Public Law Remedies: The Next Five Years

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Introduction

In this paper, I attempt to identify some of the issues that are likely to arise in the area of public law remedies over the next five years.

One safe prediction may be made. At the end of those five years, on May 28, 2009, we will recognize that our law of remedies has been shaped by some of the important developments that have taken place during 2000-2004. The analysis must start there.

Recent developments

The area of remedies in public law has seen some major recent developments, indeed most of them in the past year:

- We have received further guidance concerning when governments will be liable for damages, with developments in the area of negligence,[1] malicious prosecution,[2] abuse of public office,[3] constitutional torts[4] and the ability to seek damages alongside declarations of invalidity.[5]

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[1] *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298.
[2] *Proulx v. Quebec (Attorney General)*, [2001] 3 S.C.R. 9.
[3] *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263.
[4] *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.
[5] *Gosselin v. Québec (Attorney General)*, [2002] 4 S.C.R. 429 per Bastarache J. at para. 198 (the majority not commenting on the issue), perhaps carving back the general statement in *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 720, that an individual remedy under s. 24(1) will rarely be available in conjunction with an action under s. 52 of the *Constitution Act, 1982* as the striking down of the impugned legislation will be "the end of the matter" and no retroactive s. 24 remedy

- We have also received definitive guidance regarding the jurisdiction of tribunals and others to grant constitutional remedies.[6]

- Constitutional challengers can now be awarded interim costs.[7]

- Courts have the jurisdiction to supervise governments as they implement *Charter* rulings.[8]

- There have been some instances of aggressive reformulating of common law rules,[9] reading words out of legislation,[10] declarations requiring government to change its budgetary priorities,[11] declarations requiring the Legislature to legislate in a certain manner,[12] refusals to suspend declarations of invalidity and permit legislatures to fix the constitutional problem,[13] and mandatory orders or declarations akin to mandatory orders.[14]

I examine many of these developments in more detail below.

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will be available. See discussion, *infra*, text to nn. 36-38. To the same effect as *Schachter*, see *Guimond*, *ibid*.

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

[7] *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71.

[8] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3.

[9] *Halpern et al. v. Attorney General of Canada et al.* (2003), 65 O.R. (3d) 161 (C.A.) (common law rule reformulated immediately rather than issuing a suspended declaration). Compare *EGALE Canada Inc. v. Canada (Attorney General)* (2003), 225 D.L.R. (4th) 472 (B.C.C.A.) (suspended declaration).

[10] *R. v. Hall*, [2002] 3 S.C.R. 309.

[11] *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).

[12] *Polewsky v. Home Hardware* (2003), 66 O.R.(3d) 600 (Div. Ct.) (declaration that the Rule of Law and the common law constitutional right of access to justice compels the enactment of statutory provisions that permit persons to proceed *in forma pauperis* in the Small Claims Court).

[13] *Falkiner v. Ontario (Minister of Community and Social Services)* (2002), 59 O.R. (3d) 381 (C.A.), at paras. 114-118.

[14] *Polewsky v. Home Hardware*, *supra*, n. 12; *Ardoch Algonquin First Nation v. Canada (Attorney General)*, [2003] F.C.J. No. 1841 (F.C.A.); *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Auton v. British Columbia (Attorney General)*, *supra*, n. 11; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46.

Some might condemn these developments as anti-democratic judicial appropriations of the legislator's task[15] or contrary to a philosophy of judicial minimalism.[16] Others might praise them as necessary to vindicate constitutional rights and consistent with a healthy, functioning democracy.[17] The debate will still be raging on May 28, 2009!

Signs of change

But regardless of the side that one might take in that debate, five years from now all informed observers will probably agree that there were clear signs in 2003-2004 that big changes were possible.

Earlier this month, we were placed on notice that "the law is undoubtedly still in its early stages of development in this area" and we were alerted "to the need for flexibility and imagination in the crafting of remedies for infringements of fundamental human rights".[18]

In the area of administrative law, we have been placed on notice that the framework for analyzing when courts will quash administrative decisions – the standard of review issue – is now under critical scrutiny in our highest court.[19]

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[15] F.L. Morton and Rainer Knopff, *The Court Party* (Peterborough: Broadview Press, 2000) at 13: a "long tradition of parliamentary supremacy has been replaced by a regime of constitutional supremacy verging on judicial supremacy", with judges abandoning deference and self-restraint, transforming the courtroom into "a new arena for the pursuit of interest group politics". See also R. Bork, *Coercing Virtue: The Worldwide Rule of Judges* (Toronto: Random House, 2002).

[16] See, *e.g.*, Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge: Harvard University Press, 1999). See also D. Stratas, "*R. v. B. (S.A.)* and the Right Against Self-Incrimination: A Confusing Change of Direction" (2004), 14 C.R. (6th) 227 at 229 (discussion under the heading, "In praise of judicial minimalism").

[17] Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (2001), at 9 and ix: "the extent of judicial activism in Canada has been seriously exaggerated and, in any event, is not to be feared as inconsistent with democracy" and "democracy is improved when we are forced to consider the effects of our actions on the unpopular and disadvantaged and that an independent and courageous judiciary is the best institution we have to remind us of those concerns".

[18] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30, at para. 26.

[19] *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710 *per* LeBel J.; *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77 *per* LeBel J.; *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, 2004 SCC 23 *per* LeBel J. See discussion, *infra*, at text to nn. 132-146.

