. stated, at p. 350, that "[t]he purpose behind the imposition of this form of tortious liability is to prevent the deliberate injuring of members of the public by deliberate disregard of official duty." In *Three Rivers, supra*, Lord Steyn stated, at p. 1230, that "[t]he rationale of the tort is that in a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes." As each passage makes clear, misfeasance in a public office is not directed at a public officer who inadvertently or negligently fails adequately to discharge the obligations of his or her office: see *Three Rivers*, at p. 1273, *per* Lord [page284] Millett. Nor is the tort directed at a public officer who fails adequately to discharge the obligations of the office as a consequence of budgetary constraints or other factors beyond his or her control. A public officer who cannot adequately discharge his or her duties because of budgetary constraints has not deliberately disregarded his or her official duties. The tort is not directed at a public officer who is unable to discharge his or her obligations because of factors beyond his or her control but, rather, at a public officer who could have discharged his or her public obligations, yet wilfully chose to do otherwise.

27 Another factor that may remove an official's conduct from the scope of the tort of misfeasance in a public office is a conflict with the officer's statutory obligations and his or her constitutionally protected rights, such as the right against self-incrimination. Should such circumstances arise, a public officer's decision not to comply with his or her statutory obligation may not amount to misfeasance in a public office. I need not decide that question here except that it could be argued. A public officer who properly insists on asserting his or her constitutional rights cannot accurately be said to have deliberately disregarded the legal obligations of his or her office. Under this argument, an obligation inconsistent with the officer's constitutional rights is not itself lawful.

28 As a matter of policy, I do not believe that it is necessary to place any further restrictions on the ambit of the tort. The requirement that the defendant must have been aware that his or her conduct was unlawful reflects the well-established principle that misfeasance in a public office requires an element of "bad faith" or "dishonesty". In a democracy, public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens. Knowledge of harm is thus an insufficient basis on which to conclude that the defendant has acted in bad faith or dishonestly. A [page285] public officer may in good faith make a decision that she or he knows to be adverse to interests of certain members of the public. In order for the conduct to fall within the scope of the tort, the officer must deliberately engage in conduct that he or she knows to be inconsistent with the obligations of the office.

29 The requirement that the defendant must have been aware that his or her unlawful conduct would harm the plaintiff further restricts the ambit of the tort. Liability does not attach to each officer who blatantly disregards his or her official duty, but only to a public officer who, in addition, demonstrates a conscious disregard for the interests of those who will be affected by the misconduct in question. This requirement establishes the required nexus between the parties. Unlawful conduct in the exercise of public functions is a public wrong, but absent some awareness of harm there is no basis on which to conclude that the defendant has breached an obligation that she or he owes to the plaintiff, as an individual. And absent the breach of an obligation that the defendant owes to the plaintiff, there can be no liability in tort.

30 In sum, I believe that the underlying purpose of the tort is to protect each citizen's reasonable expectation that a public officer will not intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions. Once these requirements have been satisfied, it is unclear why the tort would be restricted to a public officer who engaged in the unlawful exercise of a statutory power that she or he actually possesses. If the tort were restricted in this manner, the tort would not extend to a public officer, such as Mr. Duplessis, who intentionally exceeded his powers for the express purpose of interfering with a citizen's economic interests. Nor would it extend to a public officer who breached a statutory obligation for the same purpose. But there is no principled reason, in my view, why a public officer who wilfully injures a member of the public [page286] through intentional abuse of a statutory power would be liable, but not a public officer who wilfully injures a member of the public through an intentional excess of power or a deliberate failure to discharge a statutory duty. In each instance, the alleged misconduct is equally inconsistent with the obligation of a public officer not to intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions.

31 I wish to stress that this conclusion is not inconsistent with *R. v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, in which the Court established that the nominate tort of statutory breach does not exist. *Saskatchewan Wheat Pool* states only that it is insufficient that the defendant has breached the statute. It does not, however, establish that the breach of a statute cannot give rise to liability if the constituent elements of tortious responsibility have been satisfied. Put a different way, the mere fact that the alleged misconduct also constitutes a breach of statute is insufficient to exempt the officer from civil liability. Just as a public officer who breaches a statute might be liable for negligence, so too might a public officer who breaches a statute be liable for misfeasance in a public office. *Saskatchewan Wheat Pool* would only be relevant to this motion if the appellants had pleaded no more than a failure to discharge a statutory obligation. This, however, is not the case. The principle established in *Saskatchewan Wheat Pool* has no bearing on the outcome of the motion on this appeal.

32 To summarize, I am of the opinion that the tort of misfeasance in a public office is an intentional tort whose distinguishing elements are twofold: (i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. Alongside deliberate unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts. More specifically, [page287] the plaintiff must prove that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law.

(2) Application to the Case at Hand

33 As outlined earlier, on a motion to strike on the basis that the statement of claim discloses no reasonable cause of action, the facts are taken as pleaded. Consequently, the primary question that arises on this appeal is whether the statement of claim pleads each of the constituent elements of the tort.

34 In respect of the first constituent element, namely, unlawful conduct in the exercise of public functions, the statement of claim alleges that the defendant officers did not cooperate with the SIU investigation, but, rather, took positive steps to frustrate the investigation. As described above, police officers are under a statutory obligation to cooperate fully with members of the SIU in the conduct of investigations, pursuant to s. 113(9) of the *Police Services Act*. On the face of it, the decision not to cooperate with an investigation constitutes an unlawful breach of statutory duty. Similarly, the alleged failure of the Chief to ensure that the defendant officers cooperated with the

investigation also would seem to constitute an unlawful breach of duty. Under s. 41(1)(b) of the *Police Services Act*, the duties of a chief of police include ensuring that members of the police force carry out their duties in accordance with the Act. A decision not to ensure that police officers cooperate with the SIU is inconsistent with the statutory obligations of the office.

35 As discussed above, an obligation inconsistent with a public officer's constitutional rights cannot give rise to misfeasance in a public office. It is arguable that the statutory obligation to cooperate fully with the members of the SIU cannot trump a police officer's constitutional right against self-incrimination. I do not need to answer this question because it has not been argued that the SIU's requests were inconsistent with the officers' [page288] constitutional rights. Nor has it been argued that the alleged misconduct, which includes submitting inaccurate and misleading shift notes and disobeying an order to remain segregated, is privileged by the right against self-incrimination. As a consequence, it is not "plain and obvious" that the officers were faced with a stark choice between complying with the SIU's requests and abandoning their right against self-incrimination, either as a matter of fact or law. The potential conflict between the duty to cooperate with the SIU and the right against self-incrimination cannot be relied on to dismiss the action at this stage of the proceedings.

36 Insofar as the second requirement is concerned, the statement of claim alleges that the acts and omissions of the defendant officers "represented intentional breaches of their legal duties as police officers". This plainly satisfies the requirement that the officers were aware that the alleged failure to cooperate with the investigation was unlawful. The allegation is not simply that the officers failed to comply with s. 113(9) of the *Police Services Act*, but that the failure to comply was intentional and deliberate. Insofar as the Chief is concerned, the statement of claim alleges as follows:

> (i) Chief Boothby, through his legal counsel, was directed by S.I.U. officers to segregate the defendant officers and he deliberately failed to do so;
>
> (ii) Chief Boothby failed to ensure that defendant police officers produced timely and complete notes;
>
> (iii) Chief Boothby failed to ensure that the defendant police officers attended for requested interviews by S.I.U. in a timely manner; and
>
> (iv) Chief Boothby failed to ensure that the defendant police officers gave accurate and complete accounts of the specifics of the shooting incident.

37 Although the allegation that the Chief deliberately failed to segregate the officers satisfies the requirement that the Chief intentionally breached [page289] his legal obligation to ensure compliance with the *Police Services Act*, the same cannot be said of his alleged failure to ensure that the defendant officers produced timely and complete notes, attended for interviews in a timely manner, and provided accurate and complete accounts of the incident. As above, inadvertence or negligence will not suffice; a mere failure to discharge the obligations of the office cannot constitute misfeasance in a public office. In light of the allegation that the Chief's failure to segregate the officers was deliberate, this is not a sufficient basis on which to strike the pleading. Suffice it to say, the failure to issue orders for the purpose of ensuring that the defendant officers cooperated with the investigation will only constitute misfeasance in a public office if the plaintiffs prove that the Chief deliberately failed to comply with the standard established by s. 41(1)(b) of the *Police Services Act*.

38 The statement of claim also alleges that the defendant officers and the Chief "knew or ought to have known" that the alleged misconduct would cause the plaintiffs to suffer physically, psychologically and emotionally. Although the allegation that the defendants knew that a failure to cooperate with the investigation would injure the plaintiffs satisfies the requirement that the alleged misconduct was likely to injure the plaintiffs, misfeasance in a public office is an intentional tort that requires subjective awareness that harm to the plaintiff is a likely consequence of the alleged misconduct. At the very least, according to a number of cases, the defendant must have been subjectively reckless or wilfully blind as to the possibility that harm was a likely consequence of the alleged misconduct: see for example *Three Rivers, supra*; *Powder Mountain Resorts, supra*; and *Alberta (Minister of Public Works, Supply and Services)* (C.A.), *supra*. This, again, is not a sufficient basis on which to strike the pleading. It is clear, however, that the phrase "or ought to have known" must be struck from the statement of claim.

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39 The final factor to be considered is whether the damages that the plaintiffs claim to have suffered as a consequence of the aforementioned misconduct are compensable. In the defendant officers' submission, the alleged damages are non-compensable. Consequently, it is their submission that even if the plaintiffs could prove the other elements of the tort, it still would be plain and obvious that the actions for misfeasance in a public office must fail.

40 In the defendant officers' submission, the essence of the plaintiffs' claim is that they were deprived of a thorough, competent and credible investigation. And owing to the fact that no individual has a private right to a thorough, competent and credible criminal investigation, the plaintiffs have suffered no compensable damages. If this were an accurate assessment of the plaintiffs' claim, I would agree. Individual citizens might desire a thorough investigation, or even that the investigation result in a certain outcome, but they are not entitled to compensation in the absence of a thorough investigation or if the desired outcome fails to materialize. This, however, is not an accurate assessment of the plaintiffs' submission. In their statement of claim, the plaintiffs also allege that they have suffered physically, psychologically and emotionally, in the form of mental distress, anger, depression and anxiety as a direct result of the defendant officers' failure to cooperate with the SIU.

41 Although courts have been cautious in protecting an individual's right to psychiatric well-being, compensation for damages of this kind is not foreign to tort law. As the law c urrently stands, that the appellant has suffered grief or emotional distress is insufficient. Nevertheless, it is well established that compensation for psychiatric damages is available in instances in which the plaintiff suffers from a "visible and provable illness" or "recognizable physical or psychopathological harm": see for example *Guay v. Sun Publishing Co.*, [1953] 2 S.C.R. 216, and *Frame v. Smith*, [1987] 2 S.C.R. 99. Consequently, even if the plaintiffs could prove that they had suffered psychiatric damage, in the form of anxiety or [page291] depression, they still would have to prove both that it was caused by the alleged misconduct and that it was of sufficient magnitude to warrant compensation. But the causation and magnitude of psychiatric damage are matters to be determined at trial. At the pleadings stage, it is sufficient that the statement of claim alleges that the plaintiffs have suffered mental distress, anger, depression and anxiety as a consequence of the alleged misconduct.

42 In the final analysis, I would allow the appeal in respect of the actions for misfeasance in a public office. If the facts are taken as pleaded, it is not plain and obvious that the actions for misfeasance in a public office against the defendant officers and the Chief must fail. The plaintiffs may well face an uphill battle, but they should not be deprived of the opportunity to prove each of the constituent elements of the tort.

C. *The Actions for Negligence*

43 In addition to the actions for misfeasance in a public office, the statement of claim includes actions for negligence against the Chief, the Board and the Province. The essence of these claims is that the Chief, the Board and the Province are liable as a consequence of their failure to ensure that the defendant officers complied with s. 113(9) of the *Police Services Act*.

44 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 to ensure that the defendant officers cooperated with the SIU investigation. If the defendants are under no such obligation, the actions for negligence cannot [page292] succeed. After discussing the general principles applicable to the duty of care analysis, I will go on to discuss this approach in the context of the negligence actions against the Chief, the Board and the Province. I will also address the defendants' submission that complained of harm is non-compensable.

(1) The Duty of Care

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.

See for example *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2; *B.D.C. Ltd. v. Hofstrand Farms Ltd.*, [1986] 1 S.C.R. 228; *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021; *London Drugs Ltd. v. Kuehne & [page293] Nagel International Ltd.*, [1992] 3 S.C.R. 299; *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85; and *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79.

47 The first stage of analysis, then, demands an inquiry into whether there is a sufficiently close relationship between the plaintiff and defendant that the defendant owes to the plaintiff a *prima facie* duty of care. The question of when such a duty arises is one with which this Court and others have repeatedly grappled since Lord Atkin enunciated the neighbour principle in *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.), at p. 580 :

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be -- persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

As eloquently observed by Professor J. G. Fleming, this passage is a sacrosanct preamble to judicial disquisitions on duty, yet contains a fateful ambiguity: *The Law of Torts* (9th ed. 1998), at p. 151. More specifically, does the reference to persons so closely and directly affected by the conduct in question that the defendant ought reasonably to have had them in contemplation conflate foreseeability of harm and duty? Or does it require something in addition to foreseeability of harm?

48 In *Cooper, supra*, the Court clearly stated that the latter approach is the correct one. At para. 29 of their joint reasons, McLachlin C.J. and Major J. stated that there must be reasonable foreseeability of harm "plus something more". At para. 31, they concluded that this "something more" is proximity: in order to establish that the defendant owed the plaintiff a duty of care, the reasonable foreseeability of harm must be supplemented by proximity. It is only if harm is a [page294] reasonably foreseeable consequence of the conduct in question and there is a sufficient degree of proximity between the parties that a *prima facie* duty of care is established. The question that thus arises is what precisely is meant by the term proximity.

49 McLachlin C.J. and Major J. concluded, at para. 32, that the term "proximity" , in the context of negligence law, is used to describe the type of relationship in which a duty of care to guard against foreseeable harm may rightly be imposed. As this Court stated in *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 24:

> The label "proximity", as it was used by Lord Wilberforce in *Anns, supra*, was clearly intended to connote that the circumstances of the relationship inhering between the plaintiff and the defendant are of such a

nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs.

50 Consequently, the essential purpose of the inquiry is to evaluate the nature of that relationship in order to determine whether it is just and fair to impose a duty of care on the defendant. The factors that are relevant to this inquiry depend on the circumstances of the case. As stated by McLachlin J. (as she then was) in *Norsk, supra*, at p. 1151, "[p]roximity may be usefully viewed, not so much as a test in itself, but as a broad concept which is capable of subsuming different categories of cases involving different factors" (cited with approval in *Hercules Managements, supra*, at para. 23, and *Cooper, supra*, at para. 35). Examples of factors that might be relevant to the inquiry include the expectations of the parties, representations, reliance and the nature of the property or interest involved.

51 The second stage of the *Anns* test requires the trial judge to consider whether there exist any residual policy considerations that ought to negative or reduce the scope of the duty or the class of persons to whom it is owed. In *Cooper*, McLachlin C.J. [page295] and Major J. wrote, at para. 37, that this stage of the analysis is not concerned with the relationship between the parties but, rather, with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. At this stage of the analysis, the question to be asked is whether there exist broad policy considerations that would make the imposition of a duty of care unwise, despite the fact that harm was a reasonably foreseeable consequence of the conduct in question and there was a sufficient degree of proximity between the parties that the imposition of a duty would not be unfair.

(2) Application of the *Anns* Test

52 The essence of the appellants' claim is that the Chief, the Board and the Province breached a duty to take reasonable care to ensure that the defendant officers complied with their legal obligation to cooperate with the SIU investigation. In order for this to give rise to an action in negligence, it must first be true that the defendants owed the appellants a duty to take such care. On the analysis above, this requires the Odhavji family to establish each of the following: (i) that the harm complained of is a reasonably foreseeable consequence of the alleged breach; (ii) that there is sufficient proximity between the parties that it would not be unjust or unfair to impose a duty of care on the defendants; and (iii) that there exist no policy reasons to negative or otherwise restrict that duty. If the defendants did not owe such a duty to the appellants, it is plain and obvious that the actions for negligence cannot succeed.

(i) *Police Chief Boothby*

53 The conclusion that the harm complained of is a reasonably foreseeable consequence of the Chief's conduct is dependent on the prior conclusion that it is a reasonably foreseeable consequence of an inadequate investigation into the shooting incident. [page296] If it is not reasonably foreseeable that the plaintiffs would suffer psychiatric harm as a consequence of an inadequate investigation into the incident, it is not reasonably foreseeable that the Chief's failure to ensure that the defendant officers' failure to cooperate with the SIU would injure the plaintiffs.

54 It is not immediately clear, in my view, that this initial threshold has been satisfied. Although it is to be expected that an inadequate investigation would distress or anger the close relatives of Mr. Odhavji, it is less obvious that this distress or anger would rise to the level of compensable psychiatric harm. Nevertheless, I do not think it "plain and obvious" that such harm is an unforeseeable consequence of the defendant officers' failure to cooperate with the investigation. The task might be a difficult one, but the appellants should not be deprived of the opportunity to prove that the complained of harm is a reasonably foreseeable consequence of a truncated or otherwise inadequate investigation into the shooting incident. It is reasonably foreseeable that the officers' failure to cooperate with the SIU investigation would harm the appellants. As the Chief was responsible for ensuring that the officers cooperated with the SIU investigation, it is reasonably foreseeable that the Chief's failure to do so would also harm the appellants.

55 The next question that arises is whether there is sufficient proximity between the parties that a duty of care may rightly be imposed on the Chief. It may be that the appellants can show that it was reasonably foreseeable that the

alleged misconduct would result in psychiatric harm, but foreseeability alone is an insufficient basis on which to establish a *prima facie* duty of care. In addition to showing foreseeability, the appellants must establish that it is just and fair to impose on the Chief a private law obligation to ensure that the defendant officers cooperated with the SIU. A broad range of factors may be relevant to this inquiry, including a close causal connection, the parties' expectations and any assumed or imposed obligations. See for example *Norsk, supra*, at p. 1153; *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860, [page297] 2000 SCC 60, at paras. 51-52; and *Cooper, supra*, at para. 35.

56 In the present case, one factor that supports a finding of proximity is the relatively direct causal link between the alleged misconduct and the complained of harm. As discussed above, the duties of a chief of police include ensuring that the members of the force carry out their duties in accordance with the provisions of the *Police Services Act*. In those instances in which a member of the public is injured as a consequence of police misconduct, there is an extremely close causal connection between the negligent supervision and the resultant injury: the failure of the chief of police to ensure that the members of the force carry out their duties in accordance with the provisions of the *Police Services Act* leads directly to the police misconduct, which, in turn, leads directly to the complained of harm. The failure of the Chief to ensure the defendant officers cooperated with the SIU is thus but one step removed from the complained of harm. Although a close causal connection is not a condition precedent of liability, it strengthens the nexus between the parties.

57 A second factor that strengthens the nexus between the Chief and the Odhavjis is the fact that members of the public reasonably expect a chief of police to be mindful of the injuries that might arise as a consequence of police misconduct. Although the vast majority of police officers in our country exercise their powers responsibly, members of the force have a significant capacity to affect members of the public adversely through improper conduct in the exercise of police functions. It is only reasonable that members of the public vulnerable to the consequences of police misconduct would expect that a chief of police would take reasonable care to prevent, or at least to discourage, members of the force from injuring members of the public through improper conduct in the exercise of police functions.

58 Finally, I also believe it noteworthy that this expectation is consistent with the statutory obligations [page298] that s. 41(1)(b) of the *Police Services Act* imposes on the Chief. Under s. 41(1)(b), the Chief is under a freestanding statutory obligation to ensure that the members of the force carry out their duties in accordance with the provisions of the *Police Services Act* and the needs of the community. This includes an obligation to ensure that members of the police force do not injure members of the public through misconduct in the exercise of police functions. The fact that the Chief already is under a duty to ensure compliance with an SIU investigation adds substantial weight to the position that it is neither unjust nor unfair to conclude that the Chief owed to the plaintiffs a duty of care to ensure that the defendant officers did, in fact, cooperate with the SIU investigation.

59 In light of the above factors, I conclude that the circumstances of the case satisfy the first stage of the *Anns* test and raise a *prima facie* duty of care. If it is reasonably foreseeable that the defendant officers' decision not to cooperate with the SIU would injure the plaintiffs, a private law obligation to ensure that the officers cooperate with the SIU is rightly imposed on the Chief. Consequently, the only issue that is left to consider is whether there exist any broad policy considerations that ought to negative the *prima facie* obligation of the Chief to prevent the misconduct.

60 Counsel for the Chief submits that imposing a private law duty on the Chief to ensure that the officers cooperate with the investigation would compromise the independence of the SIU. It is difficult to see how this is the case, particularly as the Chief already is under a statutory obligation to ensure such cooperation. Imposing a duty of care on the Chief to ensure that members of the force cooperate with the SIU would have no bearing on the capacity of the SIU to determine how or in what circumstances to conduct such an investigation. Counsel for the Chief also submits that another factor to consider is the availability of alternative remedies, namely, the public complaints process that allows members of the public to complain in respect of the conduct of [page299] a police officer. What the appellants seek, though, is not the opportunity to file a complaint that might result in the imposition of disciplinary sanctions but, rather, compensation for the psychological harm that they have suffered as a

consequence of the Chief's inadequate supervision. The public complaints process is no alternative to liability in negligence.

61 In short, I believe that it would be inappropriate to strike the action for negligent supervision against the Chief on the basis that he did not owe the plaintiffs a duty of care. If the plaintiffs can establish that the complained of harm is a reasonably foreseeable consequence of the Chief's failure to ensure that the defendant officers cooperated with the SIU, the Chief was under a private law duty of care to take reasonable care to prevent such misconduct. The cross-appeal against the Court of Appeal's decision to allow the action in negligence against Police Chief Boothby to proceed is therefore dismissed.

(ii) *Metropolitan Toronto Police Services Board*

62 The plaintiffs do not allege that the Board was under a private law obligation to ensure that the defendant officers in this appeal cooperated with the SIU investigation into the allegedly wrongful death of Mr. Odhavji. Rather, the basis of the action is that the Board breached a duty of care to ensure that police officers, as a matter of general practice, cooperate with SIU investigations. The duty of care is owed not to the Odhavjis in particular, but to the family of a person harmed by the police.

63 The first question to answer is whether it is reasonably foreseeable that the family of a person harmed by the police would suffer acute anxiety or depression as a consequence of the Board's failure to enact additional policies or training procedures for the purpose of ensuring that police officers cooperate with the SIU. But, once again, foreseeability [page300] alone is insufficient. Even if it is reasonably foreseeable that the Board's decision not to enact additional procedures would exacerbate the allegedly systematic failure of the police officers to cooperate with the SIU, and that this, in turn, would cause the families of persons harmed by the police to suffer psychiatric harm, it still must be determined whether the Board is under a private law duty to ensure that members of the force, as a matter of general practice, cooperate with the SIU. For the reasons that follow, I am of the view that the Board is under no such duty.

64 The first factor that I consider is the lack of a close causal connection between the alleged misconduct and the complained of harm. As discussed earlier, the fact that a chief of police is in a direct supervisory relationship with members of the force gives rise to a certain propinquity between the Chief and the Odhavjis; the close connection between the Chief's inadequate supervision and the officers' subsequent failure to cooperate with the SIU establishes a nexus between the Chief and the individuals who are injured as a consequence of the officers' misconduct. The Board, however, is much further in the background than the Chief. Unlike the Chief, the Board does not directly involve itself in the day-to-day conduct of police officers, but, rather, implements general policy and monitors the performance of the various chiefs of police. The Board does not supervise members of the force, but, rather, supervises the Chief (who, in turn, supervises members of the force). This lack of involvement in the day-to-day conduct of the police force weakens substantially the nexus between the Board and members of the public injured as a consequence of police misconduct.

65 A second factor that distinguishes the Board from the Chief is the absence of a statutory obligation to ensure that members of the police force cooperate with the SIU. As discussed earlier, the express duties of the Chief include ensuring that members of the force comply with s. 113(9) of the *Police Services Act*. Under s. 31(1), the Board is responsible for the provision of adequate and effective police services, but is not under an express [page301] obligation to ensure that members of the force carry out their duties in accordance with the *Police Services Act*. The absence of such an obligation is consistent with the general tenor of s. 31(1), which provides the Board with a broad degree of discretion to determine the policies and procedures that are necessary to provide adequate and effective police services. A few enumerated exceptions aside, the Board is free to determine what objectives to pursue, and what policies to enact in pursuit of those objectives.

66 It is possible, I concede, that circumstances might arise in which the Board is required to address a particular problem in order to discharge its statutory obligation to provide adequate and effective police services. If there was evidence, for example, of a widespread problem in respect of the excessive use of force in the detention of visible

minorities, the Board arguably is under a positive obligation to combat racism and the resultant use of excessive force. But as a general matter, courts should be loath to interfere with the Board's broad discretion to determine what objectives and priorities to pursue, or what policies to enact in pursuit of those objectives. Suffice it to say, the Board's decision not to enact additional policies or training procedures in respect of s. 113(9) does not constitute a breach of its obligation to provide "adequate and effective" police services.

67 Considered against this backdrop, I conclude that the circumstances of the relationship inhering between the plaintiff and the defendant are not such that a duty of care to ensure that members of the police force cooperate with the SIU may rightly be imposed. The appeal against the Court of Appeal's decision to strike the action against the Board is dismissed.

(iii) *The Province*

68 As with the Board, the plaintiffs do not allege that the Province, through the Solicitor General, was under a private law obligation to ensure that [page302] the defendant officers in this appeal cooperated with the investigation into the allegedly wrongful death of Mr. Odhavji. Rather, the basis of the action is that the Province breached a private law obligation to institute policies and training procedures for the purpose of ensuring that members of the force, as a matter of general practice, cooperate with the SIU. Owing to the fact that my conclusions in respect of the action against the Province mirror my conclusions in respect of the action against the Board, the following analysis is fairly brief.

69 As above, I am not certain that it is reasonably foreseeable that the Solicitor General's decision not to institute further policies and training procedures in respect of s. 113(9) would cause the families of persons harmed by the police to suffer compensable psychiatric harm. This, however, is a matter that is properly addressed at trial. But even if it is reasonably foreseeable that the failure of the Solicitor General to institute further policies and training procedures in respect of s. 113(9) would cause the families of persons harmed by the police to suffer compensable psychiatric harm, there is insufficient proximity between the parties to conclude that the Province is under a private law obligation to ensure that members of the force comply with s. 113(9) of the *Police Services Act*.

70 Like the Board, the Province is not directly involved in the day-to-day conduct of members of the police force. Whereas the Police Chief is in a direct supervisory relationship with members of the force, the Solicitor General's involvement in the conduct of police officers is limited to a general obligation to monitor boards and police forces to ensure that adequate and effective police services are provided and to develop and promote programs to enhance professional police practices, standards and training. Like the Board, the Province is very much in the background, perhaps even more so. The lack of any direct involvement in the day-to-day conduct of members of the force substantially weakens the nexus between the Province and the [page303] plaintiffs. The Province simply is too far removed from the day-to-day conduct of members of the force to be under a private law obligation to ensure that members of the force cooperate with the SIU.

71 This lack of any direct involvement in the day-to-day conduct of police officers is compounded by the fact that the responsible minister is not under a statutory obligation to ensure that police officers cooperate with the SIU . Under s. 3(2) of the *Police Services Act*, the Solicitor General is under a general duty to monitor police forces to ensure that adequate and effective police services are provided. It is not, however, under an obligation to ensure that members of the force carry out their duties in accordance with the *Police Services Act* and the needs of the community. Although I do not foreclose the possibility that s. 3(2) might give rise to a statutory obligation to address widespread or systemic misconduct of a particularly serious nature, the circumstances of this case do not give rise to such an obligation. The Solicitor General's decision not to enact additional policies or training procedures in respect of s. 113(9) does not constitute a breach of his duty to ensure that the Board provides "adequate and effective" police services in the municipality.

72 For the above reasons, it is my conclusion that the Province does not owe to the plaintiffs a duty of care. Absent a more direct involvement in the day-to-day conduct of police officers or a statutory obligation to ensure that members of the force comply with s. 113(9), it would be improper to impose on the Province a private law obligation

to ensure that members of the police force cooperate with the SIU. The appeal against the Court of Appeal's decision to strike the action against the Province is dismissed.

(3) Damages

73 The final factor to consider is the defendants' submission that the alleged injuries are non-compensable. Consequently, it is their submission [page304] that even if it is established that the defendants owed the plaintiffs a duty of care, it is still plain and obvious that the actions for negligence must fail.

74 As discussed in the context of the actions for misfeasance in a public office, courts have been cautious in protecting an individual's right to psychiatric well-being, but it is well established that compensation for psychiatric damages is available in instances in which the plaintiff suffers a "visible and provable illness" or "recognizable physical or psychopathological harm". At the pleadings stage, it is sufficient that the statement of claim alleges mental distress, anger, depression and anxiety as a consequence of the defendant's negligence. Causation and the magnitude of psychiatric damage are matters to be determined at trial.

D. *The Court of Appeal's Costs Award*

75 A final issue to consider is the Court of Appeal's decision to follow the usual rule that the successful party is entitled to costs. In the plaintiffs' submission, it was improper for the Court of Appeal to award costs to the defendant officers and the Province. By the consent of the parties, a "no-costs" order was made in respect of the actions against the Chief and the Board. The plaintiffs submit that they are public interest litigants and should not have been required to pay costs.

76 Although circumstances might arise in which there are cogent arguments for departing from the normal cost rules, I have difficulty conceptualizing the plaintiffs in the present appeal as public interest litigants. In the plaintiffs' own submissions, there are typically two types of public interest litigants: (i) litigants who have no direct pecuniary or other material interest in the proceedings (e.g., a non-profit organization); and (ii) litigants who do have a pecuniary interest, but whose interest is modest in comparison to the cost of the proceedings. The plaintiffs in the present case do not fit into either [page305] category -- and thus do not fit their own definition of a public interest litigant. Indeed, it is difficult to regard a plaintiff who is seeking several millions of dollars in damages as a public interest litigant. The fact that the actions involve public authorities and raise issues of public interest is insufficient to alter the essential nature of the litigation.

77 Moreover, under rule 57.01(1) of the *Rules of Civil Procedure*, costs awarded in a proceeding are a matter of discretion for the court. Consequently, this Court should not interfere with a lower court's exercise of that discretion unless there is a clear and compelling reason for doing so. See for example *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315. In the present case, there is no such basis on which to interfere with the Court of Appeal's decision to award costs in accordance with the usual rule that the successful party is entitled to costs.

V. Disposition

78 In the result, the appeal against the Court of Appeal's decision to strike the actions for misfeasance in a public office is allowed. The judgment of the Court of Appeal is set aside, and an order will issue striking the phrase "or ought to have known" from the amended statement of claim. The cross-appeal against the Court of Appeal's decision to allow the action in negligence in respect of the SIU investigation against the Chief to proceed is dismissed, as is the appeal against the Court of Appeal's decision to strike the actions in negligence in respect of the SIU investigation against the Board and the Province. Although success has been divided, the plaintiffs have achieved a significant success in respect of the actions against the defendant officers and the Chief. Accordingly, I would award costs to the plaintiffs in this Court.

[page306]

Solicitors

Solicitors for the appellants/respondents on cross-appeal: Falconer Charney Macklin, Toronto.

Solicitors for the respondents Woodhouse and Gerrits: Borden Ladner Gervais, Toronto.

Solicitors for the respondent/appellant on cross-appeal the Metropolitan Toronto Chief of Police David Boothby and the respondent the Metropolitan Toronto Police Services Board: City of Toronto, Toronto.

Solicitor for the respondent Her Majesty the Queen in Right of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Vancouver.

Solicitors for the intervener the Canadian Civil Liberties Association: Torys, Toronto.

Solicitors for the intervener the Urban Alliance on Race Relations: Fasken Martineau DuMoulin, Toronto.

Solicitors for the intervener the African Canadian Legal Clinic: African Canadian Legal Clinic, Toronto.

Solicitor for the intervener the Mental Health Legal Committee: Suzan E. Fraser, Toronto.

Solicitors for the intervener the Association in Defence of the Wrongfully Convicted: Sack Goldblatt Mitchell, Toronto.

Solicitors for the intervener the Innocence Project of Osgoode Hall Law School: Ruby & Edwardh, Toronto.

Operation Dismantle Inc. v. Canada, [1985] 1 S.C.R. 441

Supreme Court Reports

Supreme Court of Canada

Present: Ritchie *, Dickson, Estey, McIntyre, Chouinard, Lamer and Wilson JJ.

1984: February 14, 15 / 1985: May 9.

File No.: 18154.

[1985] 1 S.C.R. 441 | [1985] 1 R.C.S. 441 | [1985] S.C.J. No. 22 | [1985] A.C.S. no 22 | 1985 CanLII 74

Operation Dismantle Inc., Canadian Union of Public Employees, Canadian Union of Postal Workers, National Union of Provincial Government Employees, Ontario Federation of Labour, Arts for Peace, Canadian Peace Research and Education Association, World Federalists of Canada, Alberni Valley Coalition for Nuclear Disarmament, Comox Valley Nuclear Responsibility Society, Cranbrook Citizens for Nuclear Disarmament, Peace Education Network, Windsor Coalition for Disarmament, Union of Spiritual Communities of Christ Committee for World Disarmament and Peace, Against Cruise Testing Coalition, B.C. Voice of Women, National Action Committee on the Status of Women, Carman Nuclear Disarmament Committee, Project Survival, Denman Island Peace and Nuclear Disarmament, Muskoka Peace Group, Global Citizens' Association, Physicians for Social Responsibility (Montreal Branch), appellants; and Her Majesty The Queen, The Right Honourable Prime Minister, The Attorney General of Canada, The Secretary of State for External Affairs, The Minister of Defence, respondents.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

* Ritchie J. took no part in the judgment.

Case Summary

Constitutional law — Canadian Charter of Rights and Freedoms — Right to life, liberty and security of person — U.S. cruise missile testing in Canada — Testing alleged to increase risk of nuclear war in violation of that right — Motion to strike out — Whether or not facts as alleged in violation of Charter — Canadian [page442] Charter of Rights and Freedoms, ss. 1, 7, 24(1), 32(1)(a) — Constitution Act, 1982, s. 52(1).

Jurisdiction — Judicial review — Cabinet decision relating to national defence and external affairs — Whether or not decision reviewable by courts.

Practice — Motion to strike — U.S. cruise missile tests alleged to increase risk of nuclear war in violation of s. 7 of Charter — Whether or not statement of claim should he struck out — Whether or not statement of claim can he amended before statement of defence filed — Federal Court Rules, Rules 419(1), 421, 1104, 1723.

This appeal is from a judgment of the Federal Court of Appeal which allowed respondents' appeal from a judgment dismissing their motion to strike out the appellants' statement of claim.

Appellants alleged that a decision made by the Government of Canada to allow the United States to test cruise missiles in Canada violated s. 7 of the Charter. The development of the cruise missile, it was argued, heightened the risk of nuclear war and the increased American military presence and interest in Canada as a result of the testing allegedly made Canada more likely to be a target for nuclear attack. Declaratory relief, an injunction and damages were sought.

Held: The appeal should be dismissed.

Per Dickson C.J., Estey, McIntyre, Chouinard and Lamer JJ.: The appellants' statement of claim should be struck out and their cause of action dismissed. The statement of claim does not disclose facts which, if taken as true, would prove that the Canadian government's decision to permit the testing of the cruise missile in Canada could cause a violation or a threat of violation of their rights under s. 7 of the Charter.

The principal allegation of the statement of claim is that the testing of the cruise missile in Canada poses a threat to the lives and security of Canadians by increasing the risk of nuclear conflict and thereby violates the right to life, liberty and security of the person. This alleged violation of s. 7 turns upon an actual increase in the risk of nuclear war resulting from the federal cabinet's decision to permit the testing. This allegation is premised upon assumptions and hypotheses about how independent and sovereign nations, operating in an international arena of uncertainty and change, will react to the Canadian government's decision to permit the testing of the cruise. Since the foreign policy decisions of independent nations are not capable of prediction on the [page443] basis of evidence to any degree of certainty approaching probability, the nature of the reaction to the federal cabinet's decision to permit the testing can only he a matter of speculation. The appellants could never prove the causal link between the decision to permit the testing and the increase in the threat of nuclear conflict.

Cabinet decisions are reviewable by the Courts under s. 32(1)(a) of the Charter and the executive branch of the Canadian government bears a general duty to act in accordance with the dictates of the Charter. The decision to permit the testing of the cruise missile cannot be considered contrary to the duties of the executive since the possible effects of this government action are matters of mere speculation. Section 7 could only give rise to a duty on the part of the executive to refrain from permitting the testing if it could be said that a deprivation of life or security of the person could be proven to result from the impugned government act.

Per Wilson J.: The government's decision to allow the testing of the U.S. cruise missile in Canada, even although an exercise of the royal prerogative, was reviewable by the courts under s. 32(1)(a) of the Charter. It was not insulated from review because it was a "political question" since the Court had a constitutional obligation under s. 24 of the Charter to decide whether any particular act of the executive violated or threatened to violate any right of the citizen.

On a motion to strike out a statement of claim as disclosing no reasonable cause of action, the court must take the allegations of fact therein as proved. If such allegations raise a justiciable issue the court cannot abdicate its responsibility for review on the basis of anticipated problems of proof.

This statement of claim was struck, notwithstanding the general hesitancy of the courts to strike, because the facts disclosed no reasonable cause of action (1) under s. 24(1) of the Charter, (2) under s. 52(1) of the Constitution Act, 1982 or (3) under the common law power to grant declaratory relief. To succeed in their claim for relief under s. 24 of the Charter the plaintiffs would have to establish a violation or threat of violation of their right under s. 7 of the Charter. To obtain a declaration of unconstitutionality under s. 52(1) of the Constitution Act, 1982, the plaintiffs would have to show that the government's decision to test the cruise missile in Canada was inconsistent with their right [page444] under s. 7. To obtain declaratory relief at common law, they would have to establish a violation or threatened violation of their right under s. 7.

The government's decision to test the cruise missile in Canada does not give rise to a violation or threatened violation of the plaintiffs' right under s. 7. Even an independent, substantive right to life, liberty and security of the person cannot be absolute. It must take account of the corresponding rights of others and of the right of the state to protect the collectivity as well as the individual against external threats. The central concern of the section is direct impingement by government upon the life, liberty and personal security of individual citizens. It does not extend to incidental effects of governmental action in the field of inter-state relations.

There is at the very least a strong presumption that governmental action concerning the relation of the state with

other states, and not directed at any member of the immediate political community, was never intended to be caught by s. 7 even although such action may incidentally increase the risk of death or injury that individuals generally have to face.

Section 1 of the Charter was not called into operation here given the finding that the facts as alleged could not constitute a violation of s. 7.

Since the application to amend the statement of claim was filed after the Crown instituted its appeal, the application was made "during the pendency of an appeal" to which the Rules of the Federal Court of Appeal applied. Appellants' right under Rule 421 had therefore expired and their only recourse was to proceed under Rule 1104.

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APPEAL from a judgment of the Federal Court of Appeal, [1983] 1 F.C. 745, 49 N.R. 363, allowing an appeal from a judgment of Cattanach J., [1983] 1 F.C. 429, dismissing a motion to strike out. Appeal dismissed.
Gordon F. Henderson, Q.C., Lawrence Greenspon and Emilio Binavince, for the appellants. W.I.C. Binnie, Q.C., and Graham R. Garton, for the respondents.

Solicitors for the appellants: Karam, Tannis, Greenspon, Vanier. Solicitor for the respondents: R. Tassé, Ottawa.

[page447]

[Quicklaw note: An erratum was published at [1986] 1 S.C.R., page iv. The change indicated therein has been made to the text below and the text of the errata as published in S.C.R. is appended to the judgment.]

The judgment of Dickson C.J., Estey, McIntyre, Chouinard and Lamer JJ. was delivered by

DICKSON J.

1 This case arises out of the appellants' challenge under s. 7 of the Canadian Charter of Rights and Freedoms to the decision of the federal cabinet to permit the testing of the cruise missile by the United States of America in Canadian territory. The issue that must be addressed is whether the appellants' statement of claim should be struck out, before trial, as disclosing no reasonable cause of action. In their statement of claim, the appellants seek: (i) a declaration that the decision to permit the testing of the cruise missile is unconstitutional; (ii) injunctive relief to prohibit the testing; and (iii) damages. Cattanach J. of the Federal Court, Trial Division, refused the respondents' motion to strike. The Federal Court of Appeal unanimously allowed the respondents' appeal, struck out the statement of claim and dismissed the appellants' action.

2 The facts and procedural history of this case are fully set out and discussed in the reasons for judgment of Madame Justice Wilson. I agree with Madame Justice Wilson that the appellants' statement of claim should be struck out and this appeal dismissed. I have reached this conclusion, however, on the basis of reasons which differ somewhat from those of Madame Justice Wilson.

3 In my opinion, if the appellants are to be entitled to proceed to trial, their statement of claim must disclose facts, which, if taken as true, would show that the action of the Canadian government could cause an infringement of their rights under s. 7 of the Charter. I have concluded that the causal link between the actions of the Canadian government, and the alleged violation of appellants' rights under the Charter is simply too uncertain, speculative and hypothetical to sustain a cause of action. Thus, although decisions of the federal cabinet are reviewable by the courts under the Charter, and the government bears a general [page448] duty to act in accordance with the Charter's dictates, no duty is imposed on the Canadian government by s. 7 of the Charter to refrain from permitting the testing of the cruise missile.

I

The Appellants' Statement of Claim

4 The relevant portion of the appellants' statement of claim is found in paragraph 7 thereof. The deprivation of s. 7 Charter rights alleged by the appellants and the facts they advance to support this deprivation are described as follows:

> 7. The plaintiffs state and the fact is that the testing of the cruise missile in Canada is a violation of the collective rights of the Plaintiffs and their members and all Canadians, specifically their right to security of the person and life in that:
>
> (a) the size and eventual dispersion of the air-launched cruise missile is such that the missile cannot be detected by surveillance satellites, thus making verification of the extent of this nuclear weapons system impossible;
>
> (b) with the impossibility of verification, the future of nuclear weapons' control and limitation agreements is completely undermined as any such agreements become practically unenforceable;
>
> (c) the testing of the air-launched cruise missiles would result in an increased American military presence and interest in Canada which would result in making Canada more likely to be the target of a nuclear attack;
>
> (d) as the cruise missile cannot be detected until approximately eight minutes before it reaches its target, a "Launch on Warning" system would be necessary in order to respond to the cruise missile thereby eliminating effective human discretion and increasing the likelihood of either a pre-emptive strike or an accidental firing, or both;
>
> (e) the cruise missile is a military weapon, the development of which will have the effect of a needless and dangerous escalation of the nuclear arms race, thus endangering the security and lives of all people.

Section 7 of the Charter provides in English:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof [page449] except in accordance with the principles of fundamental justice.

and in French:

> 7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

5 Before turning to an examination of the appellants' allegations concerning the results of the decision to permit testing and its consequences on their rights under s. 7, I think it would be useful to examine the principles governing the striking out of a statement of claim and dismissal of a cause of action.

(a) Striking Out a Statement of Claim

6 The respondents, by a motion pursuant to Rule 419(1)(a) of the Federal Court Rules, moved for an order to strike out the appellants' statement of claim as disclosing no reasonable cause of action. Rule 419(1)(a) reads as follows:

> Rule 419.(1) The Court may at any stage of an action order any pleading to be struck out, with or without leave to amend, on the ground that
>
> (a) it discloses no reasonable cause of action or defence, as the case may be, ...

7 The most recent and authoritative statement of the principle applicable to determine when a statement of claim may be struck out is that of Estey J. in Attorney General of Canada v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735, at p. 740:

> 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.)

8 Madame Justice Wilson in her reasons in the present case summarized the relevant principles as follows:

> The law then would appear to be clear. The facts pleaded are to be taken as proved. When so taken, the [page450] question is do they disclose a reasonable cause of action, i.e. a cause of action "with some chance of success" (Drummond-Jackson v. British Medical Association, [1970] 1 All E.R. 1094) or, as Le Dain J. put it in Dowson v. Government of Canada (1981), 37 N.R. 127 (F.C.A.), at p. 138, is it "plain and obvious that the action cannot succeed".

9 I agree with Madame Justice Wilson that, regardless of the basis upon which the appellants advance their claim for declaratory relief -- whether it be s. 24(1) of the Charter, s. 52 of the Constitution Act, 1982, or the common law -- they must at least be able to establish a threat of violation, if not an actual violation, of their rights under the Charter.

10 In short then, for the appellants to succeed on this appeal, they must show that they have some chance of proving that the action of the Canadian government has caused a violation or a threat of violation of their rights under the Charter.

(b) The Allegations of the Statement of Claim

11 The principal allegation of the statement of claim is that the testing of the cruise missile in Canada poses a threat to the lives and security of Canadians by increasing the risk of nuclear conflict, and thus violates the right to life, liberty and security of the person guaranteed by s. 7 of the Charter.

12 As a preliminary matter, it should be noted that the exact nature of the deprivation of life and security of the person that the appellants rely upon as the legal foundation for the violation of s. 7 they allege is not clear. There seem to be two possibilities. The violation could be the result of actual deprivation of life and security of the person that would occur in the event of a nuclear attack on Canada, or it could be the result of general insecurity experienced by all people in Canada as a result of living under the increased threat of nuclear war.

13 The first possibility is apparent on a literal reading of the statement of claim. The second possibility, however, appears to be more consistent with the appellants' submission at p. 31 of their factum, that:

[page451]

> ... at the minimum, the above allegations show [in paragraph 7 of the statement of claim] that there is a "threat" to the life and security of the Appellants which "threat", depending upon the construction of the concept "infringe" or "deny" in Section 7 [sic], could arguably constitute an infringement of the person. The amendment to the Statement of Claim, rejected by the Court of Appeal, would have made the infringement or denial more explicit when it states: "The very testing of the cruise missile per se in Canada endangers the Charter of Rights and Freedoms Section 7:(sic) Rights".

14 I believe that we are obliged to read the statement of claim as generously as possible and to accommodate any inadequacies in the form of the allegations which are merely the result of drafting deficiencies.

15 Thus, I am prepared to accept that the appellants intended both of these possible deprivations as a basis for the violation of s. 7. It is apparent, however, that the violation of s. 7 alleged turns upon an actual increase in the risk of nuclear war, resulting from the federal cabinet's decision to permit the testing of the cruise missile. Thus, to succeed at trial, the appellants would have to demonstrate, inter alia, that the testing of the cruise missile would cause an increase in the risk of nuclear war. It is precisely this link between the Cabinet decision to permit the testing of the cruise and the increased risk of nuclear war which, in my opinion, they cannot establish. It will not be necessary therefore to address the issue of whether the deprivations of life and security of the person advanced by the appellants could constitute violations of s. 7.

16 As I have noted, both interpretations of the nature of the infringement of the appellants' rights are founded on

the premise that if the Canadian government allows the United States government to test the cruise missile system in Canada, then there will be an increased risk of nuclear war. Such a claim can only be based on the assumption that the net result of all of the various foreign powers' reactions to the testing of the cruise missile in Canada will be an increased risk of nuclear war.

[page452]

17 The statement of claim speaks of weapons control agreements being "practically unenforceable", Canada being "more likely to be the target of a nuclear attack", "increasing the likelihood of either a pre-emptive strike or an accidental firing, or both", and "escalation of the nuclear arms race". All of these eventualities, culminating in the increased risk of nuclear war, are alleged to flow from the Canadian Government's single act of allowing the United States to test the cruise missile in Canada.

18 Since the foreign policy decisions of independent and sovereign nations are not capable of prediction, on the basis of evidence, to any degree of certainty approaching probability, the nature of such reactions can only be a matter of speculation; the causal link between the decision of the Canadian government to permit the testing of the cruise and the results that the appellants allege could never be proven.

19 An analysis of the specific allegations of the statement of claim reveals that they are all contingent upon the possible reactions of the nuclear powers to the testing of the cruise missile in Canada. The gist of paragraphs (a) and (b) of the statement of claim is that verification of the cruise missile system is impossible because the missile cannot be detected by surveillance satellites, and that, therefore, arms control agreements will be unenforceable. This is based on two major assumptions as to how foreign powers will react to the development of the cruise missile: first, that they will not develop new types of surveillance satellites or new methods of verification, and second, that foreign powers will not establish new modes of co-operation for dealing with the problem of enforcement. With respect to the latter of these points, it is just as plausible that lack of verification would have the effect of enhancing enforceability than of undermining it, since an inability on the part of nuclear powers to verify systems like the cruise could precipitate a system of enforcement [page453] based on co-operation rather than surveillance.

20 As for paragraph (c), even if it were the case that the testing of the air-launched cruise missile would result in an increased American military presence and interest in Canada, to say that this would make Canada more likely to be the target of a nuclear attack is to assume certain reactions of hostile foreign powers to such an increased American presence. It also makes an assumption about the degree to which Canada is already a possible target of nuclear attack. Given the impossibility of determining how an independent sovereign nation might react, it can only be a matter of hypothesis whether an increased American presence would make Canada more vulnerable to nuclear attack. It would not be possible to prove it one way or the other.

21 Paragraph (d) assumes that foreign states will not develop their technology in such a way as to meet the requirements of effective detection of the cruise and that there will therefore be an increased likelihood of pre-emptive strike or an accidental firing, or both. Again, this assumption concerns how foreign powers are likely to act in response to the development of the cruise. It would be just as plausible to argue that foreign states would improve their technology with respect to detection of missiles, thereby decreasing the likelihood of accidental firing or pre-emptive strike.

22 Finally, paragraph (e) asserts that the development of the cruise will lead to an escalation of the nuclear arms race. This again involves speculation based on assumptions as to how foreign powers will react. One could equally argue that the cruise would be the precipitating factor in compelling the nuclear powers to negotiate agreements that would lead to a de-escalation of the nuclear arms race.

23 One final assumption, common to all the paragraphs except (c), is that the result of testing of the cruise missile in Canada will be its development [page454] by the United States. In all of these paragraphs, the alleged harm flows from the production and eventual deployment of the cruise missile. The effect that the testing will have on the

development and deployment of the cruise can only be a matter of speculation. It is possible that as a result of the tests, the Americans would decide not to develop and deploy the cruise since the very reason for the testing is to establish whether the missile is a viable weapons system. Similarly, it is possible that the Americans would develop the cruise missile even if testing were not permitted by the Canadians.

24 In the final analysis, exactly what the Americans will decide to do about development and deployment of the cruise missile, whether tested in Canada or not, is a decision that they, as an independent and sovereign nation, will make for themselves. Even with the assistance of qualified experts, a court could only speculate on how the American government may make this decision, and how important a factor the results of the testing of the cruise in Canada will be in that decision.

25 What can be concluded from this analysis of the statement of claim is that all of its allegations, including the ultimate assertion of an increased likelihood of nuclear war, are premised on assumptions and hypotheses about how independent and sovereign nations, operating in an international arena of radical uncertainty, and continually changing circumstances, will react to the Canadian government's decision to permit the testing of the cruise missile.

26 The point of this review is not to quarrel with the allegations made by the appellants about the results of cruise missile testing. They are, of course, entitled to their opinion and belief. Rather, I wish to highlight that they are raising matters that, in my opinion, lie in the realm of conjecture, rather than fact. In brief, it is simply not possible for a court, even with the best available evidence, to do more than speculate upon the likelihood of the federal cabinet's decision to test the cruise missile resulting in an increased threat of nuclear war.

[page455]

(c) The Rule that Facts in a Statement of Claim Must be Taken as Proven

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.

II

The Cabinet's Decision to Permit the Testing of the Cruise Missile and the Application of the Charter of Rights and Freedoms

(a) Application of the Charter to Cabinet Decisions

28 I agree with Madame Justice Wilson that cabinet decisions fall under s. 32(1)(a) of the Charter and are therefore reviewable in the courts and subject to judicial scrutiny for compatibility with the Constitution. I have no doubt that the executive branch of the Canadian government is duty bound to act in accordance with the dictates of the Charter. Specifically, the cabinet has a duty to act in a manner consistent with 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.

(b) The Absence of a Duty on the Government to Refrain from Allowing Testing

29 I do not believe the action impugned in the present case can be characterized as contrary to the duties of the executive under the Charter. Section 7 of the Charter cannot reasonably be read as imposing a duty on the government to refrain [page456] from those acts which might lead to consequences that deprive or threaten to deprive individuals of their life and security of the person. A duty of the federal cabinet cannot arise on the basis of speculation and hypothesis about possible effects of government action. Such a duty only arises, in my view, where

it can be said that a deprivation of life and security of the person could be proven to result from the impugned government act.

30 The principles governing remedial action by the courts on the basis of allegations of future harm are illustrative of the more general principle that there is no legal duty to refrain from actions which do not prejudice the legal rights of others. A person, whether the government or a private individual, cannot be held liable under the law for an action unless that action causes the deprivation, or threat of deprivation, of legal rights. And an action cannot be said to cause such deprivation where it is not provable that the deprivation will occur as a result of the challenged action. I am not suggesting that remedial action by the courts will be inappropriate where future harm is alleged. The point is that remedial action will not be justified where the link between the action and the future harm alleged is not capable of proof.

31 The reluctance of courts to provide remedies where the causal link between an action and the future harm alleged to flow from it cannot be proven is exemplified by the principles with respect to declaratory relief. According to Eager, The Declaratory Judgment Action (1971), at p. 5:

> 3. The remedy [of declaratory relief] is not generally available where the controversy is not presently existing but merely possible or remote; the action is not maintainable to settle disputes which are contingent upon the happening of some future event which may never take place.
>
> 4. Conjectural or speculative issues, or feigned disputes or one-sided contentions are not the proper subjects for declaratory relief.

Similarly, Sarna has said, "The court does not deal with unripe claims, nor does it entertain proceedings [page457] with the sole purpose of remedying only possible conflicts": (The Law of Declaratory Judgments (1978), at p. 179).

32 None of this is to deny the preventative role of the declaratory judgment. As Madame Justice Wilson points out in her judgment, Borchard, Declaratory Judgments (2nd ed. 1941), at p. 27, states that,

> ... no "injury" or "wrong" need have been actually committed or threatened in order to enable the plaintiff to invoke the judicial process; he need merely show that some legal interest or right of his has been placed in jeopardy or grave uncertainty...

33 Nonetheless, the preventative function of the declaratory judgment must be based on more than mere hypothetical consequences; there must be a cognizable threat to a legal interest before the courts will entertain the use of its process as a preventive measure. As this Court stated in Solosky v. The Queen, [1980] 1 S.C.R. 821, a declaration could issue to affect future rights, but not where the dispute in issue was merely speculative. In Solosky, supra, one of the questions was whether an order by a director of a prison to censor correspondence between the appellant inmate and his solicitor could be declared unlawful. The dispute had already arisen as a result of the existence of the censorship order and the declaration sought was a direct and present challenge to this order. This Court found that the fact that the relief sought would relate to letters not yet written, and thereby affect future rights, was not in itself a bar to the granting of a declaration. The Court made it clear, however, at p. 832:

> ... 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.
>
> (Emphasis added)

34 A similar concern with the problems inherent in basing relief on the prediction of future events is found in the principles relating to injunctive relief. Professor Sharpe, Injunctions and Specific [page458] Performance (1983), clearly articulates the difficulties in issuing an injunction where the alleged harm is prospective, at pp. 30-31:

> All injunctions are future looking in the sense that they are intended to prevent or avoid harm rather than compensate for an injury already suffered....
>
> Where the harm to the plaintiff has yet to occur the problems of prediction are encountered. Here, the plaintiff sues quia timet -- because he fears -- and the judgment as to the propriety of injunctive relief must be made without the advantage of actual evidence as to the nature of harm inflicted on the plaintiff. The

court is asked to predict that harm will occur in the future and that the harm is of a type that ought to be prevented by injunction.

35 The general principle with respect to such injunctions appears to be that "there must be a high degree of probability that the harm will in fact occur": (Sharpe, supra, at p. 31). In Redland Bricks Ltd. v. Morris, [1970] A.C. 652, at p. 665, per Lord Upjohn, the House of Lords laid down four general propositions concerning the circumstances in which mandatory injunctive relief could be granted on the basis of prospective harm. The first of these stated [at p. 665]:

1. A mandatory injunction can only be granted where the plaintiff shows a very strong probability upon the facts that grave damage will accrue to him in the future.... It is a jurisdiction to be exercised sparingly and with caution but in the proper case unhesitatingly.

36 It is clearly illustrated by the rules governing declaratory and injunctive relief that the courts will not take remedial action where the occurrence of future harm is not probable. This unwillingness to act in the absence of probable future harm demonstrates the courts' reluctance to grant relief where it cannot be shown that the impugned action will cause a violation of rights.

37 In the present case, the speculative nature of the allegation that the decision to test the cruise missile will lead to an increased threat of nuclear war makes it manifest that no duty is imposed on the [page459] Canadian government to refrain from permitting the testing. The government's action simply could not be proven to cause the alleged violation of s. 7 of the Charter and, thus, no duty can arise.

III

Justiciability

38 The approach which I have taken is not based on the concept of justiciability. I agree in substance with Madame Justice Wilson's discussion of justiciability and her conclusion that the doctrine is founded upon a concern with the appropriate role of the courts as the forum for the resolution of different types of disputes. I have no doubt that disputes of a political or foreign policy nature may be properly cognizable by the courts. My concerns in the present case focus on the impossibility of the Court finding, on the basis of evidence, the connection, alleged by the appellants, between the duty of the government to act in accordance with the Charter of Rights and Freedoms and the violation of their rights under s. 7. As stated above, I do not believe the alleged violation -- namely, the increased threat of nuclear war -- could ever be sufficiently linked as a factual matter to the acknowledged duty of the government to respect s. 7 of the Charter.

IV

Section 52 of the Constitution Act, 1982 and Section 1 of the Charter

39 I would like to note that nothing in these reasons should be taken as the adoption of the view that the reference to "laws" in s. 52 of the Constitution Act, 1982 is confined to statutes, regulations and the common law. It may well be that if the supremacy of the Constitution expressed in s. 52 is to be meaningful, then all acts taken pursuant to powers granted by law will fall within s. 52. Equally, it is not necessary for the resolution of this case to express any [page460] opinion on the application of s. 1 of the Charter or the appropriate principles for its interpretation.

V

Conclusion

40 I would accordingly dismiss the appeal with costs.

The following are the reasons delivered by

WILSON J.

41 This litigation was sparked by the decision of the Canadian government to permit the United States to test the cruise missile in Canada. It raises issues of great difficulty and considerable importance to all of us.

1. The Facts

42 The appellants are a group of organizations and unions claiming to have a collective membership of more than 1.5 million Canadians. They allege that a decision made by the Canadian government on July 15, 1983 to allow the United States to test cruise missiles within Canada violates their constitutional rights as guaranteed by the Canadian Charter of Rights and Freedoms. More specifically, quoting from their statement of claim:

> 7. The Plaintiffs state and the fact is that the testing of the cruise missile in Canada is a violation of the collective rights of the Plaintiffs and their members and all Canadians, specifically their right to security of the person and life in that:
>
> (a) the size and eventual dispersion of the air-launched cruise missile is such that the missile cannot be detected by surveillance satellites, thus making verification of the extent of this nuclear weapons system impossible;
>
> (b) with the impossibility of verification, the future of nuclear weapons' control and limitation agreements is completely undermined as any such agreements become practically unenforceable;
>
> (c) the testing of the air-launched cruise missiles would result in an increased American military presence and interest in Canada which would result in making Canada more likely to be the target of a nuclear attack;
>
> [page461]
>
> (d) as the cruise missile cannot be detected until approximately eight minutes before it reaches its target, a "Launch on Warning" system would be necessary in order to respond to the cruise missile thereby eliminating effective human discretion and increasing the likelihood of either a pre-emptive strike or an accidental firing, or both;
>
> (e) the cruise missile is a military weapon, the development of which will have the effect of a needless and dangerous escalation of the nuclear arms race, thus endangering the security and lives of all people.

43 The plaintiffs, in addition to declaratory relief, seek consequential relief in the nature of an injunction and damages. The defendants, by a motion pursuant to Rule 419(1) of the Federal Court Rules moved to strike out the plaintiffs' statement of claim and to dismiss it as disclosing no reasonable cause of action. Cattanach J. dismissed the defendants' motion to strike on the grounds that the Charter applied to the Government of Canada, including executive acts of the cabinet, and that the statement of claim contained "the germ of a cause of action" and raised a "justiciable issue". The Federal Court of Appeal unanimously allowed the defendants' appeal.

2. The Judgment Appealed From

44 Each of the five judges who sat on the appeal to the Federal Court of Appeal delivered separate reasons for allowing the appeal. Four of the five (Pratte, Le Dain, Marceau and Hugessen JJ.) held that a breach of s. 7 of the Charter must involve a failure to comply with the principles of fundamental justice and the appellants had not alleged any such failure.

45 Three of the justices (Pratte, Marceau and Hugessen JJ.) were of the opinion that the facts as alleged did not constitute a violation of the right to life, liberty and security of the person as guaranteed by s. 7. Pratte and Hugessen JJ. thought that any breach of s. 7 would only occur as the result of actions by foreign powers who were not bound by the Charter. Pratte J. went further and stated that the only "liberty and security of the person" that was protected by s. 7 was security against arbitrary [page462] arrest or detention. Marceau J. felt that s. 7 could never

have "any higher mission than that of protecting the life and the freedom of movement of the citizens against arbitrary action and despotism by people in power".

46 Two of the justices (Ryan and Le Dain JJ.) would have allowed the appeal on the fundamental ground that the issue was inherently non-justiciable and therefore incapable of adjudication by a court. Ryan J. thought that the question whether national security was impaired, and hence whether the plaintiffs' own personal security had been affected, was not triable because it was not susceptible of proof. Le Dain J. took the central issue to be the effect of testing cruise missiles on the risk of nuclear conflict, a matter which he asserted to be non-justiciable as involving factors either inaccessible to a court or incapable of being evaluated by it. The other three judges did not directly address this point.

47 Marceau J. would have allowed the appeal on the additional ground that the Charter did not give the courts a power to interfere with an exercise of the royal prerogative, especially when issues of defence and national security were involved. However, a majority of the Court (Pratte, Le Dain and Ryan JJ.) was of the opinion that the Charter did apply to decisions taken in the exercise of the royal prerogative. Hugessen J. did not deal with this question.

48 None of the five judges was prepared to say that the cabinet's decision to test the cruise missile was unreviewable because it involved a "political question". Pratte and Marceau JJ. expressly rejected this argument, Le Dain and Hugessen JJ. did not consider it necessary to deal with it, and Ryan J. did not mention it.

3. The Issues

49 The issues to be addressed on the appeal to this Court may be conveniently summarized as follows:

[page463]

(1) Is a decision made by the government of Canada in relation to a matter of national defence and foreign affairs unreviewable on any of the following grounds:

(a) it is an exercise of the royal prerogative;

(b) it is, because of the nature of the factual questions involved, inherently non-justiciable;

(c) it involves a "political question" of a kind that a court should not decide?

(2) Under what circumstances can a Statement of Claim seeking declaratory relief concerning the constitutionality of a law or governmental decision be struck out as disclosing no cause of action?

(3) Do the facts as alleged in the statement of claim,

which must be taken as proven, constitute a violation of

s. 7 of the Canadian Charter of Rights and Freedoms? and

(4) Do the plaintiffs have a right to amend the statement of claim before the filing of a statement of defence?

(1) Is the Government's Decision Reviewable?

(a) The Royal Prerogative

50 The respondents submit that at common law the authority to make international agreements (such as the one made with the United States to permit the testing) is a matter which falls within the prerogative power of the Crown and that both at common law and by s. 15 of the Constitution Act, 1867 the same is true of decisions relating to national defence. They further submit that since by s. 32(1)(a) the Charter applies "to the Parliament and government of Canada in respect of all matters within the authority of Parliament", the Charter's application must, so far as the government is concerned, be restricted to the exercise of powers which derive directly from statute. It cannot, therefore, apply to an exercise of the royal prerogative which is a source of power existing independently of Parliament; otherwise, it is argued, the limiting phrase "within the authority of Parliament" would be deprived of any

effect. The answer to this argument seems to me to be that those words of limitation, like the corresponding words "within the authority of the legislature [page464] of each province" in s. 32(1) (b), are merely a reference to the division of powers in ss. 91 and 92 of the Constitution Act, 1867. They describe the subject matters in relation to which the Parliament of Canada may legislate or the government of Canada may take executive action. As Le Dain J. points out, the royal prerogative is "within the authority of Parliament" in the sense that Parliament is competent to legislate with respect to matters falling within its scope. Since there is no reason in principle to distinguish between cabinet decisions made pursuant to statutory authority and those made in the exercise of the royal prerogative, and since the former clearly fall within the ambit of the Charter, I conclude that the latter do so also.

(b) Non-Justiciability

51 Le Dain and Ryan JJ. in the Federal Court of Appeal were of the opinion that the issues involved in this case are inherently non-justiciable, either because the question whether testing the cruise missile increases the risk of nuclear war is not susceptible of proof and hence is not triable (per Ryan J.) or because answering that question involves factors which are either inaccessible to a court or are of a nature which a court is incapable of evaluating (per Le Dain J.). To the extent that this objection to the appellants' case rests on the inherent evidentiary difficulties which would obviously confront any attempt to prove the appellants' allegations of fact, I do not think it can be sustained. It might well be that, if the issue were allowed to go to trial, the appellants would lose simply by reason of their not having been able to establish the factual basis of their claim but that does not seem to me to be a reason for striking the case out at this preliminary stage. It is trite law that on a motion to strike out a statement of claim the plaintiff's allegations of fact are to be taken as having been proved. Accordingly, it is arguable that by dealing with the case as they have done Le Dain and Ryan JJ. have, in effect, made a presumption against the appellants which they are not entitled, on a preliminary motion of this kind, to make.

[page465]

52 I am not convinced, however, that Le Dain and Ryan JJ. were restricting the concept of non-justiciability to difficulties of evidence and proof. Both rely on Lord Radcliffe's judgment in Chandler v. Director of Public Prosecutions, [1962] 3 All E.R. 142 (H.L.), and especially on the following passage at p. 151:

> The disposition and equipment of the forces and the facilities afforded to allied forces for defence purposes constitute a given fact and it cannot be a matter of proof or finding that the decisions of policy on which they rest are or are not in the country's best interests. I may add that I can think of few issues which present themselves in less triable form. It would be ingenuous to suppose that the kind of evidence that the appellants wanted to call could make more than a small contribution to its final solution. The facts which they wished to establish might well be admitted: even so, throughout history men have had to run great risk for themselves and others in the hope of attaining objectives which they prize for all. The more one looks at it, the plainer it becomes, I think, that the question whether it is in the true interests of this country to acquire, retain or house nuclear armaments depends on an infinity of considerations, military and diplomatic, technical, psychological and moral, and of decisions, tentative or final, which are themselves part assessments of fact and part expectations and hopes. I do not think that there is anything amiss with a legal ruling that does not make this issue a matter for judge or jury.
>
> (Emphasis added.)

In my opinion, this passage makes clear that in Lord Radcliffe's view these kinds of issues are to be treated as non-justiciable not simply because of evidentiary difficulties but because they involve moral and political considerations which it is not within the province of the courts to assess. Le Dain J. maintains that the difficulty is one of judicial competence rather than anything resembling the American "political questions" doctrine. However, in response to that contention it can be pointed out that, however unsuited courts may be for the task, they are called upon all the time to decide questions [page466] of principle and policy. As Melville Weston points out in "Political Questions" 38 Harv. L. Rev. 296 (1925), at p. 299:

> The word "justiciable"... is legitimately capable of denoting almost any question. That is to say, the questions are few which are intrinsically incapable of submission to a tribunal having an established procedure, with an orderly presentation of such evidence as is available, for the purpose of an adjudication

> from which practical consequences in human conduct are to follow. For example, when nations decline to submit to arbitration or to the compulsory jurisdiction of a proposed international tribunal those questions of honor or interest which they call "non-justiciable", they are really avoiding that broad sense of the word, but what they mean is a little less clear. Probably they mean only that they will not, or deem they ought not, endure the presentation of evidence on such questions, nor bind their conduct to conform to the proposed adjudications. So far as "non-justiciable" is for them more than an epithet, it expresses a sense of a lack of fitness, and not of any inherent impossibility, of submitting these questions to judicial or quasi-judicial determination.

53 In the 1950's and early 1960's there was considerable debate in Britain over the question whether restrictive trade practices legislation gave rise to questions which were subject to judicial determination: see Marshall, "Justiciability," in Oxford Essays in Jurisprudence (1961), ed. A.G. Guest; Summers, "Justiciability" (1963), 26 M.L.R. 530; Stevens "Justiciability: The Restrictive Practices Court Re-Examined", (1964) Public Law 221. I think it is fairly clear that the British restrictive trade practices legislation did not involve the courts in the resolution of issues more imponderable than those facing American courts administering the Sherman Act. Indeed, there is significantly less "policy" content in the decisions of the courts in those cases than there is in the decisions of administrative tribunals such as the Canadian Transport Commission or the CRTC. The real issue there, and perhaps also in the case at bar, is not the ability of judicial tribunals to make a decision on the questions presented, but the appropriateness [page467] of the use of judicial techniques for such purposes.

54 I cannot accept the proposition that difficulties of evidence or proof absolve the Court from making a certain kind of decision if it can be established on other grounds that it has a duty to do so. I think we should focus our attention on whether the courts should or must rather than on whether they can deal with such matters. We should put difficulties of evidence and proof aside and consider whether as a constitutional matter it is appropriate or obligatory for the courts to decide the issue before us. I will return to this question later.

(c) The Political Questions Doctrine

55 It is a well established principle of American constitutional law that there are certain kinds of "political questions" that a court ought to refuse to decide. In Baker v. Carr, 369 U.S. 186 (1962), at pp. 210-11, Brennan J. discussed the nature of the doctrine in the following terms:

> We have said that "In determining whether a question falls within (the political question) category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." Coleman v. Miller, 307 U.S. 433, 454-455. The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the "political question" label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

At p. 217 he said:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is [page468] found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

While one or two of the categories of political question referred to by Brennan J. raise the issue of judicial or institutional competence already referred to, the underlying theme is the separation of powers in the sense of the proper role of the courts vis-a-vis the other branches of government. In this regard it is perhaps noteworthy that a distinction is drawn in the American case law between matters internal to the United States on the one hand and foreign affairs on the other. In the area of foreign affairs the courts are especially deferential to the executive branch of government: see e.g. Atlee v. Laird, 347 F. Supp. 689 (1972) (U.S. Dist. Ct.), at pp. 701 ff.

56 While Brennan J.'s statement, in my view, accurately sums up the reasoning American courts have used in deciding that specific cases did not present questions which were judicially cognizable, I do not think it is particularly helpful in determining when American courts will find that those factors come into play. In cases from Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), to United States v. Nixon, 418 U.S. 683 (1974), the Court has not allowed the "respect due coordinate branches of government" to prevent it from rendering decisions highly embarrassing to those holding executive or legislative office. In Baker v. Carr itself, supra, Frankfurter J., in dissent, expressed concern that the judiciary could not find manageable standards for the problems presented by the reapportionment of political districts. Indeed, some would say that the enforcement of the desegregation decision in Brown v. Board of Education of [page469] Topeka, 347 U.S. 483 (1954), gave rise to similar problems of judicial unmanageability. Yet American courts have ventured into these areas undeterred.

57 Academic commentators have expended considerable effort trying to identify when the political questions doctrine should apply. Although there are many theories (perhaps best summarized by Professor Scharpf in his article "Judicial Review and the Political Question: A Functional Analysis," 75 Yale L.J. 517 (1966)), I think it is fair to say that they break down along two broad lines. The first, championed by scholars such as Weston "Political Questions", supra, and Wechsler, Principles, Politics, and Fundamental Law (1961); Wechsler, Book Review, 75 Yale L.J. 672 (1966), define political questions principally in terms of the separation of powers as set out in the Constitution and turn to the Constitution itself for the answer to the question when the Courts should stay their hand. The second school, represented by Finkelstein "Judicial Self-Limitation", 37 Harv. L.R. 338 (1924), and Bickel, The Least Dangerous Branch (1962), especially chapter 4, "The Passive Virtues," roots the political questions doctrine in what seems to me to be a rather vague concept of judicial "prudence" whereby the courts enter into a calculation concerning the political wisdom of intervention in sensitive areas. More recently, commentators such as Tigar, "Judicial Power, the Political Question Doctrine, and Foreign Relations", 17 U.C.L.A. L.R. 1135 (1970), and Henkin, "Is There a Political Question Doctrine?", 85 Yale L.J. 597 (1976), have doubted the need for a political questions doctrine at all, arguing that all the cases which were correctly decided can be accounted for in terms of orthodox separation of powers doctrine.

58 Professor Tigar in his article suggests that the political questions doctrine is not really a doctrine at all but simply "a group of quite different legal rules and principles, each resting in part upon deference to the political branches of government" (p. 1163). He sees Justice Brennan's formulation [page470] of the doctrine in Baker v. Carr, supra, as an "unsatisfactory effort to rationalize a collection of disparate precedent" (p. 1163).

59 In the House of Lords in Chandler, supra, Lord Devlin expressed a similar reluctance to retreat from traditional techniques in the interpretation of the phrase "purpose prejudicial to the safety or interests of the state..." in the Official Secrets Act, 1911. His colleagues, in particular Lord Radcliffe and Lord Reid, seem to have been of the view that in matters of defence the Crown's opinion as to what was prejudicial to the safety or interests of the State was conclusive upon the courts. Lord Devlin agreed with the result reached by his colleagues on the facts before him, and with the observation of Lord Parker on the Court of Criminal Appeal ([1962] 2 All E.R. 314, at pp. 319-20) that "the manner of the exercise of... [the Crown's] prerogative powers [over the disposition and armament of the military] cannot be inquired into by the courts, whether in a civil or a criminal case..." ([1962] 3 All E.R. 142 at p. 157) but went on to make three observations in clarification of his position.

60 Lord Devlin's first observation was that the principle that the substance of discretionary decisions is not reviewable in the courts is one basic to administrative law and is not confined to matters of defence or the exercise of the prerogative. The second point was that even though review on the merits of a discretionary decision was

excluded, that did not mean that judicial review was excluded entirely. The third comment was that the nature and effect of the principle of judicial review is "[to limit] the issue which the court has to determine..." ([1962] 3 All E.R. 142, at p. 158).

61 Lord Devlin then proceeded to apply these propositions to the case before him and asked what it was that the jury was required to determine. In his view "the fact to be proved is the existence of a purpose prejudicial to the state -- not a purpose which "appears to the Crown" to be prejudicial to [page471] the state" ([1962] 3 All E.R. 142, at p. 158). He accordingly went on to conclude at p. 159:

> Consequently, the Crown's opinion as to what is or is not prejudicial in this case is just as inadmissible as the appellants'. The Crown's evidence about what its interests are is an entirely different matter. They can be proved by an officer of the Crown wherever it may be necessary to do so. In a case like the present, it may be presumed that it is contrary to the interests of the Crown to have one of its airfields immobilised just as it may be presumed that it is contrary to the interests of an industrialist to have his factory immobilised. The thing speaks for itself, as the Attorney-General submitted. But the presumption is not irrebuttable. Men can exaggerate the extent of their interests and so can the Crown. The servants of the Crown, like other men animated by the highest motives, are capable of formulating a policy ad hoc so as to prevent the citizen from doing something that the Crown does not want him to do. It is the duty of the courts to be as alert now as they have always been to prevent abuse of the prerogative. But in the present case there is nothing at all to suggest that the Crown's interest in the proper operation of its airfields is not what it may naturally be presumed to be or that it was exaggerating the perils of interference with their effectiveness.
>
> (Emphasis added.)

62 It seems to me that the point being made by Lord Devlin, as well as by Tigar and Henkin in their writings, is that the courts should not be too eager to relinquish their judicial review function simply because they are called upon to exercise it in relation to weighty matters of state. Equally, however, it is important to realize that judicial review is not the same thing as substitution of the court's opinion on the merits for the opinion of the person or body to whom a discretionary decision-making power has been committed. The first step is to determine who as a constitutional matter has the decision-making power; the second is to determine the scope (if any) of judicial review of the exercise of that power.

63 It might be timely at this point to remind ourselves of the question the Court is being asked to decide. It is, of course, true that the federal legislature has exclusive legislative jurisdiction in relation to defence under s. 91(7) of the Constitution [page472] Act, 1867 and that the federal executive has the powers conferred upon it in ss. 9 - 15 of that Act. Accordingly, if the Court were simply being asked to express its opinion on the wisdom of the executive's exercise of its defence powers in this case, the Court would have to decline. It cannot substitute its opinion for that of the executive to whom the decision-making power is given by the Constitution. Because the effect of the appellants' action is to challenge the wisdom of the government's defence policy, it is tempting to say that the Court should in the same way refuse to involve itself. However, I think this would be to miss the point, to fail to focus on the question which is before us. The question before us is not whether the government's defence policy is sound but whether or not it violates the appellants' rights under s. 7 of the Charter of Rights and Freedoms. This is a totally different question. I do not think there can be any doubt that this is a question for the courts. Indeed, s. 24(1) of the Charter, also part of the Constitution, makes it clear that the adjudication of that question is the responsibility of "a court of competent jurisdiction". While the court is entitled to grant such remedy as it "considers appropriate and just in the circumstances", I do not think it is open to it to relinquish its jurisdiction either on the basis that the issue is inherently non-justiciable or that it raises a so-called "political question": see Martin H. Redish "Abstention, Separation of Powers, and the Limits of the Judicial Function," 94 Yale L.J. 71 (1984).

64 I would conclude, therefore, that if we are to look at the Constitution for the answer to the question whether it is appropriate for the courts to "second guess" the executive on matters of defence, we would conclude that it is not appropriate. However, if what we are being asked to do is to decide whether any particular act of the executive violates the rights of the citizens, then it is not only appropriate that we answer the question; it is our obligation under the Charter to do so.

65 One or two hypothetical situations will, I believe, illustrate the point. Let us take the case of [page473] a person who is being conscripted for service during wartime and has been ordered into battle overseas, all of this pursuant to appropriate legislative and executive authorization. He wishes to challenge his being conscripted and sent overseas as an infringement of his rights under s. 7. It is apparent that his liberty has been constrained and, if he is sent into battle, his security of the person and, indeed, his life are put in jeopardy. It seems to me that it would afford the conscriptee a somewhat illusory protection if the validity of his challenge is to be determined by the executive. On the other hand, it does not follow from these facts that the individual's rights under the Charter have been violated. Even if an individual's rights to life and liberty under s. 7 are interpreted at their broadest, it is clear from s. 1 that they are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". If the Court were of the opinion that conscription during wartime was a "reasonable limit" within the meaning of s. 1, a conscriptee's challenge on the facts as presented would necessarily fail.

66 By way of contrast, one can envisage a situation in which the government decided to force a particular group to participate in experimental testing of a deadly nerve gas. Although the government might argue that such experiments were an important part of our defence effort, I find it hard to believe that they would survive judicial review under the Charter. Equally we could imagine a situation during wartime in which the army began to seize people for military service without appropriate enabling legislation having been passed by Parliament. Such "press gang" tactics would, one might expect, be subject to judicial review even if the executive thought they were justified for the prosecution of the war.

67 Returning then to the present case, it seems to me that the legislature has assigned to the courts as a constitutional responsibility the task of determining whether or not a decision to permit the testing of cruise missiles violates the appellants' rights under the Charter. The preceding illustrations indicate why the legislature has done so. It is [page474] therefore, in my view, not only appropriate that we decide the matter; it is our constitutional obligation to do so.

(2) In What Circumstances May a Statement of Claim Seeking Declaratory Relief Be Struck Out?

68 In order to put this issue in context it is necessary to review the procedural history of the case.

69 On July 20, 1983 the appellants filed a statement of claim seeking a declaration that their constitutional rights had been violated and consequential relief in the form of an injunction, damages and costs. The respondents moved on August 11, 1983 under Rule 419(1) of the Federal Court Rules to strike out the statement of claim primarily on the ground that it disclosed no reasonable cause of action. The statement was also alleged to be frivolous and vexatious and an abuse of the process of the Court. Cattanach J. denied the motion on September 15, 1983. He noted the requirement under Rule 408 that a statement of claim contain a precise statement of the material facts upon which the plaintiff relies and must stand or fall on the allegations of fact. He said that a statement of claim would not be struck out if the facts alleged were capable of constituting "the scintilla of a cause of action". He noted that by virtue of s. 32(1)(a) the Charter applies to the Parliament and government of Canada and by virtue of s. 24(1) the Court has jurisdiction to administer and provide appropriate remedies. He concluded that the statement of claim contained sufficient allegations to raise a justiciable issue and analogised the alleged liability of the respondents to liability for extra-hazardous activities contemplated by the rule in Rylands v. Fletcher, [1861-73] All E.R. 1 (H.L.). He concluded that there was a "germ of a cause of action" disclosed in the statement of claim.

70 On September 19, 1983 the respondents appealed to the Federal Court of Appeal. On October 7, 1983 the appellants sought leave from the Court of Appeal to amend their statement of [page475] claim under Rule 1104 to include an allegation that the testing of the cruise missile in Canada per se violated the appellants' rights under s. 7 of the Charter. Pratte J. dismissed the application without reasons on October 11, 1983. The Federal Court of Appeal heard the case on November 28, 1983 and allowed the respondents' appeal for the reasons outlined earlier.

71 The appeal to this Court was heard on February 14 and 15, 1984. On March 6, 1984 the appellants applied to

Muldoon J. for an injunction under Rule 469 of the Federal Court Rules to prevent testing until the case was decided. Muldoon J. concluded that until this Court decreed differently the law applicable to the matter was that the appellants' claim was non-justiciable. He held that in order to get an interlocutory injunction "cogent" evidence of a violation of a right had to be presented. The evidence presented was speculative only and could not establish a "real and proximate jeopardy" to the appellants' rights. There was nothing therefore to support the issue of an injunction.

72 The procedural issue before the Court then is: did the appellants' statement of claim disclose a reasonable cause of action within the meaning of Rule 419 of the Federal Court Rules?

(a) The Applicable Principle

73 Estey J. stated the applicable principle in Attorney General of Canada v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735, at p. 740:

> 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.)

74 In Shawn v. Robertson (1964), 46 D.L.R. (2d) 363, a declaration was sought against a ministerial exercise of discretion. An application for striking out on the basis of no reasonable cause of action [page476] was made under the Ontario Rules. Grant J. stated, at p. 365:

> The principles to be applied by the Court in determining whether to exercise jurisdiction conferred by Rule 126 or not are set out in the following cases; in Ross v. Scottish Union & National Insurance Co. (1920), 53 D.L.R. 415 at pp. 421-2, 47 O.L.R. 308 at p. 316, Magee, J.A., states:
>
> > That inherent jurisdiction is partly embodied in our Rule 124 (now R. 126).... The Rule has only been acted upon in plain and obvious cases, and it should only be so when the Court is satisfied that the case is one beyond doubt, and that there is no reasonable cause of action or defence.
>
> And at p. 423 D.L.R., p. 317 O.L.R.: "To justify the use of Rule 124... it is not sufficient that the plaintiff is not likely to succeed at the trial."
>
> In Gilbert Surgical Supply Co. and Gilbert v. Frank W. Horner Ltd., 34 C.P.R. 17, [1960] O.W.N. 289, 19 Fox Pat. C. 209, Aylesworth, J.A., speaking for himself, Porter C.J.O., and LeBel, J.A., states as follows at p. 289 O.W.N.:
>
> > He said that the action was novel and he could not agree that the defendant had shown the case to be one within the Rule. At this stage of litigation the Court could not conclude that the plaintiff's action could not possibly succeed or that clearly and beyond all doubt, no reasonable cause of action had been shown.

75 A case analogous to the present case, not in the nature of the issues involved but in the novelty of the alleged cause of action and the absence of precedent, is McKay v. Essex Area Health Authority, [1982] 2 All E.R. 771. In that case a pregnant mother contracted German measles in the early months of her pregnancy. Her doctor took blood samples from her which were tested by the defendant Health Authority but the infection was not diagnosed and the child was born severely disabled. The mother and child sued the doctor and the Health Authority for negligence, the child claiming damages for her "entry into a life in which her injuries are highly debilitating". The Master struck out the child's claim on the basis it disclosed no reasonable cause of action. His order [page477] was set aside on appeal, the judge holding that the defendants owed a duty of care to the child and her real claim was not that she had suffered damage by reason of "wrongful entry into life" but by reason of having been born deformed. This gave rise to a reasonable cause of action. An appeal to the Court of Appeal was allowed and the order of the Master striking out the claim restored.

76 Stephenson L.J. had to struggle with the question whether a child had a right not to be born deformed which in the case of a child deformed or disabled before birth by disease meant a right to be aborted. Counsel for the child

submitted that this could not be viewed as a plain and obvious case susceptible of only one result, nor could it be viewed as frivolous or vexatious; although it might be novel, it raised issues of real substance which ought to go to trial. His Lordship disagreed. He said at p. 778:

> Here the court is considering not "ancient law" but a novel cause of action, for or against which there is no authority in any reported case in the courts of the United Kingdom or the Commonwealth. It is tempting to say that the question whether it exists is so difficult and so important that it should be argued out at a trial and on appeal up to the House of Lords. But it may become just as plain and obvious, after argument on the defendants' application to strike it out, that the novel cause of action is unarguable or unsustainable or has no chance of succeeding.
>
> (Emphasis added.)

77 It would seem then that as a general principle the courts will be hesitant to strike out a statement of claim as disclosing no reasonable cause of action. The fact that reaching a conclusion on this preliminary issue requires lengthy argument will not be determinative of the matter nor will the novelty of the cause of action militate against the plaintiffs.

[page478]

78 It has been suggested, however, that the plaintiffs' claim should be struck out because some of the allegations contained in it are not matters of fact but matters of opinion and that matters of opinion, being to some extent speculative, do not fall within the principle that the allegations of fact in the statement of claim must be taken as proved. I cannot accept this proposition since it appears to me to imply that a matter of opinion is not subject to proof. What we are concerned with for purposes of the application of the principle is, it seems to me, "evidentiary" facts. These may be either real or intangible. Real facts are susceptible of proof by direct evidence. Intangible facts, on the other hand, may be proved by inference from real facts or through the testimony of experts. Intangible facts are frequently the subject of opinion. The question of the probable cause of a certain result is a good illustration and germane to the issues at hand. An allegation that the lack of shower facilities at a defendant's brickworks probably resulted in a plaintiff employee's skin disease may in lay language appear to be merely an expression of medical opinion, but it is also in law a determination which the courts can properly infer from the surrounding facts and expert opinion evidence: see McGhee v. National Coal Board, [1972] 3 All E.R. 1008 (H.L.). Indeed, even a finding that an event "would cause" a certain result in the future is a finding of intangible fact. For example, in Fleming v. Hislop (1886), 11 A.C. 686, it was necessary to determine whether or not the finding "that the ignition of any other heap or bing of blaes on said farm or in the vicinity of the pursuers' land would cause material discomfort and annoyance to the pursuers," was a finding of fact or a finding of law. It was argued that it could not be a finding of fact because it related to something that was "prospective, future, not actually in existence". The Earl of Selborne agreed that, since the thing had not actually happened, a finding of fact as a thing past was impossible. But it was nevertheless a finding of fact and "there is a fallacy in saying that, because the word "would" is a word of futurity, the words "would cause" do not mean something which is properly a fact" (p. 690). See also on causation as an issue of fact: Alphacell Ltd [page479] v. Woodward, [1972] 2 All E.R. 475 per Lord Salmon, at pp. 489-90:

> The nature of causation has been discussed by many eminent philosophers and also by a number of learned judges in the past. I consider, however, that what or who has caused a certain event to occur is essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory.

79 In my view, several of the allegations contained in the statement of claim are statements of intangible fact. Some of them invite inferences; others anticipate probable consequences. They may be susceptible to proof by inference from real facts or by expert testimony or "through the application of common sense principles": see Leyland Shipping Co. v. Norwich Union Fire Insurance Society, [1918] A.C. 350, at p. 363, per Lord Dunedin. 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.

(b) Declaratory Relief

80 This may be an appropriate point at which to consider the appellants' submission that in order to establish a reasonable cause of action in relation to their claim for declaratory relief as opposed to their claim for an injunction and damages, they do not have to allege in their statement of claim the violation of a right or the threat of a violation of a right. It is sufficient, they submit, that the plaintiff have standing, that a "serious constitutional issue" is raised, and that the declaration sought serves a useful purpose. In support of this contention the appellants rely on Minister of Justice of Canada v. Borowski, [1981] 2 S.C.R. 575, and Thorson v. Attorney General of Canada, [1975] 1 S.C.R. 138. Thorson involved an alleged excess of legislative [page480] power by the Parliament of Canada as did the later case of Nova Scotia Board of Censors v. McNeil, [1976] 2 S.C.R. 265. Given the nature of such questions it is undoubtedly true that no violation of a right need necessarily be involved.

81 Borchard, Declaratory Judgments (2nd ed. 1941), at p. 27, suggests that declaratory relief in cases which are not susceptible of any other relief is distinctive in that:

> ... no "injury" or "wrong" need have been actually committed or threatened in order to enable the plaintiff to invoke the judicial process; he need merely show that some legal interest or right of his has been placed in jeopardy or grave uncertainty, by denial, by the existence of a potentially injurious instrument, by some unforeseen event or catastrophe the effect of which gives rise to dispute, or by the assertion of a conflicting claim by the defendant....

Borchard then goes to expand upon the concept of a "legal interest" at pp. 48-49:

> It is an essential condition of the right to invoke judicial relief that the plaintiff have a protectible interest. The fact that under declaratory procedure so many types of legal issues are presentable for determination which are incapable of any other form of relief, has imposed upon the courts at the outset the function of determining whether the facts justify the grant of judicial relief, and more particularly, whether the plaintiff has a "legal interest" in the relief he seeks. In the more familiar executory action, the legal interest is sought in the "cause of action," but, as already observed, the narrow scope often given to this ambiguous term has served to conceal from view the many occasions and situations in which a plaintiff not yet physically injured or one seeking escape from dilemma and uncertainty by a clarification of his legal position has need for judicial relief not of the traditional kind. The wider opportunity and necessity for judicial usefulness disclosed by the declaratory judgment make necessary either a more flexible and comprehensive connotation of the term "cause of action" or the employment of a less chameleonic term to indicate when the petitioner may be accorded judicial protection. Without losing sight of the necessity for jurisdictional facts, it is suggested that the term "legal interest" meets the need.

[page481]

82 Where, however, the unconstitutionality of a law or an act is founded upon its conflict with a right, then the right must be alleged to have been violated. Such was the case in Borowski where a declaration was being sought to the effect that the abortion provisions in the Criminal Code contravened the right to life guaranteed by s. 1(a) of the Canadian Bill of Rights R.S.C. 1970, Appendix III. It was alleged in Borowski that rights were being violated even although they were the rights of human foetuses and not the rights of the plaintiff. It seems to me that whenever a litigant raises a "serious constitutional issue" involving a violation of the Charter or the Canadian Bill of Rights then, since what is being complained of is an alleged violation of a right, it follows almost by definition that the nature of the alleged violation must be asserted. Moreover, as the respondents point out, s. 24(1) of the Charter makes the infringement or denial of a right a pre-condition to obtaining relief in the courts under that section. That being so, it seems to follow that the infringement or denial complained of must be specifically pleaded.

83 The appellants submit, however, that while their consequential relief in the form of an injunction and damages is made pursuant to s. 24(1) of the Charter, their claim for declaratory relief is at large. It is not sought pursuant to that section in paragraph 9(c) of their statement of claim which merely seeks a declaration of unconstitutionality. It is, they submit, a separate cause of action at common law and also under s. 52 of the Constitution Act, 1982 and can stand alone even if they fail in their claim for consequential relief under s. 24(1). They cite Rule 1723 of the Federal Court Rules which provides:

> Rule 1723. No action shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

84 The appellants acknowledge that a declaration of unconstitutionality is a discretionary remedy (Solosky v. The Queen, [1980] 1 S.C.R. 821) but [page482] say that the discretion lies with the trial court and is exercisable only after a trial on the merits. Accordingly, their claim for this relief should not have been struck out at the preliminary stage regardless of the fate of their other claims. However, as the respondents point out, declaratory relief is only discretionary in the sense that a court may refuse it even if the case for it has been made out: see Zamir, The Declaratory Judgment (1962), at p. 193. The court, therefore, on a motion to strike on the basis that no reasonable cause of action has been disclosed in the statement of claim is not in any sense usurping the discretionary power of the trial court.

(i) Inconsistency with the Constitution Act, 1982, s. 52(1)

85 Section 52(1) of the Constitution Act, 1982 provides:

> 52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

86 Section 52 would appear to have the same role in terms of imposing a constitutional limitation on law-making power in Canada as its predecessors, s. 2 of the Colonial Laws Validity Act, 1865, 28 & 29 Vict., c. 63 and s. 7 of the Statute of Westminster, 1931, 22 Geo. 5, c. 4 (R.S.C. 1970, Appendix II, no. 26): see La Forest, "The Canadian Charter of Rights and Freedoms: An Overview" (1983), 61 Can. Bar Rev., 19, at p. 28. Section 2 of the Colonial Laws Validity Act 1865 provides:

> 2. Any Colonial Law which is or shall be in any respect repugnant to the Provisions of any Act of Parliament extending to the Colony to which such Law may relate, or repugnant to any Order or Regulation made under Authority of such Act of Parliament, or having in the Colony the Force and Effect of such Act, shall be read subject to such Act, Order or Regulation, and shall, to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative.

Section 7 of the Statute of Westminster, 1931 provides:

[page483]

> 7.(1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.
>
> (2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.
>
> (3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively.

Accordingly, Dickson C.J.C. is unquestionably correct when he states in The Queen v. Big M Drug Mart Ltd. [1985], 1 S.C.R. 295 at p. 313:

> Section 52 sets out the fundamental principle of constitutional law that the Constitution is supreme.

The Chief Justice then goes on to note that where a declaration is sought under s. 52 to the effect that legislation is unconstitutional the standing requirements for constitutional litigation must of course be met.

87 If the appellants are relying on s. 52(1) of the Constitution Act, 1982 as the source of their right to a declaration of unconstitutionality, which it would appear from their factum that they are, it is noted that that provision is directed to "laws" which are inconsistent with the provisions of the Constitution.

88 Counsel for the appellants submitted in oral argument that they should not be prejudiced in the relief sought by

the absence of any law authorizing, ratifying or implementing the agreement between Canada and the United States since legislation, they submitted, should have been passed. The government should not therefore be allowed to immunize itself against judicial review under s. 52 of the Constitution Act, 1982 by its own omission to do that which it ought to have done.

89 This argument assumes, of course, that legislation was required and this does not appear to be so. [page484] The law in relation to treaty-making power was definitively established for Canada and the rest of the Commonwealth in Attorney-General for Canada v. Attorney-General for Ontario (Labour Conventions), [1937] A.C. 326 where Lord Atkin stated at pp. 347-48:

> It will be essential to keep in mind the distinction between (1) the formation, and (2) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign States. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. To make themselves as secure as possible they will often in such cases before final ratification seek to obtain from Parliament an expression of approval. But it has never been suggested, and it is not the law, that such an expression of approval operates as law, or that in law it precludes the assenting Parliament, or any subsequent Parliament, from refusing to give its sanction to any legislative proposals that may subsequently be brought before it. Parliament, no doubt, as the Chief Justice points out, has a constitutional control over the executive: but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone.
>
> (Emphasis added.)

90 A treaty, therefore, may be in full force and effect internationally without any legislative implementation and, absent such legislative implementation, it does not form part of the domestic law of Canada. Legislation is only required if some alteration in the domestic law is needed for its implementation: see R. St J. Macdonald: "The Relationship between International Law and Domestic Law in Canada," in Canadian Perspectives on International Law and Organization (1974), eds. Macdonald, Morris and Johnston, p. 88.

[page485]

91 The agreement in this case took the form of an "exchange of notes" between Allan Gotlieb, Canadian Ambassador to the United States and Kenneth W. Dam, Acting Secretary of State, The United States State Department. As Mr. Gotlieb points out in an article entitled "Canadian Treaty-Making: Informal Agreements and Interdepartmental Arrangements," in Canadian Perspectives on International Law and Organization, supra, at p. 230, Canadian treaty-making practice has been characterized by a movement away from formal, full-fledged governmental "treaties" and towards informal "exchange of notes" arrangements. There is nothing unusual, therefore, in the procedure adopted in relation to the cruise testing agreement.

92 Although little, if any, argument has been addressed in this case to the question whether the government's decision to permit testing of the cruise missile in Canada falls within the meaning of the word "law" as used in s. 52 of the Constitution Act, 1982, I am prepared to assume, without deciding, that it does. I am also prepared to assume that the appellants could establish their standing to bring an action under s. 52. The question remains, however, whether the appellants' claim raises a serious question of constitutional inconsistency. This in turn depends on the answer to the question whether the government's decision violates the appellants' rights under s. 7. If it does not, there is no inconsistency with the provisions of the Constitution.

(ii) At common law

93 If the appellants' claim for declaratory relief is a claim at common law of the type upheld in Dyson v. Attorney-

General, [1911] 1 K.B. 410, no issue arises as to whether or not there is a "law" implementing the cruise testing agreement. The common law action affords a means of attack on the acts of public officials who have allegedly exceeded their powers. However, in order to have standing to bring such an action a plaintiff must, as noted from Borchard, supra, be able to show that he or she will suffer injury to a right or legally protected interest from the conduct of such officials. [page486] The same point is made in de Smith, Constitutional and Administrative Law (4th ed.), at p. 604:

> The declaratory judgment is basically a twentieth-century judicial remedy and has come to be used for a great variety of purposes in public and private law. Declarations can be awarded in almost every situation where an injunction will lie -- the most important exception is that interim relief cannot be granted by way of a declaration -- and they extend to a number of situations where an injunction would be inappropriate (for example, because there is nothing to prohibit) or could not be obtained for other reasons (for example, because the prospective defendant was the Crown). The rules governing locus standi are in a state of confusion. In Gouriet v. Union of Post Office Workers [[1977] 3 All E.R. 70 (H.L.)] Mr. Gouriet eventually amended his claim to an application for a declaration that the Union of Post Office Workers was acting unlawfully in blocking mail from this country to South Africa. He was refused such a declaration. Lord Wilberforce said: "... there is no support for the proposition that declaratory relief can be granted unless the plaintiff, in proper proceedings, in which there is a dispute between the plaintiff and defendant concerning their legal respective rights and liabilities, either asserts a legal right which is denied or threatened, or claims immunity from some claim of the defendant against him, or claims that the defendant is infringing or threatens to infringe some public right so as to inflict special damage on the plaintiff."
>
> (Emphasis added.)

I believe, therefore, that the appellants, even on the common law action for a declaration, must establish at least a threat of violation, if not an actual violation, of their rights under s. 7 of the Charter in order to bring a viable claim for declaratory relief against governmental action.

94 The law then would appear to be clear. The facts pleaded are to be taken as proved. When so taken, the question is do they disclose a reasonable cause of action, i.e. a cause of action "with some chance of success" (Drummond-Jackson v. British Medical Association, [1970] All E.R. 1094) or, [page487] as Le Dain J. put it in Dowson v. Government of Canada (1981), 37 N.R. 127 (F.C.A.) at p. 138, is it "plain and obvious that the action cannot succeed?" Is it plain and obvious that the plaintiffs' claim for declaratory or consequential relief cannot succeed?

(3) Could the Facts as Alleged Constitute a Violation of Section 7 of the Charter?

95 Section 7 of the Canadian Charter of Rights and Freedoms provides as follows:

> 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.

96 Whether or not the facts that are alleged in the appellants' statement of claim could constitute a violation of s. 7 is, of course, the question that lies at the heart of this case. If they could not, then the appellants' statement of claim discloses no reasonable cause of action and the appeal must be dismissed. The appellants submit that on its proper construction s. 7 gives rise to two separate and presumably independent rights, namely the right to life, liberty and security of the person, and the right not to be deprived of such life, liberty and security of the person except in accordance with the principles of fundamental justice. In their submission, therefore, a violation of the principles of fundamental justice would only have to be alleged in relation to a claim based on a violation of the second right. As Marceau J. points out in his reasons, the French text of s. 7 does not seem to admit of this two-rights interpretation since only one right is specifically mentioned. Moreover, as the respondents point out, the appellants' suggestion does not accord with the interpretation that the courts have placed on the similarly structured provision in s. 1(a) of the Canadian Bill of Rights: see e.g. Miller v. The Queen, [1977] 2 S.C.R. 680, per Ritchie J., at pp. 703-04.

97 The appellants' submission, however, touches upon a number of important issues regarding the proper

interpretation of s. 7. Even if the section gives rise to a single unequivocal right not to be [page488] deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice, there nonetheless remains the question whether fundamental justice is entirely procedural in nature or whether it has a substantive aspect as well. This, in turn, leads to the related question whether there might not be certain deprivations of life, liberty or personal security which could not be justified no matter what procedure was employed to effect them. These are among the most important and difficult questions of interpretation arising under the Charter but I do not think it is necessary to deal with them in this case. It can, in my opinion, be disposed of without reaching these issues.

98 In my view, even an independent, substantive right to life, liberty and security of the person cannot be absolute. For example, the right to liberty, which I take to be the right to pursue one's goals free of governmental constraint, must accommodate the corresponding rights of others. The concept of "right" as used in the Charter postulates the inter-relation of individuals in society all of whom have the same right. The aphorism that "A hermit has no need of rights" makes the point. The concept of "right" also premises the existence of someone or some group against whom the right may be asserted. As Mortimer J. Adler expressed it in Six Great Ideas (1981), at p. 144:

> Living in organized societies under effective government and enforceable laws, as they must in order to survive and prosper, human beings neither have autonomy nor are they entitled to unlimited liberty of action. Autonomy is incompatible with organized society. Unlimited liberty is destructive of it.

99 The concept of "right" as used in the Charter must also, I believe, recognize and take account of the political reality of the modern state. Action by the state or, conversely, inaction by the state will frequently have the effect of decreasing or increasing the risk to the lives or security of its citizens. It may be argued, for example, that the failure of government to limit significantly the speed of traffic [page489] on the highways threatens our right to life and security in that it increases the risk of highway accidents. Such conduct, however, would not, in my view, fall within the scope of the right protected by s. 7 of the Charter.

100 In the same way, the concept of "right" as used in the Charter must take account of the fact that the self-contained political community which comprises the state is faced with at least the possibility, if not the reality, of external threats to both its collective well-being and to the individual well-being of its citizens. In order to protect the community against such threats it may well be necessary for the state to take steps which incidentally increase the risk to the lives or personal security of some or all of the state's citizens. Such steps, it seems to me, cannot have been contemplated by the draftsman of the Charter as giving rise to violations of s. 7. As John Rawls states in A Theory of Justice (1971), at p. 213:

> The government's right to maintain public order and security is... a right which the government must have if it is to carry out its duty of impartially supporting the conditions necessary for everyone's pursuit of his interests and living up to his obligations as he understands them.

101 The rights under the Charter not being absolute, their content or scope must be discerned quite apart from any limitation sought to be imposed upon them by the government under s. 1. As was pointed out by the Ontario Court of Appeal in Re Federal Republic of Germany and Rauca (1983), 41 O.R. (2d) 225, at p. 294:

> ... the Charter was not enacted in a vacuum and the rights set out therein must be interpreted rationally having regard to the then existing laws....

There is no liberty without law and there is no law without some restriction of liberty: see Dworkin, Taking Rights Seriously (1977), p. 267. This paradox caused Roscoe Pound to conclude:

> There is no more ambiguous word in legal and juristic literature than the word right. In its most general sense [page490] it means a reasonable expectation involved in civilized life. [See Jurisprudence, vol. 4, (1959), p. 56.]

102 It is not necessary to accept the restrictive interpretation advanced by Pratte J., which would limit s. 7 to protection against arbitrary arrest or detention, in order to agree that the central concern of the section is direct impingement by government upon the life, liberty and personal security of individual citizens. At the very least, it seems to me, there must be a strong presumption that governmental action which concerns the relations of the

state with other states, and which is therefore not directed at any member of the immediate political community, was never intended to be caught by s. 7 even although such action may have the incidental effect of increasing the risk of death or injury that individuals generally have to face.

103 I agree with Le Dain J. that the essence of the appellants' case is the claim that permitting the cruise missile to be tested in Canada will increase the risk of nuclear war. But even accepting this allegation of fact as true, which as I have already said I think we must do on a motion to strike, it is my opinion for the reasons given above that this state of affairs could not constitute a breach of s. 7. Moreover, I do not see how one can distinguish in a principled way between this particular risk and any other danger to which the government's action vis-à-vis other states might incidentally subject its citizens. A declaration of war, for example, almost certainly increases the risk to most citizens of death or injury. Acceptance of the appellants' submissions, it seems to me, would mean that any such declaration would also have to be regarded as a violation of s. 7. I cannot think that that could be a proper interpretation of the Charter.

104 This is not to say that every governmental action that is purportedly taken in furtherance of national defence would be beyond the reach of s. 7. If, for example, testing the cruise missile posed a direct threat to some specific segment of the populace -- as, for example, if it were being tested with live warheads -- I think that might well raise different [page491] considerations. A court might find that that constituted a violation of s. 7 and it might then be up to the government to try to establish that testing the cruise with live warheads was justified under s. 1 of the Charter. Section 1, in my opinion, is the uniquely Canadian mechanism through which the courts are to determine the justiciability of particular issues that come before it. It embodies through its reference to a free and democratic society the essential features of our constitution including the separation of powers, responsible government and the rule of law. It obviates the need for a "political questions" doctrine and permits the court to deal with what might be termed "prudential" considerations in a principled way without renouncing its constitutional and mandated responsibility for judicial review. It is not, however, called into operation here since the facts alleged in the statement of claim, even if they could be shown to be true, could not in my opinion constitute a violation of s. 7.

(4) Can the Statement of Claim be Amended?

105 The appellants were denied leave by Pratte J. to amend their statement of claim by adding the following:

> The very testing of the cruise missiles per se in Canada endangers the Charter of Rights and Freedoms Section 7: Rights.

106 Since this is a conclusion of law, not fact, it cannot in my view affect the factual allegations which the Court must accept as proved in order to decide whether the statement of claim should be struck out. We do not know the basis on which Pratte J. refused the amendment. He gave no reasons, nor was he obliged to. The matter was purely discretionary under Rule 1104. Certainly conclusions of law may be pleaded: see Famous Players Canadian Corporation Ltd. v. J.J. Turner and Sons Ltd. [1948] O.W.N. 221, per Gale J. at pp. 221-22 but they do not form part of the factual allegations which must be taken as proved for [page492] purposes of a motion to strike. No appeal was taken from the order of Pratte J.

107 Counsel for the appellants submit that prior to the filing of a statement of defence they were entitled to amend as of right under Rule 421 and that they should not be prejudiced with respect to this right because they invoked the discretion of the court under Rule 1104. It may, however, be of significance in this connection that their application for amendment to the statement of claim was filed after the Crown had instituted its appeal to the Federal Court of Appeal. In my view, their application was therefore one made "during the pendency of an appeal" to which the Rules of the Federal Court of Appeal would apply. This means, in my view, that the appellants' right under Rule 421 had expired and their only recourse was to proceed under Rule 1104.

108 The point, however, may be academic. The proposed amendment amounts to no more than an assertion of the conclusion which the appellants submit the Court ought to come to on the main issue in the case. Since the Court must address that issue in any event, the addition of the suggested amendment could, it seems to me, make no difference one way or the other to the appellants' case.

Conclusions

109 In summary, it seems to me that the issues raised on the appeal are to be disposed of as follows:

(1) The government's decision to permit testing of the cruise missile in Canada cannot escape judicial review on any of the grounds advanced;

(2) The statement of claim may be struck out if the facts as alleged do not disclose a reasonable cause of action which in this case could be either

(a) a cause of action under s. 24(1) of the Charter; or

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(b) a cause of action for declaratory relief at common law on the principle of Dyson v. Attorney-General, supra; or

(c) a cause of action under s. 52(1) of the Constitution Act, 1982 for a declaration of unconstitutionality.

(3) Taking the facts alleged as proven, they could not constitute a violation of s. 7 of the Charter so as to give rise to a cause of action under s. 24(1);

(4) The appellants could not establish their status to sue at common law for declaratory relief for the same reason that they could not establish a cause of action under s. 24(1); and

(5) The appellants could not establish a cause of action for declaratory relief under s. 52(1) since the facts as alleged could not constitute a violation of s. 7 and therefore no inconsistency with the provisions of the Constitution could be established.

110 I would accordingly dismiss the appeal with costs.

Appeal dismissed with costs.

* * * * *

Errata, published at [1986] 1 S.C.R., page iv

[1985] 1 S.C.R. p. 459, line h-3 of the English version. Read "Constitution Act, 1982" instead of "Charter".

R.D. Belanger & Associates Ltd., Belanger, Buttcon Ltd.,Butt, Crashley, Leitch, Scepter Manufacturing Co. and Larue v.Stadium Corp. of Ontario Ltd. and Bitove Corp.Indexed as: R.D. Belanger & Associates Ltd. v. Stadium Corp.of Ontario Ltd.(C.A.), 5 O.R. (3d) 778

Ontario Reports

ONTARIO

Court of Appeal for Ontario

Finlayson, Catzman and Galligan JJ.A.

November 6, 1991

Action No. 303/91

5 O.R. (3d) 778 | [1991] O.J. No. 1962

Case Summary

Civil procedure — Commencement of proceedings — Statement of claim — Striking out statement of claim — Test to be applied whether it was plain and obvious that claim disclosed no reasonable cause of action — Rules of Civil Procedure, O. Reg. 560/84, rule 21.01.

The plaintiffs sued the defendants both in contract (seeking a declaration that a provision in a licence agreement that food and beverage services be provided at "cost" meant reasonable cost) and in tort (claiming that the defendants conspired amongst themselves with the object of injuring the economic or business interests of the plaintiffs and that the defendants conspired amongst themselves to further their own objects by unlawful means). The defendants moved under rule 21.01(1)(a) and (b) of the Rules of Civil Procedure, seeking the determination of certain questions of law and the dismissal of the action. The action was dismissed and the plaintiffs appealed.

Held, the appeal should be allowed.

The test to be applied on motions of this kind was whether it was plain and obvious that the claim disclosed no reasonable cause of action. The appellate court was under no obligation to decide each and every question of law posed by the defendants; it merely had to decide whether the motions judge was correct in his decision to dismiss the action. This case should be decided under rule 21.01(1)(b), which requires that the court decide whether the statement of claim, when read as a whole, fails to disclose any reasonable cause of action. Although portions of the statement of claim could well be struck out as frivolous or vexatious, the basic contractual and tortious reliefs sought were supportable. Matters of law which have not been settled fully in our jurisprudence should not be disposed of at this stage of the proceedings.

Hunt v. Carey Canada Ltd., [1990] 2 S.C.R. 959, 49 B.C.L.R. (2d) 273, 74 D.L.R. (4th) 321, [1990] 6 W.W.R. 385, apld

Other cases referred to

Nelles v. Ontario, [1989] 2 S.C.R. 170, 69 O.R. (2d) 448 (note), 42 C.R.R. 1, 49 C.C.L.T. 217, 37 C.P.C. (2d) 1, 71 C.R. (3d) 358, 60 D.L.R. (4th) 609, 98 N.R. 321, 35 O.A.C. 161

Statutes referred to

Competition Act, R.S.C. 1985, c. C-34, Part VI, ss. 36 [am. R.S.C. 1985, c. 1 (4th Supp.), s. 11], 45 [am. R.S.C. 1985, c. 19 (2nd Supp.), s. 30]

Rules and regulations referred to

Rules of Civil Procedure, O. Reg. 560/84, rules 21.01, 21.01(1) (a), (b), 25.11

Authorities referred to

Fridman, G.H.L., The Law of Torts in Canada (Toronto: Carswell, 1990), vol. 2, pp. 265-66

APPEAL from an order of the General Division, Hoilett J., June 3, 1991, dismissing the appellants' action.
W.L.N. Somerville, Q.C., and R.S. Russell, for appellants/ respondents.

Alan H. Mark and David A. Shiller, for the Bitove Corporation, respondent/applicant.

John A. Campion and Stephanie Brown, for Stadium Corp. of Ontario Ltd., respondent/applicant.

The judgment of the court was delivered by

FINLAYSON J.A. (orally)

FINLAYSON J.A. (orally):— This is an appeal from that part of the order of the Honourable Mr. Justice Hoilett, dated June 3, 1991, in which he dismissed the appellants' action with costs fixed at $12,000.

The corporate appellants are licensees under licence agreements with the respondent, Stadium Corporation of Ontario Limited (Stadco). The individual appellants are officers of the appellant corporations. The licence agreements are for what are called skybox suites at the Skydome Stadium in Toronto. A dispute has arisen as to the cost of food and beverage services supplied to the suites, for which the licensees are obliged under the licence agreements to pay to Stadco or to the caterer designated by it, the respondent, the Bitove Corporation (Bitove). We are asked here to consider if Hoilett J., on a motion under rule 21.01 of the Rules of Civil Procedure, O. Reg. 560/84, was correct in dismissing the appellants' action.

Stripped to its essentials, the statement of claim alleges a cause of action in contract and separate causes of action in tort. The cause of action in contract relates to the contention that the provision in the licence agreement that food and beverage services are to be supplied at "cost" means that they are to be supplied at a reasonable cost or, alternatively, that it is an implied term of the licence agreement that the food and beverages are to be supplied at a reasonable price. Declarations are sought to this effect. It is pleaded that the prices charged for the supply of unprocessed food and beverages amounted to a multiple of several times the cost of these items to the respondents. Additionally, it is alleged that Stadco unilaterally added an automatic 15 per cent service charge to these prices. Whether these allegations are factual or not can only be established at trial.

The statement of claim also alleges two torts of common law conspiracy, one, that the respondents have conspired, combined, agreed or arranged amongst themselves with the object of injuring the economic or business interests of the appellants, and the other, that they have conspired, combined, agreed or arranged amongst themselves to further their own objects by unlawful means.

Sufficient particulars, which if proved would establish both causes of action, are set out. The court heard extensive argument as to the sufficiency of these particulars in law, but in the light of the decision of the Supreme Court of Canada in Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321, we do not think it is necessary to go into them. In affirming that the test to be applied on motions of this kind was whether the outcome of the case was "plain and obvious" or "beyond reasonable doubt", Wilson J., in delivering the judgment of the court, stated at p. 980 S.C.R., p. 336 D.L.R.:

> Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia Rules of Court is the same as the one that governs an application under R.S.C. O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).
> The question therefore to which we must now turn in this appeal is whether it is "plain and obvious" that the plaintiff's claims in the tort of conspiracy disclose no reasonable cause of action or whether the plaintiff has presented a case that is "fit to be tried", even although it may call for a complex or novel application of the tort of conspiracy.

Later, in commenting on a passage on the law of conspiracy quoted from vol. 2, pp. 265-66 of G.H.L. Fridman, The Law of Torts in Canada (Toronto: Carswell, 1990), Wilson J. stated at p. 986 S.C.R., p. 340 D.L.R.:

> In my view, this passage provides a useful summary of the current state of the law in Canada with respect to the tort of conspiracy. Whether it is "good law", it seems to me, it is not for the court to consider in this proceeding where the issue is simply whether the plaintiff's pleadings disclose a reasonable cause of action. I agree completely with Esson J.A. that it is not appropriate at this stage to engage in a detailed analysis of the strengths and weaknesses of Canadian law on the tort of conspiracy.

Counsel for both Stadco and Bitove sought to distinguish Hunt v. Carey on the basis that it was determined under the British Columbia equivalent of Ontario rule 21.01(1)(b), whereas they maintained they had moved under rule 21.01(1)(a) which imposes a less onerous burden on the respondents. Rule 21.01(1) reads as follows:

> 21.01 (1) A party may move before a judge,
>
> (a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or
>
> (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,
> and the judge may make an order or grant judgment accordingly.

In point of fact, both Stadco and Bitove had moved under both clauses (a) and (b) of rule 21.01(1), Stadco asking under clause (a) that eight questions of law be decided and Bitove asking that ten issues be decided. Both parties, however, then asked that the paragraphs of the statement of claim corresponding to the points of law that they wanted decided be struck out. This is a power that is exercised under clause (b). Counsel now maintain that this court is under an obligation to decide each and every one of these questions of law, some of which require substantial research, and that we are not entitled to consider only whether Hoilett J. was correct in his decision to dismiss the action. I do not agree. An examination of the statement of claim does not reveal a discrete question or questions of law such as that in Nelles v. Ontario, [1989] 2 S.C.R. 170, 60 D.L.R. (4th) 609, which can be clearly isolated from the contested issues of fact in the case. In Nelles, the Supreme Court of Canada held that a trial was not necessary to permit a conclusion on the question of prosecutorial immunity. In such circumstances, the court should exercise its jurisdiction under rule 21.01(1)(a).

This case, on the other hand, should not have its multiple questions determined under rule 21.01(1)(a). The respondents are not entitled to have their case tried by inches. They may have achieved greater success before Hoilett J. than they anticipated, but in dismissing the appellants' action, he gave them no more than they asked for. This case should be decided under rule 21.01(1)(b) which requires that the court decide whether the statement of claim, when read as a whole, fails to disclose any reasonable cause of action.

In addition to the two conspiracy torts, the appellants plead that the respondents by unlawful means have tortiously interfered with the appellants' economic interests and they claim damages therefor. Finally, they plead the statutory cause of action conferred by s. 36 [am. R.S.C. 1985, c. 1 (4th Supp.), s. 11] of the Competition Act, R.S.C.

1985, c. C-34, alleging that they have suffered loss or damage as a result of the conduct of at least some of the respondents, that conduct being contrary to the provisions of Part VI of the Competition Act, in particular s. 45 [am. R.S.C. 1985, c. 19 (2nd Supp.), s. 30] thereof.

Injunctive relief and an accounting are also claimed in addition to damages.

Counsel for Stadco submitted that there were more than 12 causes of action pleaded, but, on analysis, most of the causes of action that he listed were refinements of the broad categories that I have set out above. Counsel went through the prayer for relief and submitted that most of the declarations sought were not proper as a matter of law. He also questioned whether there was such a tort as interference with the appellants' economic interests or that s. 36 of the Competition Act could found a civil cause of action on the facts as pleaded.

All this may well be true. The statement of claim does reveal a "scatter gun" approach to the issues. Portions of the statement of claim could well be struck out under rule 25.11 as frivolous or vexatious, but we are not concerned here with niceties of pleading. Given that the basic contractual and tortious reliefs sought are supportable, it will be up to the trial judge to determine what relief, if any, is appropriate.

This lack of concern about neatness extends further to the respondents' objections to the manner in which the appellants pleaded the legal issues in this case. Matters of law which have not been settled fully in our jurisprudence should not be disposed of at this stage of the proceedings. Reference should again be made to Hunt v. Carey, where Wilson J. stated at p. 977 S.C.R., p. 334 D.L.R.:

> More recently, in Gilbert Surgical Supply Co. v. F.W. Horner Ltd., [1960] O.W.N. 289 (C.A.), at pp. 289-90, Aylesworth J.A. observed that the fact that an action might be novel was no justification for striking out a statement of claim. The court would still have to conclude that "the plaintiff's action could not possibly succeed or that clearly and beyond all doubt, no reasonable cause of action had been shown".
> Thus the Ontario Court of Appeal has firmly embraced the "plain and obvious" test and has made clear that it too is of the view that the test is rooted in the need for courts to ensure that their process is not abused. The fact that the case the plaintiff wishes to present may involve complex issues of fact and law or may raise a novel legal proposition should not prevent a plaintiff from proceeding with his action.

Accordingly, for the reasons given, I would allow the appeal, set aside the order of Hoilett J. and in its place issue an order dismissing the motions of the two respondents. The appellants are entitled to their costs against both respondents here and below to be paid forthwith after assessment.

Appeal allowed.

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

Supreme Court Reports

Supreme Court of Canada

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.
REFERENCE BY GOVERNOR IN COUNCIL

1998: February 16, 17, 18, 19 / 1998: August 20.

File No.: 25506.

[1998] 2 S.C.R. 217 | [1998] 2 R.C.S. 217 | [1998] S.C.J. No. 61 | [1998] A.C.S. no 61

IN THE MATTER OF Section 53 of the Supreme Court Act, R.S.C., 1985, c. S-26 AND IN THE MATTER OF a Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada, as set out in Order in Council P.C. 1996-1497, dated the 30th day of September, 1996

Case Summary

Constitutional law — Supreme Court of Canada — Reference jurisdiction — Whether Supreme Court's reference jurisdiction constitutional — Constitution Act, 1867, s. 101 — Supreme Court Act, R.S.C., 1985, c. S-26, s. 53.

Courts — Supreme Court of Canada — Reference jurisdiction — Governor in Council referring to Supreme Court three questions relating to secession of Quebec from Canada — Whether questions submitted fall outside scope of reference provision of Supreme Court Act — Whether questions submitted justiciable — Supreme Court Act, R.S.C., 1985, c. S-26, s. 53.

Constitutional law — Secession of province — Unilateral secession — Whether Quebec can secede unilaterally from Canada under Constitution.

International law — Secession of province of Canadian federation — Right of self-determination — Effectivity principle — Whether international law gives Quebec right to secede unilaterally from Canada.

Pursuant to s. 53 of the Supreme Court Act, the Governor in Council referred the following questions to this Court:

1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?
3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

Issues regarding the Court's reference jurisdiction were raised by the amicus curiae. He argued that s. 53 of the Supreme Court Act was unconstitutional; that, even if the Court's reference jurisdiction was constitutionally valid, the questions submitted were outside the scope of s. 53; and, finally, that these questions were not justiciable.

Held: Section 53 of the Supreme Court Act is constitutional and the Court should answer the reference questions.

(1) Supreme Court's Reference Jurisdiction

Section 101 of the Constitution Act, 1867 gives Parliament the authority to grant this Court the reference jurisdiction provided for in s. 53 of the Supreme Court Act. The words "general court of appeal" in s. 101 denote the status of the Court within the national court structure and should not be taken as a restrictive definition of the Court's functions. While, in most instances, this Court acts as the exclusive ultimate appellate court in the country, an appellate court can receive, on an exceptional basis, original jurisdiction not incompatible with its appellate jurisdiction. Even if there were any conflict between this Court's reference jurisdiction and the original jurisdiction of the provincial superior courts, any such conflict must be resolved in favour of Parliament's exercise of its plenary power to establish a "general court of appeal". A "general court of appeal" may also properly undertake other legal functions, such as the rendering of advisory opinions. There is no constitutional bar to this Court's receipt of jurisdiction to undertake an advisory role.

The reference questions are within the scope of s. 53 of the Supreme Court Act. Question 1 is directed, at least in part, to the interpretation of the Constitution Acts, which are referred to in s. 53(1)(a). Both Questions 1 and 2 fall within s. 53(1)(d), since they relate to the powers of the legislature or government of a Canadian province. Finally, all three questions are "important questions of law or fact concerning any matter" and thus come within s. 53(2). In answering Question 2, the Court is not exceeding its jurisdiction by purporting to act as an international tribunal. The Court is providing an advisory opinion to the Governor in Council in its capacity as a national court on legal questions touching and concerning the future of the Canadian federation. Further, Question 2 is not beyond the competence of this Court, as a domestic court, because it requires the Court to look at international law rather than domestic law. More importantly, Question 2 does not ask an abstract question of "pure" international law but seeks to determine the legal rights and obligations of the legislature or government of Quebec, institutions that exist as part of the Canadian legal order. International law must be addressed since it has been invoked as a consideration in the context of this Reference.

The reference questions are justiciable and should be answered. They do not ask the Court to usurp any democratic decision that the people of Quebec may be called upon to make. The questions, as interpreted by the Court, are strictly limited to aspects of the legal framework in which that democratic decision is to be taken. Since the reference questions may clearly be interpreted as directed to legal issues, the Court is in a position to answer them. The Court cannot exercise its discretion to refuse to answer the questions on a pragmatic basis. The questions raise issues of fundamental public importance and they are not too imprecise or ambiguous to permit a proper legal answer. Nor has the Court been provided with insufficient information regarding the present context in which the questions arise. Finally, the Court may deal on a reference with issues that might otherwise be considered not yet "ripe" for decision.

(2) Question 1

The Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles animating the whole of the Constitution, including the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities. Those principles must inform our overall appreciation of the constitutional rights and obligations that would come into play in the event that a clear majority of Quebecers votes on a clear question in favour of secession.

The Court in this Reference is required to consider whether Quebec has a right to unilateral secession. Arguments in support of the existence of such a right were primarily based on the principle of democracy. Democracy, however, means more than simple majority rule. Constitutional jurisprudence shows that democracy exists in the larger context of other constitutional values. Since Confederation, the people of the provinces and territories have created close ties of interdependence (economic, social, political and cultural) based on shared values that include federalism, democracy, constitutionalism and the rule of law, and respect for minorities. A democratic decision of Quebecers in favour of secession would put those relationships at risk. The Constitution vouchsafes order and

stability, and accordingly secession of a province "under the Constitution" could not be achieved unilaterally, that is, without principled negotiation with other participants in Confederation within the existing constitutional framework.

Our democratic institutions necessarily accommodate a continuous process of discussion and evolution, which is reflected in the constitutional right of each participant in the federation to initiate constitutional change. This right implies a reciprocal duty on the other participants to engage in discussions to address any legitimate initiative to change the constitutional order. A clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize.

Quebec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation. The democratic vote, by however strong a majority, would have no legal effect on its own and could not push aside the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. Democratic rights under the Constitution cannot be divorced from constitutional obligations. Nor, however, can the reverse proposition be accepted: the continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The other provinces and the federal government would have no basis to deny the right of the government of Quebec to pursue secession should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. The negotiations that followed such a vote would address the potential act of secession as well as its possible terms should in fact secession proceed. There would be no conclusions predetermined by law on any issue. Negotiations would need to address the interests of the other provinces, the federal government and Quebec and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of minorities.

The negotiation process would require the reconciliation of various rights and obligations by negotiation between two legitimate majorities, namely, the majority of the population of Quebec, and that of Canada as a whole. A political majority at either level that does not act in accordance with the underlying constitutional principles puts at risk the legitimacy of its exercise of its rights, and the ultimate acceptance of the result by the international community.

The task of the Court has been to clarify the legal framework within which political decisions are to be taken "under the Constitution" and not to usurp the prerogatives of the political forces that operate within that framework. The obligations identified by the Court are binding obligations under the Constitution. However, it will be for the political actors to determine what constitutes "a clear majority on a clear question" in the circumstances under which a future referendum vote may be taken. Equally, in the event of demonstrated majority support for Quebec secession, the content and process of the negotiations will be for the political actors to settle. The reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm precisely because that reconciliation can only be achieved through the give and take of political negotiations. To the extent issues addressed in the course of negotiation are political, the courts, appreciating their proper role in the constitutional scheme, would have no supervisory role.

(3) Question 2

The Court was also required to consider whether a right to unilateral secession exists under international law. Some supporting an affirmative answer did so on the basis of the recognized right to self-determination that belongs to all "peoples". Although much of the Quebec population certainly shares many of the characteristics of a people, it is not necessary to decide the "people" issue because, whatever may be the correct determination of this issue in the context of Quebec, a right to secession only arises under the principle of self-determination of people at international law where "a people" is governed as part of a colonial empire; where "a people" is subject to alien subjugation, domination or exploitation; and possibly where "a people" is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state. A state whose government represents the

whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states. Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development. In the circumstances, the "National Assembly, the legislature or the government of Quebec" do not enjoy a right at international law to effect the secession of Quebec from Canada unilaterally.

Although there is no right, under the Constitution or at international law, to unilateral secession, the possibility of an unconstitutional declaration of secession leading to a de facto secession is not ruled out. The ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition. Even if granted, such recognition would not, however, provide any retroactive justification for the act of secession, either under the Constitution of Canada or at international law.

(4) Question 3

In view of the answers to Questions 1 and 2, there is no conflict between domestic and international law to be addressed in the context of this Reference.

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Referred to: Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721; Re References by Governor-General in Council (1910), 43 S.C.R. 536, aff'd [1912] A.C. 571; Quebec North Shore Paper Co. v. Canadian Pacific Ltd., [1977] 2 S.C.R. 1054; De Demko v. Home Secretary, [1959] A.C. 654; Re Forest and Registrar of Court of Appeal of Manitoba (1977), 77 D.L.R. (3d) 445; Attorney-General for Ontario v. Attorney-General for Canada, [1947] A.C. 127; Muskrat v. United States, 219 U.S. 346 (1911); Reference re Powers to Levy Rates on Foreign Legations and High Commissioners' Residences, [1943] S.C.R. 208; Reference re Ownership of Offshore Mineral Rights of British Columbia, [1967] S.C.R. 792; Reference re Newfoundland Continental Shelf, [1984] 1 S.C.R. 86; Reference re Canada Assistance Plan (B.C.), [1991] 2 S.C.R. 525; McEvoy v. Attorney General for New Brunswick, [1983] 1 S.C.R. 704; Reference re Waters and Water-Powers, [1929] S.C.R. 200; Reference re Goods and Services Tax, [1992] 2 S.C.R. 445; Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3; Reference re Education System in Island of Montreal, [1926] S.C.R. 246; Reference re Authority of Parliament in relation to the Upper House, [1980] 1 S.C.R. 54; Reference re Resolution to amend the Constitution, [1981] 1 S.C.R. 753; Reference re Objection by Quebec to a Resolution to Amend the Constitution, [1982] 2 S.C.R. 793; OPSEU v. Ontario (Attorney General), [1987] 2 S.C.R. 2; Edwards v. Attorney-General for Canada, [1930] A.C. 124; New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), [1993] 1 S.C.R. 319; Fraser v. Public Service Staff Relations Board, [1985] 2 S.C.R. 455; Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick, [1892] A.C. 437; Northern Telecom Canada Ltd. v. Communication Workers of Canada, [1983] 1 S.C.R. 733; Re the Initiative and Referendum Act, [1919] A.C. 935; Haig v. Canada, [1993] 2 S.C.R. 995; R. v. S. (S.), [1990] 2 S.C.R. 254; Switzman v. Elbling, [1957] S.C.R. 285; Saumur v. City of Quebec, [1953] 2 S.C.R. 299; Boucher v. The King, [1951] S.C.R. 265; Reference re Alberta Statutes, [1938] S.C.R. 100; Reference re Provincial Electoral Boundaries (Sask.), [1991] 2 S.C.R. 158; R. v. Oakes, [1986] 1 S.C.R. 103; Harvey v. New Brunswick (Attorney General), [1996] 2 S.C.R. 876; Roncarelli v. Duplessis, [1959] S.C.R. 121; Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441; Reference re Bill 30, An Act to amend the Education Act (Ont.), [1987] 1 S.C.R. 1148; Reference re Education Act (Que.), [1993] 2 S.C.R. 511; Greater Montreal Protestant School Board v. Quebec (Attorney General), [1989] 1 S.C.R. 377; Adler v. Ontario, [1996] 3 S.C.R. 609; Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education, [1986] 1 S.C.R. 549; Reference re Public Schools Act (Man.), s. 79(3), (4) and (7), [1993] 1 S.C.R. 839; Mahe v. Alberta, [1990] 1 S.C.R. 342; R. v. Sparrow, [1990] 1 S.C.R. 1075; Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources), [1989] 2 S.C.R. 49.

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REFERENCE by the Governor in Council, pursuant to s. 53 of the Supreme Court Act, concerning the secession of Quebec from Canada.

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Stephen A. Scott, for the interveners Roopnarine Singh, Keith Owen Henderson, Claude Leclerc, Kenneth O'Donnell and Van Hoven Petteway. Vincent Pouliot, on his own behalf.

Solicitor for the Attorney General of Canada: George Thomson, Ottawa. Solicitors appointed by the Court as amicus curiae: Joli-C(oe)ur Lacasse Lemieux Simard St-Pierre, Sainte-Foy. Solicitor for the intervener the Attorney General of Manitoba: The Department of Justice, Winnipeg. Solicitor for the intervener the Attorney General for Saskatchewan: W. Brent Cotter, Regina. Solicitor for the intervener the Minister of Justice of the Northwest Territories: Bernard W. Funston, Gloucester. Solicitor for the intervener the Minister of Justice for the Government of the Yukon Territory: Stuart J. Whitley, Whitehorse. Solicitor for the intervener Kitigan Zibi Anishinabeg: Agnès Laporte, Hull. Solicitors for the intervener the Grand Council of the Crees (Eeyou Estchee): Robinson, Sheppard, Shapiro, Montréal. Solicitors for the intervener the Makivik Corporation: Hutchins, Soroka & Dionne, Montréal. Solicitor for the intervener the Chiefs of Ontario: Michael Sherry, Toronto. Solicitors for the intervener the Minority Advocacy and Rights Council: Scott & Aylen, Toronto. Solicitors for the intervener the Ad Hoc Committee of Canadian Women on the Constitution: Eberts Symes Street & Corbett, Toronto; Centre for Refugee Studies, North York. Solicitors for the intervener Guy Bertrand: Guy Bertrand & Associés, Québec; Patrick Monahan, North York. Solicitors for the interveners Roopnarine Singh, Keith Owen Henderson, Claude Leclerc, Kenneth O'Donnell and Van Hoven Petteway: Stephen A. Scott, Montréal. Solicitors for the intervener Vincent Pouliot: Paquette & Associés, Montréal.

The following is the judgment delivered by

THE COURT

I. Introduction

1 This Reference requires us to consider momentous questions that go to the heart of our system of constitutional government. The observation we made more than a decade ago in Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721 (Manitoba Language Rights Reference), at p. 728, applies with equal force here: as in that case, the present one "combines legal and constitutional questions of the utmost subtlety and complexity with political questions of great sensitivity". In our view, it is not possible to answer the questions that have been put to us without a consideration of a number of underlying principles. An exploration of the meaning and nature of these underlying principles is not merely of academic interest. On the contrary, such an exploration is of immense practical utility. Only once those underlying principles have been examined and delineated may a considered response to the questions we are required to answer emerge.

2 The questions posed by the Governor in Council by way of Order in Council P.C. 1996-1497, dated September 30, 1996, read as follows:

1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?
3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

3 Before turning to Question 1, as a preliminary matter, it is necessary to deal with the issues raised with regard to this Court's reference jurisdiction.

II. The Preliminary Objections to the Court's Reference Jurisdiction

4 The amicus curiae argued that s. 101 of the Constitution Act, 1867 does not give Parliament the authority to grant this Court the jurisdiction provided for in s. 53 of the Supreme Court Act, R.S.C., 1985, c. S-26. Alternatively, it is submitted that even if Parliament were entitled to enact s. 53 of the Supreme Court Act, the scope of that section should be interpreted to exclude the kinds of questions the Governor in Council has submitted in this Reference. In particular, it is contended that this Court cannot answer Question 2, since it is a question of "pure" international law over which this Court has no jurisdiction. Finally, even if this Court's reference jurisdiction is constitutionally valid, and even if the questions are within the purview of s. 53 of the Supreme Court Act, it is argued that the three questions referred to the Court are speculative, of a political nature, and, in any event, are not ripe for judicial decision, and therefore are not justiciable.

5 Notwithstanding certain formal objections by the Attorney General of Canada, it is our view that the amicus curiae was within his rights to make the preliminary objections, and that we should deal with them.

A. The Constitutional Validity of Section 53 of the Supreme Court Act

6 In Re References by Governor-General in Council (1910), 43 S.C.R. 536, affirmed on appeal to the Privy Council, [1912] A.C. 571 (sub nom. Attorney-General for Ontario v. Attorney-General for Canada), the constitutionality of this Court's special jurisdiction was twice upheld. The Court is asked to revisit these decisions. In light of the significant changes in the role of this Court since 1912, and the very important issues raised in this Reference, it is appropriate to reconsider briefly the constitutional validity of the Court's reference jurisdiction.

7 Section 3 of the Supreme Court Act establishes this Court both as a "general court of appeal" for Canada and as an "additional court for the better administration of the laws of Canada". These two roles reflect the two heads of power enumerated in s. 101 of the Constitution Act, 1867. However, the "laws of Canada" referred to in s. 101 consist only of federal law and statute: see Quebec North Shore Paper Co. v. Canadian Pacific Ltd., [1977] 2 S.C.R. 1054, at pp. 1065-66. As a result, the phrase "additional courts" contained in s. 101 is an insufficient basis upon which to ground the special jurisdiction established in s. 53 of the Supreme Court Act, which clearly exceeds a consideration of federal law alone (see, e.g., s. 53(2)). Section 53 must therefore be taken as enacted pursuant to Parliament's power to create a "general court of appeal" for Canada.

8 Section 53 of the Supreme Court Act is intra vires Parliament's power under s. 101 if, in "pith and substance", it is legislation in relation to the constitution or organization of a "general court of appeal". Section 53 is defined by two leading characteristics -- it establishes an original jurisdiction in this Court and imposes a duty on the Court to render advisory opinions. Section 53 is therefore constitutionally valid only if (1) a "general court of appeal" may properly exercise an original jurisdiction; and (2) a "general court of appeal" may properly undertake other legal functions, such as the rendering of advisory opinions.

(1) May a Court of Appeal Exercise an Original Jurisdiction?

9 The words "general court of appeal" in s. 101 denote the status of the Court within the national court structure and should not be taken as a restrictive definition of the Court's functions. In most instances, this Court acts as the exclusive ultimate appellate court in the country, and, as such, is properly constituted as the "general court of appeal" for Canada. Moreover, it is clear that an appellate court can receive, on an exceptional basis, original jurisdiction not incompatible with its appellate jurisdiction.

10 The English Court of Appeal, the U.S. Supreme Court and certain courts of appeal in Canada exercise an original jurisdiction in addition to their appellate functions. See De Demko v. Home Secretary, [1959] A.C. 654 (H.L.), at p. 660; Re Forest and Registrar of Court of Appeal of Manitoba (1977), 77 D.L.R. (3d) 445 (Man. C.A.), at p. 453; United States Constitution, art. III, sec. 2. Although these courts are not constituted under a head of power similar to s. 101, they certainly provide examples which suggest that there is nothing inherently self-contradictory about an appellate court exercising original jurisdiction on an exceptional basis.

11 It is also argued that this Court's original jurisdiction is unconstitutional because it conflicts with the original

jurisdiction of the provincial superior courts and usurps the normal appellate process. However, Parliament's power to establish a general court of appeal pursuant to s. 101 is plenary, and takes priority over the province's power to control the administration of justice in s. 92(14). See Attorney-General for Ontario v. Attorney-General for Canada, [1947] A.C. 127 (P.C.). Thus, even if it could be said that there is any conflict between this Court's reference jurisdiction and the original jurisdiction of the provincial superior courts, any such conflict must be resolved in favour of Parliament's exercise of its plenary power to establish a "general court of appeal" provided, as discussed below, advisory functions are not to be considered inconsistent with the functions of a general court of appeal.

(2) May a Court of Appeal Undertake Advisory Functions?

12 The amicus curiae submits that

> [Translation] [e]ither this constitutional power [to give the highest court in the federation jurisdiction to give advisory opinions] is expressly provided for by the Constitution, as is the case in India (Constitution of India, art. 143), or it is not provided for therein and so it simply does not exist. This is what the Supreme Court of the United States has held. [Emphasis added.]

13 However, the U.S. Supreme Court did not conclude that it was unable to render advisory opinions because no such express power was included in the United States Constitution. Quite the contrary, it based this conclusion on the express limitation in art. III, sec. 2 restricting federal court jurisdiction to actual "cases" or "controversies". See, e.g., Muskrat v. United States, 219 U.S. 346 (1911), at p. 362. This section reflects the strict separation of powers in the American federal constitutional arrangement. Where the "case or controversy" limitation is missing from their respective state constitutions, some American state courts do undertake advisory functions (e.g., in at least two states -- Alabama and Delaware -- advisory opinions are authorized, in certain circumstances, by statute: see Ala. Code 1975 sec. 12-2-10; Del. Code Ann. tit. 10, sec. 141 (1996 Supp.)).

14 In addition, the judicial systems in several European countries (such as Germany, France, Italy, Spain, Portugal and Belgium) include courts dedicated to the review of constitutional claims; these tribunals do not require a concrete dispute involving individual rights to examine the constitutionality of a new law -- an "abstract or objective question" is sufficient. See L. Favoreu, "American and European Models of Constitutional Justice", in D. S. Clark, ed., Comparative and Private International Law (1990), 105, at p. 113. The European Court of Justice, the European Court of Human Rights, and the Inter-American Court of Human Rights also all enjoy explicit grants of jurisdiction to render advisory opinions. See Treaty establishing the European Community, Art. 228(6); Protocol No. 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Europ. T.S. No. 5, p. 36; Statute of the Inter-American Court of Human Rights, Art. 2. There is no plausible basis on which to conclude that a court is, by its nature, inherently precluded from undertaking another legal function in tandem with its judicial duties.

15 Moreover, the Canadian Constitution does not insist on a strict separation of powers. Parliament and the provincial legislatures may properly confer other legal functions on the courts, and may confer certain judicial functions on bodies that are not courts. The exception to this rule relates only to s. 96 courts. Thus, even though the rendering of advisory opinions is quite clearly done outside the framework of adversarial litigation, and such opinions are traditionally obtained by the executive from the law officers of the Crown, there is no constitutional bar to this Court's receipt of jurisdiction to undertake such an advisory role. The legislative grant of reference jurisdiction found in s. 53 of the Supreme Court Act is therefore constitutionally valid.

B. The Court's Jurisdiction Under Section 53

16 Section 53 provides in its relevant parts as follows:

> 53. (1) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning
>
> (a) the interpretation of the Constitution Acts;

. . .

(d) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be exercised.

(2) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning any matter, whether or not in the opinion of the Court ejusdem generis with the enumerations contained in subsection (1), with reference to which the Governor in Council sees fit to submit any such question.

(3) Any question concerning any of the matters mentioned in subsections (1) and (2), and referred to the Court by the Governor in Council, shall be conclusively deemed to be an important question.

17 It is argued that even if Parliament were entitled to enact s. 53 of the Supreme Court Act, the questions submitted by the Governor in Council fall outside the scope of that section.

18 This submission cannot be accepted. Question 1 is directed, at least in part, to the interpretation of the Constitution Acts, which are referred to in s. 53(1)(a). Both Question 1 and Question 2 fall within s. 53(1)(d), since they relate to the powers of the legislature or government of a Canadian province. Finally, all three questions are clearly "important questions of law or fact concerning any matter" so that they must come within s. 53(2).

19 However, the amicus curiae has also raised some specific concerns regarding this Court's jurisdiction to answer Question 2. The question, on its face, falls within the scope of s. 53, but the concern is a more general one with respect to the jurisdiction of this Court, as a domestic tribunal, to answer what is described as a question of "pure" international law.

20 The first contention is that in answering Question 2, the Court would be exceeding its jurisdiction by purporting to act as an international tribunal. The simple answer to this submission is that this Court would not, in providing an advisory opinion in the context of a reference, be purporting to "act as" or substitute itself for an international tribunal. In accordance with well accepted principles of international law, this Court's answer to Question 2 would not purport to bind any other state or international tribunal that might subsequently consider a similar question. The Court nevertheless has jurisdiction to provide an advisory opinion to the Governor in Council in its capacity as a national court on legal questions touching and concerning the future of the Canadian federation.

21 Second, there is a concern that Question 2 is beyond the competence of this Court, as a domestic court, because it requires the Court to look at international law rather than domestic law.

22 This concern is groundless. In a number of previous cases, it has been necessary for this Court to look to international law to determine the rights or obligations of some actor within the Canadian legal system. For example, in Reference re Powers to Levy Rates on Foreign Legations and High Commissioners' Residences, [1943] S.C.R. 208, the Court was required to determine whether, taking into account the principles of international law with respect to diplomatic immunity, a municipal council had the power to levy rates on certain properties owned by foreign governments. In two subsequent references, this Court used international law to determine whether the federal government or a province possessed proprietary rights in certain portions of the territorial sea and continental shelf (Reference re Ownership of Offshore Mineral Rights of British Columbia, [1967] S.C.R. 792; Reference re Newfoundland Continental Shelf, [1984] 1 S.C.R. 86).

23 More importantly, Question 2 of this Reference does not ask an abstract question of "pure" international law but seeks to determine the legal rights and obligations of the National Assembly, legislature or government of Quebec, institutions that clearly exist as part of the Canadian legal order. As will be seen, the amicus curiae himself submitted that the success of any initiative on the part of Quebec to secede from the Canadian federation would be governed by international law. In these circumstances, a consideration of international law in the context of this Reference about the legal aspects of the unilateral secession of Quebec is not only permissible but unavoidable.

C. Justiciability

24 It is submitted that even if the Court has jurisdiction over the questions referred, the questions themselves are not justiciable. Three main arguments are raised in this regard:

(1) the questions are not justiciable because they are too "theoretical" or speculative;

(2) the questions are not justiciable because they are political in nature;

(3) the questions are not yet ripe for judicial consideration.

25 In the context of a reference, the Court, rather than acting in its traditional adjudicative function, is acting in an advisory capacity. The very fact that the Court may be asked hypothetical questions in a reference, such as the constitutionality of proposed legislation, engages the Court in an exercise it would never entertain in the context of litigation. No matter how closely the procedure on a reference may mirror the litigation process, a reference does not engage the Court in a disposition of rights. For the same reason, the Court may deal on a reference with issues that might otherwise be considered not yet "ripe" for decision.

26 Though a reference differs from the Court's usual adjudicative function, the Court should not, even in the context of a reference, entertain questions that would be inappropriate to answer. However, given the very different nature of a reference, the question of the appropriateness of answering a question should not focus on whether the dispute is formally adversarial or whether it disposes of cognizable rights. Rather, it should consider whether the dispute is appropriately addressed by a court of law. As we stated in Reference re Canada Assistance Plan (B.C.), [1991] 2 S.C.R. 525, at p. 545:

> While there may be many reasons why a question is non-justiciable, in this appeal the Attorney General of Canada submitted that to answer the questions would draw the Court into a political controversy and involve it in the legislative process. In exercising its discretion whether to determine a matter that is alleged to be non-justiciable, the Court's primary concern is to retain its proper role within the constitutional framework of our democratic form of government. . . . In considering its appropriate role the Court must determine whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch. [Emphasis added.]

