

The Charter in Administrative Law: Unfulfilled Promises and Future Prospects

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The unfulfilled promise of s. 7 of the Charter

When the *Charter* first became part of our law, many administrative law practitioners were optimistic that s. 7 of the *Charter* might have wide application in *Charter* proceedings. However, this promise has not been fulfilled.

The limited scope of the rights to liberty and security of the person

Administrative tribunals and civil courts are subject to obligations to afford procedural fairness at common law but those obligations can be ousted by clear statutory wording. Can the Charter limit such statutes and guarantee procedural fairness?

The answer to that question depended on how the Court interprets s. 7 of the Charter. Section 7 is the one right under the Charter that theoretically speaks to the issue of procedural fairness. Section 7 guarantees the application of the principles of fundamental justice to those whose rights to liberty and security of the person are infringed. The principles of fundamental justice seem susceptible to an interpretation that would include procedural fairness. Obviously, the broader the interpretation of the rights to liberty and security of the person, the broader the scope of constitutional protection for procedural fairness. A bold court in the area of procedural matters would be inclined to give the rights to liberty and security of the person a broad interpretation to ensure that the standards of "fundamental justice" have a broad application.

However, the rights to liberty and security of the person have been given a fairly narrow interpretation. Perhaps the best way to illustrate this is a close examination of the recent administrative law case of *Blencoe v. British Columbia (Human Rights Commission)*.¹

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Blencoe was a British Columbia Cabinet Minister who was subject to complaints of sexual harassment before the British Columbia Human Rights Commission. The incidents were alleged to have occurred between 1993 and 1995. In November, 1995, the Tribunal informed Blencoe that it set down the matter for hearing for March, 1998.

Blencoe brought a proceeding in the British Columbia Supreme Court alleging that his rights under s. 7 of the Charter and at common law were infringed as a result of undue delay. Blencoe relied on more than just the effluxion of time. Two potential witnesses had died. At first glance, this is a powerful argument, as the Supreme Court had already recognized that in the criminal context, the death of a key witness is sufficient prejudice for even a corporation to mount an unreasonable delay claim under s. 11(b) of the Charter.² Blencoe also raised other important forms of prejudice including unwanted media attention, treatment for depression, inability to be employed while the matter remained outstanding and having to leave British Columbia to escape the scandal.

At this point in the development of Charter jurisprudence, it seemed that Blencoe might get his relief under s. 7 of the Charter. The Supreme Court had already recognized pre-charge delay under s. 7 of the Charter in criminal proceedings.

Further, the success of Blencoe's Charter argument very much turned on the extent to which the principles of fundamental justice applied to administrative hearings generally and there had been some recent movement in that area. The principles of fundamental justice apply when a person's right to liberty and security of the person are threatened or infringed. By the time of Blencoe's argument in the Supreme Court, the scope of the rights to liberty and security of the person under s. 7. had broadened.

¹ [2000] 2 S.C.R. 307.

² *R. v. C.I.P. Inc.*, [1992] 1 S.C.R. 843.

In the first few cases under s. 7 of the Charter, the Court seemed to limit the rights to liberty and security of the person to freedom from physical constraint and imprisonment.³ Civil and administrative proceedings do not usually implicate the right to liberty and security of the person in this sense⁴ and so the broad "principles of fundamental justice" do not apply. A forest of authority against the general application of s. 7 to private law civil and administrative proceedings grew.⁵

The prospects for any further expansion of the scope of s. 7 were bleak: after all, in an early case only half of the Court accepted that immigration decisions concerning whether a person is a convention refugee affect the person's rights to liberty and security of the person⁶ and a little while later, even that was cast into doubt.⁷ The one glimmer of hope was *R. v. Morgentaler* in which the Court canvassed the possibility of infringements of privacy and psychological well-being associated with the statutory procedures for obtaining a therapeutic abortion but the decision could be explained as a security of the person case that would not affect a significant number of administrative tribunals.

Suddenly, in 1995, there was a marked broadening of the Court's view of the rights to liberty and security of the person. In *R. v. O'Connor*, four of nine Justices held that privacy interests are included in the right to liberty.⁸ Half of the Justices in *B.(R.) v. Children's Aid Society of Metropolitan Toronto* held that these rights included the right to make decisions of

³ See, e.g., *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486.

⁴ The only exception in civil and administrative law contexts is the issuance of subpoenas that are punishable through imprisonment levied as a result of a contempt proceeding. See *Thomson Newspapers Ltd. v. Canada (Director of Research and Investigation)*, [1990] 1 S.C.R. 425; *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3.

⁵ *Irwin Toy v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 (the rights to liberty and security of the person do not include corporate commercial economic interests); *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, *supra*, n. 38; *Walker v. Prince Edward Island*, [1995] 2 S.C.R. 407; *Kopyto v. Law Society of Upper Canada* (1993), 107 D.L.R. (4th) 259 (Ont. C.A.), *Biscotti v. Ontario Securities Commission* (1991), 76 D.L.R. (4th) 762 (Ont. C.A.), *Bennett v. British Columbia (Securities Commission)* (1991), 82 D.L.R. 129 (B.C.C.A.) and *B.C. Teachers' Federation v. School District No. 39 (Vancouver)*, 2003 BCCA 100 (B.C.C.A.) (the rights to liberty and security of the person do not include the right to practice a profession or to pursue a livelihood); *Canadian Association of Regulated Importers v. Canada*, [1992] 2 F.C. 130 (C.A.).

⁶ *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177.

⁷ *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711.

⁸ [1995] 4 S.C.R. 411, *per* L'Heureux-Dubé J. at para. 113.

fundamental personal importance.⁹ Again, half of the Justices in *Godbout v. Longueil (City)* endorsed this approach.¹⁰ Finally, the court unanimously endorsed this approach in *New Brunswick (Minister of Health and Community Services) v. G.(J.)*¹¹ and opened the way to the use of the principles of fundamental justice in any administrative hearing concerning decisions of fundamental importance.

Right around the time of *Blencoe*, the Court had rendered decisions of breathtaking scope.¹² The facts of *Blencoe* were somewhat sympathetic. The table seemed set for expansion of the rights to liberty and security of the person under s. 7 and thus the broader applicability of the principles of fundamental justice to administrative tribunals.