In the area of *Charter* remedies, we have been placed on notice that there is now a general basis upon which remedies under s. 24 of the *Charter* should be granted, a basis which may give rise to innovative remedial approaches.[20] The Supreme Court has set out a five-fold test for what is "just and appropriate" under s. 24 of the *Charter*, a test that will shape the development of public law remedies for years to come:

- *Meaningful remedy for the plaintiff/applicant.* The remedy must be "meaningful" by "[taking] account of the nature of the right that has been violated and the situation of the claimant", being "relevant to the experience of the claimant" and addressing "the circumstances in which the right was infringed or denied". A remedy that is "ineffective" or "smothered in procedural delays and difficulties" is not a "meaningful vindication of the right" and therefore not appropriate and just.[21]

- *Fairness to the defendant/respondent.* The remedy must be "fair to the party against whom the order is made" by not imposing "substantial hardships that are unrelated to securing the right".[22]

- *Democratic concerns.* The remedy "must employ means that are legitimate within the framework of our constitutional democracy", respecting "the relationships with and separation of functions among the legislature, the executive and the judiciary". While courts may "touch on functions that are principally assigned to the executive", they may not "depart unduly or unnecessarily from their role of adjudicating disputes and granting remedies that address the matter of those disputes".[23]

- *Institutional capability.* The remedy must "invoke "the function and powers of a court". A court should not "leap into the kinds of decisions and functions for which its design and expertise are manifestly unsuited". Guidance on this "can be inferred, in part, from the tasks with which they are normally charged and for which they have developed procedures and precedent".[24]

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[20] *Doucet-Boudreau*, *supra*, n. 8, at paras. 54-59.
[21] *Ibid.*, at para. 55. This seems to have been a key factor in the granting of a remedy in the quasi-constitutional case of *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, *supra*, n. 18, at para. 24-28.
[22] *Doucet-Boudreau*, *supra*, n. 8, at para. 58.
[23] *Ibid.*, at para. 56.
[24] *Ibid.*, at para. 57.

- *Openmindedness, flexibility and evolution.* While historical remedial practice is important, "tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand", so the lack of precedent is not a bar. A court must "remain flexible and responsive to the needs of a given case".[25]

As will be discussed below, this five-fold test may mean that earlier remedial approaches may have to be reassessed. It may also promote the development of new, innovative remedies.

Is a revolution at hand?

What is the significance of all of this for the next five years? Do the recent developments and signs of change portend an era of increasingly bold courts? Are we on the brink of some sort of revolution in the law of remedies? Will our courts be confronted with a plethora of novel remedies claims between now and May 28, 2009?

I think not. Instead, a more subtle theme is at work in the recent cases: each case is nothing more than the product achieved when judges, confronted with a difficult practical problem, try to navigate the tensions and balances that lie at the core of public law.

Those tensions and balances, some of which are openly articulated in the recent case law, include those between:

- the rights of individuals/public law complainants and the interests of government/the general public, both in general and in the particular case;

- the role of the judiciary and the roles of the other branches of government;

- the need to ensure predictability of outcomes (*stare decisis*) and the need to do justice in individual cases; and

- what is theoretically possible (the extent of judicial powers) and what is practically achievable (the inherent institutional limitations of courts).

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[25] *Ibid.*, at para. 59.

The recent cases provide a good snapshot of how the tensions were resolved and provide some indication as to what we may see in the future.

If the law of remedies were analogized to a workshop, I would suggest the following: while new, interesting tools have been added to the workshop just in case particular problems arise and while new tools may appear from time to time, the carpenters remain the same and all the old tools with the old instruction manuals are still there. A revolution is not at hand.[26]

A look ahead to May 28, 2009

This, of course, is not to say that the law of remedies has matured. On May 28, 2009, we will have plenty of new developments to talk about. The questioning of the standard of review in the Supreme Court and the enunciation of a broad five-fold test for the granting of appropriate and just remedies under s. 24 of the *Charter* may lead to some interesting developments in the future.

In fact, as you will see below, some of the most interesting developments by May 28, 2009 will be in areas so far unaddressed by courts. The practical problems are emerging now and will be hitting the courts soon.

The following is a subject-by-subject look at the issues courts will likely encounter over the next five years.

Remedial supervision

In *Doucet-Boudreau v. Nova Scotia (Minister of Education),*[27] a 5-4 majority of the Supreme Court of Canada held that in certain circumstances, it will be "appropriate and just" for a court to remain seized of a matter under subsection 24(1) of the *Charter* in order to oversee the implementation of a remedy.

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[26] On the surface, the broad, five-fold test in *Doucet-Boudreau*, *supra*, n. 8, for what is an "appropriate and just" remedy under s. 24(2) of the *Charter* looks like an invitation to create new remedies to vindicate constitutional rights. But this invitation has been extended before and the law of remedies did not materially change: see *Mills v. The Queen*, [1986] 1 S.C.R. 863, at 965 (*per* McIntyre J.) and *R. v. Gamble*, [1988] 2 S.C.R. 595, at 649 (*per* Wilson J.). Similarly broad statements have been made in *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, at 104 (*per* Sopinka J.), *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, at paras. 18 *et seq.* and *R. v. Rahey*, [1987] 1 S.C.R. 588, at pp. 619-20 (*per* Wilson J.).

[27] *Supra*, n. 8.