Thus the circumstances in which the Court may decline to answer a reference question on the basis of "non-justiciability" include:

(i) if to do so would take the Court beyond its own assessment of its proper role in the constitutional framework of our democratic form of government or

(ii) if the Court could not give an answer that lies within its area of expertise: the interpretation of law.

27 As to the "proper role" of the Court, it is important to underline, contrary to the submission of the amicus curiae, that the questions posed in this Reference do not ask the Court to usurp any democratic decision that the people of Quebec may be called upon to make. The questions posed by the Governor in Council, as we interpret them, are strictly limited to aspects of the legal framework in which that democratic decision is to be taken. The attempted analogy to the U.S. "political questions" doctrine therefore has no application. The legal framework having been clarified, it will be for the population of Quebec, acting through the political process, to decide whether or not to pursue secession. As will be seen, the legal framework involves the rights and obligations of Canadians who live outside the province of Quebec, as well as those who live within Quebec.

28 As to the "legal" nature of the questions posed, if the Court is of the opinion that it is being asked a question with a significant extralegal component, it may interpret the question so as to answer only its legal aspects; if this is not possible, the Court may decline to answer the question. In the present Reference the questions may clearly be interpreted as directed to legal issues, and, so interpreted, the Court is in a position to answer them.

29 Finally, we turn to the proposition that even though the questions referred to us are justiciable in the "reference"

sense, the Court must still determine whether it should exercise its discretion to refuse to answer the questions on a pragmatic basis.

30 Generally, the instances in which the Court has exercised its discretion to refuse to answer a reference question that is otherwise justiciable can be broadly divided into two categories. First, where the question is too imprecise or ambiguous to permit a complete or accurate answer: see, e.g., McEvoy v. Attorney General for New Brunswick, [1983] 1 S.C.R. 704; Reference re Waters and Water-Powers, [1929] S.C.R. 200; Reference re Goods and Services Tax, [1992] 2 S.C.R. 445; Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3 (Provincial Judges Reference), at para. 256. Second, where the parties have not provided sufficient information to allow the Court to provide a complete or accurate answer: see, e.g., Reference re Education System in Island of Montreal, [1926] S.C.R. 246; Reference re Authority of Parliament in relation to the Upper House, [1980] 1 S.C.R. 54 (Senate Reference); Provincial Judges Reference, at para. 257.

31 There is no doubt that the questions posed in this Reference raise difficult issues and are susceptible to varying interpretations. However, rather than refusing to answer at all, the Court is guided by the approach advocated by the majority on the "conventions" issue in Reference re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753 (Patriation Reference), at pp. 875-76:

> If the questions are thought to be ambiguous, this Court should not, in a constitutional reference, be in a worse position than that of a witness in a trial and feel compelled simply to answer yes or no. Should it find that a question might be misleading, or should it simply avoid the risk of misunderstanding, the Court is free either to interpret the question . . . or it may qualify both the question and the answer. . . .

The Reference questions raise issues of fundamental public importance. It cannot be said that the questions are too imprecise or ambiguous to permit a proper legal answer. Nor can it be said that the Court has been provided with insufficient information regarding the present context in which the questions arise. Thus, the Court is duty bound in the circumstances to provide its answers.

III. Reference Questions

A. Question 1

Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?

(1) Introduction

32 As we confirmed in Reference re Objection by Quebec to a Resolution to amend the Constitution, [1982] 2 S.C.R. 793, at p. 806, "The Constitution Act, 1982 is now in force. Its legality is neither challenged nor assailable." The "Constitution of Canada" certainly includes the constitutional texts enumerated in s. 52(2) of the Constitution Act, 1982. Although these texts have a primary place in determining constitutional rules, they are not exhaustive. The Constitution also "embraces unwritten, as well as written rules", as we recently observed in the Provincial Judges Reference, supra, at para. 92. Finally, as was said in the Patriation Reference, supra, at p. 874, the Constitution of Canada includes

> the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state.

These supporting principles and rules, which include constitutional conventions and the workings of Parliament, are a necessary part of our Constitution because problems or situations may arise which are not expressly dealt with by the text of the Constitution. In order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government. Such principles and rules emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning. In our view, there are four fundamental and organizing principles of the Constitution which are relevant to addressing the question before us (although this enumeration is by no means exhaustive): federalism; democracy; constitutionalism and the rule of law; and respect for minorities. The foundation and substance of these principles are addressed in the following paragraphs. We will then turn to their specific application to the first reference question before us.

(2) Historical Context: The Significance of Confederation

33 In our constitutional tradition, legality and legitimacy are linked. The precise nature of this link will be discussed below. However, at this stage, we wish to emphasize only that our constitutional history demonstrates that our governing institutions have adapted and changed to reflect changing social and political values. This has generally been accomplished by methods that have ensured continuity, stability and legal order.

34 Because this Reference deals with questions fundamental to the nature of Canada, it should not be surprising that it is necessary to review the context in which the Canadian union has evolved. To this end, we will briefly describe the legal evolution of the Constitution and the foundational principles governing constitutional amendments. Our purpose is not to be exhaustive, but to highlight the features most relevant in the context of this Reference.

35 Confederation was an initiative of elected representatives of the people then living in the colonies scattered across part of what is now Canada. It was not initiated by Imperial fiat. In March 1864, a select committee of the Legislative Assembly of the Province of Canada, chaired by George Brown, began to explore prospects for constitutional reform. The committee's report, released in June 1864, recommended that a federal union encompassing Canada East and Canada West, and perhaps the other British North American colonies, be pursued. A group of Reformers from Canada West, led by Brown, joined with Étienne P. Taché and John A. Macdonald in a coalition government for the purpose of engaging in constitutional reform along the lines of the federal model proposed by the committee's report.

36 An opening to pursue federal union soon arose. The leaders of the maritime colonies had planned to meet at Charlottetown in the fall to discuss the perennial topic of maritime union. The Province of Canada secured invitations to send a Canadian delegation. On September 1, 1864, 23 delegates (five from New Brunswick, five from Nova Scotia, five from Prince Edward Island, and eight from the Province of Canada) met in Charlottetown. After five days of discussion, the delegates reached agreement on a plan for federal union.

37 The salient aspects of the agreement may be briefly outlined. There was to be a federal union featuring a bicameral central legislature. Representation in the Lower House was to be based on population, whereas in the Upper House it was to be based on regional equality, the regions comprising Canada East, Canada West and the Maritimes. The significance of the adoption of a federal form of government cannot be exaggerated. Without it, neither the agreement of the delegates from Canada East nor that of the delegates from the maritime colonies could have been obtained.

38 Several matters remained to be resolved, and so the Charlottetown delegates agreed to meet again at Quebec in October, and to invite Newfoundland to send a delegation to join them. The Quebec Conference began on October 10, 1864. Thirty-three delegates (two from Newfoundland, seven from New Brunswick, five from Nova Scotia, seven from Prince Edward Island, and twelve from the Province of Canada) met over a two and a half week period. Precise consideration of each aspect of the federal structure preoccupied the political agenda. The delegates approved 72 resolutions, addressing almost all of what subsequently made its way into the final text of the Constitution Act, 1867. These included guarantees to protect French language and culture, both directly (by making French an official language in Quebec and Canada as a whole) and indirectly (by allocating jurisdiction over education and "Property and Civil Rights in the Province" to the provinces). The protection of minorities was thus reaffirmed.

39 Legally, there remained only the requirement to have the Quebec Resolutions put into proper form and passed by the Imperial Parliament in London. However, politically, it was thought that more was required. Indeed, Resolution 70 provided that "The Sanction of the Imperial and Local Parliaments shall be sought for the Union of the Provinces, on the principles adopted by the Conference." (Cited in J. Pope, ed., Confederation: Being a Series of Hitherto Unpublished Documents Bearing on the British North America Act (1895), at p. 52 (emphasis added).)

40 Confirmation of the Quebec Resolutions was achieved more smoothly in central Canada than in the Maritimes.

In February and March 1865, the Quebec Resolutions were the subject of almost six weeks of sustained debate in both houses of the Canadian legislature. The Canadian Legislative Assembly approved the Quebec Resolutions in March 1865 with the support of a majority of members from both Canada East and Canada West. The governments of both Prince Edward Island and Newfoundland chose, in accordance with popular sentiment in both colonies, not to accede to the Quebec Resolutions. In New Brunswick, a general election was required before Premier Tilley's pro-Confederation party prevailed. In Nova Scotia, Premier Tupper ultimately obtained a resolution from the House of Assembly favouring Confederation.

41 Sixteen delegates (five from New Brunswick, five from Nova Scotia, and six from the Province of Canada) met in London in December 1866 to finalize the plan for Confederation. To this end, they agreed to some slight modifications and additions to the Quebec Resolutions. Minor changes were made to the distribution of powers, provision was made for the appointment of extra senators in the event of a deadlock between the House of Commons and the Senate, and certain religious minorities were given the right to appeal to the federal government where their denominational school rights were adversely affected by provincial legislation. The British North America Bill was drafted after the London Conference with the assistance of the Colonial Office, and was introduced into the House of Lords in February 1867. The Act passed third reading in the House of Commons on March 8, received royal assent on March 29, and was proclaimed on July 1, 1867. The Dominion of Canada thus became a reality.

42 There was an early attempt at secession. In the first Dominion election in September 1867, Premier Tupper's forces were decimated: members opposed to Confederation won 18 of Nova Scotia's 19 federal seats, and in the simultaneous provincial election, 36 of the 38 seats in the provincial legislature. Newly-elected Premier Joseph Howe led a delegation to the Imperial Parliament in London in an effort to undo the new constitutional arrangements, but it was too late. The Colonial Office rejected Premier Howe's plea to permit Nova Scotia to withdraw from Confederation. As the Colonial Secretary wrote in 1868:

> The neighbouring province of New Brunswick has entered into the union in reliance on having with it the sister province of Nova Scotia; and vast obligations, political and commercial, have already been contracted on the faith of a measure so long discussed and so solemnly adopted. . . . I trust that the Assembly and the people of Nova Scotia will not be surprised that the Queen's government feel that they would not be warranted in advising the reversal of a great measure of state, attended by so many extensive consequences already in operation. . . .
>
> (Quoted in H. Wade MacLauchlan, "Accounting for Democracy and the Rule of Law in the Quebec Secession Reference" (1997), 76 Can. Bar Rev. 155, at p. 168.)

The interdependence characterized by "vast obligations, political and commercial", referred to by the Colonial Secretary in 1868, has, of course, multiplied immeasurably in the last 130 years.

43 Federalism was a legal response to the underlying political and cultural realities that existed at Confederation and continue to exist today. At Confederation, political leaders told their respective communities that the Canadian union would be able to reconcile diversity with unity. It is pertinent, in the context of the present Reference, to mention the words of George-Étienne Cartier (cited in the Parliamentary Debates on the subject of the Confederation (1865), at p. 60):

> Now, when we [are] united together, if union [is] attained, we [shall] form a political nationality with which neither the national origin, nor the religion of any individual, [will] interfere. It was lamented by some that we had this diversity of races, and hopes were expressed that this distinctive feature would cease. The idea of unity of races [is] utopian -- it [is] impossible. Distinctions of this kind [will] always exist. Dissimilarity, in fact, appear[s] to be the order of the physical world and of the moral world, as well as in the political world. But with regard to the objection based on this fact, to the effect that a great nation [can]not be formed because Lower Canada [is] in great part French and Catholic, and Upper Canada [is] British and Protestant, and the Lower Provinces [are] mixed, it [is] futile and worthless in the extreme. . . . In our own Federation we [will] have Catholic and Protestant, English, French, Irish and Scotch, and each by his efforts and his success

> [will] increase the prosperity and glory of the new Confederacy. . . . [W]e [are] of different races, not for the purpose of warring against each other, but in order to compete and emulate for the general welfare.

The federal-provincial division of powers was a legal recognition of the diversity that existed among the initial members of Confederation, and manifested a concern to accommodate that diversity within a single nation by granting significant powers to provincial governments. The Constitution Act, 1867 was an act of nation-building. It was the first step in the transition from colonies separately dependent on the Imperial Parliament for their governance to a unified and independent political state in which different peoples could resolve their disagreements and work together toward common goals and a common interest. Federalism was the political mechanism by which diversity could be reconciled with unity.

44 A federal-provincial division of powers necessitated a written constitution which circumscribed the powers of the new Dominion and Provinces of Canada. Despite its federal structure, the new Dominion was to have "a Constitution similar in Principle to that of the United Kingdom" (Constitution Act, 1867, preamble). Allowing for the obvious differences between the governance of Canada and the United Kingdom, it was nevertheless thought important to thus emphasize the continuity of constitutional principles, including democratic institutions and the rule of law; and the continuity of the exercise of sovereign power transferred from Westminster to the federal and provincial capitals of Canada.

45 After 1867, the Canadian federation continued to evolve both territorially and politically. New territories were admitted to the union and new provinces were formed. In 1870, Rupert's Land and the Northwest Territories were admitted and Manitoba was formed as a province. British Columbia was admitted in 1871, Prince Edward Island in 1873, and the Arctic Islands were added in 1880. In 1898, the Yukon Territory and in 1905, the provinces of Alberta and Saskatchewan were formed from the Northwest Territories. Newfoundland was admitted in 1949 by an amendment to the Constitution Act, 1867. The new territory of Nunavut was carved out of the Northwest Territories in 1993 with the partition to become effective in April 1999.

46 Canada's evolution from colony to fully independent state was gradual. The Imperial Parliament's passage of the Statute of Westminster, 1931 (U.K.), 22 & 23 Geo. 5, c. 4, confirmed in law what had earlier been confirmed in fact by the Balfour Declaration of 1926, namely, that Canada was an independent country. Thereafter, Canadian law alone governed in Canada, except where Canada expressly consented to the continued application of Imperial legislation. Canada's independence from Britain was achieved through legal and political evolution with an adherence to the rule of law and stability. The proclamation of the Constitution Act, 1982 removed the last vestige of British authority over the Canadian Constitution and re-affirmed Canada's commitment to the protection of its minority, aboriginal, equality, legal and language rights, and fundamental freedoms as set out in the Canadian Charter of Rights and Freedoms.

47 Legal continuity, which requires an orderly transfer of authority, necessitated that the 1982 amendments be made by the Westminster Parliament, but the legitimacy as distinguished from the formal legality of the amendments derived from political decisions taken in Canada within a legal framework which this Court, in the Patriation Reference, had ruled was in accordance with our Constitution. It should be noted, parenthetically, that the 1982 amendments did not alter the basic division of powers in ss. 91 and 92 of the Constitution Act, 1867, which is the primary textual expression of the principle of federalism in our Constitution, agreed upon at Confederation. It did, however, have the important effect that, despite the refusal of the government of Quebec to join in its adoption, Quebec has become bound to the terms of a Constitution that is different from that which prevailed previously, particularly as regards provisions governing its amendment, and the Canadian Charter of Rights and Freedoms. As to the latter, to the extent that the scope of legislative powers was thereafter to be constrained by the Charter, the constraint operated as much against federal legislative powers as against provincial legislative powers. Moreover, it is to be remembered that s. 33, the "notwithstanding clause", gives Parliament and the provincial legislatures authority to legislate on matters within their jurisdiction in derogation of the fundamental freedoms (s. 2), legal rights (ss. 7 to 14) and equality rights (s. 15) provisions of the Charter.

48 We think it apparent from even this brief historical review that the evolution of our constitutional arrangements

has been characterized by adherence to the rule of law, respect for democratic institutions, the accommodation of minorities, insistence that governments adhere to constitutional conduct and a desire for continuity and stability. We now turn to a discussion of the general constitutional principles that bear on the present Reference.

(3) Analysis of the Constitutional Principles

(a) Nature of the Principles

49 What are those underlying principles? Our Constitution is primarily a written one, the product of 131 years of evolution. Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based. The following discussion addresses the four foundational constitutional principles that are most germane for resolution of this Reference: federalism, democracy, constitutionalism and the rule of law, and respect for minority rights. These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.

50 Our Constitution has an internal architecture, or what the majority of this Court in OPSEU v. Ontario (Attorney General), [1987] 2 S.C.R. 2, at p. 57, called a "basic constitutional structure". The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole. As we recently emphasized in the Provincial Judges Reference, certain underlying principles infuse our Constitution and breathe life into it. Speaking of the rule of law principle in the Manitoba Language Rights Reference, supra, at p. 750, we held that "the principle is clearly implicit in the very nature of a Constitution". The same may be said of the other three constitutional principles we underscore today.

51 Although these underlying principles are not explicitly made part of the Constitution by any written provision, other than in some respects by the oblique reference in the preamble to the Constitution Act, 1867, it would be impossible to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood.

52 The principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions. Equally important, observance of and respect for these principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a "living tree", to invoke the famous description in Edwards v. Attorney-General for Canada, [1930] A.C. 124 (P.C.), at p. 136. As this Court indicated in New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), [1993] 1 S.C.R. 319, Canadians have long recognized the existence and importance of unwritten constitutional principles in our system of government.

53 Given the existence of these underlying constitutional principles, what use may the Court make of them? In the Provincial Judges Reference, supra, at paras. 93 and 104, we cautioned that the recognition of these constitutional principles (the majority opinion referred to them as "organizing principles" and described one of them, judicial independence, as an "unwritten norm") could not be taken as an invitation to dispense with the written text of the Constitution. On the contrary, we confirmed that there are compelling reasons to insist upon the primacy of our written constitution. A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review. However, we also observed in the Provincial Judges Reference that the effect of the preamble to the Constitution Act, 1867 was to incorporate certain constitutional principles by reference, a point made earlier in Fraser v. Public Service Staff Relations Board, [1985] 2 S.C.R. 455, at pp. 462-63. In the Provincial Judges Reference, at para. 104, we determined that the preamble "invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text".

54 Underlying 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. 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. "In other words", as this Court confirmed in the Manitoba Language Rights Reference, supra, at p. 752, "in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada". It is to a discussion of those underlying constitutional principles that we now turn.

(b) Federalism

55 It is undisputed that Canada is a federal state. Yet many commentators have observed that, according to the precise terms of the Constitution Act, 1867, the federal system was only partial. See, e.g., K. C. Wheare, Federal Government (4th ed. 1963), at pp. 18-20. This was so because, on paper, the federal government retained sweeping powers which threatened to undermine the autonomy of the provinces. Here again, however, a review of the written provisions of the Constitution does not provide the entire picture. Our political and constitutional practice has adhered to an underlying principle of federalism, and has interpreted the written provisions of the Constitution in this light. For example, although the federal power of disallowance was included in the Constitution Act, 1867, the underlying principle of federalism triumphed early. Many constitutional scholars contend that the federal power of disallowance has been abandoned (e.g., P. W. Hogg, Constitutional Law of Canada (4th ed. 1997), at p. 120).

56 In a federal system of government such as ours, political power is shared by two orders of government: the federal government on the one hand, and the provinces on the other. Each is assigned respective spheres of jurisdiction by the Constitution Act, 1867. See, e.g., Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick, [1892] A.C. 437 (P.C.), at pp. 441-42. It is up to the courts "to control the limits of the respective sovereignties": Northern Telecom Canada Ltd. v. Communication Workers of Canada, [1983] 1 S.C.R. 733, at p. 741. In interpreting our Constitution, the courts have always been concerned with the federalism principle, inherent in the structure of our constitutional arrangements, which has from the beginning been the lodestar by which the courts have been guided.

57 This underlying principle of federalism, then, has exercised a role of considerable importance in the interpretation of the written provisions of our Constitution. In the Patriation Reference, supra, at pp. 905-9, we confirmed that the principle of federalism runs through the political and legal systems of Canada. Indeed, Martland and Ritchie JJ., dissenting in the Patriation Reference, at p. 821, considered federalism to be "the dominant principle of Canadian constitutional law". With the enactment of the Charter, that proposition may have less force than it once did, but there can be little doubt that the principle of federalism remains a central organizational theme of our Constitution. Less obviously, perhaps, but certainly of equal importance, federalism is a political and legal response to underlying social and political realities.

58 The principle of federalism recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction. The federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity. The scheme of the Constitution Act, 1867, it was said in Re the Initiative and Referendum Act, [1919] A.C. 935 (P.C.), at p. 942, was

> not to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to establish a central government in which these Provinces should be represented, entrusted with exclusive authority only in affairs in which they had a common interest. Subject to this each Province was to retain its independence and autonomy and to be directly under the Crown as its head.

More recently, in Haig v. Canada, [1993] 2 S.C.R. 995, at p. 1047, the majority of this Court held that differences between provinces "are a rational part of the political reality in the federal process". It was referring to the differential application of federal law in individual provinces, but the point applies more generally. A unanimous Court expressed similar views in R. v. S. (S.), [1990] 2 S.C.R. 254, at pp. 287-88.

59 The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province. This is the case in Quebec, where the majority of the population is

French-speaking, and which possesses a distinct culture. This is not merely the result of chance. The social and demographic reality of Quebec explains the existence of the province of Quebec as a political unit and indeed, was one of the essential reasons for establishing a federal structure for the Canadian union in 1867. The experience of both Canada East and Canada West under the Union Act, 1840 (U.K.), 3-4 Vict., c. 35, had not been satisfactory. The federal structure adopted at Confederation enabled French-speaking Canadians to form a numerical majority in the province of Quebec, and so exercise the considerable provincial powers conferred by the Constitution Act, 1867 in such a way as to promote their language and culture. It also made provision for certain guaranteed representation within the federal Parliament itself.

60 Federalism was also welcomed by Nova Scotia and New Brunswick, both of which also affirmed their will to protect their individual cultures and their autonomy over local matters. All new provinces joining the federation sought to achieve similar objectives, which are no less vigorously pursued by the provinces and territories as we approach the new millennium.

(c) Democracy

61 Democracy is a fundamental value in our constitutional law and political culture. While it has both an institutional and an individual aspect, the democratic principle was also argued before us in the sense of the supremacy of the sovereign will of a people, in this case potentially to be expressed by Quebecers in support of unilateral secession. It is useful to explore in a summary way these different aspects of the democratic principle.

62 The principle of democracy has always informed the design of our constitutional structure, and continues to act as an essential interpretive consideration to this day. A majority of this Court in OPSEU v. Ontario, supra, at p. 57, confirmed 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". As is apparent from an earlier line of decisions emanating from this Court, including Switzman v. Elbling, [1957] S.C.R. 285, Saumur v. City of Quebec, [1953] 2 S.C.R. 299, Boucher v. The King, [1951] S.C.R. 265, and Reference re Alberta Statutes, [1938] S.C.R. 100, the democracy principle can best be understood as a sort of baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated. It is perhaps for this reason that the principle was not explicitly identified in the text of the Constitution Act, 1867 itself. To have done so might have appeared redundant, even silly, to the framers. As explained in the Provincial Judges Reference, supra, at para. 100, it is evident that our Constitution contemplates that Canada shall be a constitutional democracy. Yet this merely demonstrates the importance of underlying constitutional principles that are nowhere explicitly described in our constitutional texts. The representative and democratic nature of our political institutions was simply assumed.

63 Democracy is commonly understood as being a political system of majority rule. It is essential to be clear what this means. The evolution of our democratic tradition can be traced back to the Magna Carta (1215) and before, through the long struggle for Parliamentary supremacy which culminated in the English Bill of Rights of 1689, the emergence of representative political institutions in the colonial era, the development of responsible government in the 19th century, and eventually, the achievement of Confederation itself in 1867. "[T]he Canadian tradition", the majority of this Court held in Reference re Provincial Electoral Boundaries (Sask.), [1991] 2 S.C.R. 158, at p. 186, is "one of evolutionary democracy moving in uneven steps toward the goal of universal suffrage and more effective representation". Since Confederation, efforts to extend the franchise to those unjustly excluded from participation in our political system - such as women, minorities, and aboriginal peoples - have continued, with some success, to the present day.

64 Democracy is not simply concerned with the process of government. On the contrary, as suggested in Switzman v. Elbling, supra, at p. 306, democracy is fundamentally connected to substantive goals, most importantly, the promotion of self-government. Democracy accommodates cultural and group identities: Reference re Provincial Electoral Boundaries, at p. 188. Put another way, a sovereign people exercises its right to self-government through the democratic process. In considering the scope and purpose of the Charter, the Court in R. v. Oakes, [1986] 1 S.C.R. 103, articulated some of the values inherent in the notion of democracy (at p. 136):

> The Court must be guided by the values and principles essential to a free and democratic society which I believe to embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

65 In institutional terms, democracy means that each of the provincial legislatures and the federal Parliament is elected by popular franchise. These legislatures, we have said, are "at the core of the system of representative government": New Brunswick Broadcasting, supra, at p. 387. In individual terms, the right to vote in elections to the House of Commons and the provincial legislatures, and to be candidates in those elections, is guaranteed to "Every citizen of Canada" by virtue of s. 3 of the Charter. Historically, this Court has interpreted democracy to mean the process of representative and responsible government and the right of citizens to participate in the political process as voters (Reference re Provincial Electoral Boundaries, supra) and as candidates (Harvey v. New Brunswick (Attorney General), [1996] 2 S.C.R. 876). In addition, the effect of s. 4 of the Charter is to oblige the House of Commons and the provincial legislatures to hold regular elections and to permit citizens to elect representatives to their political institutions. The democratic principle is affirmed with particular clarity in that s. 4 is not subject to the notwithstanding power contained in s. 33.

66 It is, of course, true that democracy expresses the sovereign will of the people. Yet this expression, too, must be taken in the context of the other institutional values we have identified as pertinent to this Reference. The relationship between democracy and federalism means, for example, that in Canada there may be different and equally legitimate majorities in different provinces and territories and at the federal level. No one majority is more or less "legitimate" than the others as an expression of democratic opinion, although, of course, the consequences will vary with the subject matter. A federal system of government enables different provinces to pursue policies responsive to the particular concerns and interests of people in that province. At the same time, Canada as a whole is also a democratic community in which citizens construct and achieve goals on a national scale through a federal government acting within the limits of its jurisdiction. The function of federalism is to enable citizens to participate concurrently in different collectivities and to pursue goals at both a provincial and a federal level.

67 The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the "sovereign will" is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people. But there is more. Our law's claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the "sovereign will" or majority rule alone, to the exclusion of other constitutional values.

68 Finally, we highlight that a functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, "resting ultimately on public opinion reached by discussion and the interplay of ideas" (Saumur v. City of Quebec, supra, at p. 330). At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live.

69 The Constitution Act, 1982 gives expression to this principle, by conferring a right to initiate constitutional change on each participant in Confederation. In our view, the existence of this right imposes a corresponding duty on the participants in Confederation to engage in constitutional discussions in order to acknowledge and address

democratic expressions of a desire for change in other provinces. This duty is inherent in the democratic principle which is a fundamental predicate of our system of governance.

(d) Constitutionalism and the Rule of Law

70 The principles of constitutionalism and the rule of law lie at the root of our system of government. The rule of law, as observed in Roncarelli v. Duplessis, [1959] S.C.R. 121, at p. 142, is "a fundamental postulate of our constitutional structure". As we noted in the Patriation Reference, supra, at pp. 805-6, "[t]he '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". At its most basic level, 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.

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". It was this second aspect of the rule of law that was primarily at issue in the Manitoba Language Rights Reference itself. A third aspect of the rule of law is, as recently confirmed in the Provincial Judges Reference, supra, at para. 10, that "the exercise of all public 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.

72 The constitutionalism principle bears considerable similarity to the rule of law, although they are not identical. The essence of constitutionalism in Canada is embodied in s. 52(1) of the Constitution Act, 1982, which provides that "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the Charter, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch (Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441, at p. 455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.

73 An understanding of the scope and importance of the principles of the rule of law and constitutionalism is aided by acknowledging explicitly why a constitution is entrenched beyond the reach of simple majority rule. There are three overlapping reasons.

74 First, a constitution may provide an added safeguard for fundamental human rights and individual freedoms which might otherwise be susceptible to government interference. Although democratic government is generally solicitous of those rights, there are occasions when the majority will be tempted to ignore fundamental rights in order to accomplish collective goals more easily or effectively. Constitutional entrenchment ensures that those rights will be given due regard and protection. Second, a constitution may seek to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority. And third, a constitution may provide for a division of political power that allocates political power amongst different levels of government. That purpose would be defeated if one of those democratically elected levels of government could usurp the powers of the other simply by exercising its legislative power to allocate additional political power to itself unilaterally.

75 The argument that the Constitution may be legitimately circumvented by resort to a majority vote in a province-wide referendum is superficially persuasive, in large measure because it seems to appeal to some of the same

principles that underlie the legitimacy of the Constitution itself, namely, democracy and self-government. In short, it is suggested that as the notion of popular sovereignty underlies the legitimacy of our existing constitutional arrangements, so the same popular sovereignty that originally led to the present Constitution must (it is argued) also permit "the people" in their exercise of popular sovereignty to secede by majority vote alone. However, closer analysis reveals that this argument is unsound, because it misunderstands the meaning of popular sovereignty and the essence of a constitutional democracy.

76 Canadians have never accepted that ours is a system of simple majority rule. Our principle of democracy, taken in conjunction with the other constitutional principles discussed here, is richer. Constitutional government is necessarily predicated on the idea that the political representatives of the people of a province have the capacity and the power to commit the province to be bound into the future by the constitutional rules being adopted. These rules are "binding" not in the sense of frustrating the will of a majority of a province, but as defining the majority which must be consulted in order to alter the fundamental balances of political power (including the spheres of autonomy guaranteed by the principle of federalism), individual rights, and minority rights in our society. Of course, those constitutional rules are themselves amenable to amendment, but only through a process of negotiation which ensures that there is an opportunity for the constitutionally defined rights of all the parties to be respected and reconciled.

77 In this way, our belief in democracy may be harmonized with our belief in constitutionalism. Constitutional amendment often requires some form of substantial consensus precisely because the content of the underlying principles of our Constitution demand it. By requiring broad support in the form of an "enhanced majority" to achieve constitutional change, the Constitution ensures that minority interests must be addressed before proposed changes which would affect them may be enacted.

78 It might be objected, then, that constitutionalism is therefore incompatible with democratic government. This would be an erroneous view. Constitutionalism facilitates - indeed, makes possible - a democratic political system by creating an orderly framework within which people may make political decisions. Viewed correctly, constitutionalism and the rule of law are not in conflict with democracy; rather, they are essential to it. Without that relationship, the political will upon which democratic decisions are taken would itself be undermined.

(e) Protection of Minorities

79 The fourth underlying constitutional principle we address here concerns the protection of minorities. There are a number of specific constitutional provisions protecting minority language, religion and education rights. Some of those provisions are, as we have recognized on a number of occasions, the product of historical compromises. As this Court observed in Reference re Bill 30, An Act to amend the Education Act (Ont.), [1987] 1 S.C.R. 1148, at p. 1173, and in Reference re Education Act (Que.), [1993] 2 S.C.R. 511, at pp. 529-30, the protection of minority religious education rights was a central consideration in the negotiations leading to Confederation. In the absence of such protection, it was felt that the minorities in what was then Canada East and Canada West would be submerged and assimilated. See also Greater Montreal Protestant School Board v. Quebec (Attorney General), [1989] 1 S.C.R. 377, at pp. 401-2, and Adler v. Ontario, [1996] 3 S.C.R. 609. Similar concerns animated the provisions protecting minority language rights, as noted in Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education, [1986] 1 S.C.R. 549, at p. 564.

80 However, we highlight that even though those provisions were the product of negotiation and political compromise, that does not render them unprincipled. Rather, such a concern reflects a broader principle related to the protection of minority rights. Undoubtedly, the three other constitutional principles inform the scope and operation of the specific provisions that protect the rights of minorities. We emphasize that the protection of minority rights is itself an independent principle underlying our constitutional order. The principle is clearly reflected in the Charter's provisions for the protection of minority rights. See, e.g., Reference re Public Schools Act (Man.), s. 79(3), (4) and (7), [1993] 1 S.C.R. 839, and Mahe v. Alberta, [1990] 1 S.C.R. 342.

81 The concern of our courts and governments to protect minorities has been prominent in recent years,

particularly following the enactment of the Charter. Undoubtedly, one of the key considerations motivating the enactment of the Charter, and the process of constitutional judicial review that it entails, is the protection of minorities. However, it should not be forgotten that the protection of minority rights had a long history before the enactment of the Charter. Indeed, the protection of minority rights was clearly an essential consideration in the design of our constitutional structure even at the time of Confederation: Senate Reference, supra, at p. 71. Although Canada's record of upholding the rights of minorities is not a spotless one, that goal is one towards which Canadians have been striving since Confederation, and the process has not been without successes. The principle of protecting minority rights continues to exercise influence in the operation and interpretation of our Constitution.

82 Consistent with this long tradition of respect for minorities, which is at least as old as Canada itself, the framers of the Constitution Act, 1982 included in s. 35 explicit protection for existing aboriginal and treaty rights, and in s. 25, a non-derogation clause in favour of the rights of aboriginal peoples. The "promise" of s. 35, as it was termed in R. v. Sparrow, [1990] 1 S.C.R. 1075, at p. 1083, recognized not only the ancient occupation of land by aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments. The protection of these rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value.

(4) The Operation of the Constitutional Principles in the Secession Context

83 Secession is the effort of a group or section of a state to withdraw itself from the political and constitutional authority of that state, with a view to achieving statehood for a new territorial unit on the international plane. In a federal state, secession typically takes the form of a territorial unit seeking to withdraw from the federation. Secession is a legal act as much as a political one. By the terms of Question 1 of this Reference, we are asked to rule on the legality of unilateral secession "[u]nder the Constitution of Canada". This is an appropriate question, as the legality of unilateral secession must be evaluated, at least in the first instance, from the perspective of the domestic legal order of the state from which the unit seeks to withdraw. As we shall see below, it is also argued that international law is a relevant standard by which the legality of a purported act of secession may be measured.

84 The secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiation. The amendments necessary to achieve a secession could be radical and extensive. Some commentators have suggested that secession could be a change of such a magnitude that it could not be considered to be merely an amendment to the Constitution. We are not persuaded by this contention. It is of course true that the Constitution is silent as to the ability of a province to secede from Confederation but, although the Constitution neither expressly authorizes nor prohibits secession, an act of secession would purport to alter the governance of Canadian territory in a manner which undoubtedly is inconsistent with our current constitutional arrangements. The fact that those changes would be profound, or that they would purport to have a significance with respect to international law, does not negate their nature as amendments to the Constitution of Canada.

85 The Constitution is the expression of the sovereignty of the people of Canada. It lies within the power of the people of Canada, acting through their various governments duly elected and recognized under the Constitution, to effect whatever constitutional arrangements are desired within Canadian territory, including, should it be so desired, the secession of Quebec from Canada. As this Court held in the Manitoba Language Rights Reference, supra, at p. 745, "[t]he Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government". The manner in which such a political will could be formed and mobilized is a somewhat speculative exercise, though we are asked to assume the existence of such a political will for the purpose of answering the question before us. By the terms of this Reference, we have been asked to consider whether it would be constitutional in such a circumstance for the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally.

86 The "unilateral" nature of the act is of cardinal importance and we must be clear as to what is understood by this term. In one sense, any step towards a constitutional amendment initiated by a single actor on the constitutional

stage is "unilateral". We do not believe that this is the meaning contemplated by Question 1, nor is this the sense in which the term has been used in argument before us. Rather, what is claimed by a right to secede "unilaterally" is the right to effectuate secession without prior negotiations with the other provinces and the federal government. At issue is not the legality of the first step but the legality of the final act of purported unilateral secession. The supposed juridical basis for such an act is said to be a clear expression of democratic will in a referendum in the province of Quebec. This claim requires us to examine the possible juridical impact, if any, of such a referendum on the functioning of our Constitution, and on the claimed legality of a unilateral act of secession.

87 Although the Constitution does not itself address the use of a referendum procedure, and the results of a referendum have no direct role or legal effect in our constitutional scheme, a referendum undoubtedly may provide a democratic method of ascertaining the views of the electorate on important political questions on a particular occasion. The democratic principle identified above would demand that considerable weight be given to a clear expression by the people of Quebec of their will to secede from Canada, even though a referendum, in itself and without more, has no direct legal effect, and could not in itself bring about unilateral secession. Our political institutions are premised on the democratic principle, and so an expression of the democratic will of the people of a province carries weight, in that it would confer legitimacy on the efforts of the government of Quebec to initiate the Constitution's amendment process in order to secede by constitutional means. In this context, we refer to a "clear" majority as a qualitative evaluation. The referendum result, if it is to be taken as an expression of the democratic will, must be free of ambiguity both in terms of the question asked and in terms of the support it achieves.

88 The federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire. The amendment of the Constitution begins with a political process undertaken pursuant to the Constitution itself. In Canada, the initiative for constitutional amendment is the responsibility of democratically elected representatives of the participants in Confederation. Those representatives may, of course, take their cue from a referendum, but in legal terms, constitution-making in Canada, as in many countries, is undertaken by the democratically elected representatives of the people. The corollary of a legitimate attempt by one participant in Confederation to seek an amendment to the Constitution is an obligation on all parties to come to the negotiating table. The clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed.

89 What is the content of this obligation to negotiate? At this juncture, we confront the difficult inter-relationship between substantive obligations flowing from the Constitution and questions of judicial competence and restraint in supervising or enforcing those obligations. This is mirrored by the distinction between the legality and the legitimacy of actions taken under the Constitution. We propose to focus first on the substantive obligations flowing from this obligation to negotiate; once the nature of those obligations has been described, it is easier to assess the appropriate means of enforcement of those obligations, and to comment on the distinction between legality and legitimacy.

90 The conduct of the parties in such negotiations would be governed by the same constitutional principles which give rise to the duty to negotiate: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities. Those principles lead us to reject two absolutist propositions. One of those propositions is that there would be a legal obligation on the other provinces and federal government to accede to the secession of a province, subject only to negotiation of the logistical details of secession. This proposition is attributed either to the supposed implications of the democratic principle of the Constitution, or to the international law principle of self-determination of peoples.

91 For both theoretical and practical reasons, we cannot accept this view. We hold that Quebec could not purport to invoke a right of self-determination such as to dictate the terms of a proposed secession to the other parties: that would not be a negotiation at all. As well, it would be naive to expect that the substantive goal of secession could

readily be distinguished from the practical details of secession. The devil would be in the details. The democracy principle, as we have emphasized, cannot be invoked to trump the principles of federalism and rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. No negotiations could be effective if their ultimate outcome, secession, is cast as an absolute legal entitlement based upon an obligation to give effect to that act of secession in the Constitution. Such a foregone conclusion would actually undermine the obligation to negotiate and render it hollow.

92 However, we are equally unable to accept the reverse proposition, that a clear expression of self-determination by the people of Quebec would impose no obligations upon the other provinces or the federal government. The continued existence and operation of the Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. This would amount to the assertion that other constitutionally recognized principles necessarily trump the clearly expressed democratic will of the people of Quebec. Such a proposition fails to give sufficient weight to the underlying constitutional principles that must inform the amendment process, including the principles of democracy and federalism. The rights of other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. Negotiations would be necessary to address the interests of the federal government, of Quebec and the other provinces, and other participants, as well as the rights of all Canadians both within and outside Quebec.

93 Is the rejection of both of these propositions reconcilable? Yes, once it is realized that none of the rights or principles under discussion is absolute to the exclusion of the others. This observation suggests that other parties cannot exercise their rights in such a way as to amount to an absolute denial of Quebec's rights, and similarly, that so long as Quebec exercises its rights while respecting the rights of others, it may propose secession and seek to achieve it through negotiation. The negotiation process precipitated by a decision of a clear majority of the population of Quebec on a clear question to pursue secession would require the reconciliation of various rights and obligations by the representatives of two legitimate majorities, namely, the clear majority of the population of Quebec, and the clear majority of Canada as a whole, whatever that may be. There can be no suggestion that either of these majorities "trumps" the other. A political majority that does not act in accordance with the underlying constitutional principles we have identified puts at risk the legitimacy of the exercise of its rights.

94 In such circumstances, the conduct of the parties assumes primary constitutional significance. The negotiation process must be conducted with an eye to the constitutional principles we have outlined, which must inform the actions of all the participants in the negotiation process.

95 Refusal of a party to conduct negotiations in a manner consistent with constitutional principles and values would seriously put at risk the legitimacy of that party's assertion of its rights, and perhaps the negotiation process as a whole. Those who quite legitimately insist upon the importance of upholding the rule of law cannot at the same time be oblivious to the need to act in conformity with constitutional principles and values, and so do their part to contribute to the maintenance and promotion of an environment in which the rule of law may flourish.

96 No one can predict the course that such negotiations might take. The possibility that they might not lead to an agreement amongst the parties must be recognized. Negotiations following a referendum vote in favour of seeking secession would inevitably address a wide range of issues, many of great import. After 131 years of Confederation, there exists, inevitably, a high level of integration in economic, political and social institutions across Canada. The vision of those who brought about Confederation was to create a unified country, not a loose alliance of autonomous provinces. Accordingly, while there are regional economic interests, which sometimes coincide with provincial boundaries, there are also national interests and enterprises (both public and private) that would face potential dismemberment. There is a national economy and a national debt. Arguments were raised before us regarding boundary issues. There are linguistic and cultural minorities, including aboriginal peoples, unevenly distributed across the country who look to the Constitution of Canada for the protection of their rights. Of course, secession would give rise to many issues of great complexity and difficulty. These would have to be resolved within the overall framework of the rule of law, thereby assuring Canadians resident in Quebec and elsewhere a measure

of stability in what would likely be a period of considerable upheaval and uncertainty. Nobody seriously suggests that our national existence, seamless in so many aspects, could be effortlessly separated along what are now the provincial boundaries of Quebec. As the Attorney General of Saskatchewan put it in his oral submission:

> A nation is built when the communities that comprise it make commitments to it, when they forego choices and opportunities on behalf of a nation, . . . when the communities that comprise it make compromises, when they offer each other guarantees, when they make transfers and perhaps most pointedly, when they receive from others the benefits of national solidarity. The threads of a thousand acts of accommodation are the fabric of a nation. . . .

97 In the circumstances, negotiations following such a referendum would undoubtedly be difficult. While the negotiators would have to contemplate the possibility of secession, there would be no absolute legal entitlement to it and no assumption that an agreement reconciling all relevant rights and obligations would actually be reached. It is foreseeable that even negotiations carried out in conformity with the underlying constitutional principles could reach an impasse. We need not speculate here as to what would then transpire. Under the Constitution, secession requires that an amendment be negotiated.

98 The respective roles of the courts and political actors in discharging the constitutional obligations we have identified follows ineluctably from the foregoing observations. In the Patriation Reference, a distinction was drawn between the law of the Constitution, which, generally speaking, will be enforced by the courts, and other constitutional rules, such as the conventions of the Constitution, which carry only political sanctions. It is also the case, however, that judicial intervention, even in relation to the law of the Constitution, is subject to the Court's appreciation of its proper role in the constitutional scheme.

99 The notion of justiciability is, as we earlier pointed out in dealing with the preliminary objection, linked to the notion of appropriate judicial restraint. We earlier made reference to the discussion of justiciability in Reference re Canada Assistance Plan, supra, at p. 545:

> In exercising its discretion whether to determine a matter that is alleged to be non-justiciable, the Court's primary concern is to retain its proper role within the constitutional framework of our democratic form of government.

In Operation Dismantle, supra, at p. 459, it was pointed out that justiciability is a "doctrine . . . founded upon a concern with the appropriate role of the courts as the forum for the resolution of different types of disputes". An analogous doctrine of judicial restraint operates here. Also, as observed in Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources), [1989] 2 S.C.R. 49 (the Auditor General's case), at p. 91:

> There is an array of issues which calls for the exercise of judicial judgment on whether the questions are properly cognizable by the courts. Ultimately, such judgment depends on the appreciation by the judiciary of its own position in the constitutional scheme.

100 The role of the Court in this Reference is limited to the identification of the relevant aspects of the Constitution in their broadest sense. We have interpreted the questions as relating to the constitutional framework within which political decisions may ultimately be made. Within that framework, the workings of the political process are complex and can only be resolved by means of political judgments and evaluations. The Court has no supervisory role over the political aspects of constitutional negotiations. Equally, the initial impetus for negotiation, namely a clear majority on a clear question in favour of secession, is subject only to political evaluation, and properly so. A right and a corresponding duty to negotiate secession cannot be built on an alleged expression of democratic will if the expression of democratic will is itself fraught with ambiguities. Only the political actors would have the information and expertise to make the appropriate judgment as to the point at which, and the circumstances in which, those ambiguities are resolved one way or the other.

101 If the circumstances giving rise to the duty to negotiate were to arise, the distinction between the strong defence of legitimate interests and the taking of positions which, in fact, ignore the legitimate interests of others is one that also defies legal analysis. The Court would not have access to all of the information available to the political actors, and the methods appropriate for the search for truth in a court of law are ill-suited to getting to the

bottom of constitutional negotiations. To the extent that the questions are political in nature, it is not the role of the judiciary to interpose its own views on the different negotiating positions of the parties, even were it invited to do so. Rather, it is the obligation of the elected representatives to give concrete form to the discharge of their constitutional obligations which only they and their electors can ultimately assess. The reconciliation of the various legitimate constitutional interests outlined above is necessarily committed to the political rather than the judicial realm, precisely because that reconciliation can only be achieved through the give and take of the negotiation process. Having established the legal framework, it would be for the democratically elected leadership of the various participants to resolve their differences.

102 The non-justiciability of political issues that lack a legal component does not deprive the surrounding constitutional framework of its binding status, nor does this mean that constitutional obligations could be breached without incurring serious legal repercussions. Where there are legal rights there are remedies, but as we explained in the Auditor General's case, supra, at p. 90, and New Brunswick Broadcasting, supra, the appropriate recourse in some circumstances lies through the workings of the political process rather than the courts.

103 To the extent that a breach of the constitutional duty to negotiate in accordance with the principles described above undermines the legitimacy of a party's actions, it may have important ramifications at the international level. Thus, a failure of the duty to undertake negotiations and pursue them according to constitutional principles may undermine that government's claim to legitimacy which is generally a precondition for recognition by the international community. Conversely, violations of those principles by the federal or other provincial governments responding to the request for secession may undermine their legitimacy. Thus, a Quebec that had negotiated in conformity with constitutional principles and values in the face of unreasonable intransigence on the part of other participants at the federal or provincial level would be more likely to be recognized than a Quebec which did not itself act according to constitutional principles in the negotiation process. Both the legality of the acts of the parties to the negotiation process under Canadian law, and the perceived legitimacy of such action, would be important considerations in the recognition process. In this way, the adherence of the parties to the obligation to negotiate would be evaluated in an indirect manner on the international plane.

104 Accordingly, the secession of Quebec from Canada cannot be accomplished by the National Assembly, the legislature or government of Quebec unilaterally, that is to say, without principled negotiations, and be considered a lawful act. Any attempt to effect the secession of a province from Canada must be undertaken pursuant to the Constitution of Canada, or else violate the Canadian legal order. However, the continued existence and operation of the Canadian constitutional order cannot remain unaffected by the unambiguous expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The primary means by which that expression is given effect is the constitutional duty to negotiate in accordance with the constitutional principles that we have described herein. In the event secession negotiations are initiated, our Constitution, no less than our history, would call on the participants to work to reconcile the rights, obligations and legitimate aspirations of all Canadians within a framework that emphasizes constitutional responsibilities as much as it does constitutional rights.

105 It will be noted that Question 1 does not ask how secession could be achieved in a constitutional manner, but addresses one form of secession only, namely unilateral secession. Although the applicability of various procedures to achieve lawful secession was raised in argument, each option would require us to assume the existence of facts that at this stage are unknown. In accordance with the usual rule of prudence in constitutional cases, we refrain from pronouncing on the applicability of any particular constitutional procedure to effect secession unless and until sufficiently clear facts exist to squarely raise an issue for judicial determination.

(5) Suggested Principle of Effectivity

106 In the foregoing discussion we have not overlooked the principle of effectivity, which was placed at the forefront in argument before us. For the reasons that follow, we do not think that the principle of effectivity has any application to the issues raised by Question 1. A distinction must be drawn between the right of a people to act, and their power to do so. They are not identical. A right is recognized in law: mere physical ability is not necessarily given status as a right. The fact that an individual or group can act in a certain way says nothing at all about the

legal status or consequences of the act. A power may be exercised even in the absence of a right to do so, but if it is, then it is exercised without legal foundation. Our Constitution does not address powers in this sense. On the contrary, the Constitution is concerned only with the rights and obligations of individuals, groups and governments, and the structure of our institutions. It was suggested before us that the National Assembly, legislature or government of Quebec could unilaterally effect the secession of that province from Canada, but it was not suggested that they might do so as a matter of law: rather, it was contended that they simply could do so as a matter of fact. Although under the Constitution there is no right to pursue secession unilaterally, that is secession without principled negotiation, this does not rule out the possibility of an unconstitutional declaration of secession leading to a de facto secession. The ultimate success of such a secession would be dependent on effective control of a territory and recognition by the international community. The principles governing secession at international law are discussed in our answer to Question 2.

107 In our view, the alleged principle of effectivity has no constitutional or legal status in the sense that it does not provide an ex ante explanation or justification for an act. In essence, acceptance of a principle of effectivity would be tantamount to accepting that the National Assembly, legislature or government of Quebec may act without regard to the law, simply because it asserts the power to do so. So viewed, the suggestion is that the National Assembly, legislature or government of Quebec could purport to secede the province unilaterally from Canada in disregard of Canadian and international law. It is further suggested that if the secession bid was successful, a new legal order would be created in that province, which would then be considered an independent state.

108 Such a proposition is an assertion of fact, not a statement of law. It may or may not be true; in any event it is irrelevant to the questions of law before us. If, on the other hand, it is put forward as an assertion of law, then it simply amounts to the contention that the law may be broken as long as it can be broken successfully. Such a notion is contrary to the rule of law, and must be rejected.

B. Question 2

Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?

109 For reasons already discussed, the Court does not accept the contention that Question 2 raises a question of "pure" international law which this Court has no jurisdiction to address. Question 2 is posed in the context of a Reference to address the existence or non-existence of a right of unilateral secession by a province of Canada. The amicus curiae argues that this question ultimately falls to be determined under international law. In addressing this issue, the Court does not purport to act as an arbiter between sovereign states or more generally within the international community. The Court is engaged in rendering an advisory opinion on certain legal aspects of the continued existence of the Canadian federation. International law has been invoked as a consideration and it must therefore be addressed.

110 The argument before the Court on Question 2 has focused largely on determining whether, under international law, a positive legal right to unilateral secession exists in the factual circumstances assumed for the purpose of our response to Question 1. Arguments were also advanced to the effect that, regardless of the existence or non-existence of a positive right to unilateral secession, international law will in the end recognize effective political realities -- including the emergence of a new state -- as facts. While our response to Question 2 will address considerations raised by this alternative argument of "effectivity", it should first be noted that the existence of a positive legal entitlement is quite different from a prediction that the law will respond after the fact to a then existing political reality. These two concepts examine different points in time. The questions posed to the Court address legal rights in advance of a unilateral act of purported secession. While we touch below on the practice governing the international recognition of emerging states, the Court is as wary of entertaining speculation about the possible future conduct of sovereign states on the international level as it was under Question 1 to speculate about the possible future course of political negotiations among the participants in the Canadian federation. In both cases, the

Reference questions are directed only to the legal framework within which the political actors discharge their various mandates.

(1) Secession at International Law

111 It is clear that international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their "parent" state. This is acknowledged by the experts who provided their opinions on behalf of both the amicus curiae and the Attorney General of Canada. Given the lack of specific authorization for unilateral secession, proponents of the existence of such a right at international law are therefore left to attempt to found their argument (i) on the proposition that unilateral secession is not specifically prohibited and that what is not specifically prohibited is inferentially permitted; or (ii) on the implied duty of states to recognize the legitimacy of secession brought about by the exercise of the well-established international law right of "a people" to self-determination. The amicus curiae addressed the right of self-determination, but submitted that it was not applicable to the circumstances of Quebec within the Canadian federation, irrespective of the existence or non-existence of a referendum result in favour of secession. We agree on this point with the amicus curiae, for reasons that we will briefly develop.

(a) Absence of a Specific Prohibition

112 International law contains neither a right of unilateral secession nor the explicit denial of such a right, although such a denial is, to some extent, implicit in the exceptional circumstances required for secession to be permitted under the right of a people to self-determination, e.g., the right of secession that arises in the exceptional situation of an oppressed or colonial people, discussed below. As will be seen, international law places great importance on the territorial integrity of nation states and, by and large, leaves the creation of a new state to be determined by the domestic law of the existing state of which the seceding entity presently forms a part (R. Y. Jennings, The Acquisition of Territory in International Law (1963), at pp. 8-9). Where, as here, unilateral secession would be incompatible with the domestic Constitution, international law is likely to accept that conclusion subject to the right of peoples to self-determination, a topic to which we now turn.

(b) The Right of a People to Self-determination

113 While international law generally regulates the conduct of nation states, it does, in some specific circumstances, also recognize the "rights" of entities other than nation states -- such as the right of a people to self-determination.

114 The existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond "convention" and is considered a general principle of international law. (A. Cassese, Self-determination of peoples: A legal reappraisal (1995), at pp. 171-72; K. Doehring, "Self-Determination", in B. Simma, ed., The Charter of the United Nations: A Commentary (1994), at p. 70.)

115 Article 1 of the Charter of the United Nations, Can. T.S. 1945 No. 7, states in part that one of the purposes of the United Nations (U.N.) is:

Article 1

. . .

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

116 Article 55 of the U.N. Charter further states that the U.N. shall promote goals such as higher standards of living, full employment and human rights "[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples".

117 This basic principle of self-determination has been carried forward and addressed in so many U.N. conventions and resolutions that, as noted by Doehring, supra, at p. 60:

> The sheer number of resolutions concerning the right of self-determination makes their enumeration impossible.

118 For our purposes, reference to the following conventions and resolutions is sufficient. Article 1 of both the U.N.'s International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, and its International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, states:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

119 Similarly, the U.N. General Assembly's Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res. 2625 (XXV), 24 October 1970 (Declaration on Friendly Relations), states:

> By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

120 In 1993, the U.N. World Conference on Human Rights adopted the Vienna Declaration and Programme of Action, A/CONF.157/24, 25 June 1993, that reaffirmed Article 1 of the two above-mentioned covenants. The U.N. General Assembly's Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, GA Res. 50/6, 9 November 1995, also emphasizes the right to self-determination by providing that the U.N.'s member states will:

> 1. . . .
>
> Continue to reaffirm the right of self-determination of all peoples, taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, and recognize the right of peoples to take legitimate action in accordance with the Charter of the United Nations to realize their inalienable right of self-determination. This shall not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind. . . . [Emphasis added.]

121 The right to self-determination is also recognized in other international legal documents. For example, the Final Act of the Conference on Security and Co-operation in Europe, 14 I.L.M. 1292 (1975) (Helsinki Final Act), states (in Part VIII):

> The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.
>
> By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development. [Emphasis added.]

122 As will be seen, international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states. Where this is not possible, in the exceptional circumstances discussed below, a right of secession may arise.

(i) Defining "Peoples"

123 International law grants the right to self-determination to "peoples". Accordingly, access to the right requires the threshold step of characterizing as a people the group seeking self-determination. However, as the right to self-determination has developed by virtue of a combination of international agreements and conventions, coupled with state practice, with little formal elaboration of the definition of "peoples", the result has been that the precise meaning of the term "people" remains somewhat uncertain.

124 It is clear that "a people" may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to "nation" and "state". The juxtaposition of these terms is indicative that the reference to "people" does not necessarily mean the entirety of a state's population. To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose.

125 While much of the Quebec population certainly shares many of the characteristics (such as a common language and culture) that would be considered in determining whether a specific group is a "people", as do other groups within Quebec and/or Canada, it is not necessary to explore this legal characterization to resolve Question 2 appropriately. Similarly, it is not necessary for the Court to determine whether, should a Quebec people exist within the definition of public international law, such a people encompasses the entirety of the provincial population or just a portion thereof. Nor is it necessary to examine the position of the aboriginal population within Quebec. As the following discussion of the scope of the right to self-determination will make clear, whatever be the correct application of the definition of people(s) in this context, their right of self-determination cannot in the present circumstances be said to ground a right to unilateral secession.

(ii) Scope of the Right to Self-determination

126 The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination -- a people's pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances. External self-determination can be defined as in the following statement from the Declaration on Friendly Relations as

> [t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people. [Emphasis added.]

127 The international law principle of self-determination has evolved within a framework of respect for the territorial integrity of existing states. The various international documents that support the existence of a people's right to self-determination also contain parallel statements supportive of the conclusion that the exercise of such a right must be sufficiently limited to prevent threats to an existing state's territorial integrity or the stability of relations between sovereign states.

128 The Declaration on Friendly Relations, the Vienna Declaration and the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations are specific. They state, immediately after affirming a people's right to determine political, economic, social and cultural issues, that such rights are not to

> be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction. . . . [Emphasis added.]

129 Similarly, while the concluding document of the Vienna Meeting in 1989 of the Conference on Security and Co-

operation in Europe on the follow-up to the Helsinki Final Act again refers to peoples having the right to determine "their internal and external political status" (emphasis added), that statement is immediately followed by express recognition that the participating states will at all times act, as stated in the Helsinki Final Act, "in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States" (emphasis added). Principle 5 of the concluding document states that the participating states (including Canada):

> . . . confirm their commitment strictly and effectively to observe the principle of the territorial integrity of States. They will refrain from any violation of this principle and thus from any action aimed by direct or indirect means, in contravention of the purposes and principles of the Charter of the United Nations, other obligations under international law or the provisions of the [Helsinki] Final Act, at violating the territorial integrity, political independence or the unity of a State. No actions or situations in contravention of this principle will be recognized as legal by the participating States. [Emphasis added.]

Accordingly, the reference in the Helsinki Final Act to a people determining its external political status is interpreted to mean the expression of a people's external political status through the government of the existing state, save in the exceptional circumstances discussed below. As noted by Cassese, supra, at p. 287, given the history and textual structure of this document, its reference to external self-determination simply means that "no territorial or other change can be brought about by the central authorities of a State that is contrary to the will of the whole people of that State".

130 While the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights do not specifically refer to the protection of territorial integrity, they both define the ambit of the right to self-determination in terms that are normally attainable within the framework of an existing state. There is no necessary incompatibility between the maintenance of the territorial integrity of existing states, including Canada, and the right of a "people" to achieve a full measure of self-determination. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity.

(iii) Colonial and Oppressed Peoples

131 Accordingly, the general state of international law with respect to the right to self-determination is that the right operates within the overriding protection granted to the territorial integrity of "parent" states. However, as noted by Cassese, supra, at p. 334, there are certain defined contexts within which the right to the self-determination of peoples does allow that right to be exercised "externally", which, in the context of this Reference, would potentially mean secession:

> . . . the right to external self-determination, which entails the possibility of choosing (or restoring) independence, has only been bestowed upon two classes of peoples (those under colonial rule or foreign occupation), based upon the assumption that both classes make up entities that are inherently distinct from the colonialist Power and the occupant Power and that their 'territorial integrity', all but destroyed by the colonialist or occupying Power, should be fully restored. . . .

132 The right of colonial peoples to exercise their right to self-determination by breaking away from the "imperial" power is now undisputed, but is irrelevant to this Reference.

133 The other clear case where a right to external self-determination accrues is where a people is subject to alien subjugation, domination or exploitation outside a colonial context. This recognition finds its roots in the Declaration on Friendly Relations:

> Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:
>
> (a) To promote friendly relations and co-operation among States; and

> (b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;
>
> and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.

134 A number of commentators have further asserted that the right to self-determination may ground a right to unilateral secession in a third circumstance. Although this third circumstance has been described in several ways, the underlying proposition is that, when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession. The Vienna Declaration requirement that governments represent "the whole people belonging to the territory without distinction of any kind" adds credence to the assertion that such a complete blockage may potentially give rise to a right of secession.

135 Clearly, such a circumstance parallels the other two recognized situations in that the ability of a people to exercise its right to self-determination internally is somehow being totally frustrated. While it remains unclear whether this third proposition actually reflects an established international law standard, it is unnecessary for present purposes to make that determination. Even assuming that the third circumstance is sufficient to create a right to unilateral secession under international law, the current Quebec context cannot be said to approach such a threshold. As stated by the amicus curiae, Addendum to the factum of the amicus curiae, at paras. 15-16:

> [Translation] 15. The Quebec people is not the victim of attacks on its physical existence or integrity, or of a massive violation of its fundamental rights. The Quebec people is manifestly not, in the opinion of the amicus curiae, an oppressed people.
>
> 16. For close to 40 of the last 50 years, the Prime Minister of Canada has been a Quebecer. During this period, Quebecers have held from time to time all the most important positions in the federal Cabinet. During the 8 years prior to June 1997, the Prime Minister and the Leader of the Official Opposition in the House of Commons were both Quebecers. At present, the Prime Minister of Canada, the Right Honourable Chief Justice and two other members of the Court, the Chief of Staff of the Canadian Armed Forces and the Canadian ambassador to the United States, not to mention the Deputy Secretary-General of the United Nations, are all Quebecers. The international achievements of Quebecers in most fields of human endeavour are too numerous to list. Since the dynamism of the Quebec people has been directed toward the business sector, it has been clearly successful in Quebec, the rest of Canada and abroad.

136 The population of Quebec cannot plausibly be said to be denied access to government. Quebecers occupy prominent positions within the government of Canada. Residents of the province freely make political choices and pursue economic, social and cultural development within Quebec, across Canada, and throughout the world. The population of Quebec is equitably represented in legislative, executive and judicial institutions. In short, to reflect the phraseology of the international documents that address the right to self-determination of peoples, Canada is a "sovereign and independent state conducting itself in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction".

137 The continuing failure to reach agreement on amendments to the Constitution, while a matter of concern, does not amount to a denial of self-determination. In the absence of amendments to the Canadian Constitution, we must look at the constitutional arrangements presently in effect, and we cannot conclude under current circumstances that those arrangements place Quebecers in a disadvantaged position within the scope of the international law rule.

138 In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination. Such exceptional circumstances are manifestly inapplicable to Quebec under existing conditions.

Accordingly, neither the population of the province of Quebec, even if characterized in terms of "people" or "peoples", nor its representative institutions, the National Assembly, the legislature or government of Quebec, possess a right, under international law, to secede unilaterally from Canada.

139 We would not wish to leave this aspect of our answer to Question 2 without acknowledging the importance of the submissions made to us respecting the rights and concerns of aboriginal peoples in the event of a unilateral secession, as well as the appropriate means of defining the boundaries of a seceding Quebec with particular regard to the northern lands occupied largely by aboriginal peoples. However, the concern of aboriginal peoples is precipitated by the asserted right of Quebec to unilateral secession. In light of our finding that there is no such right applicable to the population of Quebec, either under the Constitution of Canada or at international law, but that on the contrary a clear democratic expression of support for secession would lead under the Constitution to negotiations in which aboriginal interests would be taken into account, it becomes unnecessary to explore further the concerns of the aboriginal peoples in this Reference.

(2) Recognition of a Factual/Political Reality: the "Effectivity" Principle

140 As stated, an argument advanced by the amicus curiae on this branch of the Reference was that, while international law may not ground a positive right to unilateral secession in the context of Quebec, international law equally does not prohibit secession and, in fact, international recognition would be conferred on such a political reality if it emerged, for example, via effective control of the territory of what is now the province of Quebec.

141 It is true that international law may well, depending on the circumstances, adapt to recognize a political and/or factual reality, regardless of the legality of the steps leading to its creation. However, as mentioned at the outset, effectivity, as such, does not have any real applicability to Question 2, which asks whether a right to unilateral secession exists.

142 No one doubts that legal consequences may flow from political facts, and that "sovereignty is a political fact for which no purely legal authority can be constituted . . .", H. W. R. Wade, "The Basis of Legal Sovereignty", [1955] Camb. L.J. 172, at p. 196. Secession of a province from Canada, if successful in the streets, might well lead to the creation of a new state. Although recognition by other states is not, at least as a matter of theory, necessary to achieve statehood, the viability of a would-be state in the international community depends, as a practical matter, upon recognition by other states. That process of recognition is guided by legal norms. However, international recognition is not alone constitutive of statehood and, critically, does not relate back to the date of secession to serve retroactively as a source of a "legal" right to secede in the first place. Recognition occurs only after a territorial unit has been successful, as a political fact, in achieving secession.

143 As indicated in responding to Question 1, one of the legal norms which may be recognized by states in granting or withholding recognition of emergent states is the legitimacy of the process by which the de facto secession is, or was, being pursued. The process of recognition, once considered to be an exercise of pure sovereign discretion, has come to be associated with legal norms. See, e.g., European Community Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, 31 I.L.M. 1486 (1992), at p. 1487. While national interest and perceived political advantage to the recognizing state obviously play an important role, foreign states may also take into account their view as to the existence of a right to self-determination on the part of the population of the putative state, and a counterpart domestic evaluation, namely, an examination of the legality of the secession according to the law of the state from which the territorial unit purports to have seceded. As we indicated in our answer to Question 1, an emergent state that has disregarded legitimate obligations arising out of its previous situation can potentially expect to be hindered by that disregard in achieving international recognition, at least with respect to the timing of that recognition. On the other hand, compliance by the seceding province with such legitimate obligations would weigh in favour of international recognition. The notion that what is not explicitly prohibited is implicitly permitted has little relevance where (as here) international law refers the legality of secession to the domestic law of the seceding state and the law of that state holds unilateral secession to be unconstitutional.

144 As a court of law, we are ultimately concerned only with legal claims. If the principle of "effectivity" is no more than that "successful revolution begets its own legality" (S. A. de Smith, "Constitutional Lawyers in Revolutionary Situations" (1968), 7 West. Ont. L. Rev. 93, at p. 96), it necessarily means that legality follows and does not precede the successful revolution. Ex hypothesi, the successful revolution took place outside the constitutional framework of the predecessor state, otherwise it would not be characterized as "a revolution". It may be that a unilateral secession by Quebec would eventually be accorded legal status by Canada and other states, and thus give rise to legal consequences; but this does not support the more radical contention that subsequent recognition of a state of affairs brought about by a unilateral declaration of independence could be taken to mean that secession was achieved under colour of a legal right.

145 An argument was made to analogize the principle of effectivity with the second aspect of the rule of law identified by this Court in the Manitoba Language Rights Reference, supra, at p. 753, namely, avoidance of a legal vacuum. In that Reference, it will be recalled, this Court declined to strike down all of Manitoba's legislation for its failure to comply with constitutional dictates, out of concern that this would leave the province in a state of chaos. In so doing, we recognized that the rule of law is a constitutional principle which permits the courts to address the practical consequences of their actions, particularly in constitutional cases. The similarity between that principle and the principle of effectivity, it was argued, is that both attempt to refashion the law to meet social reality. However, nothing of our concern in the Manitoba Language Rights Reference about the severe practical consequences of unconstitutionality affected our conclusion that, as a matter of law, all Manitoba legislation at issue in that case was unconstitutional. The Court's declaration of unconstitutionality was clear and unambiguous. The Court's concern with maintenance of the rule of law was directed in its relevant aspect to the appropriate remedy, which in that case was to suspend the declaration of invalidity to permit appropriate rectification to take place.

146 The principle of effectivity operates very differently. It proclaims that an illegal act may eventually acquire legal status if, as a matter of empirical fact, it is recognized on the international plane. Our law has long recognized that through a combination of acquiescence and prescription, an illegal act may at some later point be accorded some form of legal status. In the law of property, for example, it is well known that a squatter on land may ultimately become the owner if the true owner sleeps on his or her right to repossess the land. In this way, a change in the factual circumstances may subsequently be reflected in a change in legal status. It is, however, quite another matter to suggest that a subsequent condonation of an initially illegal act retroactively creates a legal right to engage in the act in the first place. The broader contention is not supported by the international principle of effectivity or otherwise and must be rejected.

C. Question 3

In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

147 In view of our answers to Questions 1 and 2, there is no conflict between domestic and international law to be addressed in the context of this Reference.

IV. Summary of Conclusions

148 As stated at the outset, this Reference has required us to consider momentous questions that go to the heart of our system of constitutional government. We have emphasized that the Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles that animate the whole of our Constitution, including the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities. Those principles must inform our overall appreciation of the constitutional rights and obligations that would come into play in the event a clear majority of Quebecers votes on a clear question in favour of secession.

149 The Reference requires us to consider whether Quebec has a right to unilateral secession. Those who support

the existence of such a right found their case primarily on the principle of democracy. Democracy, however, means more than simple majority rule. As reflected in our constitutional jurisprudence, democracy exists in the larger context of other constitutional values such as those already mentioned. In the 131 years since Confederation, the people of the provinces and territories have created close ties of interdependence (economically, socially, politically and culturally) based on shared values that include federalism, democracy, constitutionalism and the rule of law, and respect for minorities. A democratic decision of Quebecers in favour of secession would put those relationships at risk. The Constitution vouchsafes order and stability, and accordingly secession of a province "under the Constitution" could not be achieved unilaterally, that is, without principled negotiation with other participants in Confederation within the existing constitutional framework.

150 The Constitution is not a straitjacket. Even a brief review of our constitutional history demonstrates periods of momentous and dramatic change. Our democratic institutions necessarily accommodate a continuous process of discussion and evolution, which is reflected in the constitutional right of each participant in the federation to initiate constitutional change. This right implies a reciprocal duty on the other participants to engage in discussions to address any legitimate initiative to change the constitutional order. While it is true that some attempts at constitutional amendment in recent years have faltered, a clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize.

151 Quebec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation. The democratic vote, by however strong a majority, would have no legal effect on its own and could not push aside the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. Democratic rights under the Constitution cannot be divorced from constitutional obligations. Nor, however, can the reverse proposition be accepted. The continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The other provinces and the federal government would have no basis to deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. The negotiations that followed such a vote would address the potential act of secession as well as its possible terms should in fact secession proceed. There would be no conclusions predetermined by law on any issue. Negotiations would need to address the interests of the other provinces, the federal government, Quebec and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of minorities. No one suggests that it would be an easy set of negotiations.

152 The negotiation process would require the reconciliation of various rights and obligations by negotiation between two legitimate majorities, namely, the majority of the population of Quebec, and that of Canada as a whole. A political majority at either level that does not act in accordance with the underlying constitutional principles we have mentioned puts at risk the legitimacy of its exercise of its rights, and the ultimate acceptance of the result by the international community.

153 The task of the Court has been to clarify the legal framework within which political decisions are to be taken "under the Constitution", not to usurp the prerogatives of the political forces that operate within that framework. The obligations we have identified are binding obligations under the Constitution of Canada. However, it will be for the political actors to determine what constitutes "a clear majority on a clear question" in the circumstances under which a future referendum vote may be taken. Equally, in the event of demonstrated majority support for Quebec secession, the content and process of the negotiations will be for the political actors to settle. The reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm precisely because that reconciliation can only be achieved through the give and take of political negotiations. To the extent issues addressed in the course of negotiation are political, the courts, appreciating their proper role in the constitutional scheme, would have no supervisory role.

154 We have also considered whether a positive legal entitlement to secession exists under international law in the factual circumstances contemplated by Question 1, i.e., a clear democratic expression of support on a clear

question for Quebec secession. Some of those who supported an affirmative answer to this question did so on the basis of the recognized right to self-determination that belongs to all "peoples". Although much of the Quebec population certainly shares many of the characteristics of a people, it is not necessary to decide the "people" issue because, whatever may be the correct determination of this issue in the context of Quebec, a right to secession only arises under the principle of self-determination of peoples at international law where "a people" is governed as part of a colonial empire; where "a people" is subject to alien subjugation, domination or exploitation; and possibly where "a people" is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states. Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development. In the circumstances, the National Assembly, the legislature or the government of Quebec do not enjoy a right at international law to effect the secession of Quebec from Canada unilaterally.

155 Although there is no right, under the Constitution or at international law, to unilateral secession, that is secession without negotiation on the basis just discussed, this does not rule out the possibility of an unconstitutional declaration of secession leading to a de facto secession. The ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition. Such recognition, even if granted, would not, however, provide any retroactive justification for the act of secession, either under the Constitution of Canada or at international law.

156 The reference questions are answered accordingly.

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

Supreme Court Reports

Supreme Court of Canada

Present: Kerwin C.J. and Taschereau, Rand, Locke, Cartwright, Fauteux, Abbott, Martland and Judson JJ.

1958: June 2, 3, 4, 5, 6 / 1959: January 27.

[1959] S.C.R. 121 | [1959] R.C.S. 121

Frank Roncarelli (plaintiff), appellant; and The Honourable Maurice Duplessis (defendant), respondent.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Case Summary

Crown — Officers of the Crown — Powers and responsibilities — Prime Minister and Attorney-General — Quebec Liquor Commission — Cancellation of licence to sell liquor — Whether made at instigation of Prime Minister and Attorney-General — The Alcoholic Liquor Act, R.S.Q. 1941, c. 255 — The Attorney-General's Department Act, R.S.Q. 1941, c. 46 — The Executive Power Act, R.S.Q. 1941, c. 7.

Licences — Cancellation — Motives of cancellation — Done on instigation of Prime Minister and Attorney-General — Whether liability in damages — Whether notice under art. 88 of the Code of Civil Procedure required.

The plaintiff, the proprietor of a restaurant in Montreal and the holder of a licence to sell intoxicating liquor, sued the defendant personally for damages arising out of the cancellation of his licence by the Quebec Liquor Commission. He alleged that the licence had been arbitrarily cancelled at the instigation of the defendant who, without legal powers in the matter, had given orders to the Commission to cancel it before its expiration. This was done, it was alleged, to punish the plaintiff, a member of the Witnesses of Jehovah, because he had acted as bailsman for a large number of members of his sect charged with the violation of municipal by-laws in connection with the distribution of literature. The trial judge gave judgment for the plaintiff for part of the damages claimed. The defendant appealed and the plaintiff, seeking an increase in the amount of damages, cross-appealed. The Court of Appeal dismissed the action and the cross-appeal.

Held (Taschereau, Cartwright and Fauteux JJ. dissenting): The action should be maintained and the amount awarded at trial should be increased by $25,000. By wrongfully and without legal justification causing the cancellation of the permit, the defendant became liable for damages under art. 1053 of the Civil Code.

Per Kerwin C.J.: The trial judge correctly decided that the defendant ordered the Commission to cancel the licence, and no satisfactory reason has been advanced for the Court of Appeal setting aside that finding of fact.

Per Kerwin C.J. and Locke and Martland JJ.: There was ample evidence to sustain the finding of the trial judge that the cancellation of the permit was the result of an order given by the defendant to the manager of the Commission. There was, therefore, a relationship of cause and effect between the defendant's acts and the cancellation of the permit.

The defendant was not acting in the exercise of any of his official powers. There was no authority in the Attorney-General's Department Act, the Executive Power Act, or the Alcoholic Liquor Act enabling the defendant to direct the cancellation of a permit under the Alcoholic Liquor Act. The intent and purpose of that Act placed complete control over the liquor traffic in the hands of an independent commission.

Cancellation of a permit by the Commission, at the request or upon the direction of a third party, as was done in this case, was not a proper and valid exercise of the powers conferred upon the Commission by s. 35 of the Act.

The defendant was not entitled to the protection provided by art. 88 of the Code of Civil Procedure since what he did was not "done by him in the exercise of his functions". To interfere with the administration of the Commission by causing the cancellation of a liquor permit was entirely outside his legal functions. It involved the exercise of powers which in law he did not possess at all. His position was not altered by the fact that he thought it was his right and duty to act as he did.

Per Rand J.: To deny or revoke a permit because a citizen exercises an unchallengeable right totally irrelevant to the sale of liquor in a restaurant is beyond the scope of the discretion conferred upon the Commission by the Alcoholic Liquor Act. What was done here was not competent to the Commission and a fortiori to the government or the defendant. The act of the defendant, through the instrumentality of the Commission, brought about a breach of an implied public statutory duty toward the plaintiff. There was no immunity in the defendant from an action for damages. He was under no duty in relation to the plaintiff and his act was an intrusion upon the functions of a statutory body. His liability was, therefore, engaged. There can be no question of good faith when an act is done with an improper intent and for a purpose alien to the very statute under which the act is purported to be done. There was no need for giving a notice of action as required by art. 88 of the Code of Civil Procedure, as the act done by the defendant was quite beyond the scope of any function or duty committed to him so far so that it was one done exclusively in a private capacity however much, in fact, the influence of public office and power may have carried over into it.

Per Abbott J.: The cancellation of the licence was made solely because of the plaintiff's association with the Witnesses of Jehovah and with the object and purpose of preventing him from continuing to furnish bail for members of that sect. This cancellation was made with the express authorization and upon the order of the defendant. In purporting to authorize and instruct the Commission to cancel the licence the defendant was acting, as he was bound to know, without any legal authority whatsoever. A public officer is responsible for acts done by him without legal justification. The defendant was not entitled to avail himself of the exceptional provision of art. 88 of the Code of Civil Procedure since the act complained of was not "done by him in the exercise of his functions" but was an act done when he had gone outside his functions to perform it. Before a public officer can be held to be acting "in the exercise of his functions" within the meaning of art. 88, it must be established that at the time he performed the act complained of such public officer had reasonable ground for believing that such act was within his legal authority to perform.

Per Taschereau J., dissenting: The action cannot succeed because the plaintiff did not give the notice required by art. 88 of the Code of Civil Procedure to the defendant who was a public officer performing his functions. The failure to fulfil this condition precedent was a total bar to the claim. That failure may be raised by exception to the form or in the written plea to the action, and the words "no judgment may be rendered" indicate that the Court may raise the point propio motu. Even if what was said by the defendant affected the decision taken by the Commission, the defendant remained, nevertheless, a public officer acting in the performance of his duties. He was surely a public officer, and it is clear that he did not act in his personal quality. It was as legal adviser of the Commission and also as a public officer entrusted with the task of preventing disorders and as protector of the peace in the province, that he was consulted. It was the Attorney-General, acting in the performance of his functions, who was required to give his directives to a governmental branch. It is a fallacious principle to hold that an error, committed by a public officer in doing an act connected with the object of his functions, strips that act of its official character and that its author must then be considered as having acted outside the scope of his duties.

Per Cartwright J., dissenting: The loss suffered by the plaintiff was damnum sine injuria. Whether the defendant directed or merely approved the cancellation of the licence, he cannot be answerable in damages since the act of the Commission in cancelling the licence was not an actionable wrong. The Courts below have found, on ample evidence, that the defendant and the manager of the Commission acted throughout in the honest belief that they were fulfilling their duty to the province. On the true construction of the Alcoholic Liquor Act, the Legislature, except

in certain specified circumstances which are not present in the case at bar, has not laid down any rules as to the grounds on which the Commission may decide to cancel a permit; that decision is committed to the unfettered discretion of the Commission and its function in making the decision is administrative and not judicial or quasi-judicial. Consequently, the Commission was not bound to give the plaintiff an opportunity to be heard and the Court cannot be called upon to determine whether there existed sufficient grounds for its decision. Even if the function of the Commission was quasi-judicial and its order should be set aside for failure to hear the plaintiff, it is doubtful whether any action for damages would lie.

Per Fauteux J., dissenting: The right to exercise the discretion with respect to the cancellation of the permit, which under the Alcoholic Liquor Act was exclusively that of the Commission, was abdicated by it in favour of the defendant when he made the decision executed by the Commission. The cancellation being illegal, imputable to the defendant, and damageable for the plaintiff, the latter was entitled to succeed on an action under art. 1053 of the Civil Code.

As the notice required by art. 88 of the Code of Civil Procedure was not given, the action, however, could not be maintained. The failure to give notice, when it should be given, imports nullity and limits the very jurisdiction of the Court. In the present case, the defendant was entitled to the notice since the illegality reproached was committed "in the exercise of his functions". The meaning of this expression in art. 88 was not subject to the limitations attending expressions more or less identical appearing in art. 1054 of the Civil Code. The latter article deals with responsibility whereas art. 88 deals with procedure. Article 88 has its source in s. 8 of An Act for the Protection of Justices of the Peace, Cons. Stat. L.C., c. 101, which provided that the officer "shall be entitled" to the protection of the statute although "he has exceeded his powers or jurisdiction, and has acted clearly contrary to law". That section peremptorily establishes that, in pari materia, a public officer was not considered as having ceased to act within the exercise of his functions by the sole fact that the act committed by him might constitute an abuse of power or excess of jurisdiction, or even a violation of the law. An illegality is assumed under art. 88. The jurisprudence of the province, which has been settled for many years, is to the effect that the incidence of good or bad faith has no bearing on the right to the notice.

The illegality committed by the defendant did not amount to an offence known under the penal law or a delict under art. 1053 of the Civil Code. He did not use his functions to commit this illegality. He did not commit it on the occasion of his functions, but committed it because of his functions. His good faith has not been doubted, and on this fact there was a concurrent finding in the Courts below.

APPEALS from two judgments of the Court of Queen's Bench, Appeal Side, Province of Quebec [[1956] Que. Q.B. 447], reversing a judgment of Mackinnon J. Appeals allowed, Taschereau, Cartwright and Fauteux JJ. dissenting.
F. R. Scott and A.L. Stein, for the plaintiff, appellant. L.E. Beaulieu, Q.C., and L. Tremblay, Q.C., for the defendant, respondent.

Attorneys for the plaintiff, appellant: A.L. Stein and F.R. Scott, Montreal. Attorneys for the defendant, respondent: L.E. Beaulieu and Edouard Asselin, Montreal.

THE CHIEF JUSTICE

No satisfactory reason has been advanced for the Court of Queen's Bench (Appeal Side) [[1956] Que. Q.B. 447] setting aside the finding of fact by the trial judge that the respondent ordered the Quebec Liquor Commission to cancel the appellant's licence. A reading of the testimony of the respondent and of the person constituting the commission at the relevant time satisfies me that the trial judge correctly decided the point. As to the other questions, I agree with Mr. Justice Martland.

The appeals should be allowed with costs here and below and judgment directed to be entered for the appellant against the respondent in the sum of $33,123.53 with interest from the date of the judgement of the Superior Court, together with the costs of the action.

TASCHEREAU J. (dissenting)

TASCHEREAU J. (dissenting):-- L'intimé est Premier Ministre et Procureur Général de la province de Québec, et il occupait ces hautes fonctions dans le temps où les faits qui ont donné naissance à ce litige se sont passés.

L'appelant, un restaurateur de la Cité de Montréal, et porteur d'un permis de la Commission des Liqueurs pour la vente des spiritueux, lui a réclamé personnellement devant la Cour supérieure la somme de $118,741 en dommages. Il a allégué dans son action qu'il est licencié depuis de nombreuses années, qu'il a toujours respecté les lois de la Province se rapportant à la vente des liqueurs alcooliques, que son restaurant avait une excellente réputation, et jouissait de la faveur d'une clientèle nombreuse et recherchée.

Il a allégué en outre qu'il faisait et fait encore partie de la secte religieuse des "Témoins de Jéhovah", et que parce qu'il se serait rendu caution pour quelque 390 de ses coreligionnaires, traduits devant les tribunaux correctionnels de Montréal et accusés de distribution de littérature, sans permis, l'intimé serait illégalement intervenu auprès du gérant de la Commission pour lui faire perdre son permis, qui d'ailleurs lui a été enlevé le 4 décembre 1946. Ce serait comme résultat de l'intervention injustifiée de l'intimé que l'appelant aurait été privé de son permis, et aurait ainsi souffert les dommages considérables qu'il réclame.

La Cour supérieure a maintenu l'action jusqu'à concurrence de $8,123.53, et la Cour du banc de la reine [[1956] Que. Q.B. 447.], M. le Juge Rinfret étant dissident, aurait pour divers motifs maintenu l'appel et rejeté l'action.

L'intimé a soulevé plusieurs moyens à l'encontre de cette réclamation, mais je n'en examinerai qu'un seul, car je crois qu'il est suffisant pour disposer du présent appel. Le Code de procédure civile de la province de Québec contient la disposition suivante:

> Art. 88 C.P. -- Nul officier public ou personne remplissant des fonctions ou devoirs publics ne peut être poursuivi pour dommages à raison d'un acte par lui fait dans l'exercice de ses fonctions, et nul verdict ou jugement ne peut être rendu contre lui à moins qu'avis de cette poursuite ne lui ait été donné au moins un mois avant l'émission de l'assignation.
>
> Cet avis doit être par écrit; il doit exposer les causes de l'action, contenir l'indication des noms et de l'étude du procureur du demandeur ou de son agent et être signifié au défendeur personnellement ou à son domicile.

Le défaut de donner cet avis peut être invoqué par le défendeur, soit au moyen d'une exception à la forme ou soit par plaidoyer au fond. Charland v. Kay [(1933), 54 Que. K.B. 377.]; Corporation de la Paroisse de St-David v. Paquet [(1937), 62 Que. K.B. 140.]; Houde v. Benoit [[1943] Que. K.B. 713].

Les termes mêmes employés par le législateur dans l'art. 88 C.P.C., "nul jugement ne peut être rendu" contre le défendeur, indiquent aussi que la Cour a le devoir de soulever d'office ce moyen, si le défendeur omet ou néglige de le faire par exception à la forme, ou dans son plaidoyer écrit. La signification de cet avis à un officier public, remplissant des devoirs publics, est une condition préalable, essentielle à la réussite d'une procédure judiciaire. S'il n'est pas donné, les tribunaux ne peuvent prononcer aucune condamnation en dommages. Or, dans le cas présent, il est admis qu'aucun avis n'a été donné.

Mais, c'est la prétention de l'appelant que l'intimé ne peut se prévaloir de ce moyen qui est une fin de non recevoir, car, les conseils ou avis qu'il aurait donnés et qui auraient été la cause déterminante de la perte de son permis, ne l'ont pas été en raison d'un acte posé par lui dans l'exercice de ses fonctions.

La preuve révèle que l'appelant était bien licencié de la Commission des Liqueurs depuis de nombreuses années, que la tenue de son restaurant était irréprochable, et que dans le cours du mois de décembre de l'année 1946, alors qu'il était toujours porteur de son permis, celui-ci lui a été enlevé parce qu'il se rendait caution pour plusieurs centaines de ses coreligionnaires, distributeurs de littérature que l'on croyait séditieuse.

C'était avant le jugement de cette Cour dans la cause de Boucher v. Le Roi [[1951] S.C.R. 265, 2 D.L.R. 369, 11 C.R. 85, 99 C.C.C. 1.], alors que la conviction était profondément ancrée parmi la population, que les "Témoins de

Jéhovah" étaient des perturbateurs de la paix publique, des sources constantes de trouble et de désordre dans la Province. On jugeait leur mouvement dangereux, susceptible de soulever une partie de la population contre l'autre, et de provoquer de sérieuses agitations. On parlait même de conspiration séditieuse, et ce n'est sûrement pas sans cause raisonnable, car cette opinion fut plus tard unanimement confirmée par cinq juges de la Cour du Banc de la Reine dans l'affaire Boucher v. Le Roi [[1949] Que. K.B. 238.], et également par quatre juges dissidents devant cette Cour (Boucher v. Le Roi cité supra).

M. Archambault, alors gérant général de la Commission des Liqueurs, soupçonnait fortement que le "Frank Roncarelli" qui par ses cautionnements aidait financièrement ce mouvement qu'il croyait subversif, était détenteur d'un permis de restaurateur pour la vente de liqueurs alcooliques. Il pensait évidemment qu'il ne convenait pas que les bénéfices que Roncarelli retirait de son permis de la Commission, soient utilisés à servir la cause d'agitateurs religieux, dont les enseignements et les méthodes venaient en conflit avec les croyances populaires. Il en informa l'intimé, procureur général, qui en cette qualité est l'aviseur légal officiel de la province pour toutes les affaires juridiques.

Au cours d'une première conversation téléphonique, M. Archambault suggéra à l'intimé que le permis de Roncarelli lui soit enlevé, ce que d'ailleurs il avait personnellement le droit de faire, en vertu de l'art. 35 de la Loi des Liqueurs, qui est ainsi rédigé:

> 35. -- La Commission peut à sa discrétion annuler un permis en tout temps.

Or, comme l'exécutif de la Commission des Liqueurs ne se compose que d'un gérant général qui était M. Archambault, cette discrétion reposait entièrement sur lui.

L'intimé lui suggéra la prudence, et lui proposa de s'enquérir avec certitude si le Roncarelli, détenteur de permis, était bien le même Roncarelli qui prodiguait ses cautionnements d'une façon si généreuse. Après enquête, l'affirmative ayant été établie, M. Archambault communiqua de nouveau avec l'intimé, et voici ce que nous dit M. Archambault dans son témoignage au sujet de ces conversations:

> Q. Maintenant, ce jour-là où vous avez reçu une lettre, le 30 novembre 1946, avez-vous décidé, ce jour-là, d'enlever la licence?
>
> R. Certainement, ce jour-là, j'avais appelé le Premier Ministre, en l'occurrence le procureur général, lui faisant part des constatations, c'est-à-dire des renseignements que je possédais, et de mon intention d'annuler le privilège, et le Premier Ministre m'a répondu de prendre mes précautions, de bien vérifier s'il s'agissait bien de la même personne, qu'il pouvait y avoir plusieurs Roncarelli, et coetera. Alors, quand j'ai eu la confirmation de Y3 à l'effet que c'était la même personne, j'ai appelé le Premier Ministre pour l'assurer qu'il s'agissait bien de Frank Roncarelli, détenteur d'un permis de la Commission des Liqueurs; et, là, le Premier Ministre m'a autorisé, il m'a donné son consentement, son approbation, sa permission, et son ordre de procéder.

Voici maintenant la version de l'intimé:

> Probablement, à la suite du rapport que l'indicateur Y-3 a fait, le rapport qui est produit, M. le Juge Archambault m'a téléphoné et m'a dit: 'On est sûr, c'est cette personne-là.' Et comme dans l'intervalle j'avais étudié le problème et parcouru les statuts depuis l'institution de la Commission des Liqueurs et tous les amendements qui avaient eu lieu, et j'avais consulté, j'en suis arrivé à la conclusion qu'en mon âme et conscience, mon impérieux devoir c'était d'approuver la suggestion très au point du Juge et d'autoriser la cancellation d'un privilège que cet homme-là ne méritait pas, à mon sens, et dont il n'était pas digne.
>
> Et:
>
> Après avoir mûrement délibéré et conscient et sûr de faire mon devoir, j'ai dit à M. Archambault que j'approuvais sa suggestion d'annuler le permis, d'annuler le privilège.
>
> Et, plus loin:
>
> ... j'ai dit au Juge Archambault que j'étais de son opinion, que je ne croyais pas que Roncarelli fût digne d'obtenir des privilèges de la province après son attitude que j'ai mentionnée tout à l'heure.

> ... et lorsque le Juge Archambault m'a dit, après vérification, que c'était la même personne, j'ai dit: 'Vous avez raison, ôtez le permis, ôtez le privilège'.

Quand on demande à l'intimé s'il a donné un ordre à M. Archambault, voici ce qu'il dit:

> Non, je n'ai pas donné un ordre à M. Archambault, je viens de conter ce qui s'est passé.

Que le permis ait été enlevé à Roncarelli comme conséquence de la seule décision de M. Archambault, ce qu'il avait le droit de faire à sa discrétion, ou que cette discrétion ait été influencée par les paroles de l'intimé, n'a pas je crois d'effet décisif dans la détermination de la présente cause. Je demeure convaincu que même si les paroles de l'intimé ont pu avoir quelque influence sur la décision qui a été prise, ce dernier demeurait quand même un officier public, agissant dans l'exercice de ses fonctions, et qu'il était essentiel de lui donner l'avis requis par l'art. 88 C.P.C. L'absence de cet avis interdit aux tribunaux de prononcer aucune condamnation.

L'intimé est sûrement un officier public, et il me semble clair qu'il n'a pas agi en sa qualité personnelle. C'est bien comme aviseur légal de la Commission des Liqueurs, et aussi comme officier public chargé de la prévention des troubles, et gardien de la paix dans la province, qu'il a été consulté. C'est le Procureur Général, agissant dans l'exercice de ses fonctions, qui a été requis de donner ses directives à une branche gouvernementale dont il est l'aviseur. Vide: Loi concernant le Département du Procureur Général, R.S.Q. 1941, c. 46, art. 3, Loi des liqueurs alcooliques, S.R.Q. 1941, c. 255, art 138.

Certains, à tort ou à raison, peuvent croire que l'intimé se soit trompé, en pensant qu'il devait, pour le maintien de la paix publique et la suppression de troubles existants, et qui menaçaient de se propager davantage, conseiller l'enlèvement du permis de l'appelant. Pour ma part, je ne puis admettre le fallacieux principe qu'une erreur commise par un officier public, en posant un acte qui se rattache cependant à l'objet de son mandat, enlève à cet acte son caractère officiel, et que l'auteur de ce même acte fautif cesse alors d'agir dans l'exécution de ses fonctions.

Parce que l'appelant ne s'est pas conformé aux exigences de l'art. 88 C.P.C., en ne donnant pas l'avis requis à l'intimé qui est un officier public, agissant dans l'exercice de ses fonctions, je crois que l'action ne peut réussir. Le défaut de remplir cette condition préalable, constitue une fin de non recevoir, qui me dispense d'examiner les autres aspects de cette cause.

Je crois donc que l'appel principal, de même que l'appel logé pour faire augmenter le montant accordé par le juge de première instance, doivent être rejetés avec dépens de toutes les Cours.

The judgement of Rand and Judson JJ. was delivered by

RAND J.

RAND J.:-- The material facts from which my conclusion is drawn are these. The appellant was the proprietor of a restaurant in a busy section of Montreal which in 1946 through its transmission to him from his father had been continuously licensed for the sale of liquor for approximately 34 years; he is of good education and repute and the restaurant was of a superior class. On December 4 of that year, while his application for annual renewal was before the Liquor Commission, the existing license was cancelled and his application for renewal rejected, to which was added a declaration by the respondent that no future license would ever issue to him. These primary facts took place in the following circumstances.

For some years the appellant had been an adherent of a rather militant Christian religious sect known as the Witnesses of Jehovah. Their ideology condemns the established church institutions and stresses the absolute and exclusive personal relation of the individual to the Deity without human intermediation or intervention.

The first impact of their proselytizing zeal upon the Roman Catholic church and community in Quebec, as might be expected, produced a violent reaction. Meetings were forcibly broken up, property damaged, individuals ordered out of communities, in one case out of the province, and generally, within the cities and towns, bitter controversy aroused. The work of the Witnesses was carried on both by word of mouth and by the distribution of printed matter, the latter including two periodicals known as "The Watch Tower" and "Awake", sold at a small price.

In 1945 the provincial authorities began to take steps to bring an end to what was considered insulting and offensive to the religious beliefs and feelings of the Roman Catholic population. Large scale arrests were made of young men and women, by whom the publications mentioned were being held out for sale, under local by-laws

requiring a licence for peddling any kind of wares. Altogether almost one thousand of such charges were laid. The penalty involved in Montreal, where most of the arrests took place, was a fine of $40, and as the Witnesses disputed liability, bail was in all cases resorted to.

The appellant, being a person of some means, was accepted by the Recorder's Court as bail without question, and up to November 12, 1946, he had gone security in about 380 cases, some of the accused being involved in repeated offences. Up to this time there had been no suggestion of impropriety; the security of the appellant was taken as so satisfactory that at times, to avoid delay when he was absent from the city, recognizances were signed by him in blank and kept ready for completion by the Court officials. The reason for the accumulation of charges was the doubt that they could be sustained in law. Apparently the legal officers of Montreal, acting in concert with those of the Province, had come to an agreement with the attorney for the Witnesses to have a test case proceeded with. Pending that, however, there was no stoppage of the sale of the tracts and this became the annoying circumstance that produced the volume of proceedings.

On or about November 12 it was decided to require bail in cash for Witnesses so arrested and the sum set ranged from $100 to $300. No such bail was furnished by the appellant; his connection with giving security ended with this change of practice; and in the result, all of the charges in relation to which he had become surety were dismissed.

At no time did he take any part in the distribution of the tracts: he was an adherent of the group but nothing more. It was shown that he had leased to another member premises in Sherbrooke which were used as a hall for carrying on religious meetings: but it is unnecessary to do more than mention that fact to reject it as having no bearing on the issues raised. Beyond the giving of bail and being an adherent, the appellant is free from any relation that could be tortured into a badge of character pertinent to his fitness or unfitness to hold a liquor licence.

The mounting resistance that stopped the surety bail sought other means of crushing the propagandist invasion and among the circumstances looked into was the situation of the appellant. Admittedly an adherent, he was enabling these protagonists to be at large to carry on their campaign of publishing what they believed to be the Christian truth as revealed by the Bible; he was also the holder of a liquor licence, a "privilege" granted by the Province, the profits from which, as it was seen by the authorities, he was using to promote the disturbance of settled beliefs and arouse community disaffection generally. Following discussions between the then Mr. Archambault, as the personality of the Liquor Commission, and the chief prosecuting officer in Montreal, the former, on or about November 21, telephoned to the respondent, advised him of those facts, and queried what should be done. Mr. Duplessis answered that the matter was serious and that the identity of the person furnishing bail and the liquor licensee should be put beyond doubt. A few days later, that identity being established through a private investigator, Mr. Archambault again communicated with the respondent and, as a result of what passed between them, the licence, as of December 4, 1946, was revoked.

In the meantime, about November 25, 1946, a blasting answer had come from the Witnesses. In an issue of one of the periodicals, under the heading "Quebec's Burning Hate", was a searing denunciation of what was alleged to be the savage persecution of Christian believers. Immediately instructions were sent out from the department of the Attorney-General ordering the confiscation of the issue and proceedings and were taken against one Boucher charging him with publication of a seditious libel.

It is then wholly as a private citizen, an adherent of a religious group, holding a liquor licence and furnishing bail to arrested persons for no other purpose than to enable them to be released from detention pending the determination of the charges against them, and with no other relevant considerations to be taken into account, that he is involved in the issues of this controversy.

The complementary state of things is equally free from doubt. From the evidence of Mr. Duplessis and Mr. Archambault alone, it appears that the action taken by the latter as the general manager and sole member of the Commission was dictated by Mr. Duplessis as Attorney-General and Prime Minister of the province; that that step was taken as a means of bringing to a halt the activities of the Witnesses, to punish the appellant for the part he had played not only by revoking the existing licence but in declaring him barred from one "forever", and to warn others that they similarly would be stripped of provincial "privileges" if they persisted in any activity directly or indirectly related to the Witnesses and to the objectionable campaign. The respondent felt that action to be his duty, something which his conscience demanded of him; and as representing the provincial government his decision

became automatically that of Mr. Archambault and the Commission. The following excerpts of evidence make this clear:

M. DUPLESSIS:

R.... Au mois de novembre 1946, M. Edouard Archambault, qui était alors le gérant général de la Commission des Liqueurs m'a appelé à Québec, téléphone longue distance de Montréal, et il m'a dit que Roncarelli qui multipliait les cautionnements à la Cour du Recorder d'une façon désordonnée, contribuant à paralyser les activités de la Police et à congestionner les tribunaux, que ce nommé Roncarelli détenait un privilège de la Commission des Liqueurs de Québec. De fait, Votre Seigneurie, un permis est un privilège, ce n'est pas un droit. L'article 35 de la Loi des Liqueurs alcooliques, paragraphe 1, a été édicté en 1921 par le statut II, Geo. V, chap. 24, qui déclare ceci:

"La Commission peut, à sa discrétion annuler le permis en tout temps."

* * *

"Je vais m'en informer et je vous le dirai." J'ai dit au Juge: "Dans l'intervalle, je vais examiner la question avec des officiers légaux, je vais y penser, je vais réfléchir et je vais voir ce que devrai faire." Quelques jours après, et pendant cet intervalle j'ai étudié le problème, j'ai étudié des dossiers, comme Procureur Général et comme Premier Ministre, quelques jours après le Juge Archambault, M. Edouard Archambault, m'a téléphoné pour me dire qu'il était certain que le Roncarelli en question, qui paralysait les activités de la Cour du Recorder qui accaparait dans une large mesure les services de la force constabulaire de Montréal, dont les journaux disaient avec raison qu'elle n'avait pas le nombre suffisant de policiers, était bien la personne qui détenait un permis. Je lui ai dit: "Dans ces circonstances, je considère que c'est mon devoir, comme Procureur Général et comme Premier Ministre, en conscience, dans l'exercice de mes fonctions officielles et pour remplir le mandat que le peuple m'avait confié et qu'il m'a renouvelé avec une immense majorité en 1948, après la cancellation du permis et après la poursuite intentée contre moi, j'ai cru que c'était mon devoir, en conscience, de dire au Juge que ce permis-là, le Gouvernement de Québec ne pouvait pas accorder un privilège à un individu comme Roncarelli qui tenait l'attitude qu'il tenait".

* * *

J'ai dit: "Il y a peut-être de pauvres personnes, de bonne foi, plus riches d'idéal que d'esprit, de jugement, ces personnes-là sont probablement à la merci de quelques-uns qui les exploitent, je vais donner une entrevue pour attirer l'attention de tout le monde sur l'article 69 du Code Criminel, qui déclare que les complices sont responsables au même titre que la personne qui a commis l'offense."

* * *

D. Vous n'avez pas reçu d'autres documents, c'est seulement les communications téléphoniques de M. le Juge Archambault?

R. Oui, certainement, un message du Juge Archambault, un autre téléphone au Juge Archambault, des examens de la situation, on en a même parlé au Conseil des Ministres, j'ai discuté le cas, j'ai consulté des officiers en loi et en mon âme et conscience j'ai fait mon devoir comme Procureur Général, j'ai fait la seule chose qui s'imposait, si c'était à recommencer je ferais pareil.

D. Monsieur le Premier Ministre, le 8 février 1947, dans le journal La Presse, paraissait un article intitulé: "Roncarelli subit un second refus". Le sous-titre de cet article se lit comme suit: "L'honorable M. Duplessis refuse au restaurateur, protecteur des Témoins de Jéhovah, la permission de poursuivre la Commission des Liqueurs." Vous trouverez, monsieur le Premier Ministre, presque à la fin de ce rapport, les mots suivants:

"C'est moi-même, à titre de Procureur Général, et de responsable de l'ordre dans cette province, qui ai donné l'ordre à la Commission des Liqueurs d'annuler son permis référant à Roncarelli."

Je vous demande, monsieur le Premier Ministre, si c'est un rapport exact de vos paroles à cette conférence de presse?

R. Ce que j'ai dit lors de la conférence de presse, c'est ce que je viens de déclarer. Je ne connaissais pas Roncarelli, je ne savais pas que Roncarelli avait un permis,... lorsqu'il a attiré mon attention sur la situation absolument anormale d'un homme bénéficiant d'un privilège de la province, et multipliant les actes de nature à paralyser les tribunaux de la province et la police municipale de Montréal, c'est là que j'ai approuvé sa suggestion et que j'ai dit, comme Procureur général...

LA COUR

C'est une autre question que l'on vous pose, Monsieur le Premier Ministre. Voulez-vous relire la question. (La demande précédente est alors relue.)

R. Ce que j'ai dit à la presse, c'est ce que je viens de dire tout à l'heure. L'article tel que produit n'est pas conforme textuellement à ce que j'ai dit. Ce que j'ai dit, ce que je répète, c'est que le Juge Archambault, gérant de la Commission des Liqueurs m'a mis au fait d'une situation que j'ignorais et comme Procureur Général, pour accomplir mon devoir, j'ai dit au Juge Archambault que j'étais de son opinion, que je ne croyais pas que Roncarelli fut digne d'obtenir des privilèges de la province après son attitude que j'ai mentionnée tout à l'heure.

* * *

D. Les mots que je viens de vous lire tout à l'heure, c'est censé être textuellement les mots que vous avez donnés, parce que c'est précédé d'une indication d'un rapport textuel:

"Nous n'avons fait qu'exercer en ce faisant un droit formel et incontestable, nous avons rempli un impérieux devoir. Le permis de Roncarelli a été annulé non pas temporairement mais bien pour toujours."

LE TÉMOIN: Si j'ai dit cela?

L'AVOCAT: Oui.

R. Oui. Le permis de Roncarelli a été annulé pour ce temps-là et pour toujours. Je l'ai dit et je considérais que c'était mon devoir et en mon âme et conscience j'aurais manqué à mon devoir si je ne l'avais pas fait.

D. Avec ces renseignements additionnels diriez-vous que les mots: "C'est moi-même, à titre de Procureur Général et de responsable de l'ordre dans cette province qui ai donné l'ordre à la Commission des Liqueurs d'annuler son permis." Diriez-vous que c'est exact?

R. J'ai dit tout à l'heure ce qui en était. J'ai eu un téléphone de M. Archambault me mettant au courant de certains faits que j'ignorais au sujet de Roncarelli. Vérification, identification pour voir si c'était bien la même personne, étude, réflexion, consultation et décision d'approuver la suggestion du gérant de la Commission des Liqueurs d'annuler le privilège de Roncarelli.

* * *

LA COUR:

D. M. Stein veut savoir si vous avez donné un ordre à M. Archambault?

R. Non, je n'ai pas donné un ordre à M. Archambault, je viens de conter ce qui s'est passé. Le juge Archambault m'a mis au courant d'un fait que je ne connaissais pas, je ne connaissais pas les faits, c'est lui qui m'a mis au courant des faits. Je ne sais pas comment on peut appeler ça, quand la Procureur Général, qui est à la tête d'un département, parle à un officier, même à un officier supérieur, et qu'il émet une opinion, ce n'est pas directement un ordre, c'en est un sans l'être. Mais c'est à la suggestion du Juge Archambault, après qu'il eut porté à ma connaissance des faits que j'ignorais, que la décision a été prise.

* * *

D. Monsieur le Premier Ministre, excusez-moi si je répète encore la question, mais il me semble que vous n'avez pas répondu à la question que j'ai posée. Il paraît, non seulement dans ce journal, mais aussi dans d'autres journaux, et cela est répété exactement dans les même paroles, dans le Montreal Star, en anglais, dans la Gazette, en anglais, dans Le Canada, en français et aussi dans La Patrie, en français, textuellement les mêmes mots: "C'est moi-même, à titre de Procureur Général, chargé d'assurer le respect de l'ordre et le respect des citoyens paisibles qui ai donné à la Commission des Liqueurs, l'ordre d'annuler le permis." Je vous demande si c'est possible que vous ayez employé presque exactement ces mots en discutant l'affaire avec les journalistes, ce jour-là?

R. Lorsque les journalistes viennent au bureau pour avoir des entrevues, des fois les entrevues durent une demi-heure, des fois une heure, des fois une heure et demie; quels sont les termes exacts qui sont employés, on ne peut pas se souvenir exactement des termes. Mais la vérité vraie c'est ce que j'ai dit tout à l'heure, et c'est cela que j'ai dit aux journalistes, comme Premier Ministre et comme Procureur Général, je prends la responsabilité. Si j'avais dit au Juge Archambault: "Vous ne le ferez pas", il ne l'aurait probablement pas fait. Comme il me suggérait de le faire et qu'après réflexion et vérification je trouvais que c'était correct, que c'était conforme à mon devoir, j'ai approuvé et c'est toujours un ordre que l'on donne. Quand l'officier supérieur parle, c'est un ordre que l'on donne, même s'il accepte la suggestion de l'officier dans son département, c'est un ordre qu'il donne indirectement. Je ne me rappelle pas des expressions exactes, mais ce sont les faits.

* * *

D. Référant à l'article contenue dans la Gazette du 5 décembre, c'est-à-dire le jour suivant l'annulation du permis, vous trouvez là les mots en anglais:

"In statement to the press yesterday, the Premier recalled that: 'Two weeks ago, I pointed out that the Provincial Government had the firm intention to take the most rigorous and efficient measures possible to get rid of those who under the names of Witnesses of Jehovah, distribute circulars which in my opinion, are not only injurious for Quebec and its population, but which are of a very libellous and seditious character. The propaganda of the Witnesses of Jehovah cannot be tolerated and there are more than 400 of them now before the courts in Montreal, Quebec, Three Rivers and other centers.'

'A certain Mr. Roncarelli has supplied bail for hundreds of witnesses of Jehovah. The sympathy which this man has shown for the Witnesses, in such an evident, repeated and audacious manner, is a provocation to public order, to the administration of justice and is definitely contrary to the aims of justice.'"

D. Je vous demande, monsieur le Premier Ministre, si ce sont les paroles presque exactes ou exactes que vous avez dites à la conférence de presse?

R. Que j'ai dit ici: "A certain Mr. Roncarelli has supplied bail for hundreds of witnesses of Jehovah. The Sympathy which this man has shown for the Witnesses, in such an evident, repeated and audacious manner, is a provocation to public order, to the administration of justice and is definitely contrary to the aims of justice." Je l'ai dit et je considère que c'est vrai.

* * *

M. ARCHAMBAULT:

D. Maintenant, ce jour-là où vous avez reçu une lettre, le 30 novembre 1946, avez-vous décidé, ce jour-là, d'enlever la licence?

R. Certainement, ce jour-là, j'avais appelé le Premier Ministre, en l'occurrence le procureur général, lui faisant part des constatations, c'est-à-dire des renseignements que je possédais, et de mon intention d'annuler le privilège, et le Premier Ministre m'a répondu de prendre mes précautions, de bien vérifier s'il s'agissait bien de la même personne, qu'il pouvait y avoir plusieurs Roncarelli, et coetera. Alors, quand j'ai eu la confirmation de Y3 à l'effet que c'était la même personne, j'ai rappelé le Premier Ministre pour l'assurer qu'il s'agissait bien de Frank Roncarelli, détenteur d'un permis de la Commission des Liqueurs; et, là, le Premier Ministre m'a autorisé, il m'a donné son consentement, son approbation, sa permission, et son ordre de procéder.

In these circumstances, when the de facto power of the Executive over its appointees at will to such a statutory public function is exercised deliberately and intentionally to destroy the vital business interests of a citizen, is there legal redress by him against the person so acting? This calls for an examination of the statutory provisions governing the issue, renewal and revocation of liquor licences and the scope of authority entrusted by law to the Attorney-General and the government in relation to the administration of the Act.

The liquor law is contained in R.S.Q. 1941, c. 255, entitled An Act Respecting Alcoholic Liquor. A Commission is created as a corporation, the only member of which is the general manager. By s.5

> The exercise of the functions, duties and powers of the Quebec Liquor Commission shall be vested in one person alone, named by the Lieutenant-Governor in Council, with the title of Manager. The remuneration of such person shall be determined by the Lieutenant-Governor in Council and be paid out of the revenues of the Liquor Commission. R.S. 1925, c.37, s.5; 1 Ed. VII (2), c. 14, ss. 1 and 5; 1 Geo. VI, c. 22, ss. 1 and 5.

The entire staff for carrying out the duties of the Commission are appointed by the general manager -- here Mr. Archambault -- who fixes salaries and assigns functions, the Lieutenant-Governor in Council reserving the right of approval of the salaries. Besides the general operation of buying and selling liquor throughout the province and doing all things necessary to that end, the Commission is authorized by s. 9 (e) to "grant, refuse or cancel permits for the sale of alcoholic liquors or other permits in regard thereto and to transfer the permit of any person deceased". By s. 12 suits against the general manager for acts done in the exercise of his duties require the authority of the Chief Justice of the province, and the Commission can be sued only with the consent of the Attorney-General. Every officer of the Commission is declared to be a public officer and by R.S.Q. 1941, c. 10, s. 2, holds office during pleasure. By s. 19 the Commission shall pay over to the Provincial Treasurer any moneys which the latter considers available and by s. 20 the Commission is to account to the Provincial Treasurer for its receipts, disbursements, assets and liabilities. Sections 30 and 32 provide for the issue of permits to sell; they are to be granted to individuals only, in their own names; by s. 34 the Commission "may refuse to grant any permit"; subs. (2) provides for permits in special cases of municipalities where prohibition of sale is revoked in whole or part by by-law; subs. (3) restricts or refuses the grant of permits in certain cities the Council of which so requests; but it is provided that

> ... If the fyling of such by-law takes place after the Commission has granted a permit in such city or town, the Commission shall be unable to give effect to the request before the first of May next after the date of fyling.

Subsection (4) deals with a refusal to issue permits in small cities unless requested by a by-law, approved by a majority vote of the electors. By subs. (6) special power is given the Commission to grant permits to hotels in summer resorts for five months only notwithstanding that requests under subss. (2) and (4) are not made. Section 35 prescribes the expiration of every permit on April 30 of each year. Dealing with cancellation, the section provides that the "Commission may cancel any permit at its discretion". Besides the loss of the privilege and without the necessity of legal proceedings, cancellation entails loss of fees paid to obtain it and confiscation of the liquor in the possession of the holder and the receptacles containing it. If the cancellation is not followed by prosecution for an offence under the Act, compensation is provided for certain items of the forfeiture. Subsection (5) requires the Commission to cancel any permit made use of on behalf of a person other than the holder; s. 36 requires cancellation in specified cases. The sale of liquor is, by s. 42, forbidden to various persons. Section 148 places upon the Attorney-General the duty of

1. Assuring the observance of this Act and of the Alcoholic Liquor Possession and Transportation Act (Chap. 256), and investigating, preventing and suppressing the infringements of such acts, in every way authorized thereby;
2. Conducting the suits or prosecutions for infringements of this Act or of the said Alcoholic Liquor Possession and Transportation Act. R.S. 1925, c. 37, s. 78a; 24 Geo. V, c. 17, s. 17.

The provisions of the statute, which may be supplemented by detailed regulations, furnish a code for the complete administration of the sale and distribution of alcoholic liquors directed by the Commission as a public service, for all legitimate purposes of the populace. It recognizes the association of wines and liquors as embellishments of food

and its ritual and as an interest of the public. As put in Macbeth, the "sauce to meat is ceremony", and so we have restaurants, cafés, hotels and other places of serving food, specifically provided for in that association.

At the same time the issue of permits has a complementary interest in those so catering to the public. The continuance of the permit over the years, as in this case, not only recognizes its virtual necessity to a superior class restaurant but also its identification with the business carried on. The provisions for assignment of the permit are to this most pertinent and they were exemplified in the continuity of the business here. As its exercise continues, the economic life of the holder becomes progressively more deeply implicated with the privilege while at the same time his vocation becomes correspondingly dependent on it.

The field of licensed occupations and businesses of this nature is steadily becoming of greater concern to citizens generally. It is a matter of vital importance that a public administration that can refuse to allow a person to enter or continue a calling which, in the absence of regulation, would be free and legitimate, should be conducted with complete impartiality and integrity; and that the grounds for refusing or cancelling a permit should unquestionably be such and such only as are incompatible with the purposes envisaged by the statute: the duty of a Commission is to serve those purposes and those only. A decision to deny or cancel such a privilege lies within the "discretion" of the Commission; but that means that decision is to be based upon a weighing of considerations pertinent to the object of the administration.

In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? the legislature cannot be so distorted.

To deny or revoke a permit because a citizen exercises an unchallengeable right totally irrelevant to the sale of liquor in a restaurant is equally beyond the scope of the discretion conferred. There was here not only revocation of the existing permit but a declaration of a future, definitive disqualification of the appellant to obtain one: it was to be "forever". This purports to divest his citizenship status of its incident of membership in the class of those of the public to whom such a privilege could be extended. Under the statutory language here, that is not competent to the Commission and a fortiori to the government or the respondent: McGillivray v. Kimber [(1915), 52 S.C.R. 146, 26 D.L.R. 164.]. There is here an administrative tribunal which, in certain respects, is to act in a judicial manner; and even on the view of the dissenting justices in McGillivray, there is liability: what could be more malicious than to punish this licensee for having done what he had an absolute right to do in a matter utterly irrelevant to the Liquor Act? Malice in the proper sense in simply acting for a reason and purpose knowingly foreign to the administration, to which was added here the element of intentional punishment by what was virtually vocation outlawry.

It may be difficult if not impossible in cases generally to demonstrate a breach of this public duty in the illegal purpose served; there may be no means, even if proceedings against the Commission were permitted by the Attorney-General, as here they were refused, of compelling the Commission to justify a refusal or revocation or to give reasons for its action; on these questions I make no observation; but in the case before us that difficulty is not present: the reasons are openly avowed.

The act of the respondent through the instrumentality of the Commission brought about a breach of an implied public statutory duty toward the appellant; it was a gross abuse of legal power expressly intended to punish him for an act wholly irrelevant to the statute, a punishment which inflicted on him, as it was intended to do, the destruction of his economic life as a restaurant keeper within the province. Whatever may be the immunity of the Commission or its member from an action for damages, there is none in the respondent. He was under no duty in relation to the appellant and his act was an intrusion upon the functions of a statutory body. The injury done by him was a fault engaging liability within the principles of the underlying public law of Quebec: Mostyn v. Fabrigas [98 E.R. 1021], and under art. 1053 of the Civil Code. That, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an

administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure. An administration of licences on the highest level of fair and impartial treatment to all may be forced to follow the practice of "first come, first served", which makes the strictest observance of equal responsibility to all of even greater importance; at this stage of developing government it would be a danger of high consequence to tolerate such a departure from good faith in executing the legislative purpose. It should be added, however, that that principle is not, by this language, intended to be extended to ordinary governmental employment: with that we are not here concerned.

It was urged by Mr. Beaulieu that the respondent, as the incumbent of an office of state, so long as he was proceeding in "good faith", was free to act in a matter of this kind virtually as he pleased. The office of Attorney-General traditionally and by statute carries duties that relate to advising the Executive, including here, administrative bodies, enforcing the public law and directing the administration of justice. In any decision of the statutory body in this case, he had no part to play beyond giving advice on legal questions arising. In that role his action should have been limited to advice on the validity of a revocation for such a reason or purpose and what that advice should have been does not seem to me to admit of any doubt. To pass from this limited scope of action to that of bringing about a step by the Commission beyond the bounds prescribed by the legislature for its exclusive action converted what was done into his personal act.

"Good faith" in this context, applicable both to the respondent and the general manager, means carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and for an alien purpose; it does not mean for the purposes of punishing a person for exercising an unchallengeable right; it does not mean arbitrarily and illegally attempting to divest a citizen of an incident of his civil status.

I mention, in order to make clear that it has not been overlooked, the decision of the House of Lords in Allen v. Flood [[1898] A.C. 1.], in which the principle was laid down that an act of an individual otherwise not actionable does not become so because of the motive or reason for doing it, even maliciously to injure, as distinguished from an act done by two or more persons. No contention was made in the present case based on agreed action by the respondent and Mr. Archambault. In Allen v. Flood, the actor was a labour leader and the victims non-union workmen who were lawfully dismissed by their employer to avoid a strike involving no breach of contract or law. Here the act done was in relation to a public administration affecting the rights of a citizen to enjoy a public privilege, and a duty implied by the statute toward the victim was violated. The existing permit was an interest for which the appellant was entitled to protection against any unauthorized interference, and the illegal destruction of which gave rise to a remedy for the damages suffered. In Allen v. Flood there were no such elements.

Nor is it necessary to examine the question whether on the basis of an improper revocation the appellant could have compelled the issue of a new permit or whether the purported revocation was a void act. The revocation was de facto, it was intended to end the privilege and to bring about the consequences that followed. As against the respondent, the appellant was entitled to treat the breach of duty as effecting a revocation and to elect for damages.

Mr. Scott argued further that even if the revocation were within the scope of discretion and not a breach of duty, the intervention of the respondent in so using the Commission was equally a fault. The proposition generalized is this: where, by a statute restricting the ordinary activities of citizens, a privilege is conferred by an administrative body, the continuance of that enjoyment is to be free from the influence of third persons on that body for the purpose only of injuring the privilege holder. It is the application to such a privilege of the proposition urged but rejected in Allen v. Flood in the case of a private employment. The grounds of distinction between the two cases have been pointed out; but for the reasons given consideration of this ground is unnecessary and I express no opinion for or against it.

A subsidiary defence was that notice of action had not been given as required by art. 88 C.C.P. This provides generally that, without such notice, no public officer or person fulfilling any public function or duty is liable in damages "by reason of any act done by him in the exercise of his functions". Was the act here, then, done by the respondent in the course of that exercise? The basis of the claim, as I have found it, is that the act was quite beyond the scope of any function or duty committed to him, so far so that it was one done exclusively in a private capacity, however much in fact the influence of public office and power may have carried over into it. It would be

only through an assumption of a general overriding power of executive direction in statutory administrative matters that any colour of propriety in the act could be found. But such an assumption would be in direct conflict with fundamental postulates of our provincial as well as dominion government; and in the actual circumstances there is not a shadow of justification for it in the statutory language.

The damages suffered involved the vocation of the appellant within the province. Any attempt at a precise computation or estimate must assume probabilities in an area of uncertainty and risk. The situation is one which The Court should approach as a jury would, in a view of its broad features; and in the best consideration I can give to them, the damages should be fixed at the sum of $25,000 plus that allowed by the trial court.

I would therefore allow the appeals, set aside the judgment of the Court of Queen's Bench and restore the judgment at trial modified by increasing the damages to the sum of $33,123.53. The appellant should have his costs in the Court of Queen's Bench and in this Court.

The judgment of Locke and Martland JJ. was delivered by

MARTLAND J.

MARTLAND J.:-- This is an appeal from a judgment of the Court of Queen's Bench, Appeal Side, for the Province of Quebec [[1956] Que. Q.B. 447.], District of Montreal, rendered on April 12, 1956, overruling the judgment of the Superior Court rendered on May 2, 1951, under the terms of which the appellant had been awarded damages in the sum of $8,123.53 and costs.

The appellant had appealed from the judgment of the Superior Court in respect of the amount of damages awarded. This appeal was dismissed.

The facts which give rise to this appeal are as follows:

The appellant, on December 4, 1946, was the owner of a restaurant and café situated at 1429 Crescent Street in the City of Montreal. At that time he was the holder of a liquor permit, no. 68, granted to him on May 1, 1946, pursuant to the provisions of the Alcoholic Liquor Act of the Province of Quebec and which permitted the sale of alcoholic liquors in the restaurant and café. The permit was valid until April 30, 1947, subject to possible cancellation by the Quebec Liquor Commission (hereinafter sometimes referred to as "the Commission") in accordance with the provisions of s. 35 of that Act. The business operated by the appellant had been founded by his father in the year 1912 and it had been continuously licensed until December 4, 1946. The evidence is that prior to that date the appellant had complied with the requirements of the Alcoholic Liquor Act and had conducted a high-class restaurant business.

The appellant was an adherent of the Witnesses of Jehovah. From some time in 1944 until November 12, 1946, he had, on numerous occasions, given security for Witnesses of Jehovah who had been prosecuted under City of Montreal By-laws numbered 270 and 1643 for minor offences of distributing, peddling and canvassing without a licence. The maximum penalty for these offences was a fine of $40 and costs, or imprisonment for 60 days. The total number of bonds furnished by the appellant was 390. These security bonds were accepted by the City attorney and the Recorder of the City of Montreal without remuneration to the appellant. None of the accused who had been bonded ever defaulted. Subsequently the appellant was released from these bonds at his own request and new security was furnished by others.

As a result of a change of procedure in the Recorder's Court in Montreal by the Attorney in Chief of that Court, the appellant was not accepted as a bondsman in any cases before that Court after November 12, 1946.

Up to November 12, 1946, the security bonds furnished by the appellant were accepted without question. These bonds were based upon the appellant's immovable property containing the restaurant. The appellant did not give any security in any criminal case involving a charge of sedition.

About the 24th or 25th of November 1946 the pamphlet "Quebec's Burning Hate" began to be distributed in the Province of Quebec by the Witnesses of Jehovah. The Chief Crown Prosecutor in Montreal, then Mtre. Oscar Gagnon, K.C., decided that the distribution of this pamphlet should be prevented. There is no evidence that the appellant was at any time a distributor of this pamphlet and his restaurant and café in Montreal was not used for the distribution or storage of these pamphlets by himself or by anyone else. The appellant had ceased to be a bondsman before the distribution of this pamphlet in the Province of Quebec had commenced.

On November 25, 1946, a number of pamphlets was seized in a building in the City of Sherbrooke owned by the appellant and leased from him, as a place of worship, by Witnesses of Jehovah under the control of the local minister Mr. Raymond Browning. There is no evidence that the appellant was in any way responsible for the activities of this congregation, or that he knew that the pamphlet "Quebec's Burning Hate" was in those premises.

In the course of his inquiries about the distribution of this pamphlet, Mr. Gagnon learned that the appellant had been giving bail in a large number of cases in the Recorder's Court and also that he was the holder of the liquor permit for his restaurant. These facts were brought by Mr. Gagnon to the attention of Mr. Edouard Archambault, then Chairman of the Quebec Liquor Commission and subsequently Chief Judge of the Court of Sessions of the Peace. Mr. Archambault then interviewed Recorder Paquette, who informed him that the appellant held a licence from the Quebec Liquor Commission; that he was furnishing bail in a large number of cases of infractions of municipal by-laws; that these were so numerous that a great part of the police of Montreal had been taken from their duties as a consequence and that his Court was congested by the large number of cases pending before it.

Subsequent to the receipt of this information, Mr. Archambault communicated by telephone with the respondent. The discussion which took place on that occasion and on the occasion of a subsequent telephone call will be reviewed later. Following the two telephone conversations between Mr. Archambault and the respondent, Mr. Archambault, as manager of the Quebec Liquor Commission, issued an order for the cancellation of the appellant's permit without any prior notice to the appellant. All the liquor in the possession of the appellant on his restaurant premises was seized and was taken into the custody of the Commission.

The appellant carried on his restaurant business without a liquor licence for a period of approximately six months, after which, finding that the business could not be thus operated profitably, he closed it down and later effected a sale of the premises.

The appellant commenced action against the respondent on June 3, 1947, claiming damages in the total sum of $118,741. He alleged that the respondent, without legal or statutory authority, had caused the cancellation of his liquor permit as an act of reprisal because of his having acted as surety or bondsman for the Witnesses of Jehovah in connection with the charges above mentioned. He alleged that the permit had been arbitrarily and unlawfully cancelled and that, as a result, he had sustained the damages claimed.

By his defence the respondent alleged that the Witnesses of Jehovah, in the years 1945 and 1946, had, with the consent and encouragement of the appellant, organized a propaganda campaign in the Province of Quebec, and particularly in the City of Montreal, where they had distributed pamphlets of a seditious character. The respondent referred to the fact that the appellant had acted as surety for a number of persons under arrest and thus permitted them to repeat their offences and to continue their campaign. He alleged that in his capacity as Attorney-General of the Province of Quebec, after becoming cognizant of the conduct of the appellant and of the fact that he held a permit issued by the Quebec Liquor Commission, he had decided, after careful reflection, that it was contrary to public order to permit the appellant to enjoy the benefit of the privileges of this permit and that he, the respondent, had recommended to the manager of the Quebec Liquor Commission the cancellation of that permit. It was alleged that the permit did not give any right, but constituted a privilege available only during the pleasure of the Commission. He alleged that in the matter he had acted in his quality of Prime Minister and Attorney-General of the Province of Quebec and accordingly, could not incur any personal responsibility. He further pleaded the provisions of art. 88 of the Code of Civil Procedure and alleged that he had not received notice of the action as required by the provisions of that article.

The case came on for trial in the Superior Court before MacKinnon J., who made findings of fact and reached conclusions in law as follows:

1. that the respondent gave an order to the manager of the Commission, Mr. Archambault, to cancel the appellant's permit and that it was the respondent's order which was the determining factor in relation to the cancellation of that permit;
2. that the Commission had acted arbitrarily when it cancelled the permit and had disregarded the rules of reason and justice;
3. that the respondent had failed to show that, in law, he had any authority to interfere with the administration of the Commission, or to order it to cancel a permit;

4. that the respondent was not entitled to receive notice of the action pursuant to art. 88 of the Code of Civil Procedure because his acts which were complained of were not done in the exercise of his functions.

Damages were awarded in the total amount of $8,123.53.

From this judgment the respondent appealed. The appellant cross-appealed in respect of the matter of damages, asking for an award in an increased amount.

The respondent's appeal on the issue of liability was allowed and the appellant's appeal was dismissed. Rinfret J. dissented in respect of the allowance of the respondent's appeal.

Various reasons were given for the allowance of the appeal by the majority of the Court [[1956] Que. Q.B. 447.]. They may be summarized as follows:

Bissonnette J. reached the conclusion that, upon the evidence, the decision to cancel the permit had been made by Mr. Archambault before taking the respondent's advice. He also held that, according to the strict interpretation of the Alcoholic Liquor Act, the Commission was not obliged to justify before any Court the wisdom of its acts in cancelling a liquor permit.

Pratte J. allowed the appeal of the respondent on the first ground advanced by Bissonnette J., finding that there was no relationship of cause and effect as between the acts of the respondent and the cancellation of the permit because Mr. Archambault had already made his decision to cancel before consulting with the respondent.

Casey J. was of the same view with respect to this point. He also held that, although the discretion of the Commission to cancel a permit should not be exercised arbitrarily or capriciously, no individual has an inherent right to engage in the business regulated by the Act and the continuance of a permit was conditional upon the holder being of good moral character and a suitable person to exercise that privilege. In his view the chairman of the Commission had reasonable grounds for believing that the Witnesses of Jehovah were engaged in a campaign of libel and sedition and that the appellant, an active member of the sect, was participating in the group's activities. His view was that, in the light of this, the Commission could properly cancel the permit.

Martineau J., like the other majority judges in the Court, found that there was no relationship of cause and effect as between what the respondent had done and the cancellation of the permit, also holding that Mr. Archambault had decided to cancel it before communicating with the respondent. He was also of the view that a Minister of the Crown is not liable if, in the exercise of powers granted to him by law, he makes an erroneous decision upon reliable information. He also held that, while the Commission's discretion to cancel a permit was not absolute and had to be exercised in good faith, the discretion is not quasi-judicial but "quasi-illimited" and only restricted by the good faith of its officers. He was of the opinion that the good faith of both the respondent and Mr. Archambault could not be doubted. He found that no order to cancel the permit had been given by the respondent to Mr. Archambault. He also held that, even if an order had been given and had been the determining factor in procuring the cancellation of the permit, there would be no liability upon the respondent, in view of the appellant's participation in the propaganda of the Witnesses of Jehovah.

Rinfret J., who dissented and who would have dismissed the respondent's appeal, in general agreed with the conclusions reached by the trial judge.

In view of the foregoing, it appears that there are four main points which require to be considered in the present appeal, which are as follows:

1. Was there a relationship of cause and effect as between the respondent's acts and the cancellation of the appellant's permit?

2. If there was such a relationship, were the acts of the respondent justifiable on the ground that he acted in good faith in the exercise of his official functions as Attorney-General and Prime Minister of the Province of Quebec?

3. Was the cancellation of the appellant's permit a lawful act of the Commission, acting within the scope of its powers as defined in the Alcoholic Liquor Act?

4. Was the respondent entitled to the protection provided by art. 88 of the Code of Civil Procedure?

It is proposed to consider each of these points in the above sequence.

With respect to the first point, after reviewing the evidence, I am satisfied that there was ample evidence to sustain the finding of the trial judge that the cancellation of the appellant's permit was the result of instructions given by the respondent to the manager of the Commission.

Two telephone calls were made by Mr. Archambault to the respondent. According to the evidence of the respondent, Mr. Archambault telephoned him in November 1946 "et il m'a dit que Roncarelli qui multipliait les cautionnements à la Cour du Recorder d'une façon désordonnée, contribuant à paralyser les activités de la police et à congestionner les tribunaux, que ce nommé Roncarelli détenait un privilège de la Commission des Liqueurs de Québec."

In reply the respondent says that he said to Mr. Archambault:

> C'est une chose très grave, êtes-vous sûr qu'il s'agit de Roncarelli qui a un permis de la Commission des Liqueurs?

Mr. Archambault then replied that he would inform himself and would communicate with the respondent.

Some time after the first telephone conversation, and apparently about November 30 or December 1, 1946, Mr. Archambault again telephoned the respondent to say:

> qu'il était certain que le Roncarelli en question, qui paralysait les activités de la Cour du Recorder, qui accaparait dans une large mesure les services de la force constabulaire de Montréal, dont les journaux disaient avec raison qu'elle n'avait pas le nombre suffisant de policiers, était bien la personne qui détenait un permis.

To this the respondent replied:

> Dans ces circonstances, je considère que c'est mon devoir, comme Procureur Général et comme Premier Ministre, en conscience, dans l'exercice de mes fonctions officielles et pour remplir le mandat que le peuple m'avait confié et qu'il m'a renouvelé avec une immense majorité en 1948, après la cancellation du permis et après la poursuite intentée contre moi, j'ai cru que c'était mon devoir, en conscience, de dire au Juge que ce permis-là le Gouvernement de Québec ne pouvait pas accorder un privilège à un individu comme Roncarelli qui tenait l'attitude qu'il tenait.

The respondent further says that he told Mr. Archambault:

> Vous avez raison, ôtez le permis, ôtez le privilège.

In February 1947 the respondent, in an interview with the press, stated that the appellant's permit had been cancelled on orders from him. His statement on this point appeared in a news dispatch to the Canadian Press from its Quebec correspondent:

> It was I, as Attorney-General of the Province charged with the protection of good order, who gave the order to annul Frank Roncarelli's permit.
>
> Mr. Duplessis said:
>
> By so doing, not only have we exercised a right but we have fulfilled an imperious duty. The permit was cancelled not temporarily but definitely and for always.

It seems to me that the only reason Mr. Archambault could have had for telephoning the respondent in the first place, after his receipt of the information given by Mr. Gagnon and Recorder Paquette, was to obtain the respondent's direction as to what should be done. I find it difficult to accept the proposition that there was no relationship of cause and effect as between what the respondent said to Mr. Archambault and the cancellation of the permit. While it is true that in his evidence Mr. Archambault states that he had decided to cancel the permit on the day he received the written report from his secret agent Y3, dated November 30, 1946 (which was subsequent to the first telephone conversation), he goes on to say:

> D. Maintenant, ce jour-là où vous avez reçu une lettre, le 30 novembre 1946, avez-vous décidé, ce jour-là, d'enlever la licence?

> R. Certainement, ce jour-là, j'avais appelé le Premier Ministre, en l'occurrence le procureur général, lui faisant part des constatations, c'est-à-dire des renseignements que je possédais, et de mon intention d'annuler le privilège, et le Premier Ministre m'a répondu de prendre mes précautions, de bien vérifier s'il s'agissait bien de la même personne, qu'il pouvait y avoir plusieurs Roncarelli, et coetera. Alors, quand j'ai eu la confirmation de Y3 à l'effet que c'était la même personne, j'ai rappelé le Premier Ministre pour l'assurer qu'il s'agissait bien de Frank Roncarelli, détenteur d'un permis de la Commission des Liqueurs; et, là, le Premier Ministre m'a autorisé, il m'a donné son consentement, son approbation, sa permission, et son ordre de procéder.

I conclude from this evidence that any "decision" of Mr. Archambault's was at most tentative and would only be made effective if he received direction from the respondent to carry it out. I would doubt that, if the respondent had advised against the cancellation of the permit, Mr. Archambault's decision would have been implemented.

The respondent appears to have shared this view because in his evidence he states as follows:

> Si j'avais dit au Juge Archambault: "Vous ne le ferez pas", il ne l'aurait probablement pas fait. Comme il me suggérait de le faire et qu'après réflexion et vérification je trouvais que c'était correct, que c'était conforme à mon devoir, j'ai approuvé et c'est toujours un ordre que l'on donne. Quand l'officier supérieur parle, c'est un ordre que l'on donne, même s'il accepte la suggestion de l'officier dans son département, c'est un ordre qu'il donne indirectement. Je ne me rapelle pas des expressions exactes, mais ce sont les faits.

I, therefore, agree with the learned trial judge that the cancellation of the appellant's permit was the result of an order given by the respondent.

The second point for consideration is as to whether the respondent's acts were justifiable as having been done in good faith in the exercise of his official function as Attorney-General and Prime Minister of the Province of Quebec.

In support of his contention that the respondent had so acted, we were referred by his counsel to the following statutory provisions:

THE ATTORNEY-GENERAL'S DEPARTMENT ACT, R.S.Q. 1941, c. 46

* * *

3. The Attorney-General is the official legal adviser of the Lieutenant-Governor, and the legal member of the Executive Council of the Province of Quebec.

4. The duties of the Attorney-General are the following:

1. To see that the administration of public affairs is in accordance with the law;

2. To exercise a general superintendence over all matters connected with the administration of justice in the Province.

5. The function and powers of the Attorney-General are the following:

1. He has the functions and powers which belong to the office of Attorney-General of England, respectively, by law or usage, insofar as the same are applicable to this Province, and also the functions and powers, which, up to the Union, belonged to such offices in the late Province of Canada, and which, under the provisions of the British North America Act, 1867, are within the powers of the Government of this Province;

2. He advises the heads of the several departments of the Government of the Province upon all matters of law concerning such departments, or arising in the administration thereof;

* * *

7. He is charged with superintending the administration or the execution, as the case may be, of the laws respecting police.

THE EXECUTIVE POWER ACT, R.S.Q. 1941, c. 7

* * *

5. The Lieutenant-Governor may appoint, under the Great Seal, from among the members of the Executive Council, the following officials, who shall remain in office during pleasure:

1. A Prime Minister who shall, ex-officio, be president of the Council.

THE ALCOHOLIC LIQUOR ACT, R.S.Q. 1941, c. 255

DIVISION XII

INVESTIGATION AND PROSECUTION OF OFFENCES

148. The Attorney-General shall be charged with:

1. Assuring the observance of this act and of the Alcoholic Liquor Possession and Transportation Act (Chap. 256), and investigating, preventing and suppressing the infringements of such acts, in every way authorized thereby;

2. Conducting the suits or prosecutions for infringements of this act or of the said Alcoholic Liquor Possession and Transportation Act.

I do not find, in any of these provisions authority to enable the respondent, either as Attorney-General or Prime Minister, to direct the cancellation of a permit under the Alcoholic Liquor Act. On the contrary, the intent and purpose of that Act appears to be to place the complete control over the liquor traffic in Quebec in the hands of an independent commission. The only function of the Attorney-General under that statute is in relation to the assuring of the observance of its provisions. There is no evidence of any breach of that Act by the appellant.

However, it is further argued on behalf of the respondent that, as Attorney- General, in order to suppress or to prevent crimes and offences, "He may do so by instituting legal proceedings; he may do so by other methods." This amounts to a contention that he is free to use any methods he chooses; that, on suspicion of participation in what he thinks would be an offence, he may sentence a citizen to economic ruin without trial. This seems to me to be a very dangerous proposition and one which is completely alien to the legal concepts applicable to the administration of public office in Quebec, as well as in the other provinces of Canada.

In my view, the respondent was not acting in the exercise of any official powers which he possessed in doing what he did in this matter.

The third point to be considered is as to whether the appellant's permit was lawfully cancelled by the Commission under the provisions of the Alcoholic Liquor Act. Section 35 of that Act makes provision for the cancellation of a permit in the following terms:

> 35. 1. Whatever be the date of issue of any permit granted by the Commission, such permit shall expire on the 30th of April following, unless it be cancelled by the Commission before such date, or unless the date at which it must expire be prior to the 30th of April following.
>
> The Commission may cancel any permit at its discretion.

It is contended by the respondent, and with considerable force, that this provision gives to the Commission an unqualified administrative discretion as to the cancellation of a permit issued pursuant to that Act. Such a discretion, it is contended, is not subject to any review in the Courts.

The appellant contends that the Commission's statutory discretion is not absolute and is subject to legal restraint. He cites the statement of the law by Lord Halsbury in Sharp v. Wakefield [[1891] A.C. 173 at 179.]:

> An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and "discretion" means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion: Rooke's Case; according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.

That was a case dealing with the discretionary powers of the licensing justices to refuse renewal of a licence for the sale of intoxicating liquors. This statement of the law was approved by Lord Greene M.R. in Minister of National Revenue v. Wrights' Canadian Ropes, Limited [[1947] A.C. 109 at 122.].

The appellant further contends that, in exercising this discretion, the rules of natural justice must be observed and points out that no notice of the intention of the Commission to cancel his permit was ever given to the appellant, nor was he given a chance to be heard by the Commission before the permit was cancelled.

With respect to this latter point, it would appear to be somewhat doubtful whether the appellant had a right to a personal hearing, in view of the judgment of Lord Radcliffe in Nakkuda Ali v. Jayaratne [[1951] A.C. 66.]. However, regardless of this, it is my view that the discretionary power to cancel a permit given to the Commission by the Alcoholic Liquor Act must be related to the administration and enforcement of that statute. It is not proper to exercise the power of cancellation for reasons which are unrelated to the carrying into effect of the intent and purpose of the Act. The association of the appellant with the Witnesses of Jehovah and his furnishing of bail for members of that sect, which were admitted to be the reasons for the cancellation of his permit and which were entirely lawful, had no relationship to the intent and purposes of the Alcoholic Liquor Act.

Furthermore, it should be borne in mind that the right of cancellation of a permit under that Act is a substantial power conferred upon what the statute contemplated as an independent commission. That power must be exercised solely by that corporation. It must not and cannot be exercised by any one else. The principle involved is stated by the Earl of Selborne in the following passage in his judgment in Spackman v. Plumstead Board of Works [(1885), 10 App. Cas. 229 at 240.]:

> No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter, and he must act honestly and impartially and not under the dictation of some other person or persons to whom the authority is not given by law. There must be no malversation of any kind. There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice.

While the Earl of Selborne is here discussing the rules applicable to a quasi-judicial tribunal, that portion of his statement which requires such a tribunal to act honestly and impartially and not under the dictation of some other person or persons is, I think, equally applicable to the performance of an administrative function.

The same principle was applied in respect of the performance of an administrative function by Chief Justice Greenshields in Jaillard v. City of Montreal [(1934), 72 Que. S.C. 112.].

In the present case it is my view, for the reasons already given, that the power was not, in fact, exercised by the Commission, but was exercised by the respondent, acting through the manager of the Commission. Cancellation of a permit by the Commission at the request or upon the direction of a third party, whoever he may be, is not a proper and valid exercise of the power conferred upon the Commission by s. 35 of the Act. The Commission cannot abdicate its own functions and powers and act upon such direction.

Finally, there is the question as to the giving of notice of the action by the appellant to the respondent pursuant to art. 88 of the Code of Civil Procedure, which reads as follows:

> ACTIONS AGAINST PUBLIC OFFICERS
>
> 88. No public officer or other person fulfilling any public function or duty can be sued for damages by reason of any act done by him in the exercise of his functions, nor can any verdict or judgment be rendered against him, unless notice of such action has been given him at least one month before the issue of the writ of summons.
>
> Such notice must be in writing; it must state the grounds of the action, and the name of the plaintiff's attorney or agent, and indicate his office; and must be served upon him personnally or at his domicile.

The contention of the respondent is that, as Attorney-General, he was a public official whose function was to maintain law and order in the Province; that he acted as he did in the intended exercise of that function and that he

is not deprived of the protection afforded by the article because he had exceeded the powers which, in law, he possessed.

The issue is as to whether those acts were "done by him in the exercise of his functions." For the reasons already given in dealing with the second of the four points under discussion, I do not think that it was a function either of the Prime Minister or of the Attorney-General to interfere with the administration of the Commission by causing the cancellation of a liquor permit. That was something entirely outside his legal functions. It involved the exercise of powers which, in law, he did not possess at all.

Is the position altered by the fact that apparently he thought it was his right and duty to act as he did? I do not think that it is. The question of whether or not his acts were done by him in the exercise of his functions is not to be determined on the basis of his own appreciation of those functions, but must be determined according to law. The respondent apparently assumed that he was justified in using any means he thought fit to deal with the situation which confronted him. In my view, when he deliberately elected to use means which were entirely outside his powers and were unlawful, he did not act in the exercise of his functions as a public official.

The principle which should be applied is stated by Lopes J. in Agnew v. Jobson [(1877), 47 L.J.M.C. 67, 13 Cox C.C. 625.]. That was an action for assault against a justice of the peace who had ordered a medical examination of the person of the plaintiff. There was no legal authority to make such an order, but it was admitted that the defendant bona fide believed that he had the authority to do that which he did. The defendant relied on absence of notice of the action as required by 11 & 12 Vic., c. 44. Section 8 of that Act provided that "no action shall be brought against any justice of the peace for anything done by him in the execution of his office" unless within six calendar months of the act complained of. Section 9, the one relied on by the defendant, provided that "no such action shall be commenced against any such justice" until a month after notice of action. Lopes J. held that "such justice" in s. 9 referred to a justice in execution of his office in s. 8. He held that s. 9 did not provide a defence to the defendant in these words (p. 68):

> I am of opinion that the defendant Jobson is not entitled to notice of action. There was a total absence of any authority to do the act, and although he acted bona fide, believing he had authority, there was nothing on which to ground the belief, no knowledge of any fact such a belief might be based on.

Similarly here there was nothing on which the respondent could found the belief that he was entitled to deprive the appellant of his liquor permit.

On the issue of liability, I have, for the foregoing reasons, reached the conclusion that the respondent, by acts not justifiable in law, wrongfully caused the cancellation of the appellant's permit and thus caused damage to the appellant. The respondent intentionally inflicted damage upon the appellant and, therefore, in the absence of lawful justification, which I do not find, he is liable to the appellant for the commission of a fault under art. 1053 of the Civil Code.

I now turn to the matter of damages.

The learned trial judge awarded damages to the appellant in the sum of $8,123.53, made up of $1,123.53 for loss of value of liquor seized by the Commission, $6,000 for loss of profits from the restaurant from December 4, 1946, the date of the cancellation of the permit, to May 1, 1947, the date when the permit would normally have expired, and $1,000 for damages to his personal reputation. No objection is taken by the appellant in respect of these awards, but he contends that he is also entitled to compensation under certain other heads of damage in respect of which no award was made by the learned trial judge. These are in respect of damage to the good will and reputation of his business, loss of property rights in his permit and loss of future profits for a period of at least one year from May 1, 1947. Damages in respect of these items were not allowed by the learned trial judge because of the fact that the appellant's permit was "only a temporary asset."

The appellant contends that, although his permit was not permanent, yet, in the light of the long history of his restaurant and the continuous renewals of the permit previously, he had a reasonable expectation of renewal in the future, had not the cancellation been effected in December 1946. He contends that the value of the good will of his business was substantially damaged by that cancellation.