Blencoe was a retrenchment. The Court confirmed that the right to liberty applied to "state compulsions or prohibitions" that affect "important and fundamental life choices".¹³ The Court did not allow an extension of *Godbout* to allow for the application of s. 7 to "any and all decisions that individuals might make in conducting their affairs".¹⁴ Further, the fact that a person was caught up in an accusatory regime potentially subject to significant remedial orders was irrelevant. Instead, only fundamental important decisions were within the protection of s. 7 - a holding of very limited impact to administrative tribunals.

As for security of the person, only state-induced stress that had a "serious and profound effect" or some effect upon "an individual interest of fundamental importance" was covered, not "the type of stress, anxiety and stigma that result from administrative or civil proceedings".¹⁵

⁹ *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, *per* La Forest J. writing for three of six Justices.

¹⁰ [1997] 3 S.C.R. 844, at para. 66 *per* La Forest J., writing for 3 of 6 justices (the right to liberty protects "those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence")

¹¹ [1999] 3 S.C.R. 46. See also *Winnipeg Child and Family Services (Northwest Area) v. G.(D.F.)*, [1997] 3 S.C.R. 925 (liberty to refuse state-imposed addiction treatment); *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46 (parental rights in the custody context).

¹² *Ref. re Remuneration of Judges of the Prov. Court of P.E.I.*; *Ref. re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 S.C.R. 3; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

¹³ *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, at 340.

¹⁴ *Ibid.*, at 341.

¹⁵ *Ibid.*, at 355-356. Bastarache J. later (at 365) virtually excludes the principles of fundamental justice (and thus constitutionalized procedural fairness) from having any impact in most administrative law contexts when he states that "[i]f the purpose of the impugned proceedings is to provide a vehicle or act as an arbiter for redressing private

The types of matters allegedly suffered by Blencoe - quite extreme - were not covered and there was no interference with his ability to "make essential life choices"¹⁶

Blencoe has slammed the door on the application of the principles of fundamental justice - where constitutionalized procedural fairness resides - to most administrative tribunals and civil courts. Constitutionalized procedural fairness is something potentially¹⁷ afforded in criminal proceedings but is not generally available elsewhere.¹⁸

The definition of the principles of fundamental justice – limited impact on “fair hearing”

A big reason why the *Charter* has not had such a large impact in administrative law is that the principles of fundamental justice have been restrictively interpreted, especially in the area of procedural rights.

While the "purposive approach" held sway when defining the substantive content of most of the *Charter* sections and when defining the substantive content of the principles of fundamental justice, it has been noticeably absent when defining the procedural content of the principles of fundamental justice.

rights, some amount of stress and stigma attached to the proceedings must be accepted" and in that same paragraph he seemed to identify matters such as "regulation of a business, profession or other activity" and a "civil suit involving fraud, defamation or the tort of sexual battery" as situations of acceptable stress and stigma.

¹⁶ *Ibid.*, at 358.

¹⁷ I say "potentially" because there are many, many examples of shyness on the part of the Court in applying aggressive notions of procedural fairness in criminal contexts.

¹⁸ In *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, McLachlin C.J.C., writing for a majority of the Supreme Court, observed (at paras. 78-79) without deciding the issue that the simple presence of adjudicative proceedings "might be sufficient" for s. 7 to apply. Deprivations of liberty and security of the person "that occur as a result of an individual's interaction with the justice system and its administration", meaning "the state's conduct in the course of enforcing and securing compliance with the law", are protected by s. 7 (para. 77). McLachlin J. did not decide the point but rather left the issue of when s. 7 applies to matters concerning the administration of justice to be developed "incrementally" (para. 79). This incremental development, however, is unlikely to allow for the full scale importation of the principles of fundamental justice into civil and criminal proceedings - the Court will not be inclined to overrule *Blencoe* and the other cases concerning the rights to liberty and security of the person, cited *supra*.

The principles of fundamental procedural justice are the longstanding, time-honoured principles of our legal system.¹⁹ They are not the principles which the judiciary today believes ought to be part of fundamental justice but instead reflect what our legal system has accepted for decades.

The principles of fundamental procedural justice have been viewed as minimally acceptable standards of fair treatment, not higher standards that procedural regimes should rise to meet.

One of the most influential cases concerning procedural rights in the Charter was *R. v. Lyons*. It is influential because it was one of the first purely procedural cases to be decided by the Supreme Court of Canada.

In the course of its reasons in *Lyons*, the Court held that "s. 7 of the *Charter* entitles the appellant to a fair hearing; it does not entitle him to the most favourable procedures that could possibly be imagined".²⁰ This particular comment has cast a long shadow: it been repeatedly applied in the Court's jurisprudence concerning procedural rights under the Charter.²¹ Provided a procedure meets minimal levels of fairness, it is acceptable.

The principles of fundamental justice include a concept of a procedurally fair hearing before an independent and impartial decision-maker²² but these only enshrine what was available under the common law²³ and apply only if there is a breach of the rights to liberty and security of the person and these have been interpreted restrictively. Absent these rights, and absent a charge

¹⁹ *Ref. re Motor Vehicle Act (B.C.)*, *supra*, n. 3.

²⁰ *R. v. Lyons*, [1987] 2 S.C.R. 309, at 362.

²¹ *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *R. v. Beare*, [1988] 2 S.C.R. 387 at 412; *Thomson Newspapers Ltd. v. Canada (Director of Research and Investigation)*, *supra*, n. 4 *per* La Forest J.; *R. v. L.(D.O.)*, [1993] 4 S.C.R. 419; *R. v. Harrer*, [1995] 3 S.C.R. 562; *R. v. Mills*, *R. v. Mills*, [1999] 3 S.C.R. 668, *per* McLachlin and Iacobucci JJ.

²² *Pearlman v. Manitoba Law Society Judicial Committee*, *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869.