A major question for consideration is whether *Doucet-Boudreau* is a signal that the courts will be asserting a power of supervision over *Charter* remedies in a wide variety of cases. I think not. In my view, the facts of *Doucet-Boudreau* are very important and demonstrate that it will be only in rare cases that courts will exercise their newfound power to supervise s. 24 *Charter* remedies.

The Supreme Court in *Doucet-Boudreau* was concerned with the implementation of the right to minority-language instruction under s. 23 of the *Charter.* In this case, there was a long history of delays on the part of the Nova Scotia government in providing French-language secondary instruction and facilities in five communities in Nova Scotia. Combined with this was a significant assimilation rate for the French-language minority in those communities. In other words, the need for the remedy was pressing and it was necessary that the remedy quickly be made effective.

The trial judge, Justice LeBlanc of the Nova Scotia Supreme Court, found that the claim for a remedy under s. 23 of the Charter was made out. There were a sufficient number of children to justify the establishment of homogeneous French-language secondary instruction and facilities. He ordered the government to use its best efforts to establish such programs and facilities by specified dates in each of the five areas.

Justice LeBlanc went further. He decided to retain jurisdiction to hear reports from the province respecting its compliance with his order. He conducted compliance hearings in furtherance of that order. Only this aspect of his order was in issue on appeal.

The majority of the Nova Scotia Court of Appeal allowed the appeal and found that once the trial judge had decided the issues between the parties, he had no further jurisdiction under subsection 24(1) to oversee his order.

The majority of the Supreme Court of Canada allowed the appeal. Justices Iacobucci and Arbour, writing for the narrow 5:4 majority, found that the "appropriate and just in the circumstances" language found in ss. 24(1) of the *Charter* gives the court a wide discretion to fashion a remedy that works.

Traditionally, courts have been reluctant to supervise remedies. For example, this has been a traditional bar to specific performance in the law of contract. However, the Supreme Court applied the five-fold set of factors, discussed

above,[28] concerning what is an "appropriate and just" remedy under s. 24 of the *Charter* and dismissed this concern, observing that "tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand".[29]

The majority upheld the supervision order made by Justice LeBlanc. It was aimed at vindicating the rights of the *Charter* complainants. The order took into account the role of the courts in our constitutional democracy by leaving the decisions concerning the means to implement the order to the executive branch of the government. The order did not take the court beyond the functions and powers commonly exercised by courts.[30] Nor did it undermine the ability of a party to launch an appeal and thus, did not violate the doctrine of *functus officio*. Finally, in the circumstances of this case, the remedy was clear enough to allow the government the ability to participate fairly in the proceedings.

In my view, this type of supervisory remedy will be granted very rarely. The need for a supervisory remedy is likely only where the court has made an order that government perform some positive steps to implement *Charter* rights. Such mandatory orders have been quite rare. Even in the rare case where a mandatory order or something akin to a mandatory order is made, it is clear that a supervision order does not have to be made.[31]

The Supreme Court was not explicit about when supervisory orders should be made. Given the emphasis on vindicating the right at stake, it would seem that a supervisory order should only be made when it is absolutely necessary, such as where the discretion of the government regarding how to carry out a mandatory order should be carefully guided either because that discretion deals with certain important matters that go to the heart of the right involved or because the particular government has shown that it has been quite recalcitrant on the matter.[32]

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[28] See text to nn. 21-25, *supra*.
[29] *Doucet-Boudreau*, *supra*, n. 8, at para. 59.
[30] For example, the Supreme Court analogized to bankruptcy proceedings, where courts exercise a high degree of supervision.
[31] *Eldridge v. British Columbia (Attorney General)*, *supra*, n. 14; *Auton v. British Columbia (Attorney General)*, *supra*, n. 11; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, *supra*, n. 14.
[32] Arguably, both factors were present in *Doucet-Boudreau*, *supra*, n. 8. The discretion of the government arguably had to be guided carefully in order to ensure that the concerns about assimilation are adequately and promptly met. Section 23 rights are also quite nuanced and detailed, involving such matters central to the s. 23 right such as the facilities that must be built and the management systems that must be put in place, and so there is a good case for guiding the

What we are seeing in *Doucet-Boudreau* is a constellation of extreme circumstances, a recalcitrant government and a positive right, a constellation which made a supervisory remedy palatable to the Supreme Court.

In my view, rare will be the case where supervisory regimes are warranted and most lower courts would be reluctant to take on the burden of supervision unless it were absolutely necessary on the facts of the case. Accordingly, I anticipate that by May 28, 2009, at best there will only be a handful of supervision cases in the reported jurisprudence.

Procedures concerning supervisory remedies

To the extent that supervisory remedies become more common, jurisprudence will have to develop concerning the procedures for them.

In *Doucet-Boudreau*, the trial judge held a number of review hearings at which the government presented affidavits outlining its progress in implementing the *Charter* remedy. Cross-examinations were held and submissions made. The adequacy of these procedures was not squarely before the Supreme Court. They may be of concern in a future case.

The difficulty with this form of procedure is that of an ambush of government and consequent prejudice to the public interest may take place. Without a requirement for *all* parties to file materials and factums in advance, a government may be blindsided by an attack made in a review session.[33]

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government's discretion. Finally, the government in question had neglected its constitutional obligations over a period of several years, with assimilative pressures threatening the community – it was necessary to impose a supervision regime in order to ensure that the government implements the s. 23 right completely. Compare *Vriend v. Alberta*, [1998] 1 S.C.R. 493, where the Court adopted the relatively intrusive remedy of "reading in" against a recalcitrant government.