His position on this point is supported by the reasoning of Duff J. (as he then was) in McGillivray v. Kimber [(1915), 52 S.C.R. 146, 26 D.L.R. 164.]. That was an action claiming damages for the wrongful cancellation of the appellant's pilot's licence by the Sydney Pilotage Authority. At p. 163 he says:

> The statement of defence seems to proceed upon the theory that for the purpose of measuring legal responsibility the consequences of this dismissal came to an end with the expiry of the term and that I shall discuss; but for the present it is sufficient to repeat that the dismissal was an act which being not only calculated, but intended to prevent the appellant continuing the exercise of his calling had in fact this intended effect; and the respondents are consequently answerable in damages unless there was in law justification or excuse for what they did. Per Bowen L.J., Mogul S.S. Co. v. McGregor, 23 Q.B.D. 598.

The statement by Bowen L.J. to which he refers appears at p. 613 of the report and is also of significance in relation to the appellant's right of action in this case. It is as follows:

> Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse.

The evidence establishes that there was a substantial reduction in the value of the good will of the appellant's restaurant business as a result of what occurred, apart from the matter of any loss which might have resulted on the sale of the physical assets. It is difficult to assess this loss and there is not a great deal of evidence to assist in so doing. The appellant did file, as exhibits, income tax returns for the three years prior to 1946, which showed in those years a total net income from the business of $23,578.88. The profit-making possibilities of the business are certainly an item to be considered in determining the value of the good will.

However, in all the circumstances, the amount of these damages must be determined in a somewhat arbitrary fashion. I consider that $25.000 should be allowed as damages for the diminution of the value of the good will and for the loss of future profits.

I would allow both appeals, with costs here and below, and order the respondent to pay to the appellant damages in the total amount of $33,123.53, with interest from the date of the judgment in the Superior Court, and costs.

CARTWRIGHT J. (dissenting)

CARTWRIGHT J. (dissenting):-- This appeal is from two judgments of the Court of Queen's Bench (Appeal Side) for the Province of Quebec [[1956] Que. Q.B. 447.], of which the first allowed an appeal from a judgment of MacKinnon J. and dismissed the appellant's action, and the second dismissed a cross-appeal asking that the damages awarded by the learned trial judge be increased.

The respondent is, and was at all relevant times, the Prime Minister and Attorney-General of the Province of Quebec.

The appellant on December 4, 1946, was the owner of an immovable property, known as 1429 Crescent Street in the City of Montreal, where he had for many years successfully carried on the business of a restaurant and cafe. He was the holder of liquor permit no. 68 granted to him on May 1, 1946, for the sale of alcoholic liquors in his restaurant and cafe pursuant to the provisions of the Alcoholic Liquor Act, R.S.Q. 1941, c. 255, hereinafter referred to as "the Act". This permit would normally have expired on April 30, 1947. The business carried on by the appellant had been founded by his father in 1912 and had been licensed uninterruptedly from that time until 1946. Prior to December 4, 1946, the appellant had complied with all the requirements of the Act and had carried on his restaurant business in conformity with the laws of the Province.

The appellant was at all relevant times a member of a sect known as "The Witnesses of Jehovah" and from some time in 1944 up to November 12, 1946, had on about 390 occasions, acted as bailsman for numbers of his co-religionists prosecuted under by-laws of the City of Montreal for distributing literature without a licence. None of those for whom he acted as bailsman defaulted in appearance, and all of them were ultimately discharged upon the by-laws under which they were charged being held to be invalid.

About the 24th or 25th of November 1946 members of the sect commenced distributing copies of a circular entitled "Quebec's burning hate for God and Christ and Freedom is the shame of all Canada". Copies of this circular

are printed in the record, the English version being exhibit D7 and the French version exhibit D11. The then senior Crown Prosecutor in Montreal, Mtre Oscar Gagnon, formed the opinion that the circular was a seditious libel and that its distribution should be prevented. It results from the judgment of this Court in Boucher v. The King [[1951] S.C.R. 265, 2 D.L.R. 369, 11 C.R. 85, 99 C.C.C. 1.] that the learned Crown Prosecutor was in error in forming the opinion that the circular could be regarded as seditious. It, however, can hardly be denied that it was couched in terms which would outrage the feelings of the great majority of the inhabitants of the Province of Quebec; and the same may be said of a number of other documents circulated by the sect, copies of which form part of the record in the case at bar.

The evidence does not show that the appellant took part in the distribution of any of the circulars mentioned or that he was a leader or chief of the sect. He did not act as bailsman for any member of the sect charged in connection with the distribution of the circular, "Quebec's burning hate".

On November 25, 1946, pamphlets, including copied of "Quebec's burning hate" were sized in a building in the City of Sherbrooke owned by the appellant and leased by him to a congregation of Witnesses of Jehovah as a "Kingdom Hall" or place of worship. The appellant was not aware that the pamphlets were in this building.

From his investigations and the reports which he received M. Gagnon concluded that the distribution of the pamphlets "convergeait autour de M. Roncarelli ou de personnes qui étaient près de lui" and he so informed M. Edouard Archambault, the manager of the Quebec Liquor Commission. It may well be that M. Gagnon reached the conclusion mentioned on insufficient evidence. M. Gagnon also informed M. Archambault that the appellant had acted as bailsman for a great number of Witnesses of Jehovah.

On receiving this information from M. Gagnon, M. Archambault read the circular, "Quebec's burning hate" and had a conversation with M. Paquette, the Recorder-in-Chief at Montreal, who confirmed the statements as to the appellant furnishing bail.

At this point M. Archambault formed the opinion that he should cancel the permit held by the appellant, but before taking any action he telephoned the respondent at Quebec, told him what information he had received and that he proposed cancelling the permit. The respondent told him to be careful to make sure that the Roncarelli who had furnished bail was in fact the appellant. M. Archambault satisfied himself as to this through the report of an agent "Y3", in whom he had confidence, and thereupon, according to his uncontradicted evidence, decided to cancel the permit. The reasons which brought him to this decision were stated by him as follows:

> D. Alors, à ce moment-là, vous aviez déjà décidé d'enlever cette licence?
>
> R. Oui
>
> D. Vous basant, je suppose, sur les rapports que vous aviez déjà reçus de monsieur Oscar Gagnon et du recorder-en-chef Paquette que monsieur Roncarelli avait fourni des cautionnements?
>
> R. Oui; et, à part de cela, de la littérature que j'avais lue.
>
> D. Et le pamphlet auquel vous avez référé: "Quebec's Burning Hate"?
>
> R. Oui, monsieur.

M. Archambault then telephoned the respondent. The substance of the two telephone conversations between M. Archambault and the respondent is summarized by the former as follows:

> D. Maintenant, ce jour-là où vous avez reçu une lettre, le 30 novembre 1946, avez-vous décidé, ce jour-là, d'enlever la licence?
>
> R. Certainement, ce jour-là, j'avais appelé le Premier Ministre, en l'occurrence le procureur général, lui faisant part des constatations, c'est-à-dire des renseignements que je possédais, et de mon intention d'annuler le privilège, et le Premier Ministre m'a répondu de prendre mes précautions, de bien vérifier s'il s'agissait bien de la même personne, qu'il pouvait y avoir plusieurs Roncarelli, et coetera. Alors, quand j'ai eu la confirmation de Y3 à l'effet que c'était la même personne, j'ai rappelé le Premier Ministre pour l'assurer qu'il s'agissait bien de Frank Roncarelli, détenteur d'un permis de la Commission des Liqueurs; et, là le Premier Ministre m'a autorisé, il m'a donné son consentement, son approbation, sa permission, et son ordre de procéder.

The evidence of the respondent is also that the suggestion of cancelling the permit was made by M. Archambault, and there is no evidence to the contrary.

There has been a difference of opinion in the Courts below as to whether what was said by the respondent to M. Archambault amounted to an order to cancel or merely to an "approbation énergique" of a decision already made. I do not find it necessary to choose between these conflicting views as I propose to assume for the purposes of this appeal that what was said by the respondent was so far a determining factor in the cancellation of the permit as to render him liable for the damages caused thereby to the appellant if the cancellation was an actionable wrong giving rise to a right of action for damages.

All of the Judges in the Courts below who have dealt with that aspect of the matter have concluded that the respondent acted throughout in the honest belief that he was fulfilling his duty to the Province, and this conclusion is supported by the evidence.

The opinion of M. Archambault and of the respondent appears to have been that a permit to sell liquor under the Act is a privilege in the gift of the Province which ought not to be given to, or allowed to continue to be enjoyed by, one who was actively supporting members of a group of persons who were engaged in a concerted campaign to vilify the Province and were persistently acting in contravention of existing by-laws. Once it is found, as I think it must be on the evidence, that this opinion was honestly entertained, I have reached the conclusion, for reasons that will appear, that the Court cannot inquire as to whether there was sufficient evidence to warrant its formation or as to whether it constituted a reasonable ground for cancellation of the permit.

The permit was cancelled on December 4, 1946, without any prior notice to the appellant and without his being given any opportunity to show cause why it ought not to be cancelled. It is clear that the appellant suffered substantial financial loss as a result of the cancellation.

In determining whether the cancellation of the permit in these circumstances was an actionable wrong on the part of the commission or of M. Archambault, its manager, it is necessary to consider the relevant provisions of the Act. These appear to me to be as follows:

> S.5 A Commission is by this act created under the name of "The Quebec Liquor Commission", or "Commission des liqueurs de Québec", and shall constitute a corporation, vested with all the rights and powers belonging generally to corporations. The exercise of the functions, duties and powers of the Quebec Liquor Commission shall be vested in one person alone, named by the Lieutenant-Governor in Council, with the title of manager. The remuneration of such person shall be determined by the Lieutenant-Governor in Council and be paid out of the revenues of the Liquor Commission.
>
> * * *
>
> S.9 The function, duties and powers of the Commission shall be the following:
>
> * * *
>
> d. To control the possession, sale and delivery of alcoholic liquor in accordance with the provisions of this act;
>
> e. To grant, refuse, or cancel permits for the sale of alcoholic liquor or other permits in regard thereto, and to transfer the permit of any person deceased;
>
> * * *
>
> S.32 No permit shall be granted other than to an individual, and in his personal name.
>
> The application for a permit may be made only by a British subject, must be signed by the applicant before witnesses, and must give his surname, Christian names, age, occupation, nationality and domicile, the kind of permit required and the place where it will be used, and must be accompanied by the amount of the duties payable upon the application for the permit. The applicant must furnish all additional information which the commission may deem expedient to ask for.
>
> If the permit is to be used for the benefit of a partnership or corporation, the application therefore must likewise be accompanied by a declaration to that effect, and duly signed by such partnership or corporation.

In such case, the partnership or corporation shall be responsible for any fine and costs, to which the holder of the permit may be condemned; and the amount thereof may be recovered before any court having jurisdiction, without prejudice to imprisonment, if any.

All applications for permits must be addressed to the Commission before the 10th of January in each year, to take effect on the 1st of May in the same year.

* * *

S.34 1. The Commission may refuse to grant any permit.

2. The Commission must refuse to grant any permit for the sale of alcoholic liquor in any municipality where a prohibition by-law is in force.

Subsections 2 to 6 of s. 34 enumerate special cases in which the commission must refuse a permit.

S.35 1. Whatever be the date of issue of any permit granted by the Commission, such permit shall expire on the 30th day of April following, unless it be cancelled by the Commission before such date, or unless the date at which it must expire be prior to the 30th of April following.

The Commission may cancel any permit at its discretion.

2. Saving the provisions of subsection 4 of this section, the cancellation of a permit shall entail the loss of the privilege conferred by such permit, and of the duties paid to obtain it, and the seizure and confiscation by the Commission of the alcoholic liquor found in the possession of the holder thereof, and the receptacles containing it, without any judicial proceedings being required for such confiscation.

The cancellation of a permit shall be served by a bailiff leaving a duplicate of such order of cancellation, signed by three members of the Commission, with the holder of such permit or with any other reasonable person at his domicile or place of business.

The cancellation shall take effect as soon as the order is served.

* * *

S.35 4. If the cancellation of the permit be not preceded or followed by a conviction for any offence under this act committed by the holder of such permit while it was in force, the Commission shall remit to such holder.

a. Such part of the duties which such person has paid upon the granting of such permit, proportionate to the number of full calendar months still to run up to the 1st of May following;

b. The proceeds of every sale by the Commission, after the seizure and confiscation thereof, of beer having an alcoholic content of not more than four per cent, in weight, less ten per cent of such proceeds;

c. The value, as determined by the Commission, of the other alcoholic liquor seized and confiscated, less ten per cent of such value.

5. Save in the case where a permit is granted to an individual on behalf of a partnership or corporation, in accordance with section 32, the Commission must cancel every permit made use of on behalf of any person other than the holder.

S.36 The Commission must cancel a permit:

1. Upon the production of a final condemnation, rendered against the permit-holder, his agent or employee, for selling, in the establishment, alcoholic liquor manufactured illegally or purchased in violation of this act;

2. Upon the production of three final condemnations rendered against the permit-holder for violation of this act;

3. If it appears that the permit-holder has, without the Commission's authorization, transferred, sold, pledged, or otherwise alienated the rights conferred by the permit.

On a consideration of these sections and of the remainder of the Act I am unable to find that the Legislature has, either expressly or by necessary implication, laid down any rules to guide the commission as to the circumstances under which it may refuse to grant a permit or may cancel a permit already granted. In my opinion the intention of the legislature, to be gathered from the whole Act, was to enumerate (i) certain cases in which the granting of a permit is forbidden, and (ii) certain cases in which the cancellation of a permit is mandatory, and, in all other cases to commit the decision as to whether a permit should be granted, refused or cancelled to the unfettered discretion of the commission. I conclude that the function of the commission in making that decision is administrative and not judicial or quasi-judicial. The submission of counsel for the respondent, made in the following words, appears to me to be well founded:

> Under the Statute, no one has a pre-existing right to obtain a permit, and the permit being granted under the condition that it may be cancelled at any time, and no cause of cancellation being mentioned and no form of procedure being indicated, the cancellation is a discretionary decision of a purely administrative character.

I accept as an accurate statement of the distinction between a judicial and an administrative tribunal that adopted by Masten J.A. in giving the judgment of the Court of Appeal for Ontario in re Ashby et al [[1934] O.R. 421 at 428, 3 D.L.R. 565, 62 C.C.C. 132.]:

> The distinction between a judicial tribunal and an administrative tribunal has been well pointed out by a learned writer in 49 Law Quarterly Review at pp. 106, 107 and 108:
>
> "A tribunal that dispenses justice, i.e. every judicial tribunal, is concerned with legal rights and liabilities, which means rights and liabilities conferred or imposed by 'law'; and 'law' means statute or long-settled principles. These legal rights and liabilities are treated by a judicial tribunal as pre-existing; such a tribunal professes merely to ascertain and give effect to them; it investigates the facts by hearing 'evidence' (as tested by long-settled rules), and it investigates the law by consulting precedents. Rights or liabilities so ascertained cannot, in theory, be refused recognition and enforcement, and no judicial tribunal claims the power of refusal.
>
> In contrast, non-judicial tribunals of the type called 'administrative' have invariably based their decisions and orders, not on legal rights and liabilities, but on policy and expediency.
>
> Leeds (Corp.) v. Ryder (1907) A.C. 420, at 423, 424, per Lord Loreburn L.C.; Shell Co. of Australia v. Federal Commissioner of Taxation (1931) A.C. 275, at 295; Boulter v. Kent JJ. (1897) A.C. 556, at 564.
>
> A judicial tribunal looks for some law to guide it; an 'administrative' tribunal, within its province, is a law unto itself."

In re Ashby the Court found that the statute there under consideration set up certain fixed standards and prescribed conditions on which persons might have their certificates revoked by the board, and accordingly held its function to be quasi-judicial; in the case at bar, on the contrary, no standards or conditions are indicated and I am forced to conclude that the Legislature intended the commission "to be a law unto itself".

If I am right in the view that in cancelling the permit M. Archambault was performing an administrative act in the exercise of an unfettered discretion given to him by the statute it would seem to follow that he was not bound to give the appellant an opportunity to be heard before deciding to cancel and that the Court cannot be called upon to determine whether there existed sufficient grounds for his decision. If authority is needed for this conclusion it may be found in the judgment of the Judicial Committee, delivered by Lord Radcliffe, in Nakkuda Ali v. M.F De S. Jayaratne [[1951] A.C. 66.] and in the reasons of my brother Martland on Calgary Power Limited et al v. Copithorne [[1959] S.C.R. 24, 16 D.L.R. (2d) 241.]. The wisdom and desirability of conferring such a power upon an official without specifying the ground upon which it is to be exercised are matters for the consideration of the Legislature not of the Court.

If, contrary to my conclusion, the function of the commission was quasi-judicial, it may well be that its decision to cancel the permit would be set aside by the Court for failure to observe the rules as to how such tribunals must proceed which are laid down in many authorities and are compendiously stated in the following passage in the judgment of the Earl of Selborne in Spackman v. Plumstead Board of Works [(1885), 10 App. Cas. 229 at 240.]:

> No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter, and he must act honestly and impartially and not under the dictation of some other person or persons to whom the authority is not given by law. There must be no malversation of any kind. There would be no decision within the meaning of the Statute if there were anything of that sort done contrary to the essence of justice.

But even if it were assumed that the function of the commission was quasi-judicial and that its order cancelling the permit should be set aside for failure to observe the rules summarized in the passage quoted, I would be far from satisfied that any action for damages would lie.

If that question arose for decision it would be necessary to consider the judgments delivered in this Court in McGillivray v. Kimber [(1915), 52 S.C.R. 146, 26 D.L.R. 164.], the cases cited in Halsbury, 2nd ed., vol. 26, pp. 284 and 285, in support of the following statement:

> Persons exercising such quasi-judicial powers ... in the absence of fraud, collusion, or malice, are not liable to any civil action at the suit of any person aggrieved by their decisions...

and the judgment of Wilmot C.J., concurred in by Gould J. and Blackstone J., in Bassett v. Godschall [(1770), 3 Wils. 121 at 123, 95 E.R. 967.]:

> The legislature hath intrusted the justices of peace with a discretionary power to grant or refuse licences for keeping inns and alehouses; if they abuse that power, or misbehave themselves in the execution of their office or authority, they are answerable criminally, by way of information, in B.R. I cannot think a justice of peace is answerable in an action to every individual who asks him for a licence to keep an inn or an alehouse, and he refuses to grant one; if he were so, there would be an end of the commission of the peace, for no man would act therein. Indeed he is answerable to the public if he misbehaves himself, and wilfully, knowingly and maliciously injures or oppresses the King's subjects, under colour of his office, and contrary to law: but he cannot be answerable to every individual, touching the matter in question, in an action. Every plaintiff in an action must have an antecedent right to bring it; the plaintiff here has no right to have a licence, unless the justices think proper to grant it, therefore he can have no right of action against the justices for refusing it.

For the above reasons I have reached the conclusion that the heavy financial loss undoubtedly suffered by the appellant was damnum sine injuria. The whole loss flowed directly from the cancellation of the permit which was an act of the commission authorized by law. I have formed this opinion entirely apart from any special statutory protection afforded to the commission or to its manager, M. Archambault, as, for example, by s. 12 of the Act.

The case of James v. Cowan [[1932] A.C. 542.] relied upon by counsel for the appellant as supporting the existence of a right of action for damages seems to me to be clearly distinguishable. In that case the right of action asserted was for damages for the wrongful taking of the plaintiff's goods. The only justification put forward was an order held to be ultra vires and therefore void. It may be mentioned in passing that if, contrary to my view, the decision of the commission in the case at bar was made in the exercise of a judicial function, its failure to follow a rule of natural justice would appear to render the order voidable but not void; Dimes v. Grand Junction Canal Proprietors [(1852), 3 H.L. Cas. 759, 10 E.R. 301.].

Having concluded that the act of the commission in cancelling the permit was not an actionable wrong, it appears to me to follow that the respondent cannot be answerable in damages for directing or approving, as the case may be, the doing of that act.

As it was put by Bissonnette J. [[1956] Que. Q.B. 447 at 457]:

> D'où il découle, en saine logique, que si dans l'exercice de son pouvoir dicrétionnaire, il (M. Archambault) ne commettait ni faute, ni illégalité, personne n'est justifié à chercher à atteindre, au delà de sa personne, un conseiller, voire un chef ou supérieur politique, pour le motif que sans la faute du premier, celle qu'on veut imputer au second ne peut exister.

On this branch of the matter, I should perhaps mention that there is, in the record, no room for any suggestion that the respondent coerced an unwilling Commission into making a decision contrary to the view of the latter as to what that decision should be.

For the above reasons it is my opinion that the appeal fails and it becomes unnecessary for me to consider the alternative defence as to lack of notice of action, based upon art. 88 of the Code of Civil Procedure or the question of the quantum of damages.

The appeal, as to both of the judgments of the Court of Queen's Bench, should be dismissed with costs.

FAUTEUX J. (dissenting)

FAUTEUX J. (dissenting):-- L'appelant se pourvoit à l'encontre de deux décisions majoritaires de la Cour du banc de la reine [[1956] Que. Q.B. 447.], dont la première infirme un jugement de la Cour supérieure condamnant l'intimé à lui payer une somme de $8,123.53 à titre de dommages-intérêts, et dont la seconde rejette l'appel logé par lui-même pour faire augmenter le quantum des dommages ainsi accordés.

Les faits donnant lieu à ce litige se situent dans le cadre des activités poursuivies dans la province de Québec, au cours particulièrement des années 1944, 1945 et 1946, par la secte des Témoins de Jéhovah. Ces activités prenaient forme d'assemblées, de distribution de circulaires, de pamphlets et de livres, et de sollicitation, dans les rues et à domicile. Dirigée ouvertement contre les pratiques des religions professées dans la province et, plus particulièrement, de la religion catholique, les enseignements de cette secte étaient diffusés dans un langage manifestement, sinon délibérément, insultant et, par suite, provoquèrent dans les cités et les villages où ils étaient propagés, des troubles à la paix publique. Il y eut bris d'assemblées, assauts de personnes et dommages à la propriété. De plus, et partageant l'opinion généralement acceptée que cette campagne provocatrice était l'oeuvre de la licence et non de la liberté sous la loi, plusieurs autorités civiles refusaient d'accorder la protection recherchée par les membres de la secte ou adoptaient des moyens pour paralyser ces activités considérées comme une menace à la paix publique. L'intimé, comme Procureur Général, eut en son ministère où des plaintes nombreuses affluèrent, tous les échos de cette situation. Devant les tribunaux, actions ou poursuites se multiplièrent. A Montréal, les arrestations pour distribution de littérature, sans permis, atteignirent et dépassèrent plusieurs centaines. Devant la Cour du Recorder, où furent traduits ceux qu'on accusait de violer le règlement municipal, on plaidait l'invalidité ou l'inapplication du règlement et attendant le prononcé d'un tribunal supérieur sur le bien-fondé de ces prétentions on ajournait les causes. C'était l'appelant, l'un des membres de la secte, qui, dans la plupart de ces arrestations, à Montréal, fournissait le cautionnement garantissant la comparution des accusés. Une entente était même intervenue entre lui et les avocats chargés des poursuites, suivant laquelle on le considérait en quelque sorte comme la caution officielle des membres de la secte. L'appelant continua d'agir comme caution jusqu'au 12 novembre 1946 alors que les autorités de la Cour du Recorder, s'inquiétant de la congestion du rôle des causes résultant de la progressive multiplication des arrestations, aussi bien que du fait que le temps de nombre de constables était absorbé par ces enquêtes et ces poursuites, au préjudice de leurs autres devoirs, tentèrent de décourager les activités de la secte en exigeant des cautionnements en argent et plus substantiels, soit de $100 à $300.

Deux semaines après cette décision, apparut dans la province une nouvelle publication de la secte, intitulée: "La haine ardente du Québec pour Dieu, le Christ et la liberté." Ce livre, publié en français, en anglais et en ukrainien, étant, dans les termes les plus provocateurs, une attaque dirigée particulièrement contre les pratiques religieuses de la majorité de la population et contre l'administration de la justice dans la province, fut soumis par la police à la considération de l'avocat en chef de la Couronne, à Montréal, Me Gagnon, c.r., lequel émit l'opinion que cette publication constituait, au sens de la loi criminelle, un libelle séditieux.

Ajoutons immédiatement que le mérite de cette opinion fut par la suite judiciairement considéré avec le résultat qui suit. Un certain Aimé Boucher, distributeur de ce livre dans le district judiciaire de St-Joseph de Beauce, fut accusé sous les articles 133, 134 et 318 du Code Criminel et fut trouvé coupable par un jury dont le verdict fut confirmé par une décision majoritaire de la Cour du banc du roi en appel [[1949] Que. K.B. 238.]. Sur un pourvoi subséquent devant cinq des membres de cette Cour, une majorité, trouvant justifiés les griefs fondés sur l'adresse du juge au procès, mais étant d'opinion qu'il était loisible à un jury légalement dirigé de juger cette publication séditieuse, ordonna un nouveau procès. Sur une seconde audition du même appel, -- cette fois devant les neuf Juges de cette Cour [[1951] S.C.R. 265, 2 D.L.R. 369, 11 C.R. 85, 99 C.C.C. 1.] -- ces vues furent partagées par

quatre des membres de cette Cour. Les cinq autres, d'autre part, acquittèrent l'accusé, en déclarant en substance suivant le sommaire fidèle du jugé, qu'en droit:

> Neither language calculated to promote feelings of ill-will and hostility between different classes of His Majesty's subjects nor criticizing the courts is seditious unless there is the intention to incite to violence or resistance to or defiance of constituted authority.

En somme, la majorité écarta, comme étant la loi en la matière, la définition de l'intention séditieuse, donnée à la page 94 de la 8e édition de Stephen's Digest of Criminal Law, dans la mesure où cette définition différait de la loi telle que précisée au sommaire ci-dessus. Boucher v. His Majesty the King [[1951] S.C.R. 265, 2 D.L.R. 369, 11 C.R. 85, 99 C.C.C. 1.]. Ainsi appert-il que l'opinion émise par le représentant du Procureur Général à Montréal lors de l'apparition de ce livre en fin de 1946, fut par la suite partagée par une majorité de tous les juges qui eurent à considérer la question mais rejetée par ce qui constitue, depuis 1951, le jugement de cette Cour sur la question.

Ayant donc formé l'opinion que cette publication constituait un libelle séditieux, Me Gagnon participa à l'enquête faite pour en rechercher les distributeurs et les traduire en justice. Vers le même temps, la police saisissait en la cité de Sherbrooke, un nombre considérable de pamphlets, livres, y compris le livre en question dans un établissement appartenant à l'appelant et par lui loué aux membres de la secte. Un examen de la situation et du rôle joué par l'appelant dans les procédures mues devant la Cour du Recorder à Montréal, amena Me Gagnon à conclure à sa participation dans la distribution. Apprenant, en la même occasion, que ce dernier était propriétaire d'un restaurant et détenteur de permis de la Commission des Liqueurs pour y vendre des spiritueux, il communiqua les faits ci-dessus à M. Archambault, alors gérant général de la Commission des Liqueurs. Après avoir conféré avec le recorder en chef de la cité de Montréal et Me Gagnon, M. Archambault téléphona au Procureur Général pour lui faire part de ces agissements des membres de la secte, et de l'appelant en particulier, et de son intention d'annuler le permis en faveur de l'appelant. L'intimé demanda à M. Archambault de bien s'assurer que le détenteur du permis était bien la même personne qui, au dire de M. Archambault, "multipliait les cautionnements à la Cour du Recorder de façon désordonnée, contribuait à désorganiser les activités de la police et à congestionner les tribunaux". Et l'intimé ajouta: "Dans l'intervalle, je vais examiner les questions avec des officiers légaux, je vais y penser, je vais réfléchir et je vais voir à ce que je devrai faire." M. Archambault vérifia l'identité de l'appelant et, de son côté, le Procureur Général étudia le problème, la Loi de la Commission des Liqueurs et ses amendements, discuta de la question au Conseil des Ministres et avec des officiers en loi de son ministère. Quelques jours plus tard, M. Archambault téléphona au Procureur Général confirmant l'identité du détenteur de permis et, témoigne M. Archambault, "là, le Premier Ministre m'a autorisé, il m'a donné son consentement, son approbation, sa permission et son ordre de procéder".

A la suite de cette conversation téléphonique, le permis fut annulé et tous les spiritueux du restaurant furent confisqués. En raison de la perte d'opérations résultant de l'absence de permis, l'appelant, quelques mois plus tard, vendait ce restaurant, licencié pour vente de spiritueux depuis nombre d'années et exploité par son père, d'abord, et lui, par la suite. C'est alors que l'appelant institua la présente action en dommages contre l'intimé personnellement invoquant en substance que, dans les circonstances, le fait de cette annulation constituait, suivant les dispositions de l'art. 1053 du Code Civil, un fait dommageable, illicite et imputable à l'intimé et, dès lors, donnant droit à réparation.

En défense, et en outre des moyens plaidés sur le mérite de l'action, l'intimé invoqua spécifiquement le défaut de l'appelant de s'être conformé aux prescriptions de l'art. 88 du Code de procédure civile, lequel conditionne impérativement l'exercice du droit d'action contre un officier public à la signification d'un avis d'au moins un mois avant l'émission de l'assignation.

Après considération attentive de la question et pour les motifs donnés ci-après, je suis arrivé à la conclusion que ce moyen est bien fondé. Il convient de dire, cependant, que n'eût été ce défaut de l'appelant, j'aurais, au mérite, conclu au bien-fondé de son action et ce, pour des raisons qu'il suffit, dans les circonstances, de résumer comme suit. Personne ne met en doute que le fait invoqué au soutien de l'action en dommages, c'est-à-dire l'annulation du permis, ait constitué un fait dommageable pour l'appelant. De plus, et suivant la preuve au dossier, il est manifeste que ce fait est imputable, et exclusivement imputable, à l'intimé. Sans doute, lorsque le gérant général de la Commission des Liqueurs téléphona au Procureur Général pour le mettre au courant des faits ci-dessus, il lui indiqua au même temps son intention d'annuler le permis. Il y a loin, cependant, de l'indication d'une intention à la

réalisation de cette intention; et à la vérité, dès cette première conversation téléphonique, c'est le Procureur Général qui prit l'entière responsabilité. Tel que déjà indiqué, il demanda à M. Archambault de vérifier l'identité de personne, l'avisant que, pendant ce temps-là, il étudierait le problème et verrait ce que lui devait faire. C'est d'ailleurs précisément pour décider de l'action à prendre qu'il examina la loi et discuta de l'affaire au Conseil des Ministres et avec ses officiers en loi. Lorsque, subséquemment, M. Archambault le rappela pour lui affirmer qu'il s'agissait de la même personne, "c'est là", dit le gérant général, que le Procureur Général "m'a autorisé, il m'a donné son consentement, son approbation, sa permission et son ordre de procéder". Le Juge de la Cour supérieure et tous les Juges de la Cour d'Appel n'ont jeté, et je crois avec raison, aucun doute sur la bonne foi du Procureur Général, pas plus qu'on n'en saurait avoir sur celle du gérant général, de la Commission des Liqueurs. Ni l'un ni l'autre n'ont agi malicieusement. Mais, en témoignant que l'intimé l'avait autorisé, lui avait donné son consentement, son approbation, sa permission et son ordre de procéder, le gérant général de la Commission a bien indiqué, à mon avis, que, dans un esprit de subordination, il avait, dès la première conversation téléphonique, abdiqué, en faveur du Procureur Général s'en chargeant, le droit d'exercer la discrétion, qu'à l'exclusion de tous autres, il avait suivant l'esprit de la Loi des Liqueurs Alcooliques. Il a exécuté, mais non rendu, une décision arrêtée par le Procureur Général. D'ailleurs, ce dernier ne s'en est pas caché; il s'en est ouvert au public par la voix des journaux. En prenant lui-même cette décision, comme Premier Ministre et Procureur Général, il s'est arrogé un droit que lui nie virtuellement la Loi des Liqueurs Alcooliques; il a commis une illégalité. Dans l'espèce, l'annulation du permis est exclusivement imputable à l'intimé et précisément pour cette raison, constitue, dans les circonstances, un acte illicite donnant droit à l'appelant d'obtenir réparation pour les dommages lui en résultant.

L'article 88 du Code de procédure civile. -- Cet article se lit comme suit:

> Nul officier public ou personne remplissant des fonctions ou devoirs publics ne peut être poursuivi pour dommages à raison d'un acte par lui fait dans l'exercice de ses fonctions, et nul verdict ou jugement ne peut être rendu contre lui, à moins qu'avis de cette poursuite ne lui ait été donné au moins un mois avant l'émission de l'assignation.
>
> Cet avis doit être par écrit; il doit exposer les causes de l'action, contenir l'indication des noms et de l'étude du procureur du demandeur ou de son agent et être signifié au défendeur personnellement ou à son domicile.

Vu la forme prohibitive de la disposition et la règle de droit édictée en l'art. 14 du Code Civil, le défaut de donner cet avis, lorsqu'il y a lieu de ce faire, emporte nullité. Cette règle de droit est ainsi exprimée:

> 14. Les lois prohibitives emportent nullité, quoiqu'elle n'y soit pas prononcée.

De plus, et en raison de la prescription que "...nul verdict ou jugement ne peut être rendu...", ce défaut limite la juridiction même du tribunal. Aussi bien, non seulement, comme il a été reconnu au jugement de première instance, ce défaut peut-il être soulevé dans les plaidoiries, mais la Cour elle-même doit agir proprio motu et se conformer à la prescription.

En l'espèce, il est admis qu'aucun avis ne fut donné au Procureur Général. L'intimé a plaidé spécifiquement ce moyen dans sa défense et il l'a invoqué tant en Cour supérieure et en Cour d'Appel que devant cette Cour. Le juge au procès en disposa dans les termes suivants, dont les soulignés sont siens:

> Defendant is not entitled to avail himself of this exceptional provision as the acts complained of were not "done by him in the exercise of his functions", but they were acts performed by him when he had gone outside his functions to perform them. They were not acts "in the exercise of" but "on the occasion of public duties". Defendant was outside his functions in the acts complained of.

En Cour d'Appel [[1956] Que. Q.B. 447], seul le Juge dissident, M. le Juge Rinfret, se prononce sur la question. S'inspirant, je crois, de l'interprétation donnée par la jurisprudence à l'expression "dans l'exécution de ses fonctions", apparaissant à l'art. 1054 C.C. et plus particulièrement du critère indiqué dans Plumb v. Cobden Flour Mills [[1914] A.C. 62.], il prononce d'abord comme suit, sur le mérite même de l'action:

> L'action du défendeur, on l'a vu, ne peut pas être classifiée parmi les actes permis, par les statuts, au procureur général, ni au premier ministre; elle ne peut pas être considérée comme ayant été faite dans l'exercice ou dans l'exécution de ses fonctions comme telles; elle entre dans la catégorie des actes

> prohibés, des actes commis hors les limites des fonctions, et comme telle, elle engendre la responsabilité personnelle.

puis, précisant que l'art. 88 C.P.C. pose comme condition que le défendeur soit poursuivi "à raison d'un acte par lui fait dans l'exercice de ses fonctions", déclare que l'art. 88 n'a pas d'application en l'espèce.

Les juges de la majorité ont référé à ce moyen sans cependant s'y arrêter vu que dans leur opinion l'action, de toutes façons était mal fondée.

D'où l'on voit que le droit de l'intimé à l'avis dépend uniquement, dans la présente cause, de la question de savoir si l'acte reproché a été fait par lui "dans l'exercice de ses fonctions" au sens qu'il faut donner à ces expressions dans le contexte de l'art. 88 C.P.C., et suivant l'esprit et la fin véritables de cet article.

L'article 1054 C.C. prescrit que les maîtres et les commettants sont responsables du dommage causé par leurs domestiques ou ouvriers dans l'exécution des fonctions auxquelles ces derniers sont employés. On est dès lors porté à donner aux expressions, plus ou moins identiques, apparaissant à l'art. 88 C.P.C., le même sens que donne la jurisprudence sur l'art. 1054 C.C. La règle d'interprétation visant la similarité des expressions n'établit qu'une présomption; cette présomption étant que les expressions similaires ont le même sens lorsqu'elles se trouvent, -- ce qui n'est pas le cas en l'espèce, -- dans une même loi. On accorde, d'ailleurs, peu de poids à cette présomption. Maxwell, On Interpretation of Statutes, 9e ed., p. 322 et seq. Les considérations présidant à l'établissement, la fin et la portée de l'art 88 C.P.C., d'un part, et de l'art. 1054 C.C., d'autre part, sont totalement différents. Sanctionnant la doctrine Respondeat superior, l'art 1054 c.c., établit la responsabilité du commettant pour l'acte de son préposé, ce dernier étant considéré le continuateur de la personne juridique du premier. L'intimé, agissant en sa qualité de Procureur Général, n'est le préposé de personne. Il n'a pas de commettant. La fonction qu'il exerce, il la tient de la loi. L'article 88 C.P.C. n'affecte en rien la question de responsabilité. Il accorde, en ce qui concerne la procédure seulement, un traitement spécial au bénéfice des officiers publics en raison de la nature même de la fonction. Les motifs apportés par la jurisprudence pour limiter le champ de l'exercice des fonctions, quant à la responsabilité édictée en l'art. 1054 C.C., sont étrangers à ceux conduisant la Législature à donner, quant à la procédure seulement, une protection aux officiers publics. Aussi bien, et en toute déférence, je ne crois pas que la portée de cette protection soit assujettie aux limitations de la responsabilité frappant les dispositions de l'art. 1054 C.C. L'article 8 du c. 101 des Statuts Refondus du Bas Canada, loi-source de l'art. 88 C.P.C., établit péremptoirement à mon avis que, in pari materia, un officier public n'est pas tenu comme ayant cessé d'agir dans l'exercice de ses fonctions du seul fait que l'acte reproché constitue un excès de pouvoir, ou de juridiction, ou une violation à la loi. La version française de cette loi n'étant pas en disponibilité, je cite de la version anglaise qu'on trouve dans Consolidated Statutes, Lower Canada, 1860, l'art. 8:

> Protection to extend to the magistrate only etc., and in what cases to him.
>
> 8. The privileges and protection given by this Act, shall be given to such justice, officer of other person acting as aforesaid, only, and to no other person or persons whatever, and any such justice, officer and other person shall be entitled to such protection and privileges in all cases where he has acted bona fide in the execution of his duty, although in such act done, he has exceeded his powers or jurisdiction, and has acted clearly contrary to law.

L'article 88 C.P.C. assume que ceux au bénéfice desquels il est établi se sont rendus coupables d'une illégalité pour laquelle ils doivent répondre. Tout doute qu'on pourrait avoir sur le point est dissipé par le texte même de l'art. 429 C.P.C. lequel, pourvoyant à un changement de venue dans le cas du procès d'un officier public, édicte:

> 429. Dans toute poursuite en dommages contre un officier public, à raison de quelque illégalité dans l'exécution de ses fonctions, le juge peut ordonner que le procès ait lieu dans un autre district, s'il est démontré que la cause ne peut être instruite avec impartialité dans le district où l'action a été portée.

On doit donc se garder d'associer au droit à l'avis toute idée de justification pour l'acte reproché ou de déduire du seul fait que l'officier public doive au mérite d'être tenu personnellement responsable, qu'il ait perdu tout droit à l'avis. Dans Beattey v. Kozak [[1958] S.C.R. 177 at 188, 13 D.L.R. (2d) 1, 120 C.C.C. 1.], où la nécessité d'éviter cette confusion se présentait, une semblable observation est faite par notre collègue M. le Juge Rand. Il faut ajouter, cependant, que cette décision n'est d'aucune autre assistance sur la question qui nous intéresse; le litige

portait, en droit, sur l'interprétation d'une loi différente et fut décidé en donnant effet à la jurisprudence d'un droit également différent sur l'incidence, en la matière, du rôle de la bonne foi.

L'incidence du rôle de la bonne foi de l'officier public dans la commission d'un acte reproché, en ce qui concerne la portée de l'art. 88 C.P.C., et non en ce qui a trait au mérite de l'action, a fait, dans la province de Québec, depuis le jour où la disposition fut établie par l'art. 22 du Code de procédure civile de 1867, dont les termes sont reproduits à l'art. 88 du Code de 1897, l'objet d'un conflit dans la jurisprudence. Suivant certains jugements, la bonne foi conditionnait le droit à l'avis et dès que la déclaration contenait une allégation de mauvaise foi, le défendeur se voyait privé du droit d'invoquer le défaut de l'avis, même si, au mérite, la preuve, révélant que cette allégation était mal fondée, on devait alors rejeter l'action parce que l'avis n'avait pas été donné. Suivant d'autres jugements, on tenait le droit à l'avis absolu dans tous les cas. La bonne foi, disait-on, en s'appuyant sur le principe sanctionné par l'art. 2202 C.C., est toujours présumée et cette présomption ne peut être écartée par une simple allégation mais par une preuve de mauvaise foi. On jugeait qu'une simple allégation aux plaidoiries ne pouvait virtuellement abroger le droit au bénéfice de l'art. 88. Considérant que cet article conditionnait l'exercice même du droit d'action, on décidait que ce droit d'action devait être nié ab initio et non à la fin du procès. Ce conflit n'existe plus. Depuis plus de vingt-cinq ans, la Cour d'Appel y a mis fin en décidant que l'incidence de la bonne ou de la mauvaise foi n'a aucune portée sur le droit à l'avis et que, dans tous les cas, il doit être donné. Acceptant les arguments déjà exprimés en ce sens, la Cour d'Appel s'est particulièrement basée sur la source historique de cette disposition et sur la modification qui y fut apportée lors et par suite de son insertion au Code de procédure civile. Les sources de l'article sont indiquées dans Dame Chaput v. Crépeau [(1917), 57 Que. S.C. 443.] par M. le Juge Bruneau et les modifications faites à la situation antérieure par l'insertion de l'article dans le Code, afin d'en généraliser l'application à tous les officiers publics, sont indiquées dans cette jurisprudence définitivement arrêtée par la Cour d'Appel dans Charland v. Kay [(1933), 50 Que. K.B. 377.]; Corporation de la Paroisse de St-David-de-l'Auberivière v. Paquette et autres [(1937), 62 Que. K.B. 143.] et Houde v. Benoît [[1943] Que. K.B. 713.].

En somme, et comme le note M. le Juge Hall dans Corporation de la Paroisse de St-David-de-l'Auberivière v. Paquette et autres, supra, l'art. 22 du Code de procédure de 1867, prédécesseur de l'art. 88 du Code de 1897, a sa source dans la Loi pour la protection des juges de paix, c. 101 des Status Refondus du Bas Canada. Le premier article de cette loi prescrivait l'avis d'action, alors que dans les autres dispositions, d'autres privilèges étaient établis, y compris celui fixant la prescription à six mois. L'article 8 conditionnait le droit aux privilèges y accordés à la bonne foi. Lors de la confection du Code de procédure, la disposition ayant trait à l'avis fut extraite de la loi pour devenir l'art. 22 du Code de procédure et être déclarée applicable à tous les officiers publics. Dans le procédé, cependant, on laissa la disposition touchant la bonne foi dans la Loi pour la protection des juges de paix et on évita de l'inclure dans l'art. 22 C.P.C. comme condition de l'opération de cet article. D'autres considérations, tel, par exemple, le changement apporté par la Législature, le 4 août 1929, à l'art. 195 C.P.C. par la Loi 19 George V, c. 81, ayant pour effet de prohiber toute ordonnance de preuve avant faire droit qui jusqu'alors réservait au mérite les questions soulevées par l'inscription en droit, militent en faveur de ces vues. C'est ce changement, je crois, qui a provoqué l'occasion amenant la Cour d'Appel à fixer définitivement la jurisprudence. Les motifs déjà mentionnés suffisent pour partager les vues exprimées par la Cour d'Appel dans les causes précitées et pour conclure, comme M. le Juge Dorion dans Charland v. Kay, supra, qu'il faut s'en tenir au texte de la loi et lui donner son effet.

En assumant l'exercice d'un pouvoir discrétionnaire conféré au gérant général par la loi, l'intimé a commis une illégalité mais aucune offense connue de la loi pénale et aucun délit au sens de l'art. 1053 C.C. Il a fait ce qu'il n'avait pas le droit de faire, fermement et sincèrement convaincu, a-t-il affirmé sous serment, que non seulement il en avait le droit, mais qu'il y était tenu pour s'acquitter de ses responsabilités comme Procureur Général chargé de l'administration de la justice, du maintien de l'ordre et de la paix dans la province et de ses devoirs comme conseiller juridique du gouvernement de la province. Il n'a pas pris occasion de sa fonction pour commettre cette illégalité. Il ne l'a pas commise à l'occasion de l'exercice de ses fonctions. Il l'a commise à cause de ses fonctions. Sa bonne foi n'a pas été mise en doute, et sur ce fait, les Juges de la Cour d'Appel, qui ont considéré la question, sont d'accord avec le Juge de première instance. Suivant les décisions considérées par cette Cour dans Beatty v. Kozak, supra, on retient, sous un droit différent de celui de la province de Québec, l'incidence de la bonne foi lorsque celle-ci se fonde sur l'erreur de fait, ou sur l'erreur de fait et de droit à la fois, sinon uniquement sur l'erreur de droit, pour décider du caractère exculpatoire de l'illégalité commise, voir même du droit à l'avis. Exclusivement compétente à légiférer sur la procédure civile, la Législature de Québec par l'art. 88 C.P.C., n'a pas voulu assujettir le droit à l'avis d'action à l'incidence de la bonne ou de la mauvaise foi. Dans les circonstances de cette cause, je

suis d'opinion que l'illégalité commise par l'intimé l'a été dans l'exercice de ses fonctions et que, de plus, ce serait faire indirectement ce que l'art. 88 C.P.C., ne permet pas, suivant l'interprétation de la Cour d'Appel, que de s'appuyer sur la bonne ou la mauvaise foi, que ce soit au sens vulgaire ou technique du mot, pour conclure que l'intimé est sorti de l'exercice de ses fonctions, au sens qu'ont ces expressions dans l'art. 88 C.P.C., et qu'il ait perdu le droit à l'avis d'action.

Pour ces raisons, l'appelant aurait dû être débouté de son action. Je renverrais les appels avec dépens.

ABBOTT J.

ABBOTT J.:-- In his action appellant claimed from respondent the sum of $118,741 as damages alleged to have been sustained as a result of the cancellation of a licence or permit for the sale of alcoholic liquors held by appellant. The action was maintained by the learned trial judge to the extent of $8,123.53. From that judgment two appeals were taken, one by respondent asking that the action be dismissed in its entirety, the other by appellant asking that the amount allowed as damages be increased by an amount of $90,000. The Court of Queen's Bench [[1956] Que. Q.B. 447.] allowed the respondent's appeal, Rinfret J. dissenting, and dismissed the action. The appeal taken by appellant to increase the amount of the trial judgment was dismissed unanimously. The present appeals are from those two judgments.

The facts are these. On December 4, 1946, appellant was conducting a restaurant business in the City of Montreal, a business which he and his father and mother before him had been carrying on continuously for some thirty-four years prior to that date. The restaurant had been licensed for the sale of alcoholic beverages throughout the entire period.

In 1946 and for many years prior thereto, persons operating establishments of this kind and selling alcoholic beverages had been required to obtain a licence or permit under the Alcoholic Liquor Act, R.S.Q. 1941, c. 255. Unless granted for a shorter period, these were annual licences and expired on April 30 in each year. Moreover, s. 35, subs. 1., of the Act provides as follows:

> The Commission may cancel any permit at its discretion.

The Commission referred to is the "Quebec Liquor Commission" established as a corporation under the Act in question and, generally speaking, it has been entrusted by the Legislature with the responsibility of directing and administering the provincial monopoly of the sale and distribution of alcoholic beverages.

On December 4, 1946, without previous notice to the appellant, his licence to sell alcoholic beverages was cancelled by the Quebec Liquor Commission, and at about 2 p.m. on that date the stock of liquor on his premises was seized and removed. The licence was not restored and after operating for some months without such a licence, in 1947 appellant sold the restaurant and the building in which it was located.

Appellant learned from press reports either in the afternoon of December 4 or early the following day, that his licence had been cancelled and the stock of liquor seized because he was an adherent of a religious sect or group known as the Witnesses of Jehovah. It soon became clear from statements made by the respondent to the press and confirmed by him at the trial as having been made by him, that the cancellation of the licence had been made because of the appellant's association with the sect in question and in order to prevent him from continuing to furnish bail for members of that sect summoned before the Recorder's Court on charges of contravening certain city by-laws respecting the distribution of printed material.

It might be added here that in December 1946 and for some time prior thereto the Witnesses of Jehovah appear to have been carrying on in the Montreal district and elsewhere in the Province of Quebec, an active campaign of meetings and the distribution of printed pamphlets and other like material of an offensive character to a great many people of most religious beliefs, and I have no doubt that at that time many people believed this material to be seditious.

The evidence is referred to in detail in the Courts below and I do not propose to do so here. I am satisfied from a consideration of this evidence: First: that the cancellation of the appellant's licence was made for the sole reason which I have mentioned and with the object and purpose to which I have referred; Second: that such cancellation was made with the express authorization and upon the order of the respondent; Third: that the determining cause of

the cancellation was that order, and that the manager of the Quebec Liquor Commission would not have cancelled the licence without the order and authorization given by the respondent.

There can be no question as to the first point. It was conceded by respondent in his evidence at the trial and by his counsel at the hearing before us. As to the second and third points, I share the view of the learned trial judge and of Rinfret J. that both were clearly established.

The religious beliefs of the appellant and the fact that he acted as bondsman for members of the sect in question had no connection whatever with his obligations as the holder of a licence to sell alcoholic liquors. The cancellation of his licence upon this ground alone therefore was without any legal justification. Moreover, the religious beliefs of the appellant and his perfectly legal activities as a bondsman had nothing to do with the object and purposes of the Alcoholic Liquor Act, and the powers and responsibilities of the manager of the Quebec Liquor Commission are confined to the administration and enforcement of the provisions of the said Act. This may be one explanation of the latter's decision to consult the respondent before taking the action which he did to cancel appellant's licence.

At all events a careful reading of the evidence and a consideration of the surrounding circumstances has convinced me that without having received the authorization, direction, order, or "approbation énergique" of the respondent -- however one chooses to describe it -- the manager of the Quebec Liquor Commission would not have cancelled the licence.

The proposition that in Canada a member of the executive branch of government does not make the law but merely carries it out or administers it requires no citation of authority to support it. Similarly, I do not find it necessary to cite from the wealth of authority supporting the principle that a public officer is responsible for acts done by him without legal justification. I content myself with quoting the well known passage from Dicey's "Law of the Constitution", 9th ed., p. 193, where he says

> ... every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorize as is any private and unofficial person.

In the instant case, the respondent was given no statutory power to interfere in the administration or direction of the Quebec Liquor Commission although as Attorney-General of the Province the Commission and its officers could of course consult him for legal opinions and legal advice. The Commission is not a department of government in the accepted sense of that term. Under the Alcoholic Liquor Act the Commission is an independent body with corporate status and with the powers and responsibilities conferred upon it by the Legislature. The Attorney-General is given no power under the said Act to intervene in the administration of the affairs of the Commission nor does the Attorney-General's Department Act, R.S.Q. 1941, c. 46, confer any such authority upon him.

I have no doubt that in taking the action which he did, the respondent was convinced that he was acting in what he conceived to be the best interests of the people of his province but this, of course, has no relevance to the issue of his responsibility in damages for any acts done in excess of his legal authority. I have no doubt also that respondent knew and was bound to know as Attorney-General that neither as Premier of the province nor as Attorney-General was he authorized in law to interfere with the administration of the Quebec Liquor Commission or to give an order or an authorization to any officer of that body to exercise a discretionary authority entrusted to such officer by the statute.

It follows, therefore, that in purporting to authorize and instruct the manager of the Quebec Liquor Commission to cancel appellant's licence, the respondent was acting without any legal authority whatsoever. Moreover, as I have said, I think respondent was bound to know that he was acting without such authority.

The respondent is therefore liable under art. 1053 of the Civil Code for the damages sustained by the appellant, by reason of the acts done by respondent in excess of his legal authority.

Respondent also contended that appellant's action must fail because no notice of such action was given under art. 88 of the Code of Civil Procedure, which reads as follows:

> 88. No public officer or other person fulfilling any public function or duty can be sued for damages by reason of any act done by him in the exercise of his functions, nor can any verdict or judgment be rendered against him, unless notice of such action had been given him at least one month before the issue of the writ of summons.
>
> Such notice must be in writing; it must state the grounds of the action, and name of the plaintiff's attorney or agent, and indicate his office; and must be served upon him personally or at his domicile.

None of the learned judges constituting the majority in the Court of Queen's Bench has given as a reason for dismissing appellant's action, the failure to give such notice. The learned trial judge and Rinfret J. held that respondent is not entitled to avail himself of this exceptional provision since the act complained of was not "done by him in the exercise of his functions" but was an act done by him when he had gone outside his functions to perform it. I am in agreement with their views and there is little I need add to what they have said on this point. In this connection, however, reference may usefully be made to the decision of the Court of Appeal in Lachance v. Casault [(1902), 12 Que. K.B. 179 at 202.]. In that case a bailiff had attempted to take possession of books and papers in the hands of a judicial guardian without preparing a procès-verbal of the articles seized, as called for by the order of the Court requiring the guardian to give up possession to the seizing creditor. When the bailiff's action was resisted by the guardian as being unauthorized, the bailiff caused the guardian to be arrested. The charge having been subsequently dismissed, the bailiff was sued in damages for false arrest and malicious prosecution. It was held that, even assuming such bailiff was a public officer within the meaning of art. 88 C.C.P., he was not entitled to notice under the said article since at the time the act complained of was committed, he was not "dans l'exercice légal de ses fonctions".

In my opinion before a public officer can be held to be acting "in the exercise of his functions", within the meaning of art. 88 C.C.P., it must be established that at the time he performed the act complained of such public officer had reasonable ground for believing that such act was within his legal authority to perform; Asselin v. Davidson [(1914), 23 Que. K.B. 274 at 280.]. In the instant case, as I have said, in my view the respondent was bound to know that the act complained of was beyond his legal authority.

I now deal with the second appeal asking that the amount awarded to appellant by the trial judge be increased by an amount of $90,000. This amount is claimed under three heads, namely:

Damages to goodwill and reputation of business	$50,000
Loss of property rights in liquor permit	$15,000
Loss of profits for a period of one year, May 1st, 1947 to May 1st, 1948	$25,000
	$90,000

The licence to sell alcoholic beverages was, of course, only an annual licence subject to revocation at any time and the renewal of which might have been properly refused for a variety of reasons. Nevertheless, in my view,

appellant could reasonably expect that so long as he continued to observe the provisions of the Alcoholic Liquor Act his licence would be renewed from year to year, as in fact it had been for many years past.

There can be no doubt that cancellation of appellant's licence without legal justification resulted in a substantial reduction in the value of the goodwill and profit making possibilities of the restaurant business carried on by him at 1429 Crescent St., Montreal, and in a pecuniary loss to him for which in my opinion he is entitled to recover damages from respondent.

The restaurant business is probably no less hazardous than most other businesses, and damages of this sort are obviously difficult to assess, the amount being of necessity a more or less arbitrary one. The learned trial judge awarded appellant the sum of $6,000 as loss of profits for the period from December 4, 1946, to May 1, 1947, the date on which the licence would have expired, and this would appear to be supported by the evidence. I have reached the conclusion that the amount awarded to the appellant by the learned trial judge should be increased by an amount of $25,000, as damages for diminution in the value of the goodwill of the business and for loss of future profits.

In the result, therefore, I would allow both appeals with costs here and below, and modify the judgment at the trial by increasing the amount of the damages to $33,123.53 with interest from the date of the judgment in the Superior Court.

Appeals allowed with costs, Taschereau, Cartwright and Fauteux J.J. dissenting.

ONTARIO SUPERIOR COURT OF JUSTICE (TORONTO REGION)

CIVIL ENDORSEMENT FORM

(Rule 59.02(2)(c)(i))

BEFORE	Judge/Case Management Master	Court File Number:
	Vermette J.	CV-21-00661200-0000

Title of Proceeding:

Sgt. Julie Evans *et al.* Applicants

-v-

Attorney General for Ontario *et al.* Respondents

Case Management: ☐ **Yes** If so, by whom: | **X No**

Participants and Non-Participants: *(Rule 59.02(2)((vii))*

Party	Counsel	E-mail Address	Phone #	Participant (Y/N)
1) **Respondent Attorney General for Ontario**	**S. Zachary Green**	**zachary.green@ontario.ca**		**N**
2) **Applicants**	**Rocco Galati**	**rocco@idirect.com**		**N**
3)				
4)				
5)				

Date Heard: *(Rule 59.02(2)(c)(iii))* **May 5, 2021**

Nature of Hearing (mark with an "X"): *(Rule 59.02(2)(c)(iv))*

☐ Motion ☐ Appeal ☐ Case Conference ☐ Pre-Trial Conference ☐ Application

Format of Hearing (mark with an "X"): *(Rule 59.02(2)(c)(iv))*

☒ In Writing ☐ Telephone ☐ Videoconference ☐ In Person

If in person, indicate courthouse address:

Relief Requested: *(Rule. 59.02(2)(c)(v))*

Request by the Respondent Attorney General for Ontario that the court make an order under Rule 2.1.01(1) of the *Rules of Civil Procedure* dismissing this Application because it appears on its face to be frivolous or vexatious or otherwise an abuse of the process of the court.

Disposition made at hearing or conference (operative terms ordered): *(Rule 59.02(2)(c)(vi))*

The request is denied.

Costs: On a **N/A**	indemnity basis, fixed at $	are payable
by	to	[when]

Brief Reasons, if any: *(Rule 59.02(2)(b))*

Without commenting on the merits of the Application, there is no basis on the face of the pleading for this matter to be dealt with under Rule 2.1.01 of the *Rules of Civil Procedure* rather than by way of motion.

Additional pages attached: ☐ Yes **X** No

May 5, , 20 **21**

Date of Endorsement *(Rule 59.02(2)(c)(ii))*

Signature of Judge/Case Management Master *(Rule 59.02(2)(c)(i))*

Singh v. Canada (Minister of Citizenship and Immigration), [2010] F.C.J. No. 921

Federal Court Judgments

Federal Court

Toronto, Ontario

de Montigny J.

Heard: May 17, 2010.

Judgment: July 19, 2010.

Docket IMM-2234-09

[2010] F.C.J. No. 921 | [2010] A.C.F. no 921 | 2010 FC 757 | 2010 CF 757 | 372 F.T.R. 40 | 90 Imm. L.R. (3d) 239 | 2010 CarswellNat 2397 | 191 A.C.W.S. (3d) 597

Between Yadwinder Singh, Applicant, and The Minister of Citizenship and Immigration and Canada Border Services Agency, Respondents

(56 paras.)

Case Summary

Administrative law — Prerogative and private law remedies — Mandamus — Conditions precedent — Extraordinary circumstances — Application for judicial review for declaratory relief, or alternatively mandamus compelling Citizenship and Immigration Canada to confirm the applicant's status as a permanent resident allowed — The applicant's landing was taken back on Dec. 23, 1998 due to his inability to present a valid and subsisting passport — However, in the context of the respondent losing his passport, it should have been sufficient to demonstrate he was the legal bearer of a valid passport — The CIC erred in law in finding non-compliance with s. 14(1) of the prior Immigration Regulations — The 10-year-delay was unreasonable — Immigration Regulations, s. 14(1).

Immigration law — Immigrants — Application for immigrant visa — Humanitarian and compassionate considerations — Practice and judicial review — Judicial review — Grounds for — Application for judicial review for declaratory relief, or alternatively mandamus compelling Citizenship and Immigration Canada to confirm the applicant's status as a permanent resident allowed — The applicant's landing was taken back on Dec. 23, 1998 due to his inability to present a valid and subsisting passport — However, in the context of the respondent losing his passport, it should have been sufficient to demonstrate he was the legal bearer of a valid passport — The CIC erred in law in finding non-compliance with s. 14(1) of the prior Immigration Regulations — The 10-year-delay was unreasonable — Immigration Regulations, s. 14(1).

Application for judicial review for declaratory relief, or alternatively mandamus compelling Citizenship and Immigration Canada to confirm his status as a permanent resident. In the further alternative, the applicant sought to compel the CIC to complete the processing of his humanitarian and compassionate application for permanent residence class within a defined timeframe. The applicant was an Indian citizen who has been married to a Canadian citizen for 14 years. They had two Canadian-born children. He arrived in Canada in 1994 and claimed refugee status, but his claim was rejected. His subsequent application for permanent residence on H & C grounds was received in Dec. 1995 and approved in principle in April 2006. While this application proceeded to stage two, the applicant decided to apply for a student visa in the summer of 1997. This application never progressed, due to the applicant's passport being confiscated by border officials and subsequently lost. By the time he obtained a new passport in Jan. 2003, the second processing stage resumed in the H & C application; however, the applicant's

clearances had expired. However, the applicant's new passport and his 2004 medical examination expired by the time these documents were processed. On Aug. 31, 2005, CIC sent two letters requiring a valid passport and an updated medical exam. However, before the application was finalized, CIC received information that the applicant was the subject of drug trafficking charges in the U.S. and that his extradition was sought. The applicant's H & C file has been on hold since then. In April 2007, he was ordered to surrender to American authorities. The applicant argued the CIC's refusal to land him on Dec. 23, 1998 and Feb. 3, 2003 was unlawful, as he had met all the requirements on those dates. Alternatively, he sought mandamus compelling CIC to grant his application within 30 days, or compelling CIC to complete the processing of his application within 30 days. The respondents brought a motion pursuant to s. 87 of the Immigration and Refugee Protection Act.
HELD: Application granted with $2,000 in party and party costs.

The respondents' motion pursuant to s. 87 of the IRPA was granted. The only reason the applicant's landing was taken back on Dec. 23, 1998 was his inability to present a valid and subsisting passport. However, depending on the legal context, a person may be considered in possession of something if they held a legal right to assume immediate control over an object. Interpreting s. 14(1) of the Regulations to require physical control of the passport by the applicant would make no sense. The purpose of that subsection was to verify that an immigrant wishing to come to Canada was a citizen of another country and to ascertain the identity of the immigrant before landing him. It should have been sufficient to demonstrate he was the legal bearer of a valid passport. The respondents had a copy of his passport on the file showing it was valid until 2001. The applicant should not be made to suffer for the loss of his passport by officials of the respondents. The CIC erred in law in finding the applicant did not comply with the requirement in s. 14(1) of the prior Immigration Regulations. The applicant had met all the requirements for an order of mandamus. Prior to the charges being laid, he waited almost 10 years for his application to be processed, which amounted to unreasonable delay. The decision not to land the applicant on Dec. 23, 1998 was quashed, and the applicant's file was remitted to be processed in accordance with the law as it stood on that date and on the basis of the applicant's record at the time.

Statutes, Regulations and Rules Cited:

Federal Courts Act, R.S.C. 1985, c. F-7, s. 18.1(3)

Federal Courts Immigration and Refugee Protection Rules, SOR/ 93-22, Rule 17

Immigration Act, R.S.C. 1985, c. I-2, s. 5(2), s. 14(2)

Immigration Regulations, SOR/78-172,

Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 2, s. 11, s. 12(1), s. 12(4), s. 16(1), s. 16(2), s. 18, s. 21(1), s. 25, s. 50, s. 68, s. 72, s. 83(1)(c), s. 87, s. 190

Immigration and Refugee Protection Regulations, SOR/2002-227, s. 13, s. 14(1)

Counsel

Jeremiah Eastman, for the Applicant.

Ian Hicks, for the Respondents.

REASONS FOR ORDER AND ORDER

de MONTIGNY J.

1 de This is an application for judicial review whereby the Applicant seeks declaratory relief against the

unwillingness of Citizenship and Immigration Canada ("CIC") to confirm his status as a permanent resident. In the alternative, the Applicant seeks a *mandamus* order compelling CIC to grant him permanent residence or, in the further alternative, compelling CIC to complete the processing of his humanitarian and compassionate ("H&C") application for permanent residence class within a defined timeframe. The Applicant also seeks his costs on a solicitor-client basis.

I. Facts

2 The Applicant is an Indian citizen who has been married for over 14 years to a Canadian citizen with whom he has two Canadian-born children. He first arrived in Canada on January 21, 1994 and claimed refugee status. After the rejection of his refugee claim, he applied for permanent residence in Canada on H & C grounds. This application was received by CIC on December 28, 1995, and approved in principle on April 12, 1996. His application then proceeded to stage two in order to determine whether he met the statutory requirements for landing.

3 In the summer of 1997, the Applicant decided to apply for a student visa. Since the process was shorter if he applied from outside of Canada, and because he could not enter the United States, he gave his application and his passport to a friend who was a Canadian citizen so that he could bring it to the Canadian visa office in Buffalo, New York. The visa officer serving his friend said the Canadian visa office in Buffalo could not process the application without the Applicant being present. His friend therefore returned to Canada with the application and the Applicant's passport. Upon entry into Canada, the friend was searched by a port of entry officer, who seized the Applicant's passport, telling him that he could not carry someone else's passport. The officer gave the Applicant's friend a receipt for the passport to be picked up by the Applicant.

4 Despite the Applicant's numerous attempts to obtain his passport, he never succeeded in doing so. The evidence in the record is not clear as to what happened to the Applicant's passport. It appears to have been lost between the port of entry office in Fort Erie and the Immigration office in Niagara Falls, although there is also an indication in the record that it may have been returned to someone believed to be the Applicant.

5 The Applicant was called in to pick up his landing documents on December 23, 1998. The officer apparently handed the Applicant his Record of Landing and welcomed him as a new Canadian permanent resident, and asked to see his passport. When the Applicant showed him a copy of his passport and explained that his original passport had been lost, he was told that a copy was not sufficient; as a result, the officer asked the Applicant to give him back his Record of Landing.

6 The Applicant immediately initiated an application to obtain a new passport from the Indian consulate. The passport not having been issued after several years, the Applicant inquired about the reason for the delay at the Indian consulate. He was told that the consulate could not process his application before CIC confirmed some technical information about his status in Canada. The Applicant finally obtained a new passport in January 2003, which he submitted to CIC in February 2003.

7 By the time the second processing stage resumed, however, the Applicant's medical, criminal and security clearances had expired. The Applicant therefore submitted updated medical and criminal examinations. In a somewhat Kafkaesque turn of events, however, the Applicant's new passport and his 2004 medical examination had expired at the time these documents were processed and CIC had finalized the security checks. Thus, CIC sent the Applicant two letters on August 31, 2005, requesting a valid passport and an updated medical examination.

8 Unfortunately for the Applicant, CIC received information from the Canadian Border Services Agency ("CBSA") in September 2005, before the Applicant's permanent residence application was finalized, indicating that the Applicant was the subject of criminal charges for drug trafficking in the United States and that his extradition was sought by the American authorities. On April 24, 2007, the Applicant was ordered to surrender to the American authorities to face prosecution. Although he had initially filed an application for judicial review of that decision, he surrendered to the American authorities on August 14, 2009.

9 The Applicant's file has been on hold ever since CIC learned of the criminal charges laid against him in the United States. CIC sent him a letter on May 25, 2009, requesting new and updated medical and police certificates, passport and American police certificate in order to resume the assessment of his application for permanent residence.

10 The Applicant now seeks a declaration from this Court declaring that CIC's refusal to land him on December 23, 1998 and on February 3, 2003 was unlawful because he had allegedly met all the requirements for landing on those dates and had therefore become a permanent resident.

11 In the alternative, the Applicant seeks an order of *mandamus* compelling CIC to grant the Applicant's application for permanent residence within thirty days of the Court's order.

12 In the further alternative, the Applicant seeks an order of *mandamus* compelling the Respondents to complete the processing of the Applicant's application for permanent residence within thirty days of the Court's order.

13 The application was originally directed only against the Minister of Citizenship and Immigration. But in order to have a complete record before the Court, counsel for the Applicant brought a motion for an Order directing that the CBSA be added as a respondent. This motion was granted, on consent, on March 9, 2010, and both Respondents therefore filed a Certified Tribunal Record ("CTR"). Both Respondents also filed an application for non-disclosure pursuant to section 87 of the Immigration and Refugee Protection Act (2001, c. 27) ("*IRPA")*, thereby requesting that some information be blacked out from the record for national security reasons.

II. Issues

14 There are only two issues to be decided by this Court in the context of this application for judicial review. First, should an order for declaratory relief be issued by this Court to the effect that the Applicant met all the legal requirements for landing on December 23, 1998 and/or on June 28, 2002, and that the CIC acted illegally in refusing to land him as a permanent resident? Second, should the Court order the Respondents either to grant the Applicant's application for permanent residence, or to complete the processing of his application, within 30 days of this Court's order? These questions raise both jurisdictional and factual issues for which there are scant precedents. Moreover, the first question must be dealt with in the context of two different legal regimes, since prior to the coming into force of the *IRPA* and its Regulations, (*Immigration and Refugee Protection Regulations,* SOR/2002-227, hereafter "*IRPR"*) on June 28, 2002, the *Immigration Act* (R.S.C., 1985, c. I-2) and the *Immigration Regulations* (SOR/78-172) ("*Regulations*") governed the Applicant's application for permanent residence.

15 Before addressing these issues, however, I shall deal briefly with the Respondents' motions for non-disclosure that were made pursuant to section 87 of the *IRPA*. After holding an *ex parte* and *in camera* hearing of that motion, and a further teleconference hearing with counsel for both parties, I granted the Respondents' motion on May 7, 2010 subject to my direction given at the *in camera* hearing that paragraph 4 of p. 2 of the supplementary record be unredacted except for two words. At the time, I gave only brief oral reasons for that decision, and indicated that I would provide fuller reasons as part of my decision on the merit of the judicial review application. Accordingly, the first part of my analysis will be devoted to this issue.

III. The legislative scheme

16 Pursuant to subsection 14(2) of the *Immigration Act* an officer shall grant landing to an immigrant, defined in section 2 of that *Immigration Act* as "a person seeking landing", when the officer is satisfied, following an examination, that it would not be contrary to the Act or Regulations to grant landing:

> 14. (2) Where an immigration officer is satisfied that it would not be contrary to this Act or the regulations to grant landing to an immigrant whom the officer has examined, the officer shall
>
> (a) grant landing to that immigrant; or

(b) authorize that immigrant to come into Canada on condition that the immigrant be present for further examination by an immigration officer within such time and at such place as the immigration officer who examined the immigrant may direct.

* * *

14. (2) L'agent d'immigration qui convaincu, après l'interrogatoire d'un immigrant, que l'octroi du droit d'établissement ne contreviendrait pas, dans son cas, à la présente loi ni à ses règlements est tenu :

a) soit de lui accorder ce droit ;

b) soit de l'autoriser à entrer au Canada à condition qu'il se présente, pour interrogatoire complémentaire, devant un agent d'immigration dans le délai et au lieu fixés.

17 Pursuant to subsection 14(1) of the *Regulations*, an immigrant must be in possession of a valid and subsisting passport or travel document issued to him or her by their country of origin:

14. (1) Subject to subsection (2), every immigrant shall be in possession of

(a) a valid and subsisting passport issued to that immigrant by the country of which he is a citizen or national, other than a diplomatic, official or other similar passport;

* * *

14. (1) Sous réserve du paragraphe (2), tout immigrant doit avoir

a) un passeport en cours de validité, autre qu'un passeport diplomatique, officiel ou autre passeport semblable, qui lui a été délivré par le pays dont il est citoyen ou ressortissant;

18 Since the coming into force of the *IRPA* and the *IRPR* on June 28, 2002, the following legislative provisions apply to the Applicant's application for permanent residence. First of all, a foreign national, which is defined in section 2 as "a person who is not a Canadian citizen or a permanent resident", becomes a permanent resident pursuant to subsection 21(1) of the *IRPA* if an officer is satisfied that the foreign national meets the requirements of the legislation:

21. (1) A foreign national becomes a permanent resident if an officer is satisfied that the foreign national has applied for that status, has met the obligations set out in paragraph 20(1)(a) and subsection 20(2) and is not inadmissible.

* * *

21. (1) Devient résident permanent l'étranger dont l'agent constate qu'il a demandé ce statut, s'est déchargé des obligations prévues à l'alinéa 20(1)a) et au paragraphe 20(2) et n'est pas interdit de territoire.

19 Pursuant to subsection 72(1) of the *IRPR*, a foreign national in Canada becomes a permanent resident if it is established through an examination that he or she meets the requirements of the legislation:

Obtaining status

72. (1) A foreign national in Canada becomes a permanent resident if, following an examination, it is established that

(a) they have applied to remain in Canada as a permanent resident as a member of a class referred to in subsection (2);

(b) they are in Canada to establish permanent residence;

(c) they are a member of that class;

(d) they meet the selection criteria and other requirements applicable to that class;

(e) except in the case of a foreign national who has submitted a document accepted under subsection 178(2) or of a member of the protected temporary residents class,

(i) they and their family members, whether accompanying or not, are not inadmissible,

(ii) they hold a document described in any of paragraphs 50(1)(a) to (h), and

(iii) they hold a medical certificate, based on the most recent medical examination to which they were required to submit under these Regulations within the previous 12 months, that indicates that their health condition is not likely to be a danger to public health or public safety and, unless subsection 38(2) of the Act applies, is not reasonably expected to cause excessive demand; and

(f) in the case of a member of the protected temporary residents class, they are not inadmissible.

* * *

Obtention du statut

72. (1) L'étranger au Canada devient résident permanent si, à l'issue d'un contrôle, les éléments suivants sont établis :

a) il en a fait la demande au titre d'une des catégories prévues au paragraphe (2);

b) il est au Canada pour s'y établir en permanence;

c) il fait partie de la catégorie au titre de laquelle il a fait la demande;

d) il satisfait aux critères de sélection et autres exigences applicables à cette catégorie;

e) sauf dans le cas de l'étranger ayant fourni un document qui a été accepté aux termes du paragraphe 178(2) ou de l'étranger qui fait partie de la catégorie des résidents temporaires protégés :

(i) ni lui ni les membres de sa famille -- qu'ils l'accompagnent ou non -- ne sont interdits de territoire,

(ii) il est titulaire de l'un des documents visés aux alinéas 50(1)a) à h),

(iii) il est titulaire d'un certificat médical attestant, sur le fondement de la plus récente visite médicale à laquelle il a été requis de se soumettre aux termes du présent règlement dans les douze mois qui précèdent, que son état de santé ne constitue vraisemblablement pas un danger pour la santé ou la sécurité publiques et, sauf si le paragraphe 38(2) de la Loi s'applique, ne risque pas d'entraîner un fardeau excessif;

f) dans le cas de l'étranger qui fait partie de la catégorie des résidents temporaires protégés, il n'est pas interdit de territoire.

20 In the case of a foreign national who, like the Applicant, has obtained an exemption under section 25 of the *IRPA* to apply for permanent residence from within Canada, section 68 of the *IRPR* provides that the foreign national becomes a permanent resident if it is established through an examination that he or she is not inadmissible and holds a passport or other document listed in section 50 of the *IRPR*:

Applicant in Canada

68. If an exemption from paragraphs 72(1)(a), (c) and (d) is granted under subsection 25(1) of the Act with respect to a foreign national in Canada who has made the applications referred to in section 66, the foreign national becomes a permanent resident if, following an examination, it is established that the foreign national meets the requirements set out in paragraphs 72(1)(b) and (e) and

(a) in the case of a foreign national who intends to reside in the Province of Quebec and is not a member of the family class or a person whom the Board has determined to be a Convention refugee, the competent authority of that Province is of the opinion that the foreign national meets the selection criteria of the Province;

(b) the foreign national is not otherwise inadmissible; and

(c) the family members of the foreign national, whether accompanying or not, are not inadmissible.

* * *

Demandeur au Canada

68. Dans le cas où l'application des alinéas 72(1)a), c) et d) est levée en vertu du paragraphe 25(1) de la Loi à l'égard de l'étranger qui se trouve au Canada et qui a fait les demandes visées à l'article 66, celui-ci devient résident permanent si, à l'issue d'un contrôle, les éléments ci-après, ainsi que ceux prévus aux alinéas 72(1)b) et e), sont établis :

a) dans le cas où l'étranger cherche à s'établir dans la province de Québec, n'appartient pas à la catégorie du regroupement familial et ne s'est pas vu reconnaître, par la Commission, la qualité de réfugié, les autorités compétentes de la province sont d'avis qu'il répond aux critères de sélection de celle-ci;

b) il n'est pas par ailleurs interdit de territoire;

c) les membres de sa famille, qu'ils l'accompagnent ou non, ne sont pas interdits de territoire.

21 Section 50 of the *IRPR* provides a list of acceptable documents of which a foreign national must be in possession to become a permanent resident:

Documents -- permanent residents

50. (1) In addition to the permanent resident visa required of a foreign national who is a member of a class referred to in subsection 70(2), a foreign national seeking to become a permanent resident must hold

(a) a passport, other than a diplomatic, official or similar passport, that was issued by the country of which the foreign national is a citizen or national;

(b) a travel document that was issued by the country of which the foreign national is a citizen or national;

(c) an identity or travel document that was issued by a country to non-national residents, refugees or stateless persons who are unable to obtain a passport or other travel document from their country of citizenship or nationality or who have no country of citizenship or nationality;

(d) a travel document that was issued by the International Committee of the Red Cross in Geneva, Switzerland, to enable and facilitate emigration;

(e) a passport or travel document that was issued by the Palestinian Authority;

(f) an exit visa that was issued by the Government of the Union of Soviet Socialist Republics to its citizens who were compelled to relinquish their Soviet nationality in order to emigrate from that country;

(g) a British National (Overseas) passport that was issued by the Government of the United Kingdom to persons born, naturalized or registered in Hong Kong; or

(h) a passport that was issued by the Government of Hong Kong Special Administrative Region of the People's Republic of China.

* * *

Documents : résidents permanents

50. (1) En plus du visa de résident permanent que doit détenir l'étranger membre d'une catégorie prévue au paragraphe 70(2), l'étranger qui entend devenir résident permanent doit détenir l'un des documents suivants :

a) un passeport -- autre qu'un passeport diplomatique, officiel ou de même nature -- qui lui a été délivré par le pays dont il est citoyen ou ressortissant;

b) un titre de voyage délivré par le pays dont il est citoyen ou ressortissant;

c) un titre de voyage ou une pièce d'identité délivré par un pays aux résidents non-ressortissants, aux réfugiés au sens de la Convention ou aux apatrides qui sont dans l'impossibilité d'obtenir un passeport ou autre titre de voyage auprès de leur pays de citoyenneté ou de nationalité, ou qui n'ont pas de pays de citoyenneté ou de nationalité;

d) un titre de voyage délivré par le Comité international de la Croix-Rouge à Genève (Suisse) pour permettre et faciliter l'émigration;

e) un passeport ou un titre de voyage délivré par l'Autorité palestinienne;

f) un visa de sortie délivré par le gouvernement de l'Union des républiques socialistes soviétiques à ses citoyens obligés de renoncer à leur nationalité afin d'émigrer de ce pays;

g) un passeport intitulé "British National (Overseas) Passport", délivré par le gouvernement du Royaume-Uni aux personnes nées, naturalisées ou enregistrées à Hong Kong;

h) un passeport délivré par les autorités de la zone administrative spéciale de Hong Kong de la République populaire de Chine.

22 Finally, it appears from section 13 of the *IRPR* that a passport or any other document may be produced only by producing the original document:

Production of documents

13. (1) Subject to subsection (2), a requirement of the Act or these Regulations to produce a document is met

(a) by producing the original document;

(b) by producing a certified copy of the original document; or

(c) in the case of an application, if there is an application form on the Department's website, by completing and producing the form printed from the website or by completing and submitting the form on-line, if the website indicates that the form can be submitted on-line.

Exception

(2) Unless these Regulations provide otherwise, a passport, a permanent resident visa, a permanent resident card, a temporary resident visa, a temporary resident permit, a work permit or a study permit may be produced only by producing the original document.

* * *

Production de documents

13. (1) Sous réserve du paragraphe (2), la production de tout document requis par la Loi ou le présent règlement s'effectue selon l'une des méthodes suivantes :

a) la production de l'original;

b) la production d'un double certifié conforme;

c) dans le cas d'une demande qui peut être produite sur un formulaire reproduit à partir du site Web du ministère, la production du formulaire rempli, ou l'envoi de celui-ci directement sur le site Web du ministère s'il y est indiqué que le formulaire peut être rempli en ligne.

Exception

(2) Sauf disposition contraire du présent règlement, les passeports, visas de résident permanent, cartes de résident permanent, visas de résident temporaire, permis de séjour temporaire, permis de travail et permis d'études ne peuvent être produits autrement que par présentation de l'original.

23 When determining whether the declaratory relief sought by the Applicant should be granted, the applicable legal

regime will vary depending on the date upon which CIC's refusal to land the Applicant is being considered. To the extent that the date upon which the Applicant argues he should have been landed is that of December 23, 1998, the requirements to be applied are those found in the *Immigration Act* and the *Regulations*. If, on the other hand, the Court examines whether the Applicant should have been landed on February 3, 2003, it is the *IRPA* and the *IRPR* that must be applied.

24 No such issue as to the relevant legislation arises when considering the application for an order of *mandamus*. Section 190 of the *IRPA* indicates clearly that Parliament intended the new Act to apply retrospectively, as it specifically provides that the *IRPA* shall apply to all pending applications:

> **Application of this Act**
>
> 190. Every application, proceeding or matter under the former Act that is pending or in progress immediately before the coming into force of this section shall be governed by this Act on that coming into force.
>
> * * *
>
> **Application de la nouvelle loi**
>
> 190. La présente loi s'applique, dès l'entrée en vigueur du présent article, aux demandes et procédures présentées ou instruites, ainsi qu'aux autres questions soulevées, dans le cadre de l'ancienne loi avant son entrée en vigueur et pour lesquelles aucune décision n'a été prise.

25 Consequently, if a *mandamus* order requiring the Respondents to complete the processing of the Applicant's application were to be granted, the application would have to be made in accordance with the new legislative scheme: *Dragan v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 211, [2003] F.C.J. No. 260.

IV. Analysis

A. The Respondents' Motion for Non-Disclosure

26 Rule 17 of the *Federal Courts Immigration and Refugee Protection Rules* (SOR/93-22) ("*Rules*") *requires* the tribunal to include in the CTR "all papers relevant to the matter that are in the possession or control of the tribunal". Section 87 of *IRPA* allows for the non-disclosure of information if its disclosure would be injurious to national security or to the safety of any person.

27 In *Mohammed v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1310, [2006] F.C.J. No. 1630, this Court held that "the decision as to whether something can be withheld or not should be made by the Court and not by the Respondent alone" (at para. 19). Similarly, in *Mekonen v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1133, [2007] F.C.J. No. 1469, the Court held that "it is for the Court and not the tribunal to decide what information can be withheld from an applicant..." (at para. 10).

28 The combined effect of Rule 17 of the *Rules* and this Court's decisions in *Mohammed*, above, and *Mekomen*, above, is that a section 87 motion is required to be filed in all cases where information is redacted from the CTR for reasons of national security.

29 As provided for in paragraph 83(1)(c) of the *IRPA*, upon the request of the Minister, a judge shall hear information or other evidence, in the absence of the public, and the Applicant and his counsel if, in the judge's opinion, its disclosure could be injurious to national security or endanger the safety of any person. The evidence that is adduced in support of this application through the secret affidavit and the attachments thereto must be heard in the absence of the public, the Applicant and his counsel because disclosure of the evidence would be injurious to the national security or endanger the safety of any person.

30 Pursuant to sections 87 and 87.1, and paragraph 83(1)(b), the Court may appoint a special advocate to represent the interests of the permanent resident or foreign national if the Court is of the opinion that considerations of fairness and natural justice so require. In the case at bar, counsel for the Applicant made no such request.

31 After having held an *in camera* and *ex parte* hearing with counsel for the Respondents, during which the witness who filed the secret affidavit in support of the motion was questioned, counsel for the Applicant and for the Respondents were invited to make submissions by way of teleconference. As previously mentioned, it is at the end of this process that I granted the motion brought by the Respondents, with the caveat that one paragraph of the supplementary record be disclosed save for two words.

32 The state has a considerable interest in protecting national security and the security of its intelligence services. The disclosure of confidential information could have a detrimental effect on the ability of investigative agencies to fulfil their mandates in relation to Canada's national security. Although overturned by the Supreme Court on other grounds, the Federal Court found in *Almrei v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 420, [2004] F.C.J. No. 509, that the Court has a duty to ensure the confidentiality of information if, in the opinion of the judge, its disclosure would be injurious to national security or endanger the safety of any person. Quoting from paragraph 25 of the United Kingdom House of Lords decision in *Regina v. Shayler*, [2002] H.L.J. No. 11, Justice Edmond Blanchard stated (at para. 58):

> There is much domestic authority pointing to the need for a security or intelligence service to be secure. The commodity in which such a service deals is secret and confidential information. If the service is not secure those working against the interests of the state, whether terrorists, other criminals or foreign agents, will be alerted, and able to take evasive action; its own agents may be unmasked; members of the service will feel unable to rely on each other; those upon whom the service relies as sources of information will feel unable to rely on their identity remaining secret; and foreign counties will decline to entrust their own secrets to an insecure recipient...

In *Henrie v. Canada (Security Intelligence Review Committee)*, [1989] 2 F.C. 229 (T.D.); aff'd in (1992) 5 Admin. L.R. (2d) 269 (C.A.), this Court recognized the rule that information related to national security ought not to be disclosed as an important exception to the principle that the court process should be open and public:

> There are, however, very limited and well defined occasions where the principle of complete openness must play a secondary role and where, with regard to the admission of evidence, the public interest in not disclosing the evidence may outweigh the public interest in disclosure. This frequently occurs where national security is involved for the simple reason that the very existence of our free and democratic society as well as the continued protection of the rights of litigants ultimately depend on the security and continued existence of our nation and of its institutions and laws.

33 The notion of the sometimes competing interests of the public's right to an open system and the state's need to protect information and its sources was discussed by the Supreme Court of Canada in *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] S.C.J. No. 73. In that case, the Supreme Court acknowledged that the state has a legitimate interest in preserving Canada's supply of intelligence information received from foreign sources and noted that the inadvertent release of such information would significantly injure national security.

34 Disclosure of confidential information related to national security or which would endanger the safety of any person could cause damage to the operations of investigative agencies. In the hands of an informed reader, seemingly unrelated pieces of information, which may not in themselves be particularly sensitive, can be used to develop a more comprehensive picture when compared with information already known by the recipient or available from another source. In *Henrie*, above, Justice David Addy also stated (at paras. 29-30):

> By contrast, in security matters, there is a requirement to not only protect the identity of human sources of information but to recognize that the following types of information might require to be protected with due regard of course to the administration of justice and more particularly to the openness of its proceedings: information pertaining to the identity of targets of the surveillance whether they be individuals or groups, the technical means and sources of surveillance, the methods of operation of the Service, the identity of certain members of the Service itself, the telecommunications and cipher systems and, at times, the very fact that a surveillance is being or is not being carried out. This means for instance that evidence, which of itself might not be of any particular use in actually identifying the threat, might nevertheless require to be protected if the mere divulging of the fact that C.S.I.S. is in possession of it would alert the targeted

> organization to the fact that it is in fact subject to electronic surveillance or to a wiretap or to a leak from some human source within the organization.
>
> It is of some importance to realize that an "informed reader", that is, a person who is both knowledgeable regarding security matters and is a member of or associated with a group which constitutes a threat or a potential threat to the security of Canada, will be quite familiar with the minute details of its organization and of the ramifications of its operations regarding which our security service might well be relatively uninformed. As a result, such an informed reader may at times, by fitting a piece of apparently innocuous information into the general picture which he has before him, be in a position to arrive at some damaging deductions regarding the investigation of a particular threat or of many other threats to national security.

35 Having reviewed the redacted information, and having duly considered the secret affidavit as well the explanations given by the deponent at the *in camera* and *ex parte* hearing, I have come to the conclusion that the redactions sought were necessary in order to protect national security as well as the security of persons mentioned in the secret material. Moreover, the redacted portions of the Certified Tribunal Record are minimal in content and do not seriously prejudice the Applicant's ability to know and comprehend the case he has to meet. In any event, the resolution of this application does not turn on the security clearances of the Applicant. It is for all of these reasons that the motion of the Respondents pursuant to s. 87 of the *IRPA* was granted.

B. The Application for Declaratory Relief

36 Counsel for the Applicant seeks a declaration from this Court that he was landed on December 23, 1998 (the date on which the Applicant attended CIC Etobicoke office for his landing examination), on June 28, 2002 (the date on which the *IRPR* came into force) or in February 2003 (the date on which he submitted a passport obtained from the Indian consulate in replacement of the lost one). On each of these dates, the Applicant submitted that he met all the legal requirements for landing and therefore became a permanent resident.

37 Counsel for the Respondents, for his part, argued that the Applicant could not be granted permanent residence on either of these dates because he could not satisfy an officer that he met all the requirements of the legislation. On December 23, 1998, he was not in possession of a valid and subsisting passport as required by subsection 14(1) of the former *Regulations*, while in February 2003, his medical, criminal and security clearances had expired.

38 There is no doubt that this Court has jurisdiction to grant declaratory relief. Section 18.1(3) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, permits the Court to make whatever declaration is appropriate including both positive and negative declarations. The preconditions to be met before declaratory relief can be granted have been spelled out by the Supreme Court of Canada in the following terms:

> 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.
>
> *Canada v. Solosky*, [1980] 1 S.C.R. 821, at p. 830.

39 In the present case, these preconditions are clearly met. First of all, the parties obviously share a legal relationship ever since the Applicant made his application for permanent residence in 1995. When a person applies for permanent residence, a legal relationship is created as between that person and CIC. For instance, an applicant has a duty to truthfully answer all questions asked by the visa officer (*IRPA*, s. 16(1); *Immigration Act*, s. 12(4)), and to undergo a medical examination (*IRPA*, s. 16(2); *Immigration Act*, s. 11) and an examination by the visa officer (*IRPA*, s. 18; *Immigration Act*, s. 12(1)). CIC, on the other hand, as a duty to grant landing to immigrants who meet all legal requirements (*IRPA*, s. 21; *Immigration Act*, s. 5(2) and 14(2)).

40 Furthermore, the issue at stake is clearly a real one in that it affects the parties' interests and has not been resolved yet. Indeed, the issue is not academic or hypothetical; what is at stake is the Applicant's status in Canada and the possibility to re-enter Canada if he is ever found guilty of the charges that have been laid against him in the United States. This is not to say that the declaration sought by the Applicant would automatically provide any relief

to the Applicant. Disregard of a declaratory judgment does not amount to contempt, as such a declaratory judgment merely states an existing legal situation: *L.C.U.C. v. Canada (Canada Post Corp.)* (1986), 8 F.T.R. 93 (T.D.). For a declaratory order to have any practical and immediate effect, it would have to be accompanied by an order in the nature of a *mandamus*. I shall return to that question shortly. Suffice it to say that even if the Court were not prepared to compel the Respondents to perform any specific duty, there would still be merit in declaring the law. As the Supreme Court stated in another context, government officials and administrative boards are not above the law, and if an official acts contrary to statute, the courts are entitled to so declare: see *Canada v. Kelso*, [1981] 1 S.C.R. 199, at p. 210.

41 I have to agree with counsel for the Respondents that the Applicant could not be landed on February 23, 2003, or indeed at any point in time after the coming into force of *IRPA*, as an officer could not be satisfied that he was not inadmissible. Through no fault of his own, Mr. Singh's medical, criminal and security clearances had expired and needed to be reinitiated when he submitted a valid passport. That being said, this was a most unfortunate state of affairs. For all those years, the Applicant was on a kind of merry-go-round, as one clearance after another had to be redone since their validity periods never all coincided. This is clearly an example of the bureaucracy at its worst, and one can only sympathize with the Applicant's Kafkaesque experience. But from a strictly legal point of view, it is impossible to conclude that the various officials who dealt with Mr. Singh's application after he obtained a new passport erred in applying the requirements of the law.

42 The same cannot be said with respect to the refusal to land him on December 23, 1998. It is not in dispute that the only reason his Record of Landing was taken back from him on that date was his inability to present a valid and subsisting passport. At that point, Mr. Singh had met all the other requirements of the *Immigration Act* and its attendant *Regulations*.

43 The requirement to be in possession of a valid and subsisting passport is found in subsection 14(1) of the *Regulations*, reproduced above at paragraph 17 of these reasons. Being in possession of something generally refers to the control over an object. However, depending of the legal context, a person may be considered in possession of something if that person holds a legal right to assume immediate control over an object: see *Ready John Inc. v. Canada (Department of Public Works and Government Services)*, 2004 FCA 222, [2004] F.C.J. No. 1002 at paras. 42-45. In the specific context of the *Immigration Act*, interpreting the regulatory requirement found in subsection 14(1) as the physical control of the passport by the Applicant would make no sense. The purpose of that subsection is clearly to verify that an immigrant wishing to come to Canada is a citizen of another country and to ascertain the identity of the immigrant before landing him. This is confirmed by an amendment made to the legal regime governing refugees in 1992 (S.C. 1992, ch. 49). Pursuant to s. 38 of that statute, section 46.04 of the *Immigration Act* was modified. The modified paragraph 46.04(8) states:

> (8) An immigration officer shall not grant landing either to an applicant under subsection (1) or to any dependant of the applicant until the applicant is in possession of a valid and subsisting passport or travel document or a satisfactory identity document.

44 Moreover, the French version of subsection 14(1) of the former *Immigration Regulations* stipulates that an immigrant "doit avoir" a valid passport. This expression is clearly much broader than "being in possession of" in the English version. To have a valid passport doesn't necessarily mean to physically hold on the passport, but rather to be the bearer of that document or to have the legal use of it. It should have been sufficient for the Applicant to demonstrate that he was the legal bearer of a valid passport; this is obviously done in general by showing the passport itself, but there may be circumstances where the showing of the physical passport may not be necessary in order to meet this requirement.

45 In the specific context of this case, the interpretation of subsection 14(1) proposed by the Respondents would not only make no sense but would also bring about a terrible injustice on the Applicant. Mr. Singh would be made to suffer for the loss of his passport by officials of the Respondents. Besides, the Respondents had a copy of his passport in the file, which showed that it was valid until 2001. In those very exceptional circumstances, it would be absurd and not in keeping with the wording and the spirit of subsection 14(1) to find that the Applicant could only

satisfy the requirement set out in that provision by having with him the passport itself that was issued to him by the Indian authorities.

46 Counsel for the Respondents cited section 13 of the *IRPR* to bolster his argument. Section 13 of the *IRPR* prescribes an evidentiary rule to the effect that, if the "production" of a document is required by the legislation, it is the original document that must be "produced". Quite apart from the fact that section 13 of the *IRPR* finds no equivalent in the *Immigration Act* or in the former *Regulations*, it must be borne in mind that section 14(1) of the former *Regulations* did not speak of a requirement to produce but to hold a valid passport. These are two different requirements. The requirement to hold (in French "être titulaire de") a document is more than an evidentiary rule; it goes to the substance of being entitled to a valid passport issued by one's country of citizenship.

47 For all of those reasons, I am therefore of the view that CIC erred in law in finding that the Applicant did not comply with the requirement enunciated in s. 14(1) of the former *Immigration Regulations*, and in refusing to land the Applicant on December 23, 1998.

C. ***The Application for Mandamus***

48 The necessary conditions to be met for the issuance of a writ of *mandamus* have been set out by the Federal Court of Appeal in *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742, at para. 45; aff'd [1994] 3 S.C.R. 1100) and aptly summarized by my colleague Justice Danièle Tremblay-Lamer in the following terms:

> (1) there is a public legal duty to the applicant to act;
>
> (2) the duty must be owed to the applicant;
>
> (3) there is a clear right to the performance of that duty, in particular:
>
> (a) the applicant has satisfied all conditions precedent giving rise to the duty;
>
> (b) there was a prior demand for performance of the duty, a reasonable time to comply with the demand, and a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay; and
>
> (4) there is no other adequate remedy.
>
> *Conille v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 F.C. 33, (T.D.) at para. 8

49 In the case at bar, the Applicant seeks two alternative *mandamus* orders. The first order sought is to direct CIC to grant the Applicant his permanent residence within 30 days of the Court's order. Alternatively, the Applicant seeks an order compelling CIC to complete the processing of the Applicant's application within 30 days of the Court's order.

50 There is no doubt in my mind that the Applicant has met all the requirements for the issuance of a *mandamus* order. It is clear that CIC has a public legal duty to process the Applicant's permanent residence application. Section 5(2) of the former *Immigration Act* imposed on CIC a clear obligation to grant landing to an applicant for permanent residence who meets the relevant statutory requirements, and the same is true by virtue of section 11(1) of *IRPA*: see, for example, *Dragan*, above, at para. 40; *Vaziri v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1159, [2006] F.C.J. No. 1458 at para. 41.

51 I also find that the Applicant had a right to the performance of that duty. He submitted a completed application accompanied by all required supporting documents and paid the required processing fees. The record also shows that the Applicant and his counsel repeatedly contacted the Respondents to request updates or a final decision to be made. Yet, more than 14 years after he filed his application, a decision has yet to be made. The Respondents are correct in pointing out that the Applicant, due to the outstanding criminal charges that have been laid against him in the fall of 2005, cannot now satisfy an officer that he is not inadmissible under section 36 of *IRPA*. The fact remains that, prior to those charges having been laid, he had waited almost ten years for his application to be processed. If such a long period of time does not amount to an unreasonable delay, I truly wonder what does.

52 In light of the foregoing, I am of the view that the Applicant is entitled to an order in the nature of a *mandamus*. There is, however, authority for the proposition that while *mandamus* will be issued to compel the performance of a duty, it cannot dictate the result to be reached: see, for example, *Schwartz Hospitality Group Ltd. v. Canada (Minister of Canadian Heritage)*, 2001 FCT 112, at para. 34. Indeed, the jurisprudence is to the effect that issuing specific directions may sometimes be warranted, but only in very limited and exceptional circumstances. As stated by the Federal Court of Appeal in *Rafuse v. Canada (Pension Appeals Board)*, 2002 FCA 31, [2002] F.C.J. No. 91 at par. 14:

> While the directions that the Court may issue when setting aside a tribunal's decision include directions in the nature of a directed verdict, this is an exceptional power that should be exercised only in the clearest of circumstances: *Xie, supra*, at paragraph 18. Such will rarely be the case when the issue in dispute is essentially factual in nature (*Ali v. Canada (Minister of Employment and Immigration)*, [1994] 3 F.C. 73 (T.D.)), particularly when, as here, the tribunal has not made the relevant finding.
>
> See also: *Johnson v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1262, [2005] F.C.J. No. 1523, at paras. 20-22; *Xie v. Canada (Minister of Employment and Immigration)* (1994), 75 F.T.R. 125 (F.C.T.D.) at para. 18.

53 In the case at bar, the issue of the Applicant's inadmissibility was apparently resolved in his favour at the time of his interview on December 23, 1998. Had it not been for the error of the officer in determining that the Applicant did not hold a valid passport because it had been seized at the visa office in Buffalo and never returned to him, the Applicant would most probably have been landed on that date. The evidence in that respect, however, is not devoid of all ambiguity, and does not allow the Court to bypass the assessment of an immigration officer and to substitute its decision to that of the Minister and those who are entrusted with his delegated authority.

54 Accordingly, the decision not to land the Applicant on December 23, 1998 is quashed, and the Applicant's file is remitted back to the Respondents to be processed in accordance with the law as it stood on that date and on the basis of the Applicant's record at the time. The processing of the Applicant's file shall also be made in light of these reasons, and in particular in light of the declaratory order with respect to s. 14(1) of the *Immigration Act*. Because of the long delays through which the Applicant already had to go through, the redetermination shall be made within 90 days of the release of this Court's order.

55 Counsel proposed no question for certification, and none will be certified.

56 Counsel for the Applicant seeks his costs on a solicitor-client basis. I agree with the Respondents that there is no justification for such an award. That being said, I am prepared to grant costs on a party to party basis to the Applicant. I am of the view that the long delay in processing the Applicant's file amounts to "special circumstances" for the purpose of Rule 22 of the *Federal Courts Immigrations and Refugee Protection Rules*, SOR/93-22. Accordingly, the Respondents are jointly ordered to pay $2,000 to the Applicant.

ORDER

THIS COURT ORDERS that this application for judicial review be granted. More specifically, the Court makes the following two orders:

* The Court declares that the requirement to hold a valid passport found in s. 14(1) of the *Regulations* adopted under the former *Immigration Act* did not require an Applicant to actually have in his or her possession a hard copy of his or her passport, when it can be established by other means that the Applicant holds a valid passport;
* The Court further orders CIC to process the application for landing of the Applicant within 90 days of the release of this Order, in accordance with the law as it stood on December 23, 1998 and as interpreted in the reasons for this Order, and on the basis of the Applicant's record on that date.
* The Respondents are ordered to pay the Applicant a lump sum of $2,000.00.

de MONTIGNY J.

End of Document

Toronto-Dominion Bank v. Deloitte Haskins & Sellsand Deloitte & ToucheIndexed as: Toronto-Dominion Bank v. Deloitte Haskins & Sells(Gen. Div.), 5 O.R. (3d) 417

Ontario Reports

Ontario Court (General Division)

Blair J.

September 26, 1991

Action No. 72863/91Q

5 O.R. (3d) 417 | [1991] O.J. No. 1618

Case Summary

Torts — Negligent misstatement — Liability of auditor to third parties — Pure economic loss — Bank suing auditor of debtor for negligent preparation of financial statements — Bank pleading that auditor knew that financial statements would be provided to bank by debtor in connection with loan agreement and that bank relied on information to its detriment — Auditor's motion to strike out statement of claim as disclosing no reasonable cause of action dismissed.

The plaintiff loaned money to L Ltd., a company of which the defendant was auditor. The defendant prepared audited financial statements for the year ended March 31, 1989 and issued an unqualified auditor's report in connection therewith. In April 1990, L Ltd. made an assignment in bankruptcy; the plaintiff was an unsecured creditor in the bankruptcy for the full amount of the loan. The plaintiff sued the defendant on the basis of the auditor's alleged negligence in the preparation of the audited financial statements. The plaintiff alleged that the defendant knew or ought to have known that the audited financial statements would be provided to the plaintiff after they were received by L Ltd.; that the plaintiff would rely on the audited financial statements in continuing to extend credit to L Ltd. and might rely on them to extend further credit; and that the audited financial statements would be delivered to the plaintiff to assess the financial condition of L Ltd. and as a basis to continue to extend or to increase the credit. The defendant moved under rule 21.01(1) of the Rules of Civil Procedure for the determination of the question whether, in the absence of a special relationship with the claimant, an auditor is liable for pure economic loss, and for an order striking out the statement of claim on the ground that it disclosed no reasonable cause of action.

Held, the motion should be dismissed.

The question to be determined on this motion was whether or not, on the facts as assumed from the pleadings, it could be said to be plain, obvious and beyond doubt that the plaintiff would not be successful in establishing the existence of a special relationship at trial.

The liability of an auditor to third parties for negligent misstatement in cases of pure economic loss must be grounded on something narrower than the broad question of foreseeability. Whether this narrowing concept is characterized as the requirement for a "special relationship" or a knowledge of the "nature and purpose of the transaction", or more generally as "knowledge" amounted to the same thing, i.e. to "knowledge". Knowledge of the requisite sort was pleaded.

Al Saudi Banque v. Clark Pixley (a firm), [1990] Ch. 313, [1989] 3 All E.R. 361, [1990] 2 W.L.R. 344 (Ch. D.); Caparo Industries plc v. Dickman, [1990] 1 All E.R. 568, [1990] 2 W.L.R. 358 (H.L.); Haig v. Bamford, [1977] 1 S.C.R. 466, 27 C.P.R. (2d) 149, 72 D.L.R. (3d) 68, 9 N.R. 43, [1976] 3 W.W.R. 331, consd

Other cases referred to

Air India Flight 182 Disaster Claimants v. Air India (1987), 62 O.R. (2d) 130, 44 D.L.R. (4th) 317 (H.C.J.); Al-Nakib Investments (Jersey) Ltd. v. Longcroft, [1990] 3 All E.R. 321, [1990] 1 W.L.R. 1390 (Ch. D.); Canada Deposit Insurance Corp. v. Prisco (1990), 2 C.B.R. (3d) 96 (Alta. Q.B.); Candler v. Crane, Christmas & Co., [1951] 2 K.B. 164, [1951] 1 All E.R. 426, [1951] 1 T.L.R. 371, 95 Sol. Jo. 171 (C.A.); Dixon v. Deacon Morgan McEwan Easson (1989), 41 B.C.L.R. (2d) 82, 64 D.L.R. (4th) 441, [1990] 2 W.W.R. 500 (S.C.); Federal Business Development Bank v. Morris, Burk, Luborsky, David & Kale (1988), 38 B.L.R. 1 (Ont. H.C.J.); Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd., [1964] A.C. 465, [1963] 2 All E.R. 575, [1963] 3 W.L.R. 101, 107 Sol. Jo. 454, [1963] 1 Lloyd's Rep. 485 (H.L.); Hong Kong Bank of Canada v. Touche Ross & Co. (1989), 36 B.C.L.R. (2d) 381, 74 C.B.R. (N.S.) 164 (C.A.); Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, 49 B.C.L.R. (2d) 273, 74 D.L.R. (4th) 321, [1990] 6 W.W.R. 385; James McNaughton Paper Group Ltd. v. Hicks Anderson & Co., [1991] 2 Q.B. 113, [1991] 1 All E.R. 134, [1991] 2 W.L.R. 641 (C.A.); Kripps v. Touche Ross & Co. (1990), 52 B.C.L.R. (2d) 291 (S.C.); McGauley v. British Columbia (1990), 44 B.C.L.R. (2d) 217 (S.C.), revd (1991), 56 B.C.L.R. (2d) 1 (C.A.); MacPherson v. Schachter (1989), 1 C.C.L.T. (2d) 65 (B.C. S.C.); Morgan Crucible Co. plc v. Hill Samuel & Co. Ltd., [1991] Ch. 295, [1991] 1 All E.R. 148, [1991] 2 W.L.R. 655 (C.A.); Moriarity v. Slater (1989), 67 O.R. (2d) 758, 42 B.L.R. 52 (H.C.J.); Surrey Credit Union v. Willson (1990), 49 B.C.L.R. (2d) 102, 80 C.B.R. (N.S.) 171, 73 D.L.R. (4th) 207, [1990] 6 W.W.R. 578 (S.C.); Toromont Industrial Holdings Ltd. v. Thorne, Gunn, Helliwell & Christenson (1975), 10 O.R. (2d) 65, 23 C.P.R. (2d) 59, 62 D.L.R. (3d) 225 (H.C.J.), varied (1976), 14 O.R. (2d) 87, 73 D.L.R. (3d) 122, 30 C.P.R. (2d) 93 (C.A.); Ultra Mares Corp. v. Touche, 255 N.Y. 170 (1931)

Rules and regulations referred to

Rules of Civil Procedure, O. Reg. 560/84, rule 21.01, 21.01(1) (a), (b)

MOTION for a determination before trial of a question of law and for an order striking out a statement of claim.
John A. Campion and Paul F. Monahan, for plaintiff (responding party).

J.W. Mik and Lisa S. Corne, for defendant (moving party).

BLAIR J.

Nature of the proceeding

In this action there arises a broad and very important question of law. That question concerns the development and scope in Canada of an auditor's liability in tort for negligent misstatement.

The motion before me is under rule 21.01(1) of the Rules of Civil Procedure, O. Reg. 560/84, for:

(a) the determination before trial of a question of law raised by a pleading where the determination of the question may dispose of the claim, and

(b) an order striking out the statement of claim on the ground that it discloses no reasonable cause of action.

On such a motion the principles or tests to be applied are the following:

(i) the allegations of fact in the statement of claim, unless patently ridiculous or incapable of proof, must be accepted as proven:

(ii) the moving party, in order to succeed, must show that it is plain, obvious and beyond doubt the plaintiff could not succeed;

(iii) the novelty of the cause of action will not militate against the plaintiff; and,

(iv) the statement of claim must be read generously with allowance for inadequacies due to drafting deficiencies.

See Air India Flight 182 Disaster Claimants v. Air India (1987), 62 O.R. (2d) 130, 44 D.L.R. (4th) 317 (H.C.J.), at p. 135 O.R., p. 322 D.L.R.; Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321, at pp. 979-80 and 990-92 S.C.R., pp. 335-36 and 343-44 D.L.R.

I am of the view that these same principles or tests apply whether the motion is brought under rule 21.01(1)(a) or (b). Both involve a consideration of legal principles applied to facts as set out in the pleadings. Although he did not say so specifically, Mr. Justice White suggested as much in Moriarity v. Slater (1989), 67 O.R. (2d) 758, 42 B.L.R. 52 (H.C.J.). There, in reference to the procedure under both subrules, he commented that the proposition in question must be "crystal clear" to the motions judge and that caution and prudence should govern the exercise of the court's discretion.

Facts

The plaintiff, Toronto-Dominion Bank (the Bank), was banker to a company called Leigh Instruments Limited (Leigh) from 1982 until April 1990. By that time Leigh was indebted to the Bank in the amount of $40.5 million. The indebtedness was secured by a "letter of comfort" from Leigh's parent, the Plessy Company plc (Plessy).

The defendant, which I will refer to as "Deloitte", was Leigh's auditor. In the course of its general mandate from the company, it prepared audited financial statements for the year ended March 31, 1989 and issued an unqualified auditor's report in connection therewith. The bank loan appeared on Leigh's balance sheet, and the fact that it was secured by a comfort letter was described in a note to the financial statements.

On April 12, 1990, Leigh made an assignment in bankruptcy. I am told that there is other litigation between the Bank and Plessy regarding the Plessy security, which has apparently turned out to be somewhat less than a comfort to the Bank. In any event, the Bank is left as an unsecured creditor in the Leigh bankruptcy for the full amount of the loan advanced at the time.

In this action the Bank sues Deloitte on the basis of the auditor's alleged negligence in the preparation of the audited financial statements. The Bank asserts that the statements were provided to it as a term of the loan agreement, that it relied upon them in continuing and making further advances under the loan agreement, and that the auditors knew this would be the case. More specifically, the allegations which are of central importance for the disposition of this proceeding are the allegations that Deloitte knew (or ought to have known):

(a) that the audited financial statements would be provided to the Bank after they were received by Leigh;

(b) that the Bank would rely on the audited financial statements in continuing to extend credit to Leigh and might rely on them to extend further credit;

(c) that the audited financial statements would be delivered to the Bank to assess the financial condition of Leigh and as a basis to continue to extend or to increase the credit.

These facts, of course, have not been proved, but as outlined above, I am required to assume their truth for the purposes of this motion.

Issue

In his factum, Mr. Mik, on behalf of Deloitte, articulates the issue and the question of law for determination as one of "the liability of an auditor, in the absence of a special relationship with the claimant, for pure economic loss".

By "a special relationship" he means something more than mere knowledge or foreseeability, which he concedes is established on the pleadings. That "something more" (my term) he characterizes as the requirements of "proximity" and "fairness", relying strongly on the decision of the House of Lords in Caparo Industries plc v. Dickman, [1990] 1 All E.R. 568, [1990] 2 W.L.R. 358, and a companion decision of Millett J. in the Court of Queen's Bench in England, called Al Saudi Banque v. Clark Pixley (a firm), [1990] Ch. 313, [1989] 3 All E.R. 361 (Ch. D.).

In my view, the issue before me is more accurately articulated in another way. The question is whether or not, on the facts as assumed from the pleading, it can be said to be "plain, obvious and beyond doubt" that the plaintiff will not be successful in establishing the existence of such a special relationship (however that relationship is characterized), at a trial.

Law

Since the House of Lords broke through the barrier to liability in tort for negligent misstatement in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd., [1964] A.C. 465, [1963] 2 All E.R. 575, there has been no dirth of authorities fastening auditors with such a responsibility.

In Canada, Mr. Justice R.E. Holland found against a firm of auditors in Toromont Industrial Holdings Ltd. v. Thorne, Gunn, Helliwell & Christenson (1975), 10 O.R. (2d) 65, 62 D.L.R. (3d) 225 (H.C.J.), although he was reversed in part on appeal ((1976), 14 O.R. (2d) 87, 73 D.L.R. (3d) 122 (C.A.)). There are other examples -- here and in England -- and the Supreme Court of Canada, itself, considered the question in Haig v. Bamford, [1977] 1 S.C.R. 466, 72 D.L.R. (3d) 68.

The law is clear, therefore, that auditors may be liable to third parties in tort for negligent misstatement. Mr. Mik submits, however, that Caparo and Al Saudi Banque, and several decisions in British Columbia that appear to have accepted those cases, have narrowed the ambit of that liability in cases of pure economic loss. Haig v. Bamford (when considered in light of its facts and the root decision on which it is based -- Lord Justice Denning's dissent in Candler v. Crane, Christmas & Co., [1951] 2 K.B. 164, [1951] 1 All E.R. 426 (C.A.)) is not inconsistent with the principles enunciated in those cases, he argues, and the law is now refined and settled in this respect in a way that precludes this action against the defendant.

Caparo and its progeny of cases stand for the proposition that the following ingredients are necessary to establish a duty of care for negligent misstatement on the part of advisers such as accountants: (1) foreseeability of damage; (2) proximity or neighbourhood; (3) a sense that it is fair, just and reasonable to impose a duty in the circumstances.

Throughout the very thorough arguments of counsel for both parties, I was referred to a number of authorities on this subject, in addition to those mentioned above. These included: Federal Business Development Bank v. Morris, Burk, Luborsky, David & Kale (1988), 38 B.L.R. 1 (Ont. H.C.J.); Hong Kong Bank of Canada v. Touche Ross & Co. (1989), 36 B.C.L.R. (2d) 381, 74 C.B.R. (N.S.) 164 (C.A.); MacPherson v. Schachter (1989), 1 C.C.L.T. (2d) 65 (B.C. S.C.); Dixon v. Deacon Morgan McEwan Easson (1989), 64 D.L.R. (4th) 441, [1990] 2 W.W.R. 500 (B.C. S.C.); Surrey Credit Union v. Willson (1990), 49 B.C.L.R. (2d) 102, 73 D.L.R. (4th) 207 (S.C.); Kripps v. Touche Ross & Co. (1990), 52 B.C.L.R. (2d) 291 (S.C.); McGauley v. British Columbia (1990), 44 B.C.L.R. (2d) 217 (S.C.), appeal allowed to the extent of granting the plaintiff one last chance to amend statement of claim (1991), 56 B.C.L.R. (2d) 1 (C.A.); Al-Nakib Investments (Jersey) Ltd. v. Longcroft, [1990] 3 All E.R. 321, [1990] 1 W.L.R. 1390 (Ch. D.); Canada Deposit Insurance Corp. v. Prisco, Alta. Q.B., Wachowich J., November 30, 1990 [now reported 2 C.B.R. (3d) 96]; Morgan Crucible Co. plc v. Hill Samuel & Co. Ltd., [1991] Ch. 295, [1991] 1 All E.R. 148 (C.A.); James McNaughton Paper Group Ltd. v. Hicks Anderson & Co., [1991] 2 Q.B. 113, [1991] 2 W.L.R. 641 (C.A.).

Mr. Campion, on behalf of the Bank, does not concede that the law in this area has been redefined in any definitive way in Canada. He does accept that liability must be grounded on something narrower than the broad question of foreseeability in order to balance the policy considerations between a right to recovery for economic loss and the exposure of liability "in an indeterminate amount for an indeterminate time to an indeterminate class" (the oft-cited remark of Chief Justice Cardozo in Ultra Mares Corp. v. Touche, 255 N.Y. 170 (1931), at p. 179). He submits, however, that whether this narrowing concept is characterized as the requirement for a "special relationship" or as knowledge of the "nature or purpose of the transaction", or more generally as "knowledge", it amounts to the same thing: it amounts to "knowledge". And "knowledge" of the requisite sort, he argues, is pleaded.

He also submits that even if the test for liability is that set out in the Caparo line of authorities, the Bank has met those tests on the facts as pleaded, at least for the purposes of a motion such as this.

I agree.

In Haig v. Bamford, supra, the Supreme Court of Canada deliberately left open the question of whether foreseeability was a proper test to apply in determining the full extent of the duty owed by accountants to third parties. It held that "actual knowledge of the limited class that will use and rely on the statement" was sufficient to found liability on the facts of that case (supra, p. 476 S.C.R., p. 75 D.L.R.). Mr. Justice Dickson (as he then was) adopted [p. 477 S.C.R., p. 75 D.L.R.] as his starting point Lord Justice Denning's question in Candler v. Crane, Christmas & Co., supra, "To whom do these professional people owe this duty?", and his following answer:

> They owe the duty, of course, to their employer or client, and also, I think, to any third person to whom they themselves show the accounts, or to whom they know their employer is going to show the accounts so as to induce him to invest money or take some other action on them.

(Emphasis added)

Later, in summarizing his decision, Mr. Justice Dickson also stated [pp. 483-84 S.C.R., p. 80 D.L.R.]:

> I can see no good reason for distinguishing between the case in which a defendant accountant delivers information directly to the plaintiff at the request of his employer ... and the case in which the information is handed to the employer who, to the knowledge of the accountant, passes it to members of a limited class (whose identity is unknown to the accountant) in furtherance of a transaction the nature of which is known to the accountant.

(Emphasis added)

It is pleaded in this action that Deloitte knew that the financial statements would be provided to the Bank by Leigh in connection with the loan agreement and for the purpose of assessing the credit facility, and that the Bank relied on the information to its detriment. Having regard to this and to the passages from Haig v. Bamford cited above and having regard, I must say, even to the requirements of the Caparo line of cases -- if, indeed, they do establish the criteria -- I am not able to conclude that it is "plain, obvious and beyond doubt" that the plaintiff cannot succeed at trial.

I am mindful also of the following cautionary guideline noted by Madam Justice Wilson in Hunt v. Carey Canada Inc., supra, at pp. 990-91 S.C.R., p. 344 D.L.R.:

> ... 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 in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.

This is just such a case, it seems to me. Tempting though it may be as a judge in matters such as this, to whet one's interest and appetite in a delicious legal issue, the whetting, in my view, is best left to a time when the whole meal can be digested.

Conclusion

Accordingly, an order will go dismissing the defendant's motion, with costs to the plaintiff in the cause.

I am grateful to counsel for their skilful arguments and for the helpful materials which were provided to me.

Motion dismissed.

Thorson v. Canada (Attorney General), [1975] 1 S.C.R. 138

Supreme Court Reports

Supreme Court of Canada

Present: Fauteux C.J. and Abbott, Martland, Judson, Ritchie, Spence, Pigeon, Laskin and Dickson JJ.

1973: June 6, 7 / 1974: January 22.

[1975] 1 S.C.R. 138 | [1975] 1 R.C.S. 138

Joseph Thorarinn Thorson, Appellant; and The Attorney General of Canada, The Secretary of State of Canada, The Receiver General of Canada, Keith Spicer, The Bilingual Districts Advisory Board, Roger Duhamel, Paul Fox and Roger St. Denis, Respondents.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Case Summary

Actions — Status — Standing of taxpayer in class action — Interest no greater than that of any other taxpayer — Challenge of federal legislation — Official Languages Act, R.S.C. 1970, c. 0-2.

The appellant, suing as a taxpayer in a class action, claimed that the Official Languages Act, 1968-69 (Can.), c. 54 and Appropriation Acts providing money to implement it were unconstitutional. The question of standing was raised as a preliminary question of law and was decided against the appellant, both at first instance and on appeal.

Held (Fauteux C.J. and Abbott and Judson JJ. dissenting): The appeal should be allowed.

Per Martland, Ritchie, Spence, Pigeon, Laskin and Dickson JJ.: A question of alleged excess of legislative power is a justiciable one, and it is open to the Court, in the exercise of a discretionary power, to allow a taxpayer to have such a question adjudicated in a class action, being in effect a class action by a member of the public, when otherwise it could be immune from judicial review because there is no person or class of persons particularly aggrieved and because of the unwillingness of the Attorney-General to institute proceedings or of the Government to direct a reference. Any attempt to place standing in a federal taxpayer suit on the likely tax burden is as unreal as it is in the case of municipal taxpayer suits. It is not the alleged waste of public funds alone but the right of citizenry to constitutional behaviour that will support standing. As a matter of discretion the appellant should be allowed to proceed to have the suit determined on the merits.

Per Fauteux C.J., Abbott and Judson JJ. dissenting: The ratio of the judgments in the Ontario courts is that an individual has no status to challenge the constitutional validity of an Act of Parliament unless he is specially affected or exceptionally prejudiced by it. Municipal taxpayer class actions are in a class of their own since municipal corporations and municipal councils are creatures of a statute and can only do those things which they are authorized to do.

Cases Cited

[MacIlreith v. Hart, (1907), 39 S.C.R. 657; Smith v. Attorney General of Ontario, [1924] S.C.R. 331; Dyson v. The Attorney General, [1911] 1 K.B. 410, (2nd Dyson case) [1912] 1 Ch. 158; Attorney General v. Independent Broadcasting Authority, ex parte McWhirter, [1973] 1 All E.R. 689; London County Council v. Attorney General, [1902] A.C. 165; Wallasey Local Board v. Gracey, (1887), 36 Ch. 593; Tottenham U.D.C. v. Williamson & Sons Ltd., [1896] 2 Q.B. 353; Boyce v. Paddington Borough Council, [1903] 1 Ch. 109; Electrical Development Co. of Ontario v. Attorney General of Ontario, [1919] A.C. 687; B.C. Power Corpn. Ltd. v. B.C. Electric Co. Ltd., [1962] S.C.R. 642;

Attorney General for Victoria v. The Commonwealth (1946), 71 C.L.R. 237; Massachusetts v. Mellon, (1923), 262 U.S. 447; Ref. Re ss. (1), (3), (4), s. 11, Official Languages Acts, s. 14 Official Languages Act (N.B.), (1972), 5 N.B.R. (2d) 653; Paterson v. Bowes, (1853), 4 Gr. 170; Toronto v. Bowes, (1853), 4 Gr. 489 affd. (1856), 6 Gr. 1, affd. (1858), 11 Moo. P.C. 463, 14 E.R. 770; Crampton v. Zabriskie, (1879), 101 U.S. 601; Bromley v. Smith, (1826), 1 Sim. 8, 57 E.R. 482; Prescott v. Birmingham, [1955] Ch. 210; Bradbury v. Enfield, [1967] 1 W.L.R. 1311; Holden v. Bolton, (1887), 3 T.L.R. 676; Collins v. Lower Hutt City Corporation, [1961] N.Z.L.R. 250; Bradford v. Municipality of Brisbane, [1901] Queensland L.J. 44; Frothingham v. Mellon, (1923), 262 U.S. 447; Flast v. Cohen, (1968), 392 U.S. 83; Everson v. Board of Education, (1947), 330 U.S.1; Doremus v. Board of Education, (1952), 342 U.S. 429; Sierra Club v. Morton, (1972), 405 U.S. 727; Anderson v. Commonwealth (1932), 47 C.L.R. 50; R. v. Barker, (1762), 3 Burr. 1265, 97 E.R. 823 referred to.]

APPEAL from a judgment of the Court of Appeal for Ontario [[1972] 2 O.R. 340] dismissing an appeal from a judgment of Houlden J. whereby the appellants action was dismissed for want of status.
J.T. Thorson, Q.C., in person. J.J. Robinette, Q.C., T.B. Smith, Q.C., for the respondent.

Solicitor for the appellant: J.T. Thorson, Ottawa. Solicitor for the respondents: D.S. Maxwell, Ottawa.

The judgment of Fauteux C.J. and Abbott and Judson JJ. was delivered by

JUDSON J.

JUDSON J.:— The appellant, Joseph Thorarinn Thorson, sued in the Supreme Court of Ontario for a declaration that the Official Languages Act is ultra vires of the Parliament of Canada, and for a similar declaration in respect of appropriation Acts of the Parliament of Canada insofar as they grant money out of the Consolidated Revenue Fund for the purposes of this Act. The appellant also asked for an order compelling repayment into the Consolidated Revenue Fund of moneys already expended.

One of the defences raised by the defendants in the action was that the appellant had no status to maintain the action. Following the close of pleadings, the defendants applied for an order under Rule 124 of the Rules of Practice of the Supreme Court of Ontario for leave to set down for hearing two questions of law before the trial of the action. These are:

1. That the plaintiff (appellant) has no status or standing to maintain this action;

2. That since the plaintiff (appellant) has not alleged that he as a taxpayer of Canada has suffered any special damage or damage that would set him apart from other taxpayers of Canada as a result of the enactment of the Official Languages Act, the plaintiff (appellant) has no status or standing to obtain the relief claimed in the amended statement of claim.

Leave was granted and these two questions came on for hearing before Mr. Justice Houlden. He found that the appellant had no status to maintain the action and accordingly dismissed it. His judgment [[1972] 1 O.R. 86] was affirmed by a unanimous Court of Appeal [[1972] 2 O.R. 340].

The ratio of the judgments in the Ontario courts is that an individual has no status to challenge the constitutional validity of an Act of Parliament unless he is specially affected or exceptionally prejudiced by it. The plaintiff in this action had only the same interest as any other taxpayer in Canada, and any increased taxes resulting from the implementation of the Act would be borne by all the taxpayers of Canada.

In my opinion, this decision is sound and the case is governed directly by the judgment of this Court in Smith v. Attorney General of Ontario [[1924] S.C.R. 331]. In this action, Smith was asking for a declaratory judgment that Part IV of the Canada Temperance Act was not validly in force in the Province of Ontario. The ratio of the judgment of the Court is contained in the reasons of Duff J., at pp. 337 and 338, in the following terms:

> Much may be said, no doubt, for the view that an individual in the position of the appellant ought, without subjecting himself to a prosecution for a criminal offence, to have some means of raising the question of the legality of official acts imposing constraint upon him in his daily conduct which, on grounds not unreasonable, he thinks are unauthorized and illegal. We think, however, that to accede to appellant's contention upon this point would involve the consequence that virtually every resident of Ontario could

> maintain a similar action; and we can discover no firm ground on which the appellant's claim can be supported which would not be equally available to sustain the right of any citizen of a province to initiate proceedings impeaching the constitutional validity of any legislation directly affecting him, along with other citizens, in a similar way in his business or in his personal life.
>
> We think the recognition of such a principle would lead to grave inconvenience and analogy is against it. An individual, for example, has no status to maintain an action restraining a wrongful violation of a public right unless he is exceptionally prejudiced by the wrongful act. It is true that in this court this rule has been relaxed in order to admit actions by ratepayers for restraining ultra vires expenditures by the governing bodies of municipalities; MacIlreith v. Hart (1907), 39 S.C.R. 657. We are not sure that the reasons capable of being advanced in support of this exception would not be just as pertinent as arguments in favour of the appellant's contention, but this exception does not rest upon any clearly defined principle, and we think it ought not to be extended.

These reasons were accepted by Mignault J. and Maclean J. Idington J. thought that the action was an attempt to get an opinion which, on the facts presented, the Court had no right to give. He declined to express any opinion on the questions submitted and concurred in the dismissal of the action for the reasons given by him. The Chief Justice, who presided at the hearing, died before judgment was pronounced.

In the Smith case, as in the present appeal, much emphasis was laid on the decision in Dyson v. Attorney-General [[1911] 1 K.B. 410, and [1912] 1 Ch. 158]. In my opinion Dyson's case has no bearing upon the problem before us. The appellant in this case is seeking a declaration that Parliament had no power to enact a certain piece of legislation. Dyson's case was concerned with no such issue. The attack in Dyson's case was upon the action of the Commissioners of Inland Revenue. They had devised a form which required all land owners to state the annual value of their land on a certain basis. Dyson's objection was that this demand was not authorized by the Act, and the Court of Appeal agreed with him [[1911] 1 K.B. 410]. The decision was, therefore, a declaratory judgment against a certain form of administrative action. It was sought in the Smith case to extend this principle to legislation and this request was rejected, and rightly so in my opinion. It is being repeated in this appeal and should be rejected again.

It is also my opinion that Duff J. was right in refusing to extend the ratepayer's action in municipal cases to the kind of action before him in the Smith case and before us in the present case. These actions to restrain illegal or ultra vires expenditures, to recover funds illegally paid out or retained by a member of council (MacIlreith v. Hart [(1908), 39 S.C.R. 657]; Paterson v. Bowes [(1853), 4 Gr. 170]) bear no analogy to the present case. I do not regard them as a relaxation of the rule enunciated in the Smith case. They are in a class of their own. Municipal corporations and municipal councils are creatures of a statute and can only do those things which they are authorized, expressly or implicitly, to do. The ratepayer's action is one means of keeping municipal action within municipal powers.

I would dismiss the appeal with costs.

The judgment of Martland, Ritchie, Spence, Pigeon, Laskin and Dickson JJ. was delivered by

LASKIN J.

LASKIN J.:-- An important question of standing is raised by this appeal, brought here by leave of this Court. The appellant, suing as a taxpayer in a class action, claims a declaration against the Attorney General of Canada that the Official Languages Act, 1968-69 (Can.), c. 54, now R.S.C. 1970, c. 0-2, and Appropriation Acts providing money to implement it, are unconstitutional. There are other defendants in the action as framed, against whom specific relief is claimed, but it seems to have been assumed that their liability depends initially on whether the appellant can succeed in his claim against the Attorney General of Canada; and that unless the appellant has standing to seek a declaration of unconstitutionality, the various claims of relief must fail in limine.

The question of standing was, on the motion of the defendants under R.124 (Ont.), set down for hearing as a preliminary question of law, and was decided by Houlden J. in their favour. An appeal by the plaintiff to the Ontario Court of Appeal was dismissed without calling on counsel for the defendants. The Court of Appeal, in short reasons, approved the interpretation placed by Houlden J. on the two judgments of this Court upon which, in his view, the issue turned, namely MacIlreith v. Hart [(1907), 39 S.C.R. 657] and Smith v. Attorney General of Ontario [[1924]

S.C.R. 331]. Houlden J. regarded the Smith case as laying down the applicable principle as expounded in the reasons of Duff J., speaking in this respect for the majority of the Court. Houlden J. said this in the course of his reasons:

> In my judgment, the principle stated in the Smith case is one of general application. This principle is that an individual has no status or standing to challenge the constitutional validity of an Act of Parliament in an action of this type unless he is specially affected or exceptionally prejudiced by it ... The fact that the taxes of the plaintiff and the taxes of every taxpayer in Canada will be raised as a result of the implementation of the Official Languages Act is not, in my opinion, sufficient to constitute special damage or prejudice to the plaintiff so as to enable the plaintiff to bring this action.
>
> I think there is sound reason for this result. If every taxpayer could bring an action to test the validity of a statute that involved the expenditure of public money it would in my view lead to grave inconvenience and public disorder. It is for this reason, I believe, that the plaintiff has been unable to find any Canadian or English decision as authority for the position he is asserting.

I do not think that anything is added to the reasons for denying standing, if otherwise cogent, by reference to grave inconvenience and public disorder. An effective answer to similar arguments advanced in Dyson v. The Attorney General [[1911] 1 K.B. 410], was given by Farwell L.J. in his reasons at p. 423, reasons endorsed by Fletcher Moulton L.J. in the second Dyson case [[1912] 1 Ch. 158], at p. 168. The Courts are quite able to control declaratory actions, both through discretion, by directing a stay, and by imposing costs; and as a matter of experience, MacIlreith v. Hart, to which I will return, does not seem to have spawned any inordinate number of ratepayers' actions to challenge the legality of municipal expenditures. A more telling consideration for me, but on the other side of the issue, is whether a question of constitutionality should be immunized from judicial review by denying standing to anyone to challenge the impugned statute. That, in my view, is the consequence of the judgments below in the present case. The substantive issue raised by the plaintiff's action is a justiciable one; and, prima facie, it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication.

Because of the way in which the matter now before this Court arose, the facts alleged in the amended statement of claim are taken as admitted for present purposes. They do not, of course, answer the legal question which has been posited on those facts. There is one admission of fact to which I wish to refer, however, which was not considered in the reasons of the Courts below. Before bringing his action, the plaintiff wrote to the Attorney General of Canada inviting him, in his capacity as representative of the Crown in right of Canada in matters legal, to take appropriate proceedings to test the validity of the Official Languages Act. The letter noted that prior to the enactment of this statute the plaintiff had asked for a reference to this Court to have its validity considered but his request was refused. Although the record contains no reply to the plaintiff's letter there is an admission by the defendants in their amended statement of defence that the Attorney General declined to act in his public capacity to challenge the constitutionality of the statute.

If a previous request to the Attorney General to institute proceedings or to agree to a relator action is a condition of a private person's right to initiate proceedings such as this on his own (see Attorney General v. Independent Broadcasting Authority, ex parte McWhirter [[1973] 1 All E.R. 689], at p. 698) that condition has been met in this case. I doubt, however, whether such a condition can have any application in a federal system where the Attorney General is the legal officer of a Government obliged to enforce legislation enacted by Parliament and a challenge is made to the validity of the legislation. The situation is markedly different from that of unitary Great Britain where there is no unconstitutional legislation and the Attorney General, where he proceeds as guardian of the public interest, does so against subordinate delegated authorities. Indeed, in such situations the decision of the Attorney General to proceed on his own or to permit a relator action is within his discretion and not subject to judicial control: see London County Council v. Attorney General [[1902] A.C. 165]. Nevertheless, what was said by Lord Denning in the McWhirter case, supra, on the position of a member of the public where the Attorney General refuses without good reason to take proceedings ex officio or to give leave for relator proceedings, is relevant to a distinction that I take and on which, in my opinion, the result in this case turns. I shall come to this later in these reasons.

I agree with the submission of counsel for the respondents that the appellant's taxpayer class action here is realistically a class action by a member of the public. He is bringing what has been called a "public action" (see Jaffe, Judicial Control of Administrative Action (1965), p. 483), and the question that arises is whether the principle of MacIlreith v. Hart should be extended to cover such federal taxpayer actions (and, if so, it would extend as well to provincial taxpayer actions), as contended for by the appellant, or whether this kind of action should never be permitted for the reasons given in the Smith case, as contended for by the respondents. It is my view that this statement of the issue is both too broad and too narrow. It is too broad because it does not take account of the nature of the legislation whose validity is challenged; it is too narrow because it suggests an "either or" approach by the Courts. I am of the opinion that the Court is entitled in taxpayer actions to control standing no less than it is entitled to control the granting of declaratory orders sought in such actions. In short, the matter to me is one for the discretion of the Court, and relevant to this discretion is the nature of the legislation under attack.

Where regulatory legislation is the object of a claim of invalidity, being legislation which puts certain persons, or certain activities theretofore free of restraint, under a compulsory scheme to which such persons must adhere on pain of a penalty or a prohibitory order or nullification of a transaction in breach of the scheme, they may properly claim to be aggrieved or to have a tenable ground upon which to challenge the validity of the legislation. In such a situation, a mere taxpayer or other member of the public not directly affected by the legislation would have no standing to impugn it. Smith v. Attorney General of Ontario is this class of case. Disregarding for this purpose the significant point that the wrong Attorney General was sued, the correctness of the decision might be put in doubt if it be taken to hold that the amended Canada Temperance Act was immune from challenge by a declaratory action at the suit of either Smith or the Montreal firm which refused, because of the amended legislation, to fill Smith's liquor order and hence brought to a halt a proposed business relationship.

Why, in such a case, should Smith be disqualified as a plaintiff in a declaratory action and be compelled to violate the statute and risk prosecution in order to raise the question of its invalidity? The reasons of Duff J. mention this point but then dispose of it in the following passage, at p. 337 of [1924] S.C.R., quoted and relied upon by Houlden J.:

> Much may be said, no doubt, for the view that an individual in the position of the appellant ought, without subjecting himself to a prosecution for a criminal offence, to have some means of raising the question of the legality of official acts imposing constraint upon him in his daily conduct which, on grounds not unreasonable, he thinks are unauthorized and illegal. We think, however, that to accede to appellant's contention upon this point would involve the consequence that virtually every resident of Ontario could maintain a similar action; and we can discover no firm ground on which the appellant's claim can be supported which would not be equally available to sustain the right of any citizen of a province to initiate proceedings impeaching the constitutional validity of any legislation directly affecting him, along with other citizens, in a similar way in his business or in his personal life.
>
> We think the recognition of such a principle would lead to grave inconvenience and analogy is against it. An individual, for example, has no status to maintain an action restraining a wrongful violation of a public right unless he is exceptionally prejudiced by the wrongful act. It is true that in this court this rule has been relaxed in order to admit actions by ratepayers for restraining ultra vires expenditures by the governing bodies of municipalities; MacIlreith v. Hart. We are not sure that the reasons capable of being advanced in support of this exception would not be just as pertinent as arguments in favour of the appellant's contention, but this exception does not rest upon any clearly defined principle, and we think it ought not to be extended.
>
> On the whole we think the principle contended for, since it receives no sanction from legal analogy, and since it is open to serious objection as calculated to be attended by general inconvenience in practice, ought not to be adopted. But the question is an arguable one; and, as the merits of the appeal have been fully discussed, we are loath to give a judgment against the appellant solely based upon a fairly disputable point of procedure; and accordingly we think it right to say that in our opinion the appellant's action also fails in substance.

Much of the argument in the present appeal, especially in the submissions of the appellant, related to the significance of the assertion of Duff J., upon which Houlden J. grounded his decision and which I have already quoted, that "an individual, for example, has no right to maintain an action restraining a wrongful violation of a public

right unless he is exceptionally prejudiced by the wrongful act." The plaintiff's contention was that, on the pleadings, taking the facts alleged as established for the purposes of a motion under R.124 (Ont.), he was within this proposition, and that he was not called upon to show that he was more exceptionally prejudiced than others who, like him, were also exceptionally prejudiced. Put another way, the submission is that the issue is not magnitude of the exceptional prejudice but merely whether it exists in the case of the plaintiff, albeit many others are under the same exceptional prejudice.

I am of the opinion that the foregoing statement of Duff J. cannot be torn from the context of case law and principle out of which it obviously arises, and that the submissions of the plaintiff become somewhat tortuous in seeking to parse the words "exceptional prejudice" as if they were disembodied terms of a statute. Although Duff J. cited no authority for his assertion, it is a derivation from English cases, relating to private attempts to enjoin a public nuisance. In this class of case, which involves no question of the constitutionality of legislation, there is a clear way in which the public interest can be guarded through the intervention of the Attorney General who would be sensitive to public complaint about an interference with public rights: see Wallasey Local Board v. Gracey [(1887), 36 Ch. 593]; Tottenham Urban District Council v. Williamson & Sons Ltd. [[1896] 2 Q.B. 353], Boyce v. Paddington Borough Council [[1903] 1 Ch. 109]. It is on this basis that the Courts have said that a private person who seeks relief from what is a nuisance to the public must show that he has a particular interest or will suffer an injury peculiar to himself if he would sue to enjoin it.

This is not a principle which is capable of wholesale transfer to a field of federal public law concerned with the distribution of legislative power between central and unit legislatures, and with the validity of the legislation of one or other of those two levels. There is no question in such a case of respecting legislative sovereignty, as in unitary Great Britain, but rather a question of whether Parliament or a Legislature has itself respected the limits of its authority under the Constitution.

The Official Languages Act is not a regulatory type of statute akin to the Canada Temperance Act which was involved in the Smith case. It is both declaratory and directory in respect of the use of English and French by and in federal authorities and agencies, including Courts, and in the provision of services to the public through communication in both languages by those authorities and agencies, whether in the national capital region, or at their head or central office elsewhere in Canada, or at each principal office in a federal bilingual district established under the Act. Administration of the Act is confided to a Commissioner of Official Languages who is charged to ensure recognition of the status of both official languages and compliance with the spirit and intent of the Act. He is authorized to inquire into complaints, to recommend remedial action after investigation of any complaint and to report to Parliament if appropriate remedial action is not taken. The Act creates no offences and imposes no penalties; there are no duties laid upon members of the public, although the public service may be said, broadly speaking, to be affected by the promotion of bilingualism in order that members of the public may be served and may communicate in both official languages. Public officials only might be exposed to prosecution under s. 115 of the Criminal Code.

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: Electrical Development Co. of Ontario v. Attorney General of Ontario [[1919] A.C. 687], B.C. Power Corp. Ltd. v. B.C. Electric Co. Ltd. [[1962] S.C.R. 642]. Should they then foreclose themselves by drawing strict lines on standing, regardless of the nature of the legislation whose validity is questioned?

Short of a reference either to a provincial appellate Court by the Lieutenant Governor in Council or to this Court by the Governor General in Council, is there any other way in which the validity of a statute like the Official Languages Act can be determined in a judicial proceeding when the federal Attorney General has declined to act? Counsel for the respondents contended that a provincial Attorney General could take declaratory proceedings, but he could cite no authority for this proposition nor could I find any. However, want of authority is not an answer if principle supports the submission. I am unable to appreciate upon what principle this submission stands. Can it be said that one Attorney General of one Province is in any different position than any others of other Provinces, or is it suggested that an Attorney General class action be taken? Even if a provincial Attorney General might validly be

authorized by provincial legislation to take such declaratory proceedings, I am unaware of any such legislation. As an ordinary common law matter, I do not think a provincial Attorney General is in as strong a position in a case such as the present one as is a federal taxpayer bringing a class action. The provincial Attorney General would be representing the public interest of his Province only, and, moreover, the invalidation of the Official Languages Act would not result in any accretion to, or vindicate any legislative power of the Province.

There is Australian authority to support a declaratory action by a State Attorney General to challenge the validity of Commonwealth legislation where that legislation amounts to an invasion of State legislative power: see Attorney General for Victoria v. The Commonwealth [(1946), 71 C.L.R. 237]. This, and other like cases cited therein, represent an adaptation to Australian federalism of the English position of the Attorney General as the guardian of public rights, those rights being the rights of the citizens of the State whom the State Attorney General represents. On the other hand, authority in the United States is to the contrary. In Massachusetts v. Mellon [(1923), 262 U.S. 447], a companion case to Frothingham v. Mellon considered below, the Supreme Court of the United States said this on the point (at p. 485):

> It cannot be conceded that a State, as parens patriae, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof ... While the State, under some circumstances, may sue in that capacity for the protection of its citizens ... it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government.

The merit of the Australian position does not reach the present case because, as I have already noted, there is no invasion of provincial legislative power in the enactment of the Official Languages Act even assuming it to be unconstitutional; and the cited Australian case does not go so far as to support the right of a State Attorney General to challenge a mere Appropriation Act of the Commonwealth.

Counsel for the respondents also relied in this connection upon Reference re Subsections (1) (3) and (4) of S. 11 of the Official Languages Act, S. 23C of the New Brunswick Evidence Act and S. 14 of the New Brunswick Official Languages Act [(1972), 5 N.B.R. (2d) 653], which was a judgment of the New Brunswick Court of Appeal on a reference. There, one Leonard C. Jones applied successfully to the Court for leave to be joined as an interested party and to have all rights as a party including a right of appeal. This does not assist in the present case because a reference was refused by the federal authorities, and I do not think that a plaintiff is compelled to shop around for a reference by one of the ten provincial governments.

I come finally to the judgment of this Court in MacIlreith v. Hart [(1907), 39 S.C.R. 657]. In that case a municipal council had paid $231 to the mayor to reimburse him for his expenses in attending a municipal convention. A ratepayer of the municipality brought a class action against the mayor (the municipal council having refused to do so) for a declaration that the payment was illegal and that the sum in question should be returned by the mayor. There was at the time no authority for the municipal council to pay convention expenses. On the question whether a ratepayer's action lay, the trial judge dismissed the suit on the ground that the Attorney General was a necessary party. The Supreme Court of Nova Scotia en banc reversed, holding the action to be maintainable as brought, and this decision was affirmed by this Court.

Case law in Ontario has sanctioned such actions for a long time. The leading case is Paterson v. Bowes [(1853), 4 Gr. 170], and on the merits, sub nom Toronto v. Bowes [(1853), 4 Gr. 489 aff'd. (1856), 6 Gr. 1 aff'd (1858), 11 Moo. P.C. 463; 14 E.R. 770]. The law in the United States is the same: see Crampton v. Zabriskie [(1879), 101 U.S. 601]. Paterson v. Bowes founded itself on Bromley v. Smith [(1826), 1 Sim. 8, 57 E.R. 482] which, on its facts, falls short of being in a strict sense a ratepayers' action to challenge an illegal municipal expenditure. It does not seem to have enjoyed any prominence in England, but there is more recent case law there which provides some support for the doctrine stated in Paterson v. Bowes: see Prescott v. Birmingham [[1955] Ch. 210]; and cf. Bradbury v. Enfield [[1967] 1 W.L.R. 1311]. There is also contrary authority in England: see Holden v. Bolton [(1887), 3 T.L.R. 676]; and in New Zealand: see Collins v. Lower Hutt City Corporation [[1961] N.Z.L.R. 25]. Professor de Smith rightly refers to the Prescott case as a weak authority because standing is approved there sub silentio and he says this on the subject (Judicial Review of Administrative Action (1968 2d ed.), at p. 479):

> The state of the law is now thoroughly confused, and it is to be hoped that the House of Lords will soon have an opportunity to pronounce upon these matters. The assumption that to proclaim the ratepayer's

> locus standi in positive terms would let loose a torrent of ratepayers' actions is in fact mere conjecture. But if restrictive principles are to be cast aside, they should be cast aside unequivocally.

In those cases where the restrictive principle of requiring carriage of the suit by the Attorney General and denying any suit if the Attorney General refuses to act, has been cast aside, the rationale of the ratepayer's action has been explained in various ways, dependent, it seems to me, on the factual situation in the particular case. In Smith v. Bromley, where a limited number of householders of a parish were subject to rates imposed for the management and cultivation of certain allotments of enclosed waste lands over which rights of common existed, it was held that it was open to a dissident group to seek to reclaim a sum illegally paid out of the collected rates by the treasurer, albeit so paid with the approval of the majority. Sir John Leach V.C. said, briefly,

> Where a matter is necessarily injurious to the common right the majority of the persons interested can neither excuse the wrong nor deprive all other parties of their remedy by suit.
>
> The Attorney General may file an information in a case like this in respect of the public nature of the right; and the proceedings must be by the Attorney General when all persons interested are parties to the abuse; but where that is not the case, I am not aware of any principle or authority which makes it necessary that he should be before the Court.