²³ In *Pearlman*, the Court adopted the standards applied under administrative law cases outside the Charter. An attempt to use the requirement of independence and impartiality to attack the Minister's exercise of discretion under s. 25 of the *Extradition Act*, R.S.C. 1985, c. E-23 failed in *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631.

under s. 11, there is no general constitutional guarantee elsewhere or under the unwritten constitutional principles that a tribunal be independent and impartial and act fairly.²⁴

The recent case of *Suresh v. Canada (Minister of Citizenship and Immigration)* is very shy concerning the issue of hearing rights.²⁵ The case in part concerned the procedures that s. 7 required the Minister to follow in determining whether a refugee should be deported in circumstances where the refugee believes that he or she will be tortured or killed in the receiving country. The Court held that s. 7 of the *Charter* does not require the Minister to conduct a full oral hearing or judicial process. A refugee facing deportation to torture must be informed of the case to be met and this is to be accomplished by provision of written material to the refugee subject to privilege and other valid reasons for reduced disclosure. The refugee must be provided with an opportunity to respond in writing to the case presented to the Minister, and to challenge the Minister's information. In those submissions, the refugee is entitled to present evidence and make submissions.

I find *Suresh* to be a very restrictive decision in the area of procedural rights and s. 7. The interests at stake for the refugee are about as high as they can be - freedom from torture or death - and there is no doubt that part of the assessment is the credibility of the particular refugee. To hold that a written hearing is a satisfactory way of determining such important issues that may have matters of credibility bound up with them is astonishing!

The need for government confidentiality has been affirmed in many cases and has been invoked as a reason to deny disclosure in the administrative context.²⁶ In *Chiarelli*, although the Charter complainant faced serious consequences (deportation), the Court held that the rather limited documentation disclosed to him and the general summary from an *in camera* proceeding did not violate the principles of fundamental justice. Failure to disclose evidence will not be a problem if, after the fact, the court considers it "an omission of much significance".²⁷

²⁴ *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781.

²⁵ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3.

²⁶ See, e.g. *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711 and *Suresh v. Canada (Minister of Citizenship and Immigration)*, *ibid.*

²⁷ *B.(R.)*, *supra*, n. 9, at 379. This is a high threshold.

The unfulfilled promise of the unwritten constitutional principles in administrative law

The existence of unwritten constitutional principles gave rise to the possibility that procedural rights, such as the right to a hearing by an independent tribunal, might be available to administrative tribunals despite the absence of s. 7 protection. The unwritten constitutional principles had been applied to guarantee the independence of provincial courts in non-criminal jurisdiction despite the fact that they did not enjoy the protection of s. 11(d) of the Charter or ss. 96-101 of the *Constitution Act, 1867*.²⁸ Could the unwritten principles be applied to administrative tribunals?

In *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, the Supreme Court rejected that argument at least in the case of regulatory tribunals with a fair degree of policy content to their decisions.²⁹ In *Bell Canada v. Communications, Energy and Paperworkers Union of Canada, et al.*, Bell argued that the unwritten principle of adjudicative independence developed in the *Judges Reference* applies to purely adjudicative, "court substitute tribunals" such as the Canadian Human Rights Tribunal. The Supreme Court of Canada has rejected the argument.³⁰ It is now difficult to conceive of the unwritten principles having much of an impact in the area of administrative law.

Procedural rights in s. 11 of the Charter

Section 11 contains a significant number of important procedural guarantees. On the basis of the text of s. 11, the procedural guarantees have been restricted to criminal law contexts or contexts where a "true penal consequence" is involved.³¹ It is interesting that the decision which so limited the application of s. 11 of the Charter, *R. v. Wigglesworth*, did not even once

²⁸ *Judges Reference*, *supra*, n. 12.

²⁹ *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, *supra*, n. 24.

³⁰ [2003] 1 S.C.R. 884.

mention the purposive approach even though it was very much in vogue at that time and much of the decision is a careful analysis of the wording of the Charter sections.

Section 11 and the various *Charter* guarantees in it, especially the s. 11(d) right to a fair trial do not generally apply to those in civil proceedings³² or administrative proceedings³³. Interestingly, while s. 7 has been interpreted to provide "residual protection" for matters not expressly covered by s. 11(c), s. 7 has not been used to afford "residual protection" for procedural protections in administrative law and civil cases.

Further, the test set out for the application of s. 11 of the Charter in *R. v. Wigglesworth* has itself been restrictively interpreted: for example, the s. 11 procedural rights are not available for penitentiary discipline that can lead to loss of remission and solitary confinement.³⁴

Although the jurisprudence is not yet supportive of the application of s. 11 to administrative proceedings, it may be that large penalties imposed by administrative tribunals, such as securities commissions, which are imposed in part for general deterrence purposes may attract s. 11 because they impose "true penal consequences".³⁵ Administrative monetary penalty regimes may also attract scrutiny under s. 11 and the other criminal law protections in the *Charter*.³⁶

Issues for the future

So far we have examined a number of ways in which the *Charter* has not had wide application in administrative law. However, it would be a mistake to think that the *Charter* has no relevance to administrative proceedings. There are many "hot" issues in the area of

³¹ *R. v. Wigglesworth*, [1987] 2 S.C.R. 541.

³² See, e.g., *Wittman v. Emmott* (1991), 77 D.L.R. (4th) 77 (B.C.C.A.).

³³ See, e.g., *R. v. Wigglesworth*, *supra*, n. 31.

³⁴ *R. v. Shubley*, [1990] 1 S.C.R. 3.

³⁵ See *Re Cartway Resources Corp.*, 2004 SCC 26.

³⁶ See, e.g., *Environmental Protection Act*, R.S.O. 1990, c. E.19, s. 182.1.

administrative law and the *Charter*. I now turn to these, looking at possible developments in the future.

Striking sections and the policing of discretions

A key question in the law of *Charter* and administrative tribunals has been how courts should deal with an administrative regime that causes constitutional violations and this is likely to be a major area of development over the next few years. Should courts deal with exercises of administrative discretions that violate constitutional rights on a case by case basis? Or should courts find the statutory scheme constitutionally deficient and strike down one or more sections in the administrative regime?

Up until now, very little guidance on these questions has been given. In part this is because counsel prosecuting or defending *Charter* claims are not aware of the issue and do not make submissions on it.

The approaches of the Supreme Court on this issue have been somewhat inconsistent. In the area of the criminal law, the Supreme Courts had to deal with this issue fairly early on in the life of the *Charter* when considering a deficient search provision³⁷ and minimum sentence provisions in the *Criminal Code* – should it strike the sentencing provision or leave it to prosecutors to conduct themselves so the minimum sentence provision would never be relied upon in circumstances where it would constitute cruel and unusual punishment?³⁸ The Supreme Court, those cases, answered it with a resounding “no”.