[33] In Ontario, courts will have to examine how the power of supervision fits into the *Rules of Civil Procedure*. Depending on how courts rule on this issue, the problem of sufficient advance notice and procedural fairness may disappear at least to some extent. For example, if such supervisory sessions were cast as motions to "carry an order into operation" or "obtain other relief than that originally awarded" under Rules 59.06(2)(c) or (d), Rule 37 concerning the filing of materials under motions would apply, although there is no mandatory requirement to file a factum. The case law under Rule 59.06(2)(c) and (d), however, is restrictive and would have to be distinguished: see, e.g., *Formglas Inc. v. Plasterform Inc.* (1989), 34 C.P.C. (2d) 27, *Ontario Securities Commission v. Turbo Resources Ltd.* (1983), 33 C.P.C. 50 (Ont. H.C.).

Other questions arise. Given that review sessions are possible, is an initial order (before the first reporting session) "final" for the purposes of appeal routes? The Supreme Court appeared to answer this in the affirmative. But what about the orders made in a later reporting session? Are they final or interlocutory for the purposes of appeal routes?[34] To what extent can other parties with an interest in the implementation of the order intervene in a reporting session? To what extent can appeal courts considering an initial order (before the first reporting session) taken into account the later reporting sessions or the evidence filed in those sessions?[35]

The end of a rule restricting the availability of s. 24 remedies?

In *Schachter*,[36] Lamer C.J., writing on behalf of the Supreme Court, held that "[a]n individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with an action under s. 52 of the *Constitution Act, 1982*. He added,

> Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52 that will be the end of the matter. No retroactive s. 24 remedy will be available. It follows that where the declaration of invalidity is temporarily suspended, a s. 24 remedy will not often be available either.[37]

The effect of this rule is that some litigants who have successfully challenged laws and who receive a declaration of invalidity under s. 52 of the *Constitution Act, 1982* are nevertheless denied a personal remedy under s. 24 of the Charter rectifying the circumstances that prompted that litigation in the first place. For example, if a woman separated from her same sex partner and if she were unable to seek support under applicable family law legislation because the legislation discriminated against her contrary to s. 15 of the Charter, the woman might be able to strike down the legislation under s. 52 of the *Constitution Act, 1982* but

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[34] It would be hard to characterize an order in a review session as "finally dispos[ing] of the rights of the parties, in the sense of a substantive defence (in the case of a defendant)" and thus final (see *Sun Life Assurance Co. v. York Ridge Developments Ltd.* (1998), 28 C.P.C. (4th) 16 (Ont. C.A.) at 20) since a modification could take place in another review session. However, the review sessions are taking place after an order normally regarded as "final", so perhaps the orders made in the review sessions are "final" too.

[35] The court will have to determine whether the traditional test for the admission of fresh evidence on appeal (see *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, [2000] 1 S.C.R. 44; *R. v. G.D.B.*, [2000] 1 S.C.R. 520; *R. v. Powley* (2001), 196 D.L.R. (4th) 221 (Ont. C.A.)) requires modification in these circumstances.

[36] *Schachter v. Canada*, *supra*, n. 5.

[37] *Ibid.*, at 720.

based on the *Schachter* rule she would be precluded from obtaining a personal award of support under s. 24 of the *Charter*.

This rule seems at odds with the philosophy of vindication of remedies in *Doucet-Boudreau*.[38] I would expect that this rule will be the subject of an attack sometime in the next five years on the basis of inconsistency with *Doucet-Boudreau*.

Mandatory remedies

Another possible growth area may be in the area of mandatory remedies or so-called "structural remedies" against government under s. 24(1) of the *Charter*. With the concern about enforceability of such remedies lessened as a result of the recognition of a judicial power to supervise remedies, perhaps such remedies will be more forthcoming, with the result that certain of the "positive" aspects of *Charter* rights will be more readily asserted by *Charter* and other constitutional claimants.[39]

Although there have been examples in the case law of mandatory remedies or remedies akin to mandatory remedies,[40] few suits have sought mandatory remedies and there is no reason to expect an explosion in such suits by May 28, 2009.

To some extent, whether or not there is a growth in the area of mandatory remedies depends on whether or not there is a growth in rights under the *Charter* to positive government action. In countries such as India,[41] Sri Lanka[42] and South

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[38] See the discussion in Raymond L. MacCallum, "The Rule in *Schachter*: Rights Without Remedies" in D. McAllister and A. Dodek, *The Charter at Twenty: Law and Practice* (Toronto: Ontario Bar Association, 2002). See n. 5, *supra*, for an instance where one Justice of the Supreme Court declined to apply the *Schachter* rule.

[39] *Doucet-Boudreau*, *supra*, n. 8, has already been invoked to justify the imposition of a mandatory remedy upon government: *Ardoch Algonquin First Nation v. Canada (Attorney General)*, *supra*, n. 14, at paras. 43-47 (mandatory order upon Human Resources Development Canada to eliminate discrimination under s. 15 of the *Charter* by providing aboriginal communities with community control over labour training programs).

[40] See, e.g., *Eldridge v. British Columbia (Attorney General)*, *supra*, n. 14; *Auton v. British Columbia (Attorney General)*, *supra*, n. 11; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, *supra*, n. 14; *Ardoch Algonquin First Nation*, *supra*, n. 14; *Polewsky v. Home Hardware*, *supra*, n. 12.