Paterson v. Bowes spoke in terms of the interest of inhabitants (it was an inhabitants' class action rather than a ratepayers') to prevent a misapplication of funds which came from municipal rates, and it distinguished the case of the public nuisance. Analogy there to equity jurisdiction to hold a faithless agent to be trustee for his principal was based on the fact that the defendant mayor had obtained 10,000 pounds [Sterling] as a discount on the purchase for the city of debentures in the sum of 50,000 pounds [Sterling], and had retained the sum for his own use. The municipal council refused at first to act and it was only after the question of standing had been resolved in favour of the inhabitants who brought the action that the council agreed to be substituted as plaintiff. In Crampton v. Zabriskie, the Supreme Court of the United States said this of a taxpayer's suit against an illegal expenditure of money by a county:

> Of the right of resident tax-payers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of a debt which they in common with other property-holders of the county may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by the State courts in numerous cases; and from the nature of the powers exercised by municipal corporations, the great danger of their abuse and the necessity of prompt action to prevent irremediable injuries, it would seem eminently proper for courts of equity to interfere upon the application of the taxpayers of a county to prevent the consummation of a wrong, when the officers of those corporations assume, in excess of their powers, to create burdens upon property-holders. Certainly, in the absence of legislation restricting the right to interfere in such cases to public officers of the State or county, there would seem to be no substantial reason why a bill by or on behalf of individual taxpayers should not be entertained to prevent the misuse of corporate powers. The courts may be safely trusted to prevent the abuse of their process in such cases.

In the Smith case, as already noted, Duff J. regarded MacIlreith v. Hart as an exception from a general rule which did not rest upon any clearly defined principle. That was not the view of the Court, of which he was a member, which decided the case. He concurred in the reasons of Davies J. who founded himself on the principle of Paterson v. Bowes and who found reconciliation with English authority by concluding that ratepayers, who sue to vindicate a public right to have municipal money lawfully appropriated, suffer damage peculiar to themselves qua ratepayers in the increased rates they would have to pay by reason of illegal expenditures, even though the damage be small. Idington J. proceeded squarely on Paterson v. Bowes. So did Maclennan J. (with whom Fitzpatrick C.J. concurred) although he viewed that case as reflecting a trustee-beneficiary relationship between the municipality and its ratepayers. It is quite clear that obeisance to the special damage requirement was purely formal, and that at least equally important was the fact that ultra vires expenditures were involved which the municipal council was unwilling to reclaim.

If the Attorney General should also be unwilling to involve himself in a local municipal matter, that would end the affair unless standing was given to a ratepayer willing to bear the costs of an action to correct a wrong in municipal administration. This was the case in Bradford v. Municipality of Brisbane [[1901] Queensland L.J. 44], a judgment of

Griffith C.J., where the Attorney General refused to interfere and a ratepayer was denied standing to enjoin an allegedly illegal municipal expenditure. I am unable to appreciate how an argument of principle can be made that such a wrong, an illegality which is certainly justiciable, should go uncorrected at law, whatever may eventuate as political redress.

For myself, I do not think that it was necessary to restrict the doctrine of MacIlreith v. Hart in order to decide the Smith case as it was decided. Two entirely different situations were presented in those two cases. In the Smith case, a regulatory, even prohibitory, statute was in issue under which offences and penalties were prescribed; in MacIlreith v. Hart, there was a public right involved which had no punitive aspects for any particular ratepayer or class of ratepayers, and it would beget wonder that, in such a case, there should be no judicial means of recovering or controlling an illegal expenditure of public money.

Assuming for the moment that MacIlreith v. Hart approved a ratepayers' suit because of the communality of the relationship of persons in the city of Halifax (which had at the time a population of about 47,000) even though only $231 was involved, I do not see that the principle is any less valid in respect of a taxpayers' suit concerning Halifax in its present-day population of about 125,000, nor in respect of Metropolitan Toronto or Montreal, each of which has a population in excess of two million. The population of Metropolitan Toronto and of Montreal is greater than that of each of seven of the Provinces of Canada. If the principle of MacIlreith v. Hart is applicable to municipal ratepayers' actions, why not to a provincial taxpayers' action to challenge the constitutionality of legislation involving expenditure of public money where no other means of challenge is open?

There is, of course, this difference between an illegal expenditure by a municipality or a public corporation and an allegedly illegal expenditure by a Province or by the Dominion. Neither the Province nor the Dominion is limited in expenditure by the considerations that apply to a municipality or to a corporation. The issue here is not simply one (as it seemed to be in Frothingham v. Mellon [(1923), 262 U.S. 447], discussed below) where the challenge is merely to an Appropriation Act. The main challenge is to the Official Languages Act, but, because it has been implemented by the appointment of a Commissioner of Official Languages and other staff, there is the ancillary reference to allegedly illegal expenditures made in respect of an unconstitutional object.

In the United States, a taxpayer class action in respect of an allegedly unconstitutional State expenditure is now generally maintainable: see Douglas J., concurring in Flast v. Cohen [(1968), 392 U.S. 83], at p. 108; Everson v. Board of Education [(1947), 330 U.S. 1]; and Doremus v. Board of Education [(1952), 342 U.S. 429]. However, until recently federal taxpayer suits to challenge unconstitutional federal expenditures had been denied. Frothingham v. Mellon, already cited, decided less than a year before the Smith case, had laid down the governing rule. The reasons invoke the same concern as did the Smith case about multiplicity of actions, inconvenience, and the fact that public and not special individual interest is involved and, in addition, rely on the separation of powers doctrine which is a more explicit matter in the United States than it is here. In the course of his reasons for the Court, Sutherland J. said this:

> The right of a taxpayer to enjoin the execution of a federal appropriation act, on the ground that it is invalid and will result in taxation for illegal purposes, has never been passed upon by this Court. In cases where it was presented, the question has either been allowed to pass sub silentio or the determination of it expressly withheld....The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of state cases and is the rule of this Court. Crampton v. Zabriskie, 101 U.S. 601, 609. Nevertheless, there are decisions to the contrary. See, for example, Miller v. Grandy, 13 Mich. 540, 550. The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation. IV Dillon Municipal Corporations, 5th ed., s. 1580, et seq. But the relation of a taxpayer of the United States to the Federal Government is very different. His interest in the moneys of the Treasury--partly realized from taxation and partly from other sources--is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.

There has been a considerable modification of Frothingham v. Mellon in the recent decision of the Supreme Court of the United States in Flast v. Cohen. There that Court held that a federal taxpayer suit may be pursued to challenge the constitutionality of a federal expenditure pursuant to the federal taxing and spending power where the challenge is also based on a specific constitutional limitation on the exercise of that power. In so far as United States decisions turn on the need for showing a justiciable "case or controversy", within Article III, section 2 of the American Constitution, or otherwise require a constitutional base to support standing by a federal taxpayer, they have no application to Canada. I note, in any event, a recent recession there from the "case of controversy" requirement: see Sierra Club v. Morton [(1972), 405 U.S. 727].

In my opinion, standing of a federal taxpayer seeking to challenge the constitutionality of federal legislation is a matter particularly appropriate for the exercise of judicial discretion, relating as it does to the effectiveness of process. Central to that discretion is the justiciability of the issue sought to be raised, a point that could be said to be involved (although the case was not decided on that basis) in Anderson v. Commonwealth [(1932), 47 C.L.R. 50], where the High Court of Australia denied standing to a member of the public to challenge the validity of an agreement between the Commonwealth and one of the States. Relevant as well is the nature of the legislation whose validity is challenged, according to whether it involves prohibitions or restrictions on any class or classes of persons who would thus be particularly affected by its terms beyond any effect upon the public at large. If it is legislation of that kind, the Court may decide, as it did in the Smith case, that a member of the public, and perhaps even one like Smith, is too remotely effected to be accorded standing. On the other hand, where all members of the public are affected alike, as in the present case, and there is a justiciable issue respecting the validity of legislation, the Court must be able to say that as between allowing a taxpayers' action and denying any standing at all when the Attorney General refuses to act, it may choose to hear the case on the merits.

In his reasons in the Smith case, Duff J. concluded his exposition on standing by the statement that "the question is an arguable one". I think that the argument for standing in the present case is fortified by analogy (which Duff J. thought was absent) to the cases on certiorari and prohibition which, even in a non-constitutional context, have admitted standing in a mere stranger to challenge jurisdictional excesses, although the granting of relief remains purely discretionary: see Wade, Administrative Law (3rd ed. 1971), at p. 138, pointing to the special public aspect of these remedies. Other analogies from English legal history depend on how far back in such history one is prepared to go. Lord Mansfield, for example, looked upon the writ of mandamus as a public remedy which "was introduced to prevent disorder from a failure of justice, and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy and where in justice and good government there ought to be one": Rex v. Barker [(1762), 3 Burr. 1265, at p. 1267, 97 E.R. 823, at pp. 824-825]. The expansion of the declaratory action, now well-established, would to me be at odds with a consequent denial of its effectiveness if the law will recognize no one with standing to sue in relation to an issue which is justiciable and which strikes directly at constitutional authority.

I recognize that any attempt to place standing in a federal taxpayer suit on the likely tax burden or debt resulting from an illegal expenditure, by analogy to one of the reasons given for allowing municipal taxpayers' suits, is as unreal as it is in the municipal taxpayer cases. Certainly, a federal taxpayer's interest may be no less than that of a municipal taxpayer in that respect. It is not the alleged waste of public funds alone that will support standing but rather the right of the citizenry to constitutional behaviour by Parliament where the issue in such behaviour is justiciable as a legal question.

In the present case, I would, as a matter of discretion, hold that the appellant should be allowed to proceed to have his suit determined on the merits. Accordingly, I would allow the appeal, set aside the judgments below and dismiss the motion of the respondents under R.124. The appellant should have his costs throughout.

Appeal allowed with costs.

Trendsetter Developments Ltd. v. Ottawa Financial Corp. (Ont. C.A.), [1989] O.J. No. 179

Ontario Judgments

Supreme Court of Ontario - Court of Appeal

Toronto, Ontario

Tarnopolsky, McKinlay and Catzman JJ.A.

Heard: January 31, 1989

Judgment: February 7, 1989

Action No. 743/87

[1989] O.J. No. 179 | 32 O.A.C. 327 | 33 C.P.C. (2d) 16 | 13 A.C.W.S. (3d) 397

Between Trendsetter Developments Limited, Assaly Capital Corporation, Plaintiffs (Appellants), and Ottawa Financial Corporation, In Trust, Defendant (Respondent)

Case Summary

Practice — Pleadings — Striking out — No reasonable cause of action — Appeals — No evidence to be considered — Facts pleaded deemed to be true — Ontario Rules of Civil Procedure, R. 21.01(1)(b).

This was an appeal by the plaintiffs against an order allowing the defendant's motion to strike out the statement of claim as disclosing no reasonable cause of action. The plaintiff mortgagor brought an action and a preliminary motion thereto seeking an interlocutory injunction to restrain the defendant mortgagee from selling the subject property. The defendant's motion to strike and the plaintiff's motion for the injunction were heard at the same time. The judge allowed the defendant's motion.
HELD: The appeal was allowed.

The motions judge erred in striking out the plaintiff's statement of claim based on the evidence lead in the interlocutory injunction motion. Rule 21.01(1)(b) of the Ontario Rules of Civil Procedure provided that no evidence was admissible in a motion to strike pleadings under that rule. Under that rule only the sufficiency in law of the pleading could be attacked. The plaintiff's pleadings did disclose a reasonable cause of action if the facts, as pleaded, were accepted as true.
Gordon F. Henderson, Q.C., and William L. Vanveen, for the Plaintiffs (Appellants). S.G. Fisher, Q.C., for the Defendant (Respondent).

The judgment of the Court was delivered by

CATZMAN J.A. (orally)

CATZMAN J.A. (orally):— This is an appeal by the plaintiffs from an order made by a weekly court judge in Ottawa granting a motion by the defendant pursuant to rule 21.01(1)(b) of the Rules of Civil Procedure to strike out the statement of claim in this action on the ground that it discloses no reasonable cause of action.

The motion was heard, and disposed of, contemporaneously with a motion by the plaintiffs for an interlocutory injunction restraining the sale of the property of which the plaintiffs were the owners and the defendant was the mortgagee.

From the recitals in the order under appeal and the reasons given in the endorsement of the weekly court judge, it appears that he struck out the statement of claim and dismissed the action by reference to his determination of

issues which were raised before him on the interlocutory injunction motion and to the evidence which was before him in connection with that motion.

In our respectful view, he erred in so doing. Rule 21.01(2) (b) provides that no evidence is admissible on a motion to strike out a pleading under rule 21.01(1)(b). The reason why no evidence is admissible is that the only issue on such a motion is the sufficiency in law of the pleading attacked: Holmested and Watson, Ontario Civil Procedure, vol.1, para. 21, s. 3. Accordingly, it was not open to the weekly court judge to take into account, in disposing of the motion to strike out the statement of claim, his determination of issues on the interlocutory injunction motion and the evidence before him in connection with that motion.

The law is well established that, on a motion to strike out a statement of claim as disclosing no reasonable cause of action, all the facts pleaded in the statement of claim must be deemed to have been proven, and the court should make the order only in plain and obvious cases which it is satisfied to be beyond doubt. This is not such a case. In our view, it cannot be said on a reading of the statement of claim in this action that the facts alleged with respect to interest and the alleged contravention of statutory provisions regarding the stipulation of interest disclose no reasonable cause of action.

Accordingly, we would allow the appeal, set aside the order under appeal, and dismiss the defendant's motion to strike out the statement of claim. The costs of the appeal, of the defendant's unsuccessful motion to quash the appeal, and of the motion before the weekly court judge shall be costs in the cause.

CATZMAN J.A.
TARNOPOLSKY J.A.:— I agree.
McKINLAY J.A.:— I agree.

Vancouver (City) v. Ward, [2010] 2 S.C.R. 28

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

Heard: January 18, 2010;

Judgment: July 23, 2010.

File No.: 33089.

[2010] 2 S.C.R. 28 | [2010] 2 R.C.S. 28 | [2010] S.C.J. No. 27 | [2010] A.C.S. no 27 | 2010 SCC 27

City of Vancouver, Appellant; v. Alan Cameron Ward, Respondent. And Her Majesty The Queen in Right of the Province of British Columbia, Appellant; v. Alan Cameron Ward, Respondent, and Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Aboriginal Legal Services of Toronto Inc., Association in Defence of the Wrongly Convicted, Canadian Civil Liberties Association, Canadian Association of Chiefs of Police, Criminal Lawyers' Association (Ontario), British Columbia Civil Liberties Association and David Asper Centre for Constitutional Rights, Interveners.

(80 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Catchwords:

Constitutional law — Charter of Rights — Enforcement — Damage award as remedy for breach of rights — Quantum — Claimant strip searched and his car seized in violation of his constitutional rights — Whether claimant entitled to damages as remedy under s. 24(1) of [page29] Canadian Charter of Rights and Freedoms — If so, how should quantum of damages be assessed.

Summary:

During a ceremony in Vancouver, the city police department received information that an unknown individual intended to throw a pie at the Prime Minister who was in attendance. Based on his appearance, police officers mistakenly identified W as the would-be pie-thrower, chased him down and handcuffed him. W, who loudly protested his detention and created a disturbance, was arrested for breach of the peace and taken to the police lockup. Upon his arrival, the corrections officers conducted a strip search. While W was at the lockup, police officers impounded his car for the purpose of searching it once a search warrant had been obtained. The detectives subsequently determined that they did not have grounds to obtain the required search warrant or evidence to charge W for attempted assault. W was released approximately 4.5 hours after his arrest. He brought an action in tort and for breach of his rights guaranteed by the *Canadian Charter of Rights and Freedoms* against several parties, including the Province and the City. With respect to the strip search and the car seizure, the trial judge held that, although the Province and the City did not act in bad faith and were not liable in tort for either incident, the Province's strip search and the City's vehicle seizure violated W's right to be free from unreasonable search and seizure under s. 8 of the *Charter*. The trial judge assessed damages under s. 24(1) of the *Charter* at $100 for the seizure of the car and $5,000 for the strip search. The Court of Appeal, in a majority decision, upheld the trial judge's ruling.

Held: The appeal should be allowed in part.

The language of s. 24(1) is broad enough to include the remedy of constitutional damages for breach of a claimant's *Charter* rights if such remedy is found to be appropriate and just in the circumstances of a particular case. The first step in the inquiry is to establish that a *Charter* right has been breached; the second step is to show why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches.

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Once the claimant has established that damages are functionally justified, the state has the opportunity to demonstrate, at the third step, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust. Countervailing considerations include the existence of alternative remedies. Claimants need not show that they have exhausted all other recourses. Rather, it is for the state to show that other remedies including private law remedies or another *Charter* remedy are available in the particular case that will sufficiently address the *Charter* breach. Concern for effective governance may also negate the appropriateness of s. 24(1) damages. In some situations, the state may establish that an award of *Charter* damages would interfere with good governance such that damages should not be awarded unless the state conduct meets a minimum threshold of gravity.

If the state fails to negate that the award is "appropriate and just", the final step is to assess the quantum of the damages. To be "appropriate and just", an award of damages must represent a meaningful response to the seriousness of the breach and the objectives of s. 24(1) damages. Where the objective of compensation is engaged, the concern is to restore the claimant to the position he or she would have been in had the breach not been committed. With the objectives of vindication and deterrence, the appropriate determination is an exercise in rationality and proportionality. Generally, the more egregious the breach and the more serious the repercussions on the claimant, the higher the award for vindication or deterrence will be. In the end, s. 24(1) damages must be fair to both the claimant and the state. In considering what is fair to both, a court may take into account the public interest in good governance, the danger of deterring governments from undertaking beneficial new policies and programs, and the need to avoid diverting large sums of funds from public programs to private interests. Damages under s. 24(1) should also not duplicate damages awarded under private law causes of action, such as tort, where compensation of personal loss is at issue.

[page31]

Here, damages were properly awarded for the strip search of W. This search violated his s. 8 *Charter* rights and compensation is required, in this case, to functionally fulfill the objects of constitutional damages. Strip searches are inherently humiliating and degrading and the *Charter* breach significantly impacted on W's person and rights. The correction officers' conduct which caused the breach was also serious. Minimum sensitivity to *Charter* concerns within the context of the particular situation would have shown the search to be unnecessary and violative. Combined with the police conduct, the impingement on W also engages the objects of vindication of the right and deterrence of future breaches. The state did not establish countervailing factors and damages should be awarded for the breach. Considering the seriousness of the injury and the finding that the corrections officers' actions were not intentional, malicious, high-handed or oppressive, the trial judge's $5,000 damage award was appropriate.

With respect to the seizure of the car, W has not established that damages under s. 24(1) are appropriate and just from a functional perspective. The object of compensation is not engaged as W did not suffer any injury as a result of the seizure. Nor are the objects of vindication of the right and deterrence of future breaches compelling. While the seizure was wrong, it was not of a serious nature. A declaration under s. 24(1) that the vehicle seizure violated W's right to be free from unreasonable search and seizure under s. 8 of the *Charter* adequately serves the need for vindication of the right and deterrence of future improper car seizures.

Cases Cited

Considered: *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405; **referred to:** *Mills v. The Queen*, [1986] 1 S.C.R. 863; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *Dunlea v. Attorney-General*, [2000] NZCA 84, [2000] 3 N.Z.L.R. 136; *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Anufrijeva v. Southwark London Borough Council*, [2003] EWCA Civ 1406, [2004] Q.B. 1124; *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Taunoa v. Attorney-General*, [2007] NZSC 70, [2008] 1 N.Z.L.R. 429; *Fose [page32] v. Minister of Safety and Security*, 1997 (3) SA 786; *Attorney General of Trinidad and Tobago v. Ramanoop*, [2005] UKPC 15, [2006] 1 A.C. 328; *Smith v. Wade*, 461 U.S. 30 (1983); *R. v. B.W.P.*, 2006 SCC 27, [2006] 1 S.C.R. 941; *Simpson v. Attorney-General*, [1994] 3 N.Z.L.R. 667; *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129; *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, [1996] 2 S.C.R. 345; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679.

Statutes and Regulations Cited

Act respecting industrial accidents and occupational diseases, R.S.Q., c. A-3.001.

Canadian Charter of Rights and Freedoms, ss. 8, 9, 24, 32.

Charter of human rights and freedoms, R.S.Q., c. C-12, ss. 49, 51.

Constitution Act, 1982, s. 52(1).

History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Finch C.J.B.C. and Saunders and Low JJ.A.), 2009 BCCA 23, 89 B.C.L.R. (4) 217, 265 B.C.A.C. 174, 446 W.A.C. 174, 304 D.L.R. (4) 653, [2009] 6 W.W.R. 261, 63 C.C.L.T. (3d) 165, [2009] B.C.J. No. 91 (QL), 2009 CarswellBC 115, affirming a decision of Tysoe J., 2007 BCSC 3, 63 B.C.L.R. (4) 361, [2007] 4 W.W.R. 502, 45 C.C.L.T. (3d) 121, [2007] B.C.J. No. 9 (QL), 2007 CarswellBC 12, finding a breach of *Charter* rights and awarding damages. Appeal allowed in part.

Counsel

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[page33]

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Kent Roach and *Grace Pastine*, for the interveners the British Columbia Civil Liberties Association and the David Asper Centre for Constitutional Rights.

The judgment of the Court was delivered by

McLACHLIN C.J.

I. Introduction

1 The *Canadian Charter of Rights and Freedoms* guarantees the fundamental rights and freedoms of all Canadians and provides remedies for their breach. The first and most important remedy is the nullification of laws that violate the *Charter* under s. 52(1) of the *Constitution Act, 1982*. This is supplemented by s. 24(2), under which evidence obtained in breach of the *Charter* may be excluded if its admission would bring the administration of justice into disrepute, and s. 24(1) - the provision at issue in this case - under which the court is authorized to grant such remedies to individuals [page34] for infringement of *Charter* rights as it "considers appropriate and just in the circumstances".

2 The respondent Ward's *Charter* rights were violated by Vancouver and British Columbia officials who detained him, strip searched his person and seized his car without cause. The trial judge awarded Mr. Ward damages for the *Charter* breaches, and the majority of the Court of Appeal of British Columbia upheld that award.

3 This appeal raises the question of when damages may be awarded under s. 24(1) of the *Charter*, and what the amount of such damages should be. Although the *Charter* is 28 years old, authority on this question is sparse, inviting a comprehensive analysis of the object of damages for *Charter* breaches and the considerations that guide their award.

4 I conclude that damages may be awarded for *Charter* breach under s. 24(1) where appropriate and just. The first step in the inquiry is to establish that a *Charter* right has been breached. The second step is to show why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches. At the third step, the state has the opportunity to demonstrate, if it can, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust. The final step is to assess the quantum of the damages.

5 I conclude that damages were properly awarded for the strip search of Mr. Ward, but not justified for the seizure of his car. I would therefore allow the appeal in part.

[page35]

II. Facts

6 On August 1, 2002, Prime Minister Chrétien participated in a ceremony to mark the opening of a gate at the entrance to Vancouver's Chinatown. During the ceremony, the Vancouver Police Department ("VPD") received

information that an unknown individual intended to throw a pie at the Prime Minister, an event that had occurred elsewhere two years earlier. The suspected individual was described as a white male, 30 to 35 years, 5' 9", with dark short hair, wearing a white golf shirt or T-shirt with some red on it.

7 Mr. Ward is a Vancouver lawyer who attended the August 1 ceremony. On the day, Mr. Ward, a white male, had grey, collar-length hair, was in his mid-40s and was wearing a grey T-shirt with some red on it. Based on his appearance, Mr. Ward was identified - mistakenly - as the would-be pie-thrower. When the VPD officers noticed him, Mr. Ward was running and appeared to be avoiding interception. The officers chased Mr. Ward down and handcuffed him. Mr. Ward loudly protested his detention and created a disturbance, drawing the attention of a local television camera crew. The television broadcast showed that Mr. Ward had a "very agitated look on his face", "appeared to be yelling for the benefit of the onlookers" and was "holding back" as he was being escorted down the street.

8 Mr. Ward was arrested for breach of the peace and taken to the police lockup in Vancouver, which was under the partial management of provincial corrections officers. Upon his arrival, the corrections officers instructed Mr. Ward to remove all his clothes in preparation for a strip search. Mr. Ward complied in part but refused to take off his underwear. The officers did not insist on complete removal and Mr. Ward was never touched during the search. After the search was completed, Mr. Ward was placed in a small cell where he spent several hours before being released.

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9 While Mr. Ward was at the lockup, VPD officers impounded his car for the purpose of searching it once a search warrant had been obtained. VPD detectives subsequently determined that they did not have grounds to obtain the required search warrant or evidence to charge Mr. Ward for attempted assault. Mr. Ward was released from the lockup approximately 4.5 hours after he was arrested and several hours after the Prime Minister had left Chinatown following the ceremony.

III. Judicial History

A. *Supreme Court of British Columbia, 2007 BCSC 3, 63 B.C.L.R. (4th) 361*

10 Mr. Ward brought an action in tort and for breach of his *Charter* rights against the City, the Province, and individual police and corrections officers for his arrest, detention, strip search, and car seizure. Justice Tysoe found Mr. Ward's arrest for breach of the peace to be lawful and dismissed the action against the individual police and corrections officers. However, Tysoe J. held that - although they did not act in bad faith and were not liable in tort for either incident - the Province's strip search and the City's vehicle seizure violated Mr. Ward's right to be free from unreasonable search and seizure under s. 8 of the *Charter*. In addition, Tysoe J. found that the City breached Mr. Ward's rights under s. 9 of the *Charter* and committed the tort of wrongful imprisonment by keeping Mr. Ward in the police lockup longer than necessary.

11 Tysoe J. assessed damages under s. 24(1) of the *Charter* at $100 for the seizure of the car and $5,000 for the strip search. He rejected the governments' argument that damages were an inappropriate remedy for *Charter* breaches absent bad faith, abuse of power, or tortious conduct. In addition, [page37] Tysoe J. awarded $5,000 in damages for the wrongful imprisonment. This award is not at issue on this appeal.

B. *British Columbia Court of Appeal, 2009 BCCA 23, 89 B.C.L.R. (4th) 217*

12 Justice Low, Finch C.J.B.C. concurring, upheld Tysoe J.'s ruling, agreeing with Mr. Ward that bad faith, abuse of power, or tortious conduct are not necessary requirements for the awarding of *Charter* damages.

13 Justice Saunders, dissenting, would have allowed the Province and City appeals, holding that damages cannot be awarded where the police did not act in bad faith and simply made a mistake as to the proper course of action.

IV. Constitutional Provisions

14 Section 24(1) of the *Charter* provides as follows:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

V. Issues

15 The issues are the following:

A. When are damages under s. 24(1) available?

1. The language of s. 24(1) and the nature of *Charter* damages;
2. Step one: Proof of a *Charter* breach;
3. Step two: Functional justification of damages;

[page38]

4. Step three: Countervailing factors;
5. Step four: Quantum of s. 24(1) damages;
6. Forum and procedure.

B. Application to the Facts

1. Damages for the strip search;
2. Damages for the car seizure.

VI. Analysis

A. *When Are Damages Under Section 24(1) Available?*

(1) The Language of Section 24(1) and the Nature of *Charter* Damages

16 Section 24(1) empowers courts of competent jurisdiction to grant "appropriate and just" remedies for *Charter* breaches. This language invites a number of observations.

17 First, the language of the grant is broad. As McIntyre J. observed, "[i]t is difficult to imagine language which could give the court a wider and less fettered discretion": *Mills v. The Queen*, [1986] 1 S.C.R. 863, at p. 965. The judge of "competent jurisdiction" has broad discretion to determine what remedy is appropriate and just in the circumstances of a particular case.

18 Second, it is improper for courts to reduce this discretion by casting it in a strait-jacket of judicially prescribed conditions. To quote McIntyre J. in *Mills* once more, "[i]t is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion": *Mills*, at p. 965.

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19 Third, the prohibition on cutting down the ambit of s. 24(1) does not preclude judicial clarification of when it may be "appropriate and just" to award damages. The phrase "appropriate and just" limits what remedies are available. The court's discretion, while broad, is not unfettered. What is appropriate and just will depend on the facts and circumstances of the particular case. Prior cases may offer guidance on what is appropriate and just in a particular situation.

20 The general considerations governing what constitutes an appropriate and just remedy under s. 24(1) were set

out by Iacobucci and Arbour JJ. in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3. Briefly, an appropriate and just remedy will: (1) meaningfully vindicate the rights and freedoms of the claimants; (2) employ means that are legitimate within the framework of our constitutional democracy; (3) be a judicial remedy which vindicates the right while invoking the function and powers of a court; and (4) be fair to the party against whom the order is made: *Doucet-Boudreau*, at paras. 55-58.

21 Damages for breach of a claimant's *Charter* rights may meet these conditions. They may meaningfully vindicate the claimant's rights and freedoms. They employ a means well-recognized within our legal framework. They are appropriate to the function and powers of a court. And, depending on the circumstances and the amount awarded, they can be fair not only to the claimant whose rights were breached, but to the state which is required to pay them. I therefore conclude that s. 24(1) is broad enough to include the remedy of damages for *Charter* breach. That said, granting damages under the *Charter* is a new endeavour, and an approach to when damages are appropriate and just should develop incrementally. *Charter* damages are only one remedy amongst others available under s. 24(1), and often other [page40] s. 24(1) remedies will be more responsive to the breach.

22 The term "damages" conveniently describes the remedy sought in this case. However, it should always be borne in mind that these are not private law damages, but the distinct remedy of constitutional damages. As Thomas J. notes in *Dunlea v. Attorney-General*, [2000] NZCA 84, [2000] 3 N.Z.L.R. 136, at para. 81, a case dealing with New Zealand's *Bill of Rights Act 1990*, an action for public law damages "is not a private law action in the nature of a tort claim for which the state is vicariously liable but [a distinct] public law action directly against the state for which the state is primarily liable". In accordance with s. 32 of the *Charter*, this is equally so in the Canadian constitutional context. The nature of the remedy is to require the state (or society writ large) to compensate an individual for breaches of the individual's constitutional rights. An action for public law damages - including constitutional damages - lies against the state and not against individual actors. Actions against individual actors should be pursued in accordance with existing causes of action. However, the underlying policy considerations that are engaged when awarding private law damages against state actors may be relevant when awarding public law damages directly against the state. Such considerations may be appropriately kept in mind.

(2) Step One: Proof of a *Charter* Breach

23 Section 24(1) is remedial. The first step, therefore, is to establish a *Charter* breach. This is the wrong on which the claim for damages is based.

[page41]

(3) Step Two: Functional Justification of Damages

24 A functional approach to damages finds damages to be appropriate and just to the extent that they serve a useful function or purpose. This approach has been adopted in awarding non-pecuniary damages in personal injury cases (*Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229), and, in my view, a similar approach is appropriate in determining when damages are "appropriate and just" under s. 24(1) of the *Charter*.

25 I therefore turn to the purposes that an order for damages under s. 24(1) may serve. For damages to be awarded, they must further the general objects of the *Charter*. This reflects itself in three interrelated functions that damages may serve. The function of *compensation*, usually the most prominent function, recognizes that breach of an individual's *Charter* rights may cause personal loss which should be remedied. The function of *vindication* recognizes that *Charter* rights must be maintained, and cannot be allowed to be whittled away by attrition. Finally, the function of *deterrence* recognizes that damages may serve to deter future breaches by state actors.

26 These functions of s. 24(1) damages are supported by foreign constitutional jurisprudence and, by analogy, foreign jurisprudence arising in the statutory human rights context.

27 Compensation has been cited by Lord Woolf C.J. (speaking of the *European Convention of Human Rights*) as "fundamental". In most cases, it is the most prominent of the three functions that *Charter* damages may serve. The

goal is to compensate the claimant for the loss caused by the *Charter* breach; "[t]he applicant should, in so far as this is possible, be placed in the same position as if his Convention rights had not been infringed": [page42] *Anufrijeva v. Southwark London Borough Council*, [2003] EWCA Civ 1406, [2004] Q.B. 1124, at para. 59, *per* Lord Woolf C.J. Compensation focuses on the claimant's personal loss: physical, psychological and pecuniary. To these types of loss must be added harm to the claimant's intangible interests. In the public law damages context, courts have variously recognized this harm as distress, humiliation, embarrassment, and anxiety: *Dunlea*; *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Taunoa v. Attorney-General*, [2007] NZSC 70, [2008] 1 N.Z.L.R. 429. Often the harm to intangible interests effected by a breach of rights will merge with psychological harm. But a resilient claimant whose intangible interests are harmed should not be precluded from recovering damages simply because she cannot prove a substantial psychological injury.

28 Vindication, in the sense of affirming constitutional values, has also been recognized as a valid object of damages in many jurisdictions: see *Fose v. Minister of Safety and Security*, 1997 (3) SA 786 (C.C.), at para. 55, for a summary of the international jurisprudence. Vindication focuses on the harm the infringement causes society. As Didcott J. observed in *Fose*, violations of constitutionally protected rights harm not only their particular victims, but society as a whole. This is because they "impair public confidence and diminish public faith in the efficacy of the [constitutional] protection": *Fose*, at para. 82. While one may speak of vindication as underlining the seriousness of the harm done to the claimant, vindication as an object of constitutional damages focuses on the harm the *Charter* breach causes to the state and to society.

[page43]

29 Finally, deterrence of future breaches of the right has also been widely recognized as a valid object of public law damages: e.g., *Attorney General of Trinidad and Tobago v. Ramanoop*, [2005] UKPC 15, [2006] 1 A.C. 328, at para. 19; *Taunoa*, at para. 259; *Fose*, at para. 96; *Smith v. Wade*, 461 U.S. 30 (1983), at p. 49. Deterrence, like vindication, has a societal purpose. Deterrence seeks to regulate government behaviour, generally, in order to achieve compliance with the Constitution. This purpose is similar to the criminal sentencing object of "general deterrence", which holds that the example provided by the punishment imposed on a particular offender will dissuade potential criminals from engaging in criminal activity. When general deterrence is factored in the determination of the sentence, the offender is punished more severely, not because he or she deserves it, but because the court decides to send a message to others who may be inclined to engage in similar criminal activity: *R. v. B.W.P.*, 2006 SCC 27, [2006] 1 S.C.R. 941. Similarly, deterrence as an object of *Charter* damages is not aimed at deterring the specific wrongdoer, but rather at influencing government behaviour in order to secure state compliance with the *Charter* in the future.

30 In most cases, all three objects will be present. Harm to the claimant will evoke the need for compensation. Vindication and deterrence will support the compensatory function and bolster the appropriateness of an award of damages. However, the fact that the claimant has not suffered personal loss does not preclude damages where the objectives of vindication or deterrence clearly call for an award. Indeed, the view that constitutional damages are available only for pecuniary or physical loss has been widely rejected in other constitutional democracies: see, e.g., *Anufrijeva*; *Fose*; *Taunoa*; *Smith*; and *Ramanoop*.

31 In summary, damages under s. 24(1) of the *Charter* are a unique public law remedy, which [page44] may serve the objectives of: (1) compensating the claimant for loss and suffering caused by the breach; (2) vindicating the right by emphasizing its importance and the gravity of the breach; and (3) deterring state agents from committing future breaches. Achieving one or more of these objects is the first requirement for "appropriate and just" damages under s. 24(1) of the *Charter*.

(4) Step Three: Countervailing Factors

32 As discussed, the basic requirement for the award of damages to be "appropriate and just" is that the award must be functionally required to fulfill one or more of the objects of compensation, vindication of the right, or deterrence of future *Charter* breaches.

33 However, even if the claimant establishes that damages are functionally justified, the state may establish that other considerations render s. 24(1) damages inappropriate or unjust. A complete catalogue of countervailing considerations remains to be developed as the law in this area matures. At this point, however, two considerations are apparent: the existence of alternative remedies and concerns for good governance.

34 A functional approach to damages under s. 24(1) means that if other remedies adequately meet the need for compensation, vindication and/or deterrence, a further award of damages under s. 24(1) would serve no function and would not be "appropriate and just". The *Charter* entered an existent remedial arena which already housed tools to correct violative state conduct. Section 24(1) operates concurrently with, and does not replace, these areas of law. Alternative remedies include private law remedies for actions for personal injury, other *Charter* remedies like declarations [page45] under s. 24(1), and remedies for actions covered by legislation permitting proceedings against the Crown.

35 The claimant must establish basic functionality having regard to the objects of constitutional damages. The evidentiary burden then shifts to the state to show that the engaged functions can be fulfilled through other remedies. The claimant need not show that she has exhausted all other recourses. Rather, it is for the state to show that other remedies are available in the particular case that will sufficiently address the breach. For example, if the claimant has brought a concurrent action in tort, it is open to the state to argue that, should the tort claim be successful, the resulting award of damages would adequately address the *Charter* breach. If that were the case, an award of *Charter* damages would be duplicative. In addition, it is conceivable that another *Charter* remedy may, in a particular case, fulfill the function of *Charter* damages.

36 The existence of a potential claim in tort does not therefore bar a claimant from obtaining damages under the *Charter*. Tort law and the *Charter* are distinct legal avenues. However, a concurrent action in tort, or other private law claim, bars s. 24(1) damages if the result would be double compensation: *Simpson v. Attorney-General*, [1994] 3 N.Z.L.R. 667 (C.A.), at p. 678.

37 Declarations of *Charter* breach may provide an adequate remedy for the *Charter* breach, particularly where the claimant has suffered no personal damage. Considering declarations in *Taunoa*, at para. 368, McGrath J. writes:

[page46]

> The court's finding of a breach of rights and a declaration to that effect will often not only be appropriate relief but may also in itself be a sufficient remedy in the circumstances to vindicate a plaintiff's right. That will often be the case where no damage has been suffered that would give rise to a claim under private causes of action and, in the circumstances, if there is no need to deter persons in the position of the public officials from behaving in a similar way in the future. If in all the circumstances the court's pronouncement that there has been a breach of rights is a sufficiently appropriate remedy to vindicate the right and afford redress then, subject to any questions of costs, that will be sufficient to meet the primary remedial objective.

38 Another consideration that may negate the appropriateness of s. 24(1) damages is concern for effective governance. Good governance concerns may take different forms. At one extreme, it may be argued that any award of s. 24(1) damages will always have a chilling effect on government conduct, and hence will impact negatively on good governance. The logical conclusion of this argument is that s. 24(1) damages would never be appropriate. Clearly, this is not what the Constitution intends. Moreover, insofar as s. 24(1) damages deter *Charter* breaches, they promote good governance. Compliance with *Charter* standards is a foundational principle of good governance.

39 In some situations, however, the state may establish that an award of *Charter* damages would interfere with good governance such that damages should not be awarded unless the state conduct meets a minimum threshold of gravity. This was the situation in *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, where the claimant sought damages for state conduct pursuant to a valid statute. The Court held that the action must be struck on the ground that duly enacted laws should be enforced until declared invalid, unless the

state conduct under the law was "clearly wrong, in bad faith or an abuse of power": [page47] para. 78. The rule of law would be undermined if governments were deterred from enforcing the law by the possibility of future damage awards in the event the law was, at some future date, to be declared invalid. Thus, absent threshold misconduct, an action for damages under s. 24(1) of the *Charter* cannot be combined with an action for invalidity based on s. 52 of the *Constitution Act, 1982*: *Mackin*, at para. 81.

40 The *Mackin* principle recognizes that the state must be afforded some immunity from liability in damages resulting from the conduct of certain functions that only the state can perform. Legislative and policy-making functions are one such area of state activity. The immunity is justified because the law does not wish to chill the exercise of policy-making discretion. As Gonthier J. explained:

> The limited immunity given to government is specifically a means of creating a balance between the protection of constitutional rights and the need for effective government. In other words, this doctrine makes it possible to determine whether a remedy is appropriate and just in the circumstances. Consequently, the reasons that inform the general principle of public law are also relevant in a *Charter* context. [para. 79]

41 The government argues that the *Mackin* principle applies in this case, and, in the absence of state conduct that is at least "clearly wrong", bars Mr. Ward's claim. I cannot accept this submission. *Mackin* stands for the principle that state action taken under a statute which is subsequently declared invalid will not give rise to public law damages because good governance requires that public officials carry out their duties under valid statutes without fear of liability in the event that the statute is later struck down. The present is not a situation of state action pursuant to a valid statute that was subsequently declared invalid. Nor is the rationale animating the *Mackin* principle - that duly enacted laws should be enforced until [page48] declared invalid - applicable in the present situation. Thus, the *Mackin* immunity does not apply to this case.

42 State conduct pursuant to a valid statute may not be the only situation in which the state might seek to show that s. 24(1) damages would deter state agents from doing what is required for effective governance, although no others have been established in this case. It may be that in the future other situations may be recognized where the appropriateness of s. 24(1) damages could be negated on grounds of effective governance.

43 Such concerns may find expression, as the law in this area matures, in various defences to s. 24(1) claims. *Mackin* established a defence of immunity for state action under valid statutes subsequently declared invalid, unless the state conduct is "clearly wrong, in bad faith or an abuse of power" (para. 78). If and when other concerns under the rubric of effective governance emerge, these may be expected to give rise to analogous public law defences. By analogy to *Mackin* and the private law, where the state establishes that s. 24(1) damages raise governance concerns, it would seem a minimum threshold, such as clear disregard for the claimant's *Charter* rights, may be appropriate. Different situations may call for different thresholds, as is the case at private law. Malicious prosecution, for example, requires that "malice" be proven because of the highly discretionary and quasi-judicial role of prosecutors (*Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339), while negligent police investigation, which does not involve the same quasi-judicial decisions as to guilt or innocence or the evaluation of evidence according to legal standards, contemplates the lower "negligence" standard (*Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129). When appropriate, private law thresholds and defences may offer guidance in determining whether s. 24(1) damages would be "appropriate and just". While [page49] the threshold for liability under the *Charter* must be distinct and autonomous from that developed under private law, the existing causes of action against state actors embody a certain amount of "practical wisdom" concerning the type of situation in which it is or is not appropriate to make an award of damages against the state. Similarly, it may be necessary for the court to consider the procedural requirements of alternative remedies. Procedural requirements associated with existing remedies are crafted to achieve a proper balance between public and private interests, and the underlying policy considerations of these requirements should not be negated by recourse to s. 24(1) of the *Charter*. As stated earlier, s. 24(1) operates concurrently with, and does not replace, the general law. These are complex matters which have not been explored on this appeal. I therefore leave the exact parameters of future defences to future cases.

44 I find it useful to add a comment on the judgment of our Court in *Béliveau St-Jacques v. Fédération des*

employées et employés de services publics inc., [1996] 2 S.C.R. 345. *Béliveau St-Jacques* is not determinative of the availability of the public law remedy of damages under s. 24(1). The judgment raised specific issues concerning the interpretation of ss. 49 and 51 of the Quebec *Charter of human rights and freedoms*, R.S.Q., c. C-12, and its interaction with the statutory regime set up under the *Act respecting industrial accidents and occupational diseases*, R.S.Q., c. A-3.001.

45 If the claimant establishes breach of his *Charter* rights and shows that an award of damages under s. 24(1) of the *Charter* would serve a functional purpose, having regard to the objects of s. 24(1) damages, and the state fails to negate that [page50] the award is "appropriate and just", the final step is to determine the appropriate amount of the damages.

(5) Step Four: Quantum of Section 24(1) Damages

46 The watchword of s. 24(1) is that the remedy must be "appropriate and just". This applies to the amount, or quantum, of damages awarded as much as to the initial question of whether damages are a proper remedy.

47 As discussed earlier, damages may be awarded to compensate the claimant for his loss, to vindicate the right or to deter future violations of the right. These objects, the presence and force of which vary from case to case, determine not only whether damages are appropriate, but also the amount of damages awarded. Generally, compensation will be the most important object, and vindication and deterrence will play supporting roles. This is all the more so because other *Charter* remedies may not provide compensation for the claimant's personal injury resulting from the violation of his *Charter* rights. However, as discussed earlier, cases may arise where vindication or deterrence play a major and even exclusive role.

48 Where the objective of compensation is engaged, the concern is to restore the claimant to the position she would have been in had the breach not been committed, as discussed above. As in a tort action, any claim for compensatory damages must be supported by evidence of the loss suffered.

49 In some cases, the *Charter* breach may cause the claimant pecuniary loss. Injuries, physical and psychological, may require medical treatment, with attendant costs. Prolonged detention may result in [page51] loss of earnings. *Restitutio in integrum* requires compensation for such financial losses.

50 In other cases, like this one, the claimant's losses will be non-pecuniary. Non-pecuniary damages are harder to measure. Yet they are not by that reason to be rejected. Again, tort law provides assistance. Pain and suffering are compensable. Absent exceptional circumstances, compensation is fixed at a fairly modest conventional rate, subject to variation for the degree of suffering in the particular case. In extreme cases of catastrophic injury, a higher but still conventionally determined award is given on the basis that it serves the function purpose of providing substitute comforts and pleasures: *Andrews v. Grand & Toy*.

51 When we move from compensation to the objectives of vindication and deterrence, tort law is less useful. Making the appropriate determinations is an exercise in rationality and proportionality and will ultimately be guided by precedent as this important chapter of *Charter* jurisprudence is written by Canada's courts. That said, some initial observations may be made.

52 A principal guide to the determination of quantum is the seriousness of the breach, having regard to the objects of s. 24(1) damages. The seriousness of the breach must be evaluated with regard to the impact of the breach on the claimant and the seriousness of the state misconduct: see, in the context of s. 24(2), *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353. Generally speaking, the more egregious the conduct and the more serious the repercussions on the claimant, the higher the award for vindication or deterrence will be.

53 Just as private law damages must be fair to both the plaintiff and the defendant, so s. 24(1) damages must be fair - or "appropriate and [page52] just" - to both the claimant and the state. The court must arrive at a quantum that respects this. Large awards and the consequent diversion of public funds may serve little functional purpose in terms of the claimant's needs and may be inappropriate or unjust from the public perspective. In considering what is

fair to the claimant and the state, the court may take into account the public interest in good governance, the danger of deterring governments from undertaking beneficial new policies and programs, and the need to avoid diverting large sums of funds from public programs to private interests.

54 Courts in other jurisdictions where an award of damages for breach of rights is available have generally been careful to avoid unduly high damage awards. This may reflect the difficulty of assessing what is required to vindicate the right and deter future breaches, as well as the fact that it is society as a whole that is asked to compensate the claimant. Nevertheless, to be "appropriate and just", an award of damages must represent a meaningful response to the seriousness of the breach and the objectives of compensation, upholding *Charter* values, and deterring future breaches. The private law measure of damages for similar wrongs will often be a useful guide. However, as Lord Nicholls warns in *Ramanoop*, at para. 18, "this measure is no more than a guide because ... the violation of the constitutional right will not always be coterminous with the cause of action at law".

55 In assessing s. 24(1) damages, the court must focus on the breach of *Charter* rights as an independent wrong, worthy of compensation in its own right. At the same time, damages under s. 24(1) should not duplicate damages awarded under [page53] private law causes of action, such as tort, where compensation of personal loss is at issue.

56 A final word on exemplary or punitive damages. In *Mackin*, Justice Gonthier speculated that "[i]n theory, a plaintiff could seek compensatory and punitive damages by way of 'appropriate and just' remedy under s. 24(1) of the *Charter*": para. 79. The reality is that public law damages, in serving the objects of vindication and deterrence, may assume a punitive aspect. Nevertheless, it is worth noting a general reluctance in the international community to award purely punitive damages: see *Taunoa*, at paras. 319-21.

57 To sum up, the amount of damages must reflect what is required to functionally serve the objects of compensation, vindication of the right and deterrence of future breaches, insofar as they are engaged in a particular case, having regard to the impact of the breach on the claimant and the seriousness of the state conduct. The award must be appropriate and just from the perspective of the claimant and the state.

(6) Forum and Procedure

58 For a tribunal to grant a *Charter* remedy under s. 24(1), it must have the power to decide questions of law and the remedy must be one that the tribunal is authorized to grant: *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765. Generally, the appropriate forum for an award of damages under s. 24(1) is a court which has the power to consider *Charter* questions and which by statute or inherent jurisdiction has the power to award damages. Provincial criminal courts are not so empowered and thus do not have the power to award damages under s. 24(1).

[page54]

59 As was done here, the claimant may join a s. 24(1) claim with a tort claim. It may be useful to consider the tort claim first, since if it meets the objects of *Charter* damages, recourse to s. 24(1) will be unnecessary. This may add useful context and facilitate the s. 24(1) analysis. This said, it is not essential that the claimant exhaust her remedies in private law before bringing a s. 24(1) claim.

B. *Application to the Facts*

60 At trial, Justice Tysoe held that the provincial correction officers' strip search and the Vancouver Police Department's vehicle seizure violated Mr. Ward's right to be free from unreasonable search and seizure under s. 8 of the *Charter*. There are thus two distinct claims to consider.

(1) Damages for the Strip Search

61 The first question is whether Mr. Ward has established entitlement to the s. 24(1) remedy of damages. This requires him to show: (1) a breach of his *Charter* rights; and (2) that an award of damages would serve a functional purpose in the circumstances, having regard to the objects of s. 24(1) damages. If these are established, the burden shifts to the state (step 3) to show why, having regard to countervailing factors, an award of damages under

s. 24(1) of the *Charter* would be inappropriate. If the state fails to negate s. 24(1) damages, the inquiry moves to the final step, assessment of the appropriate amount of the damages.

62 Here the first step is met. Justice Tysoe found that the strip search violated Mr. Ward's personal rights under s. 8 of the *Charter*. This finding is [page55] not challenged on this appeal. Nor is it suggested that the British Columbia Supreme Court is not an appropriate forum for the action.

63 The second question is whether damages would serve a functional purpose by serving one or more of the objects of s. 24(1) damages - compensation, vindication and deterrence.

64 In this case, the need for compensation bulks large. Mr. Ward's injury was serious. He had a constitutional right to be free from unreasonable search and seizure, which was violated in an egregious fashion. Strip searches are inherently humiliating and degrading regardless of the manner in which they are carried out and thus constitute significant injury to an individual's intangible interests: *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679, at para. 90.

65 The corrections officers' conduct which caused the breach of Mr. Ward's *Charter* rights was also serious. Minimum sensitivity to *Charter* concerns within the context of the particular situation would have shown the search to be unnecessary and violative. Mr. Ward did not commit a serious offence, he was not charged with an offence associated with evidence being hidden on the body, no weapons were involved and he was not known to be violent or to carry weapons. Mr. Ward did not pose a risk of harm to himself or others, nor was there any suggestion that any of the officers believed that he did. In these circumstances, a reasonable person would understand that the indignity resulting from the search was disproportionate to any benefit which the search could have provided. In addition, without asking officers to be conversant with the details of court rulings, it is not too much to expect that police would be familiar with the settled law that routine strip searches are inappropriate where the individual is being held for a short time in police cells, is not mingling with the general prison population, and where the police have no legitimate concerns that the individual is [page56] concealing weapons that could be used to harm themselves or others: *Golden*, at para. 97.

66 In sum, the *Charter* breach significantly impacted on Mr. Ward's person and rights and the police conduct was serious. The impingement on Mr. Ward calls for compensation. Combined with the police conduct, it also engages the objects of vindication of the right and deterrence of future breaches. It follows that compensation is required in this case to functionally fulfill the objects of public law damages.

67 The next question is whether the state has established countervailing factors that would render s. 24(1) damages inappropriate or unjust.

68 The state has not established that alternative remedies are available to achieve the objects of compensation, vindication or deterrence with respect to the strip search. Mr. Ward sued the officers for assault, as well as the City and the Province for negligence. These claims were dismissed and their dismissal was not appealed to this Court. While this defeated Mr. Ward's claim in tort, it did not change the fact that his right under s. 8 of the *Charter* to be secure against unreasonable search and seizure was violated. No tort action was available for that violation and a declaration will not satisfy the need for compensation. Mr. Ward's only recourse is a claim for damages under s. 24(1) of the *Charter*. Nor has the state established that an award of s. 24(1) damages is negated by good governance considerations, such as those raised in *Mackin*.

[page57]

69 I conclude that damages for the strip search of Mr. Ward are required in this case to functionally fulfill the objects of public law damages, and therefore are *prima facie* "appropriate and just". The state has not negated this. It follows that damages should be awarded for this breach of Mr. Ward's *Charter* rights.

70 This brings us to the issue of quantum. As discussed earlier, the amount of damages must reflect what is

required to functionally fulfill the relevant objects of s. 24(1) compensation, while remaining fair to both the claimant and the state.

71 The object of compensation focuses primarily on the claimant's personal loss: physical, psychological, pecuniary, and harm to intangible interests. The claimant should, in so far as possible, be placed in the same position as if his *Charter* rights had not been infringed. Strip searches are inherently humiliating and thus constitute a significant injury to an individual's intangible interests regardless of the manner in which they are carried out. That said, the present search was relatively brief and not extremely disrespectful, as strip searches go. It did not involve the removal of Mr. Ward's underwear or the exposure of his genitals. Mr. Ward was never touched during the search and there is no indication that he suffered any resulting physical or psychological injury. While Mr. Ward's injury was serious, it cannot be said to be at the high end of the spectrum. This suggests a moderate damages award.

72 The objects of vindication and deterrence engage the seriousness of the state conduct. The corrections officers' conduct was serious and reflected a lack of sensitivity to *Charter* concerns. That said, the officers' action was not intentional, [page58] in that it was not malicious, high-handed or oppressive. In these circumstances, the objects of vindication and deterrence do not require an award of substantial damages against the state.

73 Considering all the factors, including the appropriate degree of deference to be paid to the trial judge's exercise of remedial discretion, I conclude that the trial judge's $5,000 damage award was appropriate.

(2) Damages for the Car Seizure

74 As with the strip search, we must determine whether Mr. Ward has established entitlement to the s. 24(1) remedy of damages to compensate for the constitutional wrong he suffered due to the City's seizure of his vehicle. Again, this requires determining: (1) breach of *Charter* right; (2) whether an award of damages would serve a functional purpose, having regard to the objects of s. 24(1) damages; (3) whether the state has established countervailing factors negating an award of s. 24(1) damages; and (4) quantum, if the right to damages is established.

75 The trial judge found that the seizure of the car violated Mr. Ward's rights under s. 8 of the *Charter*. This finding is not contested and thus satisfies the first requirement.

76 The next question is whether Mr. Ward has established that damages under s. 24(1) for the car seizure are appropriate and just from a functional perspective.

77 The object of compensation is not engaged by the seizure of the car. The trial judge found that Mr. Ward did not suffer any injury as a result of the seizure. His car was never searched and, upon his [page59] release from lockup, Mr. Ward was driven to the police compound to pick up the vehicle. Nor are the objects of vindication of the right and deterrence of future breaches compelling. While the seizure was wrong, it was not of a serious nature. The police officers did not illegally search the car, but rather arranged for its towing under the impression that it would be searched once a warrant had been obtained. When the officers determined that they did not have grounds to obtain the required warrant, the vehicle was made available for pickup.

78 I conclude that a declaration under s. 24(1) that the vehicle seizure violated Mr. Ward's right to be free from unreasonable search and seizure under s. 8 of the *Charter* adequately serves the need for vindication of the right and deterrence of future improper car seizures.

VII. Disposition

79 The appeal is allowed in part. The award against the City in the amount of $100 is set aside, substituted by a declaration under s. 24(1) that the vehicle seizure violated Mr. Ward's right to be free from unreasonable search and seizure under s. 8 of the *Charter*. The award of damages against the Province in the sum of $5,000 for breach of Mr. Ward's s. 8 *Charter* rights is confirmed.

80 We have been informed of a pre-existing agreement between Mr. Ward and the Province regarding costs and, as such, no cost order is made between Mr. Ward and the Province. No costs are awarded to or against the City.

Appeal allowed in part.

Solicitors:

Solicitor for the appellant the City of Vancouver: City of Vancouver, Vancouver.

[page60]

Solicitor for the appellant Her Majesty the Queen in Right of the Province of British Columbia: Attorney General of British Columbia, Victoria.

Solicitors for the respondent: Samuels & Company, Vancouver.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Saskatoon.

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, Ste-Foy.

Solicitors for the intervener the Aboriginal Legal Services of Toronto Inc.: Aboriginal Legal Services of Toronto Inc., Toronto; Falconer Charney, Toronto.

Solicitors for the intervener the Association in Defence of the Wrongly Convicted: Sack Goldblatt Mitchell, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Torys, Toronto.

Solicitor for the intervener the Canadian Association of Chiefs of Police: Ottawa Police Service, Ottawa.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Sack Goldblatt Mitchell, Toronto.

Solicitor for the intervener the British Columbia Civil Liberties Association and the David Asper Centre for Constitutional Rights: University of Toronto, Toronto.

Al Omani v. Canada, [2017] F.C.J. No. 1050

Federal Court Judgments

Federal Court

Toronto, Ontario

Y. Roy J.

Heard: September 26, 2016.

Judgment: August 24, 2017.

Docket: T-1774-15

[2017] F.C.J. No. 1050 | [2017] A.C.F. no 1050 | 2017 FC 786

Between Emad Ibrahim Al Omani, Lina Housne Hamza Nahas, and Sultan Emad Al Omani (A Minor), Lulwa Emad Ibrahim Al Omani (A Minor), Haya Emad Ibrahim Al Omani (A Minor), by their Litigation Guardians, Emad Ibrahim Al Omani and Lina Housne Hamza Nahas, Plaintiffs, and Her Majesty the Queen, Defendant

(128 paras.)

Counsel

Rocco Galati, for the Plaintiffs.

Susan Gans, for the Defendant.

ORDER AND REASONS

Y. ROY J.

1 The Plaintiffs form a family from Saudi Arabia who applied for permanent residence in Canada under the Federal Skilled Worker Class. They submitted a statement of claim alleging a number of causes of action resulting in various heads of damages against the Defendant due to their treatment in the immigration system. They also seek, or give notice of intent to seek, declarations that certain provisions in the *Federal Courts Act*, RSC, 1985, c F-7 [*Federal Courts Act*] and the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] are unconstitutional. The Defendant moved to strike the statement of claim in its entirety. The Court must determine whether the Defendant has established that the statement of claim fails to meet the pleadings requirements set out in the *Federal Courts Rules*, SOR 98-106 [the Rules]. At the Plaintiffs' request, the Court must also determine whether to grant leave to amend any claims that are struck.

I. Facts as set out in the statement of claim

2 The principal Plaintiff, Emad Al Omani, first submitted an application for permanent residence in Canada under the Federal Skilled Worker Class pursuant to subsection 12(2) of the IRPA in September 2006. That application included his wife, Lina Housne Hamza Nahas, and their two children, Lulwa Ehmad Alomani and Sultan Emad Alomani, as accompanying dependents. Their third child, Haya Emad Ibrahim Al Omani, was later added to the application.

3 The Canadian High Commission in London dealt with the application and refused it in December 2009 because it fell two points short of the score of 67 needed for a positive decision. The Plaintiffs mainly contest the visa officer's

award of 4/10 points for "adaptability" and 10/16 points for English proficiency, both of which are made by applying subsection 76(1) and related provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR]. The principal Plaintiff maintains he should have received 5 adaptability points for his Canadian brother plus at least 3 adaptability points for his wife's university degree. On language proficiency, he argues the visa officer should have considered other evidence of his English language abilities:

> A/ with respect to adaptability, the ***Regulations*** and CIC's own website, sets out that the Plaintiff, Emad Al Omani, should have obtained, under "adaptability", 5 points, because he has a "sibling" (brother) who is a Canadian citizen and another 3 points because his spouse has a University degree, for a ***minimum*** of 8 out of 10 points for "adaptability", and these 8 out of 10 points, which are statutorily predetermined, are ***before*** even considering the other factors of adaptability, such as the fact that both the Plaintiff and his wife have university degrees from English instruction universities, have a net worth of $2.3 ***million*** (CDN), of which half is in liquid assets, have family in Canada, have a job offer in Canada, from the company run and owned by the Plaintiff's brother;
>
> B/ with respect to language (English) proficiency, the Plaintiff, Emad Al Omani, only received 10 out of 16 points, notwithstanding that the ***Regulations***, and CIC's representations, indicate that the prescribed English exam is ***not*** the only means by which to access English proficiency, and notwithstanding that the Applicant raised the issue of the need to write the exam, when he in fact graduated from an English-speaking University, has worked for English-speaking companies, in the English language, and was in the third year of a four year MBA programme, in English, which he had not yet completed due to work demands, and that the officer was in possession of confirmation of all of the above, and refused to exercise jurisdiction to assess his English proficiency, in the circumstances, within the context of his "ability to become economically established in Canada"
>
> (at para 20(b)(ii) of the statement of claim).

4 The decision was challenged in the Federal Court. In August 2010, the decision was set aside by the Federal Court and the matter was sent back for redetermination by a different visa officer.

5 As part of the process of redetermination, the principal Plaintiff submitted further documentation requested by the Defendant and was called for an interview in January 2014. It is asserted that the interview lasted some 15 minutes. The officer asked the principal Plaintiff to explain a change in his job description. Towards the end of the interview, the officer would have asked the principal Plaintiff suddenly whether he "belonged to, or was in any way associated with "any group or organization like Al Qaeda in Iraq"". The principal Plaintiff categorically replied, according to the statement of claim, that he did not belong to, nor associated with, such groups as Al Qaeda, nor Al Qaeda itself (statement of claim, para 26(b)). When the principal Plaintiff asked for more detail on the question, the officer refused due to "secrecy" concerns.

6 In March 2014, the redetermination of the Plaintiffs' permanent residence application resulted in a second negative decision. The refusal explained that "there are reasonable grounds to believe [the principal Plaintiff is] a member of the inadmissible class of persons described in 34(1)(f)" of the IRPA.

7 In September 2014, once again the Federal Court ordered that the second negative decision be set aside and the matter was sent back for redetermination. On the record as it stands, the Plaintiffs had not heard from the Crown with respect to this second redetermination. The Plaintiffs sued.

II. Arguments

8 Fundamentally, the Plaintiffs argue that they have been mistreated in Canada's immigration system to a degree that warrants compensation. They allege the Defendant is liable in tort for misfeasance in public office, abuse and excess of jurisdiction and authority, abuse of process, negligence and negligent investigation, conspiracy, and for breaches of the plaintiffs' section 7 and section 15 *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 [*Charter*] rights.

9 The Plaintiffs are seeking:

i. general damages in the amount of $200,000 per Plaintiff;

ii. aggravated damages in the amount of $50,000 per Plaintiff;

iii. punitive damages in the amount of $50,000 per Plaintiff;

iv. any and all economic loss damages pleaded, to be calculated at trial;

v. a declaration and/or finding that section 49 of the *Federal Courts Act*, barring jury trials in the Federal Court, is unconstitutional, and of no force and effect;

vi. a declaration and/or finding that the requirement to seek leave from an administrative decision, under the IRPA, to commence judicial review under section 18 of the *Federal Courts Act*, pursuant to section 72(1) of the IRPA, violates the constitutional right to judicial review and a fair and independent judiciary and is of no force and effect; and

vii. solicitor-client costs of this action and any other relief the Court deems just.

10 The Defendant contends in her motion to strike that the statement of claim fails to establish any of the alleged causes of action and does not properly plead damages. They further seek to strike the two named Ministers (Foreign Affairs and Citizenship and Immigration) from the action in favour of Her Majesty the Queen, as well as the Plaintiffs' constitutional arguments respecting the *Federal Courts Act* and the IRPA.

III. Law on a motion to strike

11 Is before the Court the motion to strike brought on behalf of the Defendant. Rule 221(1) permits the Court to strike a claim on certain grounds:

> **221(1)** On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it
>
> **(a)** discloses no reasonable cause of action or defence, as the case may be,
>
> **(b)** is immaterial or redundant,
>
> **(c)** is scandalous, frivolous or vexatious,
>
> **(d)** may prejudice or delay the fair trial of the action,
>
> **(e)** constitutes a departure from a previous pleading, or
>
> **(f)** is otherwise an abuse of the process of the Court,
>
> and may order the action be dismissed or judgment entered accordingly.
>
> * * *
>
> **221(1)** À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :
>
> **a)** qu'il ne révèle aucune cause d'action ou de défense valable;
>
> **b)** qu'il n'est pas pertinent ou qu'il est redondant;
>
> **c)** qu'il est scandaleux, frivole ou vexatoire;
>
> **d)** qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;
>
> **e)** qu'il diverge d'un acte de procédure antérieur;
>
> **f)** qu'il constitue autrement un abus de procédure.
>
> Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.

The Defendant primarily relies on Rule 221(1)(a), which allows a claim to be struck if it "discloses no reasonable cause of action.". Rule 221(1)(c) is also in play.

12 The test to strike a claim under Rule 221 sets a high bar. First, it is assumed that the facts stated in the statement of claim can be proven. The Court must be satisfied that it is plain and obvious that the pleading discloses no reasonable cause of action assuming the facts pleaded are true: *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 SCR 45 at para 17; *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 [*Hunt*] at p 980. The Defendant bears the onus of meeting this test: *Sivak v Canada*, 2012 FC 272, 406 FTR 115 [*Sivak*] at para 25.

13 In *Hunt*, the Supreme Court sided with the articulation of the rule in England to the effect that "if there is a chance that the plaintiff may succeed, then the plaintiff should not be "driven from the judgment seat"" (p. 980). A high bar indeed to succeed on a motion to strike. Some chance of success will suffice or, as Justice Estey said in *Att. Gen. of Can. v Inuit Tapirisat et al*, [1980] 2 SCR 735, "(o)n 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"" (p.740).

14 To show a plaintiff has a reasonable cause of action, the statement of claim must plead material facts satisfying every element of the alleged causes of action: *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227, 476 NR 219 [*Mancuso*] at para 19; *Benaissa v Canada (Attorney General)*, 2005 FC 1220 [*Benaissa*] at para 15. The plaintiff needs to explain the "who, when, where, how and what" giving rise to the Defendant's liability (*Mancuso*, para 19, *Baird v Canada*, 2006 FC 205 at paras 9-11, affirmed in 2007 FCA 48).

15 Thus, there appears to be a balance. On one hand, a chance of success is enough for the matter to proceed. On the other, the material facts must be pleaded in sufficient detail such that the cause of action may exist. The purpose of pleadings is to give notice to the opposing party and define the issues in such a way that it can understand how the facts support the various causes of action. As the Court of Appeal put it in *Mancuso*, "(i)t is fundamental to the trial process that a plaintiff plead material facts in sufficient detail to support the claim and relief sought" (para 16). The Plaintiffs note that pleadings can still proceed despite being "far from models of legal clarity" (*Manuge v Canada*, 2010 SCC 67, [2010] 3 SCR 672 at para 23). But it remains that adequate material facts must be pleaded. Parties cannot make broad allegations in their statement of claim in the hope of later going on a "fishing expedition" to discover the facts: *Kastner v Painblanc* (1994), 176 NR 68, 51 ACWS (3d) 428 (FCA) at p.2.

16 Rules 174 and 181 further define the minimum requirements for a statement of claim. Pursuant to Rule 174, every pleading must contain the material facts on which the party relies.

> **174** Every pleading shall contain a concise statement of the material facts on which the party relies, but shall not include evidence by which those facts are to be proved.
>
> * * *
>
> **174** Tout acte de procédure contient un exposé concis des faits substantiels sur lesquels la partie se fonde; il ne comprend pas les moyens de preuve à l'appui de ces faits.

Rule 181 requires that a pleading contain particulars of any alleged state of mind of a person, malice, or fraudulent intention.

> **181(1)** A pleading shall contain particulars of every allegation contained therein, including
>
> **(a)** particulars of any alleged misrepresentation, fraud, breach of trust, wilful default or undue influence; and
>
> **(b)** particulars of any alleged state of mind of a person, including any alleged mental disorder or disability, malice or fraudulent intention.
>
> * * *
>
> **181(1)** L'acte de procédure contient des précisions sur chaque allégation, notamment :
>
> **a)** des précisions sur les fausses déclarations, fraudes, abus de confiance, manquements délibérés ou influences indues reprochés;

> **b)** des précisions sur toute allégation portant sur l'état mental d'une personne, tel un déséquilibre mental, une incapacité mentale ou une intention malicieuse ou frauduleuse.

17 But what are "material facts"? They cannot be conclusions or bald allegations: *Merchant Law Group v Canada Revenue Agency*, 2010 FCA 184 at para 34; 321 DLR (4th) 301 [*Merchant*]; *Mancuso* at paras 17-18. You cannot plead bad faith as a material fact by merely stating phrases such as "deliberately or negligently" or "callous disregard:" *Zündel v Canada*, 2005 FC 1612 at para 16, affirmed in 2006 FCA 356. A modicum of story-telling is required. The statement of claim must contain enough facts for the Defendant to understand, for instance, what the bad faith allegation is based on.

18 The jurisprudence suggests that a pleading can fall into one of three categories along a spectrum. The pleading either shows *no scintilla* of a cause of action, in which case the motion to strike would succeed, shows **a scintilla** of a cause of action, in which case there may be leave to amend, or it shows a *reasonable* cause of action. The Federal Court of Appeal similarly described in *Mancuso* material facts and bald allegations as lying on a continuum:

> [18] There is no bright line between material facts and bald allegations, nor between pleadings of material facts and the prohibition on pleading of evidence. They are points on a continuum, and it is the responsibility of a motions judge, looking at the pleadings as a whole, to ensure that the pleadings define the issues with sufficient precision to make the pre-trial and trial proceedings both manageable and fair.

IV. Issue

19 Motions to strike can present short questions with lengthy answers. Based on the aforementioned law, we are concerned with two overarching issues in this case:

1. Is it plain and obvious that the statement of claim discloses no reasonable cause of action with respect to some or all of the claims?
2. Do some claims that could be struck nevertheless show a scintilla of a cause of action such that the Plaintiffs should be granted leave to amend those claims?

V. Analysis of each alleged cause of action

20 The Court must take the statement of claim as it is. It must be read as generously as possible, thereby avoiding to put weight on what may be drafting deficiencies. However, would not be drafting deficiencies what would amount to speculations, hoping to find facts on discovery to support the allegations made. In effect, the motions judge is looking for the facts, taken as proven at this stage that will satisfy all of the necessary elements of the cause of action.

A. *Material facts*

21 We find guidance in the binding decision of the Federal Court of Appeal in *Mancuso* on the requirements for a statement of claim to resist a motion to strike under rule 221.

22 The main theme in *Mancuso* is the requirement that there be sufficient material facts pleaded. The material facts that are pleaded must be sufficient to support the claim and the relief sought. That means therefore that the facts must be advanced so that the cause of action may be established, leading to an appropriate remedy. The Court of Appeal agreed with the judge in *Mancuso* that "pleadings play an important role in providing notice and defining the issues to be tried and that the Court and opposing parties cannot be left to speculate as to how the facts might be variously arranged to support various causes of action" (para 16). The plaintiff must commit to more than merely stating some facts, a sort of narrative taken as proven, and then posit a series of alleged causes of action in order to prevail on a motion to strike.

23 A plaintiff will want to maximize her flexibility in a statement of claim. But she "must plead, in summary form but with sufficient detail, the constituent elements of each cause of action or legal ground raised. The pleading must tell the defendant who, when, where, how and what gave rise to its liability" (*Mancuso*, para 19). As is often the case,

the principle behind the rule helps understand the scope of the requirement. Hence, we read at paragraph 17 of *Mancuso*:

> [17] The latter part of this requirement -- sufficient material facts -- is the foundation of a proper pleading. If a court allowed parties to plead bald allegations of fact, or mere conclusory statements of law, the pleadings would fail to perform their role in identifying the issues. The proper pleading of a statement of claim is necessary for a defendant to prepare a statement of defence. Material facts frame the discovery process and allow counsel to advise their clients, to prepare their case and to map a trial strategy. Importantly, the pleadings establish the parameters of relevancy of evidence at discovery and trial.

24 Thus, adequate pleadings are required up front; adequate material facts are mandatorily required. As put by the *Mancuso* Court at para 20, "(p)laintiffs cannot file inadequate pleadings and rely on a defendant to request particulars, nor can they supplement insufficient pleadings to make them sufficient through particulars: *AstraZeneca Canada Inc. v. Novopharm Limited*, 2010 FCA 112."

25 That translates into the requirement that tort claims be identified and then the material facts are set out such that the elements of the tort claim are satisfied. In my view, that is largely missing in this statement of claim, which has made the examination of the motion to strike quite cumbersome.

B. *How the statement of claim is organized*

26 The statement of claim is difficult to apprehend and somewhat unwieldy. It starts off with bald allegations of various infringements, be they abuse of process, excess of authority, public misfeasance, negligence, negligent investigation, contempt of two Federal Court Judgments, as well as violation of section 15 and 7 of the *Charter*. For good measure, there is also an allegation that section 49 of the *Federal Courts Act* (prohibition of jury trails) and 72 of the IRPA (requirement that leave be granted for judicial review) are unconstitutional and of no force and effect.

27 It then continues with a series of paragraphs that allege facts, what constitutes in fact a narrative. Follow a number of paragraphs which provide a series of heads of damages that allegedly would result from the facts as presented. The chapeau of para 30 simply states that damages were suffered as a result of "officials' inexcusable delay, false and unfounded allegations, and breach of duty to process the main Plaintiffs' application."

28 Paragraphs 32 to 35 of the statement of claim that the Plaintiffs list causes of action. Thus, para 32 declares that there was:

* abuse and excess of jurisdiction and authority;
* abuse of process at common law and section 7 of the *Charter*;
* public misfeasance.

The paragraph ends with a mere declaration, without any connection with the facts, that "tortious conduct has caused the damages". What particular facts constitute the alleged tortious conduct is nowhere to be found in the pleading.

29 Para 34 of the statement of claim seeks to be somewhat more precise in suggesting that the delay between various proceedings constitutes in itself abuse and excess of authority as well as public misfeasance, alleging bad faith at para 35.

30 The Plaintiffs chose to plead in the alternative that officials have been negligent and engaged in negligent investigation. As for these causes of action, the statement of claim does not state what facts are pled in support of its essential elements. Rather, it is simply stated that they are owed a duty of care "to competently and with due dispatch properly process an application ...as well as competently and diligently investigate any allegations of inadmissibility" (para 36).

31 In the further alternative, the Plaintiffs allege a conspiracy to deny their permanent residence. This time, the

allegations are barely more precise in that the Plaintiffs allege "a contrived denial made in bad faith", delay and baseless association with Al Qaeda (para 37). I note that, again, the material facts that would give precision to the alleged conspiracy are not stated. In fact, there is a general allegation of conspiracy, but bad faith, delay and baseless association do not make a conspiracy, i.e. where there is proof of agreement and execution. The Defendant does not know who, when, where, how and what which would give rise to its liability.

C. *Amending pleadings*

32 It does not suffice for the Court to rule that a pleading is deficient. Rule 221 requires consideration of whether a pleading should be struck with or without leave to amend. The jurisprudence points to various considerations which come into play in making such determination.

33 The Plaintiffs have raised the possibility that if the statement of claim is struck in part or in whole, leave to amend the pleadings should be granted. As long as a pleading shows a scintilla of a cause of action, it will not be struck out if it can be cured by amendment: *Hunt* at pp 976-978; *Simon v Canada*, 2011 FCA 6 [*Simon*] at para 8; *Collins v Canada*, 2011 FCA 140 at para 30 [*Collins*]; *Sivak* at para 94; *Sweet v Canada* (1999), 249 NR 17 at para 21 (FCA) [*Sweet*]; *Larden v Canada*, (1998) 145 FTR 140 at para 26; *Kiely v Her Majesty the Queen*, (1987) 10 FTR 10 (FCTD) at p 2; *Waterside Ocean Navigation Co Inc v International Navigation Ltd*, [1977] 2 FC 257 at para 4.

34 The case law teaches that a pleading will not be struck out without leave to amend unless there is no scintilla of a cause of action (*McMillan v Canada*, (1996) 108 FTR 32 [*McMillan*] and *Sivak*). But there must be that scintilla. As Associate Chief Justice Jerome put it in *McMillan*, "(t)he burden on the applicant under R. 419 (1)(a) is heavy since portions of the pleadings will only be struck out if it is clear that the claim cannot be amended to show a proper cause of action" (para 39).

35 However, it is not for the Court to redraft the pleadings. In *Sweet*, the Court of Appeal commented that "(e)ach proceeding is to be assessed on its own merits, with consideration being given to, inter alia, the personal situation of the party, the issues and arguments raised, the manner and tone in which they are raised, the number and proportion of allegations that are defective and the readiness of the amendments needed" (my emphasis, para 21).

36 In fact, if a scintilla of a cause of action has been pleaded, this Court may be more reticent to strike claims without leave to amend in case it is the first version of the pleading, as in this case. In *Simon* and *Collins*, the Court of Appeal warned that failure to comply with the rules once the pleadings have been allowed to be amended would expose the pleadings to the risk of being struck out (*Simon* at para 17 and *Collins* at para 31).

D. *Alleged causes of action*

37 At the outset of the hearing, the parties agreed that the Defendant's list of claims was a satisfactory way to organize the discussion. I will proceed through each claim in this order and address the two issues identified above.

Claim 1: *Misfeasance in public office*

38 The statement of claim alleges the tort of misfeasance in public office. Because it constitutes the cause of action on which the Plaintiffs have chosen to rely the most heavily, I have attempted to gather the various paragraphs of the statement of claim which refer to misfeasance:

1. The Plaintiffs claim [...] all of which damages arise from: [...]

(ii) the Defendants' servants and officers' actions, and lack of action and omissions, in not issuing the permanent resident visas, and not complying with the Federal Court orders, constitutes an abuse of process, abuse and excess of authority and jurisdiction, public misfeasance, as well as negligence,

and negligent investigation, all compensable at common-law, under the ***Immigration and Refugee Protection Act ("IRPA")***, as well as s. 24(1) of the ***Charter***.

[...]

32. The Plaintiffs state, and the fact is that:

(a) the Defendants' officials have, with knowledge and intent, abused process, abused and exceeded authority and jurisdiction, and engaged in public misfeasance of their office, in their refusal to lawfully abide by the Federal Court order and terms of the ***IRPA*** and ***Regulations***, and issue permanent residence visas, and in the refusal(s) to give any cogent and/or sober answers to the plaintiffs and their counsel, except stone silence and stone-walling and that the Defendants' servants and officials have: [...]

(iii) engaged in public misfeasance as set out by the Supreme Court of Canada in ***Odhavji Estate v. Woodhouse [2003] 3 S.C.R. 263***, in that:

A/ the officials engaged in deliberate, unlawful conduct in the exercise of their public functions;

B/ the officials are aware that the conduct is unlawful and likely to injure the plaintiffs; and

C/ the officials' tortious conduct is the legal cause of the plaintiffs' injuries pleaded herein;

[...]

33. The Plaintiffs state that the Defendants' officials have a common-law duty, as well as a statutory duty under s. 3(1)(f) of the ***IRPA***, as interpreted and confirmed by this Court, in ***Dragan v Canada QL [2003] F.C.J. No. 260*** and ***Liang v Canada (M.C.I.) 2012 FC 758*** decisions to process applications consistently and promptly, which sub-section reads:

3. (1) The objectives of this Act with respect to immigration are

...

(f) to support, by means of consistent standards and prompt processing, the attainment of immigration goals established by the Government of Canada in consultation with the provinces [...]

34. The Plaintiffs state that the Defendants' inexcusable, inordinate, and castigating delay, both between the time of the 1st judicial review and the 2nd negative decision, as well as the 2nd judicial review to the present, constitutes abuse and excess of authority, as well as public misfeasance, of public office, in that inexcusable delay has been determined to constitute public misfeasance in ***inter alia, McMaster v. Canada, [2009] F.C.J. No. 1071***, by this Court.

35. The Plaintiffs further state that the conduct of the officers, and nature and substance of both decisions to deny the Plaintiffs permanent residence, has been made in bad faith, and absence of good faith, and further constitutes public misfeasance as set out above in the within statement of claim.

39 As indicated earlier, the Plaintiffs must plead with sufficient detail the constituent elements of each cause of action. But that is not enough. The Plaintiffs must also plead material facts in sufficient detail. As already indicated earlier, the trial judge in *Mancuso* commented, and it was specifically approved by the Court of Appeal, that "opposing parties cannot be left to speculate as to how the facts might be variously arranged to support various causes of action" (para 16). I am afraid this statement of fact suffers from that very deficiency. The elements of the tort of misfeasance are set out in *Odhavji Estate v Woodhouse*, 2003 SCC 69, [2003] 3 SCR 263 at paras 22-23 [*Woodhouse*]. The tort may take two different forms, but each requires the elements which are common to both. These elements are "(f)irst, the public officer must have engaged in deliberate and unlawful conduct in her or her capacity as a public officer. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff" (para 23). The tort may be approached in two ways. The two elements can be independently established, requiring unlawful conduct and knowledge that conduct was likely to cause harm. Or, both elements can be satisfied by proving the public officer specifically intends to injure a person

because such officers do not have the authority to exercise their powers for an improper purpose (*Woodhouse* at para 23).

40 The first element is focused on whether the alleged misconduct is deliberate and unlawful. This can arise from an act or omission that "arises[s] from a straightforward breach of the relevant statutory provisions or from acting in excess of the powers granted for an improper purpose": *Three Rivers District Council v Bank of England (No. 3)*, [2000] 2 WLR 1220 at p 1269, cited in *Woodhouse* at para 24.

41 The second element establishes the nexus between the impugned public official and the plaintiff by requiring that defendants know that their conduct was unlawful and likely to harm. One can read at paragraph 29 of *Woodhouse*:

> The requirement that the defendant must have been aware that his or her unlawful conduct would harm the plaintiff further restricts the ambit of the tort. Liability does not attach to each officer who blatantly disregards his or her official duty, but only to a public officer who, in addition, demonstrates a conscious disregard for the interests of those who will be affected by the misconduct in question. This requirement establishes the required nexus between the parties. Unlawful conduct in the exercise of public functions is a public wrong, but absent some awareness of harm there is no basis on which to conclude that the defendant has breached an obligation that she or he owes to the plaintiff, as an individual. And absent the breach of an obligation that the defendant owes to the plaintiff, there can be no liability in tort.

The Court has further commented that this element requires the Defendant, at the very least, to have been "subjectively reckless or wilfully blind as to the possibility that harm was a likely consequence of the alleged misconduct" (*Woodhouse* at para 38).

42 The requirement that the Defendant must have known that the conduct was unlawful is essential to the tort of misfeasance in public office. A public official's decision may well be adverse to certain people's interests, and yet still be lawful:

> The requirement that the defendant must have been aware that his or her conduct was unlawful reflects the well-established principle that misfeasance in public office requires an element of "bad faith" or "dishonesty". In a democracy, public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens. Knowledge of harm is thus an insufficient basis on which to conclude that the defendant has acted in bad faith or dishonestly. A public officer may in good faith make a decision that she or he knows to be adverse to the interest of certain members of the public. In order for the conduct to fall within the scope of the tort, the officer must deliberately engage in conduct that he or she knows to be inconsistent with the obligations of the office.
>
> (*Woodhouse*, para 28)

43 With that understanding of the tort, I will assess whether the statement of claim sufficiently pleads both tort elements for each of the Plaintiffs' misfeasance pleadings. The statement of claim seems to allege misfeasance on four grounds: (i) refusal to abide by Federal Court orders; (ii) refusal to issue permanent resident visas; (iii) refusal to provide "cogent and/or sober" answers to questions posed by the Plaintiffs; and (iv) delay in processing the Plaintiffs' permanent residence applications. For the first three grounds, the Plaintiffs allege that the actions were done "with knowledge and intent", but no similar claim is made with respect to the alleged processing delay.

(1) *Misfeasance claim 1: Contempt*

44 I see no potential for deliberate, unlawful conduct in the first allegation of contempt. The statement of claim says both Court orders sent the visa decision back for redetermination. There is no indication as to how the redetermination should proceed. No direction was given by the Court. The first redetermination resulted in a second negative decision, and the second redetermination is outstanding. The pleadings contain no facts, let alone material facts, showing that the orders were not followed. In fact, the exact opposite occurred. There was no refusal to abide by the court orders.

45 As a result, I cannot see a scintilla of a cause of action in the Plaintiffs' claim that the Defendant failed to abide by the orders in bad faith. I am striking the misfeasance claim respecting the "refusal to abide by Federal Court orders" without leave to amend.

(2) *Misfeasance claim 2: Refusal to issue permanent visas*

46 The second allegation is not, *prima facie*, unlawful. The act of refusing to issue permanent residence visas regularly occurs as a result of implementing IRPA. In this case, it is not completely clear on the record how the refusal to issue visas constitutes misfeasance.

47 The statement of claim offers that the first visa officer awarded the principal Plaintiff the wrong number of points under the IRPR in the face of evidence to the contrary and that the visas were denied "with knowledge and intent". The relevant provisions set precise point allocations for the adaptability criterion, leaving the visa officer little discretion in how to award points for a Canadian relative or a spouse's education.

48 It also states that the second visa officer deemed the principal Plaintiff inadmissible on the basis of wrong information. The relevant inadmissibility provisions of IRPA state that a foreign national is inadmissible for "being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to [in above subsections]" (para 34(1)(f) of IRPA). The determination of whether that organization engages in the enumerated acts requires that the officer must have "reasonable grounds" to believe in order to make that decision. That leaves a measure of appreciation to the officer. Certainty beyond a reasonable ground is not required. The test does not contemplate either that the officer be satisfied on a balance of probabilities, the legal standard in civil matters (*Canada (Attorney General) v Fairmont Hotels Inc.*, 2016 SCC 56, [2016] 2 SCR 720). Reasonable grounds to believe will suffice. The Plaintiffs, on the other hand, state that there is no basis for the inadmissibility finding.

49 The phrase "with knowledge and intent" is a bald conclusion; however, there are sufficient material facts alleged early in the statement of claim to appreciate that there is a basis for the claim that both actions were deliberate conduct. It appears to me that there is a scintilla of a cause of action pleaded however imperfectly. But more precision is needed. The material facts must be plainly identified and they must be connected to the elements of the tort asserted, including of course the required state of mind (*Mancuso*, para 26).

50 The second tort element is knowledge that the visa denials were unlawful and likely to harm the Plaintiffs. The statement of claim says that the visa officers denied the lawful visa issuance "with knowledge and intent" and "in bad faith". If the officers did award the wrong number of points and deem the principal Plaintiff inadmissible in the face of clearly contradictory evidence, this is sufficient to plead that the officers knew their conduct was unlawful. *Woodhouse* found that a similarly-worded pleading was sufficient to establish a reasonable cause of action in misfeasance:

> Insofar as the second requirement is concerned, the statement of claim alleges that the acts and omissions of the defendant officers "represented intentional breaches of their legal duties as police officers". This plainly satisfies the requirement that the officers were aware that the alleged failure to cooperate with the investigation was unlawful. The allegation is not simply that the officers failed to comply with s. 113(9) of the *Police Services Act*, but that the failure to comply was intentional and deliberate.
>
> (*Woodhouse*, para 36)

51 The only reference to knowledge that the unlawful conduct would likely harm the Plaintiffs is at paragraph 35, which states "that the conduct of the officers, and nature and substance of both decisions to deny the Plaintiffs permanent residence, has been made in bad faith" and the general assertion that the alleged misfeasance was done "with knowledge". Bald conclusions such as "in bad faith" do not qualify as material facts (*Merchant* at para 34). Moreover, Rule 181 requires that Plaintiffs provide particulars on the material facts they are pleading to support a tort's mental element. Here, the Plaintiffs seem to be pointing to several circumstantial facts to argue that the

Defendant intentionally misprocessed their permanent residence applications over a ten-year period to keep them out of Canada.

52 If someone applies for a permanent residence visa, they expect to have it properly processed because they want to live in Canada. It is not a stretch to infer that improper denial of such a visa would likely harm applicants wanting to come to Canada. Of course, the statement of claim should actually plead specifically the material facts necessary to make out this second tort element. That was not done. *Mancuso* requires the who, when, where, how and what. The issue must be defined with more precision in order to make the proceedings manageable and fair. The amended pleadings will have to provide the material facts such that the Defendant will know what it is defending against. At this stage, one has to speculate somewhat as to what facts constitute the cause of action. More and better precision is called for.

53 My role on a motion to strike is not to decide the Plaintiffs' chance of succeeding with this argument (*Minnes v Minnes* (1962), 39 WWR 112). Because I see a scintilla of a cause of action, barely, I am also granting leave to amend this particular misfeasance claim with respect to the second tort element (i.e. material facts underpinning the allegation that the public official "knew" that their act or omission would likely harm the Plaintiff).

(3) *Misfeasance claim 3: Refusal to provide answers*

54 The fact that the Defendant refused to answer the Plaintiffs' questions does not show unlawful conduct. This does not show a cause of action, let alone a reasonable one. Unlike the points calculation and the inadmissibility decision, the Plaintiffs failed to point to a statutory obligation that the visa officer(s) breached or show that the officer(s) acted unlawfully in the exercise of their public functions generally. As a result, I am striking the misfeasance allegation concerning the "refusal to provide "cogent and/or sober" answers to questions posed by the Plaintiffs" without leave to amend.

(4) *Misfeasance claim 4: Delay in processing visa applications*

55 For the fourth misfeasance allegation regarding processing delays, the Plaintiffs relied on *McMaster v Canada*, 2009 FC 937, 352 FTR 255 [*McMaster*] for the authority that delay can constitute unlawful conduct in a misfeasance action. *McMaster* concerned an inmate who was repeatedly denied properly-sized running shoes in the face of a statutory obligation to provide adequate footwear. The statutory obligation that the Plaintiffs rely on for delay in the immigration context is subsection 3(1)(f) of IRPA, as interpreted in *Liang v Canada (Citizenship and Immigration)*, 2012 FC 758 at paragraph 25; 413 FTR 145 [*Liang*] and *Dragan v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 211 at paragraph 45, 227 FTR 272 [*Dragan*]. This subsection states:

> 3 (1) The objectives of this Act with respect to immigration are [...]
>
> (f) to support, by means of consistent standards and prompt processing, the attainment of immigration goals established by the Government of Canada in consultation with the provinces;

Liang and *Dragan* found, on applications for *mandamus*, that unreasonable delay can amount to an implied refusal to perform the statutory duty to process visa applications under the IRPA. Justice Rennie, then of this Court, found in *Liang* that a *prima facie* case for delay was made out where applications requiring processing had been outstanding for 4.5 to 10 years.

56 The Defendant seeks to distinguish *Liang* and *Dragan* on the basis that they dealt with applications for *mandamus*, not private law actions. They argue that "even where delays are found to be unreasonable or inordinate, this does not give rise to a free-standing cause of action", citing *Farzam v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1659, 284 FTR 158 [*Farzam*] at para 105; and *Haj Khalil v Canada*, 2007 FC 923, 317 FTR 32 [*Khalil*] at para 8 (affirmed in *Haj Khalil v Canada*, 2009 FCA 66) (at para 28 of their written representations). Both *Farzam* and *Khalil* dealt with actions in negligence, not misfeasance in public office.

57 The Plaintiffs' visa applications have been effectively outstanding for 10 years given they are still waiting for the outcome of their second redetermination. This falls at the outer end of Justice Rennie's suggested timelines for establishing *prima facie* unreasonable delay in the *mandamus* context. The Defendant has not presented an

authority stating that unreasonable delay in processing visa applications cannot amount to unlawful conduct for the purposes of a misfeasance action. As a result, this appears to be an issue requiring discussion at trial and not on a motion to strike. The Supreme Court in *Hunt* commented that "(p)rovided that the plaintiff can present a "substantive" case, that case should be heard" (p 975). It is premature on a motion to strike to rule on the matter.

58 As noted above, unlike the first three misfeasance allegations, the Plaintiffs failed to specifically plead that the delay was "deliberate", but did plead that it was done "in bad faith", which implies a measure of deliberation. There are circumstantial facts that could support this tort element, namely the use of different grounds to refuse the visas in the first and second denial, but the statement of claim fails to plead clearly that the delays were deliberate. In *Woodhouse*, the Supreme Court struck allegations that lacked the words "deliberate" and "intentional", because inadvertence or negligence is insufficient to make out the intentional tort of misfeasance:

> 37 Although the allegation that the Chief deliberately failed to segregate the officers satisfies the requirement that the Chief intentionally breached his legal obligation to ensure compliance with the *Police Services Act*, the same cannot be said of his alleged failure to ensure that the defendant officers produced timely and complete notes, attended for interviews in a timely manner, and provided accurate and complete accounts of the incident. As above, inadvertence or negligence will not suffice; a mere failure to discharge the obligations of the office cannot constitute misfeasance in a public office. In light of the allegation that the Chief's failure to segregate the officers was deliberate, this is not a sufficient basis on which to strike the pleading. Suffice it to say, the failure to issue orders for the purpose of ensuring that the defendant officers cooperated with the investigation will only constitute misfeasance in a public office if the plaintiffs prove that the Chief deliberately failed to comply with the standard established by s. 41(1)(b) of the *Police Services Act*.
>
> [my emphasis]

Through the narrative offered as facts, I see however a scintilla of a cause of action on this first tort element, but the pleadings must properly set out the full cause of action. They will have to be significantly amended.

59 As with the second misfeasance claim, the pleadings on the second tort element--knowledge of unlawful conduct and likelihood of harming the Plaintiffs--are not explicit and are close to being bald, which fails to meet the requirements of Rules 174 and 181. With respect to the Defendant's knowledge that their delays were unlawful, the statement of claim fails to plead the material facts showing which public officials had this knowledge. Was the first officer aware of an unlawful delay that would likely cause harm in 2009, or only the second officer in 2014? Or was it other individuals that knew the delay was unlawful?

60 With respect to the Defendant's alleged knowledge that the delays were unlawful and likely to harm the Plaintiffs, I see a scintilla of a cause of action. It is reasonable to infer that an alleged 10-year delay in processing does not fulfill the IRPA objective of "prompt processing" and would likely cause harm to the waiting family. However, again, the statement of claim must plead sufficient material facts to qualify as a reasonable cause of action. I would not strike the pleadings without allowing an opportunity to amend in order to satisfy the requirements.

61 Accordingly, I am granting leave to amend this particular misfeasance claim with respect to the first tort element prerequisite that the unlawful conduct was deliberate, and with respect to the second tort element requirement that the public official "knew" that their act or omission was unlawful and likely to harm the Plaintiffs.

Claim 2: *Abuse and excess of jurisdiction and authority*

62 The Plaintiffs refer to "abuse and excess of jurisdiction and authority" at multiple points in their pleadings, often in concert with their claims respecting misfeasance in public office:

1. The Plaintiffs claim [...] all of which damages arise from: [...]

(ii) the Defendants' servants and officers' actions, and lack of action and omissions, in not issuing the permanent resident visas, and not complying with the Federal Court orders, constitutes an abuse of process, abuse and excess of authority and jurisdiction, public misfeasance, as well as negligence, and negligent investigation, all compensable at common-law, under the ***Immigration and Refugee Protection Act ("IRPA")***, as well as s. 24(1) of the ***Charter***.

[...]

32. The Plaintiffs state, and the fact is that:

(a) the Defendants' officials have, with knowledge and intent, abused process, abused and exceeded authority and jurisdiction, and engaged in public misfeasance of their office, in their refusal to lawfully abide by the Federal Court order and terms of the ***IRPA*** and ***Regulations***, and issue permanent residence visas, and in the refusal(s) to give any cogent and/or sober answers to the plaintiffs and their counsel, except stone silence and stone-walling and that the Defendants' servants and officials have: [...]

(i) engaged in abuse and excess of jurisdiction and authority as historically contemplated by the Supreme Court of Canada in ***Roncarelli v. Duplessis, [1959] S.C.R. 121, et seq*** [*Roncarelli*];

[...]

34. The Plaintiffs state that the Defendants' inexcusable, inordinate, and castigating delay, both between the time of the 1st judicial review and the 2nd negative decision, as well as the 2nd judicial review to the present, constitutes abuse and excess of authority, as well as public misfeasance, of public office, in that inexcusable delay has been determined to constitute public misfeasance in ***inter alia, McMaster v. Canada, [2009] F.C.J. No. 1071***, by this Court.

63 The Defendant argues that abuse and excess of authority and jurisdiction alleged by the Plaintiffs is encapsulated in the tort of misfeasance. I agree. The following discussion of the tort of misfeasance in public office in *Woodhouse* confirms that it covers the claim of abuse and excess of authority and jurisdiction as contemplated in *Roncarelli v Duplessis*, [1959] SCR 121:

> 18 The origins of the tort of misfeasance in a public office can be traced to *Ashby v. White* (1703), 2 Ld. Raym. 938, 92 E.R. 126, in which Holt C.J. found that a cause of action lay against an elections officer who maliciously and fraudulently deprived Mr. White of the right to vote. Although the defendant possessed the power to deprive certain persons from participating in the election, he did not have the power to do so for an improper purpose. Although the original judgment suggests that he was simply applying the principle *ubi jus ibi remedium*, Holt C.J. produced a revised form of the judgment in which he stated that it was because fraud and malice were proven that the action lay: J. W. Smith, A *Selection of Leading Cases on Various Branches of the Law* (13th ed. 1929), at p. 282. Thus, in its earliest form it is arguable that misfeasance in a public office was limited to circumstances in which a public officer abused a power actually possessed.
>
> 19 Subsequent cases, however, have made clear that the ambit of the tort is not restricted in this manner. In *Roncarelli v. Duplessis*, [1959] S.C.R. 121, this Court found the defendant Premier of Quebec liable for directing the manager of the Quebec Liquor Commission to revoke the plaintiff's liquor licence. Although *Roncarelli* was decided at least in part on the basis of the Quebec civil law of delictual responsibility, it is widely regarded as having established that misfeasance in a public office is a recognized tort in Canada. See for example *Powder Mountain Resorts Ltd. v. British Columbia* (2001), 94 B.C.L.R. (3d) 14, 2001 BCCA 619; and *Alberta (Minister of Public Works, Supply and Services) v. Nilsson* (2002), 220 D.L.R. (4th) 474, 2002 ABCA 283. In *Roncarelli*, the Premier was authorized to give advice to the Commission in respect of any legal questions that might arise, but had no authority to involve himself in a decision to revoke a particular licence. As Abbott J. observed, at p. 184, Mr. Duplessis "was given no statutory power to interfere in the administration or direction of the Quebec Liquor Commission". Martland J. made a similar observation, at p. 158, stating that Mr. Duplessis' conduct involved "the exercise of powers which, in law, he did not possess at all". From this, it is clear that the tort is not restricted to the abuse of a statutory or

> prerogative power actually held. If that were the case, there would have been no grounds on which to find Mr. Duplessis liable.

64 As a result, I am striking the reference to abuse and excess of jurisdiction and authority as a stand-alone cause of action. The matter ought to be dealt with under the misfeasance claims once properly amended.

Claim 3: Abuse of process

65 The statement of claim pleads the tort of abuse of process in the same paragraphs already referred to above for misfeasance in public office and quoted at length at paragraph 38 of these reasons.

66 The Defendant contends that abuse of process "involves the misuse of the process of the courts to coerce someone in a way that is outside the ambit of the legal claim upon which the court is asked adjudicate": para 33 of the Defendant's written representations citing *Levi Strauss & Co v Roadrunner Apparel Inc*, (1997), 76 CPR (3d) 129 (FCA) at p 3.

67 The Supreme Court of Canada authority provided by the Plaintiffs, *United States of America v Cobb*, 2001 SCC 19, [2001] 1 SCR 587 [*Cobb*], also defines abuse of process in terms of abusing the court process:

> 37 Canadian courts have an inherent and residual discretion at common law to control their own process and prevent its abuse. The remedy fashioned by the courts in the case of an abuse of process, and the circumstances when recourse to it is appropriate were described by this Court in *R. v. Keyowski*, [1988] 1 S.C.R. 657, at pp. 658-59:
>
> > The availability of a stay of proceedings to remedy an abuse of process was confirmed by this Court in *R. v. Jewitt*, [1985] 2 S.C.R. 128. On that occasion the Court stated that the test for abuse of process was that initially formulated by the Ontario Court of Appeal in *R. v. Young* (1984), 40 C.R. (3d) 289. A stay should be granted where "compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency", or where the proceedings are "oppressive or vexatious" ([1985] 2 S.C.R. 128, at pp. 136-37). The Court in *Jewitt* also adopted "the caveat added by the Court in *Young* that this is a power which can be exercised only in the 'clearest of cases'" (p. 137).

68 In a similar decision on a motion to strike, Prothonotary Aalto also concluded that *Cobb* relates to abuse of the court process and that the plaintiff failed to plead facts making out this tort:

> [64] On the tort of abuse of process, I agree with the Crown's submissions that *Cobb* does not support the Plaintiff's submission that this tort exists on these facts. In *Cobb*, the Supreme Court explicitly defined abuse of process as abuse of the Court's own process and that definition did not include a public official's abuse of any process in a vacuum. The Plaintiff neither pleads facts relating to an abuse of a Court process nor did he provide any case-law that expands the tort of abuse of process beyond the abuse of the Court's process as conceptualized in *Cobb*.
>
> > (*Almacén v Her Majesty the Queen*, 2015 FC 957, upheld at 2016 FC 300 and subsequently upheld at 2016 FCA 296)

69 Moreover, the Plaintiffs pleaded no material facts going to the elements of this tort in their statement of claim (i.e. how or when a court process was abused). Actually, when discussions of immigration officials came before this Court, twice they were returned for a new determination. It is difficult to see how seizing the Court on judicial review by the Plaintiffs can be an abuse of process of the Court by the Defendant. Therefore, I am striking this claim without leave to amend.

Claim 4: *Negligence and negligent investigation*

70 The statement of claim pleaded negligence and negligent investigation as follows:

> 36. In the alternative the Plaintiffs state that, the Defendants' officials have been negligent, and engaged in negligent investigation, in the exercise of their common-law, statutory, and constitutional duties owed to the Plaintiffs in that:
>
> (i) the Defendants' officials owe a common-law, statutory, and constitutional, duty of care to competently and with due dispatch properly process an application sent back by judicial order pursuant to an application for judicial review under the statutory scheme pursuant to the ***IRPA*** as well as competently and diligently investigate any allegations of inadmissibility;
>
> (ii) the Defendants' officials breached this duty of care; and
>
> (iii) as a result of this breach the Plaintiffs have suffered loss and damages which includes, ***inter alia***;
>
> A/ the mental suffering and distress of separation between the plaintiffs and their family in Canada, also protected by s.7 of the ***Charter***;
>
> B/ irreparable loss of companionship, of the Plaintiffs, particularly that involving the children;
>
> C/ economic loss, to be quantified at trial, in being deprived of, inter alia;
>
> (i) the benefit of the Plaintiff, Emad Al Omani, to exercise his proper place and activity in the joint business interests of his brother in Canada;
>
> (ii) the incursion of legal costs incurred to date, to be determined at trial;
>
> D/ the mental stress and anguish of falsely being branded as associated with Al Qaeda, or such groups, which further endangers their very lives;
>
> E/ their right to equal treatment and protection under the law, as required by s. 3(3)(d) of the ***IRPA***, the structural imperatives of the Constitution, as well as s. 15 of the *Charter*, and loss of their dignity to the extent of unequal treatment under the law.

71 The Defendant argues that the Plaintiffs have failed to plead material facts pertaining to each element of a negligence action, particularly duty of care and breach of the standard of care. I agree. The pleadings are declaratory, without any connection of material facts with the elements of the tort.

72 When a duty of care is not clearly established in the case law, the *Anns* test is used to determine if a duty exists, as per *Cooper v Hobart*, 2001 SCC 79, [2001] 3 SCR 537 at paragraph 30. The Defendant summarized the test at paragraph 36 of her written representations:

> (a) Does the relationship between the parties in the circumstances disclose the reasonably foreseeable harm and proximity sufficient to establish a *prima facie* duty of care; and
>
> (b) Notwithstanding the existence of a *prima facie* duty of care, are there residual policy considerations that should negative the imposition of a duty of care?

73 The only allegations that the Plaintiffs pleaded with respect to duty of care is to allege that the Defendant owes a duty of care to (i) "competently and with due dispatch properly process an application sent back by judicial order pursuant to an application for judicial review under the statutory scheme pursuant to the IRPA" and to (ii) "competently and diligently investigate any allegations of inadmissibility" (at para 36 of the statement of claim). They pleaded no facts whatsoever going to either element of the *Anns* test (*Anns v Merton London Borough Council*, [1978] AC 728 (HL)).

74 The Plaintiffs also pleaded scarce facts as to the breach of this alleged duty of care. Repeating the points

above, they allege the Defendant did not properly process an application sent back by judicial review and did not properly investigate allegations of inadmissibility. In my view, this is less than thin.

75 The Plaintiffs stated that there exists a duty of care without even alleging how that can be. What is the duty of care that was owed by immigration officers? The English Court of Appeal in *W. v Home Office*, [1997] E.W.J. No. 3289 (QL) [*W. v Home Office*] found twenty years ago that there is no proximity such that a duty of care exists between a plaintiff and immigration officers. One can read at para 28:

> The process whereby the decision making body gathers information and comes to its decision cannot be the subject of an action in negligence. It suffices to rely on the absence of the required proximity. In gathering information, and taking it into account, the Defendants are acting pursuant to their statutory powers and within that area of their discretion where only deliberate abuse would provide a private remedy. For them to owe a duty of care to immigrants would be inconsistent with the proper performance of their responsibilities as immigration officers. In conducting their inquiries, and making decisions in relation to immigrants, including whether they should be detained pending those inquiries, and making decisions in relation to immigrants, including whether they should be detained pending those inquiries, they are acting in that capacity of public servant to which the considerations outlined above apply.

That is the view taken by this Court in *Premakumaran v Canada*, [2005] F.C.J. No. 1388 [*Premakumaran*].

76 In that case, finding support in *A. O. Farms Inc v Canada*, [2000] F.C.J. no 1771, 28 Admin LR (3d) 315 (FCA), the Court found that the immigration officers as agents of the government owe "a duty of care to the public as a whole and not to the individual Plaintiffs. The Plaintiffs cannot be considered a "neighbour" for these purposes and no such relationship should be created between the Defendant and individual members of the public" (*Premakumaran*, at para 25). The Federal Court of Appeal agreed. It found that "(i)n this case, however, no duty of care arises. As the Motions Judge correctly found, no special relationship of proximity and reliance is present on the facts of this case" (*Premakumaran v Canada*, 2006 FCA 213, [2007] 2 FCR 191, at para 24). It is one thing to allege that the performance in office constitutes a misfeasance. It is quite another to base one's claim on a duty of care leading to a claim in negligence. Misfeasance and negligence are completely different and target different states of mind.

77 The *W. v Home Office* case found an echo in this Court in *Benaissa*. There, the Court found that the process of the gathering of information by the decision-making body leading to a decision cannot be the subject of an action in negligence. There may be, in my view, circumstances in which a degree of proximity will be sufficient. However, the bare assertion that unidentified immigration officers deliberately failed to process the application for permanent residence in a timely fashion does not plead the duty of care that would distinguish this case and the facts that could disclose the factual basis for the allegation of negligence. This does not disclose a reasonable cause of action. I cannot see a scintilla of a cause of action. There is not even the beginning of something that could be amended.

78 Justice Russell faced a similar statement of claim in *Sivak*. He struck the negligence claim for failing to plead material facts going to the essential elements of the tort of negligence:

> [45] I also agree with the Defendants that the Plaintiffs have not pled, or factually substantiated, the essential elements of the tort of negligence.
>
> [46] As the Defendants point out, to support a cause of action in negligence, a statement of claim must include sufficient facts to support the essential elements of the tort. These include establishing a duty of care, providing details of the breach of that duty, explaining the causal connection between the breach of duty and the injury, and setting out the actual loss. Such a claim requires a factual basis that identifies each wrongful act as well as negligence, such as the "when, what, by whom and to whom of the relevant circumstances." See *Benaissa v Canada (Attorney General)*, 2005 FC 1220, at paragraph 24.
>
> [47] The Plaintiffs make a bald allegation at paragraph 28(b) of the Claim that the "Defendants' officials have been negligent in the exercise of their common-law, statutory, and constitutional duties owed to the Plaintiffs" and that these duties arose in the context of the processing of their refugee claims pursuant to

> the *Immigration and Refugee Protection Act*. This is followed by unsubstantiated statements that the "Defendants' officials breached this duty of care" and that this caused the Plaintiffs' losses.
>
> [48] I agree with the Defendants that such allegations are nothing more than conclusions and are not sufficient to support a cause of action in negligence. No details have been provided to identify the "Defendants' officials," to explain their roles and responsibilities in relation to the Plaintiffs, or to establish their connection to any of the parties. Similarly, the Claim is silent as to the "Defendants' officials" particular acts or omissions that the Plaintiffs' claim were negligent and no facts are included to support the specific "common-law, statutory and constitutional duties" that were allegedly breached. It seems to me that the general requirements for establishing liability in tort have not been met and it would be impossible to conduct the necessary analysis to determine whether liability could be established. As the Defendants point out, this is particularly difficult where the defendant is a government actor. Issues arise as to whether public law discretionary powers establish private law duties owed to particular individuals or whether the decisions in question were policy decisions or operational decisions. These questions are very complex and detailed factual pleadings are required in order to properly determine whether a cause of action exists.
>
> [my emphasis]

79 In my view, the claim as pled does not disclose a reasonable cause of action; indeed, there is not even a scintilla of a cause of action. The pleadings are nothing other than general allegations and conclusions without providing the material facts required or even what the duty of care may be. Bare assertions of conclusions are not allegations of material facts. The Plaintiffs only declare that there exists some duty of care. The Court in *Sivak*, relying on *Kisikawpimootewin v Canada*, 2004 FC 1426 [*Kisikawpimootewin*] and *Murray v Canada* (1978), 21 NR 230 (FCA) found that "a claim that does not sufficiently reveal the facts upon which a cause of action is based, such that it is not possible for the defendant to answer or the Court to regulate the action, is a vexatious action" (para 30). The Plaintiffs have asserted the claim as an alternative. In so doing, they have failed to provide any material fact relevant to a negligence claim that could support what is at any rate a vague claim based on bald assertions and conclusions.

80 The tort of negligent investigation requires the Plaintiffs to plead facts pertaining to the conduct of the investigation into the inadmissibility finding to make out a reasonable cause of action (*Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at para 68). The Defendant argues that "[i]n the few cases where the standard of care has been held to have been breached, the conduct of investigators has involved egregious and overzealous behaviour" (at para 45 of the Defendant's written representations). Examples of such conduct include "ignoring exculpatory or other material evidence" and "making decisions based primarily on assumptions or stereotypes" (*Safa Almalki v Canada*, 2012 ONSC 3023 at para 17). There is nothing of the sort that is even alleged by the Plaintiffs in this lawsuit.

81 The Supreme Court also noted in *Woodhouse* that citizens are not entitled to a certain level of thoroughness in an investigation, nor are they entitled to a certain outcome:

> 40 ... Individual citizens might desire a thorough investigation, or even that the investigation result in a certain outcome, but they are not entitled to compensation in the absence of a thorough investigation or if the desired outcome fails to materialize...

82 The statement of claim recounts only the principal Plaintiff's 15-minute interview where he was asked about Al Qaeda and states that the officer refused to explain the reason for the question; it pleads that these allegations have no basis:

> 24. On January 13th, 2014 the Plaintiff, Emad Al Omani was called in for a ***very brief*** interview with respect to his application re-determination.
>
> 25. On March 17th, 2014 the Plaintiff was, Emad Al Omani was sent a second negative decision, which stated and concluded, without any reasons whatsoever, that;
>
> "In particular, there are reasonable grounds to believe that you are a member of the inadmissible class of persons described in 34(1)(f) of the Immigration and Refugee Protection Act." [...]

26. The Plaintiff, Emad Al Omani, advises that at ***no time*** was he either:

(a) given notice of these outrageous and untrue conclusions and allegations; nor

(b) shown any evidence nor any information, to address these false allegations and conclusions.

During the interview, the Plaintiff was asked an unfocused, nebulous, and non-contextual question about Al Qaeda. In fact, during the fifteen (15) minute interview, the Plaintiff, Emad Al Omani, was only asked two questions, namely:

(a) to explain the change in his job description [...]

(b) the officer asked the Plaintiff if the Plaintiff belonged to, or was in any way associated with "any group or organization like Al Qaeda in Iraq", to which the Plaintiff categorically replied that he did ***not*** belong to, ***nor*** associated with such groups as Al Qaeda, nor Al Qaeda itself.

The Plaintiff then asked the officer to be more specific with respect to why he would even ask such a question, but the immigration officer refused, citing "secrecy" barring him from divulging any Canadian government information.

27. The earlier application, which had been denied, had no such allegations nor conclusions for denial. It was denied based on the fact that some documents relating to Emad Al Omani, were missing, and a miscalculation and blatant error(s) in applying the selection criteria, for which it was sent back for reconsideration by Federal Court order.

83 Apart from these statements, no material facts are given. There is nothing on the conduct of the investigation that led to the inadmissibility finding. I agree with the Defendant that the statement of claim fails to plead facts, let alone sufficient material facts to establish the tort of negligent investigation other than suggesting that the Plaintiffs are unhappy with the conclusion reached that they are inadmissible. The pleadings do not even begin to give any indication to support a general allegation that the investigation may have been negligent. I see no scintilla of an argument and am striking this claim without leave to amend. There is not even the faintest allegation of the who, when, where, how and what giving rise to liability. It is plain and obvious that the claim cannot succeed. The Plaintiffs throw up in the air an accusation with nothing to support it. There is nothing to amend. Actually, the Plaintiffs did not even attempt to specify how the claim could be amended (*Ward v Canada (Public Safety and Emergency Preparedness)*, 2014 FC 568, para 30). The fact of the matter is that there is no cause of action given the material facts pleaded. It is not so much that there are deficiencies which may be cured by amendment. There is no cause of action pleaded.

Claim 5: *Conspiracy*

84 In what appears to be the further alternative, the Plaintiffs allege that the Defendant is engaged in a conspiracy at paragraph 37 of their statement of claim:

37. The Plaintiffs further state that the Defendant's officials have:

(a) (i) engaged, and are engaging in a conspiracy, through their conduct and communications, to deny the Plaintiff's statutory, constitutional, as well as international treaty rights, to deny their permanent residence under Canadian law, as well as a fair and impartial assessment of their application, a conspiracy as outlined, ***inter alia***, by the Supreme Court of Canada in the test set out in ***Hunt v. Carey*** and jurisprudence cited therein, namely to;

A/ engage in an agreement for the use of lawful and unlawful means, and conduct, the predominant purpose of which is to cause injury to the Plaintiff; and/or

> B/ to engage, in an agreement, to use unlawful means and conduct, whose predominant purpose and conduct directed at the Plaintiff, is to cause injury to the Plaintiff, or the Defendants' officials should know, in the circumstances, that injury to the Plaintiff, is likely to, and does result;
>
> The details and particulars of which conspiracy(ies) are as follows:
>
> (b) that the first denial was a contrived denial made in bad faith, and absence of good faith, entirely designed and engineered to deny, contrary to law, the Plaintiffs' application;
>
> (c) that the inordinate, inexcusable, and castigating delay between the 1st judicial review determination, and second denial, as well as the inordinate, inexcusable and castigating delay since the 2nd judicial review, to the present, are all designed to stone-wall and deny the Plaintiffs' procedural and substantive rights to have their applications possessed [*sic*];
>
> (d) that the baseless, false, and wholly contrived allegations of inadmissibility for association with Al Qaeda, or such groups, have been designed and engineered to simply deny the Plaintiffs their procedural and substantive right to have their application(s) processed under the ***IRPA***.
>
> The Plaintiffs state that all known (and unknown) officers to the Plaintiffs involved in the investigation, processing, and denial of the Plaintiffs' application have conspired with the goal of denying the Plaintiffs, by any and all means necessary, and therefore liable in conspiracy as set out by the Supreme Court of Canada, in ***Hunt v. Carey*** as follows [repeats test as set out above].
>
> 38. The Plaintiff states, and the fact is, that as a direct result of the Defendant's officials illegal actions, and tortious conduct, the Plaintiffs have, and will, suffer damages which he claims as set out the within statement of claim.

85 As the Plaintiffs outlined, *Hunt* explains that the tort of conspiracy can be established on two grounds: (i) the plaintiff can claim a conspiracy to injure in that two or more people work together in agreement using lawful or unlawful means for the predominant purpose of injuring the plaintiff, who is in fact injured; or (ii) the plaintiff can claim a conspiracy of unlawful acts where two or more people work together in agreement to engage in unlawful conduct directed toward the plaintiff that they ought to know is likely to cause injury to said plaintiff, who is in fact injured.

86 The Defendant referred to *Normart Management Ltd v West Hill Redevelopment Co Ltd*, (1998), 37 OR (3d) 97 (ONCA), for a list of the elements that need to be pleaded to establish a cause of action in conspiracy. The Ontario Court of Appeal writes at paragraph 21:

> [21] In *H.A. Imports of Canada Ltd. v. General Mills Inc.* (1983), 42 O.R. (2d) 645, 150 D.L.R. (3d) 574 (H.C.J.), O'Brien J., dealing with the civil action of conspiracy as pleaded, quoted from Bullen, Leake and Jacob's *Precedents of Pleadings*, 12th ed. (London: Sweet & Maxwell, 1975), as follows at pp. 646-47:
>
> > The statement of claim should describe who the several parties are and their relationship with each other. It should allege the agreement between the defendants to conspire, and state precisely what the purpose or what were the objects of the alleged conspiracy, and it must then proceed to set forth, with clarity and precision, the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy; and lastly, it must allege the injury and damage occasioned to the plaintiff thereby.

87 The statement of claim under review speaks of denials to grant permanent residence based on flimsy reasons followed by long periods without any action on the part of the government; however it identifies those involved in the alleged grand conspiracy as "all known (and unknown) officers to the Plaintiffs involved in the investigation, processing, and denial of the Plaintiffs' application" (at para 37). This obviously does not constitute an identification by name. It is not either by group or job positions. The Plaintiffs identify officers based on their allegation that those who dealt with the matter, given that permanent residence was denied, have conspired together. The statement of claim does not describe the alleged conspirators' relationship with each other apart from implying that they are those who worked on the Plaintiffs' application at some point. It is as if the Plaintiffs seek to derive some conspiracy against them based on two denials and the periods of time between events.

88 The statement of claim fails to describe the agreement(s) between the alleged conspirators. It pleads their alleged overall approach--denying the processing of the Plaintiffs' permanent residence application "by any and all means necessary"--but does not plead material facts precisely describing the purpose of the agreement between the known and unknown officers. It is fine to have a conspiracy theory, but it must be spelled out. Crying "conspiracy" is not enough to disclose a reasonable cause of action.

89 Reading the pleadings as generously as can be, there is no way to decipher what the agreement may be, who the conspirators are, whether the alleged conspiracy has the predominant purpose to injure the Plaintiffs, as opposed to pursuing some other purpose, whether the alleged conspiracy is to use lawful or unlawful means. In other words, we are left with a bald and bold allegation without even attempting to define the essential elements of the tort alleged, and obviously, offering any fact, material or not, to substantiate an allegation.

90 Instead of identifying the branch of the tort of conspiracy the Plaintiffs wish to rely on in order to state material facts on which they actually rely, they make a completely generic assertion, without more. There is not even anything about how there can be a conspiracy, as opposed to, for instance mere knowledge or approval of a cause of conduct. Proof of agreement and execution is required. Nothing of the sort is alleged with material facts in support.

91 All that is known is that the Plaintiffs were denied permanent residence twice. The pleadings, in my view, amount to a complete absence of definition of the tort and its elements. It is plain and obvious that there is no reasonable cause of action. It is as if the Plaintiffs were suggesting that, given they were denied twice and there were delays, there must be somehow a conspiracy. It is not pleading conspiracy to merely allege these facts and, without more, suggest an agreement the purpose of which is unknown. Put a different way, the Plaintiffs seem to allege their experience with immigration authorities is such that there must be some conspiracy hatched somewhere.

92 The pleadings are also so deficient in factual material that the Defendant would be incapable to know how to answer. They are bare assertions that are unfounded; not only they do not disclose a reasonable cause of action they could be struck as frivolous or vexatious (*Senechal v Muskoka (District Municipality)*, [2003] OJ No 885; *Kisikawpimootewin supra*).

93 In terms of overt acts, which would tend to show that some agreement to work together exists and could be opposed to the co-conspirators, the statement of claim simply references the first visa denial, the delay between the first judicial review and the second visa denial, the delay since the second judicial review, and the inadmissibility allegations. There is no trace of any agreement, just some discrete events. The Plaintiffs pleaded a series of independent events, and did not present anything tending to show that the conspirators agreed to undertake these acts to further the conspiracy; rather, they rely on their overarching statement that the Defendant aimed to deny the Plaintiffs' application processing, without more.

94 The nature of a conspiracy requires that there be participants, some known and others unknown, who agree to do something that will cause injury (*Cement LaFarge v B.C. Lightweight Aggregate*, [1983] 1 SCR 452). Here, the material facts allowing to conclude to some agreement are absent. The date, the object and the purpose of an agreement between unknown participants is not even pled. No overt act by the participants in furtherance of the conspiracy is offered in the pleadings. These are bald allegations involving undefined persons without even a hint of the agreement which is central to a claim of conspiracy. As found in Sivak at para 55, this constitutes a pleading that is vexatious (see also *Kisikawpimootewin*). It is not possible, on the basis of these pleadings, for the Defendant to know how to answer. The pleading is "so defective that it cannot be cured by simple amendment" (*Krause v Canada*, [1999] 2 FCR 476 (FCA)). The Plaintiffs never indicated how they could amend their pleadings on this front such that there could be some assessment of "the readiness of the amendments needed", in the words of the Federal Court of Appeal in *Sweet*.

95 I agree with the Defendant that the Plaintiffs have failed to plead all the elements of the tort of conspiracy. It

may be argued that none were pleaded. It is entirely deficient with respect to pleading the essential elements of the tort. Given the complete lack of detail on the alleged agreement, I see no scintilla of an argument. As a result, I am striking this claim without leave to amend.

Claim 6: *Breach of Plaintiffs' section 7 and 15 Charter rights*

96 The Plaintiffs allege both section 7 and section 15 *Charter* breaches at various points in their statement of claim. They note that decisions under the IRPA must be applied in a manner that is consistent with the *Charter*:

> 33. The Plaintiffs state that the Defendants' officials have a common-law duty, as well as a statutory duty under s. 3(1)(f) of the ***IRPA***, as interpreted and confirmed by this Court, in ***Dragan v Canada QL [2003] F.C.J. No. 260*** and ***Liang v Canada (M.C.I.) 2012 FC 758*** decisions to process applications consistently and promptly [...] and that such decisions must be ***Charter***-compliant, as dictated by s. 3(3)(d) of the ***IRPA*** which states:
>
> **(3)** This Act is to be construed and applied in a manner that...
>
> (d) ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada

97 The section 7 allegations appear at paragraphs 30, 32, and 36:

> 30. As a result of the Defendants' officials' inexcusable delay, false and unfounded allegations, and breach of duty to process the main Plaintiffs' application, the Plaintiffs have suffered the following damages:
>
> (a) with respect to Emad Al-Omani his wife and children, the dire danger, indelible stigma, and mental distress and suffering knowing that the High Commission is making false and unfounded allegations that he is associated with Al Qaeda, or such groups, as well as the mental suffering of not being able to join his brothers and families in Canada and the financial damages in not being able to engage with his brothers in their business in Canada, of which he has a financial interest;
>
> (b) the mental stress and anxiety, and endangerment of their lives, knowing that false allegations of association with Al Qaeda, or such groups, have been made which places their lives at risk in Saudi Arabia
>
> [...]
>
> 32. The Plaintiffs state, and the fact is that:
>
> (a) the Defendants' officials have [...]
>
> (iv) breached the plaintiffs constitutional right(s) to the Rule of Law and Constitutionalism, as well as their s. 7 and 15 ***Charter*** Rights;
>
> which tortious conduct has caused the damages set out in paragraph 30 in the statement of claim herein.
>
> [...]
>
> 36. In the alternative the Plaintiffs state that, the Defendants' officials have been negligent, and engaged in negligent investigation, in the exercise of their common-law, statutory, and constitutional duties owed to the Plaintiffs in that [...]
>
> (iii) as a result of this breach the Plaintiffs have suffered loss and damages which includes, ***inter alia***;
>
> A/ the mental suffering and distress of separation between the Plaintiffs and their family in Canada, also protected by s.7 [...]

> D/ the mental stress and anguish of falsely being branded as associated with Al Qaeda, or such groups, which further endangers their very lives;

98 The section 15 allegations at paragraphs 1, 30, 32, 36 centre on the allegation that the Plaintiffs were treated unequally on the grounds of race and national origin because they are Saudi Arabs:

> 1. The Plaintiffs claim: [...]
>
> iii) the actions and omissions of the visa office at the Canadian High Commission in London, England, constitutes a [...] breach of the Plaintiffs' right to the Rule of Law, Constitutionalism, as well as equal treatment, both under the underlying imperatives to the constitution as well as s. 15 of the ***Charter***;
>
> 30. As a result of the Defendants' officials' inexcusable delay, false and unfounded allegations, and breach of duty to process the main Plaintiffs' application, the Plaintiffs have suffered the following damages: [...]
>
> (c) loss of dignity in being treated unequally contrary to s. 3(3)(d) of the ***IRPA***, the unwritten principles of the constitution, and s. 15 of the ***Charter***, based on race and national origin, to wit: as Saudi Arabs.
>
> 32. The Plaintiffs state, and the fact is that:
>
> (a) the Defendants' officials have [...]
>
> (iv) breached the plaintiffs constitutional right(s) to the Rule of Law and Constitutionalism, as well as their s. 7 and 15 ***Charter*** Rights;
>
> which tortious conduct has caused the damages set out in paragraph 30 in the statement of claim herein. [...]
>
> 36. In the alternative the Plaintiffs state that, the Defendants' officials have been negligent, and engaged in negligent investigation, in the exercise of their common-law, statutory, and constitutional duties owed to the Plaintiffs in that [...]
>
> (iii) as a result of this breach the Plaintiffs have suffered loss and damages which includes, ***inter alia***; [...]
>
> E/ their right to equal treatment and protection under the law, as required by s. 3(3)(d) of the ***IRPA***, the structural imperatives of the Constitution, as well as s. 15 of the *Charter*, and loss of their dignity to the extent of unequal treatment under the law.

99 A preliminary issue with the Plaintiffs' claim is whether the Plaintiffs hold sections 7 and 15 *Charter* rights that can be breached. The Plaintiffs are referred to as "Saudi nationals" in the statement of claim and it appears that the principal Plaintiff only interacted with immigration officers at the Canadian High Commission in London, United Kingdom. The Plaintiffs pleaded damages on the basis that they have not been able to join their family in Canada. They are not Canadian, nor is it clear they were in Canada when the alleged *Charter* violations occurred.

100 The Defendant did not raise this as a ground to strike the statement of claim, so I will not consider it in my decision on this motion. However, given the fundamental nature of this threshold issue I think it is worth summarizing recent law on the topic.

101 In *Tabingo v Canada (Citizenship and Immigration)*, 2013 FC 377; [2014] 4 FCR 150, Justice Rennie questioned whether foreign nationals hold *Charter* rights and summarized the jurisprudence applicable to this issue at paragraphs 61-79. He found that the case law generally does not extend *Charter* rights to non-Canadians or those outside of Canada, but since the parties did not contest the issue, he did not draw his own conclusion:

> [75] Other recent decisions of this Court have found that non-citizens outside of Canada generally do not hold *Charter* rights: *Zeng v Camada (Attorney General)*, 2013 FC 104, paras 70-72; *Kinsel v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1515, paras 45-47; *Toronto Coalition to Stop the War v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 957, paras 81-82. These three decisions followed Justice Blanchard's determination that a *Charter* claim may only be advanced by an

> individual who is present in Canada, subject to criminal proceedings in Canada, or possessing Canadian citizenship.
>
> [76] This limitation on the application of the *Charter* is not a recent development. Even prior to *Slahi*, [2009] F.C.J. No. 141, the Federal Court and the Federal Court of Appeal had interpreted Singh as barring Charter claims from non-citizens outside Canada: *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1990] 2 FC 534 (CA) (aff'd on other grounds [1992] 1 SCR 236); *Ruparel v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 615; *Lee v Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No 242; *Deol v Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No 1034 (aff'd on other grounds 2002 FCA 271).
>
> [77] The only exception counsel identified involved an applicant claiming the right to citizenship, rather than the privilege of immigration: *Crease v Canada*, [1994] 3 FC 480. In that case the applicant had applied for citizenship from within Canada and had a Canadian mother.
>
> [78] The respondent does not dispute either the applicants' standing or the application of the *Charter*. The parties appear to coalesce around the proposition that the FSW applications establish a sufficient nexus with Canada to extend the reach of sections 7 and 15. The jurisprudence does not support this concession. What is in issue involves the repercussions abroad of domestic legislation. In this case, there is no question of the extra-territorial application of the *Charter* as an adjunct of the actions of Canadian officials abroad, nor is there, as I conclude on the evidence, non-compliant administration of the legislation. The issue framed by this case is whether the protections provided by sections 7 and 15 reach foreign nationals, when residing outside of or beyond Canadian territory.
>
> [79] Despite my reservations as to the correctness of the concession, given that there is no lis between the parties on the issue, I will not determine the point. *Charter* jurisprudence should develop incrementally through the interface of opposing positions and interests. In any event, it is unnecessary to determine the point, as I find that the claims of infringement fail on their merits.

102 On appeal to the Federal Court of Appeal (*Tabingo v Canada*, 2014 FCA 191; [2015] 3 FCR 346 [*Tabingo*]), Justice Sharlow acknowledged Justice Rennie's remarks in *Tabingo*, but also found that she did not need to draw a conclusion on the issue:

> [53] In this Court, the Minister argues that the applicants do not have rights under section 7 or subsection 15(1) of the Charter. However, for reasons that will become apparent from the discussion below, I do not consider it necessary to express an opinion on that point.

103 Putting aside this preliminary issue and turning to the causes of action as pleaded, statements of claim must plead material facts pertaining to each element of an alleged *Charter* violation. Once again, *Mancuso* provides useful guidance, at paragraph 21:

> [21] There are no separate rules of pleadings for Charter cases. The requirement of material facts applies to pleadings of Charter infringement as it does to causes of action rooted in the common law. The Supreme Court of Canada has defined in the case law the substantive content of each Charter right, and a plaintiff must plead sufficient material facts to satisfy the criteria applicable to the provision in question. This is no mere technicality, "rather, it is essential to the proper presentation of Charter issues": *Mackay v Manitoba*, [1989] 2 S.C.R. 357 at p. 361.

104 The section 7 of constitutional right requires that it be established that the right to life, liberty or security has been violated. The pleadings are silent as to what right would have been violated. As it has been established, more than 30 years ago, the three interests protected by section 7 are distinct (*Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177; *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486). There is no indication to be found in the pleadings of what interest is involved where a permanent resident visa has been denied to a foreigner.

105 Not only the interests are not identified such that could be identified the elements that need to be proven given the ambit of each interest, but the pleadings don't give any indication as to how the interest might be engaged. To put it another way, there are no material facts pleaded. What are the facts to support an allegation of interference

with the life, the liberty or the security of a person that is not allowed to immigrate to Canada, a privilege that has not been elevated to the level of a right (*Medovarski v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 SCR 539). At best, the pleadings speak in terms of mental stress and anxiety generated by governor action. It may be worth noting that the Supreme Court discussed that matter in *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307 [*Blencoe*] and found that stress, stigma and anxiety did not deprive of the right to life, liberty and security of the person:

> 97 To summarize, the stress, stigma and anxiety suffered by the respondent did not deprive him of his right to liberty or security of the person. The framers of the *Charter* chose to employ the words, "life, liberty and security of the person", thus limiting s. 7 rights to these three interests. While notions of dignity and reputation underlie many *Charter* rights, they are not stand-alone rights that trigger s. 7 in and of themselves. Freedom from the type of anxiety, stress and stigma suffered by the respondent in this case should not be elevated to the stature of a constitutionally protected s. 7 right.

If the Plaintiffs wish to make the case, especially in spite of Blencoe, they have to plead the material facts, which they have not done. They are essential (*Mackay v Manitoba*, [1989] 2 SCR. 357 [*Mackay*]) even more so perhaps where the Supreme Court has already found that stress, stigma and anxiety for someone living in this country did not rise to a constitutionally protected right. I do not wish to suggest that it cannot be done in an appropriate case; it is just that it is especially important that facts be pled such that there can be a reasonable cause of action. Otherwise, "the defendant would be left guessing as to the scope of the case it has to meet to respond to the section 7 infringement" (*Mancuso*, para 23).

106 I am comforted in my conclusion by the similar finding made in *Sivak* where the Court stated that the Plaintiffs "have failed to indicate how one or more of their protected interests have been infringed, and they have also failed to identify the circumstances or context in which the breaches allegedly occurred. I have to agree with the Defendants that the allegations in this regard are stated in the form of conclusions without factual basis." (para 73). To quote from *Mackay* at p 362, "*Charter* decisions cannot be based upon unsupported hypothesis of enthusiastic counsel."

107 The statement of claim also references mental suffering and financial damages resulting from the visa denials, neither of which are sufficient to ground a *Charter* claim in the absence of additional material facts as set out by the Federal Court of Appeal in *Tabingo*:

> [97] The appellants are foreign nationals who reside outside Canada. Their only connection to Canada is that they have applied under a Canadian statute for the right to become permanent residents. They have no legal right to that status, and no right to enter or remain in Canada unless they attain that status. They had the right to seek permanent resident status under the IRPA, and when they did so they had the right to have their applications considered under the IRPA. However, neither of those rights is a right to life, liberty or security of the person. When their applications were terminated by subsection 87.4(1), they were not deprived of any right that is protected by section 7 of the Charter.
>
> [98] The appellants argue that if their applications had been accepted they would have acquired the right to enter and remain in Canada, which means necessarily that they would also have acquired all Charter rights except those given only to citizens of Canada. They argue that, because of the importance of their objective of becoming permanent residents of Canada, the loss of their right to have their permanent resident visa applications considered is such a blow to their psychological and physical integrity that it should be construed as the loss of a right that is within the scope of section 7 of the Charter.
>
> [99] I do not accept this argument. I have no doubt that the termination of the appellants' permanent resident visa applications caused them financial loss, but financial loss alone does not implicate the rights to life, liberty and security of the person. The termination of their applications could have been profoundly disappointing to the appellants and perhaps for some psychologically damaging, but the evidence does not establish the high threshold of psychological harm necessary to establish a deprivation of the right to security of the person: *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307.

108 The Plaintiffs also failed to plead facts pertaining to the section 7 internal analysis regarding the principles of

fundamental justice. Being deprived of the right to life, liberty or security of the person in accordance with the principles of fundamental justice is not violation of section 7. It simply does not suffice to make a general allegation that section 7 *Charter* rights have been violated

109 With respect to the section 15 claims, they suffer from the same deficiencies. The Defendant argues that the Plaintiffs must show that there has been a distinction on an enumerated or analogous ground and that this distinction creates a disadvantage by perpetuating prejudice or stereotyping to properly plead a section 15 claim: *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 [*Kapp*] at para 17; *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396 at paras 30-31. They argue that even if there are enough facts to show adverse impact on an enumerated ground, the statement of claim does not plead facts showing how the treatment amounts to discrimination. Such analysis includes various factors such as:

> [...] (1) pre-existing disadvantage, if any, of the claimant group; (2) degree of correspondence between the differential treatment and the claimant group's reality; (3) whether the law or program has an ameliorative purpose or effect; and (4) the nature of the interest affected.
>
> *Kapp* at para 19

110 I agree with the Defendant that the Plaintiffs have not provided any material facts establishing how they were discriminated against.

111 The statement of claim fails to plead the basic elements of either *Charter* claim. These pleadings are once again so defective that they cannot be cured by simple amendment. There is not a reasonable cause of action disclosed. Since I see no scintilla of a cause of action to be cured, I have to strike both, without leave to amend.

Claim 7: Damages

112 The Defendant argues that the Plaintiffs' damages should be struck for lacking particularity. Damages are primarily pleaded at paragraphs 1, 30 and 36 of the statement of claim:

1. The Plaintiffs claim:

(a) general damages in the amount of $200,000 per Plaintiff;

(b) aggravated damages in the amount of $50,000 per Plaintiff;

(c) punitive damages in the amount of $50,000 per Plaintiff;

(d) any and all economic loss damages pleaded, to be calculated at trial;

[...]

30. As a result of the Defendants' officials' inexcusable delay, false and unfounded allegations, and breach of duty to process the main Plaintiffs' application, the Plaintiffs have suffered the following damages: [...]

(a) with respect to Emad Al-Omani his wife and children, the dire danger, indelible stigma, and mental distress and suffering knowing that the High Commission is making false and unfounded allegations that he is associated with Al Qaeda, or such groups, as well as the mental suffering of not being able to join his brothers and families in Canada and the financial damages in not being able to engage with his brothers in their business in Canada, of which he has a financial interest;

(b) the mental stress and anxiety, and endangerment of their lives, knowing that false allegations of association with Al Qaeda, or such groups, have been made which places their lives at risk in Saudi Arabia [...]

(c) loss of dignity in being treated unequally contrary to s. 3(3)(d) of the ***IRPA***, the unwritten principles of the constitution, and s. 15 of the ***Charter***, based on race and national origin, to wit: as Saudi Arabs.

[...]

36. In the alternative the Plaintiffs state that, the Defendants' officials have been negligent [...]

(iii) as a result of this breach the Plaintiffs have suffered loss and damages which includes, *inter alia*;

A/ the mental suffering and distress of separation between the plaintiffs and their family in Canada, also protected by s.7 of the ***Charter***;

B/ irreparable loss of companionship, of the Plaintiffs, particularly that involving the children;

C/ economic loss, to be quantified at trial, in being deprived of, inter alia;

(i) the benefit of the Plaintiff, Emad Al Omani, to exercise his proper place and activity in the joint business interests of his brother in Canada;

(ii) the incursion of legal costs incurred to date, to be determined at trial;

D/ the mental stress and anguish of falsely being branded as associated with Al Qaeda, or such groups, which further endangers their very lives;

E/ their right to equal treatment and protection under the law, as required by s. 3(3)(d) of the ***IRPA***, the structural imperatives of the Constitution, as well as s. 15 of the Charter, and loss of their dignity to the extent of unequal treatment under the law.

113 The Plaintiffs argue that damages do not need to be precisely calculated at this stage. There is some support for this position in *Woodhouse*:

> 41 Although courts have been cautious in protecting an individual's right to psychiatric well-being, compensation for damages of this kind is not foreign to tort law. As the law currently stands, that the appellant has suffered grief or emotional distress is insufficient. Nevertheless, it is well established that compensation for psychiatric damages is available in instances in which the plaintiff suffers from a "visible and provable illness" or "recognizable physical or psychopathological harm": see for example *Guay v. Sun Publishing Co.*, [1953] 2 S.C.R. 216, and *Frame v. Smith*, [1987] 2 S.C.R. 99. Consequently, even if the plaintiffs could prove that they had suffered psychiatric damage, in the form of anxiety or depression, they still would have to prove both that it was caused by the alleged misconduct and that it was of sufficient magnitude to warrant compensation. <u>But the causation and magnitude of psychiatric damage are matters to be determined at trial. At the pleadings stage, it is sufficient that the statement of claim alleges that the plaintiffs have suffered mental distress, anger, depression and anxiety as a consequence of the alleged misconduct.</u>
>
> [...]
>
> 74 As discussed in the context of the actions for misfeasance in a public office, courts have been cautious in protecting an individual's right to psychiatric well-being, but it is well established that compensation for psychiatric damages is available in instances in which the plaintiff suffers a "visible and provable illness" or "recognizable physical or psychopathological harm". At the pleadings stage, it is sufficient that the statement of claim alleges mental distress, anger, depression and anxiety as a consequence of the defendant's negligence. <u>Causation and the magnitude of psychiatric damage are matters to be determined at trial.</u>
>
> [my emphasis]

114 The same rule applies to other categories of damages. Other than damages alleged to result from the *Charter* violations that have been struck out, I agree with the Plaintiffs that the Defendant has not discharged her burden to show why the alleged damages should be struck. Whether they will be able to show that they have suffered damages, including that their psychiatric well-being has been affected beyond grief or emotional disturbance or

distress, remains to be shown. However the test is not likelihood of success, but rather reasonable cause of action. I am allowing the damages to proceed as pleaded.

Claim 8: Whether Ministers should be named in the statement of claim

115 The statement of claim provides the following description of the named Defendants:

> 3. (a) the Defendant, Her Majesty the Queen is statutorily and vicariously liable for the acts and omissions of her servants pursuant to s. 17(1)(5) of the ***Federal Courts Act*** as well as ss. 24(1) and 52 of the ***Constitution Act***, 1867, and in particular, any purported Crown prerogative, if any exists post the Patriation of the ***Constitution Act, 1982***, and ***Canada Act, 1982***, by the Defendants', the Minister of Foreign Affairs, and/or Citizenship and Immigration, employees of the Canadian High Commission in London, England;
>
> (b) The Defendant, the Minister of Foreign Affairs is statutorily and constitutionally responsible for maintaining and staffing Canada's visa posts abroad; and
>
> (c) The Defendant, the Minister of Citizenship and Immigration is statutorily and constitutionally responsible for administering the ***IRPA*** and its ***Regulations***.

116 The defendants seek to strike the two named Ministers (Foreign Affairs and Citizenship and Immigration) in favour of a single defendant, Her Majesty the Queen who then becomes the Defendant. The defendants note that the named Ministers are not themselves liable for the damages claimed in this case (*Federation of Newfoundland Indians v Canada*, 2003 FCT 383 at para 30). In *Cairns v Farm Credit Corp.*, [1992] 2 FC 115; 49 FTR 308, Justice Denault wrote:

> [6] The plaintiffs have named the Honourable William McKnight as a defendant in this action. A Minister of the Crown cannot be sued in his representative capacity, nor can he be sued in his personal capacity unless the allegations against him relate to acts done in his personal capacity (*Re Air India* (1987), 62 O.R. (2d) 130, (sub nom. *Air India Flight 182 Disaster Claimants v. Air India*) 44 D.L.R. (4th) 317 (H.C.)). As the plaintiffs have made no claims against the Minister relating to actions done in his personal capacity, the Honourable William McKnight must be struck as a party to the action.

Similar comments are found in *Mancuso v Canada (National Health and Welfare)*, at para 180. At the hearing of the case, counsel for the Plaintiffs all but conceded the point. At any rate, that appears to be the state of the law (*Sibomana v Canada*, 2016 FC 943 at paras 32-33).

117 I see no reason to name these two Ministers in the present case; therefore I am striking them from the statement of claim in favour of Her Majesty the Queen as the sole Defendant.

Claim 9: Constitutionality arguments regarding jury trials under the Federal Courts Act and leave for judicial review under the IRPA

118 The Plaintiffs indicated that they plan to constitutionally challenge section 49 of the *Federal Courts Act*, which bars jury trials, on the basis that it violates "the constitutional imperatives of Rule and Law and Constitutionalism, as well as the right to a jury trial, grounded in the *Magna Carta*, and continued in s. 11(f) of the *Charter* in the criminal context, as well as the residual clause of s. 7 of the *Charter* in the civil context [...]" (statement of claim, para 39).

119 The Plaintiffs also seek a declaration that subsection 72(1) of the IRPA is unconstitutional on the basis that the Defendant's officials "can perpetually deny a meritorious application whereby, sooner or later, a leave application will be denied" and a leave application is not, in itself, judicial review (at paras 40(a) and (c) of the statement of claim).

120 The Defendant argues that both arguments should be struck because they are wholly immaterial to the present action.

121 In *Mancuso*, the Federal Court of Appeal encountered a similar issue on a motion to strike seeking declarations on the constitutionality of other legislation. It concluded that while free-standing declarations of constitutionality are available, they require a factual grounding:

> [32] [...] Free-standing declarations of constitutionality can be granted: *Canadian Transit Company v. Windsor (Corporation of the City)*, 2015 FCA 88. But the right to the remedy does not translate into licence to circumvent the rules of pleading. Even pure declarations of constitutional validity require sufficient material facts to be pleaded in support of the claim. Charter questions cannot be decided in a factual vacuum: *Mackay v. Manitoba*, above, nor can questions as to legislative competence under the Constitution Act, 1867 be decided without an adequate factual grounding, which must be set out in the statement of claim. This is particularly so when the effects of the impugned legislation are the subject of the attack: *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1099.
>
> [33] The Supreme Court of Canada in Canada *(Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, para. 46 articulated the pre-conditions to the grant of a declaratory remedy: jurisdiction over the claim and a real as opposed to a theoretical question in respect of which the person raising it has an interest.
>
> [34] Following *Khadr*, this Court in *Canada (Indian Affairs) v. Daniels*, 2014 FCA 101, 2014 FCA 101 (leave to appeal granted) at paras. 77-79 highlighted the danger posed by a generic, fact-free challenge to legislation -- in other words, a failure to meet the second Khadr requirement. Dawson JA noted that legislation may be valid in some instances, and unconstitutional when applied to other situations. A court must have a sense of a law's reach in order to assess whether and by how much that reach exceeds the legislature's *vires*. It cannot evaluate whether Parliament has exceeded the ambit of its legislative competence and had more than an incidental effect on matters reserved to the provinces without examining what its legislation actually does. Facts are necessary to define the contours of legislative and constitutional competence. In the present case, this danger is particularly acute; as the judge noted, the legislation at issue pertains to literally thousands of natural health supplements.
>
> [35] This is not new law. While the plaintiffs point to *Solosky v. The Queen*, [1980] 1 S.C.R. 821 for the proposition that there is a broad right to seek declaratory relief, *Solosky* also notes that there must be "a 'real issue' concerning the relative interests of each [party]." The Court cannot be satisfied that this requirement is met absent facts being pleaded which indicate what that real issue is and its nexus to the plaintiffs and their claim for relief.
>
> [my emphasis]

122 With respect to the section 49 claim, I note that the Plaintiffs, in their memorandum of fact and law at paragraph 18, explain that this is not an argument, but rather a notice of relief to be sought. There is nothing else. Justice Zinn struck the same section 49 argument in *Cabral v Canada (Citizenship and Immigration)*, 2016 FC 1040 as immaterial to the present action. I agree. If it is no more than a notice that something will follow, it is useless; furthermore, the said notice does not even contemplate section 26 of the *Crown Liability and Proceedings Act*, RSC, 1985, c C-50. It is a different matter of a procedural nature which does not accord with a statement of claim. It shall be struck from the statement of claim. In so doing I do not wish to suggest that the constitutionality of section 49 cannot be attacked in these proceedings.

123 With respect to the Plaintiffs' claim respecting subsection 72(1) of the IRPA, I agree with the Defendant that this pleading is immaterial at this point. The Plaintiffs have had two visa decisions quashed and sent back for judicial review. Each time leave was evidently granted. The statement of claim references a hypothetical future refusal to grant leave. That cannot be the basis of a challenge to the legislation in this case. This is no more than a theoretically question, certainly not a real question on the facts of this case. As a result, the Plaintiffs' complete lack of factual basis on which to bring this claim, I am striking this claim without leave to amend.