In a relatively recent decision in the criminal context, the Supreme Court found a legislative regime for law office searches deficit and held that it was appropriate to strike it down rather than to rely upon the actors within the regime to obey *Charter* principles.³⁹

³⁷ *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145.

³⁸ *R. v. Smith*, [1987] 1 S.C.R. 1045.

³⁹ *Lavallee, Rackel & Heintz v. Canada (Attorney General)*; *White, Ottenheimer & Baker v. Canada (Attorney General)*; *R. v. Fink*, [2003] 3 S.C.R. 209.

However, this approach is not universally followed in the criminal law. In *R. v. Jarvis*⁴⁰ and *R. v. Ling*,⁴¹ the Supreme Court considered the constitutionality of income tax requirements and demands under ss. 231.1 and 231.2 of the *Income Tax Act*. The Supreme Court held that regulatory and spot-check searches, such as income tax audits, under these provisions were constitutional but that such searches would not be constitutional if they were used for the purpose of acquiring evidence (without satisfying the *Hunter v. Southam* reasonable and probable grounds) for criminal proceedings during a criminal investigation. Accordingly, these sections under the *Income Tax Act* authorize both constitutional and unconstitutional behaviour.

It seems, however, from the Court's rulings in *Jarvis* and *Ling* that that does not open up the possibility of an attack. Instead, one is to examine the procedures taken under the sections and assess the constitutionality of the procedures themselves. Just because a section can be used in an unconstitutional way does not mean that the section itself is unconstitutional.

Outside of criminal contexts, courts will occasionally rely upon the discretion of administrative officials in order to ensure that *Charter* breaches are not present and will not strike down regimes that are arguably deficient.

Perhaps the most noteworthy example of this occurred in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*.⁴² The *Charter* complainant in that case, a lesbian and gay bookstore that imported materials from the United States, found that much of its material failed to reach it due to an unpredictable and, in its view, arbitrary regime for the inspection and review of imported material by Canada Customs personnel. It alleged breaches of ss. 2(b) and 15 of the *Charter*.

Although finding *Charter* violations, the majority of the Supreme Court did not strike down any of the legislative regime, and instead considered it appropriate merely to set out a number of principles by which Canada Customs should operate in the future. The Supreme

⁴⁰ [2002] 3 S.C.R. 757.

⁴¹ [2002] 3 S.C.R. 814.

⁴² [2000] 2 S.C.R. 1120.

Court did not grant any form of supervision remedy similar to what was granted in *Doucet-Boudreau*, but such a remedy does not appear to have been sought.⁴³

We might expect in the future that cases such as *Little Sisters*, where the majority of the Court declined to grant any remedy for a *Charter* infringement, will be rare, largely because of *Doucet-Boudreau*, an authority in favour of judicial supervision of the executive in certain situations and an authority with sweeping language about the need to vindication of *Charter* rights and address *Charter* infringements.

However, today we are left in a state of confusion about this area of law. Although statements against leaving the issue of *Charter* compliance to the discretion of criminal prosecutors can be contrasted with what the Supreme Court did in *Little Sisters* – perhaps leading us to conclude that there is a criminal-civil distinction in this area – the Supreme Court has not examined the point in much detail. Perhaps in the next five years we will have a key decision on point.

Towards a coherent theory of public law civil liability

In recent years, suits against government for damages have become more and more common. This is perhaps reflective of an increasing public consciousness, likely caused by the *Charter*, that people possess rights against government.

There are many different ways in which governments can be liable for damages: negligence,⁴⁴ the tort of abuse of public office,⁴⁵ malicious prosecution,⁴⁶ bad faith decision-

⁴³ Nor were any s. 24 *Charter* remedies sought in the Supreme Court. The *Charter* claimants rested their remedial claim entirely on s. 52 of the *Constitution Act, 1982*, likely tying the Supreme Court's hands on the issue of remedy.

⁴⁴ *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201; *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298. For recovery, one must demonstrate that government, in an operational aspect (as opposed to policy) owes a duty of care, has performed below a standard of care and has caused damage. See also the analysis in *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 at paras. 52-72 (police); *Cooper v. Hobart*, [2001] 3 S.C.R. 537 (registrar of mortgage brokers acting under authority of statute); *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12 (Minister); *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562 (law society acting under authority of statute).

making⁴⁷ and violations of the *Charter*.⁴⁸ Negligent policy-making,⁴⁹ careless exceedance of legal authority⁵⁰ and passing invalid legislation⁵¹ do not give rise to a cause of action.

These various areas of government liability have been developed separately, without regard to each other. As a result, they specify tests and *mens rea* requirements that are different from each other. Yet, the policy concerns articulated in these cases are often exactly the same. There is a general concern expressed in the cases against the inhibiting effect on the actions of government that would be caused by imposing too great a liability on government. Another frequently expressed concern is the indeterminate nature of governmental liability if the gates are thrown open too widely.

In my view, in the future, we will begin to see courts developing a theory of governmental liability that is common to all of these torts. In the United States, a defence of “qualified immunity” has developed in the area of governmental liability and applies to all torts, constitutional and other causes of action, a defence that implements the public policy reasons against imposing broad liability against government.⁵² United States courts have also developed a rich jurisprudence concerning causation, remoteness, quantification of damage and assessment of punitive damages. Amazingly, this rich body of jurisprudence remains completely unexplored by Canadian courts. I expect that in the next few years, it will be discovered and applied in

⁴⁵ *Odhavji Estate*, supra, n. 44. One must establish that the public officer engaged in deliberate and unlawful conduct in his or her capacity as a public officer and that the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff.

⁴⁶ *Proulx v. Quebec (Attorney General)*, [2001] 3 S.C.R. 9. The gist of this cause of action is malice and bad faith.

⁴⁷ *Gershman v. Manitoba (Vegetable Producers’ Marketing Board)*, [1976] M.J. No. 129 (Man. C.A.). Bad faith is central to recovery.