[41] See generally, V.N. Shukla, *The Constitution of India* (Eastern Book Company, Lucknow 1996) at 280-1. In India, orders have been granted to detain children below 16 only in children's homes and not in jail, to faithfully enforce labour laws, to rehabilitate under-trial victims, to follow

Africa,[43] which have constitutions with significant positive rights, mandatory remedies are relatively common. In those jurisdictions, government budgetary considerations do not come to bear in the question of whether a mandatory order should be granted; rather it is a matter for whether the right has been breached or whether a rights violation is justified.[44] Early indications are that Canada is moving in a similar direction.[45]

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principles and norms laid down by the Court in the matter of adoption of Indian children by foreigners, to fix the minimum age for superannuation, to observe guide-lines in the allotment of cars, to provide better facilities to the inmates of government protective homes and mental hospitals, to preserve ecological balance, to submit proposals for the effective control of pollution, to hold eye camps according to standard medical guidelines and to provide and facilitate environmental awareness and education. Perhaps the most far-reaching mandatory order in India is *M.C. Mehta v State of Tamil Nadu and Others*, [1996] 6 S.C.C. 756, where the Indian Supreme Court granted a wide-ranging order concerning child labour that included highly detailed mandatory and structural injunctions.

[42] *Mandamus* has been granted against the Commissioner of Elections to register a political party when this had been refused in breach of the prohibition against discrimination (*Gooneratne v Commissioner of Elections*, [1987] 2 Sri. L.R. 165 (S.C.)); authorities have been directed to take disciplinary action against a delinquent officer who perpetrated an assault on a prisoner (*Vivienne Goonewardene v Hector Perera and Others*, 2 F.R.D. 426 at 440) and guidelines have been ordered for the training and deployment of railway officers (*Laxamana and Others v Weerasooriya, General Manager, Railways*, [1987] Sri. L.R. 172 (SC)).

[43] *Fose v. Minister of Safety and Security*, [1997] Z.A.C.C. 6; *Minister of Health and others v. Treatment Action Campaign and others*, [2002] Z.A.C.C. 15; *Government of the Republic of South Africa and Others v. Grootboom and Others*, 2001 (1) S.A. 46 (C.C.); 2000 (11) B.C.L.R. 1169 (C.C.); *Premier, Mpumalanga, and Another v. Executive Committee, Association of State-Aided Schools, Eastern Transvaal*, 1999 (2) S.A. 91 (C.C.); 1999 (2) B.C.L.R. 151 (C.C.); *Mohamed and Another v. President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)*, 2001 (3) S.A. 893 (C.C.); 2001 (7) B.C.L.R. 685 (C.C.); *Sanderson v. Attorney-General, Eastern Cape*, 1998 (2) S.A. 38 (C.C.); 1997 (12) B.C.L.R. 1675 (C.C.) para 39; *New National Party of South Africa v. Government of the Republic of South Africa and Others*, 1999 (3) S.A. 191 (C.C.); 1999 (5) B.C.L.R. 489 (C.C.) para 46; *Dawood and Another v. Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v. Minister of Home Affairs and Others*, 2000 (3) S.A. 936 (C.C.); 2000 (8) B.C.L.R. 837 (C.C.); *August and Another v. Electoral Commission and Others*, 1999 (3) S.A. 1 (C.C.); 1999 (4) B.C.L.R. 363 (C.C.).

[44] See, *e.g., Minister of Health and others v. Treatment Action Campaign and others*, *ibid.*, at para 99: "Even simple declaratory orders against government or organs of state can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so."

[45] Budgetary considerations so far have not been seen as significant factors under s. 1 in Canada: see, e.g. *G. (J.)*, supra, n. 14, at para. 100; *Auton, supra*, n. 11; *Eldridge, supra*, n. 14, at para. 87. The leading case on point is probably *Martin, supra*, n. 6, at para. 6: "On the one hand, budgetary considerations in and of themselves cannot justify violating a *Charter* right, although they may be relevant in determining the appropriate degree of deference to governmental choices based on a non-financial objective." See also paras. 109 and 112. Three cases at the Supreme Court that may deal with budgetary issues are *The Attorney General of British Columbia, et al. v. Connor Auton,*

There are a number of sections in the Charter which bestow positive rights and require government to take positive action.[46] The s. 2 freedoms have been interpreted to create the theoretical possibility that government will have to take positive action,[47] and some cases appear to require government to assist the exercise of s. 2 freedoms,[48] although more recent cases suggest this will happen only in exceptional circumstances.[49] As for other sections, there are glimmers in the case law to suggest that s. 7 may extend beyond the criminal law and restraints of liberty[50] and that positive government action may be required under s. 7 of the *Charter* in certain circumstances.[51]

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an Infant, by his Guardian Ad Litem, Michelle Auton, et al. (S.C.C. No. 29508), *Newfoundland and Labrador Association of Public and Private Employees v. Her Majesty the Queen in Right of Newfoundland as represented by Treasury Board and the Minister of Justice* (S.C.C. No. 29597) and *Jacques Chaoulli, et al. v. Attorney General of Quebec, et al.* (S.C.C. No. 29272).

[46] See, *e.g.*, s. 23 (minority language educational rights).

[47] See, *e.g.*, *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295. In *Haig v. Canada*, [1993] 2 S.C.R. 995 at 1039, L'Heureux-Dubé J. wrote that "a situation might arise in which, in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action might be required".

[48] *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016; *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627 (possibility recognized but not granted on the facts).