VI. Conclusion

124 If there is compensation to be awarded, it is not through the law of conspiracy or negligence, but rather through the law of misfeasance in public office, once properly pleaded. There is simply nothing to suggest in the statement of claim that the essential elements of the tort have even been considered. It is simply not enough to say "negligence" or "conspiracy". More is needed to have a scintilla of a cause of action. The essential elements of one cause of action are not the same as another cause of action. Misfeasance is not negligence, and negligence is not conspiracy. The material facts for each will vary. The approach taken was in effect to tell the story generally without connecting the facts to the causes of action alleged later in the document. At the end of the day, we are left with a narrative that supports a cause of action in misfeasance, which requires to be pled with more precision, but is dearly missing with respect to the alternative causes of action in negligence and conspiracy. In my view, there is a scintilla of cause of action in misfeasance pleaded such that with appropriate amendments in order to allege the material facts required, the matter could proceed further.

125 Some of the claims are therefore struck out, without leave to amend:

1. misfeasance in public office -- refusal to abide by court order
2. misfeasance in public office -- refusal to answer questions
3. abuse and excess of jurisdiction and authority
4. abuse of process
5. negligence and negligent investigation
6. conspiracy
7. sections 7 and 15 of the *Charter* violations
8. constitutional arguments concerning section 49 of the *Federal Courts Act* and section 72 of the *Immigration and Refugee Protection Act*.

126 Some claims are struck with leave to amend:

1. misfeasance in public office -- refusal to issue visas and delay in issuing visas
2. misfeasance in public office -- delay in issuing visas
3. damages -- *Charter* violations.

127 Finally, the named ministers are struck in favour of Her Majesty the Queen.

128 Given the split success on the motion, there will not be an award of costs.

ORDER in T-1774-15

THIS COURT ORDERS that for the reasons given, the following causes of action are struck out from the statement of claim, without leave to amend, pursuant to Rule 221(1) of the *Federal Courts Rules*:

1. misfeasance in public office -- refusal to abide by court order
2. misfeasance in public office -- refusal to answer questions
3. abuse and excess of jurisdiction and authority
4. abuse of process
5. negligence and negligent investigation
6. conspiracy
7. sections 7 and 15 of the *Charter* violations

8. constitutional arguments concerning section 49 of the *Federal Courts Act* and section 72 of the *Immigration and Refugee Protection Act*.

For the reasons given, the following sections are struck from the statement of claim, with leave to amend, pursuant to Rule 221(1) of the *Federal Courts Rules*:

1. misfeasance in public office -- refusal to issue visas and delay in issuing visas
2. misfeasance in public office -- delay in issuing visas
3. damages -- *Charter* violations.

In view of the fact that the success is split on this motion to strike, no costs will be awarded.

On the consent of both parties, the Plaintiffs will have 60 days from the date of this Order to file an amended statement of claim and the Defendant will have 30 days to file a Statement of Defence from the date of service of the amended statement of claim.

Y. ROY J.

Almacén v. Canada, [2016] F.C.J. No. 273

Federal Court Judgments

Federal Court

Toronto, Ontario

Russell J.

Heard: January 20, 2016.

Judgment: March 9, 2016.

Docket: T-1508-14

[2016] F.C.J. No. 273 | [2016] A.C.F. no 273 | 2016 FC 300 | 264 A.C.W.S. (3d) 354 | 39 Imm. L.R. (4th) 231 | 2016 CarswellNat 621

Between Danilo Maala Almacén, Plaintiff (Appellant), and Her Majesty the Queen, Defendant (Respondent)

(57 paras.)

Case Summary

Civil litigation — Civil procedure — Pleadings — Striking out pleadings or allegations — Grounds — Failure to disclose a cause of action or defence — Motion by plaintiff for order setting aside order striking amended statement of claim dismissed — Appellant, who was married, commenced same sex relationship with Canadian male overseas — Appellant later moved to Canada and lived with male partner, who supported him — After appellant's claim for permanent residence on H&C considerations was denied, he commenced tort claim — Claim was attempt to re-litigate reasonableness of H&C decision and, as such, was an abuse of process — Claim did not disclose reasonable cause of action as no material facts to support causes of action claimed were pleaded.

Tort law — Practice and procedure — Pleadings — Amendment — Adding or striking out claim — Motion by plaintiff for order setting aside order striking amended statement of claim dismissed — Appellant, who was married, commenced same sex relationship with Canadian male overseas — Appellant later moved to Canada and lived with male partner, who supported him — After appellant's claim for permanent residence on H&C considerations was denied, he commenced tort claim — Claim was attempt to re-litigate reasonableness of H&C decision and, as such, was an abuse of process — Claim did not disclose reasonable cause of action as no material facts to support causes of action claimed were pleaded.

Motion by the plaintiff for an order setting aside an order striking his amended statement of claim. The appellant was a male Filipino national who was married to a woman in the Philippines. In 2005, while residing in Qatar, the appellant met and entered into a romantic relationship with a Canadian male. He returned to the Philippines to run and internet cafe. At some point, he moved to Canada to work as an assistant manager in a Chinese restaurant as arranged by his male partner. In 2013, the appellant moved in with his male partner, who had supported him since that time. The appellant applied to remain in Canada on humanitarian and compassionate grounds based on his homosexual relationship and his ineligibility to be sponsored as a common law spouse. The appellant's H&C application was denied, as was his application for leave and judicial review. The appellant commenced a tort action against the Crown asserting several causes of action against the officer who decided the negative H&C decision alleging, among other things, that he knowingly misapplied the law with respect to s. 25 of the IRPA, deliberately made misstatements of fact, chose not to give articulated reasons, discriminated against him and his partner and ignored s. 3(1)(d) of the IRPA. The claim also alleged that the officer exceeded her authority, engaged in an abuse of process, breached the appellant's constitutional rights. He claimed damages for lost wages, mental suffering and

distress for Charter breaches, the tort of abuse of process and excess of authority, misfeasance of public office and negligence. The respondent brought a motion to strike the claim as disclosing no reasonable cause of action and for being an abuse of the Court process. The prothonotary allowed the motion and struck the claim in its entirety with no leave to amend. The prothonotary found that the torts of abuse of process, abuse and excess of authority and the Charter arguments were unsupported and unsubstantiated and were bald conclusions with no material facts. As such, they were struck. With respect to the tort of misfeasance in public office, the prothonotary held that, even if all allegations made were true, there were no material facts pleaded that suggested that the officer acted outside the scope of her authority and that could give rise to a cause of action. With respect to the allegations of negligence, the prothonotary found that there were no material facts to support a private law duty of care. He further found that even if a duty of care existed between the appellant and the Crown, the cause of action for negligence would fail for policy considerations. Finally, the prothonotary concluded that the claim would also fail on the basis of being a collateral attack. On appeal, the appellant argued that the prothonotary misapplied the test on a motion to strike and usurped the function of the trial judge by rendering judgment on the merits without trial and that he erred in striking the claim.
HELD: Motion dismissed.

The claim was simply an attempt to re-litigate the reasonableness of the H&C decision, and the Court had already dealt with the reasonableness of that decision. As such, it was an abuse of process. Furthermore, the claim did not disclose a reasonable cause of action. There were no facts pleaded in the claim to support the causes of action alleged.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 7, s. 11(f), s. 15

Federal Court Rules, SOR/98-106, Rule 51, Rule 221

Federal Courts Act, RSC 1985, c. F-7, s. 17, s. 18, s. 49

Immigration and Refugee Protection Act, SC 2001, c. 27, s. 3(1) (d), s. 25, s. 25(1)

Privacy Act, RSC 1985, c. P-21,

Counsel

Rocco Galati, for the Appellant.

Rachel Hepburn-Craig, for the Respondent.

ORDER AND REASONS

RUSSELL J.

I. INTRODUCTION

1 This is a motion brought by the Appellant (Plaintiff), pursuant to Rule 51 of the *Federal Court Rules*, SOR/98-106 [Rules], for an order setting aside the Order and Reasons of Prothonotary Aalto, dated August 10, 2015 [Decision], which struck the Appellant's Amended Statement of Claim of September 23, 2014 [Claim].

II. BACKGROUND

2 The Appellant is a male Filipino national who is married to a woman in the Philippines. In 2005, the Appellant

resided in Doha, Qatar where he worked at a clothing store. That same year, he met and entered into a romantic relationship with Mr. Tim Leahy.

3 In August 2009, the Appellant returned from Qatar to the Philippines to run an internet café that he had opened in January 2009 alongside his business partner, who he subsequently bought out in April 2010. At some point after this, Mr. Leahy arranged for the Appellant to move to Edmonton to work as an assistant manager in a Chinese Restaurant. The Appellant sold his business in the Philippines and moved to Canada.

4 Following the closure of the Chinese restaurant in Edmonton, the Appellant moved to Toronto in January 2013 to live with Mr. Leahy who has supported him since that time.

5 In October 2013, the Appellant applied on humanitarian and compassionate [H&C] grounds, based on his homosexual relationship, to remain in Canada, pursuant to s 25 of the *Immigration and Refugee Protection Act*, SC 2011, c 27 [IRPA]. The Appellant alleges that an H&C application was the only option available to him as he was not eligible, given his marriage in the Philippines and the duration of his relationship with Mr. Leahy, to be sponsored as a common-law spouse.

6 On February 10, 2014, the Appellant's H&C application was denied. On October 28, 2014, Justice Shore denied leave and judicial review of the H&C decision (IMM-883-13). A subsequent motion for reconsideration of this dismissal was dismissed on January 27, 2015.

A. *The Claim*

7 The Appellant commenced a contemporaneous tort action against the Crown asserting several causes of action against the officer who decided the negative H&C decision [Officer], including claims that the Officer committed the following acts in order to generate a negative decision:

(1) Knowingly misapplied the law with respect to s 25 of *IRPA*;

(2) Deliberately made the following misstatements of fact:

(a) The [Appellant] was in Canada without lawful status;

(b) The [Appellant] had not resided in the Philippines for the last 3 1/2 years; and

(c) Mr. Leahy could sponsor the [Appellant] to immigrate to Canada (which is untrue as the Plaintiff is married to a woman in the Philippines and divorce is not legal in the Philippines).

(3) Knowingly chose not to give articulated reasons addressing the [Appellant's] factors and application;

(4) Knowingly chose not to make the only reasonable decision in the circumstances, a positive decision, in order to generate a negative decision;

(5) Discriminated against the [Appellant] and his partner based on sexual orientation in order to generate a negative decision;

(6) Knowingly ignored section 3(1)(d) of the *IRPA* in order to generate a negative decision.

8 The Claim also pleads that the Officer further abused and exceeded her authority by notifying Canadian Border Services Agency [CBSA] of her negative decision for the purposes of preparing the Appellant for removal from Canada, which is beyond her scope and authority and which breaches the *Privacy Act*, RSC 1985, c P-21.

9 Additional allegations in the Claim include that the Officer:

- Engaged in abuse and excess of jurisdiction and authority as historically contemplated and set out by the Supreme Court of Canada in *Roncarelli v Duplessis*, [1959] SCR 121;

- Engaged in abuse of process at common law and s 7 of the *Charter* as enunciated *inter alia*, by the Supreme Court in *USA v Cobb*, [2001] 1 SCR 587;
- Breached the [Appellant's] constitutional right to the Rule of Law and Constitutionalism as well as his s 7 and s 15 *Charter* rights by placing his very life, liberty and security of person under threat of deportation, based on sexual orientation; which tortious conduct has caused the damages set out in the Claim.

10 The Appellant claimed damages for lost wages, mental suffering, and distress arising from the following causes of action:

(1) The Crown's breach of sections 7 and 15 of the *Charter*;

(2) The tort of abuse and excess of authority;

(3) The tort of abuse of process;

(4) Misfeasance in public office; and

(5) Negligence.

11 The Claim concludes by stating that the Appellant will bring a constitutional challenge by way of application to strike s 49 of the *Federal Courts Act*, RSC, 1985, c F-7, which bars jury trials and thus violates the constitutional imperatives of the rule of law, constitutionalism and the right of the jury trial grounded in the *Magna Carta*, and continued in ss 11(f) and 7 of the *Charter*, as well as the residual clause of s 7 of the *Charter* in the civil context.

12 In response, the Respondent brought a motion to strike the Claim as disclosing no reasonable cause of action and for being an abuse of the Court process.

III. DECISION UNDER REVIEW

13 On August 10, 2015, Prothonotary Aalto granted the Respondent's motion and struck the Claim in its entirety, with no leave to amend.

14 The Decision applied the following legal tests, respectively, when considering the issues of striking a pleading under Rule 221 of the Rules, misfeasance in public office, and whether there is a duty of care owed by the Crown to a Plaintiff under the tort of negligence: (1) whether it is plain and obvious on the material facts pleaded that the action cannot succeed: *Sivak v Canada*, 2012 FC 272 [*Sivak*]; *R v Imperial Tobacco Canada Ltd,* 2011 SCC 42 [*Imperial Tobacco*]; (2) whether the cause of action requires deliberate and unlawful conduct which would likely harm the Plaintiff: *Odhavji v Woodhouse*, [2003] 3 S.C.R. 263 [*Odhavji*]; and (3) whether the facts as pleaded disclose a proximate relationship between the Plaintiff and Defendant wherein failure to take reasonable care might foreseeably cause loss or harm to the Plaintiff; and if yes, whether there are policy considerations which exist that outweigh recognizing a duty of care: *Cooper v Hobart*, 2001 SCC 79.

15 The Decision engaged in a thorough overview of both the Appellant and Respondent's submissions on the motion before proceeding to analyze the misfeasance, negligence and other miscellaneous torts alleged by the Appellant to have been committed by the Officer.

16 The miscellaneous torts alleged by the Appellant included the torts of abuse of process, abuse and excess of authority, and arguments related to the *Charter*. Prothonotary Aalto noted that the Appellant spent little time substantiating these arguments and agreed with the Respondent that the Claim disclosed no reasonable cause of action related to them. Specifically, as regards the tort of abuse of process, the Prothonotary found that *USA v Cobb*, [2001] 1 SCR 587 [*Cobb*] did not support the Appellant's submission that the tort exists. Looking next to the tort of abuse and excess of authority, the Prothonotary took guidance from *Odhavji,* above, and *Roncarelli v Duplessis*, [1959] SCR 121 [*Roncarelli*]. Finally, in terms of the Appellant's *Charter* arguments, the Prothonotary noted that such claims should not be made in a "factual vacuum": *MacKay v Manitoba*, [1989] 2 SCR 357 (SCC).

The Prothonotary found each of these three tortious allegations to be unsupported and unsubstantiated; they were bald conclusions with no material facts. As such, they were struck.

17 The Prothonotary next considered the law relating to misfeasance in public office, noting that as per *Odjavji*, above, there were two fundamental elements to make out the tort: (1) did an officer of the Crown engage in deliberate and unlawful conduct as a public officer; and (2) was the public officer aware that the conduct was unlawful and likely to cause harm to the plaintiff? The Prothonotary held that, even if all allegations made were true, there were no material facts pleaded that suggest that the Officer acted outside the scope of her authority and that could give rise to a cause of action. The Prothonotary pointed out that there is no entitlement to a positive H&C determination. It remains inherently discretionary. Therefore, the Claim's submissions respecting this tort were also struck.

18 Finally, as regards the allegations of negligence, the Prothonotary found that there were no material facts to support a private law duty of care. The *Anns* test, as articulated by the Supreme Court of Canada, requires a relationship of sufficient proximity between the Crown and the Plaintiff that discloses reasonably foreseeable harm to establish a *prima facie* duty of care:*Imperial Tobacco*, above, at para 49; *Anns v Merton London Borough Council,* [1978] AC 728 [*Anns*]. The Prothonotary concluded that even if such a duty existed, the cause of action for negligence would fail for residual policy considerations. Prothonotary Aalto indicated that imposing a duty of care for the failure to make a positive H&C decision has the potential to create an indeterminate liability for all H&C applications which are denied. The Claim's submissions pertaining to negligence were also stuck.

19 The Prothonotary then went on to find that if his analysis pertaining to misfeasance and negligence are incorrect, the Claim still fails on the basis of being a collateral attack on the decision of Justice Shore in IMM-883-14, and an abuse of process of the Court. The Claim is a disguised attempt to re-litigate the reasonableness of the H&C decision for the fourth time when the matter has already been decided at the immigration stage in the denial of the application for leave and judicial review, as well as in the denial of further reconsideration.

IV. STATUTORY PROVISIONS

20 The following provisions of *Immigration and Refugee Protection Act,* SC 2001, c 27 [IRPA] are applicable in this proceeding:

> **Objectives -- immigration**
>
> 3 (1) The objectives of this Act with respect to immigration are
>
> ...
>
> (d) to see that families are reunited in Canada;
>
> **Humanitarian and compassionate considerations**
>
> 25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible -- other than under section 34, 35 or 37 -- or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada -- other than a foreign national who is inadmissible under section 34, 35 or 37 -- who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.
>
> * * *
>
> **Objet en matière d'immigration**
>
> 3 (1) En matière d'immigration, la présente loi a pour objet :
>
> ...

(d) de veiller à la réunification des familles au Canada;

Séjour pour motif d'ordre humanitaire à la demande de l'étranger

25 (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire -- sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 --, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada -- sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 -- qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

21 The following provisions of the Rules are applicable in this proceeding:

Appeal

51 (1) An order of a prothonotary may be appealed by a motion to a judge of the Federal Court.

Motion to strike

221 (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it

(a) discloses no reasonable cause of action or defence, as the case may be,

(b) is immaterial or redundant,

(c) is scandalous, frivolous or vexatious,

(d) may prejudice or delay the fair trial of the action,

(e) constitutes a departure from a previous pleading, or

(f) is otherwise an abuse of the process of the Court,

and may order the action be dismissed or judgment entered accordingly.

* * *

Appel

51 (1) L'ordonnance du protonotaire peut être portée en appel par voie de requête présentée à un juge de la Cour fédérale.

Requête en radiation

221 (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :

(a) qu'il ne révèle aucune cause d'action ou de défense valable;

(b) qu'il n'est pas pertinent ou qu'il est redondant;

(c) qu'il est scandaleux, frivole ou vexatoire;

(d) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;

(e) qu'il diverge d'un acte de procédure antérieur;

(f) qu'il constitue autrement un abus de procédure.

Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.

V. ISSUES

22 The Appellant submits that the following are at issue in this proceeding:

1. Whether the Prothonotary misapplied the test on a motion to strike and usurped the function of the trial judge by rendering judgment on the merits without a trial; and
2. Whether the Prothonotary erred in law in striking his Claim.

VI. ARGUMENT

A. *Appellant*

(1) Motion to Strike

23 The test on a motion to strike is high in that such an occurrence should only take place where the pleading is "bad beyond argument." The Appellant submits that the Prothonotary misapplied the test on a motion to strike: *Nelles v Ontario (1989)*, 60 DLR (4th) 609 (SCC); *Dumont v Canada (Attorney General)* [1990], 1 SCR 279; *Hunt v Carey Canada Inc*, [1990] 2 SCR 959. The Appellant points to the jurisprudence for further guiding principles, emphasizing that a statement of claim should not be struck simply because it is novel (*Nash v Ontario* (1995), 27 OR (3d) 1 (CA)), and that the Respondent must produce a case directly on point from the same jurisdiction (*Dalex Co v Schawartz Levitsky Feldman* (1994), 19 OR (3d) 463 (Gen Div)), and that the Court should be generous and allow an amendment before striking (*Grant v Cormier* (2001), 56 OR (3d) 215 (Ont CA)).

24 The Appellant submits that the Decision failed to apply the test or jurisprudence applicable on a motion to strike. Instead, it decided the case on the pleadings, without a trial, usurping the function of the trial judge. The Prothonotary ignored the facts pleaded and/or reconfigured other facts pleaded as bald statements in order to dismiss the facts, on their substance, rather than take them as proven, as is required by the jurisprudence: *Canada (Attorney General) v Inuit Tapirisat of Canada*, [1980] 2 SCR 735.

(2) Errors of Law

25 The Appellant further argues that the Prothonotary blatantly erred when ruling that the Claim failed as a collateral attack. "Collateral attack" can only be used as a defence at trial and is not a basis to call into question jurisdiction or to strike a claim. The Appellant says that the Supreme Court has, on numerous occasions, made it clear that, whether or not judicial review has been brought, a plaintiff maintains a right to commence an action without bringing into question the jurisdictional issue of collateral attack: *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62 [*TeleZone*]; *Canada (Attorney General) v McArthur*, 2010 SCC 63; *Parrish & Heimbecker Ltd v Canada (Agriculture and Agri-Food)*, 2010 SCC 64 [*Parrish*].

26 As regards the torts of excess of authority and public misfeasance, the Appellant points to paragraphs 12, 13 and 15 of the Decision, and says that the Prothonotary erred in finding that the relevant material facts were not pleaded. Further, the Appellant alleges that jurisdiction was exceeded when the Prothonotary made factual findings in a vacuum, and by holding that the determination of an H&C application is inherently discretionary: *Rudder v Canada*, 2009 FC 689 at para 37 [*Rudder*]; *Lemus v Canada (Citizenship and Immigration)*, 2014 FCA 114 at para 38 [*Lemus*].

27 As regards negligence, the Appellant argues that, contrary to the findings of the Prothonotary, there is a duty owed by the Crown to an applicant to process applications: *Liang v Canada (Citizenship and Immigration)*, 2012 FC 758 at para 25; *Dragan v Canada*, [2003] F.C.J. No 260 at para 45.

28 The Appellant also argues that the Prothonotary erred further by ruling that "imposing a duty of care for the failure to obtain a positive H&C decision has the potential to create an indeterminate liability for all H&C applications which are denied. H&C applications are discretionary and fact based."

29 The Appellant submits that jurisdiction was further exceeded by the Prothonotary's over-generalizing his Claim by stating that he was pleading that all H&C applications had a right to a positive decision. The Appellant says that this is not the case, and that on the facts pleaded: he has a right to a positive decision; that jurisprudence exists that

such a conclusion can be drawn with respect to temporary visas (*Rudder*, above); and that *mandamus* lies to compel a positive decision under s 25 of IRPA: *Lemus*, above.

30 The Appellant says that the Prothonotary also overstepped his jurisdiction by acting as a "hybrid applications/trial judge" rather than deciding a motion to strike. He seeks an order setting aside the Decision, an order granting the relief that he alleges should have been granted by Prothonotary Aalto, costs of both the motion before Prothonotary Aalto and the within appeal, as well as any such further order or direction the Court deems just.

B. *Respondent*

31 The Claim was struck by Prothonotary Aalto for two reasons: it was an attempt to re-litigate an issue already decided by the Court and it did not plead material facts to support the causes of action claimed. The Respondent submits that the Appellant has not shown that either of these reasons warrant an appeal.

32 The Respondent says that the Appellant has failed to demonstrate that the decision-maker gave insufficient weight to relevant factors or proceeded on a wrong principle of law.

33 The Appellant claims that the Respondent is liable for abuse of process, excess of jurisdiction and damages for breaches of the *Charter*. However, the Respondent submits that the Appellant has failed to raise any factual or legal argument to challenge Prothonotary Aalto's findings in regards to these claims. Therefore in this regard, the Decision should not be disturbed.

34 The Respondent further argues that the Appellant has confused the Court's reasonable finding that the Claim was an attempt to re-litigate an issue already decided (the reasonableness of the H&C decision), and therefore an abuse of process, with the concept of a "collateral attack" as explained by the Supreme Court in *TeleZone*, above. However, this was not the basis for striking the Claim. Prothonotary Aalto found that the Claim was an impermissible attack on the Court's upholding of the reasonableness of the decision on judicial review. The Respondent says that while both the decision that was under appeal and *TeleZone* use the language of "collateral attack," the term has a different meaning in the two contexts, as an attack on the decision of the Court is distinct from an attack on an administrative decision by way of action. While the latter is permissible, the former may be an abuse of process.

35 The Respondent also says that the Appellant has not shown that the Court's alternative finding, that the Claim disclosed no reasonable cause of action, was in error.

36 As regards the claim of misfeasance, the Respondent says no material facts were pleaded to establish that the Officer acted outside the scope of her authority, and even if she did, nothing was submitted to establish a causal connection to damages by way of entitlement to a positive H&C decision. The Appellant's reliance on the decisions in *Rudder* and *Lemus*, both above, do not help him. In *Rudder*, the Court exercised its discretion to grant *mandamus* on the judicial review of a temporary resident visa. This does not establish that the Appellant is somehow entitled to a positive H&C decision or that a negative decision somehow gives rise to a cause of action. Similarly, the decision in *Lemus* does not change the fact that a discretionary decision is not stripped of its discretionary nature by judicial review.

37 In terms of the claim of negligence, the Respondent submits that Prothonotary Aalto reasonably found that there was no duty of care between the Respondent and the Appellant based on the facts pleaded and a correct application of the law. The jurisprudence has established that the relationship between the government and the governed is not one of individual proximity and nothing claimed by the Appellant supports a departure from this principle: *Premakumaran v Canada*, 2006 FCA 213 at para 22 [*Premakumaran*]; *Benaissa v Canada (Attorney General)*, 2005 FC 1220 at para 35 [*Benaissa*]. The Respondent says that unlike the circumstances in the jurisprudence upon which the Appellant relies, here there has been no refusal to process his application nor any undue delay in processing his application.

38 The Appellant has misunderstood the second branch of the *Anns* test. The question is not whether the decision to reject the H&C application was a policy decision, but whether there are policy reasons that weigh against the finding of a duty of care. Prothonotary Aalto cited such policy reasons as weighing against the finding of a duty of care, including a concern over indeterminate liability for all H&C applications that are denied. The Respondent argues that the finding of no duty of care was correct in law and the striking of the claim in negligence ought not to be disturbed as a result.

VII. ANALYSIS

39 In accordance with *Merck & Co v Apotex Inc*, [2004] 2 FCR 459, a discretionary order of a prothonotary should only be reviewed *de novo* if the questions raised in the motion are vital to the final issue in the case, or the order is clearly wrong in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misrepresentation of the facts.

40 In the present motion, the questions raised are vital to the final issue in this case. Hence, I will review the Decision of Prothonotary Aalto on a *de novo* basis.

41 As Prothonotary Aalto pointed out in his reasons, I summarized the jurisprudence for striking a pleading for disclosing no reasonable cause of action and for being scandalous and vexatious in *Sivak*, above:

> [15] The test in Canada to strike out a pleading under Rule 221 of the Rules is whether it is plain and obvious on the facts pleaded that the action cannot succeed. In this regard, the Supreme Court of Canada has noted that the power to strike out a statement of claim is a "valuable housekeeping measure essential to effective and a fair litigation." See *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959 and *R v Imperial Tobacco Canada Ltd.* 2011 SCC 42, at paragraphs 17 and 19.
>
> [16] In determining whether a cause of action exists, the following principles are to be considered:
>
> a. The material facts pled are to be taken as proven, unless the alleged facts are based on assumptive or speculative conclusions which are incapable of proof;
>
> b. If the facts, taken as proven, disclose a reasonable cause of action, that is, one with some chance of success, then the action may proceed; and
>
> c. The statement of claim must be read as generously as possible, with a view to accommodating any inadequacies in the form of the allegations due to drafting deficiencies.
>
> See *Operation Dismantle Inc. v Canada*, [1985] 1 SCR 441.
>
> ...
>
> [25] *Edell v Canada (Revenue Agency)*, [2010] GSTC 9, 2010 FCA 26, reaffirms the fundamental rule that in a motion to strike the Court is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial. All allegations of fact, unless patently ridiculous or incapable of proof, must be accepted as proved. The defendant who seeks summary dismissal bears the evidentiary burden of showing the lack of a genuine issue.
>
> [26] The fundamental rule, however, must take into account that no cause of action can exist where no material facts are alleged against the defendant. See *Chavali v Canada* 2002 FCA 209.
>
> ...
>
> [31] There are many cases that hold that an action cannot be brought on speculation in the hope that sufficient facts may be gleaned on discovery to support the allegations made in the pleadings. See, for example, *AstraZeneca Canada Inc. v Novopharm Ltd.* 2009 FC 1209; appeal dismissed 2010 FCA 112.
>
> [32] In fact, it is an abuse of process for a plaintiff to start proceedings in the hope that something will turn up. A plaintiff should not be permitted to discover the defendant to pursue such an action. See *Kastner*, [1994] F.C.J. No. 1671, above.

> [33] I think it is also well-established that the rule that material facts in a statement of claim must be taken as true in determining whether a reasonable cause of action is disclosed does not require that allegations based upon assumptions and speculation be taken as true. See *Operation Dismantle*, above.
>
> ...
>
> [89] In *George v Harris*, [2000] OJ No 1762, at paragraph 20, Justice Epstein, then of the Ontario Superior Court of Justice, provided examples of what constitutes a "scandalous," "frivolous" or "vexatious" document:
>
> i. A document that demonstrates a complete absence of material facts;
>
> ii. Portions of a pleading that are irrelevant, argumentative or inserted for colour, or that constitute bare allegations;
>
> iii. A document that contains only argument and includes unfounded and inflammatory attacks on the integrity of a party, and speculative, unsupported allegations of defamation;
>
> iv. Documents that are replete with conclusions, expressions of opinion, provide no indication whether information is based on personal knowledge or information and belief, and contain many irrelevant matters.
>
> [90] A statement of claim containing bare assertions but no facts on which to base those assertions discloses no reasonable cause of action and may also be struck as an abuse of process. Furthermore, as indicated above, a claimant is not entitled to rely on the possibility that new facts may arise as the case progresses. On the contrary, the facts must be pled in the initial claim. The question of whether those facts can be proven is a separate issue, but they must be pled nonetheless.
>
> [91] The authorities cited above also show that when a particular cause of action is pled, the claim must contain pleadings of fact that satisfy all of the necessary elements of that cause of action. Otherwise, it will be plain and obvious that the claim discloses no reasonable cause of action.
>
> [92] A statement of claim will also be struck on the grounds that it is so unruly that the scope of the proceedings is unclear. As stated by this Court in *Ceminchuk v Canada*, [1995] F.C.J. No 914, at paragraph 10
>
> > A scandalous, vexatious or frivolous action may not only be one in which the claimant can present no rational argument, based upon the evidence or law, in support of the claim, but also may be an action in which the pleadings are so deficient in factual material that the defendant cannot know how to answer, and a court will be unable to regulate the proceedings. It is an action without reasonable cause, which will not lead to a practical result.

A. *Abuse of Process*

42 Prothonotary Aalto struck the Claim as being an abuse of process because it was simply a disguised attempt to re-litigate the issues that had already been litigated and decided in the immigrations context:

> [74] Even if I am wrong on both misfeasance in public office and negligence, in my view the Claim fails on the basis of being a collateral attack on the decisions of Justice Shore in IMM-883-14. No serious or arguable issue was raised on the application for leave and judicial review. Justice Shore's discretion was exercised in accordance with the jurisprudence [see, for example, *Krishnapillai*, *supra* at para. 10]. The Claim, on a plain reading, is simply a disguised attempt to re-litigate the reasonableness of the H&C decision, an already decided issue both at the immigration stage and the application for leave and judicial review to this Court and the further re-consideration. The Plaintiff has had three chances, each of which were denied. This [is] a fourth attempt to re-litigate the same issue. This action constitutes a collateral attack on those decisions and amounts to an abuse of process. To again litigate his matter is a waste of judicial resources on a claim that is bound to fail or is bereft of any chance of success [see, for example, *Hunt v Carey*, [1990] 2 SCR 959].

43 Before me, the Appellant argues, based upon the *TeleZone*, above, line of cases that whether or not judicial

review has been brought, or whether or not judicial review has been successful or unsuccessful, the Appellant still has a right to bring an action "without bringing into question the jurisdictional issue of collateral attack, *albeit* the Crown is free to raise collateral attack, *as a defence*, *at trial*" [emphasis in original].

44 The Appellant also says the Prothonotary erred because "we are not dealing with judicial review proper, on its merits, but a leave application, without reasons." The Appellant cites no authority to support this assertion.

45 Justice Shore's decisions refusing leave are final decisions of the Court based upon a review of the merits put forward by the Appellant in his application for leave and judicial review. Those decisions indicate, in accordance with established jurisprudence, that the application for leave evinced no arguable case. See *Bains v Canada (Employment and Immigration)*, [1990] F.C.J. No 457; *Sivagurunathan v Canada (Citizenship and Immigration)*, 2013 FC 233 at para 9. In order to reach that conclusion, Justice Shore, like any leave judge, was obliged to review the merits on both sides of the application and decide whether the Appellant had raised any issues that could reasonably be argued. Justice Shore decided that the Appellant had raised no such issue so that there was no case to go to a judicial review hearing. Hence, the Court has already decided that no argument can be made that the H&C decision contains a reviewable error, and the Federal Court of Appeal in *Krishnapillai v R*, 2001 FCA 378 [*Krishnapillai*], has ruled that commencing an action where leave is denied can be an abuse of the process of the Court:

> [18] The constitutional issue was raised, as is mandated by section 82.1 of the Act, through the only process contemplated by Parliament to challenge the Minister's decision: an application for leave to seek judicial review. The issue was raised, one must assume, with the other issues that could be raised in order to challenge the decision of the Minister. Section 82.1 of the Act provides that there is no appeal from a judgment denying leave. The intent of Parliament was clearly to put an end to the challenge of a decision made under the *Immigration Act* at an early stage, i.e. as soon as leave was denied. Where leave is denied, the commencement of an action raising an issue that was or could have been raised in the leave application is an indirect attempt to circumvent the intent of Parliament and a collateral attack on the judgment denying leave. This is an abuse of the process of the Court.
>
> [19] This conclusion disposes of the issue raised with respect to the constitutional validity of subsection 53(1). It could dispose, also, of the better part of the issues raised with respect to the constitutional validity of the leave requirement because, apart from the issue relating to the absence of reasons in denying leave which obviously could not have been raised prior to the decision denying leave, these issues could and should have been raised at the first opportunity, i.e. in the leave application. However, the argument was not made on that basis, and I shall treat the whole issue of the validity of the leave requirement under the following heading, as was done by the parties.
>
> ...
>
> [36] The attack on the constitutionality of the leave requirement prescribed by section 82.1 of the *Immigration Act* has no chance of success.
>
> [37] The statement of claim was properly struck out in its entirety as it was on the one hand an abuse of the process of the Court and as it did not, on the other hand, raise any reasonable cause of action.

46 As Prothonotary Aalto found, the Claim in the present case is simply an attempt to re-litigate the reasonableness of the H&C decision, and the Court has already dealt with the reasonableness of that decision. *TeleZone*, above, and other cases cited by the Appellant do not assist him. In *Parrish*, above, for example, the Supreme Court of Canada ruled that there is nothing in ss 17 and 18 of the *Federal Courts Act*, RSC, 1985, c F-7 that requires a plaintiff to be successful on judicial review before bringing a claim for damages against the Crown. That is not the issue here. In the present case, the Appellant's judicial review application had been dealt with by Justice Shore who, in order to refuse leave, had to conclude that there was nothing unreasonable or otherwise legally objectionable about the H&C decision that could be fairly argued on judicial review. The test for leave is fairly low; in order to dismiss leave Justice Shore had to decide that there was just no reasonable argument that could be made. The allegations in the claims -- knowingly misapplying the law; knowingly mistaking facts; knowingly failing to articulate reasons; discrimination; ignoring s 3(1)(a) of the IRPA -- were either raised or could have been raised in

the leave application. The Federal Court of Appeal has said that this can be an abuse of the process of the Court, and it seems to me on the facts of this case that it is. Asking for damages as opposed to asking for the H&C decision to be quashed does not mean that the merits have not already been dealt with by the Court. This is not a collateral attack strictly speaking, or *res judicata*; it is an abuse of process.

47 The Court has a discretionary right to strike where it determines that its own processes are being abused. The Appellant invites the Court to read the jurisprudence as saying that he has a right to commence an action irrespective of whether the result on judicial review is positive or negative. Even if I accept this interpretation, I do not read the cases as saying that following a negative decision on judicial review the Court cannot decide whether any action commenced is an abuse of process. This is an entirely different issue and is governed by its own jurisprudence. The Appellant has pursued judicial review and has obtained a final decision of the Court that there is no fairly arguable case for reviewable error. He is now attempting to litigate the H&C decision by way of action. I see no way around the conclusion that this is an indirect attempt to circumvent the intent of Parliament and a collateral attack on Justice Shore's judgment denying leave and therefore is an abuse of the process of the Court. On these grounds alone, the Claim has to be struck, and the Appellant has made no suggestion as to how it could be amended to make it otherwise.

48 The Appellant has also drawn the Court's attention to the Supreme Court of Canada jurisprudence to the effect that a failure to grant leave does not necessarily mean that a judgment is confirmed. In *Des Champs v Conseil des écoles*, [1999] 3 SCR 281 at para 31, the Supreme Court said that "refusal of leave is not to be taken to indicate any view by members of this Court of the merits of the decision." The jurisprudence cited by the Appellant deals with leave to appeal to the Supreme Court which is not the issue here. "Leave" does not mean the same thing in every context. In the context of immigration review, a denial of leave means that there is no fairly arguable case on the merits.

B. *No Reasonable Cause of Action*

49 In the alternative, Prothonotary Aalto struck the Claim for disclosing no reasonable cause of action. Following my own *de novo* review, I see no way to avoid the same conclusion.

50 The *mandamus* cases cited by the Appellant to support his misfeasance claims do not assist. In the present case, there are no facts pleaded in the Claim that would establish any kind of right to a positive H&C decision. Even if reviewable errors occurred in reaching a negative decision, this does not mean that the Appellant would be entitled to a positive H&C, and Justice Shore has already decided that there is no arguable case for reviewable error. No facts are pleaded to establish that the Officer acted outside her authority or that the Appellant is entitled to H&C relief. The Appellant's claim to misfeasance in public office is not supported by any material facts and he simply asks the Court to assume that he is entitled to a positive H&C decision. In addition, there are no facts pleaded to support that any damages suffered were caused by the Officer's alleged wrongdoing.

51 The Appellant refers the Court to Justice Zinn's decision in *Cabral et al v MCI et al* (Docket no. T-2425-14) at para 17. In that case, Justice Zinn decided, on the pleadings before him, that there were sufficient facts to support allegations that the Minister had acted dishonestly. In the present case, paragrap? 12 of the Claim remains a series of assertions without facts to support them.

52 For much the same reason as given by Prothonotary Aalto, my own review of the pleadings leads me to conclude that the negligence claims must be struck as revealing no possible cause of action. The Appellant has not satisfied either branch of the *Anns* test. He has not pleaded facts to support a duty of care. He seeks to rely upon judicial review cases that say there is a statutory duty to process an application. In this case, the Appellant's H&C application has been processed but, in any event, the statutory duty to process a claim does not establish a duty of care under *Anns*.

53 The Appellant does not fully address the second *Anns* issue. He appears to think that the question is whether the decision to reject the H&C application was a policy decision. The issue is whether there are policy reasons in

this case that weigh against finding that there is a duty of care. Prothonotary Aalto identified and addressed those policy considerations in his own reasons:

> [72] Even if such a *prima facie* duty existed, the cause of action fails on the second part of the *Anns* test in any event: the existence of residual policy considerations that justify denying liability. The jurisprudence teaches that policy considerations "are not concerned with the relationships between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally" (*Benaissa v Canada (Attorney General)*, 2005 FC 1220 at para. 33). In my view, imposing a duty of care for the failure to obtain a positive H&C decision has the potential to create an indeterminate liability for all H&C applications which are denied. H&C applications are discretionary and fact based. This H&C was also subjected to an application for leave and judicial review and re-consideration both of which were denied.

54 The Appellant argues that the Court should not be making a decision at this stage and that whether a duty of care exists is a matter for the trial judge. But the Appellant pleads no material facts that could support a duty of care. The Courts have found that no duty of care arises in some immigration contexts. See *Premakumaran*, above, at para 22; *Szebenyi v Canada*, 2006 FC 602 at para 91; *Khalil v Canada,* [2007] FC 923 at para 155. I also note that in *Benaissa*, above, Prothonotary Lafrenière struck a claim for the very reasons that arise in this case:

> [35] Even if foreseeability has been adequately pleaded by the Plaintiff, some further ingredient would be needed to establish the requisite proximity of relationship between the Plaintiff and the Crown: Hill v. Chief Constable of West Yorkshire, [1989] A.C. 53 (H.L.). In Cooper, the Supreme Court of Canada directed that an examination of the policy of the statute under which the officers of the Crown are appointed must be conducted to decide whether there exists the required proximity of relationship to create a statutory duty of care. If such a duty of care to the Plaintiff exists, it must be found in the statute, namely the Immigration and Refugee Protection Act.
>
> ...
>
> [38] Even if the Plaintiff could establish a *prima facie* duty of care, it is plain and obvious that he cannot succeed at the second stage of the analysis set out in *Cooper* based on the facts pleaded. The question at the second stage is whether there exist residual policy considerations which justify denying liability. These policy considerations are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally.
>
> [39] In my view, it would not be just, fair and reasonable for the law to impose a duty of care on those responsible for the administrative implementation of immigration decisions of the kind which have been made in the case of the Plaintiff, absent evidence of bad faith, gross negligence, or undue delay.

55 These considerations against finding a duty of care seem entirely appropriate to me. I would only add that finding a duty of care in this case would, to quote the Federal Court of Appeal in *Krishnapillai*, above, at para 18, allow "an indirect attempt to circumvent the intent of Parliament" to clearly "put an end to the challenge of a decision made under the *Immigration Act* at an early stage, i.e. as soon as leave was denied."

56 These seem to me to be the only issues of substance that the Appellant has raised in this appeal.

57 As the Prothonotary points out, the Claim is the Appellant's second attempt to define meritorious causes of action. In addition, there is no way to cure what is simply a collateral attack and an abuse of process on the decision of Justice Shore denying leave. It would, therefore, be inappropriate to grant leave to amend in a situation where the claim cannot possibly succeed and there is no scintilla of a cause of action. See *Spatling v Canada (Solicitor General)*, 2003 CarswellNat 1013. The problems with this Claim are not curable by amendment.

ORDER

THIS COURT ORDERS that

1. The Plaintiff's (Appellant's) motion is dismissed and the decision of Prothonotary Aalto is upheld;

2. The Defendant (Respondent) is awarded costs of this motion to appeal and costs of the motion heard by Prothonotary Aalto.

RUSSELL J.

End of Document

Almacén v. Canada, [2016] F.C.J. No. 1304

Federal Court Judgments

Federal Court of Appeal

Toronto, Ontario

D.W. Stratas, W.W. Webb and J.M. Woods JJ.A.

Heard: November 22, 2016.

Oral judgment: November 22, 2016.

Docket: A-108-16

[2016] F.C.J. No. 1304 | 2016 FCA 296 | 273 A.C.W.S. (3d) 62 | 48 Imm. L.R. (4th) 13 | 2016 CarswellNat 6003

Between Danilo Maala Almacén, Appellant, and Her Majesty the Queen, Respondent

(7 paras.)

Case Summary

Civil litigation — Civil procedure — Pleadings — Striking out pleadings or allegations — Grounds — Failure to disclose a cause of action or defense — False, frivolous, vexatious or abuse of process — Appeal by AlmacÚn from dismissal of motion to set aside order striking out statement of claim dismissed — Appellant commenced claim alleging misfeasance in public office, negligence and Charter breaches after his application to remain in Canada on humanitarian and compassionate grounds was denied — Claim was abuse of process as it was attempt to re-litigate reasonableness of H&C decision and it disclosed no cause of action.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982,

Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 25

Appeal From:

Appeal from a judgment of the Honourable Mr. Justice Russell of the Federal Court dated March 9, 2016, Docket No. T-1508-14.

Counsel

Rocco Galati, for the Appellant.

Rachel Hepburn Craig, Marina Stefanovic, for the Respondent.

REASONS FOR JUDGMENT OF THE COURT

The judgment of the Court was delivered by

W.W. WEBB J.A. (orally)

1 The Appellant's Amended Statement of Claim dated September 23, 2014 was struck by an Order of the Prothonotary dated August 10, 2015 (2015 FC 957) without leave to amend. The Appellant then brought a motion before the Federal Court to set aside this Order. This motion was dismissed by Order and reasons of Russell J. dated March 9, 2016 (2016 FC 300). This appeal is from this Order of Russell J.

2 The Appellant commenced the action in the Federal Court following the denial of the Appellant's application to remain in Canada on Humanitarian and Compassionate grounds pursuant to section 25 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the H&C Decision). The claim alleged various causes of action including misfeasance in public office, negligence, and breaches of the *Canadian Charter of Rights and Freedoms*. The Appellant also filed an application for leave and judicial review of the H&C Decision. This application for leave was denied by Shore J. and a subsequent motion for reconsideration of this decision was dismissed. The test before Shore J. was whether there were fairly arguable issues in relation to the H&C Decision. Since leave was denied and the motion for reconsideration dismissed, the conclusion is that there were no fairly arguable issues.

3 The Prothonotary struck the Appellant's Amended Statement of Claim on the basis that, based on the facts as pled, this Statement of Claim did not disclose a reasonable cause of action. The Prothonotary also stated that, in the alternative, he would have struck this Statement of Claim as an abuse of process since, in his view, this was an attempt to re-litigate the decision of Shore J. to dismiss the application for leave in relation to the H&C Decision.

4 Russell J. reviewed the decision of the Prothonotary on a *de novo* basis and dismissed the Appellant's motion to set aside the Order of the Prothonotary on the basis that it was an abuse of process as it "is simply an attempt to re-litigate the reasonableness of the H&C decision, and the Court has already dealt with the reasonableness of that decision" (paragraph 46 of his reasons). Russell J. also found that he would dismiss the motion on the basis that, based on the facts as alleged in this Statement of Claim, no reasonable cause of action was disclosed.

5 In this Court, the Appellant submitted that, at the time of the issuance of the Statement of Claim, the application for leave had not been decided. This changes nothing: once the leave application was decided, none of the issues against the validity of the decision were fairly arguable. In these circumstances an action based on the validity of the decision cannot succeed and, in our view, the foundation of his claim is the unreasonableness of the H&C Decision.

6 The Appellant submits that the Supreme Court holdings in *Attorney General of Canada v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585 (*TeleZone)* and five related cases support his position in this appeal. We disagree. None of the six cases involved a prior related proceeding that was determined by a court to be not fairly arguable. In the *TeleZone* cases the Supreme Court did not repeal the doctrine against re-litigation -- that doctrine applies here.

7 In this appeal, we have not been persuaded that Russell J. committed any reviewable error in dismissing the Appellant's motion and therefore, the appeal will be dismissed, with costs.

W.W. WEBB J.A.

Cabral v. Canada (Minister of Citizenship and Immigration), [2016] F.C.J. No. 1250

Federal Court Judgments

Federal Court

Toronto, Ontario

R.W. Zinn J.

Heard: June 8, 2016.

Judgment: September 14, 2016.

Docket: T-2425-14

[2016] F.C.J. No. 1250 | [2016] A.C.F. no 1250 | 2016 FC 1040

Between Juvenal Da Silva Cabral, Pedro Manuel Gomes Silva, Robert Zlotsz, Roberto Carlos Oliveira Silva, Rogerio De Jesus Marques Figo, Joao Gomes Carvalho, Andresz Tomasz Myrda, Antonio Joaquim Oliveira Martins, Carlos Alberto Lima Araujo, Fernando Medeiros Cordeiro, Filipe Jose Laranjeiro Henriques, Isaac Manuel Leituga Pereira, Jose Filipe Cunha Casanova, Plaintiffs, and Minister of Citizenship and Immigration, Minister of Public Safety and Emergency Preparedness and Her Majesty the Queen, Defendants

(103 paras.)

Case Summary

Immigration law — Immigrants — Application for immigrant visa — Units of assessment/Point system — Language — Motion by defendants for summary judgment dismissing plaintiffs' claims allowed — Plaintiffs' applications for permanent residence under Federal Skilled Trade Class were refused because they failed to meet language requirement — Claims advanced by nine plaintiffs were dismissed on basis that applications were filed without one of NOC identified or were incomplete or provided stale-dated information — No evidence language test required high proficiency in English or was culturally biased — Even if remaining plaintiffs had established test was biased, they failed to mitigate by taking alternative test — Immigration and Refugee Protection Regulations, ss. 87.2(3), 87.2(4).

Motion by the defendants for summary judgment dismissing the plaintiffs' claims. The plaintiffs' applications for permanent residence under the Federal Skilled Trade Class were refused because they failed to meet the language requirement by failing the International English Language Testing System (IELTS). The plaintiffs alleged the IELTS was culturally biased towards British English and unfairly required a high proficiency in English. Immigration officers refused to consider the plaintiffs' requests for substituted evaluations because the language requirement was not met. The Minister of Citizenship and Immigration had issued an instruction not to process applications that failed to meet the language threshold.
HELD: Motion allowed.

The claims advanced by nine plaintiffs were dismissed on the basis that their applications were filed without one of the NOC identified or were incomplete or provided stale-dated information. There was an absence of evidence demonstrating the IELTS required a high proficiency in English or was culturally biased. There was no genuine issue for trial regarding the Minister's instruction. Even if the remaining plaintiffs had established the IELTS was biased, they failed to mitigate their damages by taking the alternative test.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 7, s. 15

Federal Court Rules, SOR/98-106, Rule 81(1), Rule 213, Rule 215(1), Rule 219, Rule 334.39, Rule 334.39(1), Rule 334.39(1) (a), Rule 334.39(1)(c)

Immigration and Refugee Protection Act, SC 2001, c. 27, s. 3(1) (f), s. 12(2), s. 87.3(3)

Immigration and Refugee Protection Regulations, SOR/2002-227, s. 74(2), s. 74(3), s. 87.2, s. 87.2(1), s. 87.2(3), s. 87.2(3) (a), s. 87.2(3)(d)(ii), s. 87.2(3)(d)(v), s. 87.2(4)

Counsel

Rocco Galati, for the Plaintiffs.

Angela Marinos, Meva Motwani, for the Defendants.

ORDER AND REASONS

R.W. ZINN J.

Introduction

1 The Defendants move for summary judgment. They ask the Court to dismiss the action, with costs.

2 The essentials of the Plaintiffs' claim, as reflected in the Amended Statement of Claim is as follows:

(a) Each of the Plaintiffs applied for permanent resident status pursuant to subsection 12(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 and section 87.2 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, as part of the Federal Skilled Trade Class [FSTC];

(b) Despite meeting all of the other requirements for permanent residence required by the FSTC, each was refused because he failed to meet the language requirement by failing the International English Language Testing System [IELTS], adopted by the Minister of Citizenship and Immigration;

(c) The Plaintiffs allege that the IELTS is culturally biased towards "British English" rather than "Canadian English" and unfairly requires a high proficiency in English;

(d) The Plaintiffs further allege that the Minister administers the FSTC in a manner that favours persons from English-speaking countries and discriminates against those, like the Plaintiffs, who are from non-English speaking countries;

(e) Each Plaintiff, having failed to meet the threshold requirements under the IELTS, requested that the officer perform a substitute evaluation of his ability to become economically established in Canada, as provided by subsection 87.2(4) of the Regulations;

(f) The Plaintiffs allege that the officer refused to consider their applications on the merits because of a Ministerial Instruction stipulating that no FTSC application was to be examined by an officer unless the language requirement was met;

(g) The Plaintiffs allege that the Ministerial Instruction is contrary to the Regulations and is *ultra vires*;

(h) The Plaintiffs allege that the conduct of the Defendants amounts to breach of statute, public misfeasance and abuse, excess of jurisdiction and authority, abuse of process, bad faith, and breach of section 7 and 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; and

(i) The Plaintiffs suffered damages as a result of the Defendants' wrongful conduct.

3 The Defence filed by the Defendants may be summarized as the following:

(a) Only three Plaintiffs, Mr. Henriques, Mr. Cabral and Mr. Casanova, have standing to bring the action as framed as they applied for permanent residence under the FSTP program and were denied for failing the language test;

(b) The other Plaintiffs either applied under a different program, did not submit an eligible occupation, did not submit other requirements documents, did not have a valid work permit, or submitted expired language test results;

(c) None of the applications were eligible for substituted evaluation because substituted evaluation only comes into play when an application has been reviewed for completeness and eligible for processing, and none of the applications were complete;

(d) The IELTS is not biased and does not require a high proficiency in English;

(e) The Plaintiffs have the choice between two different language tests and if they fail their chosen test, they may retake it as many times as they wish, or take the other approved test; and

(f) The Ministerial Instruction is delegated legislation, enacted pursuant to subsection 87.3(3) of the Act which gives the Minister the ability to issue instructions with respect to the processing of applications such as FSTC applications.

Evidence Filed

4 The Defendants filed three affidavits and their attached exhibits in support of the motion. As a preliminary matter, the Plaintiffs submit that none of these affidavits are admissible. Each affiant was cross-examined by counsel for the Plaintiffs and the transcripts put before the Court.

5 The Plaintiffs object to these affidavits because they "are sworn without any personal knowledge of the applications of the Plaintiffs or other facts in issue in the within action," they "were not the decision-makers who decided not to process the Plaintiffs' applications," and they "did not issue the reasons or letters for the decision(s) in respect of the Plaintiffs' applications, if reasons exist." The Plaintiffs complain that by putting evidence forward through these witnesses, they have been denied the right to cross-examine the relevant individual decision-makers, that there is no evidence put before the Court by the Minister, and lastly they submit that the affidavits at issue "largely consist of opinions on the law, which is the purview of the Court."

6 The starting point is Rule 81(1) of the *Federal Courts Rules*, SOR/98-106: "Affidavits shall be confined to facts within the deponent's personal knowledge except on motions, other than motions for summary judgment or summary trial, in which statements as to the deponent's belief, with the grounds for it, may be included."

7 The Defendants' first affiant, Ms. Williams, is a Program Support Officer at the Department of Immigration, Refugee and Citizenship Canada, (formerly Citizenship and Immigration Canada) where her main duties include reviewing and assessing applications for permanent residence under the economic class under the provincial nominee program. She previously reviewed and assessed a number of different types of applications for eligibility under the economic class under the federal skilled worker program, Canadian experience class, and FSTC.

8 At paragraph 5 of her affidavit she attests that her affidavit is "directed towards setting out the operation of the FSTP [Federal Skilled Trades Program], the processing of applications submitted as part of the FSTP, and information regarding the Plaintiffs' applications." I find that to be an accurate summary of her evidence.

9 I accept, given her position and background, that she has personal knowledge of the FSTP and the processing of applications under it. Her knowledge of the Plaintiffs' applications (paragraphs 36-78 of her affidavit) is based on her review of the Global Case Management System [GCMS] notes. She attests that GCMS is an electronic file

system used by Immigration, Refugees and Citizenship Canada for the processing of applications for admission to Canada.

10 I find that, given her position, she can speak to the creation of the GCMS notes and the fact that they reflect various officers' assessments and decisions involving the applications at issue. The GCMS notes are business records of the Minister and his officials and an exception to the hearsay rule. It was not necessary, as the Plaintiffs submit, that each of the officers making the various decisions tender an affidavit. On the other hand, Ms. Williams has no direct knowledge of the applications or the officers' decisions, other than as is reflected in the GCMS notes. Accordingly, her evidence, and the evidence from the GCMS notes may be contradicted by direct evidence tendered by the Plaintiffs. I note that the cover letters returning the FSTC applications, without exception, reflect the description for rejection in the GCMS notes.

11 Ms. Williams attests in many instances that there were reasons for rejecting a Plaintiff's application other than those outlined in the GCMS notes and cover letter, such as failure to have a work permit. On cross-examination, she admitted that she could not challenge any statement made by Richard Boraks, the Plaintiffs' affiant, when he contradicts her, because she had no personal knowledge of the applications. Mr. Boraks is the lawyer who prepared 26 of the 27 applications under the FSTP for the 13 Plaintiffs. I accept that he has personal knowledge of the applications and the determinations made by the Minister's officials as were reported to him. Given this admission, and the fact that Mr. Boraks does have personal knowledge of the applications because he prepared them, his evidence is preferred. In the summary of the applications set out below, I have excluded from consideration any statement made by Ms. Williams that is contradicted by Mr. Boraks.

12 I do not find that Ms. Williams' affidavit speaks to the law, as alleged by the Plaintiffs. Her references to subsection 87.2(3) of the Regulations are incidental, and do not seek to interpret the meaning of the provision. I therefore conclude that her affidavit is admissible.

13 I apply the same reasoning to Ms. Tyler's affidavit. Ms. Tyler is the Assistant Director of the Economic Policy and Programs Division at the Department of Immigration, Refugee and Citizenship Canada. She supervises a team of analysts responsible for developing the FSTC and the language testing policies for economic immigration. In her affidavit, she attests to the creation of the FSTC, the legislative requirements of the FSTC, the language requirements of the FSTC and the content of the Ministerial instructions on the FSTC. She did not engage in the interpretation of the law, but simply listed the legislative requirements as they appear in the legislation. I therefore conclude that her affidavit is also admissible.

14 Alana Homeward is a paralegal in the Ontario Office of the Department of Justice assisting counsel for the Defendants in this matter. The majority of her affidavit speaks to Minister Kenney's trips to England and Ireland between 2012 and 2014 to announce and promote the FSTP and to invite workers to come to Canada. She attaches a number of exhibits consisting of news releases, the Minister's speaking notes and talking points, news articles, and the like. She admitted on cross-examination that she could not speak to the truth of the contents of any of these exhibits. I accept that she can attest that these documents were generated as they purport to have been; however, the probative value of the documents she attaches to her affidavit is slight, given her admission.

15 The Plaintiffs' affiant, Mr. Boraks, attaches the first page of each application but not the full contents "given their inordinate volume." Given the nature of the motion and the obligation that each party puts its best case forward, he ought to have included the entire application, regardless of volume. He also attaches as exhibits the acknowledgement of receipt and in some instances, the details for the rejection of the application.

16 His affidavit speaks to a number of matters and allegations that go well outside the pleading in this action. These include issues such as the funding of the FSTP by the government, the refusal to process applications that were incomplete in only minor respects, refusing applicants to correct minor incompleteness concerns, and the language abilities of the Plaintiffs as evidenced by the fact that they had worked in Canada for many years and had satisfied union and provincial requirements in this regard.

Federal Skilled Trades Class Application Requirements

17 There are a number of programs in Canada under which persons may immigrate to and seek permanent residence in Canada. This action deals only with the FSTC program.

18 The FSTC application is restricted to those who work in and make an application with respect to one of the skilled trade occupations listed in the National Occupational Classification [NOC] identified in subsection 87.2(1) of the Regulations.

19 Subsection 87.2(3) of the Regulations, attached as Appendix A, sets out the other requirements that must be met for an applicant to be a member of the FSTC. They may be briefly summarized, as follows. An applicant must:

(a) Meet the minimum language proficiency set by the Minister under subsection 74(3) of the Regulations in reading, writing, listening, and speaking;

(b) Have acquired at least two years of full-time experience (or the part-time equivalent) in the skilled trade during the five years preceding the application, after becoming qualified to independently practice in the occupation;

(c) Have met the relevant employment requirements of their skilled trade as specified in the NOC, except for the requirement to obtain a provincial certificate of qualification; and

(d) Have a certificate of qualification issued by a competent provincial authority in the applicant's skilled trade, or a work permit or offer of employment as described in paragraphs 87.2(3)(d)(ii) - (v) of the Regulations.

20 As noted, each Plaintiff alleges that his FSTC application was denied only because of failing to meet the language requirement set out in (a) above. Subsection 87.2(4) of the Regulations provides for the possibility of a substituted evaluation where the requirements detailed in subsection 87.2(3) of the Regulations are not sufficient indicators of whether an applicant will be able to become economically established in Canada. It provides:

> If the requirements referred to in subsection (3), whether or not they are met, are not sufficient indicators of whether the foreign national will become economically established in Canada, an officer may substitute their evaluation for the requirements. This decision requires the concurrence of another officer.

21 Each of the Plaintiffs in his application asked the officer to conduct a substitute evaluation regarding the language requirement. No substitute evaluation was conducted for any of the Plaintiffs where their application failed to meet the language requirements.

22 There are three other matters related to the language requirement relevant to this action.

23 First, the Defendants have designated two agencies, which administer two different tests, for English-language testing under paragraph 87.2(3)(a) of the Regulations: (1) Paragon Testing Enterprises Inc. which administers the Canadian English Proficiency Index Program-General test [CELPIP], and (2) Cambridge ESOL, IDP Australia, and the British Council, which administer the International English Language Testing System [IELTS]. Each of the Plaintiffs who submitted test results were tested using the IELTS test.

24 Second, Ministerial Instruction 6 [MI6] dated December 29, 2012, and Ministerial Instruction 12 [MI12] dated April 26, 2014, both provide that "test results must be less than two years old on the date on which the application is received."

25 Third, the two Ministerial Instructions directed that only those FSTC applicants who had met the language requirements would be processed. By virtue of this direction, an applicant who met all of the other requirements under the FSTC would not have his application processed, or a substituted evaluation considered, if he did not meet the minimum language thresholds that had been established.

26 This requirement was outlined in two Ministerial Instructions. MI6, which came into force coincident with the creation of the FSTC on January 2, 2013, set a cap of FSTC applications to be processed yearly and within that set a cap for certain identified occupations. MI6 provided that applicants, who met the language threshold and did not exceed the identified cap, would be placed into processing if they met certain specified requirements. It stated that those applications that did not meet these criteria were to be returned as they did not qualify for processing:

> Complete applications from skilled tradespersons received by the Centralized Intake Office in Sydney, Nova Scotia, on or after January 2, 2013, whose applicants meet the language threshold for the Federal Skilled Trades Class as set by the Minister pursuant to subsection 74(1) of the *Immigration and Refugee Protection Regulations*, in each of the four language abilities (speaking, reading, writing and oral comprehension), and that do not exceed the identified caps, shall be placed into processing if they,
>
> (1) as per the 2011 version of the National Occupational Classification (NOC), show evidence of at least two years (24 months) of full-time or equivalent part-time paid work experience, acquired in the last five years, in one of the eligible skilled trade occupations (see footnote 2) in either Group A or B, set out below:
>
> ... [emphasis added and footnotes omitted]

27 MI12, which came into force on May 1, 2014, contained similar language to MI6 in that it too provided that applications, whose applicants met the language threshold for the FSTC and did not exceed the cap, would be placed into processing. Those that did not would be returned to the applicant with the advice that their application did not qualify for processing.

Evidence Regarding Each Plaintiff's FSTC Application(s)

28 The record before the Court on this motion shows the following with respect to each Plaintiff. Some made more than one FSTC application.

Juvenal Da Silva Cabral

29 Mr. Da Silva Cabral submitted three FSTC applications.

30 Mr. Da Silva Cabral's first application was submitted on March 15, 2013 [FSTC Application 01]. The GCMS notes indicate that it was returned because Mr. Da Silva Cabral's English language test was older than two years, and he did not meet the language requirements for writing, speaking and listening.

31 Mr. Da Silva Cabral's second application was submitted November 29, 2013 [FSTC Application 02]. The GCMS notes indicate that it was returned because Mr. Da Silva Cabral did not meet the language test results for listening and writing.

32 Mr. Da Silva Cabral's third application was submitted December 29, 2014 [FSTC Application 03]. The GCMS notes and cover letter indicate that it was returned because Mr. Da Silva Cabral did not meet the language test results for listening and writing, the incorrect fee was received as a previously dependent child was no longer a dependent, and the additional family forms he submitted were outdated as they were signed and dated in 2013.

Pedro Manuel Gomes Silva

33 Mr. Gomes Silva submitted two FSTC applications.

34 Mr. Gomes Silva's first application was submitted on August 12, 2013 [FSTC Application 04]. The GCMS notes and the cover letter indicate that it was returned because Mr. Gomes Silva's English language test was older than two years, and he did not meet the language requirements for speaking and listening.

35 Mr. Gomes Silva's second application was submitted December 25, 2015 [FSTC Application 05]. The GCMS

notes and cover letter indicate that it was returned because Mr. Gomes Silva's language test was older than two years. The GCMS notes also indicate that he did not meet the language requirements for speaking and listening.

Robert Zlotsz

36 Mr. Zlostz submitted two FSTC applications.

37 Mr. Zlostz's first application was submitted on September 17, 2013 [FSTC Application 06]. The GCMS notes and the cover letter indicate that it was returned because Mr. Zlostz applied under an ineligible NOC.

38 Mr. Zlostz's second application was submitted December 29, 2014 [FSTC Application 07]. The GCMS notes and cover letter indicate that it was returned because Mr. Zlostz's language test was older than two years.

Roberto Carlos Oliveira Silva

39 Mr. Oliveira Silva submitted two FSTC applications.

40 Mr. Oliveira Silva's first application was submitted on September 3, 2013 [FSTC Application 08]. The GCMS notes and the cover letter indicate that it was returned because Mr. Oliveira Silva did not meet the language requirements for writing and speaking. The cover letter also indicates that he failed to include the appropriate NOC code for his specified work experience.

41 Mr. Oliveira Silva's second application was submitted on July 25, 2014 [FSTC Application 09]. The GSMS notes indicate that it was approved and Mr. Oliveira Silva was granted permanent residence status on April 12, 2015. Mr. Boraks attests that this application was not made under the FSTC program but under the Canadian Experience Class program. Either way, this application is irrelevant. Either it was approved under the FSTC or it was not under the FSTC. Under either scenario, it is not relevant to this action as framed.

Rogerio De Jesus Marques Figo

42 Mr. Marques Figo submitted two FSTC applications.

43 Mr. Marques Figo's first application was submitted on December 29, 2014 [FSTC Application 10]. The GCMS notes and the cover letter indicate that it was returned because Mr. Marques Figo did not meet the language requirements for reading, writing, speaking, and listening and because the attached Schedule 11 and family information forms were signed over one year prior to the application.

44 Mr. Marques Figo's second application was submitted on March 7, 2016 [FSTC Application 11]. The GCMS notes and cover letter indicate that it was returned because of a moratorium on the twelfth set of Ministerial Instructions as of January 1, 2015. As a result applications under FSTC were to be sent through Express Entry. The GCMS notes do not indicate that he ever made an application under the Express Entry.

Joao Gomes Carvalho

45 Mr. Gomes Carvalho submitted two FTSC applications.

46 Mr. Gomes Carvalho's first application was submitted on October 14, 2014 [FSTC Application 12]. The GCMS notes and the cover letter indicate that it was returned because Mr. Gomes Carvalho did not meet the language requirements for reading, writing, speaking, and listening.

47 Mr. Gomes Carvalho's second application was submitted on December 29, 2014 [FSTC Application 13]. The GCMS notes and cover letter indicate that it was returned because Mr. Gomes Carvalho did not meet the language requirements for reading, writing, speaking, and listening.

Andresz Tomasz Myrda

48 Mr. Mydra submitted three FSTC applications.

49 Mr. Mydra's first application was submitted on August 29, 2013[FSTC Application 14]. The GCMS notes and the cover letter indicate that it was returned because Mr. Mydra submitted it under an inapplicable NOC code. Mr. Boraks disputes this.

50 Mr. Mydra's second application was submitted on January 3, 2014 [FSTC Application 15]. The GCMS notes indicate that it was returned because Mr. Mydra's language test was older than two years.

51 Mr. Mydra's third application was submitted on December 29, 2014 [FSTC Application 16]. The GCMS notes and cover letter indicate that it was returned because Mr. Mydra's language test was older than two years and he did not submit a supplementary travel form for himself and his wife. Mr. Boraks attests that the travel forms were submitted.

Antonio Joaquim Oliveira Martins

52 Mr. Oliveira Martins submitted two FSTC applications.

53 Mr. Oliveira Martins' first application was submitted on January 14, 2014 [FSTC Application 17]. The GCMS notes and the cover letter indicate that it was returned because Mr. Oliveira Martins did not submit language test results, proof of studies or fees for one of his children, a Schedule A for another child, and did not include the NOC code. Mr. Boraks attests that he did submit "the child dependant information referred to in Ms. Williams' affidavit."

54 Mr. Oliveira Martins' second application was submitted on December 29, 2014 [FSTC Application 18]. The GCMS notes indicate that it was returned because Mr. Oliveira Martin did not submit language test results and he was listed as a dependant person older than 19.

Carlos Alberto Lima Araujo

55 Mr. Lima Araujo submitted one FSTC application.

56 Mr. Lima Araujo's application was submitted on December 29, 2014 [FSTC Application 19]. The GCMS notes and the cover letter indicate that it was returned because Mr. Lima Araujo submitted language test results that were older than two years, and did not submit birth certificates for himself, his spouse and his two dependents. Mr. Boraks attests that the birth certificates were included with the application.

Fernando Medeiros Cordeiro

57 Mr. Medeiros Cordeiro submitted two FSTC applications.

58 Mr. Medeiros Cordeiro's first application was submitted on May 21, 2013 [FSTC Application 20]. The GCMS notes indicate that it was returned because it was significantly incomplete.

59 Mr. Medeiros Cordeiro's second application was submitted on December 29, 2014 [FSTC Application 21]. The GCMS notes and cover letter indicate that it was returned because Mr. Medeiros Cordeiro did not submit language test results, an offer of employment or if employed a labour market opinion, a work permit, or a certificate of qualification.

Filipe Jose Laranjeiro Henriques

60 Mr. Laranjeiro Henriques submitted two FSTC applications.

61 Mr. Laranjeiro Henriques' first application was submitted on November 25, 2013 [FSTC Application 22]. The GCMS notes and the cover letter indicate that it was returned because Mr. Laranjeiro Henriques did not meet the language test results for listening.

62 Mr. Laranjeiro Henriques' second application was submitted on December 24, 2014 [FSTC Application 23]. The GCMS notes and cover letter indicate that it was returned because Mr. Laranjeiro Henriques did not meet the

language test result for reading and listening. He was also asked to update Schedules A and 11 as they were stale-dated.

Isaac Manuel Leituga Pereira

63 Mr. Leituga Pereira submitted one FSTC application.

64 Mr. Leituga Pereira's application was submitted on December 29, 2014 [FSTC Application 24]. The GCMS notes and the cover letter indicate that it was returned because Mr. Leituga Pereira did not meet the language requirements in reading, writing, speaking, and listening and he was required to submit additional family information on his spouse.

Jose Filipe Cunha Casanova

65 Mr. Cunha Casanova submitted three FSTC applications.

66 Mr. Cunha Casanova's first application was submitted on November 29, 2013 [FSTC Application 25]. The GCMS notes and the cover letter indicate that it was returned because Mr. Cunha Casanova did not meet the language requirements in reading, writing, speaking, and listening.

67 Mr. Cunha Casanova's second application was submitted on May 15, 2014 [FSTC Application 26]. The GCMS notes and the cover letter indicate that it was returned because Mr. Cunha Casanova did not meet the language requirements in reading, writing, speaking, and listening.

68 Mr. Cunha Casanova's third application was submitted on December 29, 2014 [FSTC Application 27]. The GCMS notes and the cover letter indicate that it was returned because Mr. Cunha Casanova did not meet the language requirements in reading, writing, speaking, and listening, and his language test results were older than two years.

Summary Judgment

69 Rules 213-219 of the *Federal Courts Rules* govern summary judgment. Rule 215(1) provides that if on motion "the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly." This Court has held that in determining whether there is a genuine issue for trial the judge is entitled to assume that that parties have put their best foot forward, and that if the action were to go to trial, no additional evidence would be presented: *The Rude Native Inc v Tyrone T Resto Lounge*, 2010 FC 1278 at para 16, 195 ACWS (3d) 1128. The Rules impose a burden on the moving party to establish on the balance of probabilities that there is no genuine issue for trial, but they also impose a burden on the responding party to set out specific facts and adduce evidence showing that there is a genuine issue for trial.

Analysis of Issues for Trial

70 At the commencement of the oral hearing, counsel for the Plaintiffs objected to tying his clients' case to the pleadings, rather than the evidence. If by this he meant that it was open to this Court when determining this motion to assess whether there was evidence of a triable dispute beyond the pleading, I disagree. The test on a summary judgment motion is whether there is a genuine issue for trial, and the issues to be examined are those framed by the pleadings. It is not for the Court to make a party's case nor to seek triable issues outside the four corners of the pleadings the parties have filed.

Refused Only Because of the Language Test Result

71 It is fundamental to the Plaintiffs' claim that each had his application refused only because he failed to meet the minimum language test requirements, but had met all other requirements under the FSTC program. Accordingly, as the Defendants submit, if an application did not meet all of the other requirements, it cannot found a basis for the claim.

72 There can be no genuine issue for trial with respect to any FSTC application that was not filed with respect to one of the NOC identified in subsection 87.2 of the Regulations. Failure to meet this fundamental requirement would mean that the application could not succeed, even if all of the other requirements were met. FSTC Applications 06, 08, and 17 were returned and failed to identify any NOC code or identified one that was not part of the FSTC program. Accordingly, no genuine issue for trial can be shown with respect to any of these applications.

73 There can be no genuine issue for trial with respect to any FSTC application that was incomplete or provided stale-dated information, except for language test requirements, because any such application would necessarily have to be rejected. FSTC Applications 03, 10, 18, 20, 21, 23, and 24 were either incomplete or contained stale-dated information and would have been rejected even if the language test results were acceptable. Accordingly, no genuine issue for trial can be shown with respect to any of these applications.

74 There can be no genuine issue for trial with respect to any FSTC application that was submitted after January 1, 2015, when a moratorium was put in place and applications had to be sent through Express Entry. FSTC Application 11 fell into this category. Accordingly, no genuine issue for trial can be shown with respect to that application.

75 The Plaintiffs challenge the validity of the Ministerial Instruction that requires that an applicant must meet the language thresholds thus making no substituted evaluation possible with respect to this criterion. They have not challenged the aspect of the instruction that requires that the test results be current within the previous two years. FSTC Applications 01, 04, 05, 07, 15, 16, 19, and 27 each included stale test results and accordingly would have been returned in any event. Accordingly, no genuine issue for trial can be shown with respect to these applications.

76 The remaining applications, FSTC Applications 02, 12, 13, 14, 22, 25, and 26 were rejected because each applicant failed to meet the threshold language requirements. *Prima facie*, a genuine issue for trial can be shown for these applications because they were rejected only on the basis of the language requirement.

77 These remaining applications, exclude the following Plaintiffs: Mr. Pedro Gomes Silva, Mr. Robert Zlostz, Mr. Roberto Oliveira Silva, Mr. Rogerio Marques Figo, Mr. Andresz Mydra, Mr. Antonio Oliveira Martins, Mr. Carlos Lima Araujo, Mr. Fernando Medeiros Cordeiro, and Mr. Isaac Leituga Pereira. There is no genuine issue for trial with respect to the claims advanced by these nine Plaintiffs and judgment must issue dismissing their claims.

78 In considering whether there is a genuine issue for trial with respect to the FSTC applications of the remaining Plaintiffs, I now turn to the allegations regarding the use of the IELTS test, the Ministerial Instruction, and the failure to conduct a substitute evaluation.

Minimum Language Proficiency

79 Subsection 74(2) of the Regulations provides that the "minimum language proficiency thresholds fixed by the Minister shall be established with reference to the benchmarks described in the *Canadian Language Benchmarks* and the *Niveaux de compétence linguistique canadiens*."

80 The Plaintiffs admit at paragraph 12 of their Amended Statement of Claim that "the Minister is entitled to delegate the administering of the [language] test to an outside body." As noted earlier, the Minister has delegated this vis-à-vis the English test to two outside bodies, which each administers its own test. The Plaintiffs complain only of the inappropriateness of the IELTS test but make no similar claim regarding the CELPIP test used by the other body delegated by the Minister.

81 I accept the submission of the Defendants that there is no prohibition on the number of times an applicant may take a language test, that each applicant may choose which of the two English-language tests he wishes to take, and that an applicant may take both tests.

The IELTS Test

82 The Plaintiffs allege that the IELTS is culturally biased towards "British English" and unfairly requires a high proficiency in English.

83 The Language Benchmarks established for the FSTC are as follows: Reading 4.0, Listening 5.0, Writing 4.0, and Speaking 5.0. Ms. Tyler in her affidavit provides the only evidence on this motion as to the meaning of these benchmarks. She attests that a score of 4 amounts to "fluent basic ability" and a score of 5 amounts to "initial intermediate ability."

84 In the context of the FSTC application these benchmarks require the following:

* Reading: "the ability to understand simple social messages; short simple instructions; and the purpose, main idea and key information in simple, short texts."
* Writing: "the ability to 'write short, simple texts about personal experience and familiar topics or situations related to daily life and experience'."
* Speaking: "the ability to 'communicate with some effort in short, routine social situations, and present concrete information about needs and familiar topics of personal relevance'."
* Listening: "the ability to 'understand, with some effort, the gist of moderately complex, concrete formal and informal communication'."

85 Given this description of the minimum language requirements and the fact that a benchmark of only 4 or 5 is required on a 12 point scale, and absent any evidence from the Plaintiffs to the contrary, the Court cannot conclude that the IELTS requires a "high proficiency" in English, as is alleged in the Amended Statement of Claim.

86 If the IELTS is culturally biased, as alleged in the Amended Statement of Claim, one would expect to see that English-speaking persons would do significantly better on the tests than persons, like the Plaintiffs, from Italy, Poland, and Portugal. However, the evidence presented by Ms. Tyler does not show that. A chart she attaches as an exhibit showing the 2013 IELTS scoring shows the mean scores by first language:

	Listening	Reading	Writing	Speaking	Overall
English	7.2	6.8	6.9	7.6	7.2
Italian	6.1	6.1	5.8	6.3	6.2
Polish	6.4	6.2	5.9	6.5	6.3
Portuguese	6.4	6.3	6.1	6.7	6.4

87 Perhaps more telling is the band score by percentage:

	<4	4	4.5	5	5.5	6	6.5	7	7.5	8	8.5	9
English	0	1	1	3	6	10	13	15	16	16	15	5
Italian	1	3	4	11	17	18	15	12	10	6	2	0
Polish	3	3	5	8	12	14	16	15	13	9	3	0
Portuguese	1	2	4	7	12	16	17	15	13	9	3	0

88 This last chart shows that very few persons tested whose mother tongue was not English failed to meet the minimum score of 4 or 5. Only 1% of Italian speakers scored less than 4 and only 8% scored less than 5; only 3% of Polish speakers scored less than 4 and only 11% scored less than 5; and only 1% of Portuguese speakers scored less than 4 and only 7% scored less than 5. This shows that the vast majority of test-takers of Italian, Polish, and Portuguese background passed the benchmark required by the Defendants.

89 In my view, the Plaintiffs have not shown that the IETLS is in any manner "unfair" to them based on their background. In particular, given the high test results of persons from Italy, Poland, and Portugal, it cannot be said that the test discriminates against persons from non-English speaking countries. While it is true that a greater percentage of English-speaking candidates pass the benchmarks than non-English-speaking applicants, this can hardly be surprising and more importantly does not in itself establish that there is a bias against non-English speaking applicants.

Ministerial Instructions

90 The Plaintiffs argue that the Ministerial Instructions requiring officers to consider only applications where the language benchmark had been met, were contrary to the Regulations. That allegation cannot succeed. As noted above, subsection 87.3(3) of the Act specifically empowers the Minister to issue instructions.

91 It is also pled that the instructions are *ultra vires* on the basis that they are counter to the express power granted to an officer to make a substituted evaluation pursuant to subsection 87.2(4) of the Regulations.

92 I agree with the Defendants' submission that "delegated or subordinate legislation is presumed to work together" and that the "interpretation that favours coherence will be adopted over an interpretation that generates conflict."

93 The Plaintiffs allege that the Minister in instructing officials not to process an application that fails to meet the language thresholds is acting contrary to subsection 87.2(4) of the Regulations which provides for the possibility of a substituted evaluation. They allege at paragraph 16 of their Amended Statement of Claim:

> The Plaintiffs state that, the Defendant Minister of Immigration, in directing his officers not to open or look at a file under the Federal Skilled Trade Class application under s.87.2(4) of the Regulations, notwithstanding that all the Plaintiffs, through their counsel, had requested substituted evaluation, is knowingly acting contrary to s. 87.2(4) of the Regulations and s.12(2) of the IRPA itself, and is blatantly contravening his clear statutory duty to process, under s 3(1)(f), of the IRPA, with respect these applications with the result that the Plaintiffs have suffered damages, and continue to suffer damages. [emphasis in original deleted]

94 The Plaintiffs have failed to convince me that there is a genuine issue for trial with respect to this allegation.

95 First, subsection 12(2) of the Act provides only that a "foreign national may be selected as a member of the economic class on the basis of their ability to become economically established in Canada" [emphasis added]. Accordingly, even if the Plaintiffs can establish their ability to become economically established in Canada that does not give them a right to be selected. That remains discretionary: there is no obligation or requirement on the Minister to select them.

96 Second, paragraph 3(1)(f) of the Act which sets out its objectives provides that one such objective is "to work in cooperation with the provinces to secure better recognition of the foreign credentials of permanent residents and their more rapid integration into society." The Plaintiffs have failed to plead any material fact that would support their claim that in issuing his instructions to process only those applications that meet the minimum language thresholds the Minister has breached this objective of the Act. Indeed it is arguable that the instruction that an applicant must meet the language requirement ensures that an applicant will be integrated more rapidly into Canadian society and thus is fully consistent with this purpose.

97 The Plaintiffs further allege that the Ministerial Instructions are in conflict with the Regulation that provides for substitute evaluation of applications.

98 In my view, there is no obvious conflict between these two provisions. Ministerial instructions are issued by the Minister under subsection 87.3(3) of the Act relating to the processing of FSTC applications to "best support the attainment of the immigration goals established by the Government of Canada" [emphasis added]. This is a far different and much broader goal than that which permits substituted evaluation. Subsection 87.2(4) of the Regulations makes it clear that substitute evaluation is directed to whether the applicant "will become economically established in Canada" [emphasis added].

99 Aside from different goals or purposes, the Ministerial Instruction does not nullify the possibility of possible substitute evaluation, because that option remains available if an application fails to meet any of the other requirements.

Loss or Damage Suffered

100 The Plaintiffs plead that they have suffered damages or loss as a result of the Defendants' actions. They must show that any loss is a direct result of the actions of the Defendants and that they could not avoid or mitigate that loss.

101 In my opinion, even if the Plaintiffs can establish that the IELTS is a higher standard than the Canadian Language Benchmark, as is alleged in paragraph 13 of their pleading, and even if they can establish that their IELTS results caused them damage or loss, they failed to mitigate their damage or loss because they failed to take the CELPIP test.

102 There is no allegation that the CELPIP test was inappropriate, or too high a standard, or focused on "British English" rather than "Canadian English" as is alleged regarding the IELTS. Even if the IELTS results could be said to have caused them loss or damage, they failed to mitigate that loss or damage by taking the CELPIP test. They have not shown that their language abilities would not have met the threshold under that test.

Costs

103 This claim is a proposed class proceeding. Rule 334.39(1) of the *Federal Courts Rules* provides that no costs are to be awarded in a class proceeding, except in the circumstances set out in paragraphs 334.39(1)(a)--(c). In *Paradis Honey Ltd v Canada*, 2014 FC 215 at para 122, the Court held that a motion to strike a statement of claim brought before the action has been certified, does not engage the class action rules and, in particular, the provision of Rule 334.39. The Defendants being successful are entitled to their costs.

ORDER

THIS COURT ORDERS that the Defendants' motion for summary judgment is granted, and this action is dismissed with costs to the Defendants.

R.W. ZINN J.

* * * * *

Appendix "A"

Federal Skilled Trades Class

Member of class

87.2(3) A foreign national is a member of the federal skilled trades class if

(a) following an evaluation by an organization or institution designated under subsection 74(3), they meet the threshold fixed by the Minister under subsection 74(1) for proficiency in either English or French for each of the four language skill areas;

(b) they have, during the five years before the date on which their permanent resident visa application is made, acquired at least two years of full-time work experience, or the equivalent in part-time work, in the skilled trade occupation specified in the application after becoming qualified to independently practice the occupation, and during that period of employment has performed

(i) the actions described in the lead statement for the occupation as set out in the occupational descriptions of the *National Occupational Classification*, and

(ii) a substantial number of the main duties listed in the description of the occupation set out in the *National Occupational Classification*, including all of the essential duties;

(c) they have met the relevant employment requirements of the skilled trade occupation specified in the application as set out in the *National Occupational Classification*, except for the requirement to obtain a certificate of qualification issued by a competent provincial authority; and

(d) they meet at least one of the following requirements:

(i) they hold a certificate of qualification issued by a competent provincial authority in the skilled trade occupation specified in the application,

(ii) they are in Canada and hold a work permit that is valid on the date on which their application is made and, on the date on which the visa is issued, hold a valid work permit or are authorized to work in Canada under section 186, and

(A) the work permit was issued based on a positive determination by an officer under subsection 203(1) with respect to their employment in a skilled trade occupation,

(B) they are working for any employer specified on the work permit, and

(C) they have an offer of employment -- for continuous full-time work for a total of at least one year in the skilled trade occupation that is specified in the application and is in the same minor group set out in the National Occupational Classification as the occupation specified on their work permit -- that is made by up to two employers who are specified on the work permit, none of whom is an embassy, high commission or consulate in Canada or an employer who is referred to in any of subparagraphs 200(3)(h)(i) to (iii), subject to the visa being issued to the foreign national,

(iii) they are in Canada and hold a work permit referred to in paragraph 204(a) or (c) -- that is valid on the date on which their application is received -- and, on the date on which the visa is issued, hold a valid work permit or are authorized to work in Canada under section 186, and the circumstances referred to in clauses (ii)(B) and (C) apply,

(iv) they do not hold a valid work permit or are not authorized to work in Canada under section 186 on the date on which their application is made and

(A) up to two employers, none of whom is an embassy, high commission or consulate in Canada or an employer who is referred to in any of subparagraphs 200(3)(h) (i) to (iii), have made an offer of employment to the foreign national in the skilled trade occupation specified in the application for continuous full-time work for a total of at least one year, subject to the visa being issued to them, and

(B) an officer has approved the offer for full-time work -- based on an assessment provided to the officer by the Department of Employment and Social Development, on the same basis as an assessment provided for the issuance of a work permit, at the request of up to two employers or an officer -- that the requirements set out in subsection 203(1) with respect to the offer have been met, and

(v) they either hold a valid work permit or are authorized to work in Canada under section 186 on the date on which their application for a permanent resident visa is made and on the date on which it is issued, and

(A) the circumstances referred to in clauses (ii)(B) and (C) and subparagraph (iii) do not apply, and

(B) the circumstances referred to in clauses (iv)(A) and (B) apply.

* * *

Travailleurs de métiers spécialisés (fédéral)

Qualité

87.2(3) Fait partie de la catégorie des travailleurs de métiers spécialisés (fédéral) l'étranger qui :

a) a fait évaluer sa compétence en français ou en anglais par une institution ou organisation désignée en vertu du paragraphe 74(3) et qui a obtenu, pour chacune des quatre habiletés langagières, le niveau de compétence établi par le ministre en vertu du paragraphe 74(1);

b) a accumulé, au cours des cinq années qui ont précédé la date de présentation de sa demande de visa de résident permanent, au moins deux années d'expérience de travail à temps plein ou l'équivalent temps plein pour un travail à temps partiel dans le métier spécialisé visé par sa demande après qu'il se soit qualifié pour pratiquer son métier spécialisé de façon autonome, et a accompli pendant cette période d'emploi, à la fois :

(i) l'ensemble des tâches figurant dans l'énoncé principal établi pour le métier spécialisé dans les descriptions des métiers spécialisés de la *Classification nationale des professions*,

(ii) une partie appréciable des fonctions principales du métier spécialisé figurant dans les descriptions des métiers spécialisés de la *Classification nationale des professions*, notamment toutes les fonctions essentielles;

c) satisfait aux conditions d'accès du métier spécialisé visé par sa demande selon la *Classification nationale des professions*, sauf l'exigence d'obtention d'un certificat de compétence délivré par une autorité compétente provinciale;

d) satisfait à au moins l'une des exigences suivantes :

(i) il a obtenu un certificat de compétence délivré par une autorité compétente provinciale pour le métier spécialisé visé par sa demande,

(ii) il se trouve au Canada et est titulaire d'un permis de travail valide au moment de la présentation de sa demande de visa de résident permanent et, au moment de la délivrance du visa, il est titulaire d'un permis de travail valide ou est autorisé à travailler au Canada au titre de l'article 186, les conditions suivantes étant réunies :

(A) le permis de travail lui a été délivré à la suite d'une décision positive rendue par l'agent conformément au paragraphe 203(1) à l'égard de son emploi dans un métier spécialisé,

(B) il travaille pour un employeur mentionné sur son permis de travail,

(C) il a reçu d'au plus deux employeurs mentionnés sur son permis de travail -- autres qu'une ambassade, un haut-commissariat ou un consulat au Canada ou qu'un employeur visé à l'un des sous-alinéas 200(3)h) (i) à (iii) -- sous réserve de la délivrance du visa de résident permanent, une offre d'emploi à temps plein pour une durée continue totale d'au moins un an pour le métier spécialisé visé par sa demande et faisant partie du même groupe intermédiaire, prévu à la *Classification nationale des professions*, que le métier mentionné sur son permis de travail,

(iii) il se trouve au Canada et est titulaire du permis de travail visé par un des alinéas 204a) ou c), lequel est valide au moment de la présentation de sa demande de visa de résident permanent et, au moment de la délivrance du visa, il est titulaire d'un permis de travail valide ou est autorisé à travailler au titre de l'article 186, et les conditions visées aux divisions (ii)(B) et (C) sont réunies,

iv) il n'est pas titulaire d'un permis de travail valide ou n'est pas autorisé à travailler au Canada au titre de l'article 186 au moment de la présentation de sa demande de visa permanent, et les conditions suivantes sont réunies :

(A) au plus deux employeurs -- autres qu'une ambassade, un haut-commissariat ou un consulat au Canada ou qu'un employeur visé à à l'un des sous-alinéas 200(3)h)(i) à (iii) -- ont présenté à l'étranger une offre d'emploi à temps plein d'une durée continue totale d'au moins un an pour le métier spécialisé visé dans la demande, sous réserve de la délivrance du visa de résident permanent,

(B) un agent a approuvé cette offre d'emploi sur le fondement d'une évaluation -- fournie par le ministère de l'Emploi et du Développement social à la demande d'un ou de deux employeurs ou d'un agent, au même titre qu'une évaluation fournie pour la délivrance d'un permis de travail -- qui énonce que les exigences prévues au paragraphe 203(1) sont remplies à l'égard de l'offre,

(v) au moment de la présentation de sa demande de visa de résident permanent et au moment de la délivrance du visa, il est titulaire d'un permis de travail valide ou est autorisé à travailler au Canada au titre de l'article 186, et les conditions suivantes sont réunies :

(A) les conditions visées aux divisions (ii)(B) et (C) et au sous-alinéa (iii) ne sont pas remplies,

(B) les conditions visées aux divisions (iv)(A) et (B) sont réunies.

Committe for Monetary and Economic Reform v. Canada, [2015] F.C.J. No. 59

Federal Court Judgments

Federal Court of Appeal

Toronto, Ontario

Ryer, Webb and Boivin JJ.A.

Heard: January 26, 2015.

Judgment: January 26, 2015.

Docket: A-228-14

[2015] F.C.J. No. 59 | [2015] A.C.F. no 59 | 2015 FCA 20 | 2015 CarswellNat 92 | 249 A.C.W.S. (3d) 309 | 468 N.R. 197

Between Committee for Monetary and Economic Reform ("Comer"), William Krehm, and Ann Emmett, Appellants/Respondents in the Cross-Appeal, and Her Majesty the Queen, The Minister or Finance, The Minister of National Revenue, The Bank of Canada, The Attorney General of Canada, Respondents/Appellants in the Cross-Appeal

(5 paras.)

Case Summary

Civil litigation — Civil procedure — Pleadings — Amendment of — Statement of claim — Leave to amend — Striking out pleadings or allegations — Appeal and cross-appeal from order striking statement of claim with leave to amend dismissed — Prothonotary initially struck plaintiffs' amended statement of claim without leave to amend — Federal Court judge considered issue de novo and struck pleading, but granted leave to amend — Judge did not make any error warranting appellate intervention in either appeal or cross-appeal.

Statutes, Regulations and Rules Cited:

Federal Courts Rules, SOR/98-106, Rule 51, Rule 51(1)

Appeal From:

Appeal from an order of the Honourable Mr. Justice Russell of the Federal Court, dated April 24, 2014, in Docket No. T-2010-11.

Counsel

Rocco Galati, for the Appellants/Respondents in the Cross-Appeal.

Peter Hajecek, for the Respondents/Appellants in the Cross-Appeal.

REASONS FOR JUDGMENT OF THE COURT

The judgment of the Court was delivered by

RYER J.A.

1 The appeal and the cross-appeal relate to a decision of Russell, J. of the Federal Court (2014 FC 380) on a Motion made under Rule 51 of the *Federal Courts Rules* R. 51(1), SOR/98-106, appealing an Order of Prothonotary Aalto (2013 FC 855) which struck out the Amended Statement of Claim of Committee for Monetary and Economic Reform ("COMER"), William Krehm and Ann Emmett, the Appellants in the appeal, without leave to amend.

2 The Judge determined that he was required to consider the issues *de novo*, affording no deference to the Prothonotary's findings. He then found, in paragraph 64 of his reasons that:

> The role of the Court is to decide whether the Plaintiff's allegations have any factual and legal base to them, or more precisely in a motion to strike under Rule 221, whether the claims made in the Plaintiffs' claim have any reasonable prospect of success, or whether it is plain and obvious on the facts pleaded, that the claim cannot succeed.

3 After conducting his *de novo* reconsideration of the issues on the basis of this understanding of the test in Rule 221, the Judge concluded that the Amended Statement of Claim should be struck in its entirety. However, he granted leave to amend.

4 This Court may only interfere with the decision of the Judge if it was arrived at on a wrong basis or was plainly wrong: see *Z.I. Pompey Industrie v. ECU-Line N.V.*, at para 18 [2003] 1 S.C.R. 450, 2003 SCC 27. This standard of review requires us to afford deference to the Judge's decision.

5 Notwithstanding the able arguments of counsel, we have not been persuaded that the Judge made any error that would warrant our intervention in either the appeal or the cross-appeal. Accordingly, the appeal and the cross-appeal will be dismissed without costs. The Appellants are granted 60 days from the date hereafter to make amendments to the Amended Statement of Claim.

RYER J.A.

Committee for Monetary and Economic Reform v. Canada, [2016] F.C.J. No. 185

Federal Court Judgments

Federal Court

Toronto, Ontario

Russell J.

Heard: October 14, 2015.

Judgment: February 8, 2016.

Docket: T-2010-11

[2016] F.C.J. No. 185 | [2016] A.C.F. no 185 | 2016 FC 147 | 351 C.R.R. (2d) 1

Between Committee for Monetary and Economic Reform ("Comer"), William Krehm, and Ann Emmett, Plaintiffs, and Her Majesty the Queen, The Minister of Finance, The Minister of National Revenue, The Bank of Canada, The Attorney General of Canada, Defendants

(147 paras.)

Case Summary

Civil litigation — Civil procedure — Pleadings — Striking out pleadings or allegations — Grounds — Failure to disclose a cause of action or defence — Motion by defendants to strike amended statement of claim allowed — Plaintiff, an economic think tank and its members, took issued with way in which budget was presented sought various declarations concerning defendants failure to provide interest-free loans to all levels of government for human capital expenditures — Claims regarding taxations without representation issue disclosed no reasonable cause of action and had no chance of success — Court did not have jurisdiction to grant free-standing requests for jurisdiction.

Motion by the defendants to strike the plaintiffs' amended statement of claim. The plaintiff, Committee for Monetary and Economic Reform ("COMER") was an economic think-tank dedicated to research and publication on issues of monetary and economic reform in Canada. The individual plaintiffs were members of COMER who had an interest in economic policy. The plaintiffs took issue with the way in which the Minister of Finance presented the budget. They sought a series of declarations that the defendants had failed to fulfill their legal duties to provide interest free loans to federal, provincial and municipal governments for the purpose of human capital expenditures resulting in lower human capital expenditures, that the Government of Canada used flawed accounting methods in relation to public finances thereby understating the benefit of human capital expenditures and undermining Parliament's role as guardian of the public purse and that those and other harms were the result of Canadian fiscal and monetary policy being controlled, in part, by private foreign interests through Canada's involvement in international monetary and financial institutions. They also sought damages of $10,000 for each of the individual plaintiffs for breach of their constitutional right of no taxation without representation and the infringement of the right to vote due to alleged constitutional breaches by the Minister, and the return of the portion of illegal and unconstitutional tax paid by each individual plaintiff. The defendants sought to strike the amended statement of claim on the grounds that it failed to comply with the leave to amend granted and failed to remedy the problems identified, it sought to add parties, it failed to disclose a reasonable cause of action, it was scandalous, frivolous or vexatious, it was an abuse of process, it failed to disclose facts which would show a breach of the plaintiffs' rights, the causal link between any action or inaction of the defendants and the alleged infringement was too speculative, it sought declaratory relief that was not available, the plaintiffs were not entitled to seek an advisory opinion from the court, it sought to adjudicate matters that were not justiciable, it sought to fetter the sovereignty of Parliament, the plaintiffs did not

have a s. 3 Charter right to any particular form of taxation, it concerned matters outside the jurisdiction of the court and the plaintiffs did not have standing to bring the claim as of right and did not meet the requirements of public interest standing.
HELD: Application allowed.

The amended statement of claim disclosed no reasonable cause of action and had no prospect of success at trial. The central allegation, that MPs were voting blind and had been hoodwinked by the Minister, was a bald assertion unsupported by facts. Furthermore, the plaintiffs had no right to insist that Parliament debate and pass budgets only in accordance with practices and procedures they approved of an advocated. There was no breach of s. 3 of the Charter as if they individual plaintiffs had a right to vote, they were fully represented in Parliament and it was Parliament that decided whether or not to pass the budget. The Court could not interfere with the way in which Parliament went about its business. With respect to the Bank Act issues, the plaintiffs had not resolved the problems of justiciability and jurisdiction that arose in the original statement of claim. The court did not have the jurisdiction to provide the plaintiffs with the declarations they sought. The plaintiffs had not leaded facts to demonstrate a real issue concerning the relative interests of each party and the nexus of that issue to the plaintiffs and their claim for relief. The legal issues were theoretical with no nexus to some interest of the plaintiffs other than an interest in having the court endorse their opinion on the Bank Act issues raised.

Statutes, Regulations and Rules Cited:

Bank of Canada Act, RSC 1985, c B-2, s. 18, s. 18(i), s. 18(j), s. 18(m), s. 24, s. 30.1

Bill of Rights of 1689, 1 Will & Mar sess 2, c 2, Art 9

Canadian Charter of Rights and Freedoms, 1982, s. 3, s. 7, s. 9, s. 15

Constitution Act, 1867, s. 53, s. 54, s. 90, s. 91, s. 91(1) (a), s. 91(3), s. 91(6), s. 91(14), s. 91(15), s. 91(16), s. 91(18), s. 91(19), s. 91(20), s. 101

Constitution Act, 1982, s. 36

Federal Courts Act, RSC 1985, c F-7, s. 17, s. 18, s. 18.1, s. 18.4(2)

Federal Court Rules, SOR/98-106, Rule 64, Rule 174, Rule 221

Parliament of Canada Act, RSC 1985, c P-1, s. 4, s. 5

Counsel

Rocco Galati, for the Plaintiffs.

Peter Hajecek, for the Defendants.

ORDER AND REASONS

RUSSELL J.

I. INTRODUCTION

1 This is a motion by the Defendants under Rule 221 of the *Federal Court Rules*, SOR/98-106 [*Rules*] to strike the Plaintiffs' Amended Statement of Claim of March 26, 2015 [Amended Claim].

II. BACKGROUND

2 The Plaintiff, Committee for Monetary and Economic Reform [COMER], is an economic "think-tank" based in Toronto. COMER was established in 1970 and is dedicated to research and publications on issues of monetary and economic reform in Canada. The individual Plaintiffs are members of COMER who have an interest in economic policy.

A. *History of the Litigation*

3 This litigation was commenced on December 12, 2011, with the filing of the original Statement of Claim, which was amended in minor ways on January 19, 2012 [Original Claim].

4 On August 9, 2013, the Original Claim was struck out in its entirety by Prothonotary Aalto, without leave to amend. Upon appeal from the decision of the Prothonotary, I struck the Original Claim in its entirety, but with leave to amend, by way of order on April 24, 2014 [Order of April 24, 2014].

5 Appeal and cross-appeals of my Order of April 24, 2014 were dismissed by the Federal Court of Appeal on January 26, 2015. The Plaintiffs filed the Amended Claim on March 26, 2015. The Defendants now move to strike out this Amended Claim.

B. *The Amended Claim*

6 The Plaintiffs' Amended Claim, while an amended version of the Original Claim, continues to seek a series of declarations relating to three basic assertions, as noted in my previous Order of April 24, 2014: first, that the *Bank of Canada Act*, RSC, 1985, c B-2 [*Bank Act*] provides for interest-free loans to the federal, provincial and municipal governments for the purposes of "human capital expenditures," and the Defendants have failed to fulfill their legal duties to ensure such loans are made, resulting in lower human capital expenditures by governments to the detriment of all Canadians; second, that the Government of Canada uses flawed accounting methods in relation to public finances, thereby understating the benefit of "human capital expenditures" and undermining Parliament's constitutional role as the guardian of the public purse; and third, that these and other harms are the result of Canadian fiscal and monetary policy being, in part, controlled by private foreign interests through Canada's involvement in international monetary and financial institutions.

7 The pleadings of fact which accompany the Amended Claim define "human capital expenditures" as those that encourage the qualitative and quantitative progress of a nation by way of the promotion of the health, education and quality of life of individuals, in order to make them more productive economic actors, through institutions such as schools, universities, hospitals and other public infrastructures. The Plaintiffs state that investment in human capital is the most productive investment and expenditure a government can make.

8 The Amended Claim seeks nine declarations. The first is that ss 18(i) and (j) of the *Bank Act* require the Minister of Finance [Minister] and the Government of Canada to request, and the Bank of Canada to provide, interest-free loans for the purpose of human capital expenditures to all levels of government (federal, provincial and municipal).

9 Second, the Plaintiffs ask the Court to declare that the Defendants have not only abdicated their statutory and constitutional duties with respect to ss 18(i) and (j) of the *Bank Act*, but that they have also, by way of a refusal to request and make interest-free loans under ss 18(i) and (j), caused a negative and destructive impact on Canadians through the disintegration of Canada's economy, its financial institutions, increases in public debt, a decrease in social services, as well as a widening gap between rich and poor, with the continuing disappearance of the middle class. In the accompanying facts to their Amended Claim, the Plaintiffs use a June 11, 2014 request of the Town of Lakeshore, Ontario as an example of an occasion when the Minister refused a request for an interest-free loan without regard to either the nature of the request or pertinent provisions of the *Bank Act*. The Plaintiffs say that the Minister's reasons for refusing the Town of Lakeshore's request are both financially and economically fallacious and not in accordance with statutory duties.

10 Third, the Plaintiffs seek a declaration that s 18(m) of the *Bank Act*, and its administration and operation, is unconstitutional and of no force and effect. They say the Defendants have abdicated their constitutional duties and handed them over to international, private entities whose interests have, in effect, been placed above those of Canadians and the primacy of the Canadian Constitution. The Plaintiffs state that no sovereign government such as Canada should ever borrow money from commercial banks at interest, when it can borrow from its own central bank interest-free, particularly when that central bank, unlike the banks of any other G-8 nation, is publically established, mandated, owned and accountable to Parliament and the Minister, and was created with that purpose as one of its main functions.

11 Fourth, the Plaintiffs ask the Court to declare that the fact that the minutes of meetings involving the Governor of the Bank of Canada [Governor] and other G-8 central bank governors have been kept secret is *ultra vires* the Governor, as being contrary to the *Bank Act* -- particularly s 24 -- and ought to be considered unconstitutional conduct.

12 The fifth declaration sought is that, by allowing the Governor to keep the nature and content of international bank meetings secret, by not exercising the authority and duty contained in ss 18(i) and (j) of the *Bank Act,* and in enacting s 18(m) of the *Bank Act*, Parliament has abdicated its duties and functions as mandated by ss 91(1)(a), (3), (14), (15), (16), (18), (19), (20) of the *Constitution Act, 1867,* as well as s 36 of the *Constitution Act, 1982.*

13 The Plaintiffs' sixth and seventh declarations involve the manner in which the Minister accounts for public finances, which the Plaintiffs say is conceptually and logically wrong. The Plaintiffs seek a declaration that the Minister is required to list human capital expenditures -- including those related to infrastructure as "assets" rather than "liabilities" in budgetary accounting -- as well as all revenues prior to the return of tax credits to individual and corporate tax payers, then subtract tax credits, then subtract total expenditures in order to arrive at an annual "surplus" or "deficit," as required by s 91(6) of the *Constitution Act, 1867*.

14 The eighth declaration sought is that taxes imposed to pay for the interest on the deficit and the debt to private bankers, both domestic and foreign, are illegal and unconstitutional. The Plaintiffs claim that this is the result of a breach of the constitutional right(s) to "no taxation without representation" which occurs when the Minister fails to disclose anticipated revenues to Parliament before the return of anticipated tax credits, prior to determining whether an anticipated surplus or deficit will be incurred, in the tabling of the budget. This means that a full and proper Parliamentary debate cannot properly take place, thus breaching the right to no taxation without representation under both ss 53 and 90 of the *Constitution Act, 1867*, as well as the unwritten constitutional imperatives to the same effect. Also, it results in an infringement of the Plaintiffs' right to vote under s 3 of the *Charter*, which is tied to the right to no taxation without representation with respect to the Minister's constitutional violations. The result is a breach of the terms of the *Bank Act* relating to interest-free loans and the consequent constitutional violations by the Executive of its duty to govern, and its relinquishing of sovereignty and statutory decision-making to private foreign bankers.

15 The ninth and final declaration sought is that the "privative clause" in s 30.1 of the *Bank Act* either (a) does not apply to prevent judicial review, by way of action or otherwise, with respect to statutorily or constitutionally *ultra vires* actions, or to prevent the recovery or damages based on such actions; or (b) if it does prevent judicial review and recovery, is unconstitutional and of no force and effect, as breaching the Plaintiffs' constitutional right to judicial review and the underlying constitutional imperatives of the rule of law, Constitutionalism and Federalism.

16 Besides the declaratory relief sought, the Plaintiffs also in the Amended Claim request damages in the amount of $10,000.00 each for individual Plaintiff: William Krehm, Anne Emmett, and for ten COMER Steering Committee [Steering Committee] members named in the Amended Claim, for the breach of their constitutional right of "no taxation without representation" and the inseparable infringement of the right to vote due to alleged constitutional breaches by the Minister. Further, the Plaintiffs request the return of the portion of illegal and unconstitutional tax, to be calculated and calibrated at trial, for each of the Plaintiffs and the members of the Steering Committing, consisting of the proportion of taxes to pay interest charges on the deficit, and debt between 2011 and the time of

trial, paid by the Plaintiffs and Steering Committee members, due to the statutory and constitutional breaches of the Defendants' rights in refusing and/or failing to cover deficits in the budget by way of interest-free loans, as well as the breach of their right to no taxation without representation, to be calculated by the compounded interest changes set out in the budget, as a percentage of the budget, calculated as the same percentage paid by the Plaintiffs and Steering Committee members, to be calculated at trial.

III. ISSUES

17 The Defendants have brought a motion to strike the Amended Claim on the grounds that, *inter alia*:

1. it fails to comply with the leave to amend granted and fails to remedy the problems identified in the Order of April 24, 2014;
2. it seeks to add parties and new claims that are not permissible by virtue of the leave to amend and the *Rules*;
3. it fails to disclose a reasonable cause of action against the Defendants, or any one of them;
4. it is scandalous, frivolous or vexatious;
5. it is an abuse of process of the Court;
6. it fails to disclose facts which would show that the action or inaction of the Defendants, or any one of them, could cause an infringement of the Plaintiffs' rights under the *Charter* or the Constitution;
7. the causal link between the alleged action or inaction of the Defendants or any one of them, and the alleged infringement of the Plaintiffs' rights is too uncertain, speculative and hypothetical to sustain a cause of action;
8. it seeks declaratory relief only available under s 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7 [*Federal Courts Act*] and in any event such relief is not available to the Plaintiffs;
9. the Plaintiffs are not entitled to seek an advisory opinion from the Court;
10. it seeks to adjudicate matters that are not justiciable;
11. it seeks to impose a fetter on the sovereignty of Parliament and seeks to overrule or disregard the privilege of the House of Commons over its own debates and internal procedures;
12. the Plaintiffs do not have a s 3 *Charter* right to any particular form of taxation and there is no causal connection, or legitimate expectation between their vote and the presentation of a budget before the House of Commons and resulting legislation;
13. it concerns matters outside the jurisdiction of the Court; and
14. the Plaintiffs do not have standing to bring the Amended Claim as of right, nor can they meet the necessary requirements for the grant of public interest standing.

IV. STATUTORY PROVISIONS

18 The following provisions of the *Bank Act* are applicable in these proceedings:

Powers and business

18. The Bank may

[...]

(i) make loans or advances for periods not exceeding six months to the Government of Canada or the government of a province on taking security in readily marketable securities issued or guaranteed by Canada or any province;

(j) make loans to the Government of Canada or the government of any province, but such loans outstanding at any one time shall not, in the case of the Government of Canada, exceed one-third of the estimated revenue of the Government of Canada for its fiscal year, and shall not, in the case of a provincial government, exceed one-fourth of that government's estimated revenue for its fiscal year, and such loans shall be repaid before the end of the first quarter after the end of the fiscal year of the government that has contracted the loan;

[...]

(m) open accounts in a central bank in any other country or in the Bank for International Settlements, accept deposits from central banks in other countries, the Bank for International Settlements, the International Monetary Fund, the International Bank for Reconstruction and Development and any other official international financial organization, act as agent or mandatary, or depository or correspondent for any of those banks or organizations, and pay interest on any of those deposits;

[...]

Fiscal agent of Canadian Government

24. (1) The Bank shall act as fiscal agent of the Government of Canada.

Charge for acting

(1.1) With the consent of the Minister, the Bank may charge for acting as fiscal agent of the Government of Canada.

To manage public debt

(2) The Bank, if and when required by the Minister to do so, shall act as agent for the Government of Canada in the payment of interest and principal and generally in respect of the management of the public debt of Canada.

Canadian Government cheques to be paid or negotiated at par

(3) The Bank shall not make any charge for cashing or negotiating a cheque drawn on the Receiver General or on the account of the Receiver General, or for cashing or negotiating any other instrument issued as authority for the payment of money out of the Consolidated Revenue Fund, or on a cheque drawn in favour of the Government of Canada or any of its departments and tendered for deposit in the Consolidated Revenue Fund.

[...]

No liability if in good faith

30.1 No action lies against Her Majesty, the Minister, any officer, employee or director of the Bank or any person acting under the direction of the Governor for anything done or omitted to be done in good faith in the administration or discharge of any powers or duties that under this Act are intended or authorized to be executed or performed.

* * *

Pouvoirs

18. La Banque peut :

[...]

i) consentir des prêts ou avances, pour des périodes d'au plus six mois, au gouvernement du Canada ou d'une province en grevant d'une sûreté des valeurs mobilières facilement négociables, émises ou garanties par le Canada ou cette province;

j) consentir des prêts au gouvernement du Canada ou d'une province, à condition que, d'une part, le montant non remboursé des prêts ne dépasse, à aucun moment, une certaine fraction des recettes estimatives du gouvernement en cause pour l'exercice en cours -- un tiers dans le cas du Canada, un quart dans celui d'une province -- et que, d'autre part, les prêts soient remboursés avant la fin du premier trimestre de l'exercice suivant;

[...]

m) ouvrir des comptes dans une banque centrale étrangère ou dans la Banque des règlements internationaux, accepter des dépôts -- pouvant porter intérêt -- de banques centrales étrangères, de la Banque des règlements internationaux, du Fonds monétaire international, de la Banque internationale pour la reconstruction et le développement et de tout autre organisme financier international officiel, et leur servir de mandataire, dépositaire ou correspondant;

[...]

Agent financier du gouvernement canadien

24. (1) La Banque remplit les fonctions d'agent financier du gouvernement du Canada.

Honoraires

(1.1) La Banque peut, avec le consentement du ministre, exiger des honoraires pour remplir de telles fonctions.

Gestion de la dette publique

(2) Sur demande du ministre, la Banque fait office de mandataire du gouvernement du Canada pour la gestion de la dette publique, notamment pour le paiement des intérêts et du principal de celle-ci.

Encaissement des chèques du gouvernement canadien

(3) La Banque ne peut exiger de frais pour l'encaissement ou la négociation de chèques tirés sur le receveur général ou pour son compte et d'autres effets autorisant des paiements sur le Trésor, ni pour le dépôt au Trésor de chèques faits à l'ordre du gouvernement du Canada ou d'un ministère fédéral.

[...]

Immunité judiciaire

30.1 Sa Majesté, le ministre, les administrateurs, les cadres ou les employés de la Banque ou toute autre personne agissant sous les ordres du gouverneur bénéficient de l'immunité judiciaire pour les actes ou omissions commis de bonne foi dans l'exercice -- autorisé ou requis -- des pouvoirs et fonctions conférés par la présente loi.

19 The following provisions of the *Constitution Act, 1867*, are applicable in these proceedings:

Appropriation and Tax Bills

53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

Recommendation of Money Votes

54. It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed.

[...]

Application to Legislatures of Provisions respecting Money Votes, etc.

90. The following Provisions of this Act respecting the Parliament of Canada, namely, -- the Provisions relating to Appropriation and Tax Bills, the Recommendation of Money Votes, the Assent to Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved, -- shall extend and apply to the Legislatures of the several Provinces as if those Provisions were here re-enacted and made applicable in Terms to the respective Provinces and the Legislatures thereof, with the Substitution of the Lieutenant Governor of the Province for the Governor General, of the Governor General for the Queen and for a Secretary of State, of One Year for Two Years, and of the Province for Canada.

Legislative Authority of Parliament of Canada

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,

[...]

1A. The Public Debt and Property. (45)

[...]

3. The raising of Money by any Mode or System of Taxation.

4. The borrowing of Money on the Public Credit.

[...]

6. The Census and Statistics.

[...]

14. Currency and Coinage.

[...]

16. Savings Banks.

[...]

18. Bills of Exchange and Promissory Notes.

19. Interest.

20. Legal Tender.

[...]

* * *

Bills pour lever des crédits et des impôts

53. Tout bill ayant pour but l'appropriation d'une portion quelconque du revenu public, ou la création de taxes ou d'impôts, devra originer dans la Chambre des Communes.

Recommandation des crédits

54. Il ne sera pas loisible à la Chambre des Communes d'adopter aucune résolution, adresse ou bill pour l'appropriation d'une partie quelconque du revenu public, ou d'aucune taxe ou impôt, à un objet qui

n'aura pas, au préalable, été recommandé à la chambre par un message du gouverneur-général durant la session pendant laquelle telle résolution, adresse ou bill est proposé.

[...]

Application aux législatures des dispositions relatives aux crédits, etc.

90. Les dispositions suivantes de la présente loi, concernant le parlement du Canada, savoir: -- les dispositions relatives aux bills d'appropriation et d'impôts, à la recommandation de votes de deniers, à la sanction des bills, au désaveu des lois, et à la signification du bon plaisir quant aux bills réservés, -- s'étendront et s'appliqueront aux législatures des différentes provinces, tout comme si elles étaient ici décrétées et rendues expressément applicables aux provinces respectives et à leurs législatures, en substituant toutefois le lieutenant-gouverneur de la province au gouverneur-général, le gouverneur-général à la Reine et au secrétaire d'État, un an à deux ans, et la province au Canada.

Autorité législative du parlement du Canada

91. Il sera loisible à la Reine, de l'avis et du consentement du Sénat et de la Chambre des Communes, de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada, relativement à toutes les matières ne tombant pas dans les catégories de sujets par la présente loi exclusivement assignés aux législatures des provinces; mais, pour plus de garantie, sans toutefois restreindre la généralité des termes ci-haut employés dans le présent article, il est par la présente déclaré que (nonobstant toute disposition contraire énoncée dans la présente loi) l'autorité législative exclusive du parlement du Canada s'étend à toutes les matières tombant dans les catégories de sujets ci-dessous énumérés, savoir :

[...]

1A. La dette et la propriété publiques. (45)

[...]

3. Le prélèvement de deniers par tous modes ou systèmes de taxation.

4. L'emprunt de deniers sur le crédit public.

[...]

6. Le recensement et les statistiques.

[...]

14. Le cours monétaire et le monnayage.

[...]

16. Les caisses d'épargne.

[...]

18. Les lettres de change et les billets promissoires.

19. L'intérêt de l'argent.

20. Les offres légales.

[...]

20 The following provisions of the *Constitution Act, 1982*, are applicable in these proceedings:

Democratic rights of citizens

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Life, liberty and security of person

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.

[...]

Equality before and under law and equal protection and benefit of law

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.

[...]

Commitment to promote equal opportunities

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

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

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

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

Commitment respecting public services

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

* * *

Droits démocratiques des citoyens

3. Tout citoyen canadien a le droit de vote et est éligible aux élections législatives fédérales ou provinciales.

Vie, liberté et sécurité

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

[...]

Égalité devant la loi, égalité de bénéfice et protection égale de la loi

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

[...]

Engagements relatifs à l'égalité des chances

36. (1) Sous réserve des compétences législatives du Parlement et des législatures et de leur droit de les exercer, le Parlement et les législatures, ainsi que les gouvernements fédéral et provinciaux, s'engagent à :

a) promouvoir l'égalité des chances de tous les Canadiens dans la recherche de leur bien-être;

b) favoriser le développement économique pour réduire l'inégalité des chances;

c) fournir à tous les Canadiens, à un niveau de qualité acceptable, les services publics essentiels.

Engagement relatif aux services publics

(2) Le Parlement et le gouvernement du Canada prennent l'engagement de principe de faire des paiements de péréquation propres à donner aux gouvernements provinciaux des revenus suffisants pour les mettre en mesure d'assurer les services publics à un niveau de qualité et de fiscalité sensiblement comparables.

21 The following provision of the *Rules* is applicable in these proceedings:

Motion to Strike

221.(1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it

(a) discloses no reasonable cause of action or defence, as the case may be,

(b) is immaterial or redundant

(c) is scandalous, frivolous or vexatious,

(d) may prejudice or delay the fair trial of the action,

(e) constitutes a departure from a previous pleading, or

(f) is otherwise an abuse of the process of the Court,

and may order the action be dismissed or judgement entered accordingly.

* * *

Requête en radiation

221.(1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :

(a) qu'il ne révèle aucune cause d'action ou de défense valable.

(b) qu'il n'est pas pertinent ou qu'il est redondant ;

(c) qu'il est scandaleux, frivole ou vexatoire ;

(d) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;

(e) qu'il diverge d'un acte de procédure antérieur ;

(f) qu'il constitue autrement un abus de procédure.

Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.

V. ARGUMENT

A. *Defendants' Submissions on the Motion*

(1) The Test on a Motion to Strike

22 The Defendants say that the test to strike out a pleading under Rule 221 is whether it is plain and obvious on the facts pleaded that the action cannot succeed: *Sivak et al v The Queen et al,* 2012 FC 272 at para 15 [*Sivak*]; *R v Imperial Tobacco Canada Ltd,* 2011 SCC 42 at para 17 [*Imperial Tobacco*]. While there is a rule that material facts in a statement of claim should be taken as true when determining whether the claim discloses a reasonable cause of action, this does not require the court to accept at face value bare assumptions or allegations which may be regarded as scandalous, frivolous or vexatious, or legal submissions dressed up as facts: *Operation Dismantle v*

The Queen, [1985] 1 SCR 441 at para 27 [*Operation Dismantle*]; *Carten v Canada*, 2009 FC 1233 at para 31 [*Carten*].

(2) Reasonable Cause of Action

23 The *Rules* require that the pleading of material facts disclose a reasonable cause of action. A pleading must: (i) state facts and not merely conclusions of law; (ii) include material facts; (iii) state facts and not the evidence by which they are to be proved; and (iv) state facts concisely in a summary form: *Carten*, above; *Sivak*, above; Rules 174 and 181 of the *Rules*. The Plaintiffs' Amended Claim fails to do this. Its allegations do not provide the necessary elements of each cause of action together with the material facts. Furthermore, it is not clear if the Plaintiffs continue to rely on the allegations of conspiracy and misfeasance as facts to support these allegations are not included in the pleadings. As a result, it cannot be said that the Amended Claim's assertions result in the liability of the Defendants, or any one of them.

24 The Amended Claim includes amendments that are not permissible under the *Rules:* new parties (the Steering Committee members) and a cause of action not grounded in the facts already pleaded (the allegation of a breach of s 3 *Charter* rights) have been added. The Defendants further argue that the Amended Claim breaches the terms of the permission to amend by failing to cure the problems identified in the Order of April 24, 2014.

25 The Defendants say that there is no constitutional duty to present the federal budget in the manner sought by the Plaintiffs. As a result, no breach of the principle of no taxation without representation has occurred. The Supreme Court of Canada has held that no taxation without representation means that the Crown may not levy a tax without the authority of Parliament: *Kingstreet Investments v New Brunswick*, [2007] 1 SCR 3 at para 14; *Constitution Act, 1867*, ss 53 and 90. The present circumstances suggest that this constitutional requirement has been satisfied.

26 As the master of its own procedure, Parliament cannot be said to have a duty to legislate. No cause of action can result from failing to enact a law: *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at 354-355 [*NB Broadcasting*]; *Telezone Inc v Canada (Attorney General)*, [2004] OJ No 5, 69 OR (3d) 161 (CA) [*Telezone*]; *Lucas v Toronto Services Board*, 51 OR (3d) 783 at para 10; *Moriss v Attorney General*, [1995] EWJ No 297 (England and Wales Court of Appeal) at para 38.

27 Citing s 91(6) of the *Constitution Act, 1867*, the Plaintiffs allege that the accounting method employed in the budgetary process is unconstitutional. However, this subsection, "the Census and Statistics," is simply one of the classes of subjects enumerated in s 91 over which Parliament has exclusive legislative authority; it does not impose a duty to legislate and, as such, is of little help to the Plaintiffs. The Defendants point out that, in any event, much of what is being sought by the Plaintiffs is publically available from the Department of Finance. For example, *Tax Expenditures and Evaluations 2012* can be found online at http://www.fin.gc.ca/taxexp-depfisc/2012/taxexp12-eng.asp.

28 With respect to the Plaintiffs' legitimate expectations argument, the Defendants state that it falls under the doctrine of fairness or natural justice, and does not create substantive rights: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 26. The only procedure due to a Canadian citizen is that proposed legislation receive three readings in the House of Commons and the Senate and that it receive Royal Assent: *Authorson v Canada (Attorney General)*, 2003 SCC 39 [*Authorson*]. The procedural rights described by the Plaintiffs have never existed: *Penikett v The Queen*, 1987 CanLII 145 (YK CA) at 17-18.

29 The Defendants say that the Plaintiffs' reliance on the *Magna Carta* does not assist them. While the document holds a seminal place in the development of Canadian constitutional principles, it has been displaced by legislation in both the United Kingdom and Canada. It has no contemporary independent legal significance or weight and is therefore "amenable to ordinary legislative change": *Rocco Galati et al v Canada,* 2015 FC 91 at para 74 [*Galati*].

30 Parliamentary privilege, including its corresponding powers and immunities, ensures the proper functioning of

Parliament and is one of the ways in which the constitutional separation of powers is respected: *Telezone*, above, at para 13; *Canada (House of Commons) v Vaid*, 2005 SCC 30 at para 21 [*Vaid*]. In *Authorson*, above, the Supreme Court affirmed its decision in *Reference re Resolution to Amend the Constitution*, [1981] 1 SCR 753, indicating that the way in which a legislative body proceeds is a matter immune from judicial review and is one of self-definition and inherent authority. The United Kingdom *Bill of Rights of 1689*, 1 Will & Mar sess 2, c 2, partially codifies parliamentary privilege at article 9, precluding any court from impeaching or questioning the freedom of speech and debates or proceedings in Parliament: *Prebble v Television New Zealand,* [1994] UKPC 3, [1995] 1 AC 321 (JCPC); *Hamilton v al Fayed*, [2000] 2 All ER 224 (HL) [*Hamilton v al Fayed*].

31 Once a category of privilege is established, it is not the courts but Parliament that may determine whether a particular exercise of privilege is necessary or appropriate: *Parliament of Canada Act*, RSC 1985, c P-1, ss 4-5 [*Parliament of Canada Act*]; *Pickin v British Railways Board*, [1974] AC 765 (HL) at 790; *Vaid*, above, at para 29. Recognized categories of privilege include freedom of speech and control over debates and proceedings in Parliament: *Vaid*, above. The Defendants assert that the budget debate, its presentation, supporting papers and associated legislation fall under this category of privilege: *Roman Corp v Hudon's Bay Oil & Gas Co,* [1973] SCR 820 at 827-828; *NB Broadcasting,* above.

32 By virtue of ss 53 and 54 of the *Constitution Act, 1867*, "Money Bills" must originate in the House of Commons, and the Governor General must grant a recommendation for the expenditure of public funds. There is no suggestion in the Amended Claim that these requirements have not been satisfied.

33 COMER, as an unincorporated association, cannot benefit from the protection provided for the electoral rights of citizens provided by s 3 of the *Charter*. While this protection could apply to the two individual Plaintiffs, provided they are Canadian citizens, neither has plead such a cause of action. The Amended Claim makes no suggestion that the Plaintiffs' access to "meaningful participation" in the electoral process -- what the Supreme Court has determined is protected by s 3 -- has been in any way affected: *Figueroa v Canada (Attorney General*), [2003] 1 SCR 912 at para 27.

34 In order for a cause of action to be brought under the *Charter*, at least a threat of violation of a *Charter* right must be established: *Operation Dismantle*, above, at para 7. The Amended Claim does not demonstrate a link between the actions of any of the Defendants and the alleged s 3 harms. The Defendants further submit that s 3 has never been interpreted to encompass any rights or legitimate expectations that a claimant's elected representatives will enact any particular measures or refrain from doing so.

35 With respect to the Plaintiffs' damages claim for the return of allegedly unconstitutional taxes, the Defendants assert that no factual support has been brought forward to support such a claim.

36 The Defendants also address several other allegations in the Amended Claim. As regards the alleged misfeasance by public officers in the withholding of anticipated total revenue, the Defendants say that the necessary elements of the tort -- including any alleged state of mind of a person involved, wilful default, malice or fraudulent intention -- are not made out: *St John's Port Authority v Adventure Tours Inc*, 2011 FCA 198 at para 25. Of note is the absence of facts that would support a finding of deliberate and unlawful misconduct of a public officer, or that a public officer was aware that his or her conduct was unlawful and likely to harm the Plaintiffs: *Odhavji v Woodhouse*, 2003 SCC 69 at paras 23, 28-29. In terms of the nominate tort of statutory breach, the Supreme Court of Canada has established that it does not exist: *The Queen v Saskatchewan Wheat Pool*, [1983] 1 SCR 205 at 225. Even so, the remedy for a breach of statutory duty by a public authority is judicial review for invalidity: *Holland v Saskatchewan*, 2008 SCC 42 at para 9.

37 The Plaintiffs also make a claim of conspiracy, but again fail to plead the material facts necessary to support such an allegation, such as the identity of the officials engaged in the conduct, the type of agreement entered into, the time the agreement was reached, the lawful or unlawful means that were to be used, and the nature of the intended injury to the Plaintiffs. Other requirements that are missing include an agreement between two or more

persons and intent to injure: G.H.L. Fridman, *Introduction to the Canadian Law of Torts*, 2nd ed (Markham: Butterworths, 2003) at 185.

38 The Plaintiffs plead that, through s 24 of the *Bank Act*, Parliament has allowed the impugned actions by the Government of Canada. However, the Defendants point out that this provision has nothing to do with the keeping of minutes by the Bank. In addition, the Plaintiffs have not provided the grounds necessary to demonstrate how s 30.1, which provides that no action lies against the Crown, the Minister of Finance and officials of the Bank of Canada for anything done or omitted to be done in good faith in the administration or discharge of any powers or duties under the *Bank Act*, would affect their rights.

(3) Declaratory Relief

39 The Defendants make a series of submissions in relation to the Plaintiffs' claim for declaratory relief. First, they say the Federal Court has jurisdiction to issue declaratory and coercive remedies only as prescribed in the *Federal Courts Act*. Section 18 indicates that extraordinary remedies can only be obtained on an application for judicial review under s 18.1. Subsection 18.4(2) allows the Court to direct that an application for judicial review be treated and proceeded with as an action, but does not authorize the Plaintiffs to initiate a request for declaratory or coercive relief in an action.

40 The requirements for proper judicial review, as set out by s 18.1, include that only someone who is "directly affected by the matter in respect of which relief is sought" may bring an application. The Plaintiffs are not directly affected.

41 The Plaintiffs' claim damages for a "return of the portion of illegal and unconstitutional tax." The Defendants say that it is hard to see how these taxes can be claimed without impugning the legality of the instruments that gave rise to their increase. Additionally, the law is clear that the Plaintiffs may only seek to attack administrative action by state actors by way of judicial review: *Telezone*, above, at para 52.

42 Second, in order to claim declaratory relief, entitlement must be established. The Supreme Court of Canada has held that a declaration of unconstitutionality is a declaratory remedy for the settlement of a real dispute: *Khadr v Canada (Prime Minister),* 2010 SCC 3 [*Khadr*]. Before the court can issue a declaratory remedy, it must have jurisdiction over the issue at bar, the question before the court must be real and not theoretical, and the person raising it must have a real interest in raising it. The Defendants say that the Plaintiffs have not met any of these requirements.

43 Third, the Plaintiffs are not entitled to refer matters for an advisory opinion. As determined in the Order of April 24, 2014, the Plaintiffs are asking that the Court declare that their reading of the *Bank Act* and the Constitution is correct. This is akin to asking the Court for an advisory opinion. Without an adequate description of how a private right or interest has been affected, the Plaintiffs have not demonstrated a statutory grant of jurisdiction by Parliament that the Court can rule on and find that statutory and constitutional breaches have occurred.

44 Fourth, declaratory relief necessitates a real dispute between the parties and cannot be issued in response to one that is merely hypothetical: *Operation Dismantle*, above, at para 33; *Diabo v Whitesand First Nation*, 2011 FCA 96; *Re Danson and the Attorney-General of Ontario*, (1987) 60 OR (2d) 676 at 685 (CA). A real dispute is not present here.

45 Fifth, the Plaintiffs have no real interest or right that has been affected by the interpretation or operation of s 18 of the *Bank Act*. As noted in the Order of April 24, 2014, despite claiming to be acting for "all other Canadians," the Plaintiffs have failed to produce a pleading demonstrating how "all other Canadians" have been impacted in a way that constitutes an infringement of an individual or collective right. The Court is confined to declaring contested legal rights, and cannot give advisory opinions on the law generally: *Gouriet v Union of Post Office Workers*, [1978] AC 435 at 501-502 [*Gouriet*].

(4) Justiciability

46 Justiciability is a normative inquiry that involves looking to the subject matter of the question, the manner of its presentation and the appropriateness of judicial adjudication: *Friends of the Earth - Les Ami(e)s de la Terre v Canada (Governor in Council),* 2009 FCA 297 [*Friends of the Earth*].

47 The Defendants argue that the Court can, and in this case should, deal with statutory interpretation on a motion to strike: *Les Laboratoires Servier v Apotex Inc*, 2007 FC 837 at para 38. The Defendants state that it is critical to note that s 18 of the *Bank Act*, which enumerates the business and powers of the Bank of Canada, states that the Bank "may" do what is listed at paragraphs (a) through (p). The Plaintiffs want paragraphs (i) and (j) to be read as imperative: that the Bank of Canada is statutorily required, when necessary, to make interest-free loans for the purposes they define. Such mandatory language is not present and to invoke it borders on absurdity as it would suggest that Parliament did not follow through on its very purpose for creating a Bank of Canada, as set out in the *Bank Act's* preamble: to regulate credit and currency in the best interest of the economic life of the Canadian nation.

48 If the *Bank Act* is to be read as imperative, the Defendants say that it will become necessary for the Court to detail the occasions when the Government of Canada "must" request loans and the Bank "must" provide them. Without these specifications, any declaration made by the Court will be meaningless, and the courts will not make a declaration where "it will serve little or no purposes": *Terrasses Zarolega Inc v RIO*, [1981] 1 S.C.R. 94 at 106-107.

49 The Defendants point out that absent "objective legal criteria," the Court should decline to hear a matter since such a proceeding would entail significant consideration of policy matters, which are beyond the proper subject matter for judicial review: *Friends of the Earth*, above. at para 33.

50 In asking for a declaration that the Minister and the Government of Canada be required to request interest-free loans for "human capital" and or "infrastructure" expenditures, the Plaintiffs are not merely seeking an interpretation of the *Bank Act*; they are seeking a coercive order. Section 18 does not support such a request. The Defendants argue that whether a particular loan should be sought by the Government of Canada and made by the Bank is an inappropriate matter for judicial involvement, both institutionally and constitutionally.

51 Furthermore, the *Bank Act* does not set out any requirements in regards to how the Bank ought to exercise its lending powers. Loan-making is clearly subject to the Bank's discretion and contemplation of a wide range of circumstances that the Bank is best-positioned to weigh and consider.

52 The Defendants say that under the Plaintiffs' plan, the task of regulating credit and currency in the best interest of the economic life of Canada would become the responsibility of the Court, which would have to pronounce the requirements for loans on an *ad hoc* basis, with coercive orders.

53 Furthermore, the Plaintiffs' amendments have not addressed the deficiency related to the so-called improper "handing-off" to international institutions. The Defendants suggest that the Plaintiffs want the Court to instigate a grand inquisition in regard to monetary and fiscal matters. This is not the proper role of the Court and there is no such duty on the Defendants.

54 The allegation of "handing-off" to international institutions is not a legal cause of action and is not justiciable. It is not concerned with the objective legality of an action or inaction, but instead with the abstract concept of "private interests" being placed above the "interests of Canadians." Only the people of Canada can, through the election of their representatives, determine the interests of Canadians.

55 Government policy decisions and issues that are better decided by a branch of government are non-justiciable: *Imperial Tobacco*, above, at para 72; Lorne M Sossin: *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Carswell: Toronto, 1999) at 4-5.

56 The Defendants say that the Amended Claim attacks the way in which Canada develops and implements fiscal and monetary policy, as well as its participation in international economic organizations. It attempts to address

abstruse issues relating to the governance of the Bank of Canada and fiscal policy-making -- things that are properly the concern of governments, not the judiciary: *Ontario (Attorney General) v Fraser*, 2011 SCC 20 at para 302; *Public Service Alliance of Canada v Canada*, [1987] 1 SCR 424 at para 36; *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at paras 21, 68; *Archibald v Canada*, [1997] 3 FC 335 at paras 54, 83.

57 The Amended Claim is so broad and general in its parameters that it defies judicial manageability.

(5) Court's Jurisdiction

58 The Defendants say that the test for determining if a matter is within the Federal Court's jurisdiction is stipulated in *ITO-International Terminal Operators LTD v Miida Electronics*, [1986] 1 SCR 752 at 766 [*ITO-International*]:

1. There must be a statutory grant of jurisdiction by Parliament.
2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.
3. The law on which the case is based must be "a law of Canada" as the phrase is used in s. 101 of the *Constitution Act.*

59 As regards the first component of the test, there is no statutory grant for a suit to be brought against the Bank of Canada. It has been determined that s 17 of the *Federal Courts Act*, which provides that the Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown, does not apply to a statutory corporation acting as an agent of the Crown. Therefore, the Bank of Canada, a statutory corporation created by the *Bank Act*, cannot be said to be the Crown or a Crown Agent. The powers in s 18 are not fiscal agent powers, but rather powers that the Bank of Canada is entitled to exercise in its own right.

60 Also, the Court has no jurisdiction over a Minister of the Crown. He or she may not be sued in his or her representative capacity; the Queen is the only proper defendant in an action against the Crown: *Peter G White Management v Canada*, 2006 FCA 190.

61 The Defendants also say that the second part of the *ITO-International* jurisdictional test has not been met. It is not fulfilled simply by the fact that an allegedly misused power emanates from a federal statute. The Plaintiffs do not have specific rights, nor is there a detailed, corresponding statutory framework. The allegations against the Defendants relating to the abdication of statutory and constitutional duties can only be grounded in negligence, civil conspiracy or misfeasance. These matters are based on tort law and would properly be applied by the provincial courts.

62 As regards the third portion of the test, s 3 of the *Charter* is not properly characterized as a "law of Canada" in the s 101 sense. To support this statement, the Defendants apply the reasoning in *Kigowa v Canada (Minister of Employment and Immigration)*, [1990] 1 FC 804 at para 8, which examined ss 7 and 9 of the *Charter*.

(6) Standing

63 As a final issue, the Defendants assert that the Plaintiffs do not have standing to bring this claim. Their private rights have not been interfered with, nor have they suffered special damages specific to them from an interference with a public right: *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607 at paras 18-22 [*Finlay*].

64 A general disdain for a particular law or governmental action is not enough to meet the standard of "genuine interest" for public interest standing. A stronger nexus than what is presented in the Amended Claim is required between the party making the claim and the impugned legislation: *Canadian Council of Churches v Canada*, [1992] 1 SCR 236; *Marchand v Ontario* (2006), 81 OR (3d) 172 (SCJ).

B. *Plaintiffs' Response to Defendants' Motion*

65 The Plaintiffs assert, to the extent that the Order of April 24, 2014 refused to strike the declaratory relief (the

bulk of the Amended Claim), and ruled that it is justiciable, that this motion to strike is an abuse of process because *res judicata* and issue estoppel apply.

(1) The Test on a Motion to Strike

66 In terms of the general principles that ought to be applied on a motion to strike, the Plaintiffs assert that the facts pleaded by the Plaintiffs must be taken as proven: *Canada (Attorney General) v Inuit Tapirasat of Canada*, [1980] 2 SCR 735; *Nelles v Ontario* (1989), 60 DLR (4th) 609 (SCC) [*Nelles*]; *Operation Dismantle*, above; *Hunt v Carey Canada Inc* [1990] 2 SCR 959 [*Hunt*]; *Dumont v Canada (Attorney General)*, [1990] 1 SCR 279 [*Dumont*]; *Nash v Ontario* (1995), 27 OR (3d) 1 (Ont CA) [*Nash*]; *Canada v Arsenault*, 2009 FCA 242 [*Arsenault*].

67 The Plaintiffs echo the test referenced by the Defendants, asserting that a claim can be struck only in plain and obvious cases where the pleading is bad beyond argument: *Nelles*, above, at para 3. The Court has provided further guidance in *Dumont*, above, that an outcome should be "plain and obvious" or "beyond doubt" before striking can be invoked (at para 2). Striking cannot be justified by a claim that raises an "arguable, difficult or important point of law": *Hunt*, above, at para 55.

68 The novelty of the Amended Claim is not reason in and of itself to strike it: *Nash*, above, at para 11; *Hanson v Bank of Nova Scotia* (1994), 19 OR (3d) 142 (CA); *Adams-Smith v Christian Horizons* [1997] O.J. No. 2887, (1997), 3 OR (3d) 640 (Ont Gen Div). Additionally, matters that are not fully settled by the jurisprudence should not be disposed of on a motion to strike: *RD Belanger & Associates Ltd v Stadium Corp of Ontario Ltd* (1991), 5 OR (3d) 778 (CA). In order for the Defendants to succeed, the Plaintiffs state that a case from the same jurisdiction that squarely deals with, and rejects, the very same issue must be presented: *Dalex Co v Schwartz Levitsky Feldman* (1994), 19 OR (3d) 463 (CA). The Court should be generous when interpreting the drafting of the pleadings, and allow for amendments prior to striking: *Grant v Cormier -- Grant et al* (2001), 56 OR (3d) 215 (CA).

69 The Plaintiffs also remind the Court that the line between fact and evidence is not always clear (*Liebmann v Canada,* [1994] 2 FC 3 at para 20) and that the Amended Claim must be taken as pleaded by the Plaintiffs, not as reconfigured by the Defendants: *Arsenault*, above, at para 10.

(2) Constitutional Claims

70 As regards the general principles to be applied to their constitutional claims, the Plaintiffs state that, as previously plead to the Prothonotary and to me, the Constitution does not belong to either the federal or provincial legislatures, but rather to Canadians: *Nova Scotia (Attorney General) v Canada (Attorney General)*, [1951] SCR 31 [*Nova Scotia (AG)*]. Parliament and the Executive are bound by constitutional norms, and neither can abdicate its duty to govern: *Canada (Wheat Board) v Hallet and Carey Ltd,* [1951] SCR 81 [*Wheat Board*]; *Re George Edwin Gray,* (1918) 57 SCR 150 [*Re Gray*] at 157; *Reference re Secession of Quebec*, [1998] 2 SCR 217 [*Reference re Secession of Quebec*].

71 Furthermore, the Supreme Court of Canada has held that legislative omissions can lead to constitutional breaches (*Vriend v Alberta*, [1998] 1 SCR 493) and that all executive action and inaction must conform to constitutional norms: *Air Canada v British Columbia (Attorney General)*, [1986] 2 SCR 539; *Khadr*, above.

72 With respect to the budgetary issue, the Plaintiffs submit that: (a) contrary to *Arsenault*, the Defendants misstate the Plaintiffs' Amended Claim; and (b) that s 3 of the *Charter* is intrinsically tied to the right of no taxation without representation and/or any other underlying right directly connected to the right to vote.

73 The Plaintiffs say the Defendants misstate and fail to properly respond to the constitutional question. Two erroneous submissions and assumptions have been made. First, it is not plain and obvious that s 91(6) does not impose a duty, or that it is not arguable: *Wheat Board*, above; *Re Gray*, above, at 157; *Reference re Secession of Quebec*, above. Second, the Defendants have overlooked that the constitutional, primary duty in the budgetary process, is to outline all revenues and expenditures. This duty has evolved from the *Magna Carta* and is tied to the constitutional right to no taxation without representation. The Defendants have removed and failed to reveal the true

revenue(s) to Parliament, which is the only body that can constitutionally impose tax and therefore approve the proposed spending. The Minister of Finance has essentially removed the ability of Parliament to properly review, debate and pass the budget's expenditures and corresponding tax provisions.

74 The Plaintiffs' position is misconstrued by the Defendants as an attempt to argue a right in the *Magna Carta*. All that is stated, the Plaintiffs argue, is that the right can be traced back to the *Magna Carta* and is codified by ss 53, 54 and 90 of the *Constitution Act, 1867*. It is submitted that the tort actions, which are founded in this right and the inseparable right to vote under s 3 of the *Charter*, may be "novel," but comply with the rules of pleading and the Order of April 24, 2014, while meeting the test for a reasonable cause of action.

75 Furthermore, the tort action was not, and should not be, framed in public misfeasance or conspiracy. Rather, the actions of the Minister of Finance, with respect to the budgeting process, and those of the Bank of Canada officials who relegated or abdicated their duty, relate to the constitutional breaches and torts pleaded.

(3) Declaratory Relief

76 On the issue of declaratory relief, the Plaintiffs say that the Defendants' submissions on the topic are, in any event, misguided and contrary to the jurisprudence. The Plaintiffs argue that the issue has already been decided by my Order of April 24, 2014 and was upheld by the Court of Appeal when it dismissed the Defendants' cross-appeal. Therefore, the matter constitutes *res judicata*, issue estoppel and abuse of process: *City of Toronto v CUPE, Local 79*, [2003] 3 SCR 77.

77 Declaratory relief goes to the crux of the constitutional right to judicial review: *Dunsmuir v New Brunswick,* 2008 SCC 9 at paras 27-31; *Singh v Canada (Citizenship and Immigration)*, 2010 FC 757 at para 38; *Canada v Solosky*, [1980] 1 SCR 821 at 830. The Supreme Court of Canada has recently reaffirmed the scope of the right to declaratory relief, indicating that it cannot be statute-barred: *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at paras 134, 140 and 143.

78 The Defendants ignore ss 2 and 17 of the *Federal Courts Act* as well as Rule 64 of the *Rules*. The Court has held that declaratory relief is available, and may be sought, under s 17 of the *Federal Courts Act*: *Edwards v Canada* (2000) 181 FTR 219 [*Edwards*]; *Khadr*, above.

(4) Justiciability

79 As regards the issue of justiciability, noting that the Supreme Court of Canada has stated that the constitutionality of legislation has always been a justiciable issue, the Plaintiffs argue that just because the subject-matter at hand deals with socio-economic matters does not make it non-justiciable.

80 The Plaintiffs argue that the Defendants have "figure-skated" from the notion of justiciability to that of a "political question." The Plaintiffs state:

> The "Political question" doctrine is an old doctrine adopted early in the jurisprudence over "pure questions of policy" or "choice" over "policies" *over which no statutory nor constitutional dimensions exists over which the Court can adjudicate*. In a word the subject-matter did *not* involve asserted statutory or constitutional rights. This is not the situation in the within case.

81 In terms of issues dealing with socio-economic policies that the Supreme Court of Canada has found to be justiciable, the Plaintiffs point to the following:

* Whether "wage and price" controls were within the competence of the federal Parliament: *Reference re Anti-Inflation Act, 1975*, [1976] 2 SCR 373;
* Whether the limits on transfer payments between the federal government and provincial governments could unilaterally be altered: *Reference re Canada Assistance Plan (Canada)*, [1991] 2 SCR 525 [*CAP Reference*];

* A challenge by an individual regarding whether transfer payments by the federal government to the provincial governments with respect to welfare payments were illegal because the province was breaching certain provisions of the Canada Assistance Plan: *Finlay*, above.

82 The Plaintiffs assert that the clear test for justiciability is whether there is a "sufficient legal component to warrant the intervention of the judicial branch": *CAP Reference*, above, at para 33. The Amended Claim meets this test. When social policies are alleged to infringe or violate *Charter*-protected rights, they must be scrutinized; this does not exclude "political questions": *Chaoulli v Quebec (Procureur general)*, 2005 SCC 35 at paras 89, 183, 185. In such cases the question before the court is not whether the policy is sound, but rather whether it violates constitutional rights, which is a totally different question: *Operation Dismantle*, above, at 472.

83 The declaratory relief and damages sought in the Amended Claim are, according to the Plaintiffs, grounded in the interpretation of the *Bank Act*, and the constitutional duties and requirements of the budgetary process. These have not been respected. The Constitution, as a result, is being structurally violated and the Plaintiffs' rights are being infringed.