⁴⁸ *Mackin v. New Brunswick (Minister of Finance)*; *Rice v. New Brunswick*, [2002] 1 S.C.R. 405; *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347. In *Mackin*, the court (at para. 82) suggested that damages will follow when a government authority acts “negligently, in bad faith or by abusing its powers”. Elsewhere (in para. 79), the Court suggests that damages may be awarded “only in the event of conduct that is clearly wrong, in bad faith or an abuse of power”. This ambiguity in the criteria for awarding damages needs to be clarified.

⁴⁹ *Just v. British Columbia*, [1989] 2 S.C.R. 1228; *City of Kamloops v. Nielsen*, [1984] 2 S.C.R. 2; *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445.

⁵⁰ *Odhavji Estate*, supra, n. 44.

⁵¹ *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1169; *Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957; *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42.

⁵² E.g., *Saucier v. Katz*, 533 US 194 (2001). See, generally, Michael L. Wells and Thomas A. Eaton, *Constitutional Remedies: A Reference Guide to the United States Constitution* (2002) and Peter L. Strauss, *Administrative Justice in the United States* (2d ed., 2002). An excellent analysis of governmental liability in the British Commonwealth (particularly Australia and the United Kingdom), thus far not cited by any Canadian court, is Susan Kneebone, *Tort Liability of Public Authorities* (1998).

Canada and we will begin to see a more general, uniform approach to governmental liability adopted in Canada.

The law on damages against administrative boards and government is probably best described as underdeveloped. Perhaps soon we will know much more about the remedy of damages under s. 24(1) of the *Charter* awarded for *Charter* violations – so-called “constitutional torts”. In *Mackin*,⁵³ the court spoke of a requirement for recovery that one show that the government is “clearly wrong” or has exercised “bad faith” but, unhelpfully, it did not define or explain those terms.⁵⁴ Perhaps it will have an opportunity to do so in the near future: before the Supreme Court is the *Auton* case, a claim for damages under ss. 15 and 24(1) of the *Charter* against the British Columbia government for its failure to provide funding for treatment for autism.⁵⁵

The *Auton* case is also noteworthy for its award of “symbolic damages”. These are damages designed not to compensate *Charter* claimants but instead to symbolize “in some tangible fashion, the fact that [they] have achieved a real victory”. In *Auton*, the symbolic damages acknowledged “the intransigence of the government in responding to long-standing requests and demands for autism treatment”.⁵⁶

The award of symbolic damages is a novel remedial approach. We will soon learn from the Supreme Court in *Auton* whether it is appropriate. If so, I foresee the use of “symbolic damages” to address *Charter* violations where there is no obvious alternative remedy available, such as where a criminal accused has established a *Charter* violation and is not entitled to a stay of proceedings but the court considers that some remedy nevertheless should be granted.

⁵³ *Supra*, n. 48.

⁵⁴ The test was reiterated without elaboration in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30, at para. 26.

⁵⁵ *Auton v. British Columbia (Attorney General)* (2002), 6 B.C.L.R. (4th) 201 (C.A.) (declaration of a positive obligation to fund, with the court prepared to issue a mandatory order if the government fails to implement the obligation).

⁵⁶ *Ibid.*, at para. 64.

In the case of damages for breach of the *Charter*, there are many questions still to be worked out, including the availability of punitive damages,⁵⁷ rules concerning causation, foreseeability and remoteness of damage and the extent to which intangible losses and “pain and suffering” are recoverable.⁵⁸

Access to evidence for public law challenges

One remedial issue that is not squarely on the legal map today but which is likely to become very important over the next five years is pre-hearing access to evidence for public law challenges. This is because courts recently have introduced legal tests requiring hard-to-obtain and sensitive evidence.

For example, in determining whether an administrative official has the power to demand documents or force individuals to answer questions without restrictions imposed by the *Charter*, one must determine what is the predominant purpose of the administrative official’s investigation, a matter fraught with sensitivity. If the purpose is criminal prosecution, ss. 7 and 8 of the *Charter* limit the official’s powers. If another purpose, such as a purely regulatory purpose, then the official may proceed without restriction from the *Charter*.⁵⁹

⁵⁷ In *Patenaude v Roy* (1994) 123 D.L.R. (4th) 78 (Que. C.A.) exemplary damages of \$50,000 were awarded by the trial judge for a deliberate violation of the Quebec Charter of Human Rights and Freedoms, where police officers used excessive and unnecessary force in executing a search warrant. This decision was upheld on appeal and the appeal court increased the award of exemplary damages to \$100,000.

⁵⁸ The main debate here is whether the rules applicable to common law torts apply in the case of constitutional torts. Much guidance can be obtained from abroad. Many cases suggest that constitutional torts do not necessarily follow common law tort principles, as a constitutional tort is not a common law tort: *Simpson v Attorney-General (Baigent’s case)*, [1994] 3 N.Z.L.R. 667 (C.A.); *Maharaj v Attorney-General of Trinidad and Tobago* (No. 2), [1979] A.C. 385 (P.C.); *The State (At the Prosecution of Quinn) v Ryan*, [1965] I.R. 70, 122; *Kearney v Minister for Justice Ireland and the Attorney General*, [1986] I.R. 116, 122; *Byrne v Ireland*, [1972] I.R. 241, 264-265, 297-9, 303 and *Meskeil v Córas Iompair Eireann*, [1973] I.R. 121, 132-133; *Nilabati Behera v State of Orissa*, [1993] A.I.R. 1960 (S.C.) 1969; *Saman v Leeladasa and Another*, [1989] 1 Sri. L.R. 1 (SC). It may be that intangible harm such as distress and injured feelings may be the subject of compensation: *Simpson v Attorney-General (Baigent’s case)*, [1994] 3 N.Z.L.R. 667 (C.A.) at 678. Contra, *Memphis Community School District v Stachura*, 477 U.S. 299 (1986) (damages for breach of constitutional rights under *United States Code*, s. 1983); the situation may be different for damages as a constitutional remedy outside of the *United States Code*: *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

⁵⁹ See generally *R. v. Jarvis*, *supra*, n. 40 and *R. v. Ling*, *supra*, n. 41.

In the area of damages, the motivations, purposes and intentions of the relevant officials are central.⁶⁰

In administrative law, the area of abuse of discretion and improper purpose may be increasing in importance.⁶¹ In these cases, the purposes and intentions of senior governmental officials may be relevant.