[49] *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989: "On the whole, the fundamental freedoms protected by s. 2 of the *Charter* do not impose a positive obligation of protection or inclusion on Parliament or the government, except perhaps in exceptional circumstances which are not at issue in the instant case." See also *Dunmore v. Ontario (Attorney General)*, *supra*, n. 47, where the majority *per* Bastarache J. wrote (at para. 19) that "the *Charter* does not oblige the state to take affirmative action to safeguard or facilitate the exercise of fundamental freedoms". Nevertheless, the majority found that a legislative exclusion of agricultural workers from the right to bargain collectively violated s. 2(d) of the *Charter*.

[50] The possibility that the rights to liberty and security of the person in s. 7 protects interests beyond imprisonment and physical constraint has been mooted, and indeed confirmed, in several cases: *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, *supra*, n. 14; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844; *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307; *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925; *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at 56; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at 1003. For a discussion of these cases and the potential scope of s. 7, see D. Stratas, "Procedurally Shy, Substantively Bold: Conflicting Approaches to Constitutional Review" (2003), 21 S.C.L.R. (2d) 385 at 404-408. The Supreme Court has recently confirmed that s. 7 may be broader in scope than presently recognized – it has left the issue to be developed in future cases: *Gosselin*, *supra*, n. 5.

[51] See *Gosselin*, *ibid.*, per Arbour J. (dissenting), at paras. 317-327. The majority in *Gosselin* (*per* McLachlin C.J.C.) held that "[o]ne day s. 7 may be interpreted to include positive obligations" (at

Although it has been difficult to establish a breach of s. 15 rights in recent years,[52] mandatory orders and structural injunctions remain a possibility in appropriate cases.[53]

Remedies for abuse of process: criminal proceedings

The test for a stay of criminal cases because of an abuse of process has traditionally been very high.[54] In fact, the test may be higher than ever on May 28, 2009 as lower courts apply *R. v. Regan*.[55]

In most abuse of process cases the court, in applying the "clearest of cases" test, examines the balance between staying the charges and permitting the matter to proceed to trial. The interests to be examined in the latter portion of the balance have tended to be closely focused on the case before the court. *Regan* broadened this, by examining societal interests such as encouraging victims of sexual assault to "trust the system and bring allegations to light" in order to "convey the message that if such assaults are committed they will not be tolerated, and that young women must be protected from such abuse".[56]

This being said, it is perhaps noteworthy that in the first case in the Supreme Court concerning a stay for an abuse of process, the Supreme Court examined the issue, applying its traditional jurisprudence but also applying portions of the five-fold test for s. 24(1) remedies in *Doucet-Boudreau*, and granted the stay.[57] The facts were most-assuredly extreme and a stay might have been granted without

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para. 82) and left open the possibility that "a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances" (at para. 83). LeBel J. did not form part of the majority in *Gosselin* but must be counted among those who see s. 7 capable of development in the future: see *Gosselin*, at para. 412, where he concurs with McLachlin C.J.C.'s comments and see also his reasons in *Blencoe v. British Columbia (Human Rights Commission)*, *supra*, n. 50, at para. 188.

[52] The rigour of the test in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 has diminished the number of successful claims.

[53] See, *e.g.*, *Brown et al. v Board of Education of Topeka et al*., 347 U.S. 483 (1954) and *Brown et al. v Board of Education of Topeka et al*., 349 U.S. 294 (1955).

[54] *R. v. Power*, [1994] 1 S.C.R. 601; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Carosella*, [1997] 1 S.C.R. 80. See, most recently, *R. v. Leduc*, unreported, Ont. C.A., July 24, 2003 (prosecutorial misconduct, such as wilful non-disclosure, standing alone does not warrant a stay; to justify a stay, the misconduct must either prevent a fair trial or undermine the integrity of the justice system).

[55] [2002] 1 S.C.R. 297.

[56] *Regan*, *ibid.*, at para. 116.

[57] *R. v. Taillefer; R. v. Duguay*, [2003] 3 S.C.R. 307.

mentioning *Doucet-Boudreau*. But it may be that in close cases, the language in *Doucet-Boudreau* requiring vindication of rights may tip the balance. Overall, stays for abuse of process will be pretty much as rare on May 28, 2009 as they are today.

A frequent problem in criminal cases is that a stay is often the only imaginable remedy for *Charter* violations so the remedial menu is "all or nothing". Over the next five years, we may have more instances of counsel proposing more creative remedies to courts because of the language in *Doucet-Boudreau* requiring vindication of violations of *Charter* rights. For example, in cases where the authorities have conducted an interview contrary to ss. 7 and 8 of the Charter and a prosecution is later brought, an appropriate remedy might be to prevent direct use or derivative use of the evidence.

It may also be that the jurisprudence in certain areas liberalizes to some extent over the next five years in order to allow courts to grant limited remedies for Crown misconduct. For example, awards of costs are fairly difficult to obtain on the current state of the law[58] but in the future courts might react to the commandment in *Doucet-Boudreau* that rights violations must be vindicated by making costs awards more readily available. Perhaps courts might start to award small "symbolic" monetary awards. These limited remedies might be seen as being preferable to a situation where misconduct and a rights violation has happened but an aggrieved party is left with no remedy at all, not even a symbolic one.