84 The Defendants have confused the notion of justiciability with that of enforceability by not properly distinguishing between the declaratory relief and tort relief sought, and in viewing some of the declaratory relief as non-enforceable. The statutory right to seek declaratory relief is provided for by Rule 64 of the *Rules*, whether or not any consequential relief is or can be claimed. In addition, the Supreme Court of Canada has recognized that instances may exist where it is appropriate to declare but not enforce a right: *Khadr*, above.

(5) Standing

85 Finally, the Plaintiffs submit that they clearly have standing to bring forward these justiciable issues on the facts pleaded. This standing is personal, but it is also public interest-based and is in line with recent jurisprudence: *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45; *Galati*, above.

86 The Supreme Court of Canada has ruled that the Constitution does not belong to the federal or provincial governments, but to Canadian citizens (*Nova Scotia (AG)*, above), and that it is a tool for dispute resolution, of which one of the most important goals is to serve well those who make use of it: *Reference Re Residential Tenancies Act,* [1996] 1 SCR 186 at 210.

87 The Plaintiffs submit that it is time to revisit the issue of standing with respect to the constitutional validity of statutes and executive actions. In cases like the present one, concerned with the constitutional validity of statutes and/or executive actions by way of declaratory relief, public interest standing is a constitutional right.

VI. ANALYSIS

88 Pursuant to my Order of April 24, 2014 (as endorsed by the Federal Court of Appeal on January 6, 2015), the Plaintiffs have now served and filed the Amended Claim and the Defendants have brought a second motion to strike.

89 The background to this dispute is set out in my Order of April 24, 2014.

A. *The Amendments*

90 While the Amended Claim maintains the declaratory relief described in paragraphs 1 to 10 substantially intact from their previous pleading, the Plaintiffs have dropped the allegations that the unlawful actions of the Defendants violate ss 7 and 15 of the *Charter*. Instead, the Plaintiffs now seek, as part of their declaratory relief, a declaration:

[...]

viii) that taxes imposed to pay for the interest on the deficit and debt to private bankers, both domestic and particularly foreign, are illegal and unconstitutional owing to,

A/ the breach of the constitutional right(s) to no taxation without representation resulting from the Finance Minister's failure to disclose full anticipated revenues to MPs in Parliament, before the return of anticipated tax credits, prior to determining whether an anticipated surplus or deficit will be incurred, in the tabling of the budget, in that a full and proper debate cannot properly ensue as a result, thus breaching the right to no taxation without representation under both ss.53 and 90 of the ***Constitution Act, 1867***, as well as the unwritten constitutional imperatives to the same effect;

B/ the infringement of the Plaintiffs' right to vote, under s. 3 of the ***Charter***, tied to the right to no taxation without representation with respect to the Minister of Finance's constitutional violations;

C/ breach of the terms of the ***Bank of Canada Act***, with respect to interest-free loans, and the consequent constitutional violations, by the Executive, of its duty to govern, and relinquishing sovereignty and statutory decision-making to private foreign bankers;

[...]

91 The Plaintiffs have also made it clear that their tort claims are not based upon public misfeasance and/or conspiracy. The new damages claim reads as follows:

[...]

(b) damages in the amount of:

i) $10,000.00 each for the Plaintiffs William Krehm and Ann Emmett, as well as the ten (10) named COMER Steering Committee members, named in paragraph 2(a) of the within statement of claim, for the breach of their constitutional right of "no taxation without representation" and the inseparable infringement of the right to vote under s. 3 of the Charter, as tied to the right and imperative against no taxation without representation, due to the constitutional breaches by the Minister of Finance with respect to the budgetary process; and

ii) return of the portion of illegal and unconstitutional tax, to be calculated and calibrated at trial, for each of the Plaintiffs and members of COMER's Steering Committee, consisting of the proportion of taxes, to pay interest charges on the deficit, and debt, between 2011 and the time of trial, paid by the Plaintiffs and Steering Committee members of COMER, due to the statutory and constitutional breaches of the Defendants in refusing and/or failing to cover deficits in the budget by way of interest-free loans, as well as the breach of their right to no taxation without representation, to be calculated by the compounded interest changes set out in the budget, as a percentage of the budget, calculated as the same percentage paid by the Plaintiffs and Steering Committee members, to be calculated and calibrated at trial;

[...]

92 Other amendments throughout the Amended Claim either bolster the claims with more facts (e.g. paras 15(h) and 22) or reflect the basic shifts referred to above (see paras 39, 41, 43 and 47).

B. *Rule 221 -- Motion to Strike*

93 As with the previous strike motion, there is no disagreement between the parties as to the basic jurisprudence that governs a motion to strike under Rule 221. For purposes of this motion, I adopt the principles set out in paras 66 and 68 of my Order of April 24, 2014. Essentially, the test for striking an action is a high one and the Defendants must show that it is plain and obvious, assuming the facts pleaded to be true, that the pleadings disclose no reasonable cause of action or that there is no reasonable prospect that the claim will succeed. See *Imperial Tobacco,* above, at paras 17, 21 and 25.

94 As I found in my Order of April 24, 2014, this claim remains both novel and ambitious, but this does not mean that it is plain and obvious, assuming the facts pleaded to be true, that it does not give rise to a reasonable cause of action or that there is no reasonable prospect that it will not succeed at trial.

C. *Grounds for the Motion*

95 The Defendants have raised a significant number of grounds for striking the Amended Claim. I will deal in turn with those grounds that I feel have substance and relevance.

(1) Budget Presentation and Taxation

96 As regards the declaratory relief sought in paras 1(a)(vi) to (viii) of the Amended Claim dealing with the presentation of the Federal Budget by the Minister of Finance, that Defendants argue as follows:

> 12. There is no constitutional duty of presenting the federal budget in the manner sought by the plaintiffs. There is no breach of the principle of "no taxation without representation". This principle, as defined by the Supreme Court, means that the Crown may not levy a tax except with the authority of Parliament. This constitutional requirement was satisfied here.
>
> 13. Parliament is master of its procedure. It is well recognized that there is no duty on Parliament to legislate. There is no cause of action for the omission of Parliament to enact any law.
>
> 14. The plaintiffs allege that the accounting method used in the budgetary process is a breach of ss. 91(6) *Constitution Act, 1867*, which grants legislative power over "[t]he census and statistics" to Parliament. This provision will not aid them. Section 91 enumerates the classes of subjects and all matters coming within them to which the exclusive legislative authority of the Parliament of Canada is granted -- it does not impose duties on Parliament or the Government. A reference to a class of federal power in the *Constitution Act, 1867* is not the imposition of a duty upon Parliament to legislate in respect of that subject matter. S. 91(6) -- "the Census and Statistics" -- is one of the classes of subjects enumerated in s. 91 for which it is declared in the *Constitution Act, 1867* that "the exclusive legislative authority of the Parliament of Canada extends to all matters coming within" this class of subjects.
>
> 15. In any event, much of the information sought by the plaintiffs to be included in the budget documents presented before Parliament is publicly available from the Department of Finance, for example: Tax Expenditures and Evaluations 2012 at: http:// .fin.gc.ca/taxexp-depfisc/2012/taxexp12-eng.as p.
>
> [footnotes omitted]

97 The facts supporting the Plaintiffs' request for declaratory relief on this issue are set out in paras 25-43 of the Amended Claim. The main judicial point is stated as follows:

> [39] The Plaintiffs state, and the fact is, that the above "accounting method" used in the budgetary process are [*sic*] not in accordance with accepted accounting practices, are conceptually and logically wrong, and have the effect of perpetually making the real and actual picture of what total "revenues", "total expenditures", and what the annual deficit/surplus" [sic] actually is, what the annual "deficit/surplus" actually is, in any given year, and what, as a result the standing national "debt" is. Moreover, and more importantly, the Plaintiffs state, and fact is [sic], that such "accounting" methods foreclose any actual or real debate, or consideration, by elected MPs, in Parliament, as the actual financial picture is not available nor disclosed to

> either Parliamentarians nor the Canadian public. The Plaintiffs state, and the fact is, that such accounting method breaches s. 91(6) of the ***Constitution Act, 1867*** and the duty of the Defendant(s) to maintain accurate "statistics", and the ability of MPs in Parliament to fully and openly debate the budget, which breaches the Plaintiffs' right(s) to "no taxation without representation" and also infringes their right to vote under s. 3 of the ***Charter,*** as tied to the no right to taxation without representation.
>
> [...]
>
> [41] The Plaintiffs state, and the fact is, that this failure and/or calculated choice by the Defendant Minister of Finance to withhold anticipated total revenue, before the subtraction of anticipated tax credits, along with anticipated expenditures, in the budget bill(s), violates the Plaintiffs' constitutional right to no taxation without representation as guaranteed by ss. 53 and 90 of the ***Constitution Act, 1867***, and unwritten constitutional imperative underlying it, dating back to the ***Magna Carta***, as well as diminishes, devalues and infringes on their right to vote under s. 3 of the ***Charter*** with respect to taxation as tied to deficit, debt, and the availability to debate the alternative of avoiding both by, ***inter alia***, exercising the interest-free Bank of Canada loans under s. 18 of the ***Bank of Canada Act***.

98 It is true, as the Defendants say, that the Plaintiffs take issue with the way the Minister presents the federal budget to Parliament. However, the allegations set out above are not just that the Minister's accounting methods are fallacious because they fail to take account of human capital and do not appropriately take tax credits into account. If this was the point of the claims, then clearly it would be nothing more than a debate about proper accounting procedures in the context of the federal budget. However, the Plaintiffs provide the facts about how the federal budget is presented to Parliament and say why they think it is inappropriate before they go on to state the legal basis of their claim. And the legal basis of the claim is that the Minister's accounting methods and practices breach s 91(6) of the *Constitution Act, 1867* because they mean the Defendants are not maintaining and presenting accurate statistics, which in turn breaches s 3 of the *Charter* because, in the end, inaccurate and misleading statistics prevent any meaningful debate on the budget in Parliament. This means in turn that MPs cannot fulfil their representative function and the Plaintiffs (at least the individual Plaintiffs) are therefore being taxed without any real representative input on the budget. This undermines s 3 of the *Charter* and the guarantees under ss 53 and 90 of the *Constitution Act, 1867*. This is my understanding of the Amended Claim on this issue.

99 Clearly, the Plaintiffs disagree with the way the Minister compiles and presents the budget to Parliament. They know that this, in itself, is not a legal issue they can bring to the Court. So they have hitched their complaints to s 91(6) of the *Constitution Act, 1867*, s 3 of the *Charter* and the no taxation without representation principle. Can this hitching be equated with any previous application of the constitutional principles and provisions cited and relied upon? Not to my knowledge. But that is not the issue before me. *Charter* litigation generally suggests that the Supreme Court of Canada may find a *Charter* or constitutional breach that has not been previously identified.

100 The Plaintiffs' target is the executive branch of government as embodied in the Minister of Finance. It is the Minister's actions that are alleged to thwart the Parliamentary process and to breach the *Constitution Act, 1867* and s 3 of the *Charter*. It has to be admitted that the arguments underlying the Plaintiffs' assertion of a Constitution and a *Charter* breach appear at this stage to be somewhat novel and esoteric but, as I have already said, this is not a sufficient ground for saying that they disclose no reasonable cause of action or that there is no reasonable prospect of success at trial.

101 The Plaintiffs reiterated the same points clearly in their oral arguments:

> The case before you is there is an executive breach of a constitutional requirement by the Minister of Finance with respect to the budget process, and that as a result the legislation that comes out of Parliament breaches the constitutional right to no taxation without representation. Why? The MPs are blindfolded.
>
> [Transcript of Proceedings p 38, lines 17-23]
>
> The right to vote includes the right to effective representation. If the MPs are blinded by executive constitutional breaches by the Minister of Finance, how does that ensure effective representation?
>
> [Transcript of Proceedings p 39, lines 1-5]

> [N]owhere in the pleadings are we asking Parliament to legislate. We are simply saying that there's an abdication of executive and parliamentary duty with respect to the budget as pleaded. That is a different matter.
>
> And the failure to act applies equally to the executive as it does to the legislative with respect to constitutional breaches...
>
> [Transcript of Proceedings p 39, lines 15-21]
>
> And the actual revenues are not presented to Parliament. That is what we have pleaded. That is the fact.
>
> [Transcript of Proceedings p 46, lines 20-22]
>
> At paragraph 22, I set out the codification of these principles in sections 53, 54, and 90, and then state that by removing and not revealing the true revenues of Parliament, which is the only body which can constitutionally impose tax and thus approve the proposed spending from the speech from the throne, the Minister of Finance is removing the elected MPs' ability to properly review and debate the budget and pass its expenditure and corresponding taxing provisions through elected representatives of the House of Commons. The ancient constitutional maxim of no taxation without representation was reaffirmed post-Charter by the Supreme Court of Canada in the Education Reference.
>
> [Transcript of Proceedings p 50, line 21 to p 51, line 5]

102 It seems to me that these arguments and assertions cannot apply to COMER itself, which has no right to vote. As regards the individual Plaintiffs, even assuming they pay tax, the allegations remain abstract and theoretical. A central allegation -- unsupported by facts -- is that MPs are voting blind and have been hoodwinked by the Minister of Finance. There are no facts pleaded to support this bald allegation. MPs may well understand the issues raised by the Plaintiffs concerning budgetary accounting practices, but may have decided to accept them. The Plaintiffs are alleging that Parliament is being misled by the Minister, but that the Plaintiffs are not.

103 There are no facts to say which MPs represent the individual Plaintiffs and whether those MPs have been approached and asked to deal with the issues raised in this claim or whether, having been made aware of the Plaintiffs' concerns, those MPs have voted for or against the budget. If MPs for the individual Plaintiffs have been apprised of the problem then, no matter how they vote, it is difficult to see how the Plaintiffs are not represented in Parliament on this issue. Representation does not mean that MPs must vote in accordance with the wishes of individual constituents. If representative MPs have not been contacted, then it is difficult to understand why the individual Plaintiffs have come to Court to ask that it make findings about their rights of representation in Parliament.

104 On the other hand, if MPs, or at least those which represent the individual Plaintiffs are aware of the accounting concerns that the Plaintiffs raise, then it seems to me there can be no undermining of the voting and representation rights of the individual Plaintiffs.

105 There are no facts in the pleadings to suggest that any MPs are "voting blind" or are being misled by the Minister of Finance. Similarly, there are none to establish that Parliament does not monitor and assess the budgetary process, including the way the budget is compiled and presented by the Minister of Finance. The logic of the Amended Claim is that if Parliament is not adopting and acting upon the Plaintiffs' concerns about the budgetary process then Parliamentarians are blind. This is an unsupported assertion. It is not a fact.

106 There is nothing more than a bald assertion that the Minister of Finance is "blindfolding" his Parliamentary colleagues and leading them astray to the detriment of the individual Plaintiffs, and, presumably, all Canadians with a right to vote.

107 Even at an abstract level, this seems far-fetched, to say the least. The Plaintiffs are asking the Court to simply assume that Parliament does not have the wherewithal to understand the way the budget is compiled and presented. The logic here is that, because the budget is not being presented as the Plaintiffs think it ought to be

presented, their Parliamentary representatives are being hoodwinked by the Minister of Finance and obviously do not know what they are doing when they pass a budget. This position is presumptive and unsupported by any facts. It remains an abstract debate about how the budget should be presented.

108 Bald assertions, without supporting facts, are not sufficient to satisfy the rules of pleading. See Rule 174 and accompanying jurisprudence.

109 There is nothing in the facts as pleaded in the Amended Claim to suggest that Parliament is not fully aware of the criticisms levelled by the Plaintiffs against the Minister of Finance and that parliamentarians are not free to question and debate any budget presented from the perspective of those criticisms. Hence, there is nothing to support the allegation that the ability of MPs in Parliament to fully and openly debate the budget is impeded in any way. Further, if the Minister of Finance, in compiling the budget, chooses not to take "human capital" into account and/or chooses to withhold anticipated total revenue, before the subtraction of anticipated tax credits, along with anticipated expenditures, in budget bills, these choices also become the will of Parliament following the established procedures for debating and passing budgets. The Plaintiffs can have no right to insist that Parliament should only debate and pass budgets in accordance with the principles and procedures which they approve of and advocate. If the Plaintiffs disagree with the process then, like everyone else, they have access to their own Parliamentary representatives. Hence, in my view, there is no factual basis in the Amended Claim to support an allegation that the *Constitution Act*, *1867*, s 3 of the *Charter* or any constitutional principle is breached on the principle of no taxation without representation. If the individual Plaintiffs have a vote, then they are fully represented in Parliament, and it is Parliament that decides whether or not to pass the budget presented by the Minister of Finance in accordance with its own procedures. No facts are pleaded to suggest that Parliament is not fully aware of the kinds of criticisms that the Plaintiffs have raised in this action against the Minister and the budgetary process, or that Parliament is not aware that the budgetary process is not open to the kinds of criticisms that the Plaintiffs allege in their Amended Claim.

110 The Supreme Court of Canada made the following general point in *Authorson*, above, at para 38, quoting *Reference re Resolution to Amend the Constitution,* above:

> How Houses of Parliament proceed, how a provincial legislative assembly proceeds is in either case a matter of self-definition, subject to any overriding constitutional or self-imposed statutory or indoor prescription. It is unnecessary here to embark on any historical review of the "court" aspect of Parliament and the immunity of its procedures from judicial review. Courts come into the picture when legislation is enacted and not before (unless references are made to them for their opinion on a bill or a proposed enactment). It would be incompatible with the self-regulating -- "inherent" is as apt a word -- authority of Houses of Parliament to deny their capacity to pass any kind of resolution. Reference may appropriately be made to art. 9 of the *Bill of Rights* of 1689, undoubtedly in force as part of the law of Canada, which provides that "Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament".

111 The Plaintiffs are not attacking any particular budget legislation that may have had an impact upon them that gives rise to a cause of action in any court of law. They are attacking the Parliamentary process that they say is used to present, debate and pass budget bills into law. They want the Court to interfere, albeit on Constitutional and *Charter* grounds, with the way Parliament goes about its business. In my view, the jurisprudence is clear that the Court cannot do this. The same conclusions must be reached even if the Court looks at the matter from the perspective of "when legislation is enacted and not before." Budget bills are passed in accordance with a self-regulating process in Parliament during which MPs can raise the issues of concerns to the Plaintiffs. There are no facts pleaded to suggest that the Plaintiffs are not as fully represented in Parliament on budget bills as they are on any other bill.

112 As the House of Lords made clear in *Hamilton v al Fayed*, above:

> Article 9 of Bill of Rights 1689 provides:

> "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."
>
> It is well established that article 9 does not of itself provide a comprehensive definition of parliamentary privilege. In *Prebble v. Television New Zealand Ltd.* [1995] 1 AC 321 at p. 332, I said:
>
> "In addition to article 9 itself, there is a long line of authority which supports a wider principle, of which article 9 is merely one manifestation, viz. that the courts and Parliament are both astute to recognise their respective constitutional roles. So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performances of its legislative functions and protection of its established privileges: *Burdett v. Abbott* (1811) 14 East 1; *Stockdale v. Hansard* (1839) 9 Ad. & E.C. 1; *Bradlaugh v. Gossett* (1884) 12 Q.B.D. 271; *Pickin v. British Railways Board* [1974] AC 765; *Pepper v. Hart* [1993] AC 593. As Blackstone said in his Commentaries on the Laws of England, 17th ed. (1830), vol. 1, p. 163: 'the whole of the law and custom of Parliament has its origin from this one maxim, "that whatever matter arises concerning either House of Parliament, ought to be examined, discussed and adjudged in that House to which it relates, and not elsewhere."

113 This is confirmed by s 18 of the *Constitution Act, 1867* and s 4 of the *Parliament of Canada Act*. The privileges, immunities and powers of the Senate and House of Commons and their members are matters of self-definition and regulation by Parliament. In my view, the presentation, debate and passing of the federal budget allows for no role by the Courts. In the present case, no facts are pleaded to support a case that Parliament is not cognizant of the Minister's methodology or the perspectives of the Plaintiffs, or is being blinded.

114 As far as the *Constitution Act, 1867* and s 3 of the *Charter* are concerned, COMER, as an unincorporated association, has no electoral rights. As regards the individual Plaintiffs, there are no facts pleaded to suggest that they do not have effective representation in Parliament when it comes to budget bills. In *Reference Re Provincial Electoral Boundaries (Saskatchewan),* [1991] 2 SCR 158 at 1836, the Supreme Court of Canada explained what representation means:

> Ours is a representative democracy. Each citizen is entitled to be *represented* in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative...
>
> [emphasis in original]

115 Representation does not mean that the Plaintiffs have a right to force Parliament to proceed in a way that better suits their view of the appropriate way to present and pass a budget, and they have not pleaded facts to show that any particular budget legislation has negatively impacted a legal right that they enjoy.

116 There is nothing in the Amended Claim to suggest that the individual Plaintiffs do not enjoy the same meaningful participation in the electoral process as any other Canadian voter. See *Figueroa*, above, at para 27. The Plaintiffs do not lack effective representation simply because budget bills are not presented and dealt with in accordance with their views of what they should or should not contain, and there is no suggestion that they lack a voice in the deliberations of government because they are unable to bring their grievances and concerns to the attention of the MPs who represent them. In my view, Constitutional and *Charter* protection cannot mean that individual voters have the right or the expectation that their views on the appropriate presentation and enactment of any particular piece of legislation will be followed by Parliament. This is not to say that voter concerns about the way that Parliament enacts legislation are not legitimate concerns. However, how Parliament proceeds is a matter of self-definition (see *Authorson*, above) unless, of course, there is some "overriding constitutional or self-imposed statutory or indoor prescription." In my view, notwithstanding the able arguments of Plaintiffs' counsel, the Plaintiffs do not plead anything in the Amended Claim to establish an overriding Constitutional prescription or a breach of s 3 of the *Charter* that could ground their claim for declaratory relief or damages for this aspect of their claim. The Plaintiffs don't even attempt to litigate any particular budget legislation. They focus their claim instead upon the budget compilation and Parliamentary process itself, and I think the jurisprudence is clear that the Court simply cannot go there. Article 9 of the *Bill of Rights of 1688/89* also prevents the Court from entertaining any action

against any member of Parliament which seeks to make them personally liable for acts done or things said in Parliament. See *Hamilton v al Fayed*, above.

117 In my view, then, those allegations of the Amended Claim that raise the taxation issue and seek relief based upon the *Constitution Act, 1867* and s 3 of the *Charter,* and the principle of no taxation without representation have to be struck because it is plain and obvious that they disclose no reasonable cause of action and have no reasonable prospect of success.

(2) *Bank Act* Issues

118 The balance of the Amended Claim deals with alleged breaches of the *Bank Act* by the Minister of Finance and the Government of Canada. In its essentials, this aspect of the claim has not changed since I reviewed the Plaintiffs' previous Amended Statement of Claim in April, 2014.

119 I think it is useful to bear in mind the grounds of the Defendants' cross-appeal that the Federal Court of Appeal was asked to consider in January, 2015 and which it dismissed:

1. The Judge erred in fact and law in finding that there are alleged breaches or issues in the Plaintiffs' Amended Statement of Claim ("Claim") that are justiciable;
2. The judge erred in law by finding that s. 18 of the *Bank of Canada Act* could not be interpreted in a motion to strike, but would require full legal argument on a full evidentiary record;
3. The judge erred in law by finding that had the learned Prothonotary determined s. 18 of the *Bank of Canada Act* to be a "legislative imperative" that the Claim would then become justiciable;
4. The judge erred in law by finding that even if s. 18 of the *Bank of Canada Act* is permissive, that this does not dispose of the matter of justiciability;
5. The judge erred in fact and in law by finding that the Claim does not require the Court to adjudicate and dictate competing policy choices and that objective legal criteria exist to measure the Plaintiffs' allegations;
6. The judge erred in law and in fact by characterizing the Claim as one which requires the Court to assess whether the Defendants have acted, and continue to act, in accordance with the *Bank of Canada Act* and the *Constitution*;
7. The judge erred in fact and in law by finding that relevant and material facts have actually been pleaded in the Claim in support of the declarations sought that the policies and actions allegedly pursued by the Defendants have not complied with the Bank of Canada Act and the Constitution;
8. The judge erred in law in finding on a motion to strike that any allegations in the Claim of breach of statute and/or of constitutional obligations may be justiciable depending on whether the Plaintiffs can establish a reasonable cause of action though appropriate and future amendments;

...

120 It also has to be borne in mind that in my Order of April 24, 2014, I did not say that the Plaintiffs were likely to succeed with their *Bank Act* claims. All I said was that the claims had to be struck in their entirely because, as they stood, they did not disclose a reasonable cause of action and had no prospect of success. The Federal Court of Appeal endorsed this position.

121 I concluded that the "full import of the *Bank Act* and what is required of Canada and those Minister and officials who act, or don't act, in accordance with the Bank Act is at the heart of this dispute" (para 72) and that:

> [76] So, as regards the declaratory relief sought in this Claim, it is my view that the matters raised could be justiciable and appropriate for consideration by the Court. Should the Plaintiffs stray across the line into policy, they will be controlled by the Court. There is a difference between the Court declaring that the Government or the Governor, or the Minister, should pursue a particular policy and a declaration as to

> whether the policy or policies they have pursued are compliant with the Bank Act and the Constitution. The facts are pleaded on these issues. Subject to what I have to say about other aspects of the Claim, the Plaintiffs should be allowed to go forward, call their evidence, and attempt to make their case. It cannot be said, in my view, that it is plain and obvious on the facts pleaded that the action cannot succeed as regards this aspect of the Claim. And even if s.18 of the Bank Act is interpreted as purely permissive, that does not decide the issue raised in the Claim that Canada has obviated crucial aspects of the Bank Act and has subverted or abdicated constitutional obligations by making itself subservient to private international institutions.

122 I said the *Bank Act* claims "*could be* justiciable and appropriate for consideration by the Court"(emphasis added) because the Plaintiffs do give their account of the socio-economic problems that arise from alleged breaches of the *Bank Act* and related constitutional principles. I concluded that this provided context for the alleged breaches in the claims because the Court needs to understand the Plaintiffs' version of what is at stake and what flows from the alleged breaches:

> [75] The difficult boundary between what a court should and should not decide will arise time and again in a case like the present. However, the issue is not whether the Court should mandate the Government and the Bank to adopt the economic positions espoused and advocated by the Plaintiffs. Nor will the Court be deciding whether a particular policy is "financially or economically fallacious," although this kind of accusation does appear in the Claim. In my view, the Court is being asked to decide whether particular policies and acts are in accordance with the Bank Act and the Constitution. If justiciability is a matter of "appropriateness," then the Court is the appropriate forum to decide this kind of issue. In fact, the Court does this all the time. The Supreme Court of Canada has made in clear that the Parliament of Canada and the executive cannot abdicate their functions (see *Wheat Board*, above) and that the executive and other government actors and institutions are bound by constitutional norms. See *Reference re Secession of Quebec*, above, and *Khadr*, above.

123 From a *res judicata* perspective, it has to be borne in mind that the portions of the claim related to the *Bank Act* were struck under Rule 221. My comments about justiciability -- "could be justiciable and appropriate for consideration by the Court," -not "are justiciable" simply went to Prothonotary Aalto's findings that they were not justiciable because they involved matters of policy rather than law. I was simply pointing out that legal issues could be distinguished from policy issues, so that the *Bank Act* claims could become justiciable "subject to what I have to say about other aspects of the Claim..." And when I say the "facts are pleaded on these issues," (para 76) the "issues" I am referring to are the facts that distinguish the law from policy. The Plaintiffs are right to point out that I thought the *Bank Act* claims could go forward, but this was subject to issues of jurisdiction and what I had to say about the other aspects of the claim, and the Federal Court of Appeal endorsed this reasoning and this approach to the claims.

124 The reason I said the *Bank Act* claims "could be justiciable and appropriate for consideration by the Court" is because, as drafted, these claims give rise to problems of jurisdiction and justiciability that the Plaintiffs should have the opportunity to resolve by way of amendments. Now that amendments have been made the Court has to decide whether the Plaintiffs have resolved these problems.

125 The grounds brought forward by the Defendants in the present Rule 221 motion, as well as the arguments of the Plaintiffs, have to be considered in light of what the Court has already ruled about the *Bank Act* claims and what the Federal Court of Appeal has endorsed.

126 The Plaintiffs fault the Defendants for again raising arguments on justiciability that the Court has already decided and the Federal Court of Appeal has endorsed. As a reading of my Order of April 24, 2014 shows, my conclusions on justiciability at that time were subject to serious reservations. I concluded that there were legal issues in the claims (breaches of the *Bank Act* and the Constitution) that the Court could deal with and that could be distinguished from the socio-economic policy assertions in the claims: "In my view, the Court is being asked to decide whether particular policies and acts are in accordance with the Bank Act and the Constitution. If justiciability is a matter of 'appropriateness,' then the Court is the appropriate forum to decide this kind of issue."

127 I did not conclude, however, that the claims as drafted were sufficient to allow the Court to carry out this function (otherwise I would not have struck them under Rule 221), and I went on to point out that the *Bank Act* and related Constitutional claims had to be struck, and indicated what the Plaintiffs needed to do by way of amendment to allow the Court to consider the legal (as opposed to the socio-economic policy aspects) of the claims. It has to be borne in mind that I struck all of the claims and that the Federal Court of Appeal did not just endorse what I said about justiciability; it also endorsed my decision to strike all of the claims and my reasons for doing so. So the important issue before me at this juncture is not whether the Court *could* examine and rule on the legal aspects of the claims; the issue is whether the amendments are sufficient to allow the Court to do this, and whether they overcome the problems I identified that compelled me to strike all of the claims in 2014.

128 To be fair to both sides of this dispute, my Order of April 24, 2014 may sometimes confuse issues of jurisdiction and justiciability. The Federal Court of Appeal seemed to have no problem with this and, however these concerns should be characterized, I did set them out in some detail and I will discuss them here as I described them in my Order of April 24, 2014. The Defendants may not be entirely wrong when they characterize those problems as being about justiciability rather than jurisdiction.

129 In my Order of April 24, 2014, I went on to examine the jurisdictional problems that arose in the Amended Statement of Claim that was then before me:

> [86] As I have concluded that it is not plain and obvious that the breach of statutory and constitutional obligations and the declaratory relief sought is not justiciable, all I can do at this juncture is decide whether the Court has the jurisdiction to deal with this aspect of the Claim. If amendments are made to portions of the Claim that are struck, this issue may have to be re-visited.
>
> [87] At this stage in the proceedings, s. 17 of the *Federal Courts Act* appears sufficiently wide enough to give the Federal Court concurrent jurisdiction where relief is sought against the Crown. This doesn't end the matter, of course, and the Defendants have asked the Court to examine and apply the *ITO v Miida Electronics Inc*, [1986] 1 SCR 752 at p. 766 [*ITO*], jurisdictional test.
>
> [88] Given the Federal Court of Appeal decision in *Rasmussen v Breau*, [1986] 2 FC 500 at para 12, to the effect that the *Federal Courts Act* only applies to the Crown *eo nomine*, and not to a statutory corporation acting as an agent for the Crown, it is difficult to see why the Bank should be named as a Defendant. However, the main problem in the way of determining jurisdiction at this stage is that the Plaintiffs have yet to produce pleadings that adequately set out how any private or other interest has been affected by the alleged statutory and constitutional breaches. The Plaintiffs are asking the Court to declare that their view of the way the Bank Act and the Constitution should be read is correct, and that breaches have occurred. This is akin to asking the Court for an advisory opinion, and I see nothing in the jurisprudence to suggest that the Court has the jurisdiction to provide this kind of ruling in the form of a declaration.
>
> [89] The Plaintiffs are extremely vague on this issue. They simply assert that the Federal Court has jurisdiction to issue declarations concerning statutes such as the Bank Act, and jurisdiction over federal public actors, tribunals and Ministers of the Crown. They say they have private rights to assert but, as yet, and given that the tort and Charter claims must be struck, I see no private rights at issue. In addition, they claim to be acting for "all other Canadians," but, once again, they have yet to produce pleadings that adequately plead how the rights of "all other Canadians" have been impacted in a way that translates into the infringement of an individual or a collective right. If the rights of all Canadians are impacted, then the individual Plaintiffs would be able to describe, in accordance with the rules that govern pleadings, how their individual rights have been breached, but they have, as yet, not been able to do this.
>
> [90] It seems to me that the fundamental problem of how the Plaintiffs can simply come to the Court and request declarations that their interpretations of the Bank Act and the Constitution are correct is the reason why they have attached tortious and Charter breaches to their Claim. They know that they need to show how individual rights have been infringed but, as of yet, they have not even set out in their pleadings how their own rights have been infringed, let alone the rights of "all other Canadians."

> [91] This means that, in terms of the *ITO* principles, the Plaintiffs have yet to show a statutory grant of jurisdiction by the federal Parliament that the Court can entertain and rule on the Claim as presently constituted (i.e. simply declare that statutory and constitutional breaches have occurred without an adequate description in the pleadings of how a private right or interest has been affected and the grounds for a valid cause of action), and they have yet to cite an existing body of federal law which is essential to the disposition of the case and which nourishes such a statutory grant of jurisdiction. The Plaintiffs do not have any specific rights under the legislation which they cite and they have provided no statutory or other framework for the exercise of any rights. They may be able to do these things with appropriate amendments to the pleadings. As yet, however, I cannot see how the Court acquires the jurisdiction to provide the declaratory relief that is sought.
>
> [emphasis in original]

130 It seems to me that the Plaintiffs have not resolved these problems in the Amended Claim.

131 The Plaintiffs take a very forceful and wide view on the availability of declaratory relief and the Court's jurisdiction to grant such relief. The Plaintiffs take the position that

> any citizen has a constitutional right, subject to frivolous and vexatious or no jurisdiction of the Court, to bring a public interest issue to the Court.
>
> [Transcript of Proceedings p 62, lines 25-27]

132 Even if I were to accept this broad approach to standing, I still have to decide the jurisdictional issue which I could not decide in April, 2014 for the reasons quoted above that were endorsed by the Federal Court of Appeal, and which, to use the Plaintiffs' own logic, I must accept as *res judicata*. I said that the Plaintiffs could not just ask the Court for an advisory opinion on these *Bank Act* issues because "I see nothing in the jurisprudence to suggest that the Court has the jurisdiction to provide this kind of ruling in the form of a declaration." In retrospect, I might have characterized this as a justiciability issue but, in my view, the terminology doesn't matter because I decided that the problem was that the Plaintiffs were asking for a free-standing declaration that amounted to an advisory opinion and the Court is not in the business of granting free-standing opinions.

133 The Plaintiffs' position on this issue is as follows:

> You have at paragraph 29 the ruling in Dunsmuir with respect to judicial review as a constitutional right. And Dunsmuir and other cases see judicial review writ large. It's not the procedural avenue of judicial review by way of application as opposed to by way of action. Under section 17 this Court has ruled one can seek declaratory relief by way of action, and that is in my factum.
>
> But if I can refer Your Lordship to paragraph 31, where I actually extract the portions from the Manitoba Métis case, and they are italicized and bolded at pages 242 and 243.
>
> "Citing Thorsen, [1975] 1 S.C.R. 138, the Supreme Court of Canada in this case", which is 2013 case," states: 'The constitutionality of legislation has always been a justiciable issue. The right of the citizenry to constitutional behaviour by Parliament can be vindicated by declaration that legislation is invalid or that a public act is ultra vires.'"
>
> That is paragraph 134 that is extracted. That is exactly what my clients seek with respect to the actions of the Minister of Finance and the resulting constitutional breach of their right to vote -- of their right not to be taxed without effective representation by their MPs, because they're blindfolded by the Minister of Finance and what he does not deliver, which is a constitutional requirement, we say.
>
> And then over the page from paragraph 140, the Supreme Court states:
>
> "The Courts are the guardians of the Constitution and cannot be barred by mere statutes from issuing a declaration on a fundamental constitutional matter. The principles of legality, constitutionally and the rule of law demand no less."

> And then the passage that really answers my friend at paragraph 143 of Manitoba Métis Federation -- an Inc., by the way, a corporation brought the challenge.
>
> "Furthermore, the remedy available under this analysis if of a limited nature. A declaration is a narrow remedy. It is available without a cause of action, and courts make declarations whether or not any consequential relief is available."
>
> That statutorily reproduced under rule 64 of the Federal Courts Act, My Lord, which is reproduced at paragraph 32 of my factum, and this court in Edwards, which is right below that, has ruled that the declaratory relief may be sought in an action under section 17, which was have done. And then which is consistent with the Supreme Court of Canada jurisprudence in Khadr and Thorsen.
>
> [Transcript of Proceedings p 54 line 8 to p 55, line 28]

134 The Plaintiffs appear to be of the view that, as a think-tank, they can simply come to Court and ask the Court to declare that the Minister of Finance and the Government of Canada are required to do certain things under the *Bank Act*, and that they have abdicated their constitutional duties, and allowed international private entities to trump the interests of Canadians. COMER has no Constitutional or *Charter* rights to assert and the individual Plaintiffs are no differently situated from any other Canadian and have no demonstrable individual Constitutional and *Charter* rights to assert. In the Amended Claim, the Plaintiffs collectively remain a think-tank, seeking the Court's endorsement of alleged *Bank Act* and Constitutional breaches related to the *Bank Act* and international institutions.

135 Having been given the opportunity to amend, there are still no material facts in the Amended Claim that link the impugned legislative scheme embodied in the *Bank Act* to an effect on themselves as Plaintiffs. Their argument is that freestanding declarations on the constitutionality of laws and legal authority are always available to any Canadian citizen.

136 Since my Order of April 24, 2014 was considered by the Federal Court of Appeal, the Federal Court of Appeal has had occasion to consider and pronounce in some detail on what the Court can do with pleadings that contain freestanding requests for declaratory relief. In *Mancuso v Canada (National Health and Welfare),* 2015 FCA 227 [*Mancuso*], the Federal Court of Appeal provided the following guidance:

> [31] The appellants allege that their action can nonetheless proceed to trial on the basis of the surviving paragraphs. It is not problematic, in their view, that there are no material facts in the statement of claim, including none that link the impugned scheme to an effect on themselves as plaintiffs. They base this argument on the proposition that freestanding declarations on the constitutionality of laws and legal authority are always available.
>
> [32] On this latter point, there is no doubt. Free-standing declarations of constitutionality can be granted: *Canadian Transit Company v. Windsor (Corporation of the City)*, 2015 FCA 88. But the right to the remedy does not translate into licence to circumvent the rules of pleading. Even pure declarations of constitutional validity require sufficient material facts to be pleaded in support of the claim. Charter questions cannot be decided in a factual vacuum: *Mackay v. Manitoba*, above, nor can questions as to legislative competence under the *Constitution Act, 1867* be decided without an adequate factual grounding, which must be set out in the statement of claim. This is particularly so when the effects of the impugned legislation are the subject of the attack: *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1099.
>
> [33] The Supreme Court of Canada in *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, para. 46 articulated the pre-conditions to the grant of a declaratory remedy: jurisdiction over the claim and a real as opposed to a theoretical question in respect of which the person raising it has an interest.
>
> [34] Following *Khadr*, this Court in *Canada (Indian Affairs) v. Daniels*, 2014 FCA 101 (leave to appeal granted) at paras. 77-79 highlighted the danger posed by a generic, fact-free challenge to legislation -- in other words, a failure to meet the second *Khadr* requirement. Dawson JA noted that legislation may be valid in some instances, and unconstitutional when applied to other situations. A court must have a sense of a law's reach in order to assess whether and by how much that reach exceeds the legislature's vires. It cannot evaluate whether Parliament has exceeded the ambit of its legislative competence and had more

> than an incidental effect on matters reserved to the provinces without examining what its legislation actually does. Facts are necessary to define the contours of legislative and constitutional competence. In the present case, this danger is particularly acute; as the judge noted, the legislation at issue pertains to literally thousands of natural health supplements.
>
> [35] This is not new law. While the plaintiffs point to *Solosky v. The Queen*, [1980] 1 S.C.R. 821 for the proposition that there is a broad right to seek declaratory relief, *Solosky* also notes that there must be "a 'real issue' concerning the relative interests of each [party]." The Court cannot be satisfied that this requirement is met absent facts being pleaded which indicate what that real issue is and its nexus to the plaintiffs and their claim for relief.

137 In the present case, the Plaintiffs have not, in their Amended Claim, pleaded facts to demonstrate a "real" issue concerning the relative interests of each party, and the nexus of that real issue to the Plaintiffs and their claim for relief. Although as I pointed out in my Order of April 24, 2014, the Plaintiffs do distinguish between legal issues and policy issues, the legal issues remain theoretical with no real nexus to some interest of the Plaintiffs, other than an interest in having the Court endorse their opinion on the *Bank Act* issues raised.

138 The Plaintiffs have not addressed the jurisdictional problems I referred to in paras 85 to 91 of my Order of April 24, 2014 and/or what might generally be referred to as the jurisdiction of the Court to entertain, or its willingness to grant, free-standing requests for declaration.

139 Apart from the taxation issues which I have concluded are not justiciable for reasons set out above, the Plaintiffs have made little attempt in their amendments to rectify the problems I raised in my Order of April 24, 2014. The declaratory relief related to the *Bank Act* remains the same. The damages claimed in 1(b)(ii) appear to be based upon s 3 of the *Charter* and the no taxation without representation principle, which I have found to be non-justiciable.

140 The Plaintiffs have urged me to treat my Order of April 24, 2014 and the Federal Court of Appeal decision on that judgement as *res judicata*. If I do this then I have to say that in their Amended Claim the Plaintiffs have still provided no legal or factual basis for the infringement of their private rights, and the declarations remain nothing more than a request that the Court provide an advisory opinion that supports their view of the way the *Bank Act* and the Constitution should be read.

141 In order to overcome this problem in their first Amended Statement of Claim, the Plaintiffs hitched their declaratory relief to ss 7 and 15 of the *Charter* and various tort claims, all of which they have now abandoned. In their stead, they have now hitched the declaratory relief to claims based on s 3 of the *Charter* and Constitutional guarantees of no taxation without representation, which I have found to be non-justiciable. This leaves the Court in the same situation as it found itself in April, 2014:

> [91] This means that, in terms of the *ITO* principles, the Plaintiffs have yet to show a statutory grant of jurisdiction by the federal Parliament that the Court can entertain and rule on the Claim as presently constituted (i.e. simply declare that statutory and constitutional breaches have occurred without an adequate description in the pleadings of how a private right or interest has been affected and the grounds for a valid cause of action), and they have yet to cite an existing body of federal law which is essential to the disposition of the case and which nourishes such a statutory grant of jurisdiction. The Plaintiffs do not have any specific rights under the legislation which they cite and they have provided no statutory or other framework for the exercise of any rights. They may be able to do these things with appropriate amendments to the pleadings. As yet, however, I cannot see how the Court acquires the jurisdiction to provide the declaratory relief that is sought.

142 It seems to me that the Federal Court of Appeal in *Mancuso*, above, has now made it clear that a claim for a pure declaration must establish through pleading sufficient material facts that the Court has jurisdiction over the claims "and a real as opposed to a theoretical question in respect of which the person raising has an interest."

143 I do not wish to denigrate, or even downplay, the Plaintiffs' concerns about the way that Parliament has dealt with economic and monetary issues. But not all concerns can be translated into legal action that can, or should, be dealt with by a court of law. Rather than supplement their previous ss 7 and 15 *Charter* claims, and their previous tort claims, the Plaintiffs have abandoned those claims altogether and have now come up with claims based upon s 3 of the *Charter* and Constitutional guarantees of no taxation without representation. As able as their arguments are, the sudden switch to a new game plan suggests that the Plaintiffs are not able to remove their concerns from the political realm and to characterize them in such a way that they can be dealt with by this Court.

144 It seems to me, then, that the latest Amended Claim discloses no reasonable cause of action and has no prospect of success at trial. It also seems to me that the Plaintiffs are still asking the Court for an advisory opinion in the form of declarations that their view of the way the *Bank Act* and the Constitution should be read is correct. It also seems to me that they have failed to show a statutory grant of jurisdiction by Parliament that this Court can entertain and rule on their claim as presently constituted, or that they have any specific rights under the legislation which they invoke, or a legal framework for any such rights. As the Supreme Court of Canada pointed out in *Operation Dismantle*, above, the preventive function of a declaratory judgment must be more than hypothetical and requires "a cognizable threat to a legal interest before the Court will entertain the use of its process as a preventative measure" (para 33). The Court is not here to declare the law generally or to give an advisory opinion. The Court is here to decide and declare contested legal rights. See *Gouriet*, above, at 501-502.

D. *Other issues*

145 The Defendants have raised a number of other issues going to the adequacy and appropriateness of the Amended Claim but, in light of the fundamental problems I have dealt with above, I see no point in going any further with my analysis.

E. *Leave to Amend*

146 The Plaintiffs have asked the Court to consider, as an alternative form of relief, that they be allowed to proceed on the declaratory relief in their Amended Claim, with leave to amend any struck portions with respect to the damages portion of the claim.

147 As set out above, I do not think that, even for the declaratory relief sought, that the Plaintiffs have been able to raise their claim above a mere request for an advisory opinion. In addition, as further explained above, given that the Plaintiffs have not been able to rectify the fundamental issues I pointed out in my Order of April 24, 2014, and have not suggested any way in which they could be rectified, I see no point in allowing an amendment. Having previously permitted the Plaintiffs such an opportunity, their response convinces me that, for reasons given, they have no scintilla of a cause of action that this Court can or should hear. Without having any real legal interest at stake, the Plaintiffs remain a think tank seeking to have the Court endorse their political and academic viewpoint. Amendments are not going to change this.

ORDER

THIS COURT ORDERS that

1. The Plaintiffs' latest Amended Claim is struck in its entirety;
2. Leave to amend is refused;
3. Costs are awarded to the Defendants.

RUSSELL J.

Committee for Monetary and Economic Reform v. Canada

Federal Court Judgments

Federal Court of Appeal

Toronto, Ontario

M. Noël C.J., D.G. Near and D.J. Rennie JJ.A.

Heard: December 7, 2016.

Oral judgment: December 7, 2016.

Docket: A-76-16

[2016] F.C.J. No. 1391 | [2016] A.C.F. no 1391 | 2016 FCA 312

Between Committee for Monetary and Economic Reform ("Comer"), William Krehm, and Ann Emmett, Appellants, and Her Majesty the Queen, The Minister of Finance, The Minister of National Revenue, The Bank of Canada, The Attorney General of Canada, Respondents

(14 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 Committee, Krehm and Emmet from order striking amended statement of claim dismissed — Action challenged the manner in which the Parliament handled monetary and economic issues — Court lacked jurisdiction to provide advisory opinion on state of law in general, challenged by appellants as contrary to their rights to no taxation without representation — Federal Courts Rules, Rule 221.

Appeal by the Committee for Monetary and Economic Reform, Krehm and Emmet from an order striking their amended statement of claim without leave to amend. Their action challenged the way Parliament handled economic and monetary issues in Canada, and sought declarations of various statutory violations and tortious conduct of conspiracy and misfeasance of public office. The respondents, the Crown, the Ministers of Finance and of National Revenue, the Bank of Canada and the Attorney General of Canada successfully moved to strike the original claim as disclosing no reasonable cause of action, but on appeal, the appellants were granted leave to amend their claim. In their amended pleadings, the appellants abandoned claims under sections 3 and 15 of the Canadian Charter of Rights and Freedoms, 1982, substituting claims pursuant to section 3, asserting a right to no taxation without representation. This claim was also struck in the order under appeal.
HELD: Appeal dismissed.

There was no error in the order, characterizing the claim as one for an advisory opinion on the

law in general, something beyond the jurisdiction of the court. The amended claim disclosed no reasonable cause of action and had no chance of success at trial.

Statutes, Regulations and Rules Cited:

Bank of Canada Act, R.S.C. 1985, c. B-2

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11, s. 3, s. 7, s. 15

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3

Federal Courts Rules, SOR/98-106, Rule 221

Appeal From:

Appeal from a judgment of the Federal Court dated February 8, 2016, Docket No. T-2010-11 (2016 FC 147).

Counsel

Rocco Galati, for the Appellants.

Peter Hajacek, for the Respondents.

REASONS FOR JUDGMENT OF THE COURT

The judgment of the Court was delivered by

D.J. RENNIE J.A.

1 This is an appeal brought by the Committee for Monetary and Economic Reform, William Krehm, and Ann Emmet (the appellants) from an order issued pursuant to Rule 221 of the *Federal Court Rules* (SOR/98-106) by Russell J. (the Federal Court judge) striking out the appellants' amended statement of claim without leave to amend (2016 FC 147).

2 The appellants commenced an action challenging the way Parliament handles economic and monetary issues in Canada and initially sought declarations of violations of the *Bank of Canada Act*, R.C.S. 1985, c. B-2 [*Bank of Canada Act*]; the *Constitution Act, 1867*, (U.K), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5; sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*]; and of tortious conduct of conspiracy and misfeasance in public office.

3 The respondents brought a motion to strike, and on August 9, 2013, Prothonotary Aalto struck

out the appellants' original statement of claim in its entirety without leave to amend on the basis that it did not disclose a reasonable cause of action (2013 FC 855).

4 By decision rendered on April 24, 2014, the Federal Court judge sitting in appeal from the Prothonotary's decision, reconsidered the matter *de novo.* Applying the test for striking out set out by the Supreme Court in *R v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, he too held that the statement of claim did not reveal a cause of action, but was of the view that the possibility that the appellants could come up with a proper pleading with respect to specified issues could not be excluded. He therefore granted the appellants leave to amend (2014 FC 380). On the appeal and cross-appeal which followed, this Court disposed of the matter from the bench, dismissing both (2015 FCA 20).

5 On March 26, 2015, the appellants filed an amended statement of claim wherein they abandoned prior claims made pursuant to sections 7 and 15 of the *Charter* and substituted therefor claims pursuant to section 3 of the *Charter,* asserting a right to "no taxation without representation".

6 The respondents again moved to have the statement of claim struck on the basis that the appellants' amended statement of claim failed to rectify any of the previous deficiencies and therefore disclosed no reasonable cause of action.

7 By decision rendered on February 8, 2016, the Federal Court judge again struck the amended statement of claim in its entirety, this time however without leave to further amend.

8 This is the decision now under appeal.

9 The essence of the Federal Court judge's reasoning for striking the amended statement of claim is summed up at paragraph 144 of his reasons:

> It seems to me, then, that the latest Amended Claim discloses no reasonable cause of action and has no prospect of success at trial. It also seems to me that the Plaintiffs are still asking the Court for an advisory opinion in the form of declarations that their view of the way the *Bank Act* and the Constitution should be read is correct. It also seems to me that they have failed to show a statutory grant of jurisdiction by Parliament that this Court can entertain and rule on their claim as presently constituted, or that they have any specific rights under the legislation which they invoke, or a legal framework for any such rights. As the Supreme Court of Canada pointed out in *Operation Dismantle*, [1985] 1 S.C.R. 441 above, the preventive function of a declaratory judgment must be more than hypothetical and requires "a cognizable threat to a legal interest before the Court will entertain the use of its process as a preventative measure" (para 33). The Court is not here to declare the law generally or to give an advisory opinion. The Court is here to decide and declare contested legal rights.

10 The appellants assert that the opinion so expressed is wrong in law. In support of this proposition, they essentially reiterate the arguments which they urged upon the Federal Court judge and ask that we come to a different conclusion. Counsel for the appellants focused his argument during the hearing on the issue of standing and the right to seek declarations of

constitutionality. It remains however that, as the Federal Court judge found, the right to a remedy is conditional on the existence of a justiciable issue.

11 Reviewing the matter on the least deferential and most favourable standard from the appellant's perspective (*i.e.*: correctness), we are unable to detect any error which would warrant our intervention.

12 The arguments raised by the appellants have been given full consideration and there is nothing that we could usefully add to the judgment below to explain why the Federal Court judge correctly held that the appellants' claims, as set out in their amended statement of claim, are bound to fail.

13 As to the denial of leave to amend, after having granted leave once, the Federal Court judge held that leave ought not to be granted a second time. Keeping in mind that this aspect of the decision embodies a discretionary element, we can detect no error in the conclusion reached by the Federal Court judge as expressed at paragraph 147 of his reasons.

14 The appeal will be dismissed with costs.

D.J. RENNIE J.A.

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

Supreme Court of Canada Rulings on Applications for Leave to Appeal and Other Motions

Supreme Court of Canada

Record created: February 1, 2017.

Record updated: May 4, 2017.

File No.: 37431

[2017] S.C.C.A. No. 47 | [2017] C.S.C.R. no 47

Committee for Monetary and Economic Reform ('COMER'), William Krehm and Ann Emmett v. Her Majesty the Queen, Minister of Finance, Minister of National Revenue, Bank of Canada and Attorney General of Canada

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Case Summary

Status:

Application for leave to appeal dismissed with costs (without reasons) May 4, 2017.

Catchwords:

Civil procedure — Pleadings — Standing — Declaratory judgments — Jurisdiction — Applicants' statement of claim struck out without leave to amend pursuant to s. 221 of the Federal Courts Rules, SOR/98-106 — Is the right to seek justiciable declaratory constitutional relief, particularly in public interest litigation, irreconcilable with the pre-Patriation notion of "private reference" (or "free-standing" or "advisory" opinion)? - - Is the right to seek declaratory constitutional relief, in respect of the budgetary process and the legislative provisions of the Bank of Canada Act, R.C.S. 1985, c. B-2, foreclosed by a successful underlying cause of action for damages tied to the declaratory relief?

Case Summary:

The applicants commenced an action against the respondents. They sought declarations of violations of the Bank of Canada Act, R.C.S. 1985, c. B-2; the Constitution Act, 1867, (U.K), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5; ss. 7 and 15 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11; and of tortious conduct of conspiracy and misfeasance in public office. The applicants sought damages for the violations alleged.

The respondents brought a motion to strike. The Federal Court Prothonotary struck out the original statement of claim in its entirety without leave to amend on the basis that the claim did not disclose a reasonable cause of action. On appeal from the Prothonotary's decision, the Federal Court judge agreed that the claim should be struck but granted leave to amend the pleadings. The Federal Court of Appeal dismissed the appeal and cross-appeal from that decision.

The applicants filed an amended statement of claim where they abandoned prior Charter claims and added a claim pursuant to s. 3 of the Charter, asserting a right to "no taxation without representation". The respondents again

moved to have the statement of claim struck on the basis that the applicants failed to rectify any of the previous deficiencies in the pleadings, and that the claim therefore disclosed no reasonable cause of action.

Counsel

Rocco Galati (Rocco Galati Law Firm Professional Corporation), for the motion.

Peter Hajecek (A.G. of Canada), contra.

Chronology:

1. Application for leave to appeal:
   FILED: February 1, 2017.

   SUBMITTED TO THE COURT: March 27, 2017.

   DISMISSED WITH COSTS: May 4, 2017 (without reasons)

   Before: R.S. Abella, A. Karakatsanis and R. Brown JJ.

   The request for an oral hearing is dismissed. The application for leave to appeal is dismissed with costs.

Procedural History:

Motion to strike amended statement of claim without leave to amend granted
February 8, 2016
Federal Court
(Russell J.)
2016 FC 147

Appeal dismissed
December 7, 2016
Federal Court of Appeal
(Noël C.J., Near and Rennie JJ.A.)
2016 FCA 312; [2016] F.C.J. No. 1391

Da Silva Campos v. Canada (Minister of Citizenship and Immigration), [2015] F.C.J. No. 908

Federal Court Judgments

Federal Court

Zinn J.

Heard: In writing.

Judgment: July 20, 2015.

Amended judgment: November 13, 2015.

Docket: T-2502-14

[2015] F.C.J. No. 908 | [2015] A.C.F. no 908 | 2015 FC 884 | 2015 CF 884 | 2015 CarswellNat 3252 | 257 A.C.W.S. (3d) 434 | 37 Imm. L.R. (4th) 113

Proposed Class Action Proceeding Between Andre Da Silva Campos, Armando Filipe Freitas Goncalves, Aurelio Eduardo Marques Anjo, Aurelio Jose Esteves Mota, Avelino Jesus Linhares Ormonde, Cacia Aparecida Silva Freitas, Carlos Alberto Lima Araujo, Carlos Garces Gois, Carlos Manuel Loureiro Silva, Claudia Felismina Carvalho Da Costa, Emanuel Pereira Pires, Francisco Filipe Pereira Antunes, Grzegorz Jozef Biega, Henrique Manuel Rodrigues De Matos, Herminio Augusto Jorge Pedro, Joao Gomes Carvalho, Joao Luis Agrela Santos, Joao Pedro Sousa Reis, Jorge Pinheiro Gomes Prior, Jose Antonio Campos De Azevedo, Jose Antonio Silva Moniz, Jose Carlos Sousa Costa, Jose Filipe Cunha Casanova, Jose Luis Pereira Cunha, Leandro Filipe Matos Gomes De Sa, Luis Carlos Figueiredo Bento, Luis Filipe Silverio Vicente, Maciej Stanislaw Zaprzala, Manuel Agostinho Tome Lima, Manuel Domingos Borlido Barreiras, Manuel Costa Santos, Marco Filipe Silva Martinho Martinho, Marco Paulo Cruz Pinheiro, Maria Isabel De Castro Gouveia, Michal Szleszynski, Nuno Rodrigo Rodrigues Borges, Paolo Romandia, Pedro Manuel Cardoso Areias, Pedro Manuel Gomes Silva, Pedro Filipe Vilas Boas Salazar Novais, Ricardo Jorge Carvalho Rodrigues, Roberto Carlos Oliveira Silva, Rogerio Jesus Marques Figo, Rosalino De Sousa Henriques, Rui Manuel Henriques Lourenco, Rui Miguel Da Costa Lopes, Silvio Arnaldo Fernandes, Sofia Alexandra Leal Areias Silva, Vitor Miguel Dos Santos Ribeiro, Wiktor Antoni Reinholz, Wojciech Pawel Kaczmarski, Alessandro Colucci, Antonio De Arruda Pimentel, Augusto Jose Da Costa Santos, Bonifacio Manuel Costa Santos, Carlos Alberto Lima Araujo, Carlos Filipe Botequilhas Raimundo, Daniel Orlowski, Dariusz Domagala, Eugenio Pedro Machado Da Silva, Felice Di Mauro, Filipe Jose Laranjeiro Henriques, Hugo Rafael Paulino Da Cruz, Jose Carlos Sousa Costa, Luis Carlos Da Ponte Cabral, Paulo Alexandre Arruda Viana, Ricardo Jorge Vasconcelos Barroso, Vitor Manuel Esteves Silva Vieira, Ana Filipa Cruz Pereira, Ana Rita Araujo, Arnaldo Gomes Bras, Bruno Marcelo Martins Fernandes, Cacia Aparecida Silva Freitas, Claudia Felismina Carvalho Da Costa, Fernando Antonio Pereira Mendes, Fernando Jorge Riqueza Baganha, Helder Antonio Santos Avila Brum, Henrique Manuel Rodrigues De Matos, Hernani Sebastiao Moutinho Correia, Iga Gluszko, Joao Filipe Brito Ferreira, Jose Luis Pereira Cunha, Lauzer Vincente Gomes Lopes, Luis Miguel Pereira Da Silva, Mafalda Medeiros Costa, Maria Isabel De Castro Gouveia, Mario Andre Lima Rocha, Michal Szleszynski, Nuno Rodrigo Rodrigues Borges, Paolo Romandia, Paulo Filipe Raposo Martins, Rafael Manuel Borges Batalha, Ricardo Miguel Pires De Sousa, Sandra Cristina Pires De Sousa Fernandes, Sara Cristina Custodio Pereira, Silvio Arnaldo Fernandes, Sofia Alexandra Leal Areias Silva, Stephanie Oliveira, Vitor Carvalho Marques Figueiredo, Alessandro Colucci, Antonio De Arruda Pimentel, Antonio Desiderio Ferreira Andre, Antonio Marciano Rajao Rosmaninho, Antonio Ricardo Ferraz De Sousa, Armando Filipe Freitas Goncalves, Augusto Jose Da Costa Santos, Aurelio Eduardo Marques Anjo, Aurelio Jose Esteves Mota, Bonifacio Manuel Costa Santos, Carlos Manuel Alves Barreira Luis, Emanuel Pereira Pires, Fernando Azevedo Ferreira, Fernando Jorge Neves Ferreira, Jose Antonio Fernandes Da Costa, Jose Filipe Cunha Casanova, Justyna Tadel, Mario Fernando Conceicao Martinho, Paulo Jorge Franco, Pedro Manuel Gomes Silva, Pedro Filipe Vilas Boas Salazar Novais, Ricardo Jorge Carvalho Rodrigues, Ricardo Jorge Martins Ferreira Antunes, Rui Miguel Da Costa Lopes, Wiktor Antoni Reinholz, Andre Da Silva Campos, Carlos Manuel Alves Barreira Luis, Eugenio Pedro Machado Da Silva, Filipe Jose Laranjeiro Henriques, Francisco Filipe Pereira Antunes, Lanzer Vicente Gomes Lopes, Luis Filipe Silverio Vicente, Luis Miguel Pereira Da Silva, Rui Miguel Da

Costa Lopes, Sandra Cristina Pires De Sousa Fernandes, Andrzej Tomasz Waga, Avelino Jesus Linhares Ormonde, Carlos Alberto Barbosa Silva, Carlos Antonio Ferreira Matos, Carlos Garces Gois, Carlos Jesus Correia, Carlos Manuel Loureiro Silva, Daniel Filipe Costa Ferreira, Enrique Fernandez Pereira, Fabio Soares Moniz, Fernando Medeiros Cordeiro, Gilvane Paulino Damiao, Grzegorz Jozef Biega, Helio Alexandre Da Silva Gomes, Herminio Augusto Jorge Pedro, Igor Sergio Gouveia Gomes, Joao Filipe Sousa Araujo, Joao Gomes Carvalho, Joao Luis Agrela Santos, Joao Pedro Sousa Reis, Jorge Pinheiro Gomes Prior, Jose Antonio Campos De Azevedo, Jose Antonio Silva Moniz, Leandro Filipe Matos Gomes De Sa, Luis Carlos Figueiredo Bento, Maciej Stanislaw Zaprzala, Manuel Agostinho Tome Lima, Manuel Borges Leal, Manuel Costa Santos, Marco Filipe Da Silva Martinho, Marco Paulo Da Cruz Pinheiro, Paulo Joao Duarte Sabino, Paulo Alexandre Costa Reis, Pedro Manuel Cardoso Areias, Pedro Miguel Ribeiro Pontes, Ricardo Jorge Fonseca Furtado, Ricardo Jorge Santos Ferreira, Roberto Carlos Oliveira Silva, Rogerio De Jesus Marques Figo, Rosalino De Sousa Henriques, Rui Manuel Fernandes Lima, Rui Manuel Henriques Lourenco, Vitor Alberto Vergas Marcal, Vitor Manuel Esteves Silva Vieira, Vitor Miguel Dos Santos Rireiro, Wieslaw Kotula, Artur Grzegorsz Kotula, Wojciech Pawel Kaczmarski, Bruno Marcelo Martins Fernandes, Carlos Alberto Ferreira Jesus, Edgar Da Cruz Santos, Joaquim Carlos Piedade Ferreira, Tiago Fernando Marques Maio, Aurelio Jose Esteves Mota, Carlos Manuel Loureiro Silva, Emanuel Pereira Pires, Fernando Antonio Pereira Mendes, Fernando Azevedo Ferreira, Iga Gluszko, Joao Filipe Brito Ferreira, Jorge Pinheiro Gomes Prior, Lauzer Vicente Gomes Lopes, Maciej Stanislaw Zaprzala, Manuel Costa Santos, Mario Fernando Conceicao Martinho, Nuno Rodrigo Rodrigues Borges, Pedro Filipe Vilas Boas Salazar Novais, Rafael Manuel Borges Batalha, Rosalino De Sousa Henriques, Rui Manuel Fernandes Lima, Rui Manuel Henriques Lourenco, Sandra Cristina Pires Sousa Fernandes, Tiago Fernando Marques Maio, Vitor Alberto Vergas Marcal, Wiktor Antoni Reinholz, Wojciech Pawel Kaczmarski, Adelino Silva Capela, Alexandre Ferreira Filipe, Andresz Tomasz Myrda, Antinio Joaquim Oliveira Martins, Antinio Manuel Da Silva Marques, Carlos Eurico Ferraz De Sousa, Eduardo Manuel Rodrigues Marcelino, Isaac Manuel Leituga Pereira, Isabelle Angelino, Joao Pedro Esteves Ferreira, Joao Tiago Soares, Joaquim Agostinho Da Costa Rodrigues, Joaquim Ferreira Soares, Jose Augusto Lopes Ferreira, Jose Carlos Gouveia Salgado, Jose Manuel Sieira Gavina, Jose Joaquim Marques Tourita, Juvenal Silva Cabral, Mario Luis Costa Rodrigues, Miguel Alexandre Andrino Gomes, Miltin Cesar Aguiar Carreiro, Robert Zlotsz, Sergio Fernandes Silva Anselmo, Siivino Araujo Couto, Simao Pedro Martins Da Costa, And Valdemar Ferreitra Costa, Plaintiffs, and Minister of Citizenship and Immigration, Minister of Employment and Social Development, Her Majesty the Queen, Defendants

(14 paras.)

Counsel

Rocco Galati, for the Plaintiffs.

Roger Flaim, Prathima Prashad, for the Defendants.

[Editor's note: Amended reasons were released by the Court on November 13, 2015. The changes were not indicated. This document contains the amended text.]

ORDER AND REASONS

ZINN J.

1 The defendants move to strike the Statement of Claim, without leave to amend. They submit that it discloses no reasonable cause of action, and is riddled with deficiencies such that the "claim is beyond particularizing or amending [and] should be struck in its entirety." I agree; however, the plaintiffs ought to be granted an opportunity to file an amended claim that properly and specifically sets out their claim(s).

2 The present Statement of Claim comes close to being incomprehensible. The claim appears to assert that the plaintiffs have suffered damages and loss as a result of the delay, misfeasance, discrimination, negligence, and illegality in the processing of Labour Market opinions [LMOs], Labour Market Impact Assessments [LMIAs], work permits and permanent residence applications.

3 This is a proposed class action proceeding against two Ministers for certain alleged acts and omissions, and against Her Majesty the Queen for the tortious acts and omissions of her officials and servants, including the two Ministers.

4 It is alleged that all of the plaintiffs applied for, and were denied, LMO or LMIA assessments, on Temporary Work Permits [TWP], Work Permits [WP], or Provincial Nominee Program [PNP] permanent resident consideration. The plaintiffs are sorted into eight groups (it is unclear to the court whether some plaintiffs appear in more than one group), as described in paragraph 2 of the Statement of Claim, as follows:

> [Group 1] "are all Foreign Temporary Workers, [TFW] pursuant to the *IRPA Regulations,* under the authority of s. 12(2) of the *IRPA,* who applied for Foreign Temporary Worker permits and were denied because no Labour Market Opinion ("LMO") or Labour Market Impact Assessment ("LMIA") had been processed by the Defendant Minister of Employment and Social Development (formerly Minister for Human Resources and Social Development), following which the Minister of Immigration and his officials denied them work permits due to the inordinate, inexplicable, and actionable delay by the Minister of Human Resources and Social Development, contrary to his statutory duty to process, pursuant to s. 3(1)(f) of the *IRPA,* which applications were filed and denied to the Plaintiffs set out in, and in accordance with,*" Schedule A"* of the within Statement of Claim;"
>
> [Group #2] "are all Foreign Temporary Workers, pursuant to the *IRPA Regulations,* who were denied permits based on the erroneous, arbitrary, and *ultra vires* assessment that the Plaintiffs' trade or work category lack a labour market "shortage", which refusals were made based on conceded facts by the Defendants that:
>
> (i) that no statistics existed with respect to "shortages";
>
> (ii) that the Defendant Ministers expressed, publicly, that they hoped to have such statistics as to shortages, by 2015; and
>
> (iii) that the best-placed authority as to shortages are the Provincial, local Labour authorities, industries, and trade unions;
>
> which applications were filed and denied to the Plaintiffs set out in, and in accordance with, *"Schedule B"* to the within statement of claim;"
>
> [Group #3] "were denied LMO/LMIA consideration due to illegal and *ultra vires* Ministerial directions and instructions by the Minister of Employment and Social Development, of a moratorium up to June 201h, 2014, which moratorium was applied nationally even though it arose from a local problem in Western Canada with no such problem existing in Ontario, particularly with the "ethnic food sector", and further which instructions were due to the incompetence and *ultra vires* LMO/LMIA assessments, as well as the impossible and onerous policies and requirements then imposed on June 20'h, 2014, looking forward beyond June 20'h, 2014, which included some of the following:
>
> (i) commit to hiring and training Canadians at high wage rates even though the employers cannot find Canadians willing and able to be trained and, further, if a company failed to find and train a Canadian worker over a 3-5 year period, then the company could face l year in jail and a $100,000 fine;
>
> (ii) agree to let in Ministry of Employment and Development (Human Resources and Social Development) investigators into their office, unannounced and without warrant, to review and take all company records; Ministry of Employment and Development (Human Resources and Social Development) investigators also were given ability to enter residential premises;

which LMO/LMIA applications, were filed and denied to the Plaintiffs set out in, and in accordance with *"Schedule C'* of the within Statement of Claim;"

[Group #4] were denied, contrary to law, and by way of illegal and *ultra vires* policy change and Minister's instructions, which policies and changes changed after the Plaintiffs' application was submitted, but before a decision on the assessment was made, whereby the new policies and instructions were applied to the LMO/ LMIA, resulting in a refusal of the application, and actionable damages caused to the Plaintiffs set out in, and in accordance with *"Schedule D"* of the within Statement of Claim;

[Group #5] were denied an LMO/LMIA assessment and decision in order to .renew their work permits, due to arbitrary, and *ultra vires,* compliance order(s) against their employers and Plaintiffs which made it impossible to obtain a decision, such as:

(i) the inexcusable, inordinate delay in processing and verifying which could take 5-6 months;

(ii) making assessments, and assumptions regarding commercial, market and labour standard conditions which did not accord with reality and were based on mere assumptions without evidence, when the expertise, evidence, and information lay with local Provincial authorities, industries, and unions which were not accessed by the Defendants' officials;

(iii) while they called them "investigations" with respect to the compliance orders, the Defendants' officials in fact never showed up at work-sites, or offices, to speak to employers or employees; and

(iv) while an employer was under "compliance review", all applications for that employer were not processed;

which resulted in the denial of an LMO/LMIA assessment for the Plaintiffs who applied for one, prior to the arbitrary compliance orders were put in place, but before an assessment/decision could be made, which caused actionable damages for the Plaintiffs as set out in, and in accordance with *"Schedule E'* of the within Statement of Claim;"

[Group #6] "were not able to apply for required LMO/LMIA, to renew their work permits, due to arbitrary, and *ultra vires,* arbitrary changes to LMO/LMIA Rules for which these Plaintiffs made it impossible to obtain a decision, which rules include such orders as:

(i) the Defendants' officials would change the wage rates without notice;

(ii) the Defendants' officials would change the advertising requirements without notice;

(iii) the Defendants' officials would charge their analysis of their "labour market" statistics without notice; and

(iv) the Defendants' officials would change language requirements without notice;

which resulted in the denial of an LMOILMIA assessment for the Plaintiffs who applied for one, prior to the arbitrary rules were put in place, but before an assessment/decision could be made, which caused actionable damages for the Plaintiffs as set out in, and in accordance with *"Schedule F'* of the within Statement of Claim;"

[Group #7] "were eligible Provincial Nominee Program ("PNP") Applicants in Ontario who applied but, because of either illegal and *ultra vires* "quota" and inexplicable, illegal, and actionable delay by the Defendant Minister of Immigration, as well as superimposing and overriding provincial criteria and selection with irrelevant and *ultra vires* federal criteria, will not receive an answer to their application for their permanent residence, and will see removal proceedings against them before a decision can be made, thus causing actionable damages to these Plaintiffs as set out, and in accordance with *"Schedule G"* of the within Statement of Claim;"

[Group #8] "who qualify for the "PNP" Programme in Ontario but who, because of the illegal, arbitrary, and *ultra vires* Federal "quota" by the Defendant Minister of Immigration, as well as super imposing and overriding provincial criteria and selection with irrelevant and *ultra vires* federal criteria, will not be

> processed, and subject to removal proceedings prior to a decision and thus caused actionable damages to the Plaintiffs as set in, and in accordance with *"Schedule H"* of the within Statement of Claim;"

5 The plaintiffs submit that "the substantive issues" in this motion have been dealt with by the court in Cabral et al v Canada (Minister of Citizenship and Immigration) et al, T-2425-14, which is referred to as "the companion case" and they argue that the basis of the within motion is "virtually indistinguishable, in law, and that the within motion to strike ought to be dismissed, as was largely the case in T-2425-14."

6 I agree with the defendants that the ruling on the motion to strike in T-2425-14 is of limited assistance in deciding the within motion because the subject matter of the actions are significantly different. I also agree with the defendants that the ruling in T-2425-14 is relevant in two respects: (i) whether the motion should be heard orally rather than in writing, and (ii) with respect to the plaintiffs' challenge to section 49 of the *Federal Courts Act* which bars jury trials should be struck. For the reasons given in T-2425-14, I find that this motion may be properly disposed of in writing pursuant to Rule 369 of the *Federal Courts Rules*, and that the allegation challenging section 49 of the *Federal Courts Act*, must be struck from the Statement of Claim.

7 The defendants submit that the plaintiffs, as TFWs, are "without standing with respect to claims concerning the processing of applications for [LMO/]LMIAs and thus paragraphs 2(a)-(f) and 6(a)-(f) do not disclose a reasonable case of action." It is accurate, as the defendants plead that LMOs and LMIAs are applied for and issued to employers, not the workers hired under them. However, it is not plain and obvious that a worker cannot be adversely affected by the failure or delay of Canada to issue a LMO or LMIA to a prospective employer which would have permitted the worker to be hired. On the other hand, it is unclear to the court that the claim, as currently drafted, pleads that all or any of the plaintiffs would have been hired as temporary workers had these documents been issued.

8 I am far from convinced that it is plain and obvious that none of these plaintiffs have a possible claim against the defendants; however, as presently drafted, the Statement of Claim cannot stand. The Statement of Claim suffers from a number of deficiencies that cannot be cured simply by striking its offensive parts for what would remain would not make sense. These deficiencies include the following:

1. The plaintiffs have not responded to what appears to be an accurate submission by the defendants that "the title of the proceeding lists 236 plaintiffs but upwards of 90 are listed twice [and] seven plaintiffs appear multiple times with names spelled in different ways making it unclear whether they are duplicate or different plaintiffs." This must be corrected in order that the defendants know who is bringing the action and without that information they are unable to mount much if any specific defence.
2. The Schedule "B" plaintiffs are described in paragraph 2(b) as having been denied permits but in Schedule "B" the plaintiffs are described as having been denied "LMIAs". This inconsistency must be resolved.
3. The Schedule "A" plaintiffs are described as having been denied LMIAs, but in Schedule "A" the plaintiffs list the dates they applied for work permits, which is not relevant to the claim these plaintiffs are advancing. Again, this must be resolved.
4. "In paragraph 12(a), the plaintiffs make passing reference to a 'criminal law duty of care, under s. 126 of the Criminal Code" [but] no facts are pleaded in respect of this claim, nor is this alleged duty of care otherwise referenced in the pleading." Absent such particulars, this pleading should be struck.

9 The defendants submit that "the plaintiffs plead no material facts supporting a claim that delays in the processing of applications for LMIAs are actionable." The plaintiffs plead that there were delays in processing the LMOs and LMIAs and that those delays were "inordinate, inexplicable and actionable." I do not accept, as the defendants suggest, that the claim must set out the dates of application, the date of denial, and the processing time that passed. Those facts can be discovered through a demand for particulars if the information is not otherwise available

to the defendants. It is not necessary for the purposes of pleading. On the other hand, the plaintiffs must plead more than mere delay. Without pleading the basis for its assertion that there was a delay (such as comparing the processing time to an average, or basing the processing on some specific direction or policy), the defendants cannot respond.

10 I agree with the defendants that the plaintiff s' pleading that they have been or will be denied permanent resident visas owing to 'quotas', 'delays', and 'ultra-vires federal criteria' is far too general. The plaintiffs must plead material facts to establish the alleged quota, delay and ultra-vires claims, and plead facts the support the allegation that they have been or will be denied permanent resident visas to which they would otherwise be entitled.

11 I agree with the defendants that the "plaintiffs allege certain Ministerial instructions, policies, compliance orders, rules, quotas, and 'federal criteria' are 'illegal and ultra-vires'" without specifically identifying them or stating how they are illegal or ultra-vires. Absent this information, the pleading is deficient as it lacks material facts necessary for the defendants to respond to the allegation.

12 The Statement of Claim, insofar as it makes allegations relating to TFWP, LMIAs, the PNP, the Federal Skilled Workers Program, the Federal Trades Program, work permits, permanent residence visas, compliance orders, assessments of labour shortages, and the food-services moratorium of 2014, is deficient because there are no facts or insufficient facts pled to permit the defendants and the court to understand the bases of these claims. I agree with the defendants that these pleadings are "neither complete nor intelligible."

13 I further agree with the defendants that it appears that part of this claim, as it relates to the plaintiffs in T-2425-14, is duplicative. If so, and to that extent, it is improper.

14 These irregularities and material deficiencies are sufficient, in the court's view, to strike the Statement of Claim in its entirety; however, because there may be an actionable claim by some of these plaintiffs, they will be granted leave to file a Fresh Statement of Claim within sixty (60) days that conforms to these reasons, failing which the claim will be dismissed.

ORDER

THIS COURT ORDERS that:

1. The Statement of Claim is struck in its entirety;
2. The plaintiffs are granted leave to file a Fresh Statement of Claim within sixty (60) days of this Order that complies with the Reasons provided, failing which the action will be dismissed; and
3. Costs are in the cause.

ZINN J.

Gill v. Maciver, [2022] O.J. No. 1018

Ontario Judgments

Ontario Superior Court of Justice

E.M. Stewart J.

Heard: September 27-29, 2021.

Judgment: February 24, 2022.

Court File No.: CV-20-652918-0000

[2022] O.J. No. 1018 | 2022 ONSC 1279

Between Dr. Kulvinder Kaur Gill and Dr. Ashvinder Kaur Lamba, Plaintiffs, and Dr. Angus Maciver, Dr. Nadia Alam, André Picard, Dr. Michelle Cohen, Dr. Alex Nataros, Dr. Ilan Schwartz, Dr. Andrew Fraser, Dr. Marco Prado, Timothy Caulfield, Dr. Sajjad Fazel, Alheli Picazo, Bruce Arthur, Dr. Terry Polevoy, Dr. John Van Aerde, Dr. Andrew Boozary, Dr. Abdu Sharkawy, Dr. David Jacobs, Tristan Bronca, Carly Weeks, The Pointer, The Hamilton Spectator, Société-Radio Canada, the Medical Post, Defendants

(318 paras.)

Counsel

Rocco Galati, for the Plaintiffs.

Howard Winkler and Eryn Pond, for the Defendant Dr. Angus Maciver.

Julian Porter, for the Defendant Nadia Alam.

Jaan Lilles and Katie Glowach, for the Defendants Dr. David Jacobs, Dr. Alex Nataros, Dr. Abdu Sharkawy, Dr. Nadia Alam and Dr. Michelle Cohen.

Susan Toth, for the Defendant Dr. John Van Aerde.

Andrea Gonsalves and Caitlin Milne, for the Defendant Dr. Andrew Fraser.

Alex Pettingill, for the Defendants Dr. Ilan Schwartz, Dr. Marco Prado, Timothy Caulfield and Dr. Sajjad Fazel.

Timothy Flannery, for the Defendant Dr. Terry Polevoy.

Daniel Iny and Melanie Anderson, for the Defendant Dr. Andrew Boozary.

Meredith Hayward and Michael Binetti, for the Defendants Tristan Bronca and The Medical Post.

Brian Radnoff and David Seifer, for the Defendant The Pointer Group Incorporated.

Andrew MacDonald, Carlos Martins and Emma Romano, for the Defendants André Picard and Carly Weeks.

George Pakozdi, for the Defendant Alheli Picazo.

Emma Carver, for the Defendant Bruce Arthur.

REASONS FOR DECISION

E.M. STEWART J.

Nature of the Motions

1 The Plaintiffs have initiated proceedings as against these more than 20 Defendants and claim damages in the aggregate of approximately $12,000,000.00 for defamation and other purported causes of action.

2 The Defendants have brought these several motions pursuant to s. 137.1 of the *Courts of Justice Act* ("CJA"), R.S.O 1990, c C.43. Section 137.1 allows for the dismissal by judicial order of a proceeding that limits debate on matters of public interest. These motions are more commonly referred to as "anti-SLAPP" motions. A SLAAP refers to a strategic lawsuit against public participation, a characterization which the Defendants argue aptly attaches to the proceedings brought against them.

3 The Plaintiffs argue that the motions do not satisfy the test for dismissal at this early stage and therefore submit that the relief requested by the Defendants should not be granted.

4 The most relevant portions of Section 137.1 of the CJA provide as follows:

> **Dismissal of proceeding that limits debate**
>
> **Purposes**
>
> 137.1 (1) The purposes of this section and sections 137.2 to 137.5 are,
>
> (a) to encourage individuals to express themselves on matters of public interest;
>
> (b) to promote broad participation in debates on matters of public interest;
>
> (c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and
>
> (d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action. 2015, c. 23, s.3.
>
> **Definition, "expression"**
>
> (2) In this section,
>
> "expression" means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity. 2015, c. 23, s. 3.
>
> **Order to dismiss**
>
> (3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest. 2015, c. 23, s. 3.
>
> **No dismissal**
>
> (4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,
>
> (a) there are grounds to believe that,
>
> (i) the proceeding has substantial merit, and

(ii) the moving party has no valid defence in the proceeding; and

(b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression. 2015, c. 23, s. 3.

5 It is not disputed that the tort of defamation is governed by a well-established test requiring that three criteria be met:

(a) that the words complained of were published, meaning that they were communicated to at least one person other than the plaintiff;

(b) the words complained of referred to the plaintiff; and

(c) the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person.

6 Even if the definition of defamation is met, a defendant may have several defences to rely on to escape liability. These include justification, fair comment, qualified privilege and responsible journalism (see: *Grant v. Torstar Corp.*, 2009 SCC 61).

7 In order to properly consider the issues raised by a motion brought pursuant to s. 137.1 evidence may be filed by the parties to provide background and context to an impugned statement as well as to establish the chances of success of the claims and any available defences.

8 Subsections 137.1(3) and (4) of the CJA set out a two-part test for a motion to dismiss an action on this basis. First, the defendant has the onus of showing that the plaintiff's proceeding arises from an expression that "relates to a matter of public interest". If the defendant meets that threshold, the court must dismiss the action unless the plaintiff satisfies the court that there are grounds to believe the proceeding has substantial merit, that there are grounds to believe that the defendant has no valid defence, and that the harm suffered by the plaintiff is sufficiently serious such that the public interest in allowing the proceeding to continue outweighs the public interest in protecting that expression.

9 It is instructive to repeat that, once it has been established by the Defendants that the impugned communication relates to a matter of public interest, the burden on these motions rests on the Plaintiffs to establish that there is substantial merit to each of their claims.

10 The three factors that comprise the plaintiff s onus to meet the second branch of the test are conjunctive. If the plaintiff fails to meet the onus on any one of those three requirements, the action must be dismissed.

11 The Supreme Court of Canada has considered the test for dismissal under s. 137.1 and has expressed views on issues related to the approach to be applied thereunder in two recent decisions: *1704604 Ontario Ltd. V. Pointes Protection Association*, 2020 SCC 22 and *Bent v. Platnick*, 2020 SCC 23.

12 In *Pointes Protection*, "substantial merit" was defined as a real prospect of success. The requirement was further refined in *Bent v. Platnick* as demonstrating a prospect of success that need not be demonstrably likely, but one that weighs more in favour of the plaintiff.

13 Substantial merit has been described as a more demanding standard than that applicable on a motion to strike a claim pursuant to Rule 21 of the *Rules of Civil Procedure* for failure to disclose a cause of action. Accordingly, more than merely some chance of success is required. In *Bent v. Platnick*, was stated (at para. 49):

> ...for an underlying proceeding to have "substantial merit", it must have a real prospect of success -- in other words, a prospect of success that, while not amounting to a demonstrated likelihood of success, tends to weigh more in favour of the plaintiff. In context with "grounds to believe", this means that the motion judge needs to be satisfied that there is a basis in the record and the law -- taking into account the

stage of the proceeding -- for drawing such a conclusion. This requires that the claim be legally tenable and supported by evidence that is reasonably capable of belief.

14 In *Bent v. Platnick*, the Court went on to state (at paras 87 and 88):

> In *Pointes Protection*, this Court clarifies the fact that unlike s. 137.1(3), which requires a showing on a balance of probabilities, s. 137.1(4)(a) expressly contemplates a "grounds to believe" standard instead: para.35. This requires a basis in the record and the law - taking into account the stage of the litigation - for finding that the underlying proceeding has substantial merit and that there is no valid defence.
>
> I elaborate here that, in effect, this means that any basis in the record and the law will be sufficient. By definition, "a basis" will exist if there is a single basis in the record and the law to support a finding of substantial merit and the absence of a valid defence. That basis must of course be legally tenable and reasonably capable of belief. But the "crux of the inquiry" is found, after all, in s. 137.1(4)(b), which also serves as a "robust backstop" for protecting freedom of expression.

15 The "crux of the inquiry" therefore is the balancing exercise required by s. 137.1(4)(b) which involves a weighing of the seriousness of the harm to the Plaintiffs as a result of the expressions of the Defendants and the public interest in permitting the proceeding to continue, versus the public interest in protecting the expression.

16 Having considered the submissions made on behalf of the parties, having applied the provisions of the legislation referred to above which govern the determination of the issues in light of the principles and considerations articulated by the Supreme Court of Canada in the authorities noted above, for the reasons that follow I find that an application of the test under s. 137.1 to each claim, including the allegations of "negligence" and "conspiracy" (which are nothing but dressed-up and unsubstantiated variations of the central claims of alleged defamation), must result in a dismissal of all claims.

17 I also conclude that these claims are precisely ones that are of the kind that s. 137.1 is designed to discourage and screen out.

The Plaintiffs

18 The Plaintiff Dr. Kulvinder Kaur Gill ("Dr. Gill") is a medical doctor practising at an allergy, asthma and clinical immunology clinic with locations in Brampton and Milton, Ontario. Dr. Gill has been a member of the Ontario Medical Association ("OMA") Governing Council and transparency of the OMA and the harm of escalating cuts to frontline health care. She is a founding member and leader of Concerned Ontario Doctors ("COD") which operates in part as a platform for the expression of her views.

19 The undisputed evidence on the motion plainly shows that Dr. Gill is not afraid to voice unpopular views or to court controversy.

20 Dr. Gill also is a frequent commentator on issues related to the Covid-19 pandemic and does so frequently on her Twitter account which has attracted more than 63,000 "followers".

21 Accordingly, in addition to her campaign of attack on the OMA and its leadership, Dr. Gill has been an outspoken critic of prevailing public health advice on how to prevent or slow Covid-19 infection from spreading throughout the community, using social media platforms including Twitter to disseminate her controversial views. In doing so, Dr Gill has suggested that the risks posed by the Covid-19 virus are exaggerated, vaccines are unnecessary, lockdowns are illogical, and hydroxychloroquine is an effective treatment for infection caused by the virus.

22 Dr. Gill has been formally and publicly cautioned by the College of Physicians and Surgeons of Ontario against using her position as a physician to bolster her dissemination of such misleading information which contradicts the positions advocated by public health authorities in Ontario and Canada. The prohibition contained in the *Regulated*

Health Professions Act against use in a civil proceeding of documents or details of the College's investigation requires that no further mention or consideration of same enter into the deliberations required by these motions.

23 The Plaintiff Dr. Ashvinder Kaur Lamba ("Dr. Lamba") is a medical doctor practising as a physician at a long-term care home and a retirement home in Etobicoke, Ontario and is an addiction physician in Thornhill, Ontario. She also has a family practice in Brampton. Dr. Lamba is a former OMA delegate and member of the OMA Governing Council and is now Secretary of the Board of COD.

24 Dr. Lamba is to some extent a secondary protagonist with respect to the advancement of these claims which, in large part, arise out of matters in which Dr. Gill is the central figure. Dr. Lamba did not swear or file an affidavit in response to these motions. She asserts her claims only as against two of the Defendants and only with respect to allegations relating to statements said to have been made concerning her OMA activities and positions.

25 The multi-million dollar claims for damages made by both Plaintiffs are for reputational damage only, although each Plaintiff continues to be active in their professional organization and affairs and to practise medicine unimpeded in Ontario. As will be referred to below, the Plaintiffs have advanced very little basis for demonstrating that they or their reputations have been damaged as a result of the statements or conduct of any of the Defendants.

The Defendants

26 The Defendant Dr. Angus McIver ("Dr. McIver") is an elderly physician who holds no leadership position in the OMA. He has a primary Twitter account ("@smootholdfart") with 1206 followers, and a now-deleted secondary Twitter account ("@vitomaciver") which had been used mainly for posting photos of his dog.

27 The Defendant Dr. Nadia Alam ("Dr. Alam") is a medical doctor practising as a family physician and anaesthetist in Ontario and is a Board Director of the Halton Hills Family Health Team. Dr. Alam has been and remains active in the OMA. From 2017-2020 she was a member of the Board of Directors of the OMA and was OMA President during 2018-2019. Dr. Alam is represented by two separate counsel in connection who separately address the two categories of allegations the Plaintiffs have made against her.

28 The Defendant Dr. David Jacobs ("Dr. Jacobs") is a physician specializing in diagnostic radiology in Toronto. Dr. Jacobs is a leader in his specialty associations and professional governing bodies.

29 The Defendant Dr. Alex Nataros ("Dr. Nataros") is a family physician practising medicine in British Columbia. Dr. Nataros is a recipient of the Leadership and Advocacy Award of the College of Family Physicians of Canada.

30 The Defendant Dr. Michelle Cohen ("Dr. Cohen") is a family physician in Brighton, Ontario who is a public advocate on health policy issues, having published articles in various newspapers and periodicals on health policy topics.

31 The Defendant Dr. John Van Aerde ("Dr. Van Aerde") is a specialist in paediatric medicine. Although now retired from clinical practice, Dr. Van Aerde remains active in various medical associations, medical education institutions as well as the Canadian Medical Association.

32 The Defendant Dr Andrew Fraser ("Dr. Fraser") is a tenured professor at the University of Toronto Donnelly Centre for Cellular and Biomedical Research. He conducts research on genetic models of development and disease, and has significant training and experience in pathology and statistical analysis.

33 The Defendant Dr. Ilan Schwartz ("Dr. Schwartz") is a physician with a subspecialty in infectious diseases, employed by the University of Alberta and the Alberta Health Services. Dr. Schwartz was involved in clinical trials of the use of hydroxychloroquine that were among the many such research investigations that showed it to be an ineffective treatment for Covid-19 infection.

34 The Defendant Dr. Marco Prado ("Dr. Prado") is a professor at Western University with an established expertise in biochemistry and immunology.

35 The Defendant Timothy Caulfield ("Caulfield") is a health policy and health sciences professor at the University of Alberta's Faculty of Law and School of Public Health whose research has dealt with misinformation in the context of health care and Covid-19.

36 The Defendant Dr. Sajjad Fazel ("Dr. Fazel") is a post-doctoral associate at the University of Calgary and also holds a Masters Degree in Public Health.

37 The Defendant Dr. Terry Polevoy ("Dr. Polevoy") is a retired family physician who is an active leader within various medical associations, including associations of physicians in his area of practice and provincial associations. Dr. Polevoy is active on social media, primarily through his Twitter account where he frequently shares information, opinions and news stories on a variety of subjects including politics and health care.

38 The Defendant Dr. Andrew Boozary ("Dr. Boozary") is a physician in Toronto and the Executive Director of Population Health and Social Medicine at the University Health Network.

39 The Defendant Dr. Abdu Sharkawy ("Dr. Sharkawy") is a physician with a specialization in infectious diseases and internal medicine. He routinely speaks in public and using his Twitter account to educate members of the public on health and medicine matters.

40 The Defendant The Medical Post publishes both a print magazine and an online newspaper for Canadian physicians. The online newspaper is published daily and is only available to registered users or subscribers.

41 The Defendant Tristan Bronca has worked with the Medical Post and has become familiar with the scientific literature on hydroxychloroquine showing it is not an effective treatment for covid-19.

42 The Defendant The Pointer Group Incorporated ("The Pointer") is a paid subscription-bases digital-only media platform that provides locally-focused news in the Peel and Greater Toronto Regions.

43 The Defendant André Picard ("Picard") is the Staff Senior Health Columnist for The Globe and Mail where he has worked since 1987. Picard reports and writes on health and health care issues. He is the author of six books on health-related subjects and speaks publicly on frequent occasions on such matters, also using a Twitter account for that purpose.

44 The Defendant Carly Weeks is a Health Reporter for The Globe and Mail where she has been a staff writer since 2007. She writes and often speaks publicly on health-related topics and additionally uses a Twitter account for that purpose.

45 The Defendant Alheli Picazo ("Picazo") is a freelance writer who primarily covers the topics of politics and health. She uses Twitter for this purpose and often tweets about the Covid-19 pandemic and related issues.

46 The Defendant Bruce Arthur ("Arthur") is a columnist at the Toronto Star. He uses his Twitter account to express personal views and concerns on a variety of topics, including the Covid-19 pandemic.

47 The Plaintiffs have discontinued their action as against the Defendants The Hamilton Spectator and Societe-Radio Canada.

Preliminary Observations

48 As can be seen from the above descriptions of the Defendants, the Plaintiffs have brought these proceedings

against more than 20 individual physicians, academics, medical and scientific experts, and journalists as well as against publications that have and continue to provide valuable information to the public about Covid-19.

49 In the motions before the Court, the Defendants seek to avail themselves of a provision enacted by the legislature that is intended to operate as a shield against anyone seeking to stifle debate on issues that are of interest to the public. The ultimate issue before me is whether these claims are such that they should be dismissed on that basis at this early stage.

50 The provision under which the Defendants move for orders dismissing the claims against them is not the first or the only available recourse by which a proceeding may be terminated or curtailed by the courts when appropriate. For instance, Rules 2.1.01, 20 and 21 establish bases upon which proceedings may be dismissed or adjudicated upon short of any full trial. No one has an absolute and unfettered right to pursue any civil claims through to full trial and judgment without confronting a possible roadblock that may bring the proceedings to a halt.

51 One may well wonder about the motives of these full-time physicians who remain active in what might fairly be described as the politics of their professional associations in bringing proceedings seeking staggering money judgments against such a broad array of persons whom they claim to perceive as having injured their reputations. The sheer variety of their targets and the magnitude of their claims set them up to be examined pursuant to s. 137.1.

52 Because there are so many claims made in these proceedings against so many Defendants, and so many arguments and defences advanced by them, applying the test on each of the motions brought on their behalf is a daunting task. However, it does appear that the claims can be grouped generally into 2 categories: those that arise out of statements made by some Defendants in the context of an OMA dispute, and those that arise out of or were provoked by the controversial views expressed by Dr. Gill about pandemic-related matters.

53 In dealing with the substance of these various motions, I may repeat the same positions taken by various parties, or make liberal reference to those parts of the written submissions that have been filed on behalf of some parties as well as the rationales for those arguments as advanced.

54 In several instances, some Defendants have sought to avail themselves of more than one available defence. As will be seen below, I consider it unnecessary to determine to any full extent or comment upon the defences of justification that have been asserted because I consider that the additional defences of fair comment, responsible journalism and/or qualified privilege offer full defences to the claims and therefore no entry into what may be (at its highest) an arbitration of matters of scientific debate is necessary. By declining to do so, I do not purport to suggest that the opinions of the Plaintiffs are of equal persuasive merit to those views expressed by the Defendants, but only that a thorough evaluation of them for the purposes of these motions is not strictly required.

55 As a general observation, counsel for the Plaintiffs has urged the Court to agree that it must adopt a fairly narrow approach to the s. 137.1 analysis referred to herein, must avoid drawing any inferences, and must not arrive at any conclusions based on a qualitative assessment of the evidence tendered by the parties.

56 In my opinion, to adopt an overly-rigid and narrow approach to the analysis of the material filed in this case would be to ignore the stated purpose of the legislation as well as the "crux of the inquiry" and "robust backstop" descriptions employed by the Supreme Court of Canada to describe the balancing process that is designed to protect, in appropriate cases, freedom of expression on matters of public interest from the chilling prospect of litigation.

57 Having said that, the material filed by the parties is such that it requires very little or nothing by the way of credibility assessments to dispose of the motions. Rather, the expressions or conduct of the Defendants that are the subject of the action are basically not in dispute. The critical task is to determine if they are protected when the analysis established by s. 137.1 is applied. Having carefully considered the evidence and arguments put forward by

the Plaintiffs, I nevertheless am of the opinion that the expressions complained of attract the protection that a s. 137.1 analysis permits.

58 For greater clarity, I view all of the expressions or statements complained of by the Plaintiffs to have been made on matters of public interest. The test required by s. 137.1 has been applied to each in order to determine the appropriate result. In each case, I should be taken to have accepted and adopted fully the submissions advanced on behalf of each of the Defendants.

The OMA Dispute Claims

A. Dr. MacIver

59 Section 137.1 places an initial burden, which is purposefully not an onerous one, on a defendant to satisfy the motion judge that the proceeding arises from an expression that relates to a matter of public interest. At this first stage of the s. 137.1 analysis, it is not legally relevant whether the expression is desirable or deleterious, valuable or vexatious, or whether it helps or hampers the public interest. The only question is whether the expression pertains to any matter of public interest, defined broadly.

60 The expression in the action brought against Dr. Maciver concerns tweets published by him on his Twitter feed in September 2018. In its entire context, Dr. Maciver's expression pertains to the public debate about the OMA sparked by the Plaintiffs and their physician advocacy organization COD on Twitter and their blocking of physicians who do not agree with their views.

61 When Dr. Maciver published his tweets, the Plaintiffs through COD had been engaged in ongoing, serious and inflammatory attacks on the OMA and its leadership on Twitter and on other platforms. These attacks included allegations of fraud and corruption. Dr. Maciver wanted to respond to the Plaintiffs' Twitter attacks directly on their Twitter feeds that was the site of the public conversation but could not do so because the Plaintiffs had blocked him and others from engaging with them on Twitter.

62 Frustrated by the Plaintiffs' blocking of him, Dr. Maciver tweeted the words complained of on his own Twitter feed. In his initial tweet, which is the primary subject of this litigation as against him, Dr. Maciver used some rather offensive name-calling towards the Plaintiffs. He deleted this tweet within days after posting it.

63 The following facts provide context to Dr. Maciver's expression:

(a) Prior to and at the time of the publication of the words complained of, there was significant interest in Ontario and, in particular, within the Ontario medical community concerning the contract negotiations between the Government of Ontario and the OMA, on behalf of Ontario physicians.

(b) Since its formation, COD has taken positions critical of and has attacked the OMA and its leadership. The Plaintiffs, as leaders of COD, have a "lack of confidence in the integrity, fairness, accountability and transparency of the OMA." Dr. Maciver is one of the many OMA physicians who strongly oppose COD's and the Plaintiffs' ongoing attacks on the OMA.

(c) In October 2017, Dr. Maciver replied to a COD tweet, expressing his ongoing disappointment in COD "continuing to fragment the profession in Ontario." Soon after his fairly benign expression of disappointment, the Plaintiffs blocked him from posting on their Twitter account.

(d) The Plaintiffs also have blocked the Twitter accounts of other physicians who appeared to dissent from their political views concerning the OMA.

(e) Prior to the publication of the words complained of, the Plaintiffs used Twitter to criticize the OMA and its leadership. These criticisms included allegations of fraud and corruption. Some examples of this are as follows:

* OMA=toxic culture of misogyny, bullying & intimidation

* None of them are held to account for their lies, unethical conduct, and bullying & intimidation of frontline MDs

* Corrupt OMA's hypocrisy on Full Display

* We will be fully united once we truly revamp the OMA. But that can only happen once it's dismantled, the vermin scurries out...

* The following is the epitome (so far) of the egregiousness of this organization and its so called "leaders" - how disgusting can they get?

* Instead, corrupt OMA's implementing draconian Code of Conduct to silence MDs

* ...undemocratic OMA passed Part 1 of 2 Part Code of Conduct to silence MDs from exposing unethical conduct

* LAME DUCK OMA...Incoming OMA Pres Nadia Alam was NEVER elected by membership

* Of course, the corrupt OMA rewards its unethical "leaders" with accolades and rewards. One word: karma.

* Unbelievable hypocrisy on display

* The corrupt OMA is taking extreme measures to muzzle your doctors...

64 Leading up to the publication of his impugned tweets in September 2018, Dr. Maciver became increasingly frustrated by the Plaintiffs' attacks on the OMA and, in particular, their attacks on the honesty and integrity of its leadership. Dr. Maciver believed the Plaintiffs' attacks were very serious charges which called for debate and response on the main forum in which they were being made, i.e. the Plaintiffs' Twitter feeds. Because the Plaintiffs had blocked Dr. Maciver, he could not respond directly to them.

65 On September 4, 2018, Dr. Maciver lost his temper over the Plaintiffs' ongoing conduct and what he viewed as the inflammatory positions they were taking on behalf of COD. Dr. Maciver reacted on his @smootholdfart account about being blocked by the Plaintiffs on Twitter. He made further tweets from his @vitomaciver account the same day and on September 8, 2018. From the outset, the primary focus of the Plaintiffs' complaint and this action against Dr. Maciver concerns the words "corksoakers" and "twats" published in the initial smootholdfart tweet.

66 In its entire context, Dr. Maciver's expression pertains to the public debate about the OMA sparked by the Plaintiffs and COD on Twitter and their blocking on Twitter of physicians who dissent from their inflammatory views.

67 I am of the opinion that the impugned communications authored by Dr. Maciver were on a matter of public interest.

68 In terms of referencing the Plaintiffs in the initial @smootholdfart Tweet, Dr. Maciver understood Dr. Gill and Dr. Lamba to be the public faces of COD on Twitter. This is the only reason he referenced them.

69 The law is clear that people have no legal duty to "always be calm, cool, kind, gentle and polite." It has long been recognized by courts that "there is a distinction between actionable defamation and mere obscenities, insults and other verbal abuse" and "[t]he courts cannot award damages in favour of the victims of empty threats, insulting words or rudeness" (see: *Langille et al v. McGrath*, 2000 CanLII 46809).

70 The law tolerates such speech not only as an expression of free speech in a free society but also as a safeguard against our court system being flooded with litigation.

71 It is clear from the words complained of and the overall context in which they were published on Twitter that Dr. Maciver was communicating his disapproval of the conduct of the Plaintiffs. The offensive language used by him is pure name-calling, and not defamation.

72 Although some of the language used by Dr. Maciver on Twitter may have been unprofessional and ill-advised, the words complained of are not defamatory and therefore not actionable. There is an important distinction in the law of defamation between words that are actionable for being defamatory and words that merely contain insults and are not actionable. Freedom of speech would be seriously curtailed if insulting comments, which have caused no harm to reputation, were actionable for being defamatory (see: *Diop v. Transdev Dublin Light Rail*, 2019 IEHA 849).

73 On multiple occasions, Dr. Maciver has apologized to the Plaintiffs both publicly and privately and shown contrition for the heated language he used on Twitter. The fact of Dr. Maciver's apologies was also made known within the physician community on Twitter.

74 On September 7, 2018, the Plaintiffs published a Facebook post to COD's many followers which referred to Dr. Maciver's "vulgarity" and repeated the allegedly offending language. In the post, the Plaintiffs wrongfully claimed that Dr. Maciver called them "cock sucking cunts" and further incorrectly told their readers that Dr. Maciver made his tweets as a leader of the OMA.

75 Any reputational harm to the Plaintiffs purportedly caused by Dr. Maciver's expression is evidently of very low magnitude, if any has actually occurred.

76 Dr. Gill offered no evidence of any harm arising from Dr. Maciver's briefly published expression, other than vague, unparticularized statements. In fact, it is her own evidence that she remains "a highly regarded member of [her] profession." Dr. Lamba has not seen fit to tender evidence on this motion to describe the alleged harm that she claims to have suffered.

77 Even if for the purposes of this motion the words complained of are found to be defamatory of the Plaintiffs and that some general damages to their reputation are therefore to be presumed, then the record before me supports a conclusion that any damages suffered are likely to be assessed as merely nominal and insufficient to warrant continuation of this proceeding.

78 An application of the s. 137(4)(b) "crux of the matter" analysis therefore requires a dismissal of the Plaintiffs' claims against Dr. Maciver. For the reasons he asserts, the public interest in protecting Dr. Maciver's right to speak out on a matter of public interest outweighs any considerations that might otherwise favour allowing the action against him to continue.

79 Accordingly, the relief requested by Dr. Maciver is hereby allowed and the action against him is dismissed.

B. Dr. Alam and the Medical Post

80 In 2018 Dr. Alam was President of the OMA. The Plaintiffs objected to what they described as Dr. MacIvor's vulgarity and demanded via Facebook that the OMA and Dr. Alam censure him.

81 Dr. Alam was then called upon to comment on this situation by members of the OMA as well. As such, Dr. Alam has raised a very strong defence that her response was written on an occasion of qualified privilege in furtherance of her duties to communicate to OMA membership and to respond to what may fairly be described as an attack upon her and the OMA by the Plaintiffs.

82 The basic elements of the attack by the Plaintiffs may be seen in a statement published by the Plaintiffs on their Facebook page which states, in part:

> We are your Ontario Doctors
>
> September 7, 2018
>
> #METOOMEDICINE & THE TOXIC ONTARIO MEDICAL ASSOCIATION-PART 1

> A glimpse of OMA's toxicity. This is what we and frontline MDs are subjected to in private by the Ontario Medical Association (OMA) "leaders" and staff. Now one of the OMA's "leaders" feels so empowered that he now publicly makes his racist, sexist and misogynistic comments on Twitter. Slang for "cock sucking cunts".
>
> This vulgarity is from Dr. Angus Maciver: The OMA's "distinguished leader"
>
> who was awarded "OMA Life Member Award" for his ongoing 20 years on the corrupt OMA Council, currently as President of the Perth County Medical
>
> Society and previously as the Chair of the OMA Section of General Surgery. He is also a "leader" of the Ontario Association of General Surgeons, a former Royal College of Canada examiner and former University of Western Ontario Schulich School of Medicine faculty.
>
> This is the "new", "reformed" and "progressive" OMA. OMA; its leaders never practice what they preach and either repeatedly engage in, encourage or turn a blind eye to such disgusting behaviours. This is the toxic and pervasive culture at OMA's corrupt core.
>
> ... This is the toxic and pervasive culture at the OMA's corrupt core. In the past 72 hrs, not a single OMA "leader", medical "leadership" organization or
>
> "feminist" advocacy "leader" has condemned this OMA "leader". Silence of
>
> acceptance has followed Maciver's vulgarity. It is unacceptable that still in 2018, it is not the vulgarity of comments or actions that evoke condemnation, but rather the privileged status of the harasser that evoke silence, and even worse, further empowerment of the harasser by those who witnessed it.
>
> The OMA is a toxic and self-serving organization that is corrupt to its core...
>
> As a young, visible minority, female Canadian frontline MDs, fighting the corrupt establishment that is the OMA has felt akin to battling Goliath. But we are empowered by the truth and driven by knowing we are fighting for the future of Ontario's healthcare and for you: our patients and our colleagues.
>
> ... We demand action from the Ontario Government NOW: a prompt, full independent forensic review of the corrupt OMA.
>
> -Dr Kulvinder Gill, President - Concerned Ontario Doctors
>
> -Dr. Ashvinder Lamba, Board Director - Concerned Ontario Doctors
>
> #exposcoma #carenotcuts #onpoli #onhealth #cdnhealth #healthcare #cdnpol #sexism #racism #misogyny FordNation Christine Elliott Robin Martin Effie Triantafilopoulos Ontario PC Party Andrea Horwath Ontario NDP

83 On September 8, 2018, after the Plaintiffs posted their statement on Facebook, some OMA members formed the mistaken belief that Dr. Maciver had been speaking on behalf of the OMA or that he was an OMA staff member when he posted the tweet referred to.

84 Dr. Alam consulted with senior management and staff of the OMA and it was agreed that she should contact Dr. Maciver in order to encourage him to apologize for what he had reportedly said, and Dr. Alam did so. Dr. Maciver advised that he had tried and would continue trying to resolve the dispute.

85 On September 9, 2018, Drs. Gill and Lamba posted a further statement on Facebook, a partial transcript of which is as follows:

> We are Your Ontario Doctors
>
> September 9, 2018
>
> #Metoomedicine & the toxic Ontario medical association-part 2
>
> ... We have never spoken to or interacted with OMA's decorated leader, Dr. Angus Maciver, in our personal or professional lives. We have never interacted with him ever on any social media platform. But he has now

> forced himself into our lives. Six days ago, this OMA leader felt so empowered that he directly attacked the only two young, female, visible minority MDs on the entire Board of Concerned Ontario Doctors, using slang to call us "cock sucking cunts" on Twitter as other OMA leaders enabled and encouraged him. There was no apology. There were no condemnations from any of the OMA leaders or any of the many medical leadership organizations he is affiliated with. All these medical "leaders" condoned his toxic behavior and vulgarity with their silence. The OMA normalized it.
>
> ... What is most disturbing is that all of the OMA "leaders" remained silent publicly. Not a single OMA leader condemned their decorated leader for his overtly vulgar misogyny. Not one.
>
> ... The most disturbing was that after 6 days of silence, the OMA President Nadia Alam's response is to defend and empower him, validate his lies and attack us (see Picture 3 in comments below). The corrupt OMA, that MDs are forced to be members of and pay millions to for it to protect our "best" interests, defends the harasser and his professional misconduct. The OMA President Nadia Alam's first statement on Twitter came this morning (see Picture 4 in comments below), 6 days after the OMA leader's misogyny and only following mounting public pressure. Again Alam does not condemn him. she defends and empowers him, validates his lies and attacks us. This is failed leadership.
>
> This is the same OMA President who just months ago, on International Women's Day, said she was "grateful that brave women speak up to change culture from the ground up like #metoo" (see Picture 5 in comments below). Now Alam is attacking those "brave women" because it is the toxic and corrupt OMA that she is defending.
>
> The OMA President Alam's empowerment of the harasser comes as a selfproclaimed "feminist" & #metoo "advocate". Her response is deemed by the corrupt OMA to be the only word and is supposed to close the chapter. But it won't. Because #TimesUP. MDs have had enough of OMA's toxicity.
>
> ... As we have said before (Part 1: goo.gl/GFJ485), the OMA is a deeply corrupt, authoritarian, abusive and toxic organization. It is the biggest threat to the future of healthcare in ON and Canada. Ford's government must immediately undertake a fully independent forensic review of the OMA.
>
> -Dr Kulvinder Gill, President - Concerned Ontario Doctors
>
> -Dr. Ashvinder Lamba, Board Director - Concerned Ontario Doctors
>
> #exposcoma #carenotcuts #onpoli #onhealth #cdnhealth #healthcare #cdnpol #sexism #racism #misogyny FordNation Christine Elliott Robin Martin Effie Triantafilopoulos Ontario PC Party Andrea Horwath Ontario NDP

86 On Sunday September 23, 2018, Dr. Alam received an e-mail from Drs. Lamba and Gill sent to her official OMA e-mail address and to her personal e-mail account. The text of that e-mail reads as follows:

> Drs. Kulvinder Gill and Ashvinder Lamba are giving the Ontario Medical Association (OMA) and its President Dr. Nadia Alam one last opportunity to tell the truth and condemn Dr. Angus Maciver for his vulgar misogyny and harassment against them. Do the right thing. Otherwise, your lies will be exposed.

87 Section 25 of the *Libel and Slander Act* allows qualified privilege to apply on a matter of public interest between two or more people who have a direct interest in the matter, even if the communication is witnessed or reported on by media or other people.

88 Parenthetically, on November 7, 2018 the Plaintiffs filed complaints against Dr. Alam with the College of Physicians and Surgeons of Ontario and in 2019 with the Human Rights Tribunal of Ontario concerning these same grievances.

89 Once the Plaintiffs demanded that Dr. Alam respond publicly and accused her and the OMA of being corrupt the words of Dr. Alam complained of became a matter of public interest such as to satisfy s. 137.1(3) of the CJA and additionally were ones of special importance.

90 I agree that a defence of qualified privilege is therefore available to Dr. Alam and applies here.

91 Qualified privilege exists where a person making a communication has "an interest or duty (legal, social, moral, or personal) to publish the information in issue to the person to whom it is published" and the recipient has a "corresponding interest or duty to receive it". This privilege attaches to the circumstance, and not the communication. Where the occasion itself is found to be covered by qualified privilege, then a defendant may publish remarks that are perhaps untrue and defamatory (unless the dominant motive was malice) without liability therefor.

92 There has not been any evidence of malice led by the Plaintiffs to defeat the qualified privilege defence asserted by Dr. Alam.

93 Dr. Alam therefore has satisfied the test of having a valid defence. In their Statement of Claim, the Plaintiffs also allege that Dr. Alam was in breach of her "duty of care" to them and was negligent in her conduct. There can be no recognized duty of care in these circumstances of such strong criticism of Dr. Alam that would limit her ability to respond proportionately as was done here. These additional claims that have been alleged are, in reality, mere restatements of the claims for defamation and are likewise dismissed.

94 The Plaintiffs also allege that a quotation attributed to Dr. Alam that was published in the Medical Post was defamatory. Specifically, Dr. Alam's quote in the article was as follows:

> "I spoke to Dr. McIver [sic]. By then he had already apologized to the physicians on Twitter and over email. He is blocked by them so unclear if it got through. He agreed, there is no place for this type of language between colleagues. Ever."

95 On its face, I find that there is nothing defamatory about the impugned statement, a strong defence. The full article in which this statement appears is contained at paragraphs 10 and 11 of the Factum filed on behalf of the Medical Post. Seeing Dr. Alam's statement in context will simply undermine any possible assertion that it is defamatory.

96 The Plaintiffs failed to serve a libel notice or commence an action within the requirements of s. 5 of the *Libel and Slander Act* which constitutes an absolute bar to this action against the Medical Post, a similarly strong defence.

97 As noted above, the third and final step of the section 137.1 analysis is the heart of the test. This section requires a balancing of the public interest in allowing a harmed plaintiff to pursue litigation against the public interest in protecting expressions. This step has been described as a "robust backstop" that allows judges to dismiss claims even if they are technically meritorious. Even where a plaintiff can show their proceeding has substantial merit and the defendant has no valid defence, it may still be in the public interest to prioritize protecting the expression over allowing a plaintiff to pursue a cause of action despite the harm it caused. To make this determination, the harm to the plaintiff as a result of the expression is weighed against the public interest in protecting that expression.

98 To overcome this hurdle, the Plaintiffs must show 1) the existence of harm, 2) that the harm is linked to the expression, and 3) if harm is established and linked, that this linked harm is sufficiently serious to make it preferable to allow the proceeding to continue, rather than protecting the expression.

99 Harm includes both monetary and non-monetary damages. While the Plaintiffs do not need to establish the full details of the harm, nor to have it be monetized, they do have to provide evidence of the existence of the harm, or evidence from which a judge can draw an inference of likelihood in respect of the existence of the harm, as well as the relevant causal link. Bald assertions will not be sufficient.

100 As already noted, the Plaintiffs have not produced any evidence of harm suffered or to be suffered by them as a result of the words of which they complain.

101 Dr. Alam's statements in issue and the Medical Post article are of sufficient importance to satisfy the balancing test as set out in s. 137.1(4)(b). Dr. Alam's speech and the information in the article were necessary and valuable. An application of the balancing test results in a determination strongly in favour of these Defendants. As a result, the claims against Dr. Alam and, to the extent it is also a target of these claims, against the Medical Post must be dismissed.

The Covid-19 Claims

102 The Covid-19 claims arising out of statements made by the Defendants other than Dr. Maciver appear to be advance only by Dr. Gill. She has been very vocal in her criticism of how government officials and agencies and organizations like the World Health Organization ("WHO") have responded to the ongoing worldwide pandemic.

103 The bulk of the communications in this category occurred on the lively and rather unbridled platform of Twitter, and comprise what may be accurately described as a Twitter Storm.

A. André Picard and Carly Weeks

104 In early August 2020 Dr. Gill posted tweets in which she expressed her views on how society should respond to the pandemic. In the first, Dr. Gill said "we don't need a vaccine" for Covid-19, stating that those who had not figured this out were "not paying attention". In the second, she stated that society could "safely return to normal life now" with what she referred to as "#Humanity's existing effective defences against #COVID19", identified by her as "The Truth", "T-cell Immunity" and hydroxychloroquine ("HCQ").

105 Andre Picard, the Staff Senior Health Columnist for The Globe and Mail, tweeted on his Twitter account that he found it "quite shocking" that Dr. Gill would publicly state such opinions that were so contrary to the prevailing consensus among medical professionals, scientists, and public health officials.

106 Dr. Gill then attacked Picard by posting a tweet implying that he had no right to comment because of his lack of medical training and insinuating that he was advancing the so-called "political WHO narrative", apparently improperly influenced by his association with a charity established in memory of the late former Prime Minister Pierre Trudeau.

107 The other three tweets by Picard and the single tweet by Weeks complained of were posted in the flurry of Twitter activity that followed Dr. Gill's attack on Picard. These included tweets about the controversial use of HCQ to treat Covid-19, and others attacking Picard or expressing support for him.

108 Dr. Gill alleges that the tweets are defamatory of her. In addition, she appears to allege that Picard and Weeks engaged in some form of conspiracy to injure her.

109 When Picard became aware of Dr. Gill's tweets, he was concerned that any prominent Ontario physician would publicly state views that were so contrary to the consensus among physicians, scientists and public officials on subjects on which he had reported extensively. He was concerned that Dr. Gill's statements had the potential to misinform or mislead people.

110 In addition to the numerous tweets attacking Picard for his statement, several tweets were posted supporting him. Among the tweets posted on August 6, 2020 was one by the Defendant Tristan Bronca:

> "The country's top health journalist (accurately) points out that this doctor maybe shouldn't be pushing a drug that is now primarily pushed by conspiracy theorists. She responds with a conspiracy-minded smear about how he's in bed with the WHO. Remarkable work."

111 At 5:55pm on August 6, 2020, Picard responded to Bronca's tweet by posting the second of his tweets that Dr. Gill complains of:

> "Add the subsequent avalanche of tweets from an army of hydroxychloroquine bots and unhinged conspiracy theorists and you have a concise summary of my day."

112 As the discussion continued, at some point a "hashtag" was created that read "#IStandWithPicard". Twitter users include a hashtag symbol (#) before a relevant keyword or phrase to categorize or aggregate tweets and allow others to find them more easily.

113 Users who posted tweets that included #IStandWithPicard did so to voice their support for Picard in response to the many tweets attacking him. Among them was a tweet from Picard's colleague at The Globe and Mail, Weeks.

114 On the evening of August 6, 2020, Weeks saw that the #IStandWithPicard hashtag was trending on Twitter because Picard was being attacked by many users.

115 After reading Picard's comments, Weeks agreed with Picard's reaction of "shock." Based on her research, reading and reporting about COVID-19, Weeks knew that there was a wealth of scientific literature and research regarding the lack of efficacy of HCQ against Covid-19, the difficulty of achieving herd immunity and the necessity of a safe and effective vaccine that contradicted Dr. Gill's opinions.

116 Weeks sought to express her agreement with Picard's opinion about Dr. Gill's tweets and to show support for him in light of the negative comments that had been directed at him. She also sought to promote the dissemination of accurate information concerning COVID-19. Weeks was concerned that Dr. Gill's statements had the potential to misinform or mislead people.

117 On the evening of August 6, 2020 Weeks responded to one of Picard's tweets by posting what is essentially the only expression by her, one for which she is being sued by the Plaintiffs for millions of dollars in damages:

> "André is one of the finest health communicators - anywhere - and has done more to help the public understand #COVID19 than anyone in the country. Grateful, as usual, for his no-nonsense takes and the fact he doesn't hesitate to call out BS when he sees it. #IStandWithPicard"

118 At 8:37 a.m. on August 7, 2020, Picard posted the third of his tweets about which Dr. Gill complains, in which he reiterated his concern that a Canadian pediatrician had publicly stated that a coronavirus vaccine was not necessary:

> "While I appreciate all the kindness, and am flattered to have my own hash tag #IStandWithPicard, I would prefer that people focus not on trolls but on my initial concern, that a Canadian pediatrician is saying we don't need a #coronavirus vaccine. #Covid19 #antivax @cpso_ca"

119 Picard tagged the Twitter account of the College of Physicians and Surgeons of Ontario because there was an ongoing public discussion about whether and how social media use by physicians during the pandemic should be regulated, a topic of evidently great public interest.

120 Later on the morning of August 7, 2020, Dr. Jim Woodgett, a research scientist, posted a thread on Twitter in which he advocated for the dissemination and open-minded exchange of quality information and warned against drawing attention to misinformation. Dr. Woodgett suggested that Twitter users replace #IStandWithPicard with #IStandWithScience in their tweets. Among the tweets in Dr. Woodgett's thread was one that stated:

> "I'm sure André appreciates the support, but (apologies to him) he doesn't need it and the hashtag serves to direct people to the source of the issue. On the contrary, antivaccine and pro-HCQ advocates have everything to gain by attracting attention. This fuels their cause."

121 In reply to this tweet on August 7, 2020, Picard posted the fourth and final of his tweets about which Dr. Gill complains, advocating for the dissemination of good science instead of engaging in pointless Twitter exchanges:

> "Thank you for this thoughtful thread. I wholeheartedly agree with this point in particular. We should use our energy to promote good science, not interacting with bots, trolls and politically-driven anti-science, #antivax (what's the polite word?) dogmatists. #Covid19 #scicomm."

122 In my opinion, all of the expressions complained of made by Picard and Weeks are on matters of intense public interest.

123 Those same expressions are in the nature of fair comment on statements made by Dr. Gill on a similar platform and therefore attract that defence. The Plaintiffs have not discharged their burden of showing that his defence to all their claims has no chance of success.

124 Applying the public interest balancing test, I conclude that the need to protect the freedom of these Defendants to express such views far outweighs the considerations that might apply to any factors in favour of allowing the claims of Dr. Gill against Picard and Weeks, including the unsubstantiated claims of conspiracy, to continue. Accordingly, all claims against Picard and Weeks are dismissed.

B. Tristan Bronca

125 On August 6, 2020, Bronca read the tweet by Picard mentioned above on Twitter:

> It's quite shocking to see a Canadian physician leader @dockaurG saying we don't need a #coronavirus vaccine, we just need t-cell immunity, hydroxychloroquine and "the Truth". #Covid19.

126 There were two tweets by Dr. Gill visible in Picard's tweet. Her August 4, 2020 tweet stated:

> "If you have not figured out that we don't need a vaccine, you are not paying attention. #Factsnotfear".

127 The second tweet of Dr. Gill stated:

> #Humanity's existing effective defences against #COVID19 to safely return to normal life now:
>
> -The Truth
>
> -T-cell Immunity
>
> -Hydroxychloroquine

128 Bronca believed that Dr. Gill's statements ran counter to all the public health advice and scientific opinion Bronca was aware of at the time. Dr. Gill's tweet concerned him, especially given her job as a physician. Bronca was aware of other social media communications and tweets by Dr. Gill that were of the same vein.

129 Bronca also saw Dr. Gill's response attacking Picard on August 6, 2020:

> It is quite shocking that a journalist with absolutely no medical training is attacking a MD for stating scientific facts. Not surprising given picardonhealth is a Pierre Trudeau Foundation Mentor & on its Trudeau "#COVID19 Impact Committee" to drive the political WHO narrative.

130 Bronca believed that Dr. Gill's attack on Picard had made him the target of many negative comments and criticism on Twitter. Bronca took a screenshot of the tweets of Picard and Dr. Gill and added his own opinion in his tweet, which stated:

> "The country's top health journalist (accurately) points out that this doctor maybe shouldn't be pushing a drug that is now primarily pushed by conspiracy theorists. She responds with a conspiracyminded smear about how he's in bed with the WHO. Remarkable work.

131 The "country's top health journalist" refers to Picard. "This doctor" refers to Dr. Gill. The drug referred to in the Bronca Tweet is hydroxychloroquine.

132 Through his work with Medical Post, Bronca had been immersed in reports of the studies and analysis being done relating to the efficacy of hydroxychloroquine as a treatment for Covid-19. Bronca had also spoken with medical experts who were well versed on the scientific literature on the topic of hydroxychloroquine who did not believe it was an effective treatment for Covid-19. By August 6, 2020, Bronca understood that the majority of the scientific evidence showed that hydroxychloroquine was not an effective treatment for Covid-19.

133 Bronca's tweet addresses Dr. Gill's attack on Picard and her accusation that he is driving "the political WHO narrative". Bronca understood that "WHO" refers to the World Health Organization. He understood the word "narrative", as used by Dr. Gill, is a common buzzword used by some to characterize the allegedly nefarious activities of global or high-powered organizations and the alleged lies they tell to cover up or disguise these activities.

134 Bronca thought that Dr. Gill's attack on Picard suggested that he was an active part of those allegedly nefarious activities and lies. Bronca had seen no evidence that Picard was so involved. It appeared to him that by using the language she did, Dr. Gill was attempting to smear Picard and subject him to negative comments and online hate.

135 Bronca's tweet on August 6, 2020, questions surrounding the development of effective treatments for Covid-19, and the development of vaccines for the prevention of Covid-19 were matters of great public interest to both the medical profession and the public at large. Bronca believes he should be able to publicly express his concerns about statements that run counter to public health advice and scientific opinion without the risk of lengthy and costly litigation for doing so.

136 The Bronca tweet falls within the statutory definition of expression, which is expansive. Dr. Gill's claim against Bronca clearly "arises from" the Bronca tweet. In August 2020, and for many months prior to and after, the issue of treatments for and vaccinations for Covid-19 were matters of great public interest due to the global Covid-19 pandemic. The Bronca tweet, which responded to what he fairly considered to be misleading information regarding hydroxychloroquine as treatment for Covid-19, related to a matter of public interest.

137 In my view, the Bronca tweet constitutes fair comment on a matter of public interest. This defence has been described as one that:

> "Protects obstinate, or foolish, or offensive statements of opinion, or inference, or judgment, provided certain conditions are satisfied. The word "fair" refers to limits to what any honest person, however opinionated or prejudiced, would express upon the basis of the relevant facts."

138 The Bronca tweet was based on facts. As of August 6, 2020 the majority of the scientific evidence showed that hydroxychloroquine was not an effective treatment for Covid-19. In addition, the use of hydroxychloroquine in the treatment of Covid-19 had been promoted by Alex Jones and on websites like the Gateway Pundit, both of which had a history of promoting conspiracy theories. With respect to the second sentence of the Bronca tweet, it is a fact that Dr. Gill accused Picard of "driv[ing] the political WHO narrative" in her August 6, 2020 response to Picard.

139 The Bronca tweet was also recognizable as comment by any reasonable reader of the tweet.

140 Accordingly, there are grounds to believe that Bronca's defence of fair comment has a real prospect of success. The Plaintiffs have not discharged their onus to show otherwise.

141 In the weighing of the interests pursuant to s. 137(4)(b), the Plaintiffs cannot satisfy the requirement that the harm suffered by them as a result of Bronca's expression is sufficiently serious such that the public interest in permitting the action to continue outweighs the public interest in protecting that expression. Indeed, the public interest in the protection of the right of Bronca to speak about such matters of intense public interest strongly favours dismissal of these claims.

142 Accordingly, all claims against Bronca are dismissed.

C. Dr. Jacobs, Dr. Cohen, Dr. Nataros, Dr. Alam and Dr. Sharkawy

143 The Plaintiffs have claimed against these five Defendants in defamation on the basis of their various Twitter

posts, and provision by them of commentary in articles published by the Canadian Broadcasting Corporation, as follows:

(a) That a single tweet by Dr. Sharkawy, posted August 6, 2020 in response to the Picard tweet is defamatory of Dr. Gill;

(b) That three tweets by Dr. Jacobs dated August 7, 10 and 12, 2020 are defamatory of Dr. Gill;

(c) Against Dr. Cohen on the basis of a series of tweets posted between August 6, 2020 and August 11, 2020, and comments made by Dr. Cohen in CBC's August 10, 2020 article "Ontario doctor subject of complaints after COVID-19 tweets", and in CBC's video news story "Complaints Filed against Ontario doctor after COVID-I 9 tweets" dated August 10, 2020;

(d) Against Dr. Nataros on the basis of a series of tweets posted between August 6, 2020 to October 21, 2020, and comments made by Dr. Nataros in CBC's August 10, 2020 article "Ontario doctor subject of complaints after COVID-19 tweets", and in CBC's video news story "Complaints Filed against Ontario doctor after COVID-I 9 tweets" dated August 10, 2020;

(e) That a tweet posted by Dr. Alam on August 6, 2020 in response to the Picard tweet is defamatory of Dr. Gill.

144 The Plaintiffs have asserted several causes of action as against these Defendants broadly as a whole, with little to no particularization of alleged individual involvement. The Plaintiffs plead these Defendants are liable in negligence, conspiracy, and "breach of the doctor Defendants' professional obligations".

145 The Plaintiffs' claims of conspiracy are deficiently pleaded bare assertions. The pleadings are bald, overly speculative, or simply restated legal principles rather than pleaded material facts. The Plaintiffs' pleading fails to set out any alleged "agreement" with particularity, lumps these Defendants all together, and gives no particulars of damages. In my view, it is clear from the pleadings the conspiracy claim will fail.

146 Further, the Plaintiffs have failed to meet their burden to adduce any evidence reasonably capable of belief to establish grounds to believe a conspiracy of this nature could have substantial merit or, for that matter, any merit at all.

147 The Plaintiffs also broadly assert a negligence claim as against these Defendants. The general law of negligence requires that a claim in negligence be based on a duty of care owed to them by these Defendants. The Plaintiffs assert that a special duty of exists "as set out in protocol" when a physician makes representations or remarks about a fellow doctor to the public. No such duty of care between or among physicians exists such that a cause of action may arise.

148 The Plaintiffs also assert that these Defendants are liable to the Plaintiffs in "breach of the doctor Defendants' professional obligations". The Plaintiffs have provided no basis in the record or law to support a breach of professional obligation gives rise to an independent cause of action. The Plaintiffs thereby fail in their burden to establish that there are grounds to believe the proceeding has substantial merit.

149 The Plaintiffs' claim against Dr. Sharkawy pertains to a single tweet made on August 6, 2020, which is alleged to be defamatory to Dr. Gill.

150 In response to the Picard tweet, on August 6, 2020 Dr. Sharkawy tweeted the following:

> dockaurG Curious.,.who exactly are the "Concerned Doctors of Ontario" and do they espouse your views? The rest of us Ontario MDs are quite "concerned" that you are spreading very dangerous misinformation that will cost lives #Accountability.

151 Dr. Sharkawy embedded the Picard tweet, and by extension, the two embedded tweets of Dr. Gill embedded in the Picard tweet.

152 The Plaintiffs have the onus of showing that that none of the defences raised by Dr. Sharkawy are legally tenable or supported by evidence that is reasonably capable of belief such that they can be said to have no real prospect of success. Dr. Sharkawy relies on the defences of fair comment and justification. In my view the Sharkawy tweet meets all the requirements of the defence of fair comment. Dr. Sharkawy was responding to the fact Dr. Gill had publicly posted certain tweets regarding COVID-19 public health measures in the midst of the global COVID-19 pandemic, to the effect that COVID-19 vaccines were not necessary, and HCQ was an appropriate treatment for COVID-19. Dr. Sharkawy's statement that "[t]he rest of us Ontario MDs are quite concerned" was fair comment or at least presents a strong defence of fair comment.

153 The Sharkawy tweet further satisfies the requirement that any person could honestly express that opinion on the proved facts. The public health guidance at the time, and to this day, is contrary to the views expressed by Dr. Gill in her August 4 tweet (about vaccines) and August 6 tweet (about HCQ) that Dr. Sharkawy commented his concerns about. Any reasonable person could form the same concerns and opinion on the proved facts in light of the conflict with generally accepted public health guidance.

154 The Plaintiffs allege Dr. Jacobs' August 7, 2020 tweet is defamatory. Dr. Jacobs's August 7, 2020 tweet responds to two prior tweets of Dr. Gill, which are attached to Dr. Jacobs tweet as a screenshot. Dr. Jacobs August 7, 2020 tweet reads as follows:

> No, we're not living through a scandal. We're living through one of the deadliest pandemics in the last century. What is most shocking is a medical doctor pushing conspiracy theories.
>
> This needs to stop. #Cdnpoli #COVID19 #IStandWithPicard #vaccine #coronavirus
>
> [Attached screenshot of Dr. Gill's July 3 tweet]
>
> We're living thru one of deadliest #BigPharma scandals in history. Most shocking/frightening--majority oblivious. #HCQWorks as prophylaxis & early treatment in #COVID19. HCQ doesn't work for greedy BigPharma, politicians abusing power, corrupted WHO/CCP, bought out media/academics
>
> [The July 3 tweet attached a June 30, 2020 tweet by Dr. Gill, which was also attached to Dr. Jacobs August 7, 2020 tweet]
>
> Irrational fear is driven by politicians abusing power, media misinformation, unethical academics, BigPharma COIs & corrupted WHO co-opted by CCP. Science & medicine have been hijacked & are being exploited for power & greed...

155 There are no grounds to believe the Jacobs tweet is capable of bearing the defamatory meaning alleged in paragraph 151, including such imputations as to "call into question Dr. Gill's mental stability" or "suggest that she was/is endangering the lives of her patients".

156 Further, the Plaintiffs cannot meet their burden under s. 137.1(4)(a)(ii) to show that there are grounds to believe Dr. Jacobs has no valid defence of fair comment. Dr. Jacobs further relies on the defence of fair comment. The Jacobs August 7 tweet satisfies the test for the defence of fair comment in that it is based on fact (Dr. Gill's tweets, the facts on which his comment was based, were included in the Jacobs August 7 Tweet), recognizable as comment (Dr. Jacobs' statement would be properly construed by the reasonable reader as reflecting his conclusion or inference arising from Dr. Gill's embedded tweets), could honestly be made by any person (Dr. Jacobs inference that Dr. Gill was pushing conspiracy theories has a clear linkage to the facts of Dr. Gill's statements that "HCQ doesn't work for greedy BigPharma, politicians abusing power, corrupted WHO/CCP, bought outmedia/academics" which by definition is a conspiracy theory).

157 The Plaintiffs further allege Dr. Jacobs' August 10, 2020 tweet, which attached and quoted from the August 10, 2020 Canadian Broadcasting Corporation article about Dr. Gill entitled "Ontario doctor subject of complaints after COVID-19 tweets" is defamatory. The body of Dr. Jacobs' August 10, 2020 tweet contains only the title of the

article, and a direct quote from the article "It's important that physicians recognize the influence they may have on social media, particularly when it comes to public health", included in the article from a spokesperson of the College of Physicians and Surgeons of Ontario. Dr. Jacobs replied to the tweet "The fact that so many people on this thread still believe that the current research supports the use of hydroxychloroquine, when the opposite is true, is exactly why it is so important for physicians to be responsible in what they say on social media".

158 Further, there are no grounds to believe that Dr. Jacobs' August 10, 2020 tweet is defamatory in that it would lower Dr. Gill's reputation in the eyes of a reasonable person. An excerpt of a quote from the CPSO, coupled with a statement that it is important for physicians to be responsible on social media is incapable of bearing the defamatory meaning alleged. The Plaintiffs cannot establish that there are grounds to believe that the defence of fair comment will not succeed.

159 Dr. Jacobs' August 10, 2020 tweet satisfies all elements of the defence of fair comment: (i) Public Interest: it was made on a matter of public interest, addressing physician influence on social media with respect to public health; (ii) Based on Facts: The August 10, 2020 tweet attached the CBC article, providing the full requisite factual backdrop; (iii) Recognisable as Comment: Dr. Jacobs' statement that the fact that many believed HCQ was an effective treatment for COVID-19 reflected why it was so important for physicians to be responsible on social media is clearly recognizable to the "reasonable reader" as comment. Any reasonable reader would understand that Dr. Jacobs shared the CBC article, then provided his opinion and conclusion regarding the article as comment below; (iv) Could honestly be made by any person: Dr. Jacobs' comment in the August 10, 2020 tweet is in agreement with the statement of the CPSO spokesperson mentioned in the article, demonstrating two commentors could honestly come to the same conclusion on the same known facts. (v) Absence of Malice: Dr. Jacobs posted his comment in good-faith, without malice. There are no grounds to believe the fair comment defence has no real prospect of success.

160 The Plaintiffs further claim that a tweet made by Dr. Jacobs on August 12, 2020 is defamatory of Dr. Gill. The Plaintiffs cannot establish there are grounds to believe this claim has substantial merit. For a statement to be defamatory it must refer to the Plaintiff. Dr. Jacobs' August 12, 2020 Tweet does not refer to the Plaintiff, nor did the attached article. No connection was drawn to Dr. Gill in the tweet thread.

161 Dr. Jacobs further asserts a defence of qualified privilege with respect to all three tweets that the Plaintiffs allege to be defamatory. As a physician, Dr. Jacobs has a moral and professional duty to: educate the public to ensure that medical knowledge is appropriately conveyed to facilitate health promotion and disease prevention; interpret information given out by health authorities during emergencies; and to participate in setting the standards of his profession. The public has an interest in receiving that information. There are no grounds to believe that this defence of qualified privilege has no real prospect of success in these circumstances. Indeed, it is a strong defence.

162 Some of the impugned expressions of Dr. Nataros are alleged to be defamatory on the basis that they accuse Dr. Gill of spreading "misinformation", including his contribution to the August 10, 2020 CBC News Video, in which he states.

> This is a threat to me and my practice and my professional integrity here in British Colombia. It is a threat to my 15,000 patients to have a Canadian licensed physician promoting misinformation that is harmful.

163 Further impugned expressions of Dr. Nataros appear to relate to allegations that his statements either encourage the public to lodge a complaint against Dr. Gill, or relate to statements Dr. Nataros made referencing the fact he had felt an obligation to report Dr. Gill to the CPSO. A further Impugned Expression relates to a statement that the "unanimous consensus of #MedTwitter is clear this @doekaurGMD ain't a leader among peers."

164 There are no grounds to believe that the defence of fair comment relied upon by Dr. Nataros has no real prospect of success. Dr. Nataros made these comments: (i) On a matter of public interest: his expressions are addressing the physician regulation and the public health response to the COVID-19 pandemic; (ii) Based on Fact: The existence of the COVID-19 pandemic was broadly known and Dr. Nataros either responds to a Twitter thread, attaches his letter of complaint to the CPSO or the August 10, 2020 CBC Article to the expressions, providing the

requisite factual backdrop; (iii) Recognizable as Comment: Dr. Nataros' statements are all recognizable as his opinion. The statement that he "took responsibility for a Colleague's misconduct", expresses his opinion of Dr. Gill's conduct, not a factual statement that there had been a finding of misconduct, (iv) could honestly be made by any person: Given the publicly available health information available at the time, any person could reasonably express the same opinion; (v) Absence of Malice: Dr. Nataros' only motivation in posting the impugned expressions was his concern for patients and the impact of misinformation on the public health response to the COVID-19 pandemic.

165 Several of Dr. Cohen's tweets and expressions between August 6, 2020 and August 10, 2020 are alleged to be defamatory of Dr. Gill. The Plaintiffs cannot meet their burden to show that there are grounds to believe these expressions are defamatory and thus that the claim has any real chance of success, or there are grounds to believe Dr. Cohen has no valid defences.

166 Certain of the impugned expressions of Dr. Cohen's which are alleged to be defamatory of Dr. Gill pertain to statements around Dr. Gill "blocking" people on Twitter. The Plaintiffs cannot meet their burden to show these statements are defamatory. There is no basis to discern that "blocking" someone on Twitter would tend to lower Dr. Gill's reputation in the eyes of a reasonable person. Dr. Cohen's statements use wording such as "blocked nearly every other Ontario Doctor on Twitter" which the reasonable reader would understand to not be a literal statement that nearly every doctor was blocked, but a hyperbolic statement, the sting of which is that Dr. Gill has blocked many Ontario physicians. As such, there are no grounds to believe that Dr. Cohen's defence of fair comment has no real prospect of success with respect to these expressions.

167 Dr. Cohen also further relies on the defence of qualified privilege with respect to all impugned expressions. As a physician, Dr. Cohen believed she has a moral and professional duty to educate the public to ensure that medical knowledge is appropriately conveyed to facilitate health promotion and disease preventions, interpret information given out by health authorities during emergencies, and to participate in setting the standards of her profession. The public has an interest in receiving that information. There are no grounds to believe that this defence has no real prospect of success.

168 The words of Dr. Alam's August 6, 2020 tweet on their face are not defamatory. Dr. Alam expresses her view that the medical evidence on the use of HCQ is "shaky", and that a COVID-19 vaccine is needed. While Dr. Alam's view may differ from that of Dr. Gill, a difference of professional opinion does not constitute defamation. There is nothing in Dr. Alam's tweet that would tend to lower either Plaintiff's reputation in the eyes of a reasonable person. The Plaintiffs cannot establish there are grounds to believe the defamation action as against Dr. Alam for the August 6, 2020 tweet has substantial merit, as the words are simply not capable of bearing a defamatory meaning.

169 The Plaintiffs also cannot establish there are grounds to believe that Dr. Alam has no valid defence. There are no grounds to believe that her defence of fair comment has little prospect of success. Dr. Alam's August 6, 2020 tweet satisfies the test for fair comment: (i) Is made on a matter of public interest: the tweet is addressing the public health response and treatment options with respect to the COVID-19 pandemic; (ii) Based on Fact: The factual underpinning of the Picard Tweet is attached to Dr. Alam's tweet, and the existence of the COVID-19 pandemic was broadly known; (iii) Recognizable as Comment: Dr. Alam's statement that evidence of HCQ is "shaky" and that the need for a COVID-19 vaccine is real reflect Dr. Alam's opinion; (iv) Could honestly be made by any person: Given the publicly available health information available at the time, any person could reasonable person could express the same opinion; and (v) Absence of Malice: The evidence supports that Dr. Alam was not motivated by malice, but by her good-faith belief that an appropriate vaccine is vital to combat the COVID-19 virus.

170 The burden of proof is on the Plaintiffs to show on a balance of probabilities that that (a) they likely have suffered or will suffer harm; (b) that such harm is as a result of the expression established under s. 137.1(3); and, (c) that the corresponding public interest in allowing the underlying proceeding to continue outweighs the deleterious effects on expression and public participation.

171 Although a fully developed damages brief may not be necessary on a s. 137.1 motion, in this case there is

simply a complete dearth of any evidence on the motion to show harm, or linking these Defendants' expressions to any of the undefined damages that are claimed by the Plaintiffs.

172 The Plaintiffs' claims of harm are completely undifferentiated. The Plaintiffs fail to even allege specific claims of damage with respect to each individual Defendant or expression, let alone provide any evidence of a causal link of harm or damage arising from each expression.

173 This is particularly problematic in the context of this case, as even if the Plaintiffs were able to establish harm, there are many potential causes of the harm that the Plaintiffs claim to have suffered. Evidence of a causal link of harm arising from the impugned expression is required.

174 Evidence of a causal link between the expression and the harm is especially important, in the circumstances of the present motion, where there may be sources other than these Defendants' expressions that may have caused the Plaintiffs harm, including self-inflicted harm by the Plaintiffs themselves as a result of the professional and public criticism received for controversial statements and media appearances.

175 These allegations appear to be part of a larger tactical campaign in opposition to COVID-19 public health measures, designed to benefit from the publicity of the claim to promote public health and policy views and to silence those who express views contrary to those of the Plaintiffs.

176 The public interest of protecting the expression of these Defendants significantly outweighs any public interest in permitting the proceeding to continue. There are numerous relevant factors at the weighing stage which weigh heavily in favour of protecting their expressions.

177 These Defendants were not motivated by any malice or ill-will towards the Plaintiffs. Rather, the defendant Physicians' expressions were motivated by good-faith efforts to protect the public from misinformation, and provide the public with health information in the context of an unprecedented global pandemic:

(a) Dr. Sharkawy expressed concern that misinformation espoused to the public could result in Canadians choosing not to get vaccinated for COVID-19 or using unapproved treatments for COVID-19 that were not medically accepted. His expression was motivated by a moral duty as a physician to express his views to the public out of concern for public safety;

(b) Dr. Jacobs's expressions were motivated by an intention to inform his followers of appropriate approved treatments for COVID-19, and a belief that properly informing the public could save lives. Dr. Jacobs emphasized the importance that the public receive a clear and consistent message when it comes to public health messaging, as harm to patients can arise when a physician provides an opinion that does not align with information from public health or government;

(c) Dr. Cohen's expressions were motivated by concern about the public health impacts of Dr. Gill's tweets with respect to the need for COVID-19 vaccinations and the use of hydroxychloroquine. Dr. Cohen felt a duty as a physician to offer her views in the public interest.

(d) Dr. Nataros felt a duty as a physician to offer his views to the public and address misinformation about COVID-19. Dr. Nataros' expressions were motivated by concern for public safety arising from the spread of misinformation on COVID-19 treatments and the efficacy of vaccines.

178 The expressions of these Defendants in seeking to address misinformation are intimately tied to the search for truth, a core value underlying freedom of expression. The expression of these Defendants is therefore to be afforded a high weight in the s. 137.1(4)(b) weighing exercise.

179 If this proceeding were allowed to continue, its chilling effects would have an impact well beyond the parties to this case. There is a real risk that the effects of this proceeding will stifle the speech of the Defendants, and deter other physicians, journalist, scientists, and other members of the public from engaging in public discussion and

discourse about potential misinformation on matters of public health in the future. The public has a clear interest in discussion and discourse about matters of public health.

180 Even on a generous interpretation of the limited evidence adduced by the Plaintiffs, the harm likely to be or already suffered by the Plaintiffs lies at the very low end of the spectrum as does the public interest in allowing the proceeding to continue. The balancing test produces a result that favours that urged by these Defendants.

181 Accordingly, all claims as against these Defendants should be dismissed.

D. Dr. Van Aerde

182 On August 4, 2020, Dr. Gill tweeted:

> "If you have not yet figured out that we don't need a vaccine, you are not paying attention. #FactsNotFear".