In the area of justification under s. 1, the motivations, purposes and intentions of senior governmental officials may be relevant.

The evidence of motivations, purposes and intentions is sometimes evident in documents, but sometimes it is not. In public law cases, access to this sort of evidence is often hard to come by. Evidence of *mens rea*, intention and purpose is the very sort of evidence that gives rise to claims of Crown privilege,⁶² the secrecy provisions under the *Canada Evidence Act*,⁶³ exemptions under freedom of information legislation⁶⁴ and discovery objections. Frequently it is not part of the record that must be passed in judicial review proceedings.⁶⁵ Some attempts to subpoena evidence arguably necessary to satisfy a legal test in a constitutional case have failed.⁶⁶ I expect that these issues – best described as remedies concerning pre-trial and interlocutory access to evidence – will be a more significant area of litigation over the next five years. *Charter* and other constitutional standards may also be brought to bear in this litigation.⁶⁷

⁶⁰ See text to nn. 53-58, *supra*.

⁶¹ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

⁶² *Carey v. Ontario*, [1986] 2 S.C.R. 637.

⁶³ R.S. 1985, c. C-5, ss. 37-39, as added by 2001, c. 41, s. 43. See *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 (national security); *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3.

⁶⁴ *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31.

⁶⁵ *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1; *Federal Court Rules*, SOR/98-106, Rule 317.

⁶⁶ See *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3.

⁶⁷ A right to a fair trial, which includes access to evidence necessary to prove one's case, has now been recognized as having some constitutional force in the civil context: *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 at para. 50. The issue of access to evidence in certain circumstances may raise s. 2(b) *Charter* issues and other constitutional issues. Section 2(b) has not been raised against the secrecy provisions of the *Canada Evidence Act* but an attack based on the unwritten principles and s. 96 of the *Constitution Act, 1867* has been rejected: *Babcock v. Canada (Attorney General)*, *supra*, n. 63. A constitutionalized guarantee of freedom of expression has been used to limit the scope of Crown privilege in India: *S.P. Gupta v. President of India and Ors*, [1982] A.I.R. (S.C.) 149. As for freedom of information legislation, the fundamental importance of freedom of information in a democracy has been recognized (*Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403) and a underlying constitutional principle of democracy that can be asserted as a cause of action has been recognized (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217), which leads to the possibility of direct attacks against

Further, I expect that increasingly courts will strive to adopt creative means by which a balance can be achieved between the ability of litigants to litigate their public law cases while maximizing government confidentiality. A good example is seen in a recent British Columbia case where access to cabinet documents for the purposes of litigating a *Charter* case was given but on extremely strict conditions, including written undertakings.⁶⁸

The jurisdiction of administrative tribunals to grant Charter remedies

The Supreme Court has recently clarified whether administrative tribunals can use s. 52 of the *Constitution Act, 1982* to refuse to apply unconstitutional laws.⁶⁹ It answered this in the affirmative, by confirming that if a tribunal has an implied power to determine *any* legal questions, it has the jurisdiction to decide the constitutional validity of its provisions.⁷⁰ In answering this question, it resolved years of uncertainty.⁷¹ But plenty of uncertainty remains.

Suppose that an administrative tribunal has the power to refuse to apply unconstitutional laws under s. 52 of the *Constitution Act, 1982*. Does the tribunal have *all* of the remedial powers that a court has under that section? For example, a court has the power to delay a declaration of invalidity in order to give the Legislature an opportunity to enact a new law. Does a tribunal have this power? There is a good case to suggest that a tribunal does not have this power: the remedial jurisdiction of tribunals is not inherent and is likely limited to what has been granted to

limitations in freedom of information legislation. On some of these issues, see *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)*, unreported, Ont. Div. Ct., March 25, 2004 (application dismissed).

⁶⁸ *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*, 2002 BCSC 1509 (S.C.).

⁶⁹ *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 S.C.R. 504.

⁷⁰ *Ibid.* at para. 50.

⁷¹ The Court had confirmed the ability of tribunals to refuse to apply unconstitutional laws in *Douglas/Kwanten Faculty Association v. Douglas College*, [1990] 3 S.C.R. 570 at 594, *Cuddy Chicks Ltd. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5 at 13 and *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22 at 35 but seemed to retreat from that position in *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, when the majority held that there was a requirement of an express or implied authorization to determine questions of law. McLachlin J.'s dissent in *Cooper* (especially at para. 70) underscored the fact that there was a retreat. The open question, after *Cooper*, was what constituted implied authorization. An implied authorization to consider the tribunal's governing legislation was not enough. The Court in *Martin*, *supra*, n. 67, ended this distinction – an authorization, express or implied, to determine questions of law is sufficient.

them under statute.⁷² However, a broader, more purposive approach to the issue would imply this jurisdiction as a necessary adjunct to the tribunal's jurisdiction to grant a *Charter* remedy.⁷³

What about statutory courts, such as preliminary inquiry courts? There is no reason why they should stand in a different position from administrative tribunals. As a logical matter, if the latter have the power to decline to apply unconstitutional legislation, so should the former. However, the Court's holding in *Seaboyer* stands in the way, at least in the case of preliminary inquiry judges.⁷⁴ In that case, the Supreme Court held that preliminary inquiry judges have no jurisdiction to determine the constitutionality of evidentiary legislation under s. 52 of the *Constitution Act, 1982*. I would expect that this holding will be challenged in the near future, but that the challenge will face difficulty in light of the Supreme Court's ruling in *R. v. Hynes*,⁷⁵ in which preliminary inquiry judges were held not to possess jurisdiction to grant remedies under s. 24 of the *Charter* because of the limited nature of their task.

If administrative tribunals have the power to use s. 52 of the *Constitution Act, 1982*, do they have the jurisdiction to use s. 24 of the *Charter*? Interestingly, the test is not the one set out in *Martin*, whether the authority to grant s. 24 remedies has been granted, expressly or impliedly, by legislation. Instead, the court has specified a "functional-structural" approach, an approach that seeks to determine legislative intent by looking at the function and structure of the tribunal in question to see whether the tribunal is suited to grant the remedy sought.⁷⁶

One issue that may be clarified in the next five years is whether it is necessary for a party requesting a s. 24 *Charter* remedy to show that the administrative tribunal has the statutory jurisdiction to grant such a remedy. Initial indications are that while an express provision

⁷² *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575.