Remedies for abuse of process: administrative law proceedings

The recent case of *Blencoe* demonstrates that administrative law proceedings theoretically may be stayed because of an abuse of process.[59] As in criminal cases, the test is high and remedies short of a stay will be preferred.[60]

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[58] See, *e.g.*, *R. v. Pawlowski* (1993), 79 C.C.C. (3d) 353 (Ont. C.A.); *R. v. Greganti* (2000), 142 C.C.C. (3d) 77 (Ont. S.C.J.); *R. v. Jedynack* (1994), 16 O.R. (3d) 612 (Gen. Div.); *R. v. Robinson*, [1999] A.J. No. 1469 (C.A.).

[59] *Blencoe v. British Columbia (Human Rights Commission)*, *supra*, n. 50 (remedy not granted).

[60] The "clearest of cases" standard in cases such as *Power* applies: see *Blencoe*, *ibid.*, paras. 118-119. The court must be satisfied that "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted": *Blencoe*, *ibid*., para. 120, citing D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at 9-68.

Until *Blencoe*, most counsel were probably unaware of the availability of stays in administrative law proceedings, particularly in the case of extreme delays. Some were unaware of the availability of *mandamus* to make a recalcitrant board hurry up.[61] There is also the writ of *procedendo* which has not been used in Canada within living memory. Delays can also give rise to a violation of natural justice leading to successful review.[62]

The problem of delays before certain administrative tribunals, particularly due to government underfunding, persists. Sometimes cases such as *Blencoe* have an educational effect on the Bar and prompt more litigation. I anticipate that there will be a few more cases in this area of law by May 28, 2009!

Striking sections and the policing of discretions

A key question in the law of *Charter* remedies has been how courts should deal with an administrative regime that causes constitutional violations. 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 provision[63] and minimum sentence provisions in the *Criminal Code* – should it strike the sentencing provision or leave it to prosecutors to conduct

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[61] *R. v. Bradley*, [1941] S.C.R. 270, at 277, *per* Duff C.J.; *Rourke v. The Queen*, [1978] 1 S.C.R. 1021, at 1027, *per* Laskin C.J.; and *Rahey*, *supra*, n. 25, at 624-25, *per* Wilson J., and at 631, *per* La Forest J. The remedy has been applied in the immigration area in a number of cases. See, *e.g.*, *Muia v. Canada (Minister of Citizenship and Immigration)* (1996), 113 F.T.R. 234; *Dass v. Canada (Minister of Employment and Immigration)*, [1996] 2 F.C. 410 (C.A.), at para. 24; *Dee v. Canada (Minister of Citizenship & Immigration)* (1998), 46 Imm. L.R. (2d) 278 (F.C.T.D.); and *Kiani v. Canada (Minister of Citizenship & Immigration)* (1999), 50 Imm. L.R. (2d) 81 (F.C.T.D.), at para. 34.

[62] *R. v. Chief Constable of the Merseyside Police, Ex parte Calveley*, [1986] 1 Q.B. 424 (C.A.).

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

themselves so the minimum sentence provision would never be relied upon in circumstances where it would constitute cruel and unusual punishment?[64] 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.[65]

However, this approach is not universally followed in the criminal law. In *R. v. Jarvis*[66] and *R. v. Ling*,[67] 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)*.[68] 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, its

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[64] *R. v. Smith*, [1987] 1 S.C.R. 1045.
[65] *Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink*, [2003] 3 S.C.R. 209.
[66] [2002] 3 S.C.R. 757.
[67] [2002] 3 S.C.R. 814.
[68] [2000] 2 S.C.R. 1120.

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 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.[69]

We may expect that by May 28, 2009 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 by May 28, 2009 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. By May 28, 2009, this trend no doubt will have intensified.

There are many different ways in which governments can be liable for damages: negligence,[70] the tort of abuse of public office,[71] malicious prosecution,[72] bad

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[69] 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.

[70] *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201; *Ingles v. Tutkaluk Construction Ltd.*, *supra*, n. 1. 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*, supra, n. 3 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*

faith decision-making[73] and violations of the *Charter*.[74] Negligent policy-making,[75] careless exceedance of legal authority[76] and passing invalid legislation[77] 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, by May 28, 2009, 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.[78] United States courts have also developed a rich

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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).

[71] *Odhavji Estate*, supra, n. 3. 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.

[72] *Proulx, supra*, n. 2. The gist of this cause of action is malice and bad faith.

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

[74] *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick, supra*, n. 4; *Guimond v. Quebec (Attorney General), supra*, n. 4. 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.

[75] *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.

[76] *Odhavji Estate*, supra, n. 3.

[77] *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.

[78] *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

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 by May 28, 2009, it will be discovered and applied in Canada and we will begin to see a more general, uniform approach to governmental liability adopted in Canada.

Also by May 28, 2009, 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*,[79] 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.[80] 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.[81]

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".[82]

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.

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,[83] rules concerning

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Kingdom), thus far not cited by any Canadian court, is Susan Kneebone, *Tort Liability of Public Authorities* (1998).

[79] *Supra*, n. 4.

[80] 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*, *supra*, n. 18, at para. 19.

[81] *Supra*, n. 11.

[82] *Ibid.*, at para. 64.

[83] 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

causation, foreseeability and remoteness of damage and the extent to which intangible losses and "pain and suffering" are recoverable.[84]

Separate remedial hearings

The decision of the Supreme Court in *Doucet-Boudreau* shows that the issue of what is an appropriate and just remedy is a complicated, multi-faceted issue and thus is one that is best examined only after the court has determined that there has been a rights violation and after it has identified with precision the nature of the rights violation.