183 Dr. Gill suggests in her Affidavit that this tweet was taken "out of context and distorted", and it was made in response to an announcement made "moments prior" by Dr. Theresa Tam at a press conference. She states this was a "singular 'vaccine Tweet'". And yet, she also posted "[w]e don't need a #SARSCoV2 vaccine" on July 8, 2020, a full month before Dr. Tam's press conference. Her clearly stated public position against COVID-19 vaccines is not affected by context.

184 In another tweet, dated August 6, 2020, which was removed from Twitter for violating its rules, Dr. Gill stated:

> "#Humanity's existing effective defences against #COVID19 to safely return to normal life now includes: -Truth, -T-cell Immunity, Hydroxychloroquine."

185 On August 6, 2020, Dr. Van Aerde, shocked by the anti-vaccine rhetoric of a fellow pediatrician, made the following expressions on Twitter and Facebook (collectively, the "Expressions"):

> "Requesting @Twitter and @TwitterSupport remove account @dockaurg for misinformation against vaccination and in favour of hydroxychloroquine and misrepresenting Canadian physicians."
>
> "Another Twitter account hacked? I am sorry if that is the case, But here is another of your tweets attached with unprofessional lies. As a colleague Pediatrician I have to admit that you are dangerous to children. How do you come up with this? Why Don't you quote evidence?"
>
> "I was blocked too... after I called out the untruths and supported Andre Picard. Some of us have requested Twitter to remove her account. She was trained in Western as Pediatrician. She has tweeted before on bogus treatments, lots of trolls followers. There is a call for her unprofessionalism to be looked at by cspo. Somebody mentioned she is part of our FB community, and I suggest for her to be removed for lack of professionalism and scholarship as per CANMEDS2105."

186 Dr. Gill "blocked" Dr. Van Aerde shortly after these tweets were posted. Blocking on Twitter prevented Dr. Van Aerde from viewing and responding to Dr. Gill's tweets from his own Twitter account.

187 There is no dispute that Dr. Van Aerde is the author of the expressions and that those expressions are captured by the statutory definition of expression under s. 137.1(2).

188 Dr. Van Aerde's expressions relate directly to the COVID-19 global pandemic and information and disinformation about COVID-19. The expressions respond to Dr. Gill's propositions that "we don't need a vaccine", and all we need is "...-Truth, -T-cell Immunity, Hydroxychloroquine".

189 No issue falls more squarely into the definition of a matter of public interest than a global pandemic. The public has a genuine stake in the matter of debates about pandemics and COVID-19 health treatments.

190 To the extent that the content of the expressions made by Dr. Van Aerde are comments, rather than statements of fact, then there are reasonable grounds to believe that fair comment is a valid defence for him.

191 The expressions are based on factual evidence that vaccines are a critical tool to end the pandemic and supported by multiple health agencies and organizations. Any person could honestly express that opinion on those facts. At least 22 other people did, nine of whom are Canadian physicians, as evidenced by this litigation.

192 Dr. Van Aerde's expressions are very likely also protected by a defence of qualified privilege. The occasion here that triggers qualified privilege is the need to respond to an influential physician using her Twitter platform to spread misinformation in the middle of a pandemic. Misinformation about treatments and vaccines could have serious and widespread health consequences. Dr. Van Aerde had a professional, social, and moral duty to respond to Dr. Gill's statements and challenge her views.

193 The Plaintiff has failed to adduce any evidence of a conspiracy. She provides no evidence in her affidavit of a conspiracy. The Statement of Claim makes bald allegations that, because Dr. Van Aerde was on the same Facebook group as other defendants, there is necessarily some conspiracy between them to harm Dr. Gill. She argues that the Defendants, "like a pack of hyenas" coordinated an attack on her without any evidence to support her claim.

194 Dr. Gill also includes negligence as a cause of action in her claim but Dr. Gill's only evidence of negligence is adopting of allegations in her Statement of Claim as sworn facts. A cause of action in negligence is not properly set out in her pleadings. Dr. Gill is really claiming negligence because she was defamed. If she was defamed, the proper cause of action is defamation, which is her only plausible cause of action.

195 The final step involves weighing the harm suffered against the interest in protecting the expression made. Dr. Van Aerde was somewhat harsh in his comments but not gratuitously so and the focus is not on whether the expression should have been more polite. Dr. Gill has suffered no harm as a result of the expressions of Dr. Van Aerde. The imposition of subjective and moralistic limits on debates, and in particular on those of scientists amidst a pandemic, is not in the public interest. When the final comparative weighing step of the test is applied, I consider that the correct result is that all claims against Dr. Van Aerde be dismissed.

E. Dr. Fraser

196 On October 1, 2020, Dr Gill "quote-tweeted" (re-posted, with commentary), her own earlier tweet from September 17, 2020, which read:

> Why is there fear re meaningless "cases"? Up to 90% false+ d/t high PCR cycle thresholds on ppl who are not infectious. Even among the small % of actual true positives: it is good news b/c ICU adms & deaths are at all-time lows. These healthy ppl are contributing to herd immunity

197 Dr Gill's October 1 tweet added the following additional commentary:

> This cannot be stressed enough. Rising "cases" amongst young & healthy ppl, without equal rise in ICU adms or deaths directly as a result of the virus, is very encouraging news: it means we are building natural community/herd immunity which will protect elderly & high-risk groups

198 Dr. Fraser saw Dr. Gill's October 1 tweet and understood it to suggest that Ontario was developing natural herd immunity to COVID-19--a proposition that he considered to be dangerous misinformation about the risk of COVID-19 transmission that could lull Ontarians into abandoning public health measures at a time when infections were on the rise. Dr. Fraser was concerned that Dr. Gill's tweet would undermine public health efforts that aimed to reduce the spread of COVID-19 by encouraging the use of masks and social distancing, and reducing contacts.

199 Dr. Fraser's understanding at the time, based on his review of infection rates in Ontario, was that nowhere near the percentage of the population required to achieve herd immunity had been infected and recovered from COVID-19 as of October 1, 2020. He was concerned that members of the public would read Dr. Gill's tweet and understand that precautions were no longer necessary because the population had achieved, or had nearly achieved, herd immunity. He feared this could cause people to disregard public health guidelines and expose

themselves to a higher risk of infection. He was particularly concerned that individuals who read the tweet would be more likely to accept her statement as truthful and authoritative because Dr. Gill's Twitter profile highlights her physician credentials.

200 Dr. Fraser had been closely following reporting of the nascent "second wave" of COVID-19 infections developing in Europe and had observed that Ontario appeared to be lagging a couple of weeks behind but following a similar trend. Of course, a "second wave" of infections in Ontario did ultimately occur, reaching its peak later that fall.

201 Based on these concerns, Dr. Fraser posted a small number of tweets in response to Dr. Gill's October 1 tweet, and in response to her followers who engaged with him subsequently, in an effort to push back against what he considered to be misinformation that could have dangerous repercussions if left unchallenged. As a publicly funded scientist, Dr. Fraser felt that he had a responsibility to voice his concerns so that Dr. Gill's followers and others who saw her tweet would be aware that her views did not represent the consensus in the scientific community.

202 Almost immediately after Dr. Fraser published his first tweet, Dr. Gill blocked him from her Twitter page, making it impossible for him to engage with her. She also "quotetweeted" Dr. Fraser's tweet and referred to Dr. Fraser using the same language about which she complains in this action.

203 The impugned tweets relate to the COVID-19 pandemic, and the dangers of misinformation regarding the risk of transmission and the need for public health measures in response to the pandemic. That is a matter of significant public interest. One can scarcely imagine a topic of greater public interest.

204 The first impugned tweet, which Dr. Fraser posted on October 1, 2020 in response to Dr. Gill's tweet, reads:

> Can you please stop with this herd immunity garbage? What proportion of the population is seropositive at this stage in your opinion? 80%? Or below 5%? This is simply lunatic stuff. I can't believe you are qualified as an MD.

205 Applying the proper approach to determining meanings, the tweet means that the Ontario population had not reached herd immunity to COVID-19 as of October 1, 2020 and there was no reasonable basis to suggest that Ontario had reached or was close to reaching herd immunity. It was therefore irresponsible for Dr. Gill to tell the public that Ontario had reached or was close to reaching herd immunity.

206 The reference to "lunatic stuff" is understood reasonably as a reference to the suggestion that Ontario had reached herd immunity--it does not convey the meaning that Dr. Gill is a lunatic. If it were to be understood as referring to Dr. Gill, it is mere vulgar abuse, an insult that might hurt Dr. Gill's feelings but that is not actionable and would not harm her reputation in the eyes of a right-thinking person.

207 The second impugned tweet was a response Dr. Fraser posted to a tweet from Martin Kulldorff, which defended Dr. Gill after Dr. Fraser's first tweet. Dr. Fraser wrote:

> Let's at least agree that there is a substantial history here of Kulvinder pushing fact-free COVID myths.
>
> I also had anonymous threats to my personal email account for pointing out her skews and misrepresentations. Not the behaviour of a reasonable person I would say.

208 The tweet meant and was understood to mean that prior to her October 1 tweet, Dr. Gill had made claims about COVID-19 that were not grounded in fact. The mention of "anonymous threats to my personal email account" and "Not the behaviour of a reasonable person" meant and were understood to mean that an anonymous supporter of Dr. Gill had made threats to Dr. Fraser's personal email account because Dr. Fraser had pointed out Dr. Gill's misrepresentations of fact. That supporter's conduct was not the behaviour of a reasonable person. That comment was not objectively understood to refer to Dr. Gill herself.

209 Dr. Fraser posted the third and fourth impugned tweets in response to one of Dr. Gill's supporters, who had criticised one of his tweets. The tweets read:

> Dr. Gill was previously reprimanded for spreading untruths about COVID. She was pushing HCQ and suggested vaccine was unnecessary. She suggests that the low deaths SO FAR in Ontario's 2ND wave is due to herd immunity...nonsensical as I said. I stand by my condemnation of her views
>
> And:
>
> the reason I pushed back hard against her fact-free tweets is that this is the second time she is spreading harmful and dangerous views. Last time she was forced to retract her tweets. It is disgraceful that an MD continues to push illogical and wrong views during a pandemic.

210 These tweets mean and were understood to mean that Dr. Fraser understood Dr. Gill had been admonished previously for making inaccurate statements about hydroxychloroquine as a COVID treatment and that vaccines are not needed and that she was forced to retract those tweets and Dr. Gill is again giving the public inaccurate and potentially harmful information about COVID, this time relating to herd immunity. Further, it is unreasonable to suggest that the low deaths in Ontario's second wave as of October 4 are due to herd immunity.

211 Finally, the fifth impugned tweet was a comment Dr. Fraser made in response to a tweet by the Defendant, Marco Prado. It reads:

> Thank you Marco! I feel it is our responsibility as academics to try to push back against dangerous and wrong views that encourage complacency and a false sense of security during this pandemic. If this was the first time Dr. Gill had done this, it could be a mistake. It wasn't.

212 This tweet meant and was understood to mean that academics have a responsibility during the pandemic to speak out when others express views that may lead members of the public to stop taking appropriate precautions and increasing their risk of contracting COVID- 19. Further, Dr. Gill's comments cannot be overlooked as a mistake because on Dr. Fraser's understanding it is not the first time she has published comments during the pandemic that are not based on fact and may have dangerous implications.

213 Even if Dr. Gill were to satisfy the substantial merit requirement, she cannot meet her burden of demonstrating that Dr. Fraser has no valid defence to the claim. Dr. Gill must show there are grounds to believe that Dr. Fraser's defences have no real prospect of success. She must show that none of the defences are legally tenable or supported by evidence that is reasonably capable of belief. There must be a basis in the record and the law, taking into account the stage of the proceeding, to support a finding that the defences do not tend to weigh more favour of Dr. Fraser. Dr. Gill has not met that burden.

214 The comments expressed in the impugned tweets have a nexus to the underlying facts. A person could honestly have made the same comments Dr. Fraser did based on the facts Dr. Fraser knew and as summarised above. Moreover, Dr. Fraser honestly believed in the comments he expressed. He believed that Dr. Gill's tweet suggested Ontario had reached, or was close to reaching herd immunity; that Ontario was in fact not close to COVID-19 herd immunity; and that it was unreasonable and dangerous for a physician to suggest otherwise to the public because it could result in individuals refusing to follow public health measures to reduce the transmission of the virus. Dr. Fraser honestly believed, based on the CBC article, that Dr. Gill had previously posted a tweet containing inaccurate information about COVID-19 and that the tweet had been taken down from Twitter for violating its rules--a public rebuke or reprimand.

215 Dr. Fraser's unchallenged evidence is that he did not act out of any malice or ill-will toward Dr. Gill. Dr. Fraser did not and does not know Dr. Gill and had never interacted with her before his initial tweet in response to her October 1, 2020 tweet. He did not intend to cause any harm to Dr. Gill but his predominant motive was to ensure the public was not swayed by inaccurate, misinformation during a significant public health crisis. His only intention was to provide an opposing informed perspective regarding the appropriate interpretation of public health

information relating to COVID-19 for the benefit of Dr. Gill's Twitter followers and for anyone else who became aware of Dr. Gill's October 1, 2020 tweet.

216 Dr. Gill's and Dr. Fraser's tweets were public communications related to the appropriate public health response to a pandemic. At the time, Dr. Fraser perceived that members of the Canadian public were genuinely confused about the risk of transmission of COVID-19 and what precautions were necessary to reduce the risk of transmission of this potentially deadly disease. There is a compelling social interest in attaching privilege to communications such as Dr. Fraser's impugned tweets, which respond to and debate statements made on a public forum relating to pressing matters of public health.

217 To the extent Dr. Gill has suffered any harm, she has not shown any causal link to Dr. Fraser's impugned tweets. There are many potential causes of the harm Dr. Gill claims to have suffered. Dr. Gill herself is the most obvious cause of damage to her reputation. Other potential causes include the comments and criticisms of others. When Dr. Fraser published the impugned tweets, Dr. Gill was already the subject of criticism on social media for spreading misinformation about COVID-19.

218 There is great public interest in protecting Dr. Fraser's expressions which are of substantial importance. He spoke up against what he considered to be misinformation that could lead individuals to ignore public health recommendations and measures designed to mitigate the risk of COVID-19 pandemic. A public health emergency in which informed, knowledgeable experts are stifled from commenting publicly to combat misinformation is a significant threat to the general public interest.

219 When the ultimate balancing test is applied, the interests and factors that might favour allowing this action against Dr. Fraser to continue are easily and far outweighed by the public interest in protecting speech of this nature. Accordingly, all claims against Dr. Fraser are dismissed.

E. Dr. Schwartz, Timothy Caulfield, Dr. Prato and Dr. Fazel

220 On August 6, 2020, Professor Caulfield responded to a tweet posted by André Picard on the same date in which Picard indicated he was shocked to see Dr. Gill tweeting that we do not need a coronavirus vaccine, but rather that we just need T-cell immunity, HCQ, and the truth:

> Incredible. A leading MD spreading #misinformation about vaccines & value of lockdown? Pushing disproven #Hydroxychloroquine?
>
> She has already blocked me (preemptive?), so can't see all. Will @cpso_ca explore? She's involved (leads?) "Concerned Ontario Doctors".

221 Following his above tweet, Professor Caulfield then copied and pasted the following two tweets from Dr. Gill (the "#FactsNotFear tweets"), over which he included the letters "WTF":

> There is absolutely no medical or scientific reason for this prolonged, harmful, and illogical lockdown. #FactsNotFear

222 On August 6, 2020, Professor Caulfield responded to a tweet by Dr. Michelle Cohen regarding the spread of misinformation on social media by tweeting "Go Team".

223 On August 6, 2020, Dr. Fazel responded to the #FactsNotFear tweets as follows:

> I'll just put this here. #VaccinesWork #vaccination #VaccinesforALL [infographic from the Public Health Agency of Canada titled: "Vaccines Work", outlining the efficacy of vaccines for whopping cough, measles, chickenpox, mumps, diphtheria, and polio]

224 On August 6, 2020, Dr. Fazel responded to a tweet by Professor Caulfield of the same date regarding a leading physician spreading misinformation:

> Just like any other profession, unfortunately, even in medicine you have a few rotten apples. This is why it's crucial to improve evidence-based literacy in the community.

225 On August 6, 2020, Dr. Fazel responded to a post by Dr. Gill by tweeting:

> There is a difference between having opposing views that are backed by evidence and spreading misinformation.

226 On July 22, 2020, Dr. Schwartz quoted a tweet regarding a comment by Dr. Anthony Fauci on vaccine antibodies and T-cells, and he added the following:

> Apparently "T-Cell Immunity" is the new rallying cry for anti-science plague enthusiasts who argue that many more people are immune than measured in serosurveys (which measure antibodies).
>
> [thinking emoji] I'd listen to Dr. Fauci [world emoji]'s pre-eminent immunologist on this one

227 Dr. Schwartz subsequently added to that tweet:

> Case in point:
>
> [re-tweet of Dr. Gill's tweet: T-cell immunity, T-cell immunity, T-cell immunity...]

228 On August 6, 2020, Dr. Schwartz responded to a tweet by Mr. Picard which re-posted a tweet that expressed disdain for Picard and support for Dr. Gill, and added a comment that "the trolls [were] out in full force":

> Yes, her army of despicables also attacked me last week when I called her out for her anti-science stance.

229 On August 6, 2020, Dr. Schwartz responded to a tweet from Dr. Jo Kennelly, the late wife of Dr. Frank Plummer, in which Dr. Kennelly indicated that vaccine cell creation and T-cell natural immunity were not mutually exclusive in Dr. Plummer's eyes:

> Except it pains me that she uses his good name in vain to support her anti-science opinions.

230 On August 10, 2020, Dr. Schwartz re-tweeted an article from CBC of the same date, titled "Ontario doctor subject of complaints after COVID-19 tweet".

231 On August 10, 2020, Dr. Schwartz tweeted:

> This pediatrician has consistently espoused misinformation & conspiracy theories at a time when trust in our profession is critically important. She accuses all who call her out of bigotry & corruption & hides behind summer student experience in a respected lab.

232 On October 4, 2020 Dr. Prado responded to a tweet posted by Dr. Andrew Fraser in which Dr. Fraser reported that he received threats from supporters of Dr. Gill to his personal email after challenging Dr. Gill's tweets. Regarding the supporters that threatened Dr. Fraser, Dr. Prado wrote:

> I have no patience with conspiracy theory defenders. My family lives in Brazil. Many people they know had major issues because of COVID and were in the hospital. Some died. You are right, stay strong and keep pushing for scientific facts Andy!

233 Dr. Gill claims against these four Defendants in defamation and conspiracy. She also claims against Dr. Schwartz, Dr. Fazel, and Dr. Prado in negligence.

234 Dr. Gill cannot prove the substantial merit element as she does not have viable causes of action in defamation, negligence, or conspiracy. Dr. Gill cannot prove the "no valid defence" element as the defences of fair comment and qualified privilege advance by these Defendants have sufficient validity. Dr. Gill cannot prove that any damages she may have suffered are sufficiently serious for the interest in permitting the proceeding to continue to outweigh the public interest in protecting the impugned expressions, and therefore she cannot overcome the public interest hurdle.

235 Given that the proceeding arises from expressions made by these Defendants that relate to matters of public

interest, the onus shifts to the Plaintiffs to show that there are grounds to believe that the proceeding has substantial merit and that these Defendants have no valid defence.

236 None of the impugned statements of these Defendants are capable of giving rise to the defamatory meanings alleged. Further, those meanings would not have arisen in the minds of reasonable readers. In the "Twitter-sphere" the exchanges would simply be seen as a disagreement between medical professionals in terms that would not be interpreted as defamatory.

237 In the circumstances, Dr. Gill cannot show that there are reasonable grounds to support a finding that these Defendants owed her a duty of care in these circumstances.

238 There are no grounds to believe the conspiracy claim has substantial merit. The statement of claim is deficient and does not disclose a reasonable cause of action as it relates to the claim of conspiracy against the moving parties. Moreover, Dr. Gill has put forward insufficient evidence to support such a claim.

239 Dr. Gill cannot satisfy the court that there are grounds to believe that her claims of defamation, negligence, or conspiracy are legally tenable and supported by evidence reasonably capable of belief such that they have a real prospect of success.

240 For the reasons set out in their detailed Factum at paragraphs 66 through 91, I agree with these Defendants that the Plaintiffs have not shown that their defences of fair comment and qualified privilege lack the necessary prospects of success to permit the action to proceed.

241 When the balancing test is applied to the claims against these Defendants I consider that the comparative interests and considerations are very heavily in favour of the position advanced of these Defendants. Accordingly, all claims made against them are dismissed.

G. Dr. Polevoy

242 Dr. Polevoy is a retired physician now living in the Region of Waterloo, Ontario. He has been an advocate for good patient care and public health for many years. Dr. Polevoy is also an active physician leader with a long history of leadership in specialty associations, and provincial associations.

243 Dr. Polevoy uses his Twitter account as a platform to express his view on a number of topics, including to communicate with the public on health and medicine.

244 The Plaintiffs have claimed damages for alleged defamation on the basis of series of tweets posted between August 6, 2020 and October 21, 2020 similar in nature to those of the other physician Defendants.

245 Dr. Polevoy has adopted the arguments and submissions advanced on behalf of the other Defendant physicians with respect to the nature of his tweets and the available defences to him of fair comment and qualified privilege. In my opinion they apply equally to his tweeted expressions. Further, any communication expressing any complaint or concern about the Plaintiffs that he made to the College of Physicians and Surgeons of Ontario which is the governing body for physicians in the province must be considered to have occurred on an occasion of qualified privilege. Qualified privilege is a strong defence to any claims made by the Plaintiffs of defamation.

246 A consideration of the factors that must be weighed when applying the ultimate balancing test on this motion likewise favours the interest in protecting his right to express himself on matters of public interest. As a result, all claims against Dr. Polevoy in this action are dismissed.

H. Dr. Boozary

247 The only allegations in the Statement of Claim regarding Dr. Boozary are that he published three statements on his public Twitter profile in August 2020 which contain allegedly defamatory remarks concerning Dr. Gill.

248 The following tweets are the allegedly defamatory tweets posted by Dr. Boozary:

(a) On August 6, 2020:

The war on science is real in Canada- maybe ugliest when it comes from our own MD's. All indebted for the strength/ integrity of science/health journalism as counter force up north.

[attaches Dr. Kulvinder Kaur MDs tweet: if you have not yet figured out that we don't need a vaccine, you are not paying attention #FactsNotFear].

(b) On August 7, 2020:

#IstandWithPicard - we all do. Hate only seems to fuel the bots will just continue to send love/strength to Andre/ seven nation army of science at the front line. Trust in science and each other going to get us thru

(c) On August 9, 2020:

Being blocked by @dockaurG a badge of honour sure but unsettling/win for misinformation that there's still an MD platform of >20k followers amplifying anti-science/anti-vax harm.

249 Dr. Boozary has an interest and is actively involved in the public health response to COVID-19 as a primary care doctor, as an assistant professor at the Dalla Lana School of Public Health, and as a co-lead for the Toronto Region's COVID-19 Homelessness and Shelter Response. Through these roles and in the media, Dr. Boozary has been actively involved in public education. Dr. Boozary has also tweeted throughout the pandemic about emerging scientific research, his view on health policy responses, and how he believes we should be coming together to protect those who are most vulnerable.

250 The proceeding against Dr. Boozary arises from an expression made by Dr. Boozary that relates to a matter of public interest. Dr. Boozary's tweets are expressions. All of Dr. Boozary's tweets relate to the COVID-19 pandemic - particularly about the importance of sharing health science information during the crisis - which is a topic of obvious public interest. At this stage, the court is not assessing the quality of the expression, and so it is not legally relevant whether the expression is desirable or deleterious, valuable or vexatious, or whether it helps or hampers the public interest ... The question is only whether the expression pertains to any matter of public interest, defined broadly. This is not an onerous burden, and is clearly met in this case.

251 Dr. Boozary's August 6 tweet does not make any defamatory statement about Dr. Gill. Dr. Gill tweeted "we don't need a vaccine", which was counter to prevailing scientific opinion that a vaccine is necessary to reduce mortality and prevent the ongoing spread of COVID-19. Dr. Boozary stated in the August 6 tweet in response, copying Dr. Gill's tweet, "The war on science is real in Canada- maybe ugliest when it comes from our own MD's."

252 Dr. Boozary's tweet does not injure Dr. Gill's reputation. Dr. Gill's own expression has an impact on her reputation in that people reading it may either agree or disagree and people may feel strongly either way. Dr. Gill has also continued to openly broadcast her opinions on the public health response to COVID-19, even where those opinions are contrary to prevailing scientific opinion, and is thus maintaining the reputation that she has created. Dr. Boozary's election to share his own view on the matter, to his much smaller audience, would not affect Dr. Gill's reputation. Those who agree with Dr. Gill might actually support the idea that she is involved in a "war on science" in that they disagree with the prevailing scientific opinion of the importance of vaccines in fighting COVID-19. In short, Dr. Boozary's comments in the August 6 tweet did nothing to lower the reputation of Dr. Gill and are not defamatory.

253 Dr. Boozary's August 7 tweet is also not defamatory. The words of the Tweet do not refer to Dr. Gill. The Tweet is about hateful "bots", which by definition are unidentified Twitter users, and attempts to offer support to

André Picard and scientists at the front line in the pandemic. A reasonable person could not interpret the August 7 tweet to have lowered Dr. Gill's reputation in any way.

254 Finally, the August 9 tweet also is not defamatory. In the tweet, Dr. Boozary did not claim that Dr. Gill is anti-science or anti-vaccine, but rather that she used her large platform to amplify messages that are anti-science and anti-vaccine. He stated his opinion that it was concerning for a medical doctor with so many followers to be amplifying medical information which he considered to be contrary to scientific evidence. The August 9 tweet does not lower Dr. Gill's reputation as anyone familiar with Dr. Gill's Twitter account would be aware of the content she shares and could recognize that Dr. Boozary was stating his own views about that content, not falsely alleging anything against Dr. Gill.

255 Even if Dr. Boozary's tweets were somehow defamatory, then the defence of fair comment applies to them. Thus, the Plaintiffs are unable to meet their burden of showing there are grounds to believe that Dr. Boozary's defence has no real prospect of success.

256 All three of Dr. Boozary's tweets clearly meet the first criteria as they relate to the dissemination of scientific information regarding the COVID-19 pandemic, which is a matter of obvious public interest. The specific issues that Dr. Boozary was tweeting about within the broader rubric of the pandemic - namely, concerns about a medical doctor denying the need for a vaccine and support for health science reporting - are of particular concern during this global crisis.

257 Turning to the other criteria for establishing fair comment for the August 6 tweet, these criteria are met. Dr. Boozary's comment relates to the fact that Dr. Gill tweeted that "we don't need a vaccine"; he embedded Dr. Gill's full tweet as evidence of this fact. The August 6 tweet is recognizable as a comment because "the war on science is real" is a conclusion or observation which is generally incapable of proof. Further, it is a matter of Dr. Boozary's opinion to say it is "ugliest" when this comes from a medical doctor. Any person could honestly hold these views, given the prevailing scientific position that we do need a vaccine to combat COVID-19 and the important role of doctors in assuaging vaccine hesitancy.

258 The other criteria are also met for the August 7 tweet. This tweet does not make any comment about Dr. Gill. Dr. Boozary makes three comments in this tweet: (1) he supports Picard and others on the "front line" in science; (2) we need to trust in science and each other; and (3) hate fuels the "bots". The first two comments are statements of support that require no factual basis.

259 With respect to the third comment, Dr. Boozary's evidence in cross-examination was that he understood the term "bots" to refer to accounts that have no obvious human identity or accountability and are spreading vitriol against individuals not in relation to the subject matter of their tweets but against them personally, such as death threats.

260 The August 7 tweet is a matter of comment and opinion, and a person could honestly express the same opinions on the facts.

261 Finally, the August 9 tweet also meets the other criteria. The facts grounding Dr. Boozary's comments in this tweet are: Dr. Gill blocked Dr. Boozary on Twitter, Dr. Gill is a medical doctor, Dr. Gill had more than 20,000 twitter followers and Dr. Gill tweeted (which is quoted in Dr. Boozary's August 6 tweet) that "we don't need a vaccine". Calling Dr. Gill blocking him a "badge of honour" is a comment, as this is a subjective personal perspective on the known fact. Dr. Boozary also comments subjectively that he considers the existence of her account "unsettling" and a "win for misinformation", which are also clearly opinions.

262 While Dr. Boozary has met the criteria for the defence of fair comment for all three expressions at issue, Dr. Gill has failed to establish that Dr. Boozary was actuated by express malice, an onus which she bears in order to defeat the privilege. Malice relates to the state of mind of the defendant and is ordinarily established through proof that the defendant knew the statement was untrue, was reckless with respect to its truth, did not believe the

statements were true, or had some improper motive or purpose. Although Dr. Gill did not plead malice with any specificity, her claim that Dr. Boozary acted maliciously cannot succeed on any of these bases. Dr. Boozary affirmed his belief in the statements and that he made those statements for the purpose of expressing his opinion on the dissemination of public health information, without malicious intent. Dr. Boozary also denied Dr. Gill's unsupported allegation that his tweets were sexist, racist, or misogynistic.

263 In applying the balancing test, Dr. Boozary rightly submits that Dr. Gill has failed to establish both the existence of harm as well as causation - both of which are required under the test.

264 Dr. Boozary's expression has high importance. His tweets related to the spread of scientific information regarding the deadly global pandemic, in the midst of the crisis. Scientific and public health information about COVID-19 is a matter of obvious public interest, because everyone in the public has a substantial concern about this topic in that it affects the welfare of citizens, and in particular there has been considerable public controversy about vaccinations. This interest far outweighs any interest that could support allowing the action against him to proceed.

265 An application of the final balancing test results in a determination in Dr. Boozary's favour. All claims against him in this action are dismissed.

I. The Pointer Group Incorporated

266 On October 19, 2020 Dr. Gill delivered a notice of libel pursuant to section 5 of the *Libel and Slander Act* to The Pointer concerning an article published by The Pointer on August 13, 2020 (the "Article"). The libel notice alleged that the Article contained defamatory statements about Dr. Gill.

267 On October 22, 2020, The Pointer responded to the libel notice and denied that the Article was defamatory.

268 The Article, published on August 13, 2020, reports on:

(a) Tweets published by Dr. Gill on August 4, 5, 6 and 12, 2020, which appear in the Article in their entirety and which express her views that lockdowns are unwarranted and promotes the use of hydroxychloroquine as a treatment for the virus;

(b) Twitter's removal of Dr. Gill's tweet on August 6, 2020, because it violated Twitter's policies. The August 6, 2020 tweet is set out in the Article even though it was removed on Twitter. That tweet promoted T-cell immunity (herd immunity) and hydroxychloroquine as humanity's effective defences against COVID-19;

(c) Dr. Gill defending the use of a hydroxychloroquine and promoting it as "effective in the fight against COVID-19";

(d) A complaint made to the College of Physicians and Surgeons of Ontario ("CPSO") about Dr. Gill's tweets;

(e) The fact there are medical studies that have questioned the use of hydroxychloroquine as a treatment for COVID-19;

(f) Health Canada's position that it does not support the use of hydroxychloroquine to prevent or treat COVID-19 without a prescription and warning Canadians about false and misleading claims; and

(g) Concerns expressed by Dr. David Juurlink, head of clinical pharmacology and toxicology at the University of Toronto, regarding Dr. Gill's tweets including that her advice in her tweets is dangerous.

269 Dr. Juurlink's comments in the Article are not the subject of Dr. Gill's claim and Dr. Juurlink is not a defendant in this action.

270 The Article reports on Dr. Gill's own tweets, which are publicly available and are repeated verbatim in the

Article. The Article also accurately reports that there are research and statements from public authorities that have contradicted Dr. Gill's views and that other members of the medical community do not support her views, have made complaints about her public statements and are concerned about the impact those statements will have on members of the public. There is nothing in the Article that is not true.

271 Dr. Gill appears to have asserted that she did not make the statements attributed to her, and that the statements as reported were distorted and taken out of context. The Article simply reports on her tweets and does not take them out of context.

272 Dr. Gill knowingly tweeted about the pandemic, despite the controversial nature of her views, and knowing that they would be subject to public criticism and media reports. The Article is a fair and accurate report about Dr. Gill's tweets and the controversy created by them, and is based on true underlying fact.

273 The public has an interest in receiving competing viewpoints to those expressed publicly by Dr. Gill. Information on whether Dr. Gill's opinions expressed in her tweets are disputed is important to public debate and information about COVID-19 and potential treatments.

274 The Pointer states that attempts to contact Dr. Gill for comment were made before publishing the Article, but she did not respond, nor did she follow up after publication of the Article. Before the Article was published, among other things, The Pointer sent an email to Dr. Gill at the email address: concernedontariodoctors@gmail.com, the email address for Concerned Ontario Doctors, but received no reply.

275 In her affidavit sworn June 14, 2021 Dr. Gill asserted for the first time that The Pointer did not attempt to contact her before publishing the Article. She did not complain about this in her libel notice or in her Statement of Claim. In response to the libel notice, The Pointer wrote, among other things, that it had attempted to contact Dr. Gill for comment before publishing the Article. Dr. Gill did not dispute this.

276 The Article contains references to four reliable sources: Dr. Juurlink, Health Canada, Health Link BC, and an extensive study by the New England Journal of Medicine on the efficacy of hydroxychloroquine for treatment of COVID-19.

277 Dr. Gill claims that The Pointer did not engage in responsible journalism because it simply repeated the defamation of others without verification or competent investigation and echoed the defamation of the other Defendants. However, I agree with the arguments advanced by the Pointer that:

(a) There was no repetition of defamation of others. The Article contained quotations from an interview The Pointer conducted with Dr. Juurlink. Dr. Juurlink is not a named defendant. The quotation in the Article from Dr. Juurlink is a statement of his opinion and it is a reasonable comment of his concerns about Dr. Gill's tweets. The Article is reporting his concerns, which are shared by other members of the medical community; and

(b) There was no echoing of the defamation of the other defendants. The sole reference to another defendant in the Article was an indirect reference to the fact "the CBC [i.e. Radio Canada] reported Dr. Alex Nataros... filed a complaint with the [CPSO] for an "egregious spread of misinformation."" The article quotes from a tweet made by Dr. Nataros in response to Dr. Gill's tweets, which is part of Dr. Gill's claim. However, one quote of one tweet by one other defendant does not constitute a general repeating or echoing the defamation of others. As noted, the action was discontinued against Radio Canada.

278 The Article therefore bears all of the features of a strong responsible journalism defence.

279 Journalists at large must have the freedom to responsibly report on the COVID-19 pandemic, including Dr. Gill's comments and the criticism of them, irrespective of whether Dr. Gill has a valid basis to assert that lockdowns

are ineffective or that hydroxychloroquine is effective against COVID-19. The media must be permitted to report responsibly on comments that affect the public and which are a matter of public interest.

280 The Plaintiffs should not be permitted to stifle public discourse and participation in public health debates caused by their own public comments.

281 In my view, the Plaintiffs have failed to discharge their onus of showing that The Pointer's defence of responsible journalism has very little chance of succeeding. In fact, I consider that the evidence entirely contradicts such a conclusion and that The Pointer has a very strong defence available to it.

282 Further and finally, when the balancing test is ultimately applied, it results in an assessment very much in favour of The Pointer and the public interest concerns it has advanced. As a result, the claims against it in this action must be dismissed.

J. Alheli Picazo

283 The action against Picazo is based on four tweets she posted to her Twitter account. The first three comprised a "thread" or series of tweets posted on August 6, 2020, prompted by a tweet from the Defendant, André Picard earlier that day. Picard's tweet embedded two tweets dated August 4 and 6, 2020 from Dr. Gill that read as follows:

> "If you have not yet figured out that we don't need a vaccine, you are not paying attention. #FactsNotFear"
>
> and
>
> "#Humanity's existing effective defences against #COVID19 to safely return to normal life now:
>
> -The Truth
>
> -T-cell immunity
>
> -Hydroxychloroquine"

284 In the first tweet in Picazo's impugned August 6, 2020 thread, Picazo wrote, "Her behaviour and tweets throughout the pandemic have been grossly irresponsible, to say the least. I would have no faith in her as a doctor for anything." Embedded in this tweet was an image of another tweet Dr. Gill sent on August 4, 2020, stating, "There is absolutely no medical or scientific reason for this prolonged, harmful and illogical lockdown. #FactsNotFear". Picazo's tweet also embedded a tweet by Bronca, which itself contained an image of the two tweets published by Dr. Gill set out at the previous paragraph.

285 Picazo's second tweet stated, "This is unprofessional, imo." "Imo" is a well-known acronym for "in my opinion". That tweet embedded images of, and was a comment on, two additional tweets of Dr. Gill, which read:

> "#COVID19 Defined By
>
> "Absolute power corrupts absolutely"
>
> "A lie told often enough becomes truth"
>
> "Cancer of bureaucracy is destroying medicine"
>
> "Media's most powerful entity on earth: power to make the innocent guilty & to make the
>
> guilty innocent - control minds of masses""
>
> and
>
> ""If you're not careful, newspapers will have you hating the ppl who are oppressed & loving the ppl who are doing the oppressing" 2020: frontline MDs silenced/censored for speaking the truth & upholding HippocraticOath [sic] while media invokes fear & "journalists" propagate lies"

286 The third tweet in Picazo's thread stated, "There is an abandonment of science happening here, she just doesn't seem to be able to recognize the culprit", which was a comment on a tweet by Dr. Gill that stated:

> "My heart is broken watching #COVID19Canada unfold. Absolutely broken watching our govts embrace quackery & abandon science. Broken hearing endless political/media lies. Broken watching govts violate our freedom/rights. Broken from govts allowing Cdns to die when we can save them."

287 The final tweet by Picazo that Dr. Gill alleges was defamatory was posted on October 20, 2020. That tweet was part of a series of tweets Picazo wrote regarding the renaming of Sir John A. MacDonald Hall at the Queen's University Faculty of Law, which was a news story at that time. Picazo was responding to comments made by Queen's Law professor Bruce Pardy that were critical of the proposal to remove the name. Picazo wrote, "What's more threatening to Canadians than the re-naming of a building? Covid denialism and promoting bad science and fringe theories/figures. #cdnpoli". That tweet contained embedded images of four other tweets from various accounts, including one from Dr. Gill that promoted the use of HCQ.

288 Numerous articles and scholarly resources have been tendered by the various Defendants that make clear that Dr. Gill's views on the use of lockdowns as a public health measure, the proximity of reaching her immunity, the efficacy and safety of HCQ as a treatment for COVID-19, and the necessity of a COVID-19 vaccine run contrary to the generally accepted views of the scientific and medical community.

289 To satisfy the requirements of s. 137.1(3), the moving party must demonstrate on a balance of probabilities that (i) the proceeding arises from an expression made by the moving party and that (ii) the expression relates to a matter of public interest. These requirements are easily satisfied in the case as against Picazo which arises from the four tweets referred to.

290 Dr. Gill has claimed in defamation and also alleged conspiracy. There are no grounds to believe that either of these claims has a real prospect of success. Further, there are no grounds to believe that Picazo's defences of justification and fair comment have no real prospect of success.

291 Picazo's impugned comments were that Dr. Gill's tweets: (a) were grossly irresponsible; (b) were unprofessional; (c) constituted an abandonment of science; (d) contained bad science; and (e) contained fringe theories.

292 Although Dr. Gill further claims that Picazo said she engaged in "COVIDdenial". Picazo's October 20, 2020 tweet, which referred to "Covid denialism and promoting bad science and fringe theories/figures", was directed at Bruce Pardy, not at Dr. Gill. Picazo's tweet embedded four tweets (only one of which was a tweet of the Plaintiffs) that had been previously retweeted by Bruce Pardy. Reading this tweet in context, the meaning, as far as it relates to Dr. Gill's tweet, is that it was Bruce Pardy who was promoting bad science and fringe theories. Dr. Gill's tweet that was embedded in Picazo's October 20, 2020 tweet simply attached an article promoting the use of HCQ to treat COVID-19, and so the meaning (as it relates to Dr. Gill) is that the use of HCQ to treat COVID is "bad science" and a "fringe theory".

293 In my view, these comments were not defamatory. The thrust of Picazo's comments is that Dr Gill's tweets promoted ideas and theories related to lockdowns, HCQ, and vaccines that contradicted the generally accepted medical and scientific consensus and that the tweets were, for that reason, irresponsible and unprofessional. Prior to August 6, 2020, Dr. Gill already had a reputation as an advocate of controversial opinions regarding the COVID-19 pandemic. Picazo's comments regarding Dr. Gill's tweets contain the same conclusions that a reasonable person would have reached. Picazo's tweets simply affirmed Dr. Gill's self-positioning as a bold, advocate willing to "tell it like it is" in the face of (in Dr. Gill's view) misinformation being spread by the government, public health authorities, and the mainstream media.

294 The content and tone of Picazo's tweets were mild and measured relative to the highly charged online

discourse surrounding the COVID-19 pandemic and, in particular, to the way in which Dr. Gill expresses herself on Twitter.

295 Picazo's impugned comments also attract a strong fair comment defence. They relate to a matter of public interest. They are based on fact, i.e., the underlying tweets from Dr. Gill that Picazo was referring to and are embedded in Picazo's tweets. These tweets, and the other tweets of Dr. Gill are publicly available on her Twitter page for the world to see.

296 Picazo's comments are recognizable as comment and are expressly framed as such, and constitute an opinion that a person could honestly express on the proved facts. It is Picazo's unchallenged evidence that she was expressing her honestly held opinion that Dr. Gill's statements about COVID-19, vaccines and public health measures were inaccurate, irresponsible, and unprofessional for a medical doctor to be making, that they created a potential risk to public health, and that they ran counter to the prevailing views on these issues as expressed by public health authorities.

297 The Plaintiffs have failed in their onus of demonstrating that the defence of fair comment has little or no application to Picazo's expressions. In my view, the record shows that a very strong defence in that regard is available to her.

298 Further, Dr. Gill has failed to demonstrate or particularize any overt acts by Picazo in furtherance of the alleged conspiracy, to explain how Picazo acted in concert with other Defendants, or to set out particularized allegations of damages suffered as a result of the conspiracy. The conspiracy claim fails to meet the "substantial merit" test and should be dismissed on this basis alone.

299 Finally, an application of the ultimate balancing test very much favours Picazo and the interests and values that she has argued must be protected. Accordingly, I conclude that all claims in this action against her ought to be dismissed.

K. Bruce Arthur

300 On August 6, 2020, Arthur saw a tweet by André Picard, whom he follows on Twitter, which embedded the following August 4, 2020 tweet by Dr. Gill:

> "If you have not figured out that we don't need a vaccine, you are not paying attention. #FactsNotFear"

301 Arthur was concerned by this tweet because it contradicted the public health advice he had become aware of over the previous months. He was particularly concerned that the tweet had been made by a physician.

302 Arthur then reviewed Dr. Gill's Twitter account, and saw the following tweets:

a) "There is absolutely no medical or scientific reason for this prolonged, harmful and illogical lockdown."

b) "Current status of #COVID19 99.9% Politics, Power, Greed & Fear. 0.1% Science & Medicine."

c) "#Humanity's existing effective defences against #COVID19 to safely return to normal life now: -The Truth - T-cell Immunity - Hydroxychloroquine."

303 Arthur observed that Dr. Gill's tweets had been retweeted many, many times.

304 Arthur also observed that Dr. Gill had tweeted about André Picard, accusing him of having been appointed by Trudeau to the COVID-19 Impact Committee "to drive the political WHO narrative." This tweet had resulted in a barrage of negative online vitriol directed at Picard.

305 After learning that Dr. Gill had blocked him from being able to view her Twitter page, Arthur tweeted the following:

> I don't boast about being blocked, but this one is a badge of honour, from a Canadian doctor who is spreading dangerous misinformation, and who unleashed a troll farm at @picardonhealth, one of the finest public service journalists in Canada. What a disgrace.
>
> [Screenshot of Twitter message showing he had been blocked]
>
> Now, let's wait and see which media outlet her a platform. It'll be telling.

306 This single tweet is the sole subject of the defamation claim against Arthur.

307 The expression at issue relates to a matter of public interest - namely, the COVID-19 pandemic and ensuing public health response. The public interest nature of the expression should not be in dispute on this motion, particularly since Dr. Gill herself has extensively tweeted about this topic.

308 When determining whether a statement has a defamatory meaning, attention must be given to the mode of communication, context, and all surrounding circumstances. As a platform, Twitter allows for an open exchange of ideas and invites users to engage with the views of others. By making controversial statements on this very public platform, Dr. Gill implicitly invited members of the public to respond to her views.

309 Arthur's tweet cannot bear the defamatory meanings ascribed to it by Dr. Gill. It does not call her a conspiracy theorist, it does not call into question her mental stability, and it says nothing about her ability to care for her patients. It merely states Arthur's own view that her publicly-available tweets include dangerous misinformation about COVID-19, and that the spreading of this misinformation and her related accusations hurled at Picard were a "disgrace".

310 There is no evidence that the Arthur tweet lowered Dr. Gill's reputation. Her tweets were available for the public to see. Any reasonable member of the community could immediately look at her Twitter page and discern for themselves whether they agreed with Arthur's assessment of her tweets.

311 Dr. Gill has fostered a reputation for herself as an outspoken and controversial advocate against public health advice on COVID-19 measures, and the mainstream media's coverage of COVID-19. Public health authorities have deemed anti-vaccine and anti-lockdown rhetoric to be "misinformation". Therefore, Arthur's characterization of Dr. Gill's tweets as "misinformation" likely served only to solidify her stance as a crusader against public health advice and the mainstream media, a reputation she herself created.

312 Arthur's tweet also attracts a strong defence of fair comment on a matter of public interest. It was on a matter of obvious public interest. It was based in fact, as it directly responded to Dr. Gill's Twitter posts about vaccines, lockdowns, hydroxychloroquine and the overall COVID-19 public health response, which she does not dispute making. The tweet expressed an honestly held opinion that many other Defendants in this litigation shared. There is no credible suggestion or evidence that it was motivated by malice.

313 Arthur's tweet is also recognizable as comment. Arthur was reacting to the fact that Dr. Gill had blocked him on Twitter, and tweeted that it being blocked was a "badge of honour" due to his opinion that she was "spreading dangerous misinformation" and had unfairly criticized Picard. The final words, "What a disgrace", shows that Arthur was only expressing his opinion and personal observation of Dr. Gill's actions on Twitter.

314 Dr. Gill has not put forward any real evidence of any harm caused to her by Arthur's single tweet, or of any reputational or other harm at all.

315 In any event, any potential harm arising from the impugned expressions is outweighed by the importance of allowing citizens to freely express themselves via social media platforms on what will be the defining public health issue of our time. An application of the ultimate balancing test to these facts requires that all claims against Arthur be dismissed.

Conclusion

316 For these reasons, the motions brought by the Defendants are granted, and all claims against them in these proceedings are hereby dismissed.

Costs

317 Given the position taken on behalf of the Plaintiffs by their counsel in response to the suggestion made by some of the Defendants that the Plaintiffs' claims were being maintained with the possible benefit of third party funding, I did not consider it necessary or appropriate to refer to it in the above reasons as it did not form any part of the applicable analysis. However, I should indicate to the parties that approach taken in that regard is without prejudice to the entitlement of any party to refer to such issue if there is a proper basis for doing so when making submissions on costs.

318 If the parties cannot agree on the subject of costs, written submissions may be delivered by the Defendants for my consideration within 30 days of the date of this decision. Written submissions may be delivered by the Plaintiffs within 30 days thereafter.

E.M. STEWART J.

Mancuso v. Canada (Minister of National Health and Welfare), [2014] F.C.J. No. 732

Federal Court Judgments

Federal Court

Toronto, Ontario

Russell J.

Heard: January 21, 2014.

Judgment: July 16, 2014.

Amended Judgment: November 3, 2014.

Docket: T-1754-12

[2014] F.C.J. No. 732 | [2014] A.C.F. no 732 | 2014 FC 708 | 242 A.C.W.S. (3d) 788 | 460 F.T.R. 25 | 2014 CarswellNat 2540

Between Nick Mancuso, The Results Company Inc., David Rowland, Life Choice Ltd (Amalgamated from, rolled into, and continuing on business for, and from, E.D. Modern Design Ltd. and E.G.D. Modern Design Ltd.), and Dr. Eldon Dahl, and Agnesa Dahl, Plaintiffs, and Minister of National Health and Welfare, Attorney General of Canada, Minister of Public Safety and Emergency Preparedness, Royal Canadian Mounted Police, and Her Majesty the Queen in Right of Canada, Defendants

(184 paras.)

Case Summary

Commercial law — Trade regulation — Food and drugs — Natural health products — Enforcement — Motion by defendants to strike plaintiffs' action challenging constitutionality of Food and Drugs Act and Natural Health Products Regulations or to proceed only against Federal Crown allowed in part — Cross-motion by plaintiffs to stay enforcement of certain provisions of Act and Regulations dismissed — Damages claim, allegations of malicious intent and improper purpose, and Charter infringement claims struck for failing to plead material facts, failing to disclose reasonable cause of action or abuse of process — Corporate plaintiffs could not maintain s. 7 Charter claim — Federal Crown only proper defendant.

Constitutional law — Canadian Charter of Rights and Freedoms — Availability of Charter protection — Corporations — Motion by defendants to strike plaintiffs' action challenging constitutionality of Food and Drugs Act and Natural Health Products Regulations or to proceed only against Federal Crown allowed in part — Cross-motion by plaintiffs to stay enforcement of certain provisions of Act and Regulations dismissed — Damages claim, allegations of malicious intent and improper purpose, and Charter infringement claims struck for failing to plead material facts, failing to disclose reasonable cause of action or abuse of process — Corporate plaintiffs could not maintain s. 7 Charter claim — Federal Crown only proper defendant.

Constitutional law — Constitutional proceedings — Practice and procedure — Pleadings — Motion by defendants to strike plaintiffs' action challenging constitutionality of Food and Drugs Act and Natural Health Products Regulations or to proceed only against Federal Crown allowed in part — Cross-motion by plaintiffs to stay enforcement of certain provisions of Act and Regulations dismissed — Damages claim, allegations of malicious intent and improper purpose, and Charter infringement claims struck for failing to

plead material facts, failing to disclose reasonable cause of action or abuse of process — Corporate plaintiffs could not maintain s. 7 Charter claim — Federal Crown only proper defendant.

Motion by the defendants to strike the plaintiffs' action challenging the constitutionality of the Food and Drugs Act and Natural Health Products Regulations or to allow the action to proceed only against the Federal Crown. Cross-motion by the plaintiffs to stay the enforcement of certain provisions of the Act and Regulations pending the outcome of the action. The plaintiffs were users, manufacturers or distributors of products that fell within the definition of natural health product, including dietary food supplements, nutritional food supplements and vitamins. They alleged the federal government did not have constitutional authority to regulate natural health substances, the Act and Regulations infringed their rights under the Charter, and they had suffered damages as a result of Charter breaches and tortious conduct by government officials in enforcing the Act and Regulations. The plaintiff Dahl challenged enforcement actions under the Act that led to criminal convictions against him.
HELD: Motion allowed in part; cross-motion dismissed.

Certain claims for relief were struck as overly broad. The plaintiffs' damages claim and allegations of malicious intent and improper purpose or bad faith in relation to enforcement actions against them were also struck with leave to amend to state conduct under the provisions of the Act and Regulations that was clearly wrong, in bad faith or an abuse of power. Several paragraphs were struck for failing to plead sufficient material facts to support the assertions made. Other paragraphs were struck as vexatious or because they disclosed no reasonable cause of action. The Charter claim was struck as it did not outline how any asserted rights were infringed and thus disclosed no reasonable cause of action. The bulk of the pleadings respecting Dahl were struck as an abuse of process as they were an attempt to re-litigate the validity of actions related to the previous criminal proceedings. Dahl could not use his unchallenged convictions to demonstrate unconstitutionality. There was no reasonable chance of success that his malicious prosecution claim would succeed. The corporate plaintiffs could not bring a proactive challenge to the Act and Regulations on s. 7 Charter grounds as they had no procedural protections under s. 7. Their claim of s. 2(b) Charter breaches had not been pleaded with sufficient detail to allow adjudication. The defendant Ministers and RCMP were not proper defendants. The federal Crown was the only proper defendant in the action.

Statutes, Regulations and Rules Cited:

Canadian Bill of Rights, R.S.C. 1985, App. III, s. 1(c)

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 1, s. 2, s. 2(a), s. 2(b), s. 7, s. 8, s. 9, s. 11(b), s. 15, s. 24(1)

Constitutional Act, 1867, s. 92(7), s. 92(13), s. 92(16)

Constitution Act, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 24, s. 52

Controlled Drugs and Substances Act, S.C. 1996, c. 19, s. 5(2), s. 6(1)

Customs Act, R.S.C. 1985, c. 1 (2nd Supp.), s. 153(a), s. 159

Federal Court Rules, SOR/98-106, Rule 64, Rule 181, Rule 221, Rule 221(1)(a), Rule 221(a), Rule 221(c), Rule 221(d), Rule 221(f)

Federal Courts Act, R.S.C. 1985, c. F-7, s. 17, s. 18(3)

Food and Drugs Act, R.S.C. 1985, c. F-27, s. 2, s. 3(1), s. 3(2)

Natural Health Products Regulations, SOR/2003-196, s. 44, s. 63, s. 83, s. 87, s. 91, s. 93, s. 94, s. 98, s. 108, s. 115

Counsel

Rocco Galati, for the Plaintiffs.

Sean Gaudet and Andrew Law, for the Defendants.

[Editor's note: Amended reasons were released by the Court on November 3, 2014. The changes were not indicated. This document contains the amended text.]

JUDGMENT AND REASONS

RUSSELL J.

INTRODUCTION

1 The Plaintiffs have brought an action challenging certain provisions of the *Food and Drugs Act*, RSC, 1985, c F-27 [Act] on constitutional grounds, challenging the *Natural Health Products Regulations*, SOR/2003-196 [Regulations] on constitutional grounds and as exceeding the authority delegated by the Act, and claiming damages based on alleged Charter breaches and tortious conduct in the implementation and enforcement of the Act and the Regulations. This judgment relates to two motions brought in the context of that action. The Defendants have brought a motion to strike the Statement of Claim [Claim] in its entirety, or in the alternative to strike certain paragraphs that amount to the bulk of the Claim (paragraphs 1(a), 1(b), 1(c), 1(e), 2 - 29, 34, 36 and 37-100). They also seek to amend the Claim to remove all of the Defendants except Her Majesty the Queen in Right of Canada. The Plaintiffs have brought a cross-motion seeking to stay the enforcement of s. 3(1) and (2) of the Act and large portions of the Regulations pending the outcome of the action.

BACKGROUND

2 The Plaintiffs are present or past users, manufacturers or distributors of products that fall within the definition of "natural health product" as set out in the Regulations [natural health products], which they describe as naturally occurring dietary food supplements, nutritional food supplements and vitamins. They challenge the validity and the enforcement of the Regulations and certain sections of the Act on a number of grounds, including that:

> the federal government does not have the constitutional authority to regulate natural health substances under the division of powers set out in the *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3, reprinted in RSC 1985, App II, No 5 [Constitution Act 1867];
>
> Parliament never intended the definition of "drug" in the
>
> Act to apply to natural health products and therefore the
>
> Regulations exceed the authority delegated by the Act; and
>
> the enactment and enforcement of the Regulations and the application of certain sections of the Act to natural health products have infringed their rights under ss. 2(a), 2(b), 7, 8, 9 and 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 [Charter].

3 The Plaintiffs also allege that they have suffered damages as a result of these alleged Charter breaches as well as heavy-handed and tortious conduct by government officials and the Royal Canadian Mounted Police [RCMP] in enforcing the Act and the Regulations.

4 With respect to the constitutional division of powers, the Claim states that Parliament has the jurisdiction to regulate any product that has a potential health risk, but Parliament cannot extend this jurisdiction to products which

pose no or a *de minimis* health risk, so that the Regulations are therefore *ultra vires* the jurisdiction of Parliament (Claim, at para 16(h)).

5 The Plaintiff Nick Mancuso [Mancuso] is a Canadian actor who says that he has, throughout his life, relied heavily on dietary food supplements and vitamins as a conscious, informed choice regarding his health. He views the free choice to use these products as part of his belief system in terms of how to maintain good health and "in general, with respect to his bodily and psychological integrity." He resists the notion that the state can "arbitrarily and selectively dictate" what dietary supplements or vitamins can be sold to him, and alleges that restrictions on the sale of natural food products and the communication of health claims about them violate his rights under ss. 2(a), 2(b), 7 and 15 of the Charter and have caused him mental distress.

6 The Plaintiff David Rowland [Rowland] is an advocate of "alternative" medicine who says that he has been involved for many years with the development of natural health products. A line of dietary supplements developed by Rowland -- the Vitamost(R) line -- are or were distributed by The Results Company Inc [the Results Company], another Plaintiff described as "a small family owned business." Rowland and the Results Company allege that the product and site licensing regime imposed by the Regulations -- the National Products Number [NPN] licensing scheme -- has severely restricted the sale of these supplements. They say the NPN regime is "oppressive and totally unnecessary" because the products are safe, and that the Regulations are "unconstitutional and ultra vires the Act."

7 Rowland and the Results Company allege that Health Canada has refused licences for some of their products and has withheld approval for others, causing a steep decline in their business. They allege that the NPN regime is a form of censorship that prohibits the sale of natural health products and decides which health claims can be made about them, prohibiting "all other true claims." They say that "[i]n no other industry are suppliers prevented from telling their customers the truth about what their products do." They also allege that the enforcement of the Regulations has been "excessive and abusive," employing "para-military methods of enforcement." They allege that they have suffered damage to reputation and economic losses, and Rowland alleges breaches of his rights under ss. 2, 7 and 15 of the Charter "as claimed and articulated with respect to Nick Mancuso."

8 The Plaintiff Eldon Dahl [Dr. Dahl] has been involved in importing, exporting, preparing and distributing natural health products since purchasing an existing health food store in West Vancouver in 1984. He says he is qualified as a Naturopathic Physician. The Plaintiff Agnesa Dahl [Mrs. Dahl] is his wife, and the Plaintiff Life Choice Ltd [Life Choice] is their company, which was formed from the amalgamation of companies they previously owned or controlled (E.D. Modern Design Ltd and E.G.D. Modern Design Ltd). The Dahls and the predecessor companies of Life Choice have been subject to enforcement action under the Act and the Regulations on a number of occasions, including searches and seizures dating back to 2001. In 2004, Dr. Dahl and his then company (E.D. Internal Health) were charged with 42 counts of violating the *Customs Act*, RSC, 1985, c 1 (2nd Supp.) [Customs Act] and the *Controlled Drugs and Substances Act*, SC 1996, c 19 [CDSA]. Dr. Dahl and E.D. Internal Health were found guilty on 33 counts and received a conditional sentence and fines: *R v Dahl*, 120998, March 26th 2004 (BC Prov Ct) [*R v Dahl #1*]; *R v Dahl*, [2004] B.C.J. No. 3072, 120998-C3, May 26, 2004 (BC Prov Ct) [*R v Dahl #2*]. In early 2010, the Dahls and their company, E.G.D. Modern Design Ltd, were charged with 33 counts of violating the Act and the CDSA. The charges against the Dahls were stayed due to delay in January 2013, while E.G.D. Modern Design pleaded guilty on 11 counts (including 8 under the Act) and was sentenced to pay fines totalling $125,250: *R v Dahl*, 2013 ABQB 54 [*R v Dahl #6*]; trial excerpt from *R v Eldon Garth Dahl, Agnesa Dahl and EDG Modern Design Ltd*, [2013] A.J. No. 89, 100237221Q3 (Alta QB) [*R v Dahl #7*] at pp. 52-104 (Defendant's Motion Record, at 559-611).

9 The Dahls allege violations of their rights under ss. 7, 8 and 9 of the Charter in connection with the searches and seizures preceding the charges outlined above, which they characterize as excessive and abusive, including a "heavily armed raid" resulting in the seizure of products and a search of their home in which they allege they were unlawfully detained and a gun was pointed at Mrs. Dahl's chest. They allege that Dr. Dahl was "falsely convicted" in 2004, and that they were "falsely and maliciously charged [...] and prosecuted" beginning in 2010 "for the possession and sale of perfectly safe, natural products... [which] are arbitrarily, vaguely, and overly-broadly treated

as 'drugs' and falsely and maliciously enforced as such." They say that Dr. Dahl has an unwarranted criminal record "for not only something he was not responsible for, but also due to the ultra vires, unconstitutional Regulations and their excessive and abusive enforcement by the Defendants' officials" (emphasis in original). The Dahls and Life Choice also allege that Health Canada issued unfounded Health Warning Bulletins on its website regarding safety concerns with Dr. Dahl's and E.G.D. Modern Design's products, without notifying them, and has refused to remove these warnings even after the products were proven to be safe.

10 The Dahls state that they have suffered loss of reputation, mental distress, and financial losses as a result of these events. In addition to the alleged breaches of ss. 7, 8 and 9 of the Charter, the Dahls claim that they "have also had their Charter rights, as consumers, manufacturers, and distributors, personally breached under ss. 2, 7 and 15 of the Charter for the same reasons and rationale as set out with respect to Nick Mancuso and David Rowland."

11 Finally, the Claim states that in addition to the various constitutional breaches alleged by the "biological" Plaintiffs, the corporate Plaintiffs claim breaches of the following Charter and constitutional rights:

a) the right to freedom of expression and communication as guaranteed under s. 2 of the Charter;

b) the procedural safeguards of s. 7 of the Charter in the context of (quasi) criminal prosecution and regulatory scheme;

c) the right to equality, as a structural imperative of the underlying principle of the *Constitution Act, 1867* as enunciated by the Supreme Court of Canada in *Winner v SMT (Eastern) Ltd*, [1951] SCR 887 [*Winner*] , which right, above and beyond s. 15 of the Charter, is also involved by the biological Plaintiffs.

12 The Defendants argue that the Claim should be struck in its entirety without leave to amend. Should any portion of it proceed, they say that the only proper Defendant is Her Majesty the Queen in Right of Canada. The Plaintiffs argue that not only should the Claim proceed but, in addition, the Court should stay the enforcement of s. 3(1) and (2) of the Act and ss. 44, 63-83, 87, 91, 93, 94, 98 and 108-115 of the Regulations pending the outcome of the action.

ISSUES

13 The issues that arise in this proceeding are:

1. Should the Claim, or any portion of it, be struck?
2. If the Claim is struck, should the Court grant leave to amend it?
3. If any portion of the Claim is permitted to proceed, who are the proper defendants?
4. Should the Court stay the enforcement of s. 3(1) and (2) of the Act and ss. 44, 63-83, 87, 91, 93, 94, 98 and 108-115 of the Regulations pending the outcome of the action?

ARGUMENTS

Defendants' Motion to Strike the Claim

Arguments of the Defendants

14 The Defendants argue that the Claim should be struck in its entirety without leave to amend. They say it is in fact three separate claims combined together into one unduly complex, prolix and convoluted pleading that is so undefined and broad in scope as to be judicially unmanageable. They also argue that it does not meet the basic rules of pleading in that it fails to set out a concise statement of the material facts relied upon, is replete with bald allegations and colourful rhetoric, and pleads evidence instead of material facts in many instances. The Defendants

say it is not possible for them to answer the allegations contained in the pleading by preparing a statement of defence.

15 The Defendants also argue that the Plaintiffs are asking the Court to make findings inconsistent with previous findings made by other courts in different proceedings, and are attempting to re-litigate matters that were, or ought to have been, raised in earlier proceedings. As such, they say the Claim is an abuse of process. In addition, the Defendants argue that the corporate Plaintiffs are asserting violations of Charter provisions they are not entitled to invoke, all of the Plaintiffs are seeking prerogative relief (specifically orders in the nature of prohibition) that cannot be obtained in an action, and the Claim names improper and unnecessary parties.

16 The Defendants acknowledge that, for the purposes of this motion, the allegations set out in the Claim are deemed to be proven unless they are incapable of proof. They state that the test for striking out pleadings under Rule 221(1)(a) of the *Federal Court Rules*, SOR/98-106 [Rules] is whether it is plain and obvious, assuming the facts pleaded to be true, that the claim discloses no reasonable cause of action - that is, it has no reasonable prospect for success: *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at para 18 [*Hunt*]; *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17 [*Imperial Tobacco*]. They also point out that Rule 221 states a number of other grounds upon which a pleading in an action may be struck:

> 221.(1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it
>
> (a) discloses no reasonable cause of action or defence, as the case may be,
>
> (b) is immaterial or redundant,
>
> (c) is scandalous, frivolous or vexatious,
>
> (d) may prejudice or delay the fair trial of the action,
>
> (e) constitutes a departure from a previous pleading, or
>
> (f) is otherwise an abuse of the process of the Court,
>
> and may order the action be dismissed or judgment entered accordingly.

17 The Defendants state that the present motion relies upon subrules 221(a), (c), (d), and (f).

18 With respect to the argument that the Claim is scandalous, frivolous and vexatious (Rule 221(c)) and will delay the fair trial of the action (Rule 221(d)), the Defendants say that the Claim fails to meet the basic rules of pleading, is based upon bald assertions that are unsupported by any material facts and, taken as a whole, is a lengthy and disorganized diatribe in favour of de-regulation of the production, distribution, sale and consumption of natural health products.

19 The purpose of pleadings, the Defendants argue, is to clearly define the issues in dispute and give fair notice of the case to be met by the other side. Pleadings establish a landmark by which the parties and the court can determine the relevancy of evidence, both on discovery and at trial: *Sivak v Canada*, 2012 FC 272 at para 11 [*Sivak #2*]. Pleadings that are irrelevant, immaterial, redundant, argumentative and/or inserted for colour should be struck pursuant to Rule 221(c), and a pleading should also be struck as scandalous where it contains unfounded and inflammatory attacks on the integrity of a party: *Sivak #2*, above, at para 89; *George v Harris*, [2000] OJ No 1762 at para 18, 97 ACWS (3d) 225 [*George*].

20 The Defendants note that there are four basic requirements of pleading. Every pleading must: (a) state facts and not merely conclusions of law; (b) include material facts; (c) state facts and not the evidence by which they are to be proven; and (d) state facts concisely in a summary form: *Carten v Canada*, 2009 FC 1233 at para 36, aff'd by 2010 FC 857. A plaintiff is required to plead with sufficient particularity the constituent elements of every cause of action raised, and cannot plead bare assertions without supporting facts, as this may prejudice the trial of the action: *Simon v Canada*, 2011 FCA 6 at para 18 [*Simon*]; *Merchant Law Group v Canada (Revenue Agency)*, 2010

FCA 184 at para 34 [*Merchant Law*]; *Johnson v Canada (Royal Canadian Mounted Police)*, 2002 FCT 917 at paras 24-25 [*Johnson*].

21 The Defendants point to examples of what they characterize as bald assertions unsupported by any material facts in paragraphs 6, 7, 16(t), 16(y), 35 and 36 of the Claim. They state that these are "merely examples" and that it is impossible for them to respond to "bald, vague, over-generalized, bombastic assertions." They argue that the Claim does not set out concise statements of material facts in support of recognizable causes of action in law, and is therefore not a proper pleading.

22 With respect to the allegations of Mancuso (paragraphs 24-30 of the Claim), the Defendants say that while he claims that the regulatory schemes enforced by Health Canada officials have curtailed and eliminated the availability of "many" of the "safe products" that he seeks to consume, he has not identified any specific dietary food supplements and vitamins to which he has been denied access. In addition, while he alleges that the current regulatory scheme violates his rights under ss. 2(a), 2(b), 7 and 15 of the Charter, he has failed to plead the constituent elements of the Charter violations he asserts.

23 With respect to the claim of a s. 2(a) violation, the Defendants say that Mancuso has failed to plead the prohibition of any practice or line of conduct with a nexus to a religious belief or morality to which he subscribes, which is required to establish a breach of s. 2(a) of the Charter: *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 56. Rather, he simply asserts a preference for certain dietary food supplements and vitamins. Without more, the Defendants argue, Mancuso's s. 2(a) claim presents no reasonable prospect of success.

24 The Defendants say Mancuso's allegations regarding freedom of expression under s. 2(b) of the Charter are similarly deficient. Although the Supreme Court of Canada has adopted a wide definition of "expression," Mancuso has not pleaded any personal attempts to make or receive prohibited expressive activity.

25 The Defendants say that Mancuso has also failed to properly plead a violation of s. 7 of the Charter. He must show that there is a deprivation of life, liberty or security of the person that is inconsistent with a principle of fundamental justice. He has failed to indicate any health product necessary to his bodily and/or psychological integrity that is made unavailable to him by effect of the legislation he seeks to invalidate. As such, there is no basis upon which to find a deprivation of life, liberty or personal security. Furthermore, Mancuso does not assert any discordance with a principle of fundamental justice.

26 Finally, the Defendants say that Mancuso's allegation of a breach of s. 15 of the Charter presents no reasonable prospect of success as he has not pleaded disadvantage based on a prohibited or analogous ground. Mancuso alleges discrimination based on choice of food, dietary supplements and vitamins. This is not a prohibited ground under s. 15 and has not been recognized or pleaded as an analogous ground of discrimination.

27 With respect to the breaches of ss. 2, 7 and 15 alleged by Rowland and Dr. and Mrs. Dahl, the Defendants argue that since these Plaintiffs rely entirely upon Mancuso's facts in support of these allegations, they have pleaded no material facts upon which it might be found that *their* rights have been violated. In addition, their claims suffer from the same deficiencies present in Mancuso's.

28 The Defendants also argue that the declarations sought by the Plaintiffs are so broad and undefined in scope as to be judicially unmanageable, which is reason alone to conclude that these portions of the Claim have no chance of success: *Chaudhary v Canada (Attorney General)*, 2010 ONSC 6092 at para 17. The Plaintiffs seek sweeping declarations invalidating "the entire scheme and enforcement" of the Regulations. This request is so sweeping and imprecise as to be entirely unworkable. The Plaintiffs also ask that the Court read down the definition of "drug" in s. 2 of the Act to exclude natural health products, but the requested declaration is so vague and imprecise that the Court would be unable to define with precision the scope of any constitutional invalidity or to provide meaningful guidance to the parties. The Defendants say that the Court should not issue sweeping declarations within a factual vacuum.

29 The Defendants also argue that the Plaintiffs' action for damages has no reasonable prospect of success. An action for damages brought under s. 24(1) of the Charter cannot be combined with an action for a declaration of invalidity based on s. 52 of the *Constitution Act, 1982*: *Mackin v New Brunswick (Minister of Finance)*, 2002 SCC 13 at para 81 [*Mackin*]; see also *Vancouver (City) v Ward*, 2010 SCC 27 at para 39 [*Ward*]; *Schachter v Canada*, [1992] 2 SCR 679 at para 89 [*Schachter*]. Canadian courts, including the Federal Court, have relied upon *Mackin* to strike statements of claim where s. 24(1) damages are sought for the enforcement of legislation that was constitutionally valid at the time of enforcement: *Zündel v Canada*, 2005 FC 1612, aff'd 2006 FCA 356 [*Zündel*]; see also *Perron v Canada (Attorney General)*, [2003] 3 CNLR 198, [2003] OJ No 1348 at paras 55-56.

30 Furthermore, the Defendants say that damages are not available for the application of a law that was constitutionally valid at the time of enforcement. Absent conduct that is in bad faith or an abuse of power, public officials are entitled to a sphere of civil immunity in respect of the acts that give effect to valid grants of statutory authority, and this immunity applies even where that grant of authority is subsequently declared unconstitutional. There are no retroactive remedies under s. 24(1) of the Charter: *Mackin*, above, at para 78; *Schachter*, above, at para 89. Since the Plaintiffs have not pleaded with any particularity any allegations of bad faith or abuse of power, even assuming the extensive constitutional invalidities they allege, the Plaintiffs would not be entitled to any damages. The Crown's actions fall squarely within the immunity.

31 The Defendants argue that the claims of Dr. Dahl, Mrs. Dahl and Life Choice should be struck in their entirety because they are an abuse of process. The rule against collateral attack protects against attempts to challenge judicial decisions in previous proceedings. This is complemented by the doctrine of abuse of process in situations where a plaintiff accepts the legal force of a judicial order, but contests the correctness of that order and/or the factual findings underlying it for the purposes of a different proceeding with different legal consequences: *Toronto (City) v Canadian Union of Public Employees (CUPE), Local 79*, 2003 SCC 63 [*CUPE*] at paras 33-34. Canadian courts have routinely struck out civil actions where a plaintiff seeks a judicial finding different from a finding made by a trial judge in a prior criminal proceeding: *Demeter v British Pacific Life Insurance Co (1985)*, 13 DLR (4th) 318, 7 OAC 143 at paras 6-7 (CA); *Wolf v Ontario (Attorney General)*, 2012 ONSC 72 at paras 56-7 [*Wolf*]; *Sauvé v Canada*, 2010 FC 217 [*Sauvé*], aff'd in part by 2011 FCA 141.

32 The Plaintiffs are asking the Court to revisit the legality of the searches conducted by authorities on March 31, 2004 and January 15, 2009, the correctness of the 2004 and 2013 convictions, and the factual findings underlying those convictions. Dr. Dahl and E.D. Internal Health unsuccessfully challenged the validity of three search warrants under s. 8 of the Charter in the 2004 criminal proceeding (*R v Dahl #1*, at para 10), and the Plaintiffs also unsuccessfully challenged the legality of the January 15, 2009 searches in the Alberta Court of Queen's Bench: trial excerpt from *R v Eldon Garth Dahl, Agnesa Dahl and EDG Modern Design Ltd*, 100237221Q3 (Alta QB) [*R v Dahl #5*], March 20, 2012 cross-examination on Voir Dire at pp. 40-41 (Defendant's Motion Record, at pp. 345-346). They now seek to re-litigate the constitutional validity of these same searches. In addition, they allege that they were "falsely and maliciously charged" in the latter proceeding, despite the guilty plea of E.G.D. Modern Design Ltd, with Dr. Dahl acting as principal. The Defendants argue that the entirety of paragraphs 40-41 of the Claim is premised on the assertion that, contrary to the findings of two trial judges and a plea of guilty, these Plaintiffs were subject to unlawful searches and have been wrongfully convicted. This Court would be unable to grant the remedies sought without first making findings on criminal liability, the constitutionality of police searches and/or the admissibility of evidence in a criminal proceeding that are inconsistent with prior findings made in the Plaintiffs' criminal trials. This would undermine the principles of consistency, finality and integrity in the administration of justice, and this portion of the Claim should therefore be struck out in its entirety as a collateral attack and abuse of process.

33 The Defendants argue further that the case law clearly establishes that corporations do not possess rights under s. 7 or s. 15 of the Charter. While corporations can rely on s. 2(a) of the Charter in defence to a criminal charge, that provision cannot be used as a sword by a corporate plaintiff in civil proceedings: *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326 at para 101; *Peter Hogg, Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters Canada Ltd., 2007) at 59-12.

34 The Defendants also argue that the Plaintiffs are not entitled to seek an injunction and prohibition by way of an action, as these remedies can only be obtained on application for judicial review: *Federal Courts Act*, RSC 1985, c F-7, s. 18(3) and *Burton v Canada*, [1996] FCJ No 1059 at para 22, 65 ACWS (3d) 20 (FCTD).

35 Should any portion of the Claim proceed, the Defendants argue that it should only continue against Her Majesty the Queen. The three named Ministers and the RCMP are not proper or necessary parties. The Claim discloses no material facts alleging any wrongdoing on the part of the named Ministers, the Minister of National Health and Welfare does not exist, naming the Attorney General of Canada is redundant, and the RCMP is not a suable entity: *Mandate Erectors and Welding Ltd v Canada*, [1996] FCJ No 1130, 118 FTR 290 at paras 19-21 (TD) [*Mandate Erectors*]; *Cairns v Farm Credit Corp*, [1992] 2 FC 115 (TD) at para 6 [*Cairns*]; *Sauvé*, above, at para 44.

Arguments of the Plaintiffs

36 The Plaintiffs respond that the Claim should not be struck, and that the named Defendants are all proper parties to the action.

37 The Plaintiffs note that the facts pleaded in the Claim must be taken as proven for the purposes of this motion: *Canada (Attorney General) v Inuit Tapirisat of Canada*, [1980] 2 SCR 735; *Nelles v Ontario* (1989), 60 DLR (4th) 609 (SCC) [*Nelles*]; *Operation Dismantle Inc v Canada*, [1985] 1 SCR 441; *Hunt*, above; *Dumont v Canada (Attorney General)*, [1990] 1 SCR 279 [*Dumont*]; *Trendsetter Ltd v Ottawa Financial Corp* (1989), 32 OAC 327 (CA) [*Trendsetter*]; *Nash v Ontario* (1995), 27 OR (3d) 1 (Ont CA) [*Nash*]; *Arsenault v Canada*, 2009 FCA 242 [*Arsenault*]. A claim should be struck "only in plain and obvious cases where the pleading is bad beyond argument" (*Nelles*, above, at 627), or where it is "'plain and obvious' or 'beyond doubt'" that the claim will not succeed (*Dumont*, above, at 280; *Trendsetter*, above). The fact that a claim is novel or raises a difficult point of law is not a justification for striking it: *Hunt*, above, at 990-91); *Nash*, above; *Hanson v Bank of Nova Scotia* (1994), 19 OR (3d) 142 (CA); *Adams-Smith v Christian Horizons* (1997), 14 CPC (4th) 78 (Ont Gen Div); *Miller (Litigation Guardian of) v Wiwchairyk* (1997), 34 OR (3d) 640 (Ont Gen Div). Matters not fully settled by the jurisprudence should not be decided on a motion to strike: *RD Belanger & Associates Ltd v Stadium Corp of Ontario Ltd* (1991), 5 OR (3d) 778 (CA). Indeed, the Plaintiffs say that, in order to succeed in striking a claim, the Defendants must produce a "decided case directly on point from the same jurisdiction demonstrating that the very same issue has been squarely dealt with and rejected": *Dalex Co v Schwartz Levitsky Feldman* (1994), 19 OR (3d) 463 (Gen Div). Finally, the Court should be generous with respect to the drafting of the pleadings, permitting amendment before striking: *Grant v Cormier -- Grant* (2001), 56 OR (3d) 215, [2001] OJ No 3851 (CA); *Toronto-Dominion Bank v Deloitte Haskins & Sells* (1991), 5 OR (3d) 417, [1991] OJ No 1618 (Gen Div).

38 The Plaintiffs argue that the Defendants improperly teeter-totter between asserting that certain facts are not "facts" because they are bald conclusions without evidentiary foundation on the one hand, and on the other hand that facts pleaded are not properly "*facts*"because they constitute "evidence." This is an attempt to selectively excise facts from the Claim, contrary to this Court's guidance: *Liebmann v Canada (Minister of National Defence)*, [1994] 2 FC 3 (TD) at para 20 [*Liebmann*].

39 The Plaintiffs also argue that the Defendants confuse the declaratory relief sought with the tort damages portion of the Claim, and ignore the fact that, in the main, the Claim seeks declaratory relief. The Plaintiffs say that they are seeking: 1) in the main, declaratory relief as to the various provisions of the Regulations (Claim, at paras 1(a)(i)-(xi), 1(b)(i)-(v), 1(c) and 1(d)); 2) injunctive relief or relief in the nature of prohibition (Claim, at paras 1(e)(i) -- (iv)); and 3) monetary compensation by way of damages (Claim, at paras 2(a) -- (d)).

40 The Plaintiffs say that declaratory relief goes to the crux of the constitutional right to judicial review: *Dunsmuir v New Brunswick,* 2008 SCC 9 [*Dunsmuir*] at paras 27-31; *Singh v Canada (Minister of Citizenship and Immigration)*, 2010 FC 757; *Canada v Solosky*, [1980] 1 SCR 821 at 830; *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at paras 134, 140, 143 [*Manitoba Metis Federation*]. Under Rule 64, declaratory relief may be sought in the Federal Court "whether or not any consequential relief is or can be claimed." It has been held that

declaratory relief can be sought in an action under s. 17 of the *Federal Courts Act*: *Edwards v Canada* (2000), 181 FTR 219, 94 ACWS (3d) 922; see also *Canada (Prime Minister) v Khadr*, [2010] 1 SCR 44. Furthermore, "[t]he constitutionality of legislation has always been a justiciable issue": *Thorson v Canada (Attorney General)*, [1975] 1 SCR 138 at 151; *Manitoba Metis Federation*, above, at para 134.

41 The Plaintiffs do not dispute the rules of pleading asserted by the Defendants, but argue that the Claim does not suffer from the deficiencies alleged. They say that the Defendants take various assertions of fact out of context as examples of improper pleading, and seek to improperly colour the factual pleadings in their entirety on that basis. In so doing, the Defendants are not taking the Claim as pleaded, but are re-configuring it to suit their own ends, contrary to the clear direction of the Federal Court of Appeal in *Arsenault*, above, at para 10. The facts alleged must be read in their context and taken as proven.

42 With respect to the claims of Mancuso, the Plaintiffs say that, contrary to the Defendants' assertions, the Claim sets out (at paragraphs 28, 29 and 30(a) and (b)) that Mancuso has been deprived of products and published information on those products by virtue of the Regulations and their enforcement, thereby infringing his rights under ss. 2, 7 and 15 of the Charter. The Defendants' complaints do not rise above a request for particulars, which the Plaintiffs say are provided in Mancuso's affidavit in the present motion record. The Plaintiffs argue that Mancuso's s. 7 claims are supported by the jurisprudence (*Singh v Canada (Minister of Employment and Immigration*), [1985] 1 SCR 177; *R v Morgentaler*, [1988] 1 SCR 30; *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519; *Chaoulli v Quebec (Attorney General)*, [2005] 1 SCR 791, and that while his s. 15 claim is arguably novel, it cannot be said that it is "plain and obvious" that it cannot succeed: *Dumont*, above, at p. 280.

43 The Plaintiffs say that the same arguments apply with respect to the Charter claims of Rowland, Dr. Dahl and Mrs. Dahl, and that the Dahls have additional claims under ss. 2, 7 and 15 of the Charter arising out of the manner in which the search warrants were executed, the fact that out-dated health advisories concerning their products have not been removed, and other facts alleged in the Claim.

44 With respect to the argument that the declarations sought are "unmanageable and imprecise," the Plaintiffs argue that each declaration sought is, in and by itself, precise, clear and discreet. The only "broad-sweeping" declaration sought, they say, is that dietary food supplements and vitamins cannot to be treated as "drugs" under the Act, which relief is well-founded and backed by facts as to the essential differences between a "food" and a "drug."

45 As to the purported inability to claim damages in an action that also seeks relief under s. 52 of the *Constitution Act, 1982*, the Plaintiffs argue that *Mackin*, above, is not as absolute as the Defendants suggest when it comes to damages arising from unconstitutional subordinate Regulations, and the Defendants' position has been bluntly rejected by the Supreme Court in *Manitoba Metis Federation*, above, at para 134. Furthermore, the notion that damages under s. 24(1) are not available for the application of a law that was constitutionally valid at the time of enforcement does not cover enforcement that was in excess of, and an abuse of, authority, and bad faith and abuse of authority have been pleaded.

46 The Plaintiffs argue that the Dahls' claims are not collateral attacks, and that the doctrines of *res judicata* and abuse of process do not apply because the judicial forum is different and the issues are different. Specifically, the criminal proceedings did not deal with the declaratory relief sought and the claim of damages for abusive and excess enforcement methods. Dealing with the Defendants' assertions about the relief sought and evidence led at the criminal trials is the purview of the trial judge in the present action and should not be dealt with on a motion to strike. The Plaintiffs argue that the present situation involves different judicial proceedings with different jurisdictions dealing with different grounds and remedies, not a collateral attack, and that recent Supreme Court jurisprudence rejects the Defendants' position on this issue: *Dunsmuir*, above; *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62 [*TeleZone*]; *Canada (Attorney General) v McArthur*, 2010 SCC 63; *Parrish & Heimbecker Ltd v Canada (Agriculture and Agri-Food)*, 2010 SCC 64 [*Parrish & Heimbecker*]; *Nu-Pharm Inc v Canada (Attorney General)*, 2010 SCC 65 [*Nu-Pharm*]; *Canadian Food Inspection Agency v Professional Institute of the Public Service of*

Canada, 2010 SCC 66; *Manuge v Canada*, 2010 SCC 67 [*Manuge*]; *Sivak v Canada (Minister of Citizenship and Immigration)*, 2011 FC 402 [*Sivak #1*].

47 With respect to the Charter claims of the corporate Plaintiffs, the Plaintiffs argue that while corporations do not have the same rights afforded to biological persons under ss. 7 and 15, they can invoke s. 2 Charter rights, s. 7 procedural rights in the context of a (quasi) criminal scheme, and s. 7 fundamental justice rights against overbroad or impermissibly vague legislation: *R v Heywood*, [1994] 3 SCR 761 [*Heywood*]; *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606 [*Nova Scotia Pharmaceutical*]. They say that the only Charter relief claimed by the corporate Plaintiffs here is: 1) the void for vagueness and over-breadth doctrines under s. 7, which a corporation has the right to invoke since corporations are subject to the criminal provisions set up by the Regulations (*Nova Scotia Pharmaceutical*, above); and 2) the right to "commercial speech" under s. 2(a) and (b) of the Charter (*RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 [*RJR-MacDonald (1995)*]; *Irwin Toy Ltd v Québec (Attorney General)*, [1989] 1 SCR 927 [*Irwin Toy*]; *Rocket v Royal College of Dental Surgeons of Ontario*, [1990] 2 SCR 232 [*Rocket*]). They argue that corporations have a right to seek declaratory relief and obtain constitutional remedies with respect to the application and enforcement of statutes governing them: *Winner v SMT (Eastern) Ltd*, [1951] S.C.R. 887 [*Winner*]; *RJR-MacDonald (1995)*, above.

48 Furthermore, while the corporate Plaintiffs are not entitled to invoke the equality provisions of s. 15 of the Charter, they argue that they are entitled to invoke "the equality provisions of the underlying constitutional imperative [of] equality of treatment": Donald A MacIntosh, *Fundamentals of the Criminal Justice System*, (Agincourt: Carswell, 1989); *Winner*, above; *Bolling v Sharpe*, 347 U.S. 497 (1954); *Canada v Schmidt*, [1987] 1 SCR 500.

49 With respect to the Defendants' argument that they are not entitled to the injunctive relief claimed, the Plaintiffs argue that nothing prevents the Court from granting injunctive relief in the course of, and ancillary to, an action (*Toth v Canada (Minister of Employment and Immigration)* (1988), 6 Imm LR (2d) 123 (FCA) [*Toth*]; *Manitoba (Attorney General) v Metropolitan Stores (MTS) Ltd*, [1987] 1 SCR 110 [*Metropolitan Stores*]; *RJR-MacDonald v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald (1994)*]), and that nothing prevents the Court from granting relief "in the nature" of prohibition and/or injunction under s. 24(1) of the Charter.

50 With respect to the proper parties to the action, the Plaintiffs argue that while Her Majesty the Queen is normally the only Defendant in claims against the government, in cases dealing with constitutional issues this Court has determined that others can be personally named: *Liebmann*, above, at paras 51-52. Furthermore, the determination of the standing of parties is not best done at the stage of a motion to strike: *Apotex Inc v Canada (Governor in Council)*, 2007 FCA 374 at para 13 [*Apotex*].

Plaintiffs' Motion for an Interim Injunction

51 As noted above, the Plaintiffs have filed a cross-motion seeking to stay the enforcement of s. 3(1) and (2) of the Act and ss. 44, 63-83, 87, 91, 93, 94, 98 and 108-115 of the Regulations pending the outcome of the action. The parties agree that the test on such a motion is that set out in *Toth*, above (see also *RJR-MacDonald (1994)*, above, at pp. 333-334; *Metropolitan Stores*, above). That is, the Plaintiffs must establish that:

a) They have raised a serious issue for trial;

b) They would suffer irreparable harm if the provisions are not stayed; and

c) The balance of convenience favours the granting of a stay.

52 The parties disagree on whether that test is met in the present circumstances.

Arguments of the Plaintiffs

53 The Plaintiffs say they have raised serious issues for trial in their claim. They argue that the threshold for this element of the test is low (*RJR-MacDonald (1994)*), above, at para 50), and that such a stay is obtainable as

against regulatory provisions as well as executive action: *Toth*, above; *Metropolitan Stores*, above; *RJR-MacDonald (1994)*, above. They argue that the action presents the following serious issues, among others:

(a) That the definition of "drug" in s. 2 of the Act is overly-broad and thus violates s. 7 of the Charter (citing *Heywood*, above, at paras 48-51);

(b) That the doctrine of overbreadth and others apply under s. 7, as tenets of fundamental justice, to all legislative provisions whether criminal, civil, administrative or other (citing *Nova Scotia Pharmaceutical*, above);

(c) That the Regulations with respect to natural health products are *ultra vires* the Parliament of Canada and unlawfully intrude on the exclusive jurisdiction of the Provinces over civil rights, property, food, health and matters of a merely private and local nature (citing the Constitution Act, 1867, s. 92(7), (13) and (16), *Schneider v British Columbia*, [1982] 2 SCR 112 at 142; *RJR-MacDonald (1995)*, above at para 32; *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 24; *Reference Re Securities Act*, 2011 SCC 66), and is beyond the Federal government's criminal law power;

(d) That the Regulations are *ultra vires* the Act as they go beyond the intent and meaning of the enacting legislation;

(e) That the definition of "drug" in the Act is void for vagueness in that it encompasses any and all food and dietary supplements and / or vitamins and herbs (citing *Heywood*, above; *Nova Scotia Pharmaceutical*, above); and

(f) That s. 3(1) and (2) of the Act violate the Plaintiffs' rights under s. 2(a) and (b) of the Charter and s. 1(c) of the *Canadian Bill of Rights* (citing *Irwin Toy*, above; *Rocket*, above; *RJR-MacDonald (1995)*, above).

54 The Plaintiffs also submit that they will suffer irreparable harm if the statutory provisions are not stayed. Physical and psychological integrity is protected as a s. 7 right, and "commercial free speech" is protected under s. 2(a) and (b), and the ongoing infringement of these rights is not compensable through damages. Where a serious issue has been established and there is a potential Charter breach, irreparable harm is made out as such breaches are assumed not to be compensable through damages: *RJR-MacDonald (1994)*, above, at paras 60-61.

55 As to the balance of convenience, the Plaintiffs argue that the provisions sought to be stayed do not deal with any health and safety issues, and that in the history of the natural health products at issue, there has been no serious injury or death attributed to them. With respect to the public interest, the Plaintiffs point to the Supreme Court's analysis in *RJR-MacDonald (1994)*, above, at paras 62-67, affirming that that the public interest is a "special factor" to be considered in constitutional cases, but noting that "the government does not have a monopoly on the public interest" and it is open to both parties in an interlocutory proceeding involving the Charter to rely upon considerations of the public interest.

Arguments of the Defendants

56 The Defendants argue that the Plaintiffs have not raised a serious issue to be tried, largely on the basis of their argument on the motion to strike that the Claim as a whole is frivolous and vexatious. Where this is the case, they argue, no serious issue is raised: *RJR-MacDonald (1994)*, above, at p. 337.

57 With respect to irreparable harm, the Defendants say that the Federal Court of Appeal has repeatedly stated that speculative harm is not irreparable harm (*Canada (Attorney General) v Canada (Information Commissioner)*, 2001 FCA 25 at para 12 [*Information Commissioner*]; *International Longshore and Warehouse Union*, *Canada v Canada (Attorney General)*, 2008 FCA 3 at paras 25, 33), and argue that the harm alleged by the Plaintiffs is speculative. For example, while Mancuso identifies three products "eliminated from the market" allegedly due to the licensing scheme being challenged, he also states in his affidavit that he uses these products "regularly and commonly." He also fails to identify any medical condition from which he suffers that will deteriorate or worsen unless a stay is granted; his claims to mental and physical distress are unspecified. Thus, the Court is left to

speculate as to the nature of the harm that will result. The harms alleged by Rowland are similarly speculative. Moreover, the business income losses he alleges are compensable through damages if the Plaintiffs are successful, and thus by definition they do not constitute irreparable harm: *RJR-MacDonald (1994)*, above, at p. 341. The Defendants note that the law on damages for a Charter breach has developed substantially since *RJR-MacDonald (1994)*, such that it should no longer be assumed that alleged Charter breaches cannot be remedied through damages: see *Ward*, above.

58 Finally, with respect to the balance of convenience, the Defendants note that the public interest has central importance in assessing the balance of convenience in Charter cases (*RJR-MacDonald (1994)*, above, at p. 343), and argue that legislation is presumed to serve the public interest, even in the face of a constitutional challenge: *Harper v Canada (Attorney General)*, 2000 SCC 57 at para 9 [*Harper*]. In most cases, they say, this presumption is determinative on a motion for an interlocutory injunction, which will only be granted based on alleged unconstitutionality in "clear cases": *Harper*, above, at para 9. It is rare for a claim alleging constitutional invalidity to meet this threshold for at least two reasons: 1) the extent and meaning of the rights guaranteed by the Charter are often ambiguous, particularly where the constitutionality of the impugned provisions has not been previously litigated; and 2) it remains open to the government to justify a breach of those rights based on s. 1 of the Charter (*Metropolitan Stores*, above, at paras 42, 44). At the interlocutory stage, the Defendants argue, a reviewing court is simply not in an adequate position to assess the merits of a reasonable limitation argument.

59 In this case, the Defendants argue, the impugned provisions have the purpose of protecting the health and well-being of Canadians by prohibiting the advertising and labelling of drugs for serious diseases and by regulating the manufacturing, labelling, advertising and sale of natural health products. Even the temporary staying of these provisions would deprive officials of tools that Parliament and the Governor in Council have enacted to protect the health and safety of the public. Thus, in advance of any finding of unconstitutionality, the balance of convenience must favour the maintenance of validly-enacted legislation, and the Plaintiffs' motion for an injunction must be dismissed.

60 In addition, the Defendants argue, the Plaintiffs have provided no compelling basis to rebut the presumption that the balance of convenience favours the continued operation of the challenged laws. Financial loss is not sufficient to bring a claim within the small minority of cases where the interlocutory staying of legislation can be justified: *Evangelical Fellowship of Canada v Canadian Musical Reproduction Rights Agency*, [1999] FCJ No 1391, [2000] 1 FC 586 (FCA) at para 32. There is no basis here to find that the public interest is served by granting a stay of the impugned legislation.

ANALYSIS

Motion to Strike

The Law

61 There is no disagreement between the parties as to the rules and principles applicable in a motion to strike. The disagreement arises over their application to the facts of this case.

62 This motion is brought under subrules 221(a), (c), (d) and (f). The Defendants say that the Claim does not satisfy the basic rules of pleading. They say it is scandalous, frivolous and vexatious, that it will prevent the fair and effective trial of the action, and that at least in part it constitutes a collateral attack on judicial decisions rendered in other proceedings. They say that the Claim is so deficient that it should be struck in its entirety.

The General Challenge

63 As the Defendants point out, the Claim constitutes a challenge to the Act and the Regulations.

64 In oral argument, the Plaintiffs have told the Court that they are only challenging the NPN and safe licensing

aspects of the Act and Regulations as well as the overly broad definition of "drug" found in s. 2 of the Act that allows any food, dietary food supplement, nutritional food derivative, or vitamin to be classified as a drug for purposes of the legislation, even when such substances do not pose a health risk. The Plaintiffs say that they do not wish to challenge the health and safety aspects of the legislative scheme. The basic assertion is that food, dietary food supplements and vitamins should be classified as food, and not drugs, and that the enforcement and inspection system to which they are subject should be akin to the food inspection and enforcement system, and not the pharmaceutical and/or prohibited drug system.

65 It seems to me that these objectives are adequately and clearly embodied in the CLAIM section of the Claim along with the legal ramifications and basis for the relief being sought. The issue is whether the balance of the Claim is sufficiently compliant with the rules of pleading. In other words, does the Claim plead with sufficient particularity the constituent elements of each cause of action or legal ground raised, and does it provide a sufficient factual basis in an appropriate and summary form?

66 The Defendants, however, feel that at least portions of the CLAIM section should be struck for several reasons:

a) The claims are too broad and abstract. The substances at issue are not specified (apparently some 55,000 substances are presently regulated);

b) 1(a)(viii) is a repetition of 1(a)(i);

c) 1(a)(ix) lacks the specificity required of pleadings. The Defendants need to know the names of the officials involved, and the time and places of the violations at issue;

d) 1(a)(x) is too abstract and requires the material facts related to the Plaintiffs;

e) 1(a)(xi) is likewise too abstract and needs materials facts related to the Plaintiffs.

67 As regards 1(a) of the CLAIM section, the Plaintiffs are merely stating in a general way the relief they are seeking and the basis for that relief. There is no need to state the specifics here if they can be found in the balance of the Claim. In my view, 1(a)(viii) is not a repetition of 1(a)(i) because it states a different legal basis for declaring the definition of "drug" to be void.

68 As regards 1(b) of the CLAIM section, the Defendants raise the following concerns:

a) 1(b)(i) is too broad and unmanageable. It says the "entire scheme and enforcement, [...] is unconstitutional in breaching section 7 of the Charter in its reverse onus enforcement [...]";

b) 1(b)(ii) is likewise too broad and unmanageable. Specifics are required. The usual way to attack a scheme of enforcement is by way of judicial review of a particular administrative decision under the Act, rather than by way of an action;

c) 1(b)(iii) raises the same concerns;

d) 1(b)(iv) is too broad because it requires the Court to declare that anyone can eat what they want without restriction by the State.

69 My reading of these paragraphs in the CLAIM section is that 1(b)(i) only deals with the "reverse onus" aspect of enforcement and that 1(b)(ii) only deals with over breadth with respect to NPN licensing and compliance costs. Hence, I see nothing inappropriate about these paragraphs.

70 As regards 1(b)(iii), it seems to me that the reference to a "large number of persons" is a problem because it is unnecessarily broad and unmanageable. However, the intent may be that the discrimination occurs "against any person, who, like the individual Plaintiffs, have a preference [...]. "Hence, the final seven lines of 1(b)(iii) should be struck with leave to amend.

71 I also agree that 1(b)(iv) is much broader than what the Plaintiffs say is their purpose in bringing this claim. I

don't see how the Court could possibly, on the facts pleaded, deal with a request for such a broad declaration, or how the Defendants could defend. Hence, this paragraph should also be struck with leave to amend.

72 As regards 1(c) of the CLAIM section, the Defendants complain that the Plaintiffs are asking the Court to review the whole scheme for classification, inspection and enforcement of food, dietary food supplements and vitamins and declare how it should be regulated. I agree with the Defendants that this is far beyond what is required in the present case, or indeed the power of the Court. It would involve the Defendants and the Court in a broad inquiry (there are presently 55,000 approved health products) and in a broad-ranging policy discussion as to how such products are best regulated. Even if this were an appropriate role for the Court to assume - which it is not (see *Friends of the Earth v Canada (Governor in Council)*, [2009] 3 FCR 201 at paras 25, 33, 36, 39-40, 45 aff'd 2009 FCA 297; *Canadian Union of Public Employees v Canada (Minister of Health)*, 2004 FC 1334 at para 40) -- the pleadings do not, when read as a whole, provide any factual basis for such a broad declaration. Paragraph 1(c) should be struck.

73 As regards 1(e) of the CLAIM section, the Defendants have the following complaints:

a) The prerogative relief of prohibition and injunction is not available in an action;

b) 1(e)(i) is too broad and a declaration of invalidity is sufficient;

c) With respect to 1(e)(ii), there is nothing in the Claim that provides a factual or legal basis for an interference with NAFTA, GATT, the WTO, and related agreements, policies regulations, and rulings;

d) 1(e)(iii) asks for a general prohibition that goes will beyond the issues and facts set out in the Claim;

e) 1(e)(iv) is far too broad in that it refers to "any advertising" and it should be made clear that the intent is to deal with sections 3(1) and 3(2) of the Act.

74 I see no reason to rule at this stage that the prerogative remedies are not available in an action. See my decision in *Sivak #1*, above, at paras 36-44. In *Manuge*, above, one of the companion cases to *Telezone*, above, the plaintiff sought declarations of invalidity (on both Charter and administrative law grounds), constitutional remedies and damages or restitution in the context of an action, and the Supreme Court raised no concerns with this approach in ruling that the claim should be permitted to proceed in the Federal Court: see *Manuge*, above, at paras 1, 9-10 and 17-24. In the companion case of *Nu-Pharm*, above, the Supreme Court raised no concern that the plaintiff sought injunctive relief along with damages in the same claim before this court. In *Ward v Samson Cree Nation*, [1999] FCJ No 1403, 247 NR 254 (CA), the Court of Appeal found that a claim for declaratory relief could be added to a claim for damages through an amendment to the statement of claim, though the majority and minority differed on the basis for doing so. See also *Hinton v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 215 at paras 49-50 and 54.

75 In both *Manuge* and *Telezone*, the Supreme Court noted that there is "a residual discretion to stay an action if it is premised on public law considerations to such a degree that [...] 'in its essential character, it is a claim for judicial review with only a thin pretence of a private wrong'": *Manuge*, above, at para 18, quoting *Telezone*, above, at para 78. It is not enough, however, for a defendant to claim that some of the matters at issue would be amenable to judicial review. If there are valid causes of action pleaded -- which an amended statement of claim may yet disclose in this matter -- this suggests there is more than a thin pretence of private wrong and the plaintiff will normally be permitted to pursue the action: *Manuge,* at paras 19-21; *Telezone,* at para 76.

76 Paragraph 1(e)(i) is too broad in that it refers to paragraph 1(c) which has been struck, but I don't see that the references to paragraph 1(a) or (b) cause a problem. Consequently, the reference to paragraph 1(c) should be struck from paragraph 1(e)(i).

77 I agree with the Defendants' objections to paragraph 1(e)(ii), (iii) and (iv). The relief requested here goes well

beyond what the facts and law pleaded in the rest of the Claim can support. Consequently, these paragraph should be struck.

The Damage Claims

78 The Defendants say that the damages claims have no reasonable prospect of success and that the Plaintiffs are improperly seeking relief under both s. 24(1) of the Charter and s. 52(1) of the *Constitution Act, 1982*.

79 Relying upon *Mackin*, above, and Justice Hughes' decision in *Zündel*, above, the Defendants say that, absent conduct that is in bad faith or an abuse of power, damages are not available where a plaintiff seeks civil remedies arising from the application of a law that was constitutionally valid at the time of enforcement.

80 The Plaintiffs say that *Mackin* is not absolute, and does not prevent damages for unconstitutional subordinate regulations. Further, they say that *TeleZone*, and *Sivak #1*, both above, make it clear that the Plaintiffs can seek declaratory relief and damages together. They argue that *Mackin* does not cover the situation where damages are not barred by the expiry of a limitation period, and does not prevent a claim for damages where enforcement has occurred in excess and abuse of authority, or in bad faith, as pleaded in the present case.

81 I agree that the rule in *Mackin* is not absolute. As the Supreme Court explained in *Ward*, above at para 39, the consequence of *Mackin* is that a claim for damages for state conduct pursuant to a statute that was valid at the time will be struck unless the state conduct under the law was "clearly wrong, in bad faith or an abuse of power." The rule of law demands that duly enacted laws be enforced until declared invalid, and in the absence of "threshold misconduct" as just described, no claim for damages under s. 24(1) of the Charter (or any other claim for damages) will result from that enforcement if the law is subsequently declared invalid: *Ward*, above, at paras 39, 41; *Mackin*, above, at paras 78-79. The Court in *Mackin* went on to say (at para 81):

> [81] In short, although it cannot be asserted that damages may never be obtained following a declaration of unconstitutionality, it is true that, as a rule, an action for damages brought under s. 24(1) of the Charter cannot be combined with an action for a declaration of invalidity based on s. 52 of the Constitution Act, 1982.
>
> [Emphasis added]

82 I see nothing in *Mackin* that suggests the application of the above principles is in any way dependent on whether or not damages are barred by the expiry of a limitation period. That is a separate issue.

83 The Plaintiffs do plead that methods of enforcement of the Act and the Regulations are in excess and are an abuse of authority at paragraphs 19-21, and make further allegations of malicious intent and improper purpose or bad faith in relation to enforcement actions against the Dahls and their company at paragraph 92. However, each of these pleadings must be struck for reasons I will outline further below. If the Plaintiffs wish to maintain an action for damages arising from the enforcement of the portions of the Act and the Regulations which they claim are *ultra vires* and unconstitutional, they will need to plead, in a manner that conforms to the rules of pleading, state conduct under those provisions that was "clearly wrong, in bad faith or an abuse of power."

The Facts

84 The Defendants say that paragraph 6 of Claim offends the rules of pleading because it makes general, unsupported assertions about natural health products that "have been safely consumed for centuries, in various forms, without regulations, prohibition, nor enforcement as 'drugs', prior to 1985-2005."

85 I agree that this is little more than an unsupported assertion and, in its present form, it is not possible for the Defendants to answer. The Defendants need to know at least:

a) What specific products are referred to;

b) When and where they have been consumed;

c) By whom have they been consumed;

d) In what forms have they been consumed.

86 Paragraph 6 should be struck for failure to plead sufficient material facts to support the assertion made.

87 Paragraph 7, likewise refers in a general way to "draconian tactics usually reserved for dangerous, armed criminals and terrorists." There are insufficient facts pleaded to support this broad assertion or to save it from being scandalous and vexatious, and, in its present form, it is impossible to defend against without investigating every instance of enforcement. The Defendants are also being asked to examine, and the Court to rule on, the erroneous classification of "any and all 'foods' as 'drugs'." As there appear to be, according to Defendants' counsel, some 55,000 substances to deal with, this is simply unworkable for the Defendants and the Court. It seems to me that some specific substances and foods are required together with the facts to support the basic assertion of arbitrary selection. Paragraph 7 should be struck.

88 Paragraph 8 is similarly problematic. It is not clear whether the Plaintiffs are asserting that the Defendants have selected and prohibited the sale of prunes, or have prohibited health claims for prunes, chamomile and oregano, or whether they are saying this could happen. And there is no indication of how these examples are connected to anything that the Plaintiffs might have suffered. Paragraph 6 refers to the Plaintiffs as consumers, producers, distributors and vendors, but unless the Defendants know which dietary food supplements and vitamins they produce, distribute, sell and consume, it is impossible to know if any of what may be hypothetical examples are reasonable or have any relevance for the Plaintiffs. Paragraph 8 should be struck for these reasons.

89 Paragraph 9 may or may not be a reasonable hypothesis. Without specific instances, or the material facts as to the erroneous classification and arbitrary selection of all foods and substances presently classified, the Defendants cannot defend these assertions or answer hypothetical examples.

90 The Plaintiffs appear to be avoiding specific foods and substances because they wish to have all natural health products declared foods and freely available, with the right to claim health benefits, without restraint. But they are not providing the material facts required on all natural health products to support why this is justified and allow the Defendants to answer the case and the Court to adjudicate it. Nor are they explaining or providing the facts to connect all natural health products to them.

91 In my view, then, paragraphs 6, 7, 8, and 9 have to be struck.

92 The Defendants object to paragraph 10 of the Claim as being argument and not facts. In my view, this paragraph contains a statement of the facts upon which the Plaintiffs rely to distinguish dietary food supplements from drugs. I see nothing improper with this paragraph.

93 The Defendants also object to paragraph 11 as unsupported assertion and argument. There is no fact stated with respect to any particular health product and the Court is being asked to draw a single conclusion about all natural health products. In my view, however, this paragraph is a statement about Health Canada's approach to enforcement and the reasons why the Plaintiffs consider such an approach to enforcement to be inappropriate. I don't see why the Defendants should have any difficulty in answering this paragraph. It either describes Health Canada's approach to enforcement or it doesn't.

94 The Defendants object to paragraph 12 of the Claim as having no relevance and for not being connected to any of the Plaintiffs, and because no declaration is sought with regard to Schedule F of the Regulations. In my view, however, this paragraph does no more than provide specific facts to show that dietary food supplements are listed together with pharmaceuticals and are treated in the same way. These are facts to support the Plaintiffs' claim that natural health products are dealt with inappropriately under the Act and the Regulations. This paragraph is simple to answer. These substances either are listed, or are not listed, in Schedule F.

95 The Defendants object to paragraph 13 as being argument, bare legal conclusions and too wide-ranging in that it refers to every dietary food supplement and every drug. It seems to me that the paragraph is an attempt to explain and provide the facts to support the Plaintiffs' principle proposition that natural health products should not be listed and treated in law like drugs because drugs have different properties and propensities from natural food products. The only sentence I can see as objectionable occurs in 13(g) and reads "we have, in Canada, an alarming growth of these diseases termed 'iatrogenic' (physician caused)." This is objectionable because there are no facts pleaded to support what is a bare conclusion and a matter of opinion. It is also irrelevant to the factual comparison between drugs and natural food products. Like "Death is the most permanent side effect of all" in 13(d), it is inserted for colour and to promote natural food products at the expense of pharmaceuticals. This sentence should be struck.

96 The Defendants also object to paragraph 14 as being too broad and as involving a policy debate about what products should be regulated by Health Canada, which the Court cannot decide. They also argue that it contains bare conclusions and assertions rather than material facts. I have to disagree with the Defendants. Once again, the paragraph is a statement of the material facts upon which the Plaintiffs rely to distinguish "nutrients" from drugs, and these facts are recited to support their argument that nutrients should not be regulated like drugs, which in turn gives rise to the relief that is requested. I do not see this as requiring the Court to decide policy. The issue for the Court will be whether, as a result of natural food products being regulated in the way they are, have the Plaintiffs established a right to the relief they seek on the basis of the forms of action and breaches of rights which they allege?

97 The Defendants say that paragraph 15 is improper for a number of reasons:

a) It deals with Dr. Dahl's past convictions under the CDSA and has nothing to do with the relief being sought in this claim in relation to the Act and the Regulations;

b) 15(f) does not plead facts;

c) 15(g) is colourful in its assertion that RCMP officers "have guns drawn every time when they raid vitamin suppliers." This is a fact the Plaintiffs cannot possibly know.

98 In general, I agree with the Defendants on most of these points and, as I point out later, I also agree that the bulk of the pleadings with respect to Dr. Dahl have to be struck as an abuse of process, and the remainder must be struck for other reasons. I see nothing wrong, however, with the subparagraphs (a), (b), (c) and (h) and find that they can be separated from the other subparagraphs. It is my view that only subparagraphs (e), (f), and (g) should be struck.

99 The Defendants object to paragraph 16 as containing unmanageable bald assertions, unsupported by material facts. The Plaintiffs concede that paragraph 16 probably belongs, for the most part, in the CLAIMS sections. I think the best approach, then, is to strike paragraph 16 in its entirety so that the Plaintiffs can correct the problem by way of amendment. However, I also point out the following:

a) There is a significant amount of overlap with the CLAIMS as already set out and the Plaintiffs should ensure that repetition does not occur;

b) Moving paragraph16(f) to the CLAIMS section will not cure the problem because these are material facts pleaded to support the assertion;

c) The kind of assertion that is found in paragraph16(g) involves a general inquiry into all of the natural health products being regulated and is not connected to the individual Plaintiffs. It is more argument than pleading;

d) The kind of bald assertion found in paragraph16(m) about "confusion" is unacceptable without the specifics. As pleaded, it is nothing more than an opinion or argument;

e) The same goes for paragraphs 16(s), (t), (u);

f) Paragraph 16(y) again refers to "Draconian methods of enforcement" as though they are ubiquitous and routine, but there are insufficient materials facts to support such an assertion.

If the Plaintiffs intend to re-draft paragraph 16 for inclusion elsewhere in the Claim, these problems should be born in mind.

100 Paragraph 17 of the Claim alleges that the Government specifically designed the regulations to be cost prohibitive for and to eliminate small producers, distributors etc. Legislative purpose could be relevant to some of the constitutional analysis, including the division of powers issues (if found to be economic regulation of a specific industry, it would presumptively fall under the provincial power over property and civil rights). On the other hand, if this allegation is meant to establish bad faith, then it offends the rules of pleading because bad faith has to be pleaded with more particularity, per *Merchant Law*, above. I think the Plaintiffs must amend the pleading to clarify this point, and to plead the allegation with sufficient particularity if it is intended to establish bad faith, before they can be permitted to pursue such a claim through discovery and at trial.

101 The Defendants object to paragraph 18 of the Claim as being too broadly worded as a general attack on the regulatory scheme of the Act and the Regulations that is not connected to any material facts pleaded. It contains unsupported general conclusions -- 18(b) -- and applies to all applications - 18(c) -- under the scheme.

102 In my view, paragraph 18 is an attempt to provide material facts to support a general assertion that the regime under the Act and the Regulations is vague, overly-broad and arbitrary. This is necessary background for the Plaintiffs specific complaints:

a) 18(a) is a clear statement of fact;

b) 18(b) is a straight statement of fact about what qualifications are required of any decision-maker. It does not require an assessment of every decision and every official;

c) 18(c) is a statement of fact about how any application is assessed and that science plays no part and no reasons are given;

d) 18(d) is likewise a statement of fact;

e) 18(e) is likewise a statement of fact;

f) 18(f) is unacceptable as a bald, unsupported assertion and requires specific facts;

g) 18(g) is a summary of the character and impact of the facts previously pleaded but it is laden with argument.

I agree with the Defendants that these facts about the administration of the regime may not avail the Plaintiffs in the relief they seek for reasons of relevance to the Plaintiffs' own experience with the system. But at this stage, apart from 18(f) and 18(g), I don't think they can be struck as inadequate pleading. My conclusion is that 18(f) and 18(g) must be struck but that the balance of paragraph 18 can remain.

103 This highlights a general challenge in evaluating the pleadings. In effect, we have two separate claims:

a) Claims for relief based upon individual experience; and

b) A general attack on the scheme of the Act and the Regulations.

In some cases, the same facts may go toward both. This is not prohibited. In general, it is sufficient for a party to plead the material facts and counsel is then at liberty to present in argument any legal consequences which the facts support: see *Conohan v The Cooperators*, [2002] 3 FC 421, 2002 FCA 60. I have attempted to be sensitive to this and to evaluate facts pleaded in relation to more than one type of claim or cause of action where they could reasonably be seen as relevant. Still, the Plaintiffs bear the responsibility of pleading the material facts in a manner that discloses a cause of action recognized in law, and it is inevitable that the manner of pleading will affect whether a claim is recognizable or not. The pleadings play an important role in providing notice and defining the issues to be

tried, and the Court and opposing parties cannot be left to speculate as to how the facts might be variously arranged to support various causes of action: see *Johnson*, above, at para 25. Rather, "[e]ach constituent element of each cause of action must be pleaded with sufficient particularity": *Simon*, above, at para 18.

104 The Defendants object generally to paragraphs 19-21 of the Claim as being bare general assertions without supporting facts. As noted above, these paragraphs (and paragraphs 19 and 21 in particular), amount to a pleading that the Defendants' enforcement actions were an abuse of authority and/or conducted in bad faith. Thus, the Court must bear in mind the guidance of the Court of Appeal in *Merchant Law*, above, at para 34-35:

> [34] I agree with the Federal Court's observation (at paragraph 26) that paragraph 12 of the amended statement of claim "contains a set of conclusions, but does not provide any material facts for the conclusions." When pleading bad faith or abuse of power, it is not enough to assert, baldly, conclusory phrases such as "deliberately or negligently," "callous disregard," or "by fraud and theft did steal": *Zundel v. Canada*, 2005 FC 1612, 144 A.C.W.S. (3d) 635; Vojic v. Canada (M.N.R.), [1987] 2 C.T.C. 203, 87 D.T.C. 5384 (F.C.A.). "The bare assertion of a conclusion upon which the court is called upon to pronounce is not an allegation of material fact": *Canadian Olympic Association v. USA Hockey, Inc.* (1997), 74 C.P.R. (3d) 348, 72 A.C.W.S. (3d) 346 (F.C.T.D.). Making bald, conclusory allegations without any evidentiary foundation is an abuse of process: *AstraZeneca Canada Inc. v. Novopharm Limited*, 2010 FCA 112 at paragraph 5. If the requirement of pleading material facts did not exist in Rule 174 or if courts did not enforce it according to its terms, parties would be able to make the broadest, most sweeping allegations without evidence and embark upon a fishing expedition. As this Court has said, "an action at law is not a fishing expedition and a plaintiff who starts proceedings simply in the hope that something will turn up abuses the court's process": *Kastner v. Painblanc* (1994), 58 C.P.R. (3d) 502, 176 N.R. 68 at paragraph 4 (F.C.A.).
>
> [35] To this, I would add that the tort of misfeasance in public office requires a particular state of mind of a public officer in carrying out the impunged action, i.e., deliberate conduct which the public officer knows to be inconsistent with the obligations of his or her office: *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69 at paragraph 28. For this tort, particularization of the allegations is mandatory. Rule 181 specifically requires particularization of allegations of "breach of trust," "wilful default," "state of mind of a person," "malice" or "fraudulent intention."

105 Paragraph 19 is drafted as though the enforcement methods complained of are the same in every case of enforcement and are always an excess or abuse of authority carried out for the same purpose in each case. The Plaintiffs cannot possibly know this, and it is telling that they only refer to one example in their own case (the experiences of the Dahls). A claim that does not plead sufficient material facts for the defendant to know how to answer is a vexatious pleading (*Kisikawpimootewin v Canada*, 2004 FC 1426; *Murray v Canada* (1978), 21 NR 230 (FCA)), nor can an action be brought on speculation hoping that sufficient facts will be obtained during discovery to substantiate the pleadings (*AstraZeneca Canada Inc v Novopharm Ltd,* 2009 FC 1209, aff'd 2010 FCA 112; *Sivak #2*, above, at paras 30-31). The appropriateness of enforcement procedures as well as their purpose can only be assessed and adjudicated by knowing the full facts and context of each individual case. That is an impossible action to mount and to defend when there must be thousands of instances. As drafted, this is a colourful assertion unsupported by the facts as pleaded. It has to be struck.

106 Paragraph 20 has similar problems. It asserts a general practice but cites no specific instances. Whether or not this is a general and invariable practice is a fact that can be defended, but it need not go further than that. If it is not a general and invariable practice then the Defendants need not make or address specific instances unless the Plaintiffs have pleaded specific instances correctly. Hence, I think it needs to be made clear by the Plaintiffs whether what they refer to here is something mandated by the Act or the Regulations, or conduct set out in some administrative policy of directive, or whether they are referring to what individual officials have chosen to do that is either in breach of the Act or the Regulations or not required for the purposes of the regime. If the Plaintiffs intend this as a statement of what all officials do then they need to plead the facts to show that it always occurs (which seems impossible to me) or individual instances of this having happened that the Defendants can answer and the

Court can adjudicate. Paragraph 20 as presently drafted should be struck so that these matters can be clarified by amendment.

107 Paragraph 21 has the same problems as paragraph 19. It asserts conduct that occurs in all instances and which the Plaintiffs cannot know, the Defendants cannot defend, and the Court cannot manage or adjudicate without knowing the full facts and context of each instance. In addition, it alleges that Health Canada officials repeatedly engaged in a practice of misleading the RCMP, which is a serious allegation of bad faith that would need to be pleaded with much greater particularity to avoid being vexatious: see *Merchant Law*, above, at paras 34-35, and Rule 181. This paragraph should be struck.

108 The Defendants object to paragraphs 22 and 23 of the Claim on the grounds that Rowland is attempting to use the doctrine of reasonable expectations as a sword in a context where, even if the facts pleaded are true, all he is saying is that his personal expectations were not met. I agree that the doctrine of reasonable expectations (or legitimate expectations as it is sometimes called) cannot be used in this way and that no valid basis is pleaded and no reasonable cause of action is set out in these paragraphs. See *Mackin*, above, at para 83. As the Supreme Court has consistently held, "[t]he doctrine of reasonable expectations does not create substantive rights, and does not fetter the discretion of a statutory decision-maker": *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 SCR 249, 2002 SCC 11 at para 78; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 26; *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 SCR 525 at paras 58-59. None of the Plaintiffs could have any legitimate expectation that the Government of Canada would change the Regulations or take any other action based on a public announcement by a Minister of the Crown that he intended to follow the recommendations of a Parliamentary Committee. Paragraphs 22 and 23 should be struck.

109 The Defendants make extensive objection to Mancuso's Charter claims as set out in paragraphs 24 to 30 of the Claim:

(a) The claims pleaded by Mancuso are similarly composed of bald assertions of *Charter* infringements unsupported by materials facts. Mancuso pleads that the entirety of the "current scheme" violates his rights under sections 2, 7 and 15 of the *Charter*. Mancuso fails to specify the health product(s) that are not made available to him as a result of the *Food and Drugs Act* or the *Natural Health Product Regulations*, or that he has unsuccessfully taken steps to obtain any such products.

(b) Mancuso also fails to plead the constituent elements of the *Charter* violations he asserts. Section 2(a) of the *Charter* protects the single integrated concept of "freedom of conscience and religion". To successfully establish a breach of section 2(a), a claimant must demonstrate that he/she has a practice or belief, having a nexus with religion or secular morality, which calls for a particular line of conduct. Mancuso has failed to plead the prohibition of any practice or line of conduct with a nexus to religious beliefs or morality to which he ascribes. He simply asserts a preference for certain dietary food supplements and vitamins. Without more, his section 2(a) claim presents no reasonable prospect for success.

(c) The plaintiff's allegations relating to freedom of expression under section 2(b) of the *Charter* are similarly deficient. Although the Supreme Court of Canada has adopted a wide definition of expression, Mancuso has not pleaded any personal attempts to make or receive prohibited expressive activity.

(d) To establish a breach of s. 7, a claimant must demonstrate a deprivation that is inconsistent with a principle of fundamental justice. Mancuso has failed to indicate any health product necessary to his bodily and/or psychological integrity that is made unavailable to him by effect of the legislation he seeks to invalidate. As a result, there is no basis upon which to find a deprivation of life, liberty pr personal security. Moreover, he does not assert any discordance with a principle of fundamental justice.

(e) Finally, Mancuso's allegation of invalidity pursuant to s.15 of the *Charter* presents no reasonable prospect for success as the alleged discrimination does not fall within the purview of s.15. To succeed on a section 15 claim, a claimant must establish disadvantage on a prohibited ground or analogous characteristic. Mancuso alleges discrimination on the basis of his choice of food, dietary (food)

supplements, and vitamins. This is not a prohibited ground under s.15 of the *Charter*, nor has it been recognized, or pleaded, as an analogous ground of discrimination.

(f) Given the above-noted absence of material facts, the entirety of Mancuso's allegations of *Charter* invalidity should be struck as presenting no reasonable prospect for success.

110 All I can do is agree with the Defendants. We simply don't have any facts about what Mancuso has relied upon, or any difficulties he has experienced in accessing particular natural health products. If Mancuso has, throughout his life, heavily relied upon dietary food supplements and vitamins then, presumably he has not been prevented from accessing them. His general views about freedom of choice with respect to health don't tell the Defendants or the Court how any asserted rights have been infringed. These paragraphs present no reasonable cause of action and should be struck in their entirety.

111 Paragraphs 31 to 39 provide the basis for the claims of Rowland and the Results Company. The Results Company is claiming damages, and Rowland claims personal damages as well as a breach of his ss. 2, 7 and 15 Charter rights as claimed and articulated with respect to Mancuso, at paragraph 30 of the Claim.

112 For reasons already given, I have already held that Mancuso has not articulated or appropriately pleaded any basis for a breach of Charter rights. This means, inevitably, that neither has Rowland, so that Rowland's Charter right claims must be struck.

113 Rowland says that he, "as a consumer, producer, as well as a distributor of these products, further claims, personally, damages in loss of income and reputation, derived from the Results Company [...]." No cause of action is pleaded to ground Rowland's claim except "the Defendants officials arbitrary, excess and abuse of authority in the enforcement of the Act and Regulations." If this is intended as a tort claim, the constituent elements of the tort need to be set out and pleaded appropriately; otherwise there is no way of knowing, defending or adjudicating this aspect of the claim. Hence, Rowland's personal damages claims should be struck for revealing no reasonable cause of action.

114 The Results Company's claims do mention specific products and plead facts related to the company's dealings with Health Canada. Some of the complaints involve specific dealings between the company and Health Canada, and some of them allege some kind of conspiracy or policy by Health Canada to force small companies out of business in order to favour and support large pharmaceutical companies. Some of these assertions are very broad and are supported by very few facts, if any.

115 This portion of the Claim appears to support counsel for the Plaintiffs' oral assertion that the Plaintiffs' real concern is the NPN licensing and site licensing aspects of the regulatory scheme under the Act and the Regulations. However, the personal claims of Mancuso, Rowland and the Dahls suggest that counsel is not being entirely accurate in this regard.

116 In addressing the Results Company's claims it is often difficult to disentangle fact and substance from some of the broad, unsupported and often colourful assertions that are made.

117 I see nothing wrong with paragraphs 31 to 33. The problems begin at paragraph 34 which seems intended to provide a factual basis for the assertion regarding "the Defendants' officials' excessive and abusive enforcement of these (unconstitutional and ultra vires the Act) Regulations [...]." So the Results Company appears not to be basing its claim for damages upon the regulatory and enforcement scheme per se, but upon its "excessive and abusive enforcement." It is hard to see, then, how the Results Company's experiences can be said to support the general declaratory relief sought in paragraph 1 of the CLAIMS section. However, it is not entirely clear from paragraph 34 that "excessive and abusive enforcement" is the real issue because paragraph 34 begins with the words "As a result of Health Canada's oppressive and totally unnecessary Natural Products ("NPN") product licensing scheme, The Results Company Inc. is quickly being put out of business and may not survive past the end of 2012."

118 When I read the whole of paragraph 34, some of it appears to be about the NPN product licensing scheme per se, yet the sentence that immediately precedes the subparagraphs says that those subparagraphs are meant to ground the "effect of the Defendants' officials' excessive and abusive enforcement." This aspect of the claim can neither be defended nor adjudicated until this issue is clarified.

119 Subparagraph 34(b) attributes a drop in sales "entirely to Health Canada's discriminatory NPN licensing scheme under which Health Canada has refused licences for some Vitamost(R) products, has withheld licenses for others, and made it cost prohibitive even to apply for licenses for most products in the Vitamost(R) line."

120 If these matters were so vital to the Results Company's future, one has to wonder why the decisions in question where not subjected to judicial review, though of course this is not a pre-requisite to bringing an action for damages: see *Telezone*, *Nu-Pharm*, *Parrish & Heimbecker*, all above. However, without the specifics as to which licenses have been refused or withheld, and the costs associated with each application, it is not possible to defend or adjudicate this aspect of the Claim.

121 Subparagraph 34(c) alleges, in effect, that Health Canada has used the NPN licensing scheme to favour "mass merchandisers" at the expense of "small family businesses" so that there is "no more level playing field, due to Health Canada." Is this meant to suggest a deliberate policy by Health Canada, a conspiracy by Health Canada Officials, or simple ignorance as to effects of the licensing scheme? This claim goes will beyond the Results Company and whatever it may have suffered. There are no facts to support such general allegations and, as it stands, this broad claim cannot be defended or adjudicated. It reads like someone's opinion rather than a factual pleading.

122 I see nothing wrong with subparagraph 34(d) which appears to provide a specific example of excessive or abusive enforcement that can be defended and adjudicated.

123 Subparagraph 34(e) is deficient and should be struck because no facts are provided to support what is a bald assertion. In order to defend and adjudicate this allegation, it would be necessary to know, at least, the following:

a) What are the products in the Vitamost(R) line apart from Advaya(R) which is mentioned in 34(f);

b) Which of them are innovative and why?

c) For which of the products has the Results Company experienced discrimination and what form did that discrimination take?

d) Which specific ingredients or combination of ingredients have not been documented by the sources deemed acceptable to Health Canada, who are those sources, and how has this prevented the licensing of a formulation on the Vitamost(R) line?

124 Advaya(R) is the only specific example given in paragraph 34(f). The Plaintiffs say that they cannot comply with the Health Canada requirement and list "the exact quantity of each ingredient" because this would "reveal proprietary information protected by patent." Patents do not protect undisclosed proprietary information. The patent monopoly is given in return for public disclosure of the invention. So this makes no sense. However, the main complaint appears to be that:

> Health Canada does not allow any of the many health claims for Advaya(R) that the Results Company has been able to verify by means clinical trials and symptom surveys, all of which claims are compliant with U.S. guidelines for dietary supplements.

It isn't clear here whether the Results Company is objecting to a particular decision or decisions of Health Canada that have prevented such health claims - in which case the facts would be needed to ground the claim that such decision is excessive or abusive -- or whether the Results Company is saying that the Act and/or the Regulations prevent such claims -- in which case the Plaintiffs need to plead how this translates into a cause of action.

125 Paragraph 34(g) does not say which Vitamost(R) formulas are at issue. More importantly, however, it alleges general discrimination through NPN licensing "against complex formulations." No facts are pleaded to say whether such "discrimination" is deliberate or is simply a function of the way the system works for all complex formulations, and there is nothing to explain how this translates into a cause of action for damages that the Defendants can defend.

126 Paragraphs 34(h) to 34(k) express little more than disagreement with the need for testing in Canada, and Health Canada's approach. The opinion is expressed that finished product testing and stability testing is unnecessary. This appears to be what the Results Company means by something that is "oppressive and totally unnecessary."

127 The difficulty is that an opinion that simply questions the need for Health Canada's approach to testing is not the basis for any form of action, and the constituents of any form of action are not pleaded. Is this conspiracy, negligence or a malicious tort? Until the facts are pleaded and joined with the constituents of same form of action that justifies a damages claim, these paragraphs remain nothing more than a difference of opinion over the need for testing.

128 Much the same can be said of paragraphs 34(c) to (t).

129 As a way of summarizing what the whole of paragraph 34 amounts to in law, the Plaintiffs say in paragraph 34(s) that:

> Both NPN licensing and the DIN registration scheme that it replaces are forms of censorship which both prevents new products from coming to market and restricts the sales of those which are permitted to be sold. Health Canada decides which health claims it will allow for each product and prohibits all other true claims -- including those referenced by textbooks, clinical studies, and even testimonials sworn by affidavit. This censorship is an insidious way of limiting public access to high quality formulas by restricting both the formulators who create these products and the entrepreneurs who bring them to market. In no other industry are suppliers prevented from telling their customers the truth about what their products do. Because Vitamost(R) products are innovative, 25 years of censorship has severely limited their sales. Customers only find out about these unique supplements by word of mouth, since TRC is prevented from advertising the benefits of taking Vitamost(R) formulas;

130 If the Plaintiffs are alleging "censorship" as the legal basis of their claim and the form of action they are pursuing, then they need to show how "censorship," in law, gives rise to a cause of action. That is, they must set out the material facts they are using the label "censorship" to describe in a manner that matches the constituent elements of a cause of action that they are entitled to bring: *Simon*, above, at para 18.

131 If the Plaintiffs are simply seeking damages as relief under s. 24(1) of the Charter, then they need to plead the facts that will support the accusations of bad faith or abuse of power by public officials: see *Ward*, above, at para 39; *Mackin*, above, at paras 78-79. The same applies to civil causes of action: simply enforcing a statute and regulations that were valid at the time will not give rise to a cause of action (*Mackin,* at para 78), and there is no cause of action for legislating or failing to legislate in a manner that is adverse to a party's interests or may cause them to incur losses: see *Welbridge Holdings Ltd v Greater Winnipeg*, [1971] SCR 957; *Mahoney v Canada*, [1986] FCJ No 438, 4 FTR 259 (FCTD); *Kwong Estate v Alberta*, [1978] AJ No 594, 96 DLR (3d) 214 (ABCA).

132 I see nothing in paragraph 34 that pleads facts to establish "excessive and abusive enforcement" as opposed to the simple enforcement of what is, in the Plaintiffs' opinion, an "oppressive and totally unnecessary [...] licensing scheme."

133 All in all, I see nothing pleaded in paragraph 34 that sets out a concise statement of material facts that could support a recognizable cause of action in law.

134 There is nothing in paragraphs 35 and 36, which attempt to summarize the Plaintiffs position, that saves the pleadings from the problems I have identified above. As drafted, with the exception of subparagraph 34(d) (addressed above) and the background information provided in paragraphs 31-33 and 35, the whole of section C of the Claim is little more than the personal views of Rowland and his company, the Results Company, that the NPN licensing scheme is unnecessary and has not allowed him to make the profits he would like to have made, because it discriminates in favour of larger companies who are better able to meet the costs involved.

135 Consequently, it is my view that paragraphs 31 to 39 of the Claim should be struck.

136 The Defendants object to the claims of Dr. Dahl, Ms. Dahl and Life Choice as an abuse of process and as a collateral attack upon judicial decisions made in previous proceedings.

137 The Defendants allege that:

> Dahl, Mrs. Dahl and Life Choice Ltd. ask this Court to revisit the legality of the searches conducted by authorities on March 31, 2004 and January 15th 2009, the correctness of their 2004 and 2013 criminal convictions, and the factual findings underlying those convictions. For example:
>
> (a) In their 2004 criminal proceeding, Dahl and E.D. Internal Health unsuccessfully challenged the validity of three search warrants pursuant to s.8 of the *Charter*. The plaintiffs now seek to re-litigate the constitutionality of these search warrants and the actions taken under their authority.
>
> (b) In the 2013 criminal proceedings, E.G.D. Modern Design Ltd., with Dahl acting as principal, pleaded guilty to eleven charges under the *Food and Drugs Act* and the *Controlled Drugs and Substances Act*. Despite their guilty plea, the plaintiffs allege in this action that they were falsely and maliciously charged.
>
> (c) The plaintiffs unsuccessfully challenged the legality of the January 15th 2009 searches in the Alberta Court of Queen's Bench. The plaintiffs plead in this proceeding that these searches were contrary to sections 7, 8 and 9 of the *Charter*.
>
> On a generous and fair reading, the entirety of paragraphs 40-101 of the statement of claim is premised on the assertion that, contrary to the findings of two trial judges and their own pleas of guilt, these plaintiffs were subject to unlawful searches and have been wrongly convicted. This court would be unable to grant the remedies sought by the plaintiffs in this action without first making findings on criminal liability the constitutionality of police searches and/or the admissibility of evidence in a criminal proceeding that are inconsistent with prior findings made in the plaintiffs' criminal trials. Because such findings would necessarily undermine the principles of consistency, finality, and integrity in the administration of justice, this portion of the statement of claim should be truck in its entirety as a collateral attack and abuse of process.

138 Paragraphs 40 to 55 provide background information about the Dahls, some of their business endeavours and four encounters with Health Canada. It seems to me that the description of the first four encounters with Health Canada provides no information that is relevant to the relief sought in this action, but the Defendants have conceded that, on their own, these paragraphs are inoffensive.

139 The facts pleaded by the Dahls provide the only possible factual basis found in the Claim for excessive and abusive enforcement and, indirectly at least, highlight the poverty of the rest of the pleadings on this issue.

140 The Plaintiffs go on to describe a search that took place in March 2001 that led to criminal conviction in 2004, and a search in January 2009 that led to criminal conviction in 2013.

141 Dr. Dahl says that, as a result of the first criminal proceedings, he:

> Now has a criminal record for not only something he was not responsible for, but also due to the *ultra vires*, unconstitutional Regulations and their excessive and abusive enforcement by the Defendants' officials.

142 The convictions stemming from the 2001 investigation were under three different statutes. Dr. Dahl's company, E.D. Internal Health Ltd, pleaded guilty to sixteen charges under the Act and the Regulations and received a fine of $5,600: see *R v Dahl #2*, above, at para 18. The 42 charges that went to trial were all under the Customs Act and the CDSA. These charges related to importing anabolic steroids or their derivatives and mis-describing these goods on customs forms. The Plaintiffs say some of these substances are not considered anabolic steroids and are not controlled in the United States and should not be in Canada, but as it stands they are listed in Schedule IV (s. 23) of the CDSA. Dr. Dahl and E.D. Internal Health Ltd were found guilty after trial on 33 counts under ss. 153(a) and 159 of the Customs Act and ss. 5(2) and 6(1) of the CDSA (*R v Dahl #1*, above). Dr. Dahl received a conditional sentence and fines totalling $116,360, and E.D. Internal Health Ltd received fines totalling $232,720.

143 There is nothing pleaded that shows why the convictions under the Customs Act and the CDSA have any relevance to the present Claim. Based on the pleadings, the validity and enforcement of those statutes is not at issue. Only the 16 convictions resulting from the guilty pleas of E.D. Internal Health under the Act and the Regulations could have any possible relevance here.

144 Dr. Dahl complained of breaches of s. 8 of the Charter at the trial before Justice Lytwyn who found no violation of s. 8: see *R v Dahl #1*, above, at para 10. If Dr. Dahl disagreed with this finding, he could have appealed Justice Lytwyn's decision. He cannot now come before this Court and have these searches re-examined with a view to finding a breach of s. 8 of the Charter.

145 Dr. Dahl complains that he now has a criminal record for something he was not responsible for. However, E.D. Internal Health accepted responsibility for the 16 charges under the Act and the Regulations through its guilty pleas, and a competent Court found that Dr. Dahl and E.D. Internal Health were responsible for 33 additional offences under the Customs Act and CDSA. He cannot now come before this Court and ask for the same issues to be re-determined.

146 Dr. Dahl also says that due to the 2004 trial, he now has a criminal record "due to the ultra vires unconstitutional Regulations and their excessive and abusive enforcement by the Defendants' officials." There are two components to this allegation: that the Regulations are *ultra vires* and unconstitutional, and that their enforcement leading up to the trial and convictions in 2004 were abusive and excessive.

147 In large measure, the claim of abusive enforcement amounts to an attempt to re-litigate the validity of the three search warrants related to the 2004 criminal proceeding. As I have already noted above, their constitutionality has already been decided by Justice Lytwyn. The attempt to re-litigate that issue here is, if not strictly speaking a collateral attack on the legal effect of the 2004 convictions, certainly an abuse of the Court's process that should not be permitted to proceed: see *CUPE*, above, at paras 33-55; *Wolf*, above, at paras 54-57.

148 While the Plaintiffs refer to *TeleZone*, above, and its companion cases to argue that the collateral attack and abuse of process doctrines should not apply where the forum is different and the issue to be decided is different, those cases do not avail the Plaintiffs here. They dealt with the question of whether an administrative decision must first be challenged through judicial review before an action for damages can be brought based on the consequences of those decisions. The Supreme Court found that such a detour was not necessary, nor were the actions in question collateral attacks on the administrative decisions in question. In so finding, the Court emphasized the differences between the nature and purpose of judicial review on the one hand and proceedings to determine civil liability on the other (see *TeleZone*, above, at paras 20-31, 60-68). Thus, the Plaintiffs are not wrong to suggest that differences in the nature of the issues at stake can affect the application of the collateral attack and abuse of process doctrines. However, none of these cases suggested that matters squarely decided in previous criminal court proceedings can be re-litigated by the party against whom those matters were decided in future civil proceedings in which they seek to obtain damages. In my view, this scenario goes to the very heart of the abuse of process doctrine, in that it would bring the administration of justice into disrepute, and cannot be permitted for the reasons stated in *CUPE*, above.

149 The Plaintiffs also plead at paragraph 70 under the heading "Post March 21, 2001" that:

> After the investigation, all of Dr. Dahl's Canadian shipments were stopped from entering Canada. Customs sent everything for inspection or held them up. His only alternative was to close his Canadian business. He ended up selling his stock and exclusive product lines at cost and also his warehouse.

If this is intended to be an allegation of excessive enforcement so as to ground a claim for damages, it is not properly pleaded. On the most generous reading, it can be seen as an attempt to plead a claim in negligence, but the Plaintiffs have not pleaded what duty or standard of care was owed to them and how it was breached. Even if it could be established that the customs officials in question owed a private law duty of care to the Plaintiffs, which is a steep hill to climb (see *Cooper v Hobart*, [2001] 3 SCR 537, 2001 SCC 79; *Edwards v Law Society of Upper Canada*, [2001] 3 SCR 562, 2001 SCC 80), they have not pleaded any facts that could be taken as a breach of that duty. There is nothing to suggest that customs official were doing anything other than carrying out their statutory duties reasonably and in good faith. Likewise, the allegation cannot ground a claim for malicious prosecution as there is no indication that a prosecution resulted from these alleged customs enforcement activities, let alone that this was done without reasonable cause and was motivated by malice: see *Nelles v Ontario*, [1989] 2 SCR 170. A claim of misfeasance in public office would require a pleading that a public office holder engaged in deliberate and unlawful conduct in his or her capacity as a public officer, and was aware both that their conduct was unlawful and was likely to harm the Plaintiff: *Odhaviji Estate v Woodhouse*, [2003] 3 SCR 263 at paras 22-23, 28 [*Odhaviji Estate*]. None of this has been pleaded here with respect to the actions of customs officials. Thus, paragraph 70 should be struck.

150 As regards the alleged legal invalidity of the Regulations, both as being *ultra vires* the Act and unconstitutional, I do not see how the 2004 convictions have any bearing on that claim. As already noted above, the convictions under the Customs Act and CDSA are irrelevant, and any attempt to impugn the 16 convictions of E.D. Internal Health under the Act and the Regulations is an abuse of the Court's process: see *CUPE*, above, at paras 33-55; *Wolf*, above, at paras 54-57. The time to challenge those charges based on the purported legal invalidity of the Regulations was before entering guilty pleas on behalf of E.D. Internal Health.

151 Dr. Dahl says he is not questioning the fact of his convictions; he says, however, that this does not prevent him from attempting to show in these proceedings that the Regulations under which E.D. Internal Health was convicted were unconstitutional. I agree, but Dr. Dahl cannot use the fact of the unchallenged convictions to demonstrate unconstitutionality, which he is trying to do. The argument appears to be that the Regulations and the scheme of the Act are so absurd that they led to Dr. Dahl's criminal convictions in 2004. They certainly did not lead to the convictions under the Customs Act and CDSA, and the unchallenged convictions under the Act and the Regulations are not a factual basis for the unconstitutionality of the Regulations. Moreover, the notion that Dr. Dahl is not attempting to impugn the 2004 convictions through the present Claim is belied by pleadings that attack the factual underpinnings of those convictions -- including that certain evidence "went unnoticed by the Trial Judge" (para 72), and that Dr. Dahl "was charged with products that were never actually in his possession" (para 74) -- and the allegation that Dr. Dahl was "falsely convicted in 2004" (para 98).

152 Dr. Dahl appears to be arguing that the Regulations are making criminals out of innocent people, but if he has been convicted he is not an innocent person. He simply feels that the offences he was convicted of should not be offences. Without more, this is not a ground for unconstitutionality.

153 If the Court is intended to see the convictions as part of the harm flowing from the allegedly invalid Regulations, then the principles from *Mackin*, above, apply. Setting aside the claims about excessive searches, already dealt with above, the Plaintiffs have not pleaded the kind of threshold misconduct (i.e. conduct that is "clearly wrong, in bad faith or an abuse of power") that would be necessary to create the possibility of damages following a declaration of invalidity: see *Mackin*, above, at paras 79-82; *Ward*, above, at paras 39-40.

154 The second search and seizure took place in January 2009 and this led to charges in January 2010. Dr. Dahl, Mrs. Dahl and their company, E.G.D. Modern Design Ltd, were each charged with 33 regulatory and criminal

offences under the Act, the CDSA, and their respective Regulations: *R v Dahl #6*, above at para 3. The trial commenced on March 19, 2012, and two defence applications were heard, including an unsuccessful challenge to four of the six searches based on s. 8 of the Charter. However, due to the late disclosure of certain documents by the Crown, the trial was adjourned and there were difficulties rescheduling it within a reasonable time. The resulting delay infringed the Dahls' rights under s. 11(b) of the Charter, and the charges against them were stayed. However, Justice Jeffrey of the Court of Queen's Bench found that the Charter considerations applied differently to a corporate defendant: unlike for individual defendants where security of the person considerations such as prolonged anxiety and stigma figured prominently, with respect to corporate defendants, s. 11(b) serves exclusively to protect the right to a fair trial. There was no evidence that E.G.D. Modern Design's ability to make full answer and defence had been impaired, and the charges against that company were permitted to proceed: see *R v Dahl #6*, above, at paras 9, 14-15.

155 Ultimately, E.G.D. Modern Designs Ltd, with Dr. Dahl acting as principal, pleaded guilty to 11 charges, eight under the Act and Regulations, and three under the CDSA. Regarding the eight offences under the Act and the Regulations, the company was fined $2,500 for each of five of these offences, and the maximum $5,000 each for the remaining three since they revealed "an intent to consciously organize and operate surreptitiously, wilfully circumventing the law after having experienced the effect of being caught once before": *R v Dahl #7*, above, at p. 94 (Defendant's Motion Record, at p. 601). The Court made an explicit finding that Dr. Dahl was the controlling mind of the corporate defendants convicted in both 2004 and 2013 (*R v Dahl #7*, above, at p. 93 (Defendant's Motion Record, at p. 600):

> In both cases, the senior officer or representative of the corporation was the same, Mr. Eldon Dahl. In each case he was the controlling mind.
>
> A corporation faces criminal liability for the criminal acts of its representatives. Here, each corporation, the old 2004 corporation, E.D. Internal Health, and now the entity before me, E.G.D. Modern Design Ltd., were directed and controlled by the same individual.

156 As noted above, Dr. Dahl, Mrs. Dahl and E.G.D. Modern Design Ltd unsuccessfully challenged the search warrants and their execution in the proceeding in the Court of Queen's Bench in Alberta: *R v Dahl #5*, above, at pp. 176-192 (Defendant's Motion Record, at pp. 481-497). Justice Jeffrey reviewed the whole process of the search of the Dahls' home and the reasons for the entry with guns drawn and found as follows:

> Here, the police did not depart from the knock and announce approach. They drew their weapons rather then keeping them holstered, that is all. They did not escalate the entry into a dynamic entry. [page 188, lines 25-28]
>
> In my view, in the heat of the moment and the uncertainty of what they might face, the apparent lack of cooperation justified the police considering whether they had misread the Dahls. Some of the alleged offences here did involve the *Controlled Drugs and Substances Act*, not matters some might consider of lesser severity such as the other charges under the *Food and Drugs Act*. Investigations and searches associated with alleged offences under the *Controlled Drugs and Substances Act* can be met with violence. Weapons are not uncommon in these contexts. [page 188, lines 34-40]
>
> Here, the police did not do anything else that escalated the entry other than draw their guns to help ensure their own safety. I do not find this manner of conduct of the search warrant at Number 19 unreasonable in the circumstances and dismiss the application to exclude evidence resulting from the search here. [page 189, lines 33-36]

157 In the present proceedings, the Dahls say the search of their home was unconstitutional, that they were unlawfully detained during that search, and that they were falsely and maliciously charged.