⁷³ See, e.g., *974649 Ontario Inc.*, *ibid.*, in which the Supreme Court (in paras. 93-97) found that provincial offences courts, statutory courts with no inherent jurisdiction, possessed the power to award costs as a s. 24 *Charter* remedy even though there is no provision in the *Provincial Offences Act* expressly granting the jurisdiction to award such costs.

⁷⁴ *R. v. Seaboyer*, [1991] 2 S.C.R. 577.

⁷⁵ [2001] 3 S.C.R. 623.

⁷⁶ *R. v. Hynes*, *ibid.*, and *R. v. 974649 Ontario Inc.*, *supra*, n. 72.

preventing the tribunal from awarding such a remedy will be fatal to the exercise of a s. 24 *Charter* remedy, the jurisdiction to award such a remedy may be implied.⁷⁷

As each tribunal has different functions and structures, I expect that over the next five years there will be a plethora of litigation applying these cases and testing whether particular tribunals have s. 24 remedial powers.

Standards of review on constitutional questions

As we all know, there have been many cases concerning the standard of judicial review of decisions of administrative tribunals. As for the standard of review of trial court judgments, there is the recent decision of the Supreme Court in *Housen v. Nikolaisen*.⁷⁸

Housen v. Nikolaisen has been applied in judicial review proceedings in support of holdings that findings of fact and findings of mixed fact and law by administrative tribunals should receive substantial deference.⁷⁹

What is the standard of review where questions of constitutional law or mixed fact and constitutional law are being considered by courts and administrative tribunals?

Declarations of invalidity made by tribunals are reviewable on the basis of a correctness standard and do not bind courts, other tribunals or even another panel of the same tribunal.⁸⁰

⁷⁷ See, e.g., 974649 *Ontario Inc.*, *ibid.*, in which the Supreme Court (in paras. 93-97) found that provincial offences courts, statutory courts with no inherent jurisdiction, possessed the power to award costs as a s. 24 *Charter* remedy even though there is no provision in the *Provincial Offences Act* expressly granting the jurisdiction to award such costs.

⁷⁸ [2002] 2 S.C.R. 235.

⁷⁹ *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2002] 4 F.C. 3 (C.A.).

⁸⁰ *Martin*, *supra*, n. 67, para. 31; *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585.

Pure questions of law determined by an administrative tribunal are reviewable on a correctness standard.⁸¹ An error of law by an administrative tribunal interpreting the Constitution can always be reviewed fully by a superior court. This seems consistent with earlier decisions.⁸²

In the rest of this area, however, it would seem that there is some confusion and uncertainty and some clarification from the Supreme Court of Canada would be helpful. It is expected that this will be a significant issue over the next five years.

Housen v. Nikolaisen and its holding that courts should defer to determinations of questions of mixed fact and law has occasionally been applied to courts and tribunals determining questions of mixed fact and constitutional law. In *Canada (Attorney General) v. Misquadis*,⁸³ Human Resources Development Canada refused to enter into Aboriginal Human Resources Development Agreements with organizations mandated by certain aboriginal communities. The Federal Court Trial Division held that the refusal constituted a violation of s. 15 of the *Charter*. The Federal Court of Appeal, however, held, applying *Housen v. Nikolaisen*, that the standard of review of that question, a question of mixed fact and constitutional law, was a matter on which the Federal Court of Appeal should defer.⁸⁴ The Court broadly declared that *Housen v. Nikolaisen* “applies to Charter cases in the same way as to other cases”.⁸⁵

The Federal Court of Appeal is not alone in this view. Two other Courts of Appeal support its decision and both of those decisions are cited by the Federal Court of Appeal in *Misquadis*. In both *R v. Coates*⁸⁶ and in *R. v. Chang*,⁸⁷ the Court of Appeal for Ontario and the

⁸¹ *Nova Scotia (Workers' Compensation Board) v. Martin*; *Nova Scotia (Workers' Compensation Board) v. Laseur*, *supra*, n. 69, applying *Cuddy Chicks Ltd. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5 at 17. The Court added that “an error of law by an administrative tribunal interpreting the Constitution can always be reviewed fully by a superior court”, perhaps leaving open the status of errors on questions of mixed fact and law.

⁸² *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 (*Seemle*, a standard of correctness was applied when considering whether a school board's decision was consistent with s. 15. Arbour J.A. in the Court of Appeal ((1995), 22 O.R. (3d) 1 at 7) specifically noted that the school board was normally entitled to deference but on constitutional questions the standard was correctness.)

⁸³ 2003 FCA 473.

⁸⁴ *Ibid.*, at para. 16.

⁸⁵ *Ibid.*

⁸⁶ [2003] O.J. No. 2295, at para. 20 (C.A.): “The decision in *Housen*, *supra*, stressed very strongly the need for great caution and deference on the part of appellate courts when they review the assessment of facts by a trial court. The rule in *Housen*, *supra*, does not, however, preclude an appellate court from identifying errors in the findings of fact

Alberta Court of Appeal respectively adopted deferential approaches to questions of mixed fact and constitutional law.

This approach is also consistent with other areas of constitutional law. In the area of exclusion of evidence under s. 24(2) of the *Charter*, the Supreme Court of Canada has long held the view that decisions by trial judges on questions of mixed fact and law (*i.e.*, whether evidence should be excluded or not) are subject to high levels of deference⁸⁸, though in some cases the standard is expressed at different levels.⁸⁹ The Supreme Court has made similar statements concerning other classic mixed fact and law questions with constitutional content, such as whether a confession is voluntary and thus compliant with s. 7,⁹⁰ whether a press ban or sealing order should be made,⁹¹ whether a prosecution constitutes an abuse of process under s. 7⁹² and whether reasonable and probable grounds are present.⁹³

However, there are authorities that seem to go in a different direction.

For example, determinations concerning the scope of a *Charter* right, which are often part and parcel of the question of the application of the *Charter* to a set of facts (*i.e.*, a question of mixed fact and law), have been said to be subject to a standard of correctness.⁹⁴

where those errors are sufficiently palpable and important and have a sufficiently decisive effect that they would justify intervention and review on appeal: *Prudhomme v. Prudhomme*, [2002] S.C.C. No. 85.”