158 E.G.D. Modern Design Ltd pleaded guilty to eight charges under the Act and Regulations and another three under the CDSA. Dr. Dahl was the principal who entered these pleas and was found to have been the directing mind of the corporation with respect to the alleged illegal conduct. Under these circumstances, there is no reasonable prospect of succeeding on a claim of malicious prosecution. The Plaintiffs would not only have to establish that the proceedings concluded in their favour, but that they were instituted without reasonable cause and

were motivated by malice: see *Nelles*, above; Lewis N Klar, *Tort Law*, 5th ed (Toronto: Carswell, 2012) at p. 67. Dr. and Mrs. Dahl had the charges against them stayed, which could be seen as a termination of the proceedings in their favour. The Plaintiffs have alleged that the Defendants' enforcement actions had an improper purpose of driving small entities out of the natural health products industry (see para 92(i) of the Claim). However, given that E.G.D. Modern Design pleaded guilty to11 of the charges, with Dr. Dahl confirming to the Court on its behalf that it was admitting the essential elements of each of the offences (see *R v Dahl # 7*, above, at p. 90), and given the Court's finding that Dr. Dahl was the directing mind whose illegal and criminal conduct gave rise to the company's criminal liability, there is no possibility of establishing that there was a lack of reasonable and probable cause for the Defendants to pursue the prosecution. Moreover, the allegation of malice is not properly pleaded because it is a bald allegation with no supporting material facts presented: see *Merchant Law*, above, at paras 34-35. The allegation of malicious prosecution and all of the accompanying allegations to malicious intent and being "falsely and maliciously charged" and "falsely and maliciously prosecuted" in paragraphs 92-93 must be struck.

159 Moreover, given that the legality of the search of the Dahl's home was explicitly ruled upon by Justice Jeffrey in this proceeding, which resulted in guilty verdicts against one of the Plaintiffs based on guilty pleas entered by Dr. Dahl as the corporation's principal, the attack on the constitutionality of that search in this proceeding is an abuse of process that must be struck: *CUPE*, above, at paras 33-55. The court made an explicit finding that the search of the Dahl's home was lawful and carried out in a reasonable manner in the circumstances: see *R v Dahl #5*, above, at pp. 176-189.

160 Like the 2004 convictions, the 2009 convictions of E.G.D. Modern Design Ltd are not relevant to the alleged invalidity of the impugned Regulations. The time to challenge these charges based on the purported unconstitutionality of the Regulations was before entering guilty pleas on behalf of E.G.D. Modern Design Ltd.

161 Two further allegations by the Dahl's require brief comment. Arguably, each discloses a potential cause of action, but both must nevertheless be struck from the present Claim.

162 The Dahls allege unlawful detention "contrary to ss. 7, 8 and 9 of the Charter" during the search of their home (para 92(c)). Section 9 of the Charter provides that "[e]veryone has the right not to be arbitrarily detained or imprisoned." The Plaintiffs plead at paragraph 90 of the Claim that:

> [Dr. Dahl] and his wife sat in their living room for 11 hours and were prevented from moving or seeing the Health Canada agents search the entire residence. When questioned if they were under arrest, Dr. Eldon Dahl was told that they were just being "detained" and not to move...

There is jurisprudence holding that the lawful authority to detain is not necessarily implied in the lawful authority to search and seize granted by a search warrant, and a detention in these circumstances may be arbitrary, especially if it is prolonged: see for example *R. v Douglas*, 2012 SKQB 250. The Defendants have not pointed to any explicit ruling on this point by the Alberta courts, and accepting the facts as pleaded, I cannot say at this stage that a claim on this basis, either in tort or based on s. 9 of the Charter, has no reasonable chance of success.

163 There is also the matter of the warnings allegedly published by Health Canada about the Plaintiffs' products. They allege at paragraphs 81-84 of the Claim that Health Canada published two warnings, on August 21, 2008 and September 3, 2008 respectively, alleging that the products of Dr. Dahl and E.G.D. Modern Design were contaminated with bacteria and unsafe, and has refused to remove these warnings from its website even though the products were later licensed as "proven safe" by the Defendants' officials. The Plaintiffs have not pleaded deliberate unlawful conduct so as to ground a claim of misfeasance in public office (see *Odhavji Estate*, above), but read generously, these pleadings could reveal a claim for negligence. Even if this is so, however, it is not a claim that can be considered by this Court as currently pleaded.

164 The problem with both of these claims is that, at least as pleaded, they have no connection whatsoever with the content of the Act or Regulations that are challenged in this proceeding. Not only does this present practical problems for the discovery process and any eventual trial of the action, which would inevitably be disjointed, but there is a more fundamental problem relating to the jurisdiction of this Court. As Justice MacKay observed in

Mandate Erectors, above, at para 15, the second part of the jurisdictional test set out in *I.T.O. - International Terminal Operators Ltd. v Miida Electronics Inc. et al.*, [1986] 1 SCR 752, 28 DLR (4th) 641 [*ITO*] states that in order for the Federal Court to have jurisdiction, there must be an "existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction." In removing the named ministers from the style of cause, he found that they could not be sued in their representative capacity, were not sued in their personal capacity, and if they had been, the claims would have been in tort and would have been outside the jurisdiction of this Court. Certain other named defendants were also removed as defendants, as the Court found that the federal laws implicated in the claim were not essential to the disposition of the claims made against them within the terms of the *ITO* test: *Mandate Erectors*, above, at paras 18-19.

165 I find the same is true in the present case. The Dahls have not demonstrated in their pleadings that there is anything about the challenged Act and Regulations that is essential to the disposition of their claims of unlawful detention or negligence in warning the public about their products. These are distinct tort (and perhaps Charter in the former case) claims that have nothing to do with a federally enacted law, and nothing to do with the broader challenge the Plaintiffs are trying to make to the Act and Regulations in their Claim. If the Dahls' wish to pursue those allegations, they must do so in a provincial superior court. They may encounter limitation issues, but that is of no concern here.

166 It may be that these allegations are not intended to ground independent causes of action, but are instead intended to indicate damages suffered as a result of the impugned provisions of the Act and Regulations, or state misconduct in relation to those instruments that could permit a damages claim despite the principles stated in *Mackin*. If so, then the Plaintiffs need to plead some connection between the impugned provisions of the Act and Regulations and the allegedly unlawful conduct.

167 For the above reasons, paragraphs 56-93 of the Claim, and any references to wrongful conviction, malicious prosecution, false advisories, or unlawful searches appearing elsewhere in the Claim in reference to the allegations in those paragraphs must be struck. Paragraphs 40-55 seem inoffensive, but they do not disclose any cause of action either on their own or in connection with any other remaining portions of the Claim, and should be struck on that basis.

168 There follows a series of paragraphs in which the Dahls describe the losses they and their companies have suffered as a result of the alleged unlawful conduct of the Defendants (see paras 95-101). However, each of the causes of action that could ground a claim to damages has been struck above. Since I have decided to grant leave to amend the Claim, I think the most prudent course is to strike these paragraphs and allow the Plaintiffs to amend them in accordance with the amended causes of action.

169 In paragraph 97(g) of the Claim, Dr. Dahl and Mrs. Dahl also assert that they have "had their Charter right [...] personally breached under ss. 2, 7, and 15 of the Charter for the same reasons and rationale as set out with respect to Nick Mancuso and David Rowland."

170 As I have already ruled that Mancuso and Rowland have not pleaded the facts required to establish such breaches, it follows that there are no material facts pleaded to establish breaches of the Dahls' ss. 2, 7, and 15 Charter rights.

The Charter Claims of the Corporate Plaintiffs

171 The final portion of the Claim relates to allegations of Charter breaches by the corporate Plaintiffs, which are The Results Company Inc and Life Choice Ltd, the latter being the successor company to E.D. Modern Design Ltd and E.G.G. Modern Design Ltd. The Plaintiffs plead the following in this regard at paragraph 102 of the Claim:

> The Plaintiffs state, for the sake of clarity, that while the within Statement of Claim clearly sets out which Charter and constitutional breaches are involved, as being infringed, with respect to the biological Plaintiffs, the corporate Plaintiffs also claim the following Charter and constitutional rights have been breached:

(a) the right to freedom of expression and communication as guaranteed under s. 2 of the Charter;

(b) the procedural safeguards of s. 7 of the Charter in the context of (quasi) criminal prosecution and regulatory scheme;

(c) the right to equality, as a structural imperative of the underlying principle of the Constitution Act, 1867 as enunciated by the Supreme Court of Canada in *Winner v. S.M.T. (Eastern) Ltd.*, [1951] S.C.R. 887, which right, above and beyond s. 15 of the Charter, is also involved by the biological Plaintiffs.

172 With respect to the s. 7 claim, the Supreme Court has consistently held that the word "everyone" in s. 7 of the Charter does not include a corporation. Corporations do not have s. 7 rights because the protected interests -- life, liberty and security of the person -- are attributes of natural persons and not artificial persons: see at *Irwin Toy,* above, at paras 94-96; *Dywidag Systems International, Canada Ltd. v Zutphen Brothers*, [1990] 1 SCR 705 at paras 6-7 [*Dywidag Systems*]; Hogg, above, at p. 47-5. Without a deprivation of one of these protected interests, the principles of fundamental justice -- or "procedural safeguards of s. 7 of the Charter" as the Plaintiffs refer to them -- do not come into play. At a minimum, corporations cannot obtain relief on s. 7 grounds under s. 24(1) of the Charter, because s. 24(1) provides remedies for those whose rights have been violated: *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at para 37 [*Big M*]. On the other hand, a corporation can defend against a criminal or regulatory charge on the basis that the law under which it has been charged violates the Charter rights of individuals (including their s. 7 rights), and is therefore constitutionally invalid: see *Big M,* at paras 37-43 (regarding s. 2(a) of the Charter), and *R v Wholesale Travel Group Inc.*, [1991] 3 SCR 154 at paras 21-26 per Lamer CJ and Sopinka J, with Gonthier, Stevenson and Iacobucci JJ expressing agreement at para 236 [*Wholesale Travel*]. Does this mean that corporations can also launch a proactive challenge to the constitutional validity of a law on s. 7 grounds when they are not defending against a criminal or quasi-criminal charge? The Supreme Court has said they cannot, in *Dywidag Systems*, above, at para 7:

> [6] There can now be no doubt that a corporation cannot avail itself of the protection offered by s. 7 of the Charter. In *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, the majority of this Court held that a corporation cannot be deprived of life, liberty and security of the person and cannot therefore avail itself of the protection offered by s. 7 of the *Charter*. At page 1004 it was stated:
>
> > [...] it appears to us that [s. 7] was intended to confer protection on a singularly human level. A plain, common sense reading of the phrase "Everyone has the right to life, liberty and security of the person" serves to underline the human element involved; only human beings can enjoy these rights. "Everyone" then, must be read in light of the rest of the section and defined to exclude corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and include only human beings.
>
> [7] It is true that there is an exception to this general principle that was established in Big M Drug Mart, supra, where it was held that "[a]ny accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid" (pp. 313-14). Here no penal proceedings are pending and the exception is obviously not applicable.
>
> [Emphasis added]

The Plaintiffs point out that corporations have been permitted to seek declarations of constitutional invalidity by bringing motions before the Court, citing the example of *RJR-MacDonald (1995)*, above. That case dealt with the constitutional division of powers and s. 2(b) of the Charter, from which corporations can benefit in a more direct fashion (see below). Having been referred to no contrary authority, I conclude that the question of whether a corporation can bring a proactive challenge to a law on s. 7 grounds has been settled by *Dywidag Systems*, above, and the corporate Plaintiffs cannot bring such a challenge here. I would note in passing that this conclusion does not necessarily prevent the Plaintiffs from advancing their argument that the impugned provisions are unconstitutionally vague should they choose to do so (see paragraph 16 of the Claim, struck above with leave to amend), since this argument could be relevant under s. 1 of the Charter should they establish a breach of another Charter provision: see *Nova Scotia Pharmaceutical*, above, at paras 39-40.

173 Moreover, even if *Dywidag Systems*, above, was not conclusive authority on this point, the Plaintiffs have not pleaded a challenge in the nature of *Big M* or *Wholesale Travel*, both above, arguing that the impugned provisions are invalid because they violate the rights of individuals. Rather, the corporate Plaintiffs appear to be claiming procedural protections under s. 7 in complete abstraction from the question of whether anyone's s. 7 rights are violated. It is clear that such an argument has no chance of success, as the procedural protections under s. 7 come into play only where an infringement of life, liberty or security of the person has been established: see *Main Rehabilitation Co v Canada*, 2004 FCA 403 at paras 4-5.

174 The situation is quite different with respect to the corporate Plaintiffs' claim that their "right to freedom of expression and communication as guaranteed under s. 2 of the Charter" has been breached. The jurisprudence establishes that commercial speech, including that of corporations, is protected under s. 2(b) of the Charter, though perhaps enjoying weaker protection than other forms of speech that are closer to the core of what the provision was intended to protect: see *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712 at paras 45-60; *Irwin Toy*, above; *Rocket*, above; *RJR-MacDonald (1995)*, above; *Canada (Attorney General) v JTI-Macdonald Corp*, [2007] 2 SCR 610. Since most legislative limitations on protected expression will infringe s. 2(a), the analysis in most cases comes down to whether the limitations in question are reasonable limits that can demonstrably justified under s. 1 of the Charter.

175 The claim that the corporate Plaintiffs enjoy a "right to equality, as a structural imperative of the underlying principle of the Constitution Act, 1867" amounts to an appeal to unwritten constitutional principles, which have been discussed by the Supreme Court in a number of cases. It is not entirely clear whether the Plaintiffs are advancing "equality" as an independent principle or as a component of the rule of law. They cite Donald MacIntosh, citing in turn A. V. Dicey, who expressed the view that "equality before the law" is a component of the rule of law: see MacIntosh, above, at p. 7. Whether and in what circumstances such unwritten principles can be used as a basis for invalidating legislation on constitutional grounds remains a debatable point: see *Reference re Secession of Quebec*, [1998] 2 SCR 217; *Reference re Resolution to Amend the Constitution*, [1981] 1 SCR 753 at 845 (Patriation Reference); Hogg, above at 15-53, discussing *Mackin*, above; c.f. *British Columbia v Imperial Tobacco Canada Ltd*, [2005] 2 SCR 473 at paras 59-60. It is not a point that needs to be decided at this stage of these proceedings, in part because it is not clear whether this is the position the Plaintiffs are advancing. They say they are entitled to equality, as a structural imperative of the underlying principle of the *Constitution Act*, 1867, but they do not tell the Court or the Defendants how that right has been breached, or what remedies should flow. Is this part of the challenge to the impugned portions of the Act and Regulations, or specific actions of the executive branch in enforcing them, or both? How exactly have their purported rights to equality been breached? The Plaintiffs don't say.

176 The same absence of a factual foundation affects the claim under s. 2(b) of the Charter. How exactly have the rights of the corporate Plaintiffs to freedom of expression been infringed? There are glimmers of this earlier in the Claim (see paragraph 16(b), (p), (q), (r) and (w) and paragraph 34 (s)), but in my view, the alleged breaches of the corporate Plaintiffs' s. 2(b) Charter rights have not been pleaded with sufficient detail to allow the Court to adjudicate the matter. As the Supreme Court found in *MacKay v Manitoba*, [1989] 2 SCR 357 the presentation of a factual foundation is essential to the proper adjudication of Charter issues.

Proper Defendants

177 The Defendants say that Her Majesty the Queen in Right of Canada is the only proper defendant in this action. This is because the Claim discloses no material facts alleging any wrongdoing on the part of the named Ministers. Also, the Minister of National Health and Welfare does not exist, the naming of the Attorney General of Canada is redundant, and the RCMP is not a suable entity (see *Sauvé*, above, at para 44).

178 The Plaintiffs disagree and refer the Court to *Liebmann*, above, at paras 51-52 as well as *Apotex*, above, at para 13.

179 I do not see the relevance of either of these cases. *Liebmann* added Her Majesty the Queen as an additional defendant and decided that the debate about the appropriateness of granting injunctive relief against officers of the Crown "when that injunction operates against them in their representative capacity only as opposed to against them in their personal capacity" was irrelevant in that particular case because "the challenge is a constitutional one" in which "the Court has jurisdiction pursuant to section 24 of the Constitution Act, 1982 to grant whatever remedies are appropriate in the circumstances."

180 In the present case, there is nothing in the Claim, even before portions of it are struck, that involves the Minister of Public Safety and Emergency Preparedness, or which explains how the Minister of National Health and Welfare (who does not exist) and the RCMP (who cannot be sued) can have any relevance or standing in a constitutional challenge, or why it is necessary to name the Attorney General of Canada in addition to the Crown in order to obtain relief under s. 24 of the Constitution Act, 1982. Ministers cannot be sued in their representative capacity, and there is no indication that they are being sued in their personal capacity: *Cairns*, above, at para 6; *Merchant Law*, above, at paras 19-21.

181 *Apotex*, above, merely says that it "is not always appropriate for motions to strike to be the context to make a binding decision on a question of standing, [...]," rather "a judge should exercise her discretion as to whether it would be appropriate in the circumstances to render a decision on standing or whether a final disposition of the question should be heard with the merits of the case."

182 It is my view that Her Majesty the Queen in Right of Canada is the only proper defendant in this action and that the other named defendants must be struck.

The Stay Motion

183 For obvious reasons, given my decision on the Defendants' strike motion, the Court cannot grant the Plaintiffs a stay of the operation of s. 3(1) and (2) of the Act, and the stipulated sections of the *Natural Health Products Regulations*. The Plaintiffs have yet to disclose a serious issue to be tried and so cannot satisfy the cumulative, tri-partite test established in *RJR-MacDonald (1994)*, above.

184 However, because the issue of a stay may arise again, following amendments to the Claim, I think it might help if I also point out that, on the present record before me for a stay, I would not have been able to grant it even had the Plaintiffs established a serious issue to be tried. I say this for the following reasons:

a) There is no convincing, non-speculative evidence of irreversible harm established on a balance or probabilities. See *Information Commissioner*, above, at para 62. As the Defendants point out, Mancuso identifies products eliminated from the market but he also says that he uses these products regularly and commonly. Mancuso also leaves his claims to mental and physical distress unspecified and unsubstantiated. In addition, the harm referred to by Rowland is either vague and speculative or it is quantifiable business losses.

b) The evidence presented by the Plaintiffs (and the weakness of their case for serious issue is inevitably significant here) does not overcome the presumption that the Act and the Regulations serve the public good, so that the balance of convenience favours the Plaintiffs. See *Harper*, above at para 9. As the Defendants point out, even a *prima facie* Charter breach leaves it open to the Crown to justify that breach under s. 1 of the Charter (and it is difficult to see how the Court could assess this issue at an interlocutory stage such as the present), and even a temporary staying of the legislative and regulatory provision in question could impact the well-being of Canadians in general in serious ways and in advance of any finding of constitutionality. The evidentiary record before me provides little to support such a serious interference with the wording of the Act and the Regulations.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Claim is struck in accordance with my reasons pursuant to s. 221 of the *Federal Court Rules*.
2. The Plaintiffs are hereby granted leave to amend their Claim within 30 days of the date of this order, unless otherwise extended by the Court.
3. All Defendants are hereby struck from the style of cause except Her Majesty the Queen in Right of Canada.
4. The Defendants may move to strike any amended Claim.
5. The Plaintiffs' motion for a stay is dismissed.
6. The parties may address the Court on the issue of costs for these two motions, and should do so in writing within 30 days of the date of this order.

RUSSELL J.

Mancuso v. Canada (Minister of National Health and Welfare), [2015] F.C.J. No. 1245

Federal Court Judgments

Federal Court of Appeal

Toronto, Ontario

Stratas, Rennie and Gleason JJ.A.

Heard: September 9, 2015.

Judgment: October 27, 2015.

Docket: A-365-14

[2015] F.C.J. No. 1245 | [2015] A.C.F. no 1245 | 2015 FCA 227 | 259 A.C.W.S. (3d) 661 | 476 N.R. 219 | 2015 CarswellNat 5213

Between Nick Mancuso, the Results Company Inc., David Rowland, Life Choice Ltd. (Amalgamated From, Rolled Into, and Continuing on Business for, and From, E.D. Modern Design Ltd. and E.G.D. Modern Design Ltd.) and Dr. Eldon Dahl, and Agnesa Dahl, Appellants, and Minister of National Health and Welfare, Attorney General of Canada, Minister of Public Safety and Emergency Preparedness, Royal Canadian Mounted Police, and Her Majesty the Queen in Right of Canada, Respondents

(46 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 — Appeal by plaintiffs and cross-appeal by defendants from order striking statement of claim dismissed — Plaintiffs were comprised of individuals and companies who consumed, distributed and produced natural health products — They challenged enactment of legislative scheme regulating such products, alleging Charter breaches, lack of legislative competence, and tortious conduct in course of enforcement — Judge appropriately struck whole of claim — Unobjectionable portions required fresh pleading stating material facts in support — Accepted claims could not proceed to trial in absence of material facts, which were required to assess legislative competence.

Commercial law — Trade regulation — Food and drugs — Natural health products — Appeal by plaintiffs and cross-appeal by defendants from order striking statement of claim dismissed — Plaintiffs were comprised of individuals and companies who consumed, distributed and produced natural health products — They challenged enactment of legislative scheme regulating such products, alleging Charter breaches, lack of legislative competence, and tortious conduct in course of enforcement — Judge appropriately struck whole of claim — Unobjectionable portions required fresh pleading stating material facts in support — Accepted claims could not proceed to trial in absence of material facts, which were required to assess legislative competence.

Constitutional law — Constitutional proceedings — Practice and procedure — Pleadings — Appeal by plaintiffs and cross-appeal by defendants from order striking statement of claim dismissed — Plaintiffs were comprised of individuals and companies who consumed, distributed and produced natural health products — They challenged enactment of legislative scheme regulating such products, alleging Charter

breaches, lack of legislative competence, and tortious conduct in course of enforcement — Judge appropriately struck whole of claim — Unobjectionable portions required fresh pleading stating material facts in support — Accepted claims could not proceed to trial in absence of material facts, which were required to assess legislative competence.

Appeal by the plaintiffs and cross-appeal by the defendants from a judgment striking the appellants' statement of claim. The appellants were comprised of consumers, distributors and producers of natural health products. They commenced an action challenging the constitutional authority of Parliament to enact a scheme for the regulation of the production and sale of natural health products, including vitamins, and dietary and nutritional food supplements. Alternatively, the appellants challenged the statutory authority that authorized the regulations, and pled various Charter violations and tortious conduct by government officials in the administration and enforcement of the scheme, supporting a claim for damages. They sought declarations of invalidity and a stay of the enforcement of the legislation and regulations. A Federal Court order struck the statement of claim. The plaintiffs appealed and the defendants cross-appealed to the extent that it was an error not to strike the claim in its entirety.
HELD: Appeal and cross-appeal dismissed.

The cross-appeal was unnecessary, as the ruling of the Federal Court judge clearly intended to strike the whole of the statement of claim with leave to file a fresh as amended claim eliminating the defects. The judge accepted the plaintiffs could seek declarations of invalidity on constitutional and administrative law grounds with claims for damages and restitution. The judge appropriately struck the whole of the claim for failure to meet the requirement of pleading material facts. No material facts were pled to support the claims of Charter violations by the individual appellants. The corporate plaintiffs were unable to maintain a s. 7 Charter claim under the prevailing circumstances. The tort claims were supported by bald assertions rather than material facts. The notion that the appellants could proceed to trial on the basis of the unobjectionable portions of the pleading was rejected, as the Court required a sense of the law's reach in order to define the contours of legislative and constitutional competence to assess whether the legislation was ultra vires. With respect to the claims arising from enforcement, the judge erred in characterizing the claims as a collateral attack, but correctly identified them as an abuse of process.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 2(a), s. 2(b), s. 7, s. 8, s. 9, s. 15, s. 24(1), s. 52

Constitution Act, 1867, s. 91(27)

Controlled Drugs and Substances Act, S.C. 1996, c. 19,

Federal Courts Rules, Rule 174, Rule 221, Rule 221(f)

Food and Drugs Act, R.S.C., 1985, c. F-27, s. 2

Natural Health Products Regulations, S.O.R. 2003-196,

Appeal From:

Appeal from a judgment of the Federal Court dated July 16, 2014, Docket Number T-17-54-12 (2014 Fc 708).

Counsel

Rocco Galati, for the Appellant.

Sean Gaudet, Andrew Law, for the Respondent.

REASONS FOR JUDGMENT

The judgment of the Court was delivered by

RENNIE J.A.

1 This appeal and cross-appeal arise from a judgment dated July 16, 2014 of the Federal Court striking the appellants' statement of claim: 2014 FC 708. In brief, the appellants commenced an action challenging the constitutional authority of Parliament to enact a scheme for the regulation of the production and sale of natural health products, including vitamins, and dietary and nutritional food supplements. In the alternative, if the scheme is constitutional, the appellants challenge the statutory authority that authorizes the regulations, and plead various Charter violations and tortious conduct by government officials in the administration and enforcement of the scheme. The appellants seek declarations of invalidity and a stay of the enforcement of the legislation and regulations.

2 The Federal Court, per Justice James Russell (the judge) granted the defendants' motion to strike. The appellants appeal the order striking the statement of claim. Should the Court find that the judge did not strike the claim in its entirety, the respondents have filed a cross-appeal, contending that it was an error not to do so.

3 For the reasons that follow, I would dismiss the appeal and cross-appeal.

I. The Statement of Claim

4 The plaintiffs plead in their statement of claim that they are consumers, distributors and producers of "natural health products" in Canada. They include both natural persons and corporations. "Natural health products" are regulated as "drugs" as defined by section 2 of the *Food and Drugs Act* (R.S.C., 1985, c. F-27) (*FDA*), and the *Natural Health Products Regulations*, SOR 2003-196 (the *Regulations*), non-compliance with which attracts regulatory and criminal consequences.

5 In their statement of claim, the plaintiffs plead that Parliament does not have the legislative competence, under section 91(27) of the *Constitution Act*, *1867*, to regulate natural health substances. They plead that Parliament's competence is confined to the regulation of substances that pose a health risk and does not extend to the regulation of substances that pose no health risk, or little health risk, like natural health products. In the alternative, they say that the *Regulations* defining a "drug" are overbroad and that Parliament did not intend the definition of "drug" in section 2 of the *FDA* to include natural health products, and therefore the *Regulations* exceed the authority delegated by the *FDA*.

6 They also plead that the *Regulations* as a whole, and specific provisions such as the prohibition on the production and sale of a "natural health product" without a "Natural Product Number" or NPN, violate subsections 2(a), 2(b), and sections 7, 9 and 15 of the Charter. Section 8 violations are also said to arise from various searches and seizures to which some of the plaintiffs were subject under the *FDA* and the *Regulations* and the *Controlled Drugs and Substances Act* (S.C. 1996, c. 19).

7 The plaintiffs also plead that in the implementation and enforcement of this regulatory scheme, agents and officials of the defendants committed torts related to the exercise of state authority, including malicious prosecution and misfeasance in a public office. They seek damages for lost profits, loss of reputation, mental distress, punitive and exemplary damages, as well as damages under subsection 24(1) of the Charter. They seek to have the action determined by a jury trial.

II. Analysis

A. *Standard of review*

8 The decision of this Court in *Imperial Manufacturing Group Inc. v. Decor Grates Incorporated*, 2015 FCA 100

instructs that the usual appellate standard of review applies to decisions of a trial judge in matters of pleadings and therefore that conclusions on questions of fact and questions of mixed fact and law that are suffused by fact can only be interfered with if there is a palpable and overriding error. Conclusions on questions of law and questions of law that may be extracted from questions of mixed fact and law attract no deference and are reviewed on a standard of correctness.

9 I am satisfied that the judge identified and properly applied the governing principles applicable to a motion to strike and that no reviewable error arises in his conclusion that the statement of claim did not comply with the rules of pleading.

B. *Preliminary issue - The scope of the decision below*

10 The first paragraph in the judge's judgment provides that "The Claim is struck in accordance with my reasons pursuant to s. 221 of the *Federal Court Rules*." The appellants contend that this should be interpreted as meaning that the claim is struck, subject to the parts of the reasons which allowed some paragraphs to stand. I do not think there is any merit to this argument. The judge intended that the whole claim be struck and the plaintiffs be permitted to file a "fresh as amended statement of claim" that eliminated the defects existing in the pleading before him.

11 I agree that the judge found certain paragraphs of the claim unobjectionable. He accepted, for example, that the plaintiffs could, in an action in the Federal Court, obtain declarations of invalidity on both constitutional and administrative law grounds along with claims for damages and restitution. He also accepted that the facts pleaded in relation to the general attack on the *vires* of the scheme might also bear on the claims for individual relief. Further, he accepted that certain paragraphs and subparagraphs of the claim were also unobjectionable (see, for example, subparagraphs 1(a), 1(b), 1(d), and 1(e)(i) and paragraphs 2, 3, and 18).

12 However, the appellants' interpretation of the judgment is not supported by its plain language-- "the claim is struck." Further, the judge's reasons leave no doubt that the judge struck the claim in its entirety. He found that the claim invited a broad ranging policy discussion as to whether, and how, natural health products should be regulated. On multiple occasions he adverted to the inability of the defendants to plead in defence, given the scope or breadth of the assertions and the lack of underlying material facts or particularity, and in addressing costs, the judge characterized the pleading as "very unwieldy and non-compliant." Given the number of paragraphs and subparagraphs struck and their distribution throughout the claim, the residue would be a disjointed and difficult read and entirely lacking in any material fact.

13 Although some paragraphs seeking declaratory relief were not mentioned as explicitly being struck, these comments must be read in light of the judge's extensive consideration of the requirement of a factual matrix as prerequisite to the determination of constitutionality. The judge found that the plaintiffs were seeking to impugn the whole scheme for the classification, inspection and enforcement of food, dietary food supplements and vitamins. He noted that the pleading did not particularize which of the 55,000 natural food products were in issue and made no link between the products and the plaintiffs. He concluded that the pleadings did not provide a factual foundation for such a broad declaration.

14 The argument that the judge allowed the declaratory component of the claim to continue is also inconsistent with the appellants' own memorandum of fact and law which concedes at paragraph 21 that "the Court erred in striking the claim in its entirety."

15 In the result, the cross-appeal is unnecessary and should be dismissed.

C. *The requirement of material facts*

16 It is fundamental to the trial process that a plaintiff plead material facts in sufficient detail to support the claim and relief sought. As the judge noted "pleadings play an important role in providing notice and defining the issues to

be tried and that the Court and opposing parties cannot be left to speculate as to how the facts might be variously arranged to support various causes of action."

17 The latter part of this requirement -- sufficient material facts -- is the foundation of a proper pleading. If a court allowed parties to plead bald allegations of fact, or mere conclusory statements of law, the pleadings would fail to perform their role in identifying the issues. The proper pleading of a statement of claim is necessary for a defendant to prepare a statement of defence. Material facts frame the discovery process and allow counsel to advise their clients, to prepare their case and to map a trial strategy. Importantly, the pleadings establish the parameters of relevancy of evidence at discovery and trial.

18 There is no bright line between material facts and bald allegations, nor between pleadings of material facts and the prohibition on pleading of evidence. They are points on a continuum, and it is the responsibility of a motions judge, looking at the pleadings as a whole, to ensure that the pleadings define the issues with sufficient precision to make the pre-trial and trial proceedings both manageable and fair.

19 What constitutes a material fact is determined in light of the cause of action and the damages sought to be recovered. The plaintiff must plead, in summary form but with sufficient detail, the constituent elements of each cause of action or legal ground raised. The pleading must tell the defendant who, when, where, how and what gave rise to its liability.

20 The requirement of material facts is embodied in the rules of practice of the Federal Courts and others: see *Federal Courts Rules*, Rule 174; Alta. Reg. 124/2010, s. 13.6; B.C. Reg. 168/2009, s. 3-1(2); N.S. Civ. Pro. Rules, s. 14.04; R.R.O. 1990, Reg. 194, s. 25.06. While the contours of what constitutes material facts are assessed by a motions judge in light of the causes of action pleaded and the damages sought, the requirement for adequate material facts to be pleaded is mandatory. Plaintiffs cannot file inadequate pleadings and rely on a defendant to request particulars, nor can they supplement insufficient pleadings to make them sufficient through particulars: *AstraZeneca Canada Inc. v. Novopharm Limited*, 2010 FCA 112.

D. *Pleading of Charter violations*

21 There are no separate rules of pleadings for Charter cases. The requirement of material facts applies to pleadings of Charter infringement as it does to causes of action rooted in the common law. The Supreme Court of Canada has defined in the case law the substantive content of each Charter right, and a plaintiff must plead sufficient material facts to satisfy the criteria applicable to the provision in question. This is no mere technicality, "rather, it is essential to the proper presentation of Charter issues": *Mackay v Manitoba*, [1989] 2 S.C.R. 357 at p. 361.

22 In respect of all of the Charter allegations, the judge found that the plaintiffs did not identify any specific natural health product to which they had been denied access, nor how that denial related to the rights might be protected by the Charter provisions raised. For example, a violation of subsection 2(a) requires that the claimant's practice or belief have a nexus with a religious belief or practice or secular morality: *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, 2004 SCC 47, at p. 56. Here, no material facts were pleaded supporting the proposition that the plaintiffs had such a practice or belief that was in any way connected with their consumption or sale of natural health products. Similarly, insofar as the plaintiffs assert infringement of their freedom of expression, no material facts were pleaded as to communications that the plaintiffs intended to send or receive that were interfered with by the regulatory scheme, a prerequisite for a violation of subsection 2(b).

23 With regard to the section 7 claims, the plaintiffs need to plead material facts to support the claim that restrictions on the availability of natural health products interfered with either their security of person or liberty. Again, as the judge noted, the plaintiffs did not identify any particular products to which they have been denied access or how any such denial might have risen to the level of a section 7 violation. A section 7 infringement typically engages a fundamental life choice or issues inherently related to personal well-being: *Re B.C. Motor*

Vehicle Act, [1985] 2 S.C.R. 486; *R. v. Morgentaler*, [1988] 1 S.C.R. 30. In the absence of a pleading of a specific regulated drug to which the plaintiffs have been denied access, or a description of how the plaintiffs use of it has been constrained in a manner that engages section 7 interests, the defendant would be left guessing as to the scope of the case it has to meet to respond to the section 7 infringement.

24 Similarly, to establish a violation of section 15, a claimant must first establish that the basis on which he or she claims to have been discriminated against is either an enumerated or an analogous ground within the scope of section 15. While the appellants plead that choice in food, supplements and vitamins is an analogous ground, they did not plead any facts in support of this claim, or facts in support of the other elements of a section 15 violation, such as how the regulation of the product perpetuates disadvantage or prejudice rising to substantive discrimination: *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396, 2011 SCC 12 at paras. 30-31.

E. *The corporate plaintiffs*

25 The judge correctly struck the claims of Charter violations advanced by the corporate plaintiffs. A corporation cannot maintain a section 7 Charter challenge for either a subsection 24(1) or a section 52 remedy unless it is the defendant in a criminal or regulatory prosecution or is subject to compulsory measures, such as injunctive relief, at the behest of the state in a regulatory proceeding: *R. v. Big M Drug Mart Ltd*., [1985] 1 S.C.R. 295; *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157. The pleadings on behalf of the corporate defendants also suffer from the same deficiency found by the judge in respect of the individual plaintiffs. The claims by the corporate plaintiffs for breaches of the "right to equality as a structural imperative of the underlying principle of the *Constitution Act 1867*", and for violations of the corporations' subsection 2(b) rights, lacked a factual foundation in the pleadings. In any event, a corporation cannot assert section 15 rights.

F. *The tort claims*

26 A properly pleaded tort claim identifies the particular nominate tort alleged and sets out the material facts needed to satisfy the elements of that tort. As the judge pointed out, while the appellants assert various torts including misfeasance in public office, they do not link particular conduct to the elements of the tort. For example, the tort of misfeasance in public office requires a pleading of a particular state of mind by a public official -- deliberate, specific conduct which the official knows to be inconsistent with their legal obligations: *Odhavji Estate v. Woodhouse*, 2003 SCC 69; *St. John's Port Authority v. Adventure Tours Inc.*, 2011 FCA 198; *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184. The statement of claim in this case does not meet that standard.

27 The bald assertion of a conclusion is not a pleading of material fact. The judge properly struck many of the paragraphs underlying the tort claims on the basis that without more, these were conclusory statements. He also found that the allegations of bad faith and abuse of power comprised a set of statements or conclusions and did not meet the standard of pleading described in *Merchant Law* at paras. 34-35.

28 The judge assessed the allegations of tortious conduct in the implementation and enforcement of the *Regulations* against these principles and concluded that the appropriateness of the enforcement measures could only be assessed in the light of the facts and context of a particular action or series of actions. What was pleaded, however, was a general practice, with no specific instances, leaving it unclear as to whether the conduct was "something mandated by the Act or the Regulations, or conduct set out in some administrative policy of directive, or whether they are referring to what individual officials have chosen to do" (Reasons for Decision at para. 106).

G. *Damages*

29 Relying on *Mackin* and *Ward*, the judge correctly dismissed the claim for relief under sections 24(1) of the *Constitution Act, 1982*: *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, [2002] 1 S.C.R. 405, 2002 SCC 13; *Vancouver (City) v. Ward*, [2010] 2 S.C.R. 28, 2010 SCC 27; *Henry v. British Columbia (Attorney General)*, 2015 SCC 24. As a general rule, damages are not available from harm arising from the

application of a law which is subsequently found to be unconstitutional, without more. The plaintiffs pleaded that the respondents' conduct was "clearly wrong, in bad faith or an abuse of power" -- one of the elements typically required in order to found a damages claim under section 24(1) of the Charter -- but failed to supply material facts on the question of how the *Regulations* and their enforcement constitute serious error, bad faith or abuse so as to trigger an entitlement to Charter damages. They also fail to give any particulars of any conduct that would support a damages claim.

H. *Declaratory relief*

30 As noted, the judge did not explicitly strike the paragraphs of the claim which sought declarations as to the constitutionality of the scheme, either under the *Constitution Act, 1867* or the Charter. Nor did he explicitly strike the declaratory relief in respect of administrative law challenges to the scope of the definition of "drug" in section 2 of the *FDA* and the *Regulations*.

31 The appellants allege that their action can nonetheless proceed to trial on the basis of the surviving paragraphs. It is not problematic, in their view, that there are no material facts in the statement of claim, including none that link the impugned scheme to an effect on themselves as plaintiffs. They base this argument on the proposition that freestanding declarations on the constitutionality of laws and legal authority are always available.

32 On this latter point, there is no doubt. Free-standing declarations of constitutionality can be granted: *Canadian Transit Company v. Windsor (Corporation of the City)*, 2015 FCA 88. But the right to the remedy does not translate into licence to circumvent the rules of pleading. Even pure declarations of constitutional validity require sufficient material facts to be pleaded in support of the claim. Charter questions cannot be decided in a factual vacuum: *Mackay v. Manitoba*, above, nor can questions as to legislative competence under the *Constitution Act, 1867* be decided without an adequate factual grounding, which must be set out in the statement of claim. This is particularly so when the effects of the impugned legislation are the subject of the attack: *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1099.

33 The Supreme Court of Canada in *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, para. 46 articulated the pre-conditions to the grant of a declaratory remedy: jurisdiction over the claim and a real as opposed to a theoretical question in respect of which the person raising it has an interest.

34 Following *Khadr*, this Court in *Canada (Indian Affairs) v. Daniels*, 2014 FCA 101 (leave to appeal granted) at paras. 77-79 highlighted the danger posed by a generic, fact-free challenge to legislation -- in other words, a failure to meet the second *Khadr* requirement. Dawson JA noted that legislation may be valid in some instances, and unconstitutional when applied to other situations. A court must have a sense of a law's reach in order to assess whether and by how much that reach exceeds the legislature's *vires*. It cannot evaluate whether Parliament has exceeded the ambit of its legislative competence and had more than an incidental effect on matters reserved to the provinces without examining what its legislation actually does. Facts are necessary to define the contours of legislative and constitutional competence. In the present case, this danger is particularly acute; as the judge noted, the legislation at issue pertains to literally thousands of natural health supplements.

35 This is not new law. While the plaintiffs point to *Solosky v. The Queen*, [1980] 1 S.C.R. 821 for the proposition that there is a broad right to seek declaratory relief, *Solosky* also notes that there must be "a 'real issue' concerning the relative interests of each [party]." The Court cannot be satisfied that this requirement is met absent facts being pleaded which indicate what that real issue is and its nexus to the plaintiffs and their claim for relief.

36 To conclude, while the Federal Court correctly found that there was nothing inherently faulty with claims in respect of declaratory relief (subparagraphs 1(a)(ix) through 1(b)(v)), the action could not move forward on the constitutional issues on the basis of the claims for relief alone. The paragraphs said to underlie the claims of constitutional breaches were struck, and with them disappeared the basis on which these claims could be adjudicated.

I. *The section 8 violations*

37 A final issue concerns the claim that searches conducted by officers of the defendant against some of the appellants violated section 8 the Charter. The judge struck these allegations on the basis that they had previously been raised and disposed of in the criminal and regulatory prosecutions: *R v. Dahl*, 120998, March 26th 2004 (BC Prov Ct); *R v. Eldon Garth Dahl, Agnesa Dahl and EDG Modern Design Ltd*, 100237221Q3 (AltaB)) [2013] A.J. No. 89. Given that, he found that the section 8 Charter claim constituted a collateral attack on the Provincial Court and Queen's Bench decisions and also an abuse of process.

38 The appellants raise three arguments. Their first and second arguments are that these doctrines do not apply because the judicial forum and the relief sought are different. They also contend that the judge erred in striking the claim on the basis of abuse of process and collateral attack on preliminary motion. On this last point, they say that they will adduce evidence at trial which is different from or expands on the facts which underlie the decision of the BC and Alberta courts, and explain why this claim is not impermissible relitigation. As this requires the judge to weigh evidence, the issue of collateral attack and abuse of process cannot be determined on a motion to strike and must await trial.

39 Collateral attack and abuse of process are related, but distinct, doctrines: *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63. A collateral attack is an impermissible attempt to nullify the result of another proceeding outside of the proper channels for the review of that decision. The purpose of the doctrine is to prevent attempts to overturn decisions made in other courts. Its ambit is narrow.

40 Abuse of process, in contrast, is a residual and discretionary doctrine of broad application and scope, which bars the relitigation of issues. It is directed to preventing relitigation of the same issues and the attendant mischief of inconsistent decisions by different courts which, in turn, would undermine the doctrines of finality and respect for the administration of justice. It is thus a more flexible doctrine than collateral attack. It permits a judge to bar relitigation of a criminal conviction in a different forum, as was the case in *CUPE*.

41 The relief sought by the appellants is different in this action from that in the BC and Alberta proceedings. Here, damages are sought for an alleged unconstitutional search and for torts claimed to have been committed in the execution of the search. In the provincial courts, what was sought was the exclusion of the evidence obtained in the search at a criminal trial. These differences preclude the application of the doctrine of collateral attack. Abuse of process, however, remains available; indeed, contrary to the appellants' first and second arguments, abuse of process explicitly contemplates a different judicial forum and relief sought.

42 The remaining question is whether it is appropriate to strike a claim on the basis that it is an abuse of process on a motion to strike. It should be noted at the outset that the rules of practice of the Federal Courts expressly contemplate this (Rule 221(f)). Further, this Court has endorsed the propriety of striking a claim as being an abuse of process at the pleadings stage where the claimant sought to relitigate a criminal conviction from another jurisdiction in a civil action before the Federal Court: *Sauvé v. Canada* 2011 FCA 141 (commenting favourably on the lower court's striking of paragraphs not under appeal).

43 Whether a particular issue has previously been judicially determined is a fact of which a judge is entitled to take notice at the early stage of a motion to strike. The fact of the other decision can form the foundation for the exercise of the judge's discretion. Allowing the abuse of process doctrine to be raised at the pleadings stage is consistent with the objective of maintaining respect for the administration of justice and the court's desire for comity and mutual respect between jurisdictions. More practically, a defendant has the right to have an abusive claim struck before being subjected to an intrusive and costly discovery process. While plaintiffs are not required to build into their pleadings a response to every conceivable defence, it is not unduly burdensome to expect plaintiffs who know they are relitigating a previously-determined issue to include in their pleadings the material facts they will rely upon to explain why the discretion to find the claim abusive should not be exercised.

44 Here, there are no such facts that could be pleaded because granting the Charter or tort claims related to the impugned search would necessarily require the Federal Court to make different factual findings from those reached in the final decisions of the BC Provincial Court and Alberta Court of Queen's Bench in the criminal proceedings, which found the impugned search to be lawful.

45 Accordingly, while the judge erred in characterising the claim as a collateral attack, he correctly identified it as an abuse of process. The difference of forum and relief do not preclude the claim from being abusive; it was appropriate for the judge to decide this issue on a motion to strike, and there is no reviewable error in his application of the principle of abuse of process to the claim before him.

III. Conclusion

46 I would dismiss the appeal and the cross-appeal, with costs. I would grant the appellants sixty days from the date of this Court's judgment to serve and file their fresh as amended statement of claim.

RENNIE J.A.
STRATAS J.A.:— I agree.
GLEASON J.A.:— I agree.

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

Supreme Court of Canada Rulings on Applications for Leave to Appeal and Other Motions

Supreme Court of Canada

Record created: March 10, 2016.

Record updated: June 23, 2016.

File No.: 36889

[2016] S.C.C.A. No. 92 | [2016] C.S.C.R. no 92

Nick Mancuso, The Results Company Inc., David Rowland, Life Choice Ltd. (amalgamated from, rolled into, and continuing on business for, and from, E.D. Modern Design Ltd. and E.G.D. Modern Design Ltd.) and Dr. Eldon Dahl, and Agnesa Dahl v. Minister of National Health and Welfare, Attorney General of Canada, Minister of Public Safety and Emergency Preparedness, Royal Canadian Mounted Police, and Her Majesty the Queen in Right of Canada

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Case Summary

Status:

The motion for an extension of time to serve and file the application for leave to appeal is dismissed with costs June 23, 2016. In any event, had such motion been granted, the application for leave to appeal would have been dismissed with costs.

Catchwords:

Charter of Rights — Alleged violations of ss. 2(a), 2(b), 7, 9 and 15 of the Charter — Civil Procedure — Pleadings — Motion to strike — Constitutional law — Division of powers — Does a Judge, sitting on a motion to strike, have the jurisdiction to make findings of fact — Does a Judge sitting on a motion to strike have jurisdiction to "strike the entirety of the claim", with leave to amend, and not allow to proceed the factual assertions and legal remedy not struck — Can an action for Declaratory relief proceed without a "cause of action" for damages — Does a guilty plea in Provincial Court, under a statute where its constitutionality has not been determined, bar a subsequent Superior Court action attacking the constitutionality of the legislation, based on a "collateral attack/abuse of process" pursuant to Toronto (City) v. C.U.P.E., Local 79, [2003] 3 S.C.R. 77, 2003 SCC 63.

Case Summary:

The applicants are individual and corporate consumers, distributors and producers of certain health products (the "Products") in Canada. The Products are regulated as "drugs" as defined by s. 2 under the Food and Drugs Act, R.S.C., 1985, c. F-27 (the "Act") and the Natural Health Products Regulations, SOR 2003-196 (the "Regulations"). The applicants brought an action challenging Parliament's constitutional authority to regulate the production and sale of natural health products, including vitamins and dietary and nutritional food supplements. Alternatively, they challenged the statutory authority for the Regulations, pleading Charter breaches and tortious conduct by government officials in administering and enforcing the regulatory scheme. Their statement of claim sought, inter alia, damages, declarations of invalidity and a stay of enforcement of provisions of the Act and Regulations.

The respondents brought a motion to strike the statement of claim in its entirety or paragraphs amounting to the bulk of the claim, and brought a motion to remove all defendants but Her Majesty the Queen in Right of Canada.

The Federal Court struck the Claim "in accordance with these reasons", granted leave to amend the Claim within 30 days, and struck the other defendants. The applicants appealed the decision, arguing that the Judge had erred in striking parts of the Claim and that those parts which had not been struck should be allowed to proceed. The respondents cross-appealed on the issue of whether the whole Claim had been struck. The Federal Court of Appeal interpreted the lower court decision as striking the entire statement of claim and dismissed the appeal.

Counsel

Rocco Galati (Rocco Galati Law Firm Professional Corporation), for the motion.

Sean Gaudet (A.G. of Canada), contra.

Chronology:

1. Application for leave to appeal:
FILED: March 10, 2016.

SUBMITTED TO THE COURT: May 30, 2016.

DISMISSED WITH COSTS: June 23, 2016 (without reasons).

Before: Cromwell, Wagner and Côté JJ.

The motion for an extension of time to serve and file the application for leave to appeal is dismissed with costs. In any event, had such motion been granted, the application for leave to appeal would have been dismissed with costs.

Procedural History:

Judgment at first instance: Applicants' Claim struck in

accordance with reasons with leave to amend; All

defendants struck except Her Majesty the Queen in Right

of Canada; Motion for stay dismissed.

Federal Court, Russell J., July 16, 2014.

2014 FC 708.

Judgment on appeal: Appeal and cross-appeal dismissed. Federal Court of Appeal, Stratas, Rennie and Gleason JJ.A, October 27, 2015.

A-365-14; 2015 FCA 227; [2015] F.C.J. No. 1245.

Sivak v. Canada, [2012] F.C.J. No. 291

Federal Court Judgments

Federal Court

Toronto, Ontario

Russell J.

Heard: January 16, 2012.

Judgment: February 28, 2012.

Docket T-1700-11

[2012] F.C.J. No. 291 | 2012 FC 272 | 406 F.T.R. 115 | 7 Imm. L.R. (4th) 247 | 2012 CarswellNat 658 | 213 A.C.W.S. (3d) 30

Between David Sivak, Luci Bajzova, Monika Sivak, Lucie Bajzova, Miroslav Sarkozi, Andrej Balog, Zaneta Balogova, Galina Balogova, Viktor Sarkozi, Andrej Balog, Andrej Balog, Marie Balogova, Lukas Balog, Milan Lasab, Milada Lasaboya, and Elvis Kulasic, Plaintiffs, and Her Majesty the Queen and the Minister of Citizenship and Immigration, Defendants

(95 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 — Motion by Crown defendants to strike portions of statement of claim allowed — Plaintiffs accused Canadian government of conspiring to deprive them and other Czech Roma of rights under Canadian immigration system — Pleadings were bald accusations supported by rhetoric rather than facts — Portions of pleadings alleging Charter breaches, negligence, conspiracy, abuse of process and misfeasance of public officer were struck as pleadings failed to state or factually substantiate essential elements of claims — Minister of Foreign Affairs struck, as he was not a necessary party to action — Impugned portions struck without leave to amend.

Government law — Crown — Actions by and against Crown — Practice and procedure — Pleadings — Motion by Crown defendants to strike portions of statement of claim allowed — Plaintiffs accused Canadian government of conspiring to deprive them and other Czech Roma of rights under Canadian immigration system — Pleadings were bald accusations supported by rhetoric rather than facts — Portions of pleadings alleging Charter breaches, negligence, conspiracy, abuse of process and misfeasance of public officer were struck as pleadings failed to state or factually substantiate essential elements of claims — Minister of Foreign Affairs struck, as he was not a necessary party to action — Impugned portions struck without leave to amend.

Motion by the defendants, the Crown and the Minister of Citizenship and Immigration, to strike portions of the statement of claim of the plaintiffs, Sivak and 16 others. The motion arose in the context of a motion by the plaintiffs seeking certification of a class action. The plaintiffs accused the Canadian government of conspiring to deprive them and other Czech Roma of rights under the Canadian immigration system. The action arose in the context of a 2009 Fact-Finding Mission Report on State Protection in the Czech Republic and the extent to which it related to the decision-making process of the Refugee Protection Division. The matter was converted to an action, as it raised important issues of institutional bias that could not be assessed on judicial review. The defendants brought a motion to strike portions of the pleadings. The defendants submitted that the Minister of Foreign Affairs was not a proper or

necessary party and that the claim did not support a cause of action against him. The defendants also sought to strike the claims alleging negligence, conspiracy, misfeasance in public office, and breaches of ss. 7 and 15 of the Charter. The plaintiffs submitted that the motion to strike was premature and heavy-handed.
HELD: Motion allowed.

The impugned portions of the pleadings were little more than bald accusations bolstered with rhetoric and irrelevant asides that did not provide a basis of fact. The allegations against the Minister of Foreign Affairs were nothing more than speculative and were conclusions unsupported by material facts. The claim did not disclose any wrongdoing by the Minister, any basis for vicarious liability, or any cause of action against him. The plaintiffs did not plead or factually substantiate the essential elements of the tort of negligence, as no details were provided to support the duties allegedly breached. Similarly, the essential elements of the torts of conspiracy, abuse of process, and misfeasance in public office and supporting material facts were not sufficiently pled. The Charter claims failed to indicate how the plaintiffs' protected interests were infringed. They also failed to identify the circumstances or context in which the breaches allegedly occurred. Further portions were struck as immaterial or redundant. The impugned portions were struck without leave to amend.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 7, s. 15

Federal Courts Act, R.S.C. 1985, c. F-7, s. 18.4(2)

Federal Courts Rules, Rule 104(1)(a), Rule 174, Rule 181, Rule 221, Rule 221(1), Rule 222(1)

Counsel

Rocco Galati, for the Plaintiffs.

Marie-Louise Wcislo, Prathima Prasad and Susan Gans, for the Defendants.

REASONS FOR ORDER AND ORDER

RUSSELL J.

THE MOTION

1 I have before me a motion by the Defendants to strike portions of the Plaintiffs' Amended Statement of Claim. I heard this motion in conjunction with a motion by the Plaintiffs seeking certification as a class action and, to some extent, both motions need to be considered together.

2 By way of judgment, dated March 31, 2011, I converted the Plaintiffs' previous judicial review application into an action pursuant to subsection 18.4(2) of the *Federal Courts Act*, directing that henceforth the judicial review would be treated and proceeded with as an action.

3 Since actions are commenced by way of Statement of Claim, the Plaintiffs filed their most recent Amended Statement of Claim (Claim) on October 19, 2011, and it is this document against which the Defendants' strike motion is directed.

4 The Defendants do not seek to strike the Claim in its entirety. They acknowledge the importance of resolving as quickly as possible the dispute between the parties concerning procedural fairness, natural justice, and the validity of the Fact-Finding Mission Report on State Protection Czech Republic, dated June 2009 (2009 Report) in so far as the 2009 Report relates to the Refugee Protection Division's (RPD) decision-making process. What the Defendants

object to are those portions of the Claim that deal with tort allegations, as well as a few more peripheral matters which they say do not comply with the rules and jurisprudence that govern pleadings in this Court.

OVERVIEW

5 After reviewing the Claim, my general conclusion is that the impugned portions are, as the Defendants allege, often little more than bald accusations which the Plaintiffs have attempted to bolster with colourful rhetoric and irrelevant asides instead of providing a real basis of fact. For example, a passage such as

> there is no doubt, in the minds of anyone involved with refugees, particularly the members of the immigration bar, as well as notable NGOs, that this "June, 2009 Report" was manufactured by the IRB, as a means of appeasing the Minister, in order to base negative findings and refugee determinations, which would reduce the acceptance rates of Czech Roma

is a statement of what the Plaintiffs hope to prove, but it also reveals that the Plaintiffs are short of facts to support their case, and so have to fall back upon the alleged omniscience of the "immigration bar" and "anyone involved with refugees." I do not see anywhere in the rules that govern pleadings that facts can be dispensed with provided plaintiff or defendant invokes the oracular powers of their own counsel and his or her cohorts at the bar.

6 This matter was converted to an action because it raised important matters of possible institutional bias that I felt could not be assessed on judicial review given the limited record available to the Court. Since conversion, the Plaintiffs have broadened the scope of their objectives and now wish to accuse the Canadian government of conspiring to deprive them, and other Czech Roma, of their rights under our immigration system. If the Plaintiffs wish to launch such an attack they must proceed efficiently and effectively.

7 To proceed efficiently and effectively both sides must abide by and follow the *Federal Courts Rules* (Rules) which were promulgated precisely for this purpose. At this stage in the proceedings the Plaintiffs must comply with the rules that govern the form and content of pleadings. In my view, the Plaintiffs have not done this with their Claim, and the result is that this action has already taken much longer than it should have taken to reach this stage. The issues raised by the Plaintiffs have a significance for many other extant and future refugee claims, and the system could easily become trammelled as other claims are held in abeyance to await the outcome of this action. This situation gives rise to an even greater need for efficiency and effectiveness than might otherwise be the case. Hence, from this point on, the Court will look to counsel on both sides to do everything in their power to ensure the just, most expeditious and least expensive determination of this dispute on its merits.

8 Deficient pleadings do not promote the just, most expeditious and least expensive determination on the merits. In fact, they promote the opposite, which is why it is important that the objections to the Claim be dealt with quickly and that timelines be set to achieve the remaining steps needed to carry this dispute to a resolution.

THE MOTION TO STRIKE

9 Rather than request particulars, the Defendants have brought a motion to strike some portions of the Claim. After hearing the differences between counsel on these matters, I do not think the Defendants are being premature or heavy-handed. The wide disparity of views between the parties over what is required of pleadings means that the Court's early involvement is to be preferred.

The Applicable Rules

10 I see no dispute between the parties concerning the applicable rules and principles that govern pleadings. The Plaintiffs simply allege that they have complied with the law and that their Claim as presently drafted is sufficient.

11 The two principal functions of pleadings are to clearly define the issues between litigants and to give fair notice of the case which has to be met by the other side. See *Cerqueira v Ontario*, 2010 ONSC 3954.

12 Rule 174 requires that every pleading shall contain a concise statement of the material facts on which the party relies, but shall not include evidence by which those facts are to be proven.

13 Rule 181 requires that a pleading "shall contain particulars of every allegation contained therein."

14 Pursuant to subsection 221(1) of the Rules, a defendant may bring a motion to strike out all or some of a statement of claim on the following grounds:

a. It discloses no reasonable cause of action;

b. It is immaterial, or redundant; or

c. It is scandalous, frivolous or vexatious.

15 The test in Canada to strike out a pleading under Rule 221 of the Rules is whether it is plain and obvious on the facts pleaded that the action cannot succeed. In this regard, the Supreme Court of Canada has noted that the power to strike out a statement of claim is a "valuable housekeeping measure essential to effective and a fair litigation." See *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959 and *R v Imperial Tobacco Canada Ltd.* 2011 SCC 42, at paragraphs 17 and 19.

16 In determining whether a cause of action exists, the following principles are to be considered:

a. The material facts pled are to be taken as proven, unless the alleged facts are based on assumptive or speculative conclusions which are incapable of proof;

b. If the facts, taken as proven, disclose a reasonable cause of action, that is, one with some chance of success, then the action may proceed; and

c. The statement of claim must be read as generously as possible, with a view to accommodating any inadequacies in the form of the allegations due to drafting deficiencies.

See *Operation Dismantle Inc. v Canada*, [1985] 1 SCR 441.

17 These basic principles have acquired a fairly heavy gloss of case law over the years as the Court has applied them to particular sets of pleadings. I think it might be helpful at this stage to set out some of the more basic guidelines that have emerged from the cases that I believe have relevance for this motion.

Rule 174

18 In *Baird v Canada* 2006 FC 205; affirmed 2007 FCA 48, a statement of claim was held to be fatally flawed where it did not specify a time when the offending activities giving rise to the causes of action took place. Nor did it specify which Crown servant did something wrong. The pleadings were allegations and conclusions, and did not provide the essential facts grounding the cause of action.

19 In *Sunsolar Energy Technologies (S.E.T.) Inc. v Flexible Solutions International Inc.* 2004 FC 1205, this Court concluded that in order to implead corporate officers and directors, actual actions of personal conduct must be pleaded. A bare assertion of conclusion is not an allegation of material fact, nor can it support a cause of action against an individual defendant. Nor can it be pled that it is a "reasonable conclusion" that an individual was implicated to a sufficient extent to support a finding of deliberate acts. To hold otherwise is to turn an action into a fishing expedition.

20 *Conohan v The Cooperators*, [2002] 3 FC 421, 2002 FCA 60 makes the often repeated point that it is sufficient for a party to plead the material facts. Counsel is then at liberty to present in argument any legal consequences which the facts support.

21 The importance of pleading facts is asserted again in *Johnson v Canada (Royal Canadian Mounted Police)*

2002 FCT 917, where the Court reiterated that it is not sufficient for a claim to contain assertions without facts upon which to base those assertions. In *Johnson*, this meant that a plea of breach of agreement must allege the relevant terms that have been breached, and a plea of breach of fiduciary duty must identify the material facts alleged to give rise to the existence of the duty and the breach.

22 *Kastner v Painblanc* (1994), 58 CPR (3d) 502, 176 NR 68 (Fed. CA) emphasizes the important general point that an action is not a fishing expedition and that a plaintiff who starts proceedings in the hope that something will turn up abuses the Court's process.

Rule 181

23 *Chen v Canada (Minister of Citizenship and Immigration)* 2006 FC 389, makes it clear that the purpose of pleadings is to define the matters at issue between the parties, but the purpose of particulars is different. Particulars are meant to provide the opposing party with sufficient information of the allegations being advanced so that it might know the case to be met at trial and to prepare a full and meaningful response. If a pleading is not good as a matter of law, particulars cannot save it. If it is not good as a matter of pleading, particulars will not improve it. These distinctions are of significance in the present case because Plaintiffs' counsel often took the position before me that this motion to strike is not appropriate because the Defendants have not asked for particulars and, if the Claim as pled is in any way defective, such defects can be remedied by the Court simply ordering particulars.

24 *Paul v Kingsclear Indian Band* (1997), 137 FTR 275 (TD), however, establishes clearly that there is no obligation on a defendant to demand particulars and a plaintiff cannot cure an otherwise deficient statement of claim by arguing that defendant has not sought particulars.

Rule 221

25 *Edell v Canada (Revenue Agency)*, [2010] GSTC 9, 2010 FCA 26, reaffirms the fundamental rule that in a motion to strike the Court is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial. All allegations of fact, unless patently ridiculous or incapable of proof, must be accepted as proved. The defendant who seeks summary dismissal bears the evidentiary burden of showing the lack of a genuine issue.

26 The fundamental rule, however, must take into account that no cause of action can exist where no material facts are alleged against the defendant. See *Chavali v Canada* 2002 FCA 209.

27 *Apotex Inc. v Glaxo Group Ltd*, 2001 FCT 1351 teaches that the Court should generally refuse to strike out "surplus statements" that are not prejudicial. Doubt is to be resolved in favour of permitting the pleading so that relevant evidence in support of the pleading may be brought before the trial judge.

28 Also, while the Court is not required to re-draft pleadings, it must examine defective pleadings to determine if they could be saved through proper amendments. See *Sweet v Canada* (1999), 249 NR 17 (Fed. CA).

29 Even though, if there is any doubt, paragraphs in the pleadings should be left in so that evidence may be brought before the trial judge, this does not mean that redundant or immaterial paragraphs outlining the evidence should remain in the pleadings. See *Mathias v The Queen*, [1980] 2 FC 813 (TD).

30 *Kisikawpimootewin v Canada*, 2004 FC 1426 reiterates the well-recognized premise that a scandalous, vexatious or frivolous action includes an action where the pleadings are so deficient in factual material that the defendant cannot know how to answer. This is echoed again in *Murray v Canada* (1978), 21 NR 230 (Fed. CA). A claim that does not sufficiently reveal the facts upon which a cause of action is based, such that it is not possible for the defendant to answer or the Court to regulate the action, is a vexatious action.

31 There are many cases that hold that an action cannot be brought on speculation in the hope that sufficient facts may be gleaned on discovery to support the allegations made in the pleadings. See, for example, *AstraZeneca Canada Inc. v Novopharm Ltd.* 2009 FC 1209; appeal dismissed 2010 FCA 112.

32 In fact, it is an abuse of process for a plaintiff to start proceedings in the hope that something will turn up. A plaintiff should not be permitted to discover the defendant to pursue such an action. See *Kastner*, above.

33 I think it is also well-established that the rule that material facts in a statement of claim must be taken as true in determining whether a reasonable cause of action is disclosed does not require that allegations based upon assumptions and speculation be taken as true. See *Operation Dismantle*, above.

GROUNDS

The Minister of Foreign Affairs

34 The Defendants say that the Minister of Foreign Affairs should be struck from the Claim as he is not a proper or necessary party; nor is he vicariously liable for acts or omissions of employees at visa posts abroad.

35 Paragraph 104(1)(*a*) of the Rules authorizes the Court to order that a person who is not a proper or necessary party shall cease to be a party to an action. A person is only considered a necessary party where he or she would be bound by the results of the action, and where there is a question in the action "which cannot be effectually and completely settled unless he is a party." The Defendants say that the Minister of Foreign Affairs does not fall into either category. Furthermore, where the Plaintiffs' Claim does not seek relief against a defendant, and makes no allegations against him, that defendant is not a necessary party.

36 The Defendants say that, in the present case, the Claim does not disclose any material facts that establish wrongdoing on the part of the Minister of Foreign Affairs or that support a cause of action against him. The Claim contains only bald allegations respecting this defendant which are asserted in the form of conclusions. In fact, the Minister of Foreign Affairs is referred to only twice in the Claim: once in paragraph 7(b)(ii), which describes the Minister as a party while making allegations against his staff, and again in paragraph 23 in which the Plaintiffs conclude, without any supporting facts, that the Minister of Foreign Affairs "conspired with and facilitated in the manufacturing of the June 2009 Report." It is possible that the Plaintiffs are also referring to the Minister of Foreign Affairs in paragraphs 26 and 27 of the Claim, which allege a "Ministerial and IRB effort to attempt to be rid of the Roma problem" and a "Ministerial and RPD conspiracy." However, the term "Ministerial" is not defined in the Claim and no facts are pled to support the conclusions in those paragraphs. Therefore, it is entirely unclear how the Minister of Foreign Affairs is implicated in any alleged wrongdoing.

37 Furthermore, the Defendants say that the Minister of Foreign Affairs is not vicariously liable for the acts or omissions of the staff members at the embassies and visa posts abroad. While unclear from the vague language in the Claim, the Plaintiffs appear to make this allegation at paragraph 7(b)(ii). The Minister of Foreign Affairs, however, is himself a Crown servant when acting in his official capacity. An individual Crown servant is not vicariously liable for the torts of subordinate Crown servants. This also applies to the statement at paragraph 7(b)(iii) in which the Plaintiffs claim that the Minister of Citizenship and Immigration is liable for the actions of his employees and staff.

38 Based on the foregoing, the Defendants say that the Claim does not comply with Rules 174 and 181 respecting the allegations against the Minister of Foreign Affairs. He should be removed as a party to the within action and the Claim should be amended accordingly. In addition, the portions of paragraph 7(b) alleging vicarious liability on the part of the Minister of Foreign Affairs and the Minister of Citizenship and Immigration should be struck.

39 In response, the Plaintiffs argue that, with respect to paragraphs 9 to 23 of the Defendants' submissions:

a. The Minister of Foreign Affairs in statutorily charged with overseeing, *inter alia*, the operations of Canada's embassies and the foreign missions, including the issuance of visas when visa requirements are imposed;

b. Questions with respect to the contact of the two researchers who drafted the "June, 2009 Issue Paper", and the Canadian Embassy were refused answered;

c. The Plaintiffs plead, as a fact, that both the Minister of Citizenship and Foreign Affairs, conspired to:

(i) Engage in an agreement for the use of lawful and unlawful means, and conduct, the predominant purpose of which is to cause injury to the Plaintiffs, and all other Canadians (*sic*); and/or

(ii) To engage in an agreement, to use unlawful means and conduct, whose predominant purpose and conduct directed at the Plaintiffs, and all other Czech Roma, is to cause injury to the Plaintiffs and all other Czech Roma, or the Defendants' officials should know, in the circumstances, that injury to the Plaintiffs, and all other Czech Roma, is likely to, and does result;

d. The Plaintiffs have pleaded that the actions of the Minister, and his officials, breached their Charter and constitutional rights;

e. While Ministers are generally not named as Defendants, there are exceptions to this, particularly with respect to constitutional and Charter issues and the Plaintiffs state that this is such an exception and that, at this juncture, it is premature to strike any parties from the pleadings. See *Liebmann v Canada (Minister of National Defence)*, [1994] 2 FC 3 and *Cairns v Farm Credit Corp.*, [1992] 2 FC 115.

40 I do not think that the Plaintiffs adequately answer the complaints raised by the Defendants. My reading of the Claim leads me to the conclusion that the Plaintiffs' accusations against the Minister of Foreign Affairs are, as pled, nothing more than speculative allegations and conclusions unsupported by material facts.

41 I agree with the Defendants that, as presently drafted, the Claim does not disclose sufficient material facts to establish and support:

a. Any wrongdoing on the part of the Minister of Foreign Affairs;

b. Any cause of action against him;

c. How the Minister of Foreign Affairs could be vicariously or otherwise liable for the acts and omissions of other people such as staff members at the embassies and visa posts abroad and/or the imposition of visa requirements.

42 As it stands, the allegations against the Minister of Foreign Affairs are bald accusations. If the Plaintiffs wish to establish that the Minister of Foreign Affairs has conspired to cause them injury, then they must set out the facts upon which they rely. As presently drafted, the Claim merely states what the Plaintiffs hope to prove at trial. At this stage, this amounts to a fishing expedition. As the Federal Court of Appeal made clear in *Simon v Canada*, 2011 DTC 5016; 2011 FCA 6, the requirement that a pleading contain a concise statement of the material facts relied upon is a technical requirement with a precise meaning in law. Each constituent element of a cause of action must be pleaded with sufficient particularity. Making allegations without a factual foundation is an abuse of process. In my view, there is nothing clear and/or inferable in the way the Minister of Foreign Affairs is simply accused of wrongdoing on the basis that he has some vague responsibility for overseeing embassies and foreign missions, or that embassy officials are somehow conducting a broad "Ministerial" conspiracy.

43 The Federal Court of Appeal in *Baird v Canada* 2007 FCA 48 affirmed that a statement of claim was fatally flawed where it did not specify a time when the offending activities giving rise to the causes of action took place, and did not specify which Crown servant did something wrong. It is not enough to plead allegations and conclusions. The essential facts grounding a cause of action must be pled.

44 The applicable rules and jurisprudence interpreting those rules, are readily available to the Plaintiffs and their counsel. The failure to plead sufficient material facts to support a claim against the Minister of Foreign Affairs, or particular Crown servants, leads me to conclude that the Plaintiffs have no such facts and are seeking to use these proceedings as a fishing expedition.

Negligence

45 I also agree with the Defendants that the Plaintiffs have not pled, or factually substantiated, the essential elements of the tort of negligence.

46 As the Defendants point out, to support a cause of action in negligence, a statement of claim must include sufficient facts to support the essential elements of the tort. These include establishing a duty of care, providing details of the breach of that duty, explaining the causal connection between the breach of duty and the injury, and setting out the actual loss. Such a claim requires a factual basis that identifies each wrongful act as well as negligence, such as the "when, what, by whom and to whom of the relevant circumstances." See *Benaissa v Canada (Attorney General)* 2005 FC 1220, at paragraph 24.

47 The Plaintiffs make a bald allegation at paragraph 28(b) of the Claim that the "Defendants' officials have been negligent in the exercise of their common-law, statutory, and constitutional duties owed to the Plaintiffs" and that these duties arose in the context of the processing of their refugee claims pursuant to the *Immigration and Refugee Protection Act*. This is followed by unsubstantiated statements that the "Defendants' officials breached this duty of care" and that this caused the Plaintiffs' losses.

48 I agree with the Defendants that such allegations are nothing more than conclusions and are not sufficient to support a cause of action in negligence. No details have been provided to identify the "Defendants' officials," to explain their roles and responsibilities in relation to the Plaintiffs, or to establish their connection to any of the parties. Similarly, the Claim is silent as to the "Defendants' officials" particular acts or omissions that the Plaintiffs' claim were negligent and no facts are included to support the specific "common-law, statutory and constitutional duties" that were allegedly breached. It seems to me that the general requirements for establishing liability in tort have not been met and it would be impossible to conduct the necessary analysis to determine whether liability could be established. As the Defendants point out, this is particularly difficult where the defendant is a government actor. Issues arise as to whether public law discretionary powers establish private law duties owed to particular individuals or whether the decisions in question were policy decisions or operational decisions. These questions are very complex and detailed factual pleadings are required in order to properly determine whether a cause of action exists.

49 As I read the Claim as presently drafted, the majority of the limited factual allegations upon which the claim in negligence is based relate mainly to members of the Board and/or of the Board's Research Directorate. The Defendants are correct to point out that these individuals are not linked to the named Defendants in the Statement of Claim and factual allegations respecting their conduct are insufficient and fail to ground liability in negligence by the named Defendants.

50 All that the Plaintiffs say in general reply is that "the proper and complete context and reading [of all their tort claims] illustrate that the various causes of action are properly pleaded."

51 Once again, if the Claim is read in the light of the relevant rules and governing jurisprudence, I think the Plaintiffs fall a long way short of providing what is required.

Conspiracy

52 The Defendants point out that the Plaintiffs have not pled the essential elements of the tort of conspiracy and that paragraphs 23, 27 and 28(a)(iv) should therefore be struck from the Claim.

53 The Defendants direct the Court to the Supreme Court of Canada decision in *Canada Cement LaFarge Ltd. v British Columbia Lightweight Aggregate Ltd.*, [1983] 1 SCR 452 (SCC) at paragraph 33 for the constituents of the tort of conspiracy:

> ... whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them 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... and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.

54 In *Normart Management Ltd. v West Hill Redevelopment Co.*, (1998), 37 OR (3d) 97 (OCA) the Ontario Court of Appeal provided guidance with respect to pleading the tort of conspiracy at paragraphs 21 and 22. Applied to the present context, I think this means that, as the Defendants point out,

a. All the parties to the conspiracy must be identified and their relationship to each other must be described;
b. Agreements between the various defendants must be pled with all facts material to such agreements including the parties to each agreement, the date of the agreement, and the object and purpose of each agreement;
c. Overt acts of each of the alleged conspirators in pursuance or furtherance of the conspiracy must be pled with clarity and precision, including the times and dates of such overt acts; and
d. The pleadings must allege the injury and the damage occasioned to the plaintiffs and special damages in the sense of the monetary loss the plaintiffs have sustained must be pled and particularized.

55 Once again, I have to agree with the Defendants that the Claim is entirely deficient with respect to pleading the elements of the tort of conspiracy. Bald allegations of a conspiracy involving undefined Ministers, the Board, and unidentified "Defendants' officials" are made at paragraphs 23, 27 and 28(a)(iv) without any reference to the above requirements. The Plaintiffs also accuse the "Defendants' officials" of engaging in unlawful conduct at paragraph 28(b)(iii)(A), but provide no details to describe this conduct or establish its unlawfulness. This is scandalous and vexatious.

56 Once again, the Plaintiffs provide no detailed response and say little more than that, in their opinion, they have complied with the rules and the governing jurisprudence.

57 I have to conclude that, once again, when the Claim is read against the rules and governing jurisprudence, the paragraphs alleging conspiracy should be struck.

Misfeasance in Public Office/Abuse of Authority

58 The Defendants make similar complaints in relation to this aspect of the Claim. They say that the Plaintiffs have not pled the essential elements of the tort of misfeasance in public office/abuse of authority, so that, paragraphs 24 and 28(a)(i) and (iii) of the Claim should be struck.

59 In *Freeman-Maloy v Marsden*, (2006) 79 OR (3d) 401, the Ontario Court of Appeal provided the following guidance regarding the constituents of the tort of misfeasance in a public office:

> [10] The tort of misfeasance in a public office is founded on the fundamental rule of law principle that those who hold public office and exercise public functions are subject to the law and must not abuse their powers to the detriment of the ordinary citizen. As Lord Steyn put it in *Three Rivers District Council v. Bank of England* (No. 3), [2000] 2 W.L.R. 1220, at p. 1230 W.L.R.: "The rationale of the tort is that in a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes." The "underlying purpose" of the tort of misfeasance in a public office "is to protect each citizen's reasonable expectation that a public officer will not intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions": *Odhavji*, *supra*, at para. 30.
>
> [11] In *Three Rivers*, *supra*, the House Lords identified the ingredients of the tort as being: (1) the defendant must be a public officer; (2) the claim must arise from the exercise of power as a public officer; and (3) the

mental element, namely, the defendant must have acted with malice or bad faith. In *Odhavji*, at para. 23, [page407] Iacobucci J. described the elements of the tort in similar terms: "First, the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff."

60 The Supreme Court of Canada has also provided extensive guidance with regard to this tort. In *Odhavji Estate v Woodhouse* 2003 SCC 69 (SCC), the Supreme Court of Canada emphasized the following:

> 22 What then are the essential ingredients of the tort, at least insofar as it is necessary to determine the issues that arise on the pleadings in this case? In *Three Rivers*, the House of Lords held that the tort of misfeasance in a public office can arise in one of two ways, what I shall call Category A and Category B. Category A involves conduct that is specifically intended to injure a person or class of persons. Category B involves a public officer who acts with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the plaintiff. This understanding of the tort has been endorsed by a number of Canadian courts: see for example *Powder Mountain Resorts, supra*, [2001] B.C.J. No. 2172; *Alberta (Minister of Public Works, Supply and Services)* (C.A.), *supra*, [2002] A.J. No. 1474; and *Granite Power Corp. v. Ontario*, [2002] O.J. No. 2188 (QL) (S.C.J.). It is important, however, to recall that the two categories merely represent two different ways in which a public officer can commit the tort; in each instance, the plaintiff must prove each of the tort's constituent elements. It is thus necessary to consider the elements that are common to each form of the tort.
>
> 23 In my view, there are two such elements. First, the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff. What distinguishes one form of misfeasance in a public office from the other is the manner in which the plaintiff proves each ingredient of the tort. In Category B, the plaintiff must prove the two ingredients of the tort independently of one another. In Category A, the fact that the public officer has acted for the express purpose of harming the plaintiff is sufficient to satisfy each ingredient of the tort, owing to the fact that a public officer does not have the authority to exercise his or her powers for an improper purpose, such [page282] as deliberately harming a member of the public. In each instance, the tort involves deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injure the plaintiff.
>
> 24 Insofar as the nature of the misconduct is concerned, the essential question to be determined is not whether the officer has unlawfully exercised a power actually possessed, but whether the alleged misconduct is deliberate and unlawful. As Lord Hobhouse wrote in *Three Rivers, supra*, at p. 1269:
>
> > The relevant act (or omission, in the sense described) must be unlawful. This may arise from a straightforward breach of the relevant statutory provisions or from acting in excess of the powers granted or for an improper purpose.
>
> Lord Millett reached a similar conclusion, namely, that a failure to act can amount to misfeasance in a public office, but only in those circumstances in which the public officer is under a legal obligation to act. Lord Hobhouse stated the principle in the following terms, at p. 1269: "If there is a legal duty to act and the decision not to act amounts to an unlawful breach of that legal duty, the omission can amount to misfeasance [in a public office]." See also *R. v. Dytham*, [1979] Q.B. 722 (C.A.). So, in the United Kingdom, a failure to act can constitute misfeasance in a public office, but only if the failure to act constitutes a deliberate breach of official duty.
>
> 25 Canadian courts also have made a deliberate unlawful act a focal point of the inquiry. In *Alberta (Minister of Public Works, Supply and Services) v. Nilsson* (1999). 70 Alta. L.R. (3d) 267, 1999 ABQB 440, at para. 108, the Court of Queen's Bench stated that the essential question to be determined is whether there has been deliberate misconduct on the part of a public official. Deliberate misconduct, on this view, consists of: (i) an intentional illegal act; and (ii) an intent to harm an individual or class [page283] of individuals. See also *Uni-Jet Industrial Pipe Ltd. v. Canada (Attorney General)* (2001), 156 Man. R. (2d) 14, 2001 MBCA 40, in which Kroft J.A. adopted the same test. In *Powder Mountain Resorts, supra*, Newbury J.A. described the tort in similar terms, at para. 7:

> ... it may, I think, now be accepted that the tort of abuse of public office will be made out in Canada where a public official is shown either to have exercised power for the specific purpose of injuring the plaintiff (i.e., to have acted in "bad faith in the sense of the exercise of public power for an improper or ulterior motive") or to have acted "unlawfully with a mind of reckless indifference to the illegality of his act" and to the probability of injury to the plaintiff. (See Lord Steyn in *Three Rivers*, at [1231].) Thus there remains what in theory at least is a clear line between this tort on the one hand, and what on the other hand may be called negligent excess of power -- i.e., an act committed without knowledge of (or subjective recklessness as to) its unlawfulness and the probable consequences for the plaintiff. [Emphasis in original.]
>
> Under this view, the ambit of the tort is limited not by the requirement that the defendant must have been engaged in a particular type of unlawful conduct, but by the requirement that the unlawful conduct must have been deliberate and the defendant must have been aware that the unlawful conduct was likely to harm the plaintiff.

61 It seems to me, then, that in order to establish a cause of action based on the tort of public misfeasance/abuse of authority, the Claim must meet the following requirements:

a. It must be established that the Defendant(s) is a public officer;

b. The Claim must arise from the exercise of power as a public officer; and

c. The mental element, namely that the Defendant(s) must have acted in bad faith or with malice, must be present.

62 As the Defendants point out, while the Plaintiffs have listed the generic elements of the tort of misfeasance in public office/abuse of authority at paragraph 28(a)(iii) of their Claim, they have failed to provide material facts to substantiate the allegations. Again, the "Defendants' officials" are not identified, there are no particulars respecting the nature of the public offices that particular individuals are alleged to have held, the unidentified "Defendants' officials" are not connected to the named Defendants, and the bald allegation of "unlawful conduct" is not substantiated by material facts. Also, the majority of the factual allegations in the Claim refer to members of the Board and/or of the Board's Research Directorate and their relationship to the named Defendants, or to the "Defendants' officials" is not established in the Claim.

63 With respect to the allegations in this regard against the Minister of Citizenship and Immigration at paragraph 24 of the Claim I agree with the Defendants that insufficient material facts are pled and details of the public comments that were allegedly made are not provided. Paragraph 24 of the Claim is not sufficient to ground a cause of action against the Minister of Citizenship and Immigration based on public misfeasance/abuse of authority.

64 Once again, the Plaintiffs provide no substantial response to these deficiencies in their Claim. They simply say that they disagree and that their Claim complies with the relevant rules and jurisprudence. I cannot accept this position.

65 Based on the foregoing, paragraphs 24 and 28(a)(i) and (iii) of the Claim should be struck, as well as any other reference to the tort of public misfeasance/abuse of authority.

Abuse of Process

66 The Defendants have similar complaints with regard to the abuse of process claims. They say the Plaintiffs have not pled the essential elements of the tort of abuse process and it is not relevant to the within proceedings.

67 An allegation of "abuse of process" is made at paragraph 28(a)(ii) of the Claim. The Plaintiffs assert that unidentified Defendants' officials "engaged in an abuse of process at common law." This allegation is not factually substantiated.

68 The tort of abuse of process usually involves the misuse of the process of the Court to coerce someone in a

way that is outside the ambit of the legal claim upon which the Court is asked to adjudicate. The Federal Court of Appeal in *Levi Strauss & Co. v Roadrunner Apparel Inc.* (1997), 76 CPR (3d) 129 (FCA) held that:

> A review of the authorities shows that the essential element of the tort of abuse of process is that the abuser must have used the legal process for a purpose other than that which it was designed to serve, in other words for a collateral, extraneous, ulterior, improper or illicit purpose. The gist of the tort is the misuse of or perversion of the Court's process and there is no abuse when a litigant employs regular legal process to its proper conclusion, even with bad intentions.

69 The Defendants say that it is entirely unclear from the Claim how the tort of abuse of process could be applied to the actions of any of the named Defendants and that, in any case, the elements of the tort have not been pled. For these reasons they say that paragraph 28(a)(ii) should therefore be struck, as well as any other reference to the tort of abuse of process.

70 Once again, the Plaintiffs assert that they have pled this matter appropriately. However, they also say that abuse of process is not restricted to Court proceedings and that it can attach to Ministerial abuse. They say that the essential point is that the Ministers have interfered with the IRB which is supposed to be as independent as the judiciary. The Plaintiffs say that the Ministers and their staffs have interfered with the IRB both by their comments and their actions.

71 Quite apart from whether abuse of process can be applied in this context (basically a legal point that can be left for future determination) it is my view that the Plaintiffs still need to provide the factual underpinnings for the tort. Before the Defendants can properly respond, they still need to know the who, where, when, what and how of these allegations. Factual substantiation is missing from the Claim. For this reason, I think I have to strike paragraph 28(a)(ii) and other reference to the tort of abuse of process.

Conclusions on the Named Torts

72 Generally speaking, then, with regard to the named private law causes of action, I feel that the Defendants' objections to the pleadings are substantially justified, and that the Claim fails to comply with Rule 174 and the "plain and obvious" test posited in *Hunt*, above.

Sections 7 and 15 of the Charter

73 The Defendants allege that the Plaintiffs' allegations at paragraphs 24, 28(a)(v) and 28(b)(iii)(A), (B) and (D) of the Claim respecting alleged breaches of sections 7 and 15 of the Charter are speculative and hypothetical and are not supported by adequate facts. In both respects, the Plaintiffs assert that the actions of unidentified officials of the Defendants breached the Plaintiffs' sections 7 and 15 Charter rights, resulting in damages. They have failed to indicate how one or more of their protected interests have been infringed, and they have also failed to identify the circumstances or context in which the breaches allegedly occurred. I have to agree with the Defendants that the allegations in this regard are stated in the form of conclusions without any factual basis. This does not meet the requirements set out by the Supreme Court of Canada in *MacKay v Manitoba*, [1989] 2 SCR 357.

74 Charter allegations in the Claim that are made in a "factual vacuum" should be struck. In *MacKay*, above, the Supreme Court of Canada provided the following guidance:

> 9 *Charter decisions should not and must not be made in a factual vacuum.* To attempt to do so would trivialize the Charter and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of Charter issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. Charter [page362] decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel. [emphasis added]

75 Once again, the Plaintiffs say that their Claim sufficiently pleads the facts and grounds upon which the Defendants can respond to the allegations of Charter breaches, but they have also indicated that they are not adverse to providing particulars if the Defendants require them.

76 Once again, I have to agree that, with regard to sections 7 and 15 and the Charter, the Claim is deficient in the ways alleged by the Defendants.

Redundant and Immaterial Material

77 The Defendants say that, pursuant to subsection 222(1) of the Rules, the Court can strike out a pleading on the ground that it is "immaterial or redundant." Immaterial or redundant allegations in a claim result in useless expense and prejudice the trial by involving the parties in a dispute that is wholly apart from the issues. Similarly, portions of a pleading that are irrelevant or inserted for colour should also be struck as they are scandalous.

78 On this basis, the Defendants seek to strike the following paragraphs from the Claim for the following reasons:

a. Paragraphs 12(c) and 14 - in these paragraphs, the Plaintiffs purport to have knowledge of the opinions of "members of the refugee bar, and others" respecting the June 2009 Report and assert that this ill-defined group predicted that the situation was a repeat of the "Hungarian (Roma) Lead Case." Such opinions cannot be proven, the scope of the group is not clearly identifiable, the allegations are unsubstantiated and they are irrelevant and redundant to the Claim. Such allegations are inserted for colour only and should be struck as they are scandalous and violate the Rules;

b. Paragraph 12(f) and 17 - these paragraphs also refer to the "Hungarian Lead Case" and are argumentative, inserted for colour only, and are irrelevant and redundant to the within Claim;

c. Paragraph 20 - this paragraph refers to the cross-examination of Gordon Ritchie and the Defendants' alleged refusal to answer undertakings. These factual details are irrelevant to the Claim;

d. Paragraph 25 - this paragraph should be struck because it is repetitive of paragraph 28 which is in fact pled with more specificity (although factually insufficient in any event). Paragraph 25 does not refer to a specific cause of action upon which the Plaintiffs base their entitlement to the damages claimed and is redundant;

e. Paragraph 27 - this paragraph is immaterial to the Claim. It refers to the treatment of the Roma during the Holocaust and is inserted for colour only and is redundant.

79 In response, the Plaintiffs simply say that "these 'facts' with respect to the Hungarian Roma Lead Case, in *Geza v Canada (Minister of Citizenship and Immigration)*, [2006] FCJ No 477, (FCA) were not only pleaded, and advanced, but also further *accepted* by the Court of Appeal in that case."

80 It is difficult to know what the Plaintiffs mean by this allegation, and which "facts" they are referring. *Geza* was not an action and we are in the present case dealing with particular rules of pleadings. The Rules are clear that the pleadings are to contain facts, not evidence. I just do not see, for instance, what the unsubstantiated collective opinion of the immigration bar has to do with the factual underpinnings of this case. The same goes for most of the other points. In my view, the redundant material simply has no place in this Claim and impedes progress towards a clear statement of facts and issues to which the Defendants can respond, and the Court can adjudicate. The Plaintiffs may well feel a sense of historical grievance, and they may have good reason for it, but I think it better to wait until the facts are provided before the government of Canada and the RPD are connected with Hitler's Holocaust and a historical "continuum of persecution." I am well aware of the cases referred to earlier where the Court has refused to strike "surplus" statements that do not give rise to prejudice. However, accusations of this kind are not self-evident facts. All they do is raise the emotional and rhetorical temperature of the action and impede the just, most expeditious and least determination of the action on its merits.

81 I disagree with the Defendants regarding paragraph 12(f) which, although it refers to the "Hungarian Lead Case" and unspecified public comments by Minister Kenney, does allege facts which may be relevant and may help to ground the principal claim of institutional bias.

82 As regards paragraph 25, because paragraph 24 is not substantiated by relevant facts, there is nothing to ground the Minister's alleged public references and the balance of the paragraph is really pleading evidence.

Improperly Pleading Evidence

83 As the Defendants point out, Rule 174 of the Rules directs that a statement of claim shall not include evidence by which the facts of the case are to be proven.

84 On this basis, the Defendants say that the following paragraphs of the Claim should be struck:

a. Paragraph 12(c) - not only should this paragraph be struck on the basis that it is irrelevant and/or immaterial, it also constitutes evidence.;

b. Paragraph 12(g) - this paragraph lists the credentials of Paul St. Clair. This is evidence that has no place in the Claim;

c. Paragraph 14 - as noted above, this paragraph purports to confirm the opinion in the minds of "anyone involved with refugees, particularly the members of the immigration bar" which could constitute evidence.

85 The Plaintiffs provide little by way of response on this issue other than disagreement. There is significant overlap here with other grounds of complaint and I think I have said enough already to explain why I agree with the Defendants on these points.

Miscellaneous Deficiencies

86 The Defendants also complain of the following deficiencies:

a. The term "Minister" is used throughout the Claim without proper specificity given that two Ministers are named as Defendants. In this regard, it is unclear which Minister the Plaintiffs are referring to in certain sections of the Claim. Further, the Plaintiffs appear to use the Minister of Immigration, Minister Kenney, Minister, Immigration Minister and the Minister of Citizenship and Immigration interchangeably (see, for example, paragraph 12(b), 12(c), 22 and 24.) Such terminology must be clarified so that the Defendants can properly respond to the Claim;

b. The Plaintiffs have not defined or listed the statutory provisions or legislation upon which they rely despite making numerous, vague references to statutory breaches through the Claim;

c. The relief outlined in paragraph 6 of the Claim is duplicative of the relief outlined in paragraph 1(a) to (d). As well, the Plaintiffs have only particularized their damages with respect to their negligence claim.

87 Given that I have already accepted the Defendants arguments as outlined above, I think that these difficulties disappear and/or do not sufficiently offend the Rules to warrant striking.

Conclusions

88 It seems to me that the Defendants have provided ample authority and justification for striking certain portions of the Claim as outlined above.

89 In *George v Harris*, [2000] OJ No 1762, at paragraph 20, Justice Epstein, then of the Ontario Superior Court of Justice, provided examples of what constitutes a "scandalous," "frivolous" or "vexatious" document:

i. A document that demonstrates a complete absence of material facts;

ii. Portions of a pleading that are irrelevant, argumentative or inserted for colour, or that constitute bare allegations;

iii. A document that contains only argument and includes unfounded and inflammatory attacks on the integrity of a party, and speculative, unsupported allegations of defamation;

iv. Documents that are replete with conclusions, expressions of opinion, provide no indication whether information is based on personal knowledge or information and belief, and contain many irrelevant matters.

90 A statement of claim containing bare assertions but no facts on which to base those assertions discloses no reasonable cause of action and may also be struck as an abuse of process. Furthermore, as indicated above, a claimant is not entitled to rely on the possibility that new facts may arise as the case progresses. On the contrary, the facts must be pled in the initial claim. The question of whether those facts can be proven is a separate issue, but they must be pled nonetheless.

91 The authorities cited above also show that when a particular cause of action is pled, the claim must contain pleadings of fact that satisfy all of the necessary elements of that cause of action. Otherwise, it will be plain and obvious that the claim discloses no reasonable cause of action.

92 A statement of claim will also be struck on the grounds that it is so unruly that the scope of the proceedings is unclear. As stated by this Court in *Ceminchuk v Canada*, [1995] FCJ No 914, at paragraph 10

> A scandalous, vexatious or frivolous action may not only be one in which the claimant can present no rational argument, based upon the evidence or law, in support of the claim, but also may be an action in which the pleadings are so deficient in factual material that the defendant cannot know how to answer, and a court will be unable to regulate the proceedings. It is an action without reasonable cause, which will not lead to a practical result.

93 The Plaintiffs claim that this motion to strike is premature and the Defendants were obliged to request particulars first. However, as pointed out above, I think the jurisprudence of the Court is clear that there is no obligation on defendants to demand particulars and a plaintiff cannot cure an otherwise deficient statement of claim by arguing that the defendants have not sought particulars. See *Paul v Kingsclear Indian Band*, (1997), 132 FTR 145 (TD).

Amendments

94 I have no motion or request before me from the Plaintiffs that they be allowed to amend their Claim to correct the deficiencies outlined above. By and large, they have simply alleged that they have already pled in accordance with the relevant rules and governing jurisprudence. For the most part, and for reasons given, I cannot accept this position. I am well aware that an amendment should be allowed where a claim might possibly succeed if the pleading is amended and that to deny an amendment there must be no scintilla of a cause of action. See *Larden v Canada* (1998), 145 FTR 140. However, the Plaintiffs have not sought leave to amend and I have nothing before me to suggest that the Plaintiffs can establish the scintilla of a cause of action in relation to those portions of the Claim that have been struck.

95 It will soon be a year since I ordered this matter converted to an action, and yet we are still dealing with the fundamentals of the Claim. The time has come to adopt a more urgent approach to this action and I want counsel on both sides to acknowledge this factor and to proceed and conduct themselves accordingly. I know that Mr. Galati plans to take a break during the rest of January and February, but he has indicated he can be available to deal with this file during March 2012. In any event, the matter cannot be allowed to drag on and both counsel must expect to have to prioritize this action in future. Both sides acknowledge the importance of the issues raised for the immigration system generally and there is already a significant body of applications in this Court awaiting the outcome of these proceedings. That body will grow and will, eventually, begin to cause problems for the administration of justice in this Court, as well as for the handling of cases before the IRB. This uncertainty must be addressed quickly and the Court will be looking for counsel's enhanced assistance in ensuring the just, most expeditious and least expensive determination of the merits.

ORDER

THIS COURT ORDERS that

1. For reasons given, the following are struck from the Amended Statement of Claim pursuant to Rule 221(1) of the *Federal Court Rules* without leave to amend:

   (i) Paragraph 6(b)

   (ii) Paragraph 12(c);

   (iii) Paragraph 14;

   (iv) Paragraph 17;

   (v) Paragraph 20;

   (vi) Paragraph 24;

   (vii) Paragraph 25;

   (viii) Paragraph 27;

   (ix) Paragraph 12(g);

   (x) The Minister of Foreign Affairs as a party;

   (xi) All references to the Minister of Foreign Affairs in the body of the Claim;

   (xii) Paragraph 28(b) and all other references to the tort of negligence;

   (xiii) Paragraphs 23, 27 and 28(a)(iv) and all references to the tort of conspiracy;

   (xiv) Paragraphs 24, 28(a)(i) and (iii) and all references to the tort of public misfeasance/abuse of authority;

   (xv) Paragraphs 28(a)(ii) and all references to the tort of abuse of process;

   (xvi) All allegations of breach of sections 7 and 15 of the Charter contained in paragraphs 24, 28(a)(v), 28(b)(iii)(A), (B) and (D), and elsewhere in the claim.

2. The Defendants shall have the costs of this motion.

3. Counsel will confer and prepare and provide to the Court on or before March 20th, 2012, an itemized list of the further steps to be taken in this action and a preliminary timetable for accomplishing them. If necessary, the Court will then establish the time for a conference meeting to discuss and resolve points of concern.

RUSSELL J.

End of Document

Wang v. Canada, [2016] F.C.J. No. 1502

Federal Court Judgments

Federal Court

Toronto, Ontario

R.L. Barnes J.

Heard: May 16, 2016.

Judgment: September 16, 2016.

Docket: T-1747-15

[2016] F.C.J. No. 1502 | [2016] A.C.F. no 1502 | 2016 FC 1052

Between Zhenhua Wang and Chunxiang Yan, Plaintiffs, and Her Majesty the Queen, Oxana M. Kowalyk (Id Member), Susy Kim (Id Member), Iris Kohler (Id Member), Officer O'hara (CBSA Officer), Hal Sippel, Eric Blenkarn, Andrej Rustja, CBSA Officers, All John and Jane Doe CBSA/CIC Officials Unknown to the Plaintiffs, Involved in the Arrest, Detention and Continued Detention of the Plaintiffs, Linda Lizotte-Macpherson, President of the CBSA, Minister of Public Safety and Emergency Preparedness, Minister of Citizenship and Immigration, Attorney General of Canada, Defendants

(32 paras.)

Counsel

Mr. Rocco Galati, for the Plaintiffs.

Mr. Jonathan Dawe, Mr. Michael Dineen, for the Defendants, Oxana M. Kowalyk (Id Member), Susy Kim (Id Member), Iris Kohler (Id Member).

Mr. Jamie Todd, Ms. Ildiko Erdei, for the Defendants, Officer O'hara (CBSA Officer), Hal Sippel, Eric Blenkarn, Andrej Rustja, CBSA Officers, All John and Jane Doe CBSA/CIC Officials Unknown to the Plaintiffs, Involved in the Arrest, Detention and Continued Detention of the Plaintiffs, Linda Lizotte-Macpherson, President of the CBSA, Minister of Public Safety and Emergency Preparedness, Minister of Citizenship and Immigration, Attorney General of Canada.

ORDER AND REASONS

R.L. BARNES J.

1 On these motions the Defendants seek relief under Rule 221 of the *Federal Courts Rules*, SOR/98-106, striking out the Statement of Claim filed by the Plaintiffs in this action on the basis that it discloses no viable cause of action, is scandalous, frivolous or vexatious, is an abuse of the process of the Court and is barred by cause of action estoppel.

2 At the outset of argument the Plaintiffs conceded that the claims asserted against the President of the Canada Border Services Agency [CBSA], the Minister of Public Safety and Emergency Preparedness and the Minister of Citizenship and Immigration [CIC] should be struck. In the result the action is dismissed as against those parties.

What remains for determination is whether the claims against the remaining Defendants should be struck and, if so, on what terms.

3 In order to apply the legal principles relied upon by the parties it is necessary to consider the specific allegations in the Plaintiffs' 65 page Statement of Claim.

4 The Plaintiffs' complaint arises out of their arrest and detention at the hands of the CBSA on March 7, 2014. Among other allegations the Plaintiffs say that they were wrongfully arrested and unlawfully detained on the strength of false information that CBSA and CIC officials either knowingly or negligently relied upon in the prosecution of the Plaintiffs' ongoing immigration detentions. Included in the claims against the named and unnamed officials are allegations that they misrepresented evidence, conspired to deprive the Plaintiffs of a fair hearing, and sought to punish the Plaintiffs for bringing refugee claims.

5 Some representative passages concerning the alleged conduct of the CBSA and CIC officers are set out below:

> * The Arrest and Detention of Plaintiffs in Canada
>
> 87. Prior to, and up to being arrested by the CBSA on March 7th, 2014, the Plaintiffs were subject to the following actionable conduct by the CBSA/CIC officials:
>
> (a) negligent investigation in refusing to properly investigate the facts and evidence put forward by the Plaintiffs; and relying solely on the false information provided by those who defrauded the Plaintiffs, as well as officials of the People's Republic of China, and who were defendants in Ontario civil actions for that fraud and other criminal acts, for which negligent investigation the CBSA/CIC officers, and Her Majesty the Queen are liable, in that:
>
> (i) the officers owed a common-law and statutory duty of care to competently investigate prior to arrest and detention;
>
> (ii) the officer(s) breached that duty of care; and
>
> (iii) as a result of that breach they caused the Plaintiffs compensable damages;
>
> (b) that the initial duty to competently investigate is owed to the present day, which has been flagrantly breached and ignored by the named and unnamed CBSA/CIC officers, notwithstanding more comprehensive and updated information and evidence provided by Plaintiffs' counsel;
>
> (c) engaged in abuse and excess of authority, and misfeasance of public office for the facts set out above, by:
>
> (i) refusing disclosure undertaken and resisting disclosure due to the Plaintiffs;
>
> (ii) misrepresenting the nature and quality of the evidence against the Plaintiffs;
>
> (iii) acting in bad faith, and absence of good faith, continued to shift the grounds, for continued detention against the Plaintiffs;
>
> (iv) sought the continued detention of the Plaintiffs, as punishment, because the Plaintiffs made refugee claims, refugee claims necessitated by the actions of the Defendant CBSA/CIC officials who have now, knowingly, exposed the Plaintiffs to torture and/or death if returned to China;
>
> (v) refusing to properly investigate;
>
> (d) conspired to deprive the Plaintiffs of their statutory and constitutional rights, to be free of arbitrary and unlawful arrest and detention as set out below in this statement of claim;
>
> (e) breached the Plaintiffs' constitutional right(s) to counsel; and
>
> (f) otherwise breached their rights under s. 7 of the ***Charter***, to life, liberty, and security of the person, in a matter inconsistent with the tenets of fundamental justice, and contrary to s. 15 of

the ***Charter***, by discriminating against the Plaintiffs based on their status as wealthy Chinese nationals, with respect to their investigation, arrest, detention, and continued detention of the Plaintiffs.

. . .

102. Prior to, and during, the 1st detention review, the Defendant CBSA/CIC officials at the hearing, engaged in the following actionable conduct:

(a) they continued to engage in negligent investigation as set out above;

(b) they engaged in abuse of process, and abuse and excess of authority, and misfeasance of public office by:

(i) refusing disclosure undertaken and owed to the Plaintiffs;

(ii) misrepresenting the nature and quality of the evidence against the Plaintiffs';

(iii) in bad faith, and absence of good faith, shifted the grounds, for continued detention against the Plaintiffs;

(iv) sought the continued detention of the Plaintiffs, as punishment, because the Plaintiffs made refugee claims, refugee claims necessitated by the actions of the Defendant CBSA/CIC officials who have now, knowingly, exposed the Plaintiffs to torture and/or death if returned to China;

(c) conspired to deprive the Plaintiffs of a fair hearing, and further conspired to continue the Plaintiffs' unlawful and arbitrary arrest and detention by:

(i) engaging in an agreement for the use of lawful and unlawful means, and conduct, the predominant purpose of which is to cause injury to the Plaintiffs; and/or

(ii) engaging, in an agreement, to use unlawful means and conduct, whose predominant purpose and conduct directed at the Plaintiffs, is to cause injury to the Plaintiffs, or the Defendants' officials should know, in the circumstances, that injury to the Plaintiffs, is likely to, and does result;

(d) continued to breach the Plaintiffs' right to counsel and effective right to assistance of assistance of counsel;

(e) endangered the lives of the Plaintiffs if ever returned to China; and

(f) otherwise breached their rights under s. 7 of the ***Charter***, to life, liberty, and security of the person, in a matter inconsistent with the tenets of fundamental justice, and contrary to s. 15 of the ***Charter***, by discriminating against the Plaintiffs based on their status as wealthy Chinese nationals, with respect to their investigation, arrest, detention, and continued detention of the Plaintiffs.

6 In this action the Plaintiffs also seek damages from three members of the Immigration Division (collectively the ID Members) for unlawfully maintaining the Plaintiffs' detention in the context of three detention reviews. Each of the impugned decisions was overturned by this Court on judicial review. The Plaintiffs' claims are based, in part, on an assertion that ID Members Kowalyk, Kim and Kohler are liable in damages for failing to follow the Federal Court orders that quashed the earlier detention review decisions and for a variety of other adjudicative errors. Parts of the Statement of Claim assert causes of actions in negligence and others assert fraud and malice.

7 The material allegations made against the ID Members are the following:

MEMBER KOWALYK

106. In making her decision, on December 11th, 2014, ID Member O.M. Kowalyk, which decision was made in bad faith, and absence of good faith, the ID Member, with knowledge and intent

and sole purpose of the continued detention of the Plaintiffs, contrary to law, engaged in the following conduct, and made the following baseless findings, with intention and knowledge, in bad faith and absence of good faith, for the sole purpose of continuing the unlawful detention of the Plaintiffs by:

(a) making substantive determinations with respect to the strength and ***bona fides*** of the Plaintiffs' refugee claims which are outside the jurisdiction of the ID, and the exclusive jurisdiction of the RPD (Refugee Protection Division) of the IRB;

(b) making rulings diametrically opposed to binding Federal Court orders and judgments;

(c) knowingly misapplying the jurisprudence to the facts of the Plaintiffs' detention with the intention to continue the unlawful and arbitrary detention of the Plaintiffs;

(d) refusing a release plan, which has been accepted as a release plan, for those accused of (association with) terrorism in Canada;

(e) knowingly making capricious and perverse findings of fact and law, with the knowledge and intention of continuing the detention of the Plaintiffs; and

(f) doing all of the above set out in (a)- (e), based on discrimination, contrary to s. 15 of the ***Charter***, because the Plaintiffs are wealthy Chinese nationals;

which conduct and findings were contrary to the binding jurisprudence, and the knowledge, experience, and expertise of the Member which spans just over 30 years as an Adjudicator and ID member conducting detention reviews.

...

109. The Plaintiffs state and the fact is that the errors cited by the Federal Court were not "errors" by Member Kowalyk, but made knowingly by her, in bad faith, and absence of good faith, intentionally designed for the purpose of continuing the Plaintiffs' unlawful and unconstitutional detention.

...

MEMBER KIM

114. In making her decision, on April 2nd, 2015, ID Member Susy Kim, which decision was made in bad faith, and absence of good faith, the ID Member, with knowledge and intent and sole purpose of the continued detention of the Plaintiffs, contrary to law, engaged in the following conduct, and made the following baseless findings, with intention and knowledge, in bad faith and absence of good faith, for the sole purpose of continuing the unlawful detention of the Plaintiffs:

(a) making rulings diametrically opposed to binding Federal Court orders and judgment of Justice Phelan and knowingly ignored and contradicted Justice Phelan's judgment on judicial review;

(b) making substantive determinations with respect to the Plaintiffs' refugee hearings which are outside the jurisdiction of the ID, and the exclusive jurisdiction of the RPD (Refugee Protection Division) of the IRB;

(c) making rulings diametrically opposed to binding Federal Court orders and judgments;

(d) knowingly misapplying the jurisprudence to facts of the Plaintiffs' detention with the intention to continue the unlawful and arbitrary detention of the Plaintiffs;

(e) refusing a release plan, which has been accepted as a release plan, for those accused of (association with) terrorism in Canada;

(f) knowingly making capricious and perverse findings of fact and law, with the knowledge and intention of continuing the detention of the Plaintiffs; and

(g) doing all of the above set out in (a)- (e), based on discrimination, contrary to s. 15 of the ***Charter***, because the Plaintiffs are wealthy Chinese nationals;

which conduct and findings were contrary to the binding Federal Court jurisprudence, including that of the previous, successful judicial review, by the Federal Court, of the previous detention review of Oxana M. Kowalyk.

...

116. The Member's decision essentially adopted and rehashed the decision of the previous ID Member (Kowalyk). This is referenced in Justice Gagne's decision, at paragraph 48, as quoted in the previous paragraph of this Statement of Claim. The decision further ignores and flies in the face of the judicial review conducted by Justice Phelan of ID Member Kowalski's decision, whereby ID Member Kim knowingly adopts Kowalyk's errors to fly in the face of the Federal Court decision quashing Kowalyk's decision.

117. The Plaintiffs state and the fact is that the errors cited by the Federal Court were not "errors" by Member Susy Kim, but made knowingly by her, in bad faith, and absence of good faith, intentionally designed for the purpose of continuing the Plaintiffs' unlawful and unconstitutional detention.

...

MEMBER KOHLER

143. In making her decision, which decision was made in bad faith, and absence of good faith, the ID Member, Iris Kohler, with knowledge and intent and sole purpose of the continued detention of the Plaintiffs, contrary to law, engaged in the following conduct, and made the following baseless findings, with intention and knowledge, in bad faith and absence of good faith, for the sole purpose of continuing the unlawful detention of the Plaintiffs:

(a) making rulings diametrically opposed to binding Federal Court orders and judgments;

(b) making substantive determinations with respect to the Plaintiffs' refugee hearings which are outside the jurisdiction of the ID, and the exclusive jurisdiction of the RPD (Refugee Protection Division) of the IRB;

(c) knowingly misapplying the jurisprudence to facts of the Plaintiffs' detention with the intention to continue the unlawful and arbitrary detention of the Plaintiffs;

(d) refusing a release plan, which has been accepted as a release plan, for those accused of (association with) terrorism in Canada;

(e) knowingly making capricious and perverse findings of fact and law, with the knowledge and intention of continuing the detention of the Plaintiffs; and

(f) doing all of the above set out in (a)- (e), with discrimination, contrary to s. 15 of the ***Charter*** **,** because the Plaintiffs are wealthy Chinese nationals;

which conduct and findings were contrary to the binding Federal Court jurisprudence, including that of previous, successful judicial reviews, by the Federal Court, of previous detention reviews, by Justice Phelan and Justice Gagné, as set out above.

...

146. Furthermore, ID Member Kolher's decision, rehashes and repeats the reasons of the previous two ID Members' decisions, with a number of paragraphs being extracted and merged from ID Member Kowalyk's, and ID Member Kim's decision, which findings and conclusions knowingly, and with the sole intent to continue the detention of the Plaintiffs, fly in the face of the previous two Federal Court decisions of Justice Phelan and Justice Gagné.

147. The Plaintiffs state and the fact is that the errors cited by the Federal Court were not "errors" by Member Iris Kohler, but made knowingly by her, in bad faith, and absence of good faith, intentionally designed for the purpose of continuing the Plaintiffs' unlawful and unconstitutional detention.

8 In addition to the above allegations, the Statement of Claim includes prolix, unfocussed and generalized accusations of a conspiracy to harm the Plaintiffs carried out by the named Defendants and other unnamed government officials. It is not possible to tell whether the ID Members are included in all of the conspiracy allegations but, in a few instances, they are expressly identified. For the most part, these conspiracy allegations simply repeat the earlier pleading of individualized bad faith set out above. Below are the key conspiracy allegations specific to the ID Members:

(d) that the ID members, Oxana Kowalyk, Susy Kim, Iris Kohler, have also done so in a separate and overlapping conspiracy, by:

(i) making substantive determinations with respect to the Plaintiffs' refugee hearings which are outside the jurisdiction of the ID, and the exclusive jurisdiction of the RPD (Refugee Protection Division) of the IRB;

(ii) making rulings diametrically opposed to binding Federal Court orders and judgments particularly the Federal Court orders and judgment made with respect to the Plaintiffs; on judicial review(s) of their detention;

(iii) knowingly misapplying the jurisprudence to facts of the Plaintiffs' detention with the intention to continue the unlawful and arbitrary detention of the Plaintiffs;

(iv) refusing a release plan, which has been accepted as a release plan, for those accused of (association with) terrorism in Canada;

(v) knowingly making capricious and perverse findings of fact and law, with the knowledge and intention of continuing the detention of the Plaintiffs; and

(vi) doing all of the above set out in (a)-(e), based on discrimination, contrary to s. 15 of the ***Charter***, because the Plaintiffs are wealthy Chinese nationals;

...

155. The Plaintiffs further state that actions of the named and unnamed CBSA/CIC officers, in conjunction with the ID Members, at the behest and false information from agents of the People's Republic of China, and the fraudsters Szeto and Chen, with the resulting unlawful and unconstitutional detention, constitute torture and unusual treatment contrary to the ***Convention Against Torture and Other Cruel or Unusual Treatment***, and also constitutes a crime against humanity contrary to, ***inter alia***, s. 6 of the ***Crimes Against Humanity Act***, as well as an offence under the ***Criminal Code of Canada***. The Plaintiffs state, and fact is, that the named and unnamed officials, in furtherance of attempting to remove the Plaintiffs to China, are acting as ***de facto*** agents for the People's Republic of China, and in fact are accessories, co-conspirators with the attempt to deliver the Plaintiffs to torture, and unlawful imprisonment and/ or death. This conspiracy, and over-lapping conspiracies, and unlawful and unconstitutional conduct, through the knowledge and willful conduct of the above-noted officials, in bad faith and the absence of good faith, also grounds the basis for civil and constitutional torts and liability.

...

158. The Plaintiffs further state that this entire process, is a statutory and constitutional abuse of process, by way of disguised extradition, on false information obtained from fraudsters and officials of a dictatorial regime, with a refusal by Canadian officials to properly and competently investigate, to remove at the request of a regime that engages in ***inter alia***, torture, without the procedural and substantive safeguards of the ***Extradition Act***, which the named and unnamed officials, and ID

> Members, know run contrary to the Royal Commission Inquiry conducted with respect to Maher Arar, and its report and recommendations, as well as the Ontario Court of Appeal decision (leave to the SCC denied), finding it constitutionally impermissible to extradite based on information obtained by torture, as set out in ***USA v. Kadr***, which decision is a document referred to in the pleadings herein.

9 In one concluding passage, the Statement of Claim asserts that the ID Members, among others, were acting "as ***de facto*** agents of the People's Republic of China, in what amounts to a disguised and baseless extradition" (see para 156 (vi)).

I. Analysis

10 Rule 221 of the *Federal Courts Rules* applies to these motions and provides for relief on the following basis:

> STRIKING OUT PLEADINGS
>
> 221 (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it
>
> (a) discloses no reasonable cause of action or defence, as the case may be,
>
> (b) is immaterial or redundant,
>
> (c) is scandalous, frivolous or vexatious,
>
> (d) may prejudice or delay the fair trial of the action,
>
> (e) constitutes a departure from a previous pleading, or
>
> (f) is otherwise an abuse of the process of the Court,
>
> and may order the action be dismissed or judgment entered accordingly.
>
> (2) No evidence shall be heard on a motion for an order under paragraph (1)(a).
>
> * * *
>
> RADIATION D'ACTES DE PROCÉDURE
>
> 221 (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :
>
> a) qu'il ne révèle aucune cause d'action ou de défense valable;
>
> b) qu'il n'est pas pertinent ou qu'il est redondant;
>
> c) qu'il est scandaleux, frivole ou vexatoire;
>
> d) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;
>
> e) qu'il diverge d'un acte de procédure antérieur;
>
> f) qu'il constitue autrement un abus de procédure.
>
> Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.
>
> (2) Aucune preuve n'est admissible dans le cadre d'une requête invoquant le motif visé à l'alinéa (1)a).

11 The Defendants all contend that the Statement of Claim discloses no cause of action known to law and is scandalous, frivolous and vexatious. They also argue that a markedly similar Statement of Claim was struck out by the Ontario Superior Court as disclosing no viable cause of action, thus rendering this proceeding an abuse of process by relitigation or subject to cause of action estoppel. The Immigration Division members also rely on the immunity that is afforded to them by section 156(a) of the *Immigration and Refugee Protection Act,* SC 2001, c 27 [IRPA].

II. The claims against the ID Members

12 There is no question that the claims advanced against the ID Members in the performance of their adjudicative duties are protected by a strongly worded immunity provision. Section 156 of IRPA states:

> 156. Immunity and no summons -- The following rules apply to the Chairperson and the members in respect of the exercise or purported exercise of their functions under this Act:
>
> (a) no criminal or civil proceedings lie against them for anything done or omitted to be done in good faith; and
>
> (b) they are not competent or compellable to appear as a witness in any civil proceedings.

13 Mr. Galati opposes the motion to strike the claims against the ID Members on the basis that the Court must take the pleaded facts as provable. He asserts that it is only where it is plain and obvious that a pleading is bad that it can be struck: see, for instance, *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at page 980, 74 DLR (4th) 321. Motions to strike under Rule 221 of the *Federal Courts Rules* are, of course, also subject to Rule 174 requiring that every pleading contain "a concise statement of the material facts on which the party relies".

14 While I accept that, on a motion to strike, the Court must take the pleaded facts to be provable and should only strike in the clearest of cases, at the same time not every legal theory that can be imagined by the creative legal mind must be entertained. For instance, I do not agree that this Court must accept, as potentially viable, fanciful interpretations of the scope of immunity afforded to the ID Members by section 156 of IRPA. An example of such an argument is the Plaintiffs' contention that they are entitled to pursue a cause of action for the negligent enforcement of a judicial decree (*i.e.*, the Federal Court judgments). The Plaintiffs advance this claim on the strength of the decision in *Holland v Saskatchewan*, 2008 SCC 42, [2008] 2 SCR 551. That case, of course, involved an allegation of negligent implementation of a judicial decree and not negligent adjudication. In the face of the broad immunity created by section 156, it is plain and obvious that this allegation and any similar allegation could not, in the absence of pleaded material facts bearing on bad faith, possibly succeed.

15 The same can be said of the allegations concerning ostensible errors made by the ID Members. The Statement of Claim does not survive a motion to strike by the pleading of a series of supposed errors followed by a bare assertion of bad faith and conspiracy. Indeed, all of the conspiracy allegations are purely speculative and improper. To assert without any factual foundation that the ID Members were engaged in a conspiracy to harm the Plaintiffs with the CBSA and CIC officials and were acting as de facto agents of the Chinese authorities is particularly scandalous and improper. What the record actually discloses is that the ID Members produced thoughtful and thorough decisions. This Court found some discrete reviewable errors in their decisions but identified nothing blameworthy and returned the cases for redetermination. The remedy for adjudicative error lies in judicial review and not in a collateral action seeking damages.

16 What the Court must still consider is whether some remainder of the Statement of Claim would, if proven, be sufficient to escape the confines of section 156. To determine this, it is necessary to consider the basic principles with respect to pleadings. The fundamental purpose and rule of pleadings were discussed by Justice Eric Bowie in *Zelinski v the Queen*, [2002] 1 CTC 2422, [2002] DTC 1204 (TCC) and recently endorsed by Justice Wyman Webb in *Beima v Canada*, 2016 FCA 205, [2016] F.C.J. No 907 (QL):

> 4 The purpose of pleadings is to define the issues in dispute between the parties for the purposes of production, discovery and trial. What is required of a party pleading is to set forth a concise statement of the material facts upon which she relies. Material facts are those facts which, if established at the trial, will tend to show that the party pleading is entitled to the relief sought ...
>
> 5 The applicable principle is stated in Holmsted and Watson [Ontario Civil Procedure, Vol. 3, pages 25-20 to 25-21]:
>
> > This is the rule of pleading: all of the other pleading rules are essentially corollaries or qualifications to this basic rule that the pleader must state the material facts relied upon for his or her claim or defence. The rule involves four separate elements: (1) every pleading must state facts, not mere conclusions of law; (2) it must state material facts and not include facts which are immaterial; (3) it must state facts

> and not the evidence by which they are to be proved; (4) it must state facts concisely in a summary form.

17 The question is therefore whether the Statement of Claim contains any material factual allegations that could support a finding of bad faith on the part of any of the ID Members in the discharge of their adjudicative functions. In this context, bad faith requires proof of deliberate dishonest conduct by each of the ID Members in carrying out their detention review responsibilities.

18 An assessment of the Statement of Claim must begin with an appreciation of the legal principles that distinguish between speculative or conclusory allegations and those that are sufficiently particularized to be subjected to further judicial scrutiny (*i.e.*, material facts that are capable of supporting a potentially viable cause of action). This distinction is discussed by Justice David Stratas in *Merchant Law Group v Canada Revenue Agency*, 2010 FCA 184, 321 DLR (4th) 301 [*Merchant Law*] in the following passage:

> [34] I agree with the Federal Court's observation (at paragraph 26) that paragraph 12 of the amended statement of claim "contains a set of conclusions, but does not provide any material facts for the conclusions." When pleading bad faith or abuse of power, it is not enough to assert, baldly, conclusory phrases such as "deliberately or negligently," "callous disregard," or "by fraud and theft did steal": *Zundel v. Canada*, 2005 FC 1612, 144 A.C.W.S. (3d) 635; *Vojic v. Canada (M.N.R.)*, [1987] 2 C.T.C. 203, 87 D.T.C. 5384 (F.C.A.). "The bare assertion of a conclusion upon which the court is called upon to pronounce is not an allegation of material fact": *Canadian Olympic Association v. USA Hockey, Inc.* (1997), 74 C.P.R. (3d) 348, 72 A.C.W.S. (3d) 346 (F.C.T.D.). Making bald, conclusory allegations without any evidentiary foundation is an abuse of process: *AstraZeneca Canada Inc. v. Novopharm Limited*, 2010 FCA 112 at paragraph 5. If the requirement of pleading material facts did not exist in Rule 174 or if courts did not enforce it according to its terms, parties would be able to make the broadest, most sweeping allegations without evidence and embark upon a fishing expedition. As this Court has said, "an action at law is not a fishing expedition and a plaintiff who starts proceedings simply in the hope that something will turn up abuses the court's process": *Kastner v. Painblanc* (1994), 58 C.P.R. (3d) 502, 176 N.R. 68 at paragraph 4 (F.C.A.).
>
> [35] To this, I would add that the tort of misfeasance in public office requires a particular state of mind of a public officer in carrying out the impunged action, *i.e.*, deliberate conduct which the public officer knows to be inconsistent with the obligations of his or her office: *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69 at paragraph 28. For this tort, particularization of the allegations is mandatory. Rule 181 specifically requires particularization of allegations of "breach of trust," "wilful default," "state of mind of a person," "malice" or "fraudulent intention."

19 More recently, Justice Michael Manson discussed the need for particulars when pleadings allege fraud or malice. His comments in *Tomchin v Canada*, 2015 FC 402, 332 CRR (2d) 64 [*Tomchin*] are particularly apt on this motion:

> [21] In order to strike a pleading on the ground that it does not disclose a reasonable cause of action, those allegations that are properly pleaded as concise material facts and are capable of being proved must be taken as true (*Hunt v Carey Canada Inc*, [1990] 2 SCR 959; *Federal Court Rules*, Rule 174). However, that rule does not apply to allegations based on assumptions and speculation (*Operation Dismantle Inc v Canada*, [1985] 1 SCR 441 at para 27).
>
> [22] As well, any pleading of misrepresentation, fraud, malice or fraudulent intent must provide particulars of each and every allegation; bald allegations of bad faith, ulterior motives or *ultra vires* activities is both "scandalous, frivolous and vexatious", and an abuse of process of this Court (*Federal Court Rules*, Rule 191; *Merchant Law Group v Canada (Revenue Agency)*, 2010 FCA 184 at paras 34-35).
>
> ...
>
> [38] Throughout the Statement of Claim, the Plaintiff alleges bad faith and ulterior motives on the part of the Defendants. However, I agree with the Defendants that the allegations are purely speculative and none of

> the statements are supported by the facts as pleaded. What the facts show is nothing other than legitimate, *intra vires* reasons for the Plaintiff's interview, investigation and detention by CBSA.
>
> ...
>
> [47] The pleading as a whole is replete with opinion and conclusory statements, devoid of the concise, material facts needed to support a viable cause of action. I agree with the Defendants that the Statement of Claim appears to have been filed for collateral purposes, in the hopes that a fishing expedition may yield some claim of substance that may somehow support the Plaintiff's desire for a remedy against the Defendants. His position is simply wrong (*Kastner v Painblanc,* [1994] F.C.J. No 1671 at para 4 (FCA)).

20 The allegations made by the Plaintiffs against the ID Members in this proceeding are bad for the same reasons identified in the *Merchant Law* and *Tomchin* decisions noted above. The allegations of bad faith and malice are merely conclusions unsupported by any material facts. The allegation of a conspiracy in concert with the People's Republic of China is particularly troublesome. In the absence of any supporting facts it is a scandalous allegation and, in that form, should never have been pleaded.

21 I can only conclude from the total absence of particulars that the claims made against the ID Members were solely intended to embarrass those Defendants for making detention rulings adverse to the Plaintiffs' interests. In the result, all of the claims against the ID Members are struck out without leave to amend and the action is dismissed as against each of them.

22 The ID Members are entitled to their costs in the action. Having regard to the scandalous nature of the allegations made against them, an increased award of costs is justified. These Defendants are awarded $5,500 payable within 30 days by the Plaintiffs, jointly and severally.

III. The claims against the CBSA and CIC

23 One of the principal arguments advanced on behalf of the CBSA and CIC Defendants is that this action is an abusive relitigation of a very similar cause of action dismissed by the Ontario Superior Court of Justice. To fairly address this argument it is necessary to examine the scope and disposition of that earlier action.

24 The Statement of Claim issued on behalf of the Plaintiffs in the Ontario Superior Court of Justice named, among other parties, CIC and the CBSA as Defendants. That Statement of Claim sets out, almost verbatim, much of the factual history contained in the Federal Court Statement of Claim (see for example paras 16-18 and 76-99).

25 Nevertheless, the specific allegations directed at the conduct of CIC and the CBSA in the Ontario pleading were limited to the following:

> 62. CIC and CBSA knew, or ought to have known, at the time that the application forms were submitted by Chen and Szeto, that Chen and Szeto were not licensed or approved immigration consultants or professionals, and that they were submitting the application documents contrary to the IRPA s. 91(1).
>
> 63. Furthermore, subsequent to Ms. Yan and Mr. Wang's discovery that Chen and Szeto were not licensed to submit immigration applications, and subsequent to their discovery of significant other misrepresentations and frauds perpetuated against them by Chen and Szeto, CIC and CBSA were notified by letters dated, respectively, January 27, 2014 and February 5, 2014 from counsel for Ms. Yan and Mr. Wang, specifically advising CIC and CBSA that:
>
> (a) Ms. Yan and Mr. Wang had discovered that Chen and Szeto were not licensed or approved immigration consultants and were not licensed or qualified to complete and submit applications to Canada Immigration on their behalf;
>
> (b) Ms. Yan and Mr. Wang had reason to believe that Chen and Szeto had provided incorrect information on the applications;

(c) Chen and Szeto had threatened repeatedly to make false reports regarding Ms. Yan and Mr. Wang to CBSA and Canada Immigration in the course of continued attempts at extorting funds from Ms. Yan and Mr. Wang. Because of the legal actions and criminal complaints made by Ms. Yan and Mr. Wang against Chen and Szeto, Ms. Yan and Mr. Wang had reason to believe that Chen and Szeto had made and were continuing to make false allegations to CBSA and CIC against Ms. Yan and Mr. Wang; and

(d) Ms. Yan and Mr. Wang were requesting copies of all application documents submitted on their behalf by Chen and Szeto.

64. Ms. Yan and Mr. Wang have to date received no response whatsoever from CBSA or CIC to the January 27th and February 5th letters.

65. Therefore, in addition to the fact that CIC and CBSA should have known that Chen and Szeto were in breach of s. 91(1) of the IRPA at the time of submission of the purported application, CIC and CBSA should certainly have known, and commenced a specific investigation and consulted with Ms. Yan and Mr. Wang's counsel, after receipt of their counsel's February notice letter.

66. Further, having received the latest application in or about 2013, and possibly previous applications from Chen and Szeto prior to that time, and then the February notification from counsel for Yan and Mr. Wang, CBSA should then have known that they were relying upon documents, the preparation of which were a criminal offence by Chen and Szeto contrary to s. 91(1) of the IRPA.

67. Knowing that the preparation of the application documents was a criminal offence by third parties, the CBSA should not have instructed its counsel to rely upon information on those documents to continue the detention and deny the freedom of Ms. Yan and Mr. Wang.

68. Chen and Szeto were not licensed or approved immigration consultants, and they were submitting the application documents contrary to the IRPA s. 91(1).

...

74. The CBSA's arrest disclosure referred to "tips" that they received in respect of Ms. Yan and Mr. Wang.

75. Ms. Yan and Mr. Wang believe that their concerns, set out in their counsel's February 2014 letter to CIC and CBSA, were correct and that Chen and Szeto made false report to the Canadian immigration agencies including CIC and CBSA, as well as false reports to the embassy, national government, and provincial government of China, as well as false reports to the Dominican Republic, all falsely claiming improperly actions and activities by the Plaintiffs.

...

109. The plaintiffs state pleading that they have suffered damages as a result of the Citizenship and Immigration Canada and Canada Border Services Agency failure:

(a) to identify and take preventative steps because, at the time that the application forms were submitted by Chen and Szeto, Chen and Szeto were not licensed or approved immigration consultants or professionals, and that they were submitting the application documents contrary to the IRPA s. 91(1);

(b) to take preventative action, including contacting counsel for the plaintiffs, upon receipt of counsel's letter in February 2014 warning that Chen and Szeto were not licensed and may have file false information regarding the plaintiffs;

(c) to refrain from using documents prepared by Chen and Szeto and relying upon "tips" from Chen and Szeto as a part of the basis for investigation and detention of the plaintiffs; and

(d) to refrain from CBSA instructing its Minister's Counsel to rely on documents prepared by Chen and Szeto in submissions at Detention Hearings to continue the detention of the plaintiffs.

26 Not surprisingly, the Attorney General of Canada moved to strike the Ontario Statement of Claim as it related to CIC and the CBSA on the basis that it disclosed no cause of action and was otherwise frivolous, vexatious and an abuse of the Court process. On the day the motion was to be heard, the Plaintiffs' then counsel (not Mr. Galati) requested and obtained an adjournment based, in part, on an argument that "new facts" had emerged "which inform the Plaintiffs' case against the moving Defendants". Plaintiffs' counsel also advised the Court that he intended to amend the Statement of Claim. Thrown-away costs were awarded to the Attorney General in the amount of $2,500.00, payable within 30 days.

27 The Attorney General brought the motion to strike back before the Court on June 17, 2015. Plaintiffs' counsel failed to file any responding material and seems not to have opposed the motion. Indeed, in an apparent effort to avoid the motion to strike, the Plaintiffs filed a Notice of Discontinuance on June 11, 2015. Justice Edward Belobaba described the filing of the Notice of Discontinuance as "improper" and of no effect. He went on to strike the claims against the Attorney General without leave to amend on the following basis:

> The AG Canada's motion to strike St. of Claim as against AG Canada (CIC & CBSA) w/o leave to amend is granted. Unopposed. No reasonable cause of action is created by not investigating s 91 IRPA breaches. Ps have not alleged insufficient legal basis for detention. I agree with and adopt AG's submissions in paras. 35- 37, 38-40 and 41-43, 45 and 50 of AG's Factum.

28 By reference Justice Belobaba adopted the following points from the Attorney General's written arguments:

> 35. There is nothing in *IRPA* that imposes a duty on CIC or CBSA to investigate or take action against anyone who contravenes s. 91 by giving representation or advice in an immigration proceeding or application for consideration.
>
> 36. Similarly, s. 91(9) of *IRPA*, which provides that "[e]very person who contravenes subsection (1) commits an offence..." does not impose any duty on CIC or CBSA to investigate or penalize every person who breaches s. 91.
>
> 37. The Plaintiffs have cited no authority to show any duty on CIC or CBSA to investigate or penalize all persons who may have breached s. 91 of *IRPA*. They have also not pointed to any rationale for imposing such a duty on CIC or CBSA or indicated how it would be possible or feasible to perform such a duty.
>
> **2) No cause of action created by not investigating Ms. Chen and Mr. Sze to**
>
> 38. The Plaintiffs seem to suggest that CIC or CBSA should have investigated Ms. Chen and Mr. Szeto after the Plaintiffs' counsel wrote letters of January 27, 2014, and February 5, 2014 advising that these persons breached s. 0091. This allegation fails to show any cause of action as the Plaintiffs cannot, by their counsel's letters, create a duty on CIC and CBSA to investigate persons who allegedly breach s. 91(1), where no such duty exists in law.
>
> Claim, paras 63, 65, 68, 109(b), [Motion Record of the AG]
>
> 39. The Plaintiffs have not explained how their counsel's letters could mandate CIC or CBSA to investigate or prosecute Ms. Chen or Mr. Szeto for breaching or allegedly breaching s. 91, absent any legislative duty, court order or other legal requirement to do so.
>
> 40. Further, the Plaintiffs do not allege that their detention by CBSA is unlawful, i.e. that there are insufficient legal bases for the detention. As such, they fail to show any reasonable cause of action regarding their detention.
>
> **3) Plaintiffs have not alleged insufficient legal basis for detention**
>
> ***Plaintiffs' detention currently based on flight risk***

41. The Plaintiffs assert a claim for "Special damages in the amount of $10,000.00 of each day of detention of the plaintiffs by the defendant Canada Border Services Agency", but nowhere in the Claim do the Plaintiffs allege that their detention is unlawful.

Claim, para 1 (o), [Motion Record of the AG]

42. It seems that the Plaintiffs are seeking damages for time spent in lawful detention. However, this does not give rise to any reasonable cause of action.

43. Further, the Plaintiffs implicitly admit that their detention is lawful, as they assert that "the essence of its [CBSA's] current claims against the Plaintiffs" include "the flight risk and misrepresentation issues". While the Plaintiffs say that these "claims" are "in any event, incorrect", they do not indicate any reason why they are not flight risks. In addition, they do not allege that the flight risk issue was caused by Ms. Chen or Mr. Szeto. In fact, their allegations indicate the contrary.

Claim, para 45, [Motion Record of the AG]

...

45. The Plaintiffs' allegations indicate that they are foreign nationals who are detained in Canada as flight risks, i.e., being unlikely to appear for examination, an admissibility hearing or removal from Canada. Since they state that "flight risk" is part of the essence of CBSA's claims against them, and flight risk in these circumstances is sufficient for their lawful detention by the Immigration Division, the mere fact that they are detained or that they disagree with the flight risk finding does not create a reasonable cause of action.

...

50. As such, the Plaintiffs fail to show any cause of action against the AG (on behalf of CIC or CBSA) regarding their detention, or regarding the use or reliance of alleged incorrect information submitted by Mr. Chen and Mr. Szeto, as the Plaintiffs' allegations indicate that CIC or CBSA relied on information other than that received from Ms. Chen and Mr. Szeto, to lawfully detain them as flight risks, pursuant to *IRPA*.

29 It is quite clear to me that Justice Belobaba effectively dismissed the Plaintiffs' claims against the CIC and the CBSA alleging a negligent investigation, albeit in relation to specified deficiencies pertaining to the supposed fraudsters, Szeto and Chen. To the extent that the Statement of Claim purported to assert a claim to damages from the Plaintiffs' detention, that, too, was dismissed.

30 I have some reservations about globally applying abuse of process principles to this motion to strike based on the Ontario Superior Court's dismissal endorsement. That proceeding was supported by a few vague allegations of negligent investigation by unnamed officials in the CBSA and CIC, but the Statement of Claim did not include allegations against the ID Members named in this action nor did it assert that government officials acted or conspired to present false evidence to the Immigration Division for the purpose of harming the Plaintiffs. In addition to the absence of a clear overlap of pleaded issues, it is also not entirely clear what the Ontario Superior Court decided beyond the finding that no cause of action based on an alleged negligent investigation could be made out. It is also of some significance that the Ontario action was dismissed on a motion to strike that was unopposed. Finally, some of the allegations in the Federal Court Statement of Claim post-date the dismissal of the Ontario action. Those after-the- fact allegations cannot be struck based on the argument that a party is required to put its best case forward and cannot selectively plead or split its case. Alleged events that have not yet occurred cannot be reasonably anticipated and pleaded. Given these issues I am not prepared to strike the entire Statement of Claim based on abuse of process by relitigation principles. That is not to say, however, that all of what has been pleaded in this action is permissible in the face of the dismissal of the Ontario action. In my view, the Plaintiffs are not entitled to replead their allegations concerning supposedly negligent investigations by the CBSA, CIC or any of their officials. The Ontario Superior Court found those allegations could not support a viable cause of action and the

Plaintiffs are not legally entitled to relitigate that issue in this Court. To do so is an abuse of process: see *Toronto (City) v CUPE*, *Local 79*, 2003 SCC 63 at para 37, [2003] 3 SCR 77. Those allegations are accordingly struck from the Statement of Claim without leave to amend.

31 There is not much of any substance that remains in the Statement of Claim, and what does remain is devoid of material facts. Prolixity, repetition and the bare pleading of a series of events are not substitutes for the requirement that a defendant know what is being factually and legally alleged so that a proper answer and defence can be stated. What is always required is a recitation of material facts that can support an arguable cause of action. Nevertheless, there are some generalized allegations that CBSA and CIC officials knowingly fabricated a case against the Plaintiffs in order to keep them in custody. In theory, a viable cause of action for misfeasance in public office could arise, provided that there are sufficient material facts pleaded to support it. Here there are none and the remaining portions of the Statement of Claim are struck out for that reason and because what little remains is unintelligible. The Plaintiffs will, however, have leave to file a fresh Statement of Claim provided that it contains sufficient material particulars to support a cause of action for misfeasance in the prosecution of a case for the detention of the Plaintiffs.

32 These Defendants have been successful on their separate motions and are entitled to their costs which I fix at $3,500.00. These costs are similarly payable jointly and severally by the Plaintiffs within 30 days.

ORDER

THIS COURT ORDERS that these motions are allowed and the Statement of Claim is struck out in its entirety. The action against the Defendants, Oxana M. Kowalyk (ID Member), Susy Kim (ID Member), Iris Kohler (ID Member), Linda Lizotte-Macpherson, President of the CBSA, the Minister of Public Safety and Emergency Preparedness, the Minister of Citizenship and Immigration is dismissed without leave to amend or refile. The Plaintiffs will have leave to refile only in respect of a cause of action framed in accordance with these reasons.

THIS COURT FURTHER ORDERS that the Defendants Oxama M. Kowalyk, Susy Kim and Iris Kohler, shall have their costs in the amount of $5,500.00 payable by the Plaintiffs jointly and severally within thirty (30) days.

THE COURT FURTHER ORDERS that the remaining Defendants shall have their costs in the amount of $3,500.00 payable by the Plaintiffs jointly and severally within thirty (30) days.

R.L. BARNES J.

Wang v. Canada, [2018] F.C.J. No. 268

Federal Court Judgments

Federal Court of Appeal

Toronto, Ontario

W.W. Webb, D.J. Rennie and M.J.L. Gleason JJ.A.

Heard: February 28, 2018.

Oral judgment: February 28, 2018.

Docket: A-339-16

[2018] F.C.J. No. 268 | [2018] A.C.F. no 268 | 2018 FCA 46

Between Zhenhua Wang And Chunxiang Yan, Appellants (Plaintiffs), and Her Majesty the Queen, Oxana M. Kowalyk (ID Member), Susy Kim (ID Member), Iris Kohler (ID Member), Officer O'hara (CBSA Officer), Hal Sippel, Eric Blenkarn, Andrej Rustja, CBSA Officers, All John and Jane Doe CBSA/CIC Officials Unknown to the Plaintiffs, Involved in the Arrest, Detention and Continued Detention of the Plaintiffs, Minister of Citizenship and Immigration, Attorney General of Canada, Respondents (Defendants)

(3 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 — Appeal by plaintiffs from order striking out the statement of claim without leave to amend dismissed — Open to Federal Court to conclude that the claims against the individual members of the Refugee Board should be struck in the absence of any material facts that could conceivably ever support a claim against them — Portions of the claim that sought to re-litigate issues that had previously been finally decided were properly struck as abusive.

Counsel

Rocco Galati, for the Appellants.

James Todd, B. Asha Gafar, for the Respondents.

Jonathan Dawe, Michael Dineen, for the Respondents, Oxana M. Kowalyk (ID Member), Susy Kim (ID Member), Iris Kohler (ID Member).

REASONS FOR JUDGMENT OF THE COURT

The judgment of the Court was delivered by

M.J.L. GLEASON J.A. (orally)

1 The appellants appeal from the judgment of the Federal Court in *Wang and Yan v. The Queen et al*, 2016 FC

1052 (per Barnes, J.) in which the Federal Court struck the appellants' Statement of Claim, with leave to amend it in part. We see no basis for interfering with the Federal Court's judgment as the Federal Court correctly set out the law applicable on a motion to strike and made no palpable and overriding error in applying that law to the appellants' Statement of Claim.

2 More specifically, it was open to the Federal Court to conclude that the claims against the individual members of the Immigration Division of the Immigration and Refugee Board (the ID) should be struck in the absence of any material facts that could conceivably ever support a claim against them. Likewise, it was open to the Federal Court to dismiss as abusive those portions of the claim that sought to re-litigate issues that had previously been finally decided by the Ontario Superior Court of Justice and to conclude that what remained of the pleading was so devoid of material fact that it ought to be struck, with leave to amend. Although the Federal Court did not deal with the appellants' claim for *habeus corpus*, the appellants have been released from custody and the circumstances have therefore changed from those that existed at the time of the pleading. It is unnecessary for us to address in this appeal the extent, if any, of the Federal Court's jurisdiction to hear a new application for *habeas corpus* based on these changed facts, which application has not yet been made.

3 We would accordingly dismiss this appeal with costs, fixed in the all-inclusive amount of $2000.00, payable to the respondent members of the ID and in the all-inclusive amount of $2000.00, payable to the remaining respondents. We would grant the appellants the requested 60 days within which to amend their Statement of Claim, if they wish.

M.J.L. GLEASON J.A.

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

Supreme Court of Canada Rulings on Applications for Leave to Appeal and Other Motions

Supreme Court of Canada

Record created: September 18, 2018.

Record updated: February 21, 2019.

File No.: 38301

[2018] S.C.C.A. No. 368 | [2018] C.S.C.R. no 368

Zhenhua Wang, Chunxiang Yan v. Her Majesty the Queen, Oxana M. Kowalyk (ID Member), Susy Kim (ID Member), Iris Kohler (ID Member), Officer O'Hara (CBSA Officer), Hall Sippel, Eric Blenkarn, Andrej Rustja, CBSA Officers, All John and Jane Doe CBSA/ CIC officials unknown to the Plaintiffs, involved in the arrest, detention and continued detention of the Plaintiffs, Minister of Citizenship and Immigration, Attorney General of Canada

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Case Summary

Status:

Application for leave to appeal dismissed with costs (without reasons) February 21, 2019.

Catchwords:

Civil procedure — Pleadings — Statement of claim — Motion to strike — Whether Federal Court of Appeal applied wrong test on motion to strike — Whether Federal Court of Appeal drew a non-existing distinction between negligent "implementation" and "adjudication" by an administrative tribunal pursuant to Holland v. Saskatchewan, 2008 SCC 42, [2008] 2 S.C.R. 551 — Whether "material proof" in pleadings is required to meet bad faith exception to immunity from civil action, pursuant to s. 156(a) of the Immigration and Refugee Protection Act, S.C. 2001, c. 27 — Whether Federal Court has concurrent jurisdiction, in habeas corpus, in context of a Federal scheme, in this case, immigration, in accordance with Idziak v. Canada (Minister of Justice), [1992] 3 S.C.R. 631.

Case Summary:

The applicants, Zhenhua Wang and Chunxiang Yan, alleged they were wrongfully arrested and unlawfully detained because of false information that the Canada Border Services Agency ("CBSA") and the Minister of Citizenship and Immigration ("CIC") officials knowingly or negligently relied upon in the prosecution of their immigration detentions. In their statement of claim, the applicants alleged that named and unnamed officials misrepresented evidence, conspired to deprive the applicants of a fair hearing and sought to punish the applicants for bringing refugee claims. The applicants sought damages against the numerous named and unnamed respondents.

The respondents sought to strike out the statement of claim filed by the applicants pursuant to r. 221 of the *Federal Courts Rules*, SOR/98-106, on the basis that it disclosed no viable cause of action. At the Federal Court, the motions judge allowed the motion to strike the statement of claim. Leave to amend or re-file the action was granted in part. The Federal Court of Appeal dismissed the appeal.

Counsel

Rocco Galati (Rocco Galati Law Firm Professional Corporation), for the motion.

James Todd (A.G. of Canada), contra.

Chronology:

1. Application for leave to appeal:
   FILED: September 18, 2018.

   SUBMITTED TO THE COURT: January 21, 2019.

   DISMISSED WITH COSTS: February 21, 2019 (without reasons)

   Before: R.S. Abella, C. Gascon and R. Brown JJ.

   The motion for an extension of time to serve and file the application for leave to appeal is granted. The application for leave to appeal from the judgment of the Federal Court of Appeal, Number A-339-16, 2018 FCA 46, dated February 28, 2018, is dismissed with costs in accordance with the tariff of fees and disbursements set out in Schedule B of the Rules of the Supreme Court of Canada.

Procedural History:

Motion to strike allowed and statement of claim struck. Leave to amend or re-file action granted in part.
September 16, 2016
Federal Court
Barnes J.
2016 FC 1052

Appeal dismissed.
February 28, 2018
Federal Court of Appeal
Webb, Rennie and Gleason JJ.A.
2018 FCA 46; [2018] F.C.J. No. 268

End of Document

FORM 36
(RULE 9-8 (1))

No. VLC-S-S217586
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 — Plaintiff(s)

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) — Defendant(s)

NOTICE OF DISCONTINUANCE

Filed by: Rocco Galati Law Firm PC

TAKE NOTICE that Kimberly Woolman, The Estate of Jaqueline Woolman

[*Check whichever one of the following boxes is correct and complete the required information.*]

☒ discontinue(s) this proceeding against

Her Majesty the Queen in right British Columbia, Prime Minister Justin Trudeau, Chief Public Health Officer Theresa Tam, D

☐ discontinue(s) the following claim(s) in this proceeding against

[*Check the correct box(es).*]

☒ Notice of trial has not been filed

☐ Notice of trial has been filed and this discontinuance is

- ☐ with the consent of all parties of record
- ☐ by leave of the court

Date:
25 May 2022

Signature of

☐ filing party ☒ lawyer for filing party(ies)

Rocco Galati. B.A., LL.B., LL.M.