⁸⁷ 2003 ABCA 293, at para. 7: “An appeal against a determination of whether a private citizen was acting as an agent of the state or whether s. 8 of the Charter was violated involves the application of a legal standard to a set of facts, which raises a question of mixed fact and law for which the standard of review lies along a spectrum: *Housen v. Nikolaisen* (2002), 286 N.R. 1, 211 D.L.R. (4th) 577, 2002 SCC 33 at para. 36.”

⁸⁸ *R. v. Buhay*, [2003] 1 S.C.R. 631, at paras. 44-45. The appreciation of whether the admission of evidence would bring the administration of justice into disrepute “is a question of mixed fact and law as it involves the application of a legal standard to a set of facts” and “[t]his question is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law”.

⁸⁹ Compare the standard discussed in *Buhay*, *ibid.*, with the standard expressed in *R. v. Stillman*, [1997] 1 S.C.R. 607, at para. 68 (adopted later in *R. v. Belnavis*, [1997] 3 S.C.R. 341, at para. 35): “some apparent error as to the applicable principles or rules of law or has made an unreasonable finding”.

⁹⁰ *R. v. Oickle*, [2000] 2 S.C.R. 3, para. 22.

⁹¹ *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, paras. 188-189.

⁹² *Semle, R. v. Regan*, [2002] 1 S.C.R. 297. The Supreme Court held that appellate courts were entitled to intervene with the trial judge’s finding of facts because of fundamental errors of principle and some palpable and overriding errors, though one could fairly state that a less deferential standard of review was in fact applied.

⁹³ *R. v. Feeney*, [1997] 2 S.C.R. 13, at para. 30. See also the highly deferential decision of the Supreme Court in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 (national security).

⁹⁴ *R. v. Ngo*, (2003) 175 C.C.C. (3d) 290, 2003 ABCA 121.

In *Westcoast Energy Inc. v. Canada (National Energy Board)*,⁹⁵ the majority of the Court ruled that questions of mixed law and fact are to be accorded some measure of deference, but not in every case. The majority held that it would be particularly inappropriate to defer to a tribunal whose expertise lies completely outside the realm of legal analysis on a question of constitutional interpretation. In its view, questions of this type must be answered correctly and are subject to being overridden by the courts. In the case before it, the National Energy Board's assessment regarding whether a set of pipelines constituted an interprovincial work or undertaking, normally a question of characterization or of mixed fact and law, was not entitled to deference. It was an opinion as to the constitutional significance of facts and, as such, was not entitled to deference.

The Supreme Court of Canada in *R. v. Jarvis*⁹⁶ held that the question of whether a particular investigation was a criminal investigation (and thus subject to stringent s. 8 *Charter* standards) or a regulatory investigation (and thus not subject to stringent s. 8 *Charter* standards) was a question of mixed fact and law which was "not immune from judicial review", suggesting perhaps that a measure of deference is warranted.⁹⁷ It then proceeded to examine the issue without much deference⁹⁸ and it did the same in the companion case of *Ling*.⁹⁹

How are the remedial choices of administrative tribunals or lower courts to be characterized? Are they issues of fundamental constitutional law inviting a correctness standard, or are they issues of fact and law, based on a substantial factual appreciation to which appellate or reviewing courts should defer? The Supreme Court in *Doucet-Boudreau* held that its analysis "does not preclude review on appeal of a superior court's choice of remedy under s. 24(1)", but it was silent as to the standard of review.

What is the standard of review of an interpretation of a statute on the basis of *Charter* values? Normally, tribunals seem to enjoy "reasonableness" standard of review for questions of

⁹⁵ [1998] 1 S.C.R. 322.

⁹⁶ *Supra*, n. 40.

⁹⁷ *Ibid.*, at para. 100.

⁹⁸ *Ibid.*, at paras. 100-105.

⁹⁹ *Supra*, n. 41.

interpretation of their own legislation¹⁰⁰ but does this change when questions of interpretation are imbued with issues of constitutional law? This has not been tested.

Is there a justification in this area for treating administrative tribunals differently from first-instance courts? In *Westcoast*, the Supreme Court held that “courts are in a better position than administrative tribunals to adjudicate constitutional questions” but this is not always the case, particularly where the administrative tribunal is comprised of legally trained individuals and the assessment of the issue of mixed fact and law is better placed with the tribunal because of its particular expertise on the factual elements of the question of mixed fact and law.¹⁰¹

It seems problematic to accord deference to decisions on questions of mixed fact and constitutional law when these questions are so central to the regime of rights protection. How do we reconcile those deferential approaches with the statement of the majority of the Supreme Court in *Doucet-Boudreau* that “[d]eference ends, however, where the constitutional rights that the courts are charged with protecting begin”?¹⁰²

The issue of standard of review in constitutional matters is not easy. Even in the area of questions of fact in constitutional cases, the “palpable and overriding error” standard, applied in all other contexts, is not automatic. There have been suggestions that review of “social” or “legislative” facts should be subject to a standard lower than palpable and overriding error.¹⁰³ In the words of the Supreme Court, “an appellate court may interfere with a finding of a trial judge respecting a legislative or social fact in issue in a determination of constitutionality whenever it finds that the trial judge erred in the consideration or appreciation of the matter.”¹⁰⁴ This makes sense: the rigid application of that rule would deny appellate courts their proper role in developing legal principles of general application.¹⁰⁵ Perhaps the same can be said for certain questions of mixed fact and constitutional law.

¹⁰⁰ *Macdonell v. Quebec (Commission d'accès à l'information)*, [2002] 3 S.C.R. 661.

¹⁰¹ *Supra*, n. 95, at para. 40.

¹⁰² *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, para. 36, citing McLachlin J. in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 136.

¹⁰³ *RJR*, *supra*, n. 102, at para. 174, *per La Forest J.* dissenting.

¹⁰⁴ *Ibid.*, at para. 81.

¹⁰⁵ *Ibid.*, at para. 80. See also *Dunagin v. City of Oxford, Mississippi*, 718 F.2d 738 (1983) (*en banc*), *cert. denied*, 467 U.S. 1259 (1984), cited in *RJR*, *supra*, n. 102.