The British Columbia Supreme Court in the s. 15 case of *Auton* conducted a separate hearing for the purposes of receiving evidence and submissions relevant to the issue of remedy.[85] By May 28, 2009, I expect that this approach will be commonplace. Indeed, by May 28, 2009, an appellate court may have already suggested that that is the most appropriate way of proceeding where the case is complex and there is a live remedial issue.

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warrant. This decision was upheld on appeal and the appeal court increased the award of exemplary damages to $100,000.

[84] 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 *Meskell 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).

[85] *Auton (Guardian ad litem of) v. British Columbia (Minister of Health)*, [2000] B.C.J. No. 1547 (S.C.) (finding on liability); [2001] B.C.J. No. 215 (S.C.) (finding on remedy).

Interim cost awards, other interim financial awards and legal aid

There is every indication to believe that the number of unrepresented litigants in civil and criminal proceedings will increase. This is imposing serious burdens on courts everywhere.

On May 28, 2009, these issues are bound to remain of central interest to courts. What are the prospects that remedies for such litigants, such as expanded access to state funded counsel, will be awarded? So far, the likelihood seems low, but to some extent this depends on developments in the area of courts making mandatory orders that have an effect on governmental budgetary priorities.

In my view, the law in the area of financial assistance for legal services remains rather unclear due to the absence of a significant Supreme Court decision in the area. One does not have a right to state funded legal counsel under s. 10 of the *Charter* when detained.[86] However, one does have a right to state-funded legal counsel under s. 7 of the *Charter* when subject to child welfare proceedings.[87] Where a *Charter* challenger is impecunious, has established a *prima facie* violation of the *Charter* and "special circumstances" exist, the Court has a "narrow" jurisdiction to make an award of interim costs in a constitutional challenge in civil court.[88]

In the criminal context, if in some unique situations an accused can establish that he or she can only obtain a fair trial if represented by a particular counsel, he or she can obtain an order ensuring that the accused is represented by that counsel.[89] While the state has a constitutional obligation to ensure that indigent accused receive a fair trial, and in many cases that means ensuring that the accused is represented by counsel, the Court (so far) does not have the jurisdiction to review state policies concerning Legal Aid.[90] Courts have, with few exceptions, rejected the proposition that enhanced rates above those authorized by Legal Aid are necessary to ensure that accused receive competent counsel.[91]

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[86] *R. v. Prosper*, [1994] 3 S.C.R. 236. See also *R. v. Rockwood* (1989), 49 C.C.C. (3d) 129 (N.S.C.A.), *R. v. Ho*, [2004] 2 W.W.R. 590 (B.C.C.A.), and *Attorney General of Quebec v. R.C.* (2003), 13 C.R. (6th) 1 (Que. C.A.).
[87] *G. (J.)*, *supra*, n. 14.
[88] *British Columbia v. Okanagan Indian Band*, *supra*, n. 7.
[89] *R. v. Fisher*, [1997] S.J. No. 530 (Q.B.).
[90] *R. v. Peterman*, unreported, April 30, 2004, Ont. C.A.; *R. v. Cai* (2002), 170 C.C.C. (3d) 1 (Alta. C.A.),
[91] See *R. v. Abu-Taha*, [2001] O.J. No. 4278 (S.C.J.); *R. v. Montpellier*, [2002] O.J. No. 4279 (S.C.J.); *R. v. Magda*, [2001] O.J. No. 1861 (S.C.J.).

In some cases, if an accused is not represented by counsel, his or her right to a fair trial as guaranteed by ss. 7 and 11(d) of the Charter will be infringed. If such an accused lacks the means to employ counsel privately, but has nevertheless been refused legal aid, the court can make an order staying the proceedings until the necessary funding for counsel is provided by the state. The trial will then not proceed until either the government or Legal Aid Ontario provides funding for counsel.[92]

It is noteworthy that the issues in the preceding two paragraphs have not been considered by the Supreme Court. The Court has upheld the availability of interim costs remedies and the provision of state funded counsel in the context of child welfare proceedings. *Doucet-Boudreau* with its ringing language requiring the making of remedies that vindicate constitutional rights, the right to counsel in s. 10(b) included, has been decided. Are we on the brink of a significant development in this area of law from the Supreme Court of Canada? No doubt, by May 28, 2009, we will know.

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*.[93]

In the area of damages, the motivations, purposes and intentions of the relevant officials are central.[94]

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[92] *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.).
[93] See generally *R. v. Jarvis*, *supra*, n. 66 and *R. v. Ling*, *supra*, n. 67.
[94] See text to nn. 70-74, *supra*.

In administrative law, the area of abuse of discretion and improper purpose may be increasing in importance.[95] 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,[96] the secrecy provisions under the *Canada Evidence Act*,[97] exemptions under freedom of information legislation[98] and discovery objections. Frequently it is not part of the record that must be passed in judicial review proceedings.[99] Some attempts to subpoena evidence arguably necessary to satisfy a legal test in a constitutional case have failed.[100] 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 in May, 2009. *Charter* and other constitutional standards may also be brought to bear in this litigation.[101]

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[95] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.
[96] *Carey v. Ontario*, [1986] 2 S.C.R. 637.
[97] 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.
[98] *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31.
[99] *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1; *Federal Court Rules*, SOR/98-106, Rule 317.
[100] See *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3.
[101] 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. 97. 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 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).

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.[102]

Reassessment of the law concerning exclusion of evidence?

There are a number of unsatisfactory aspects in the law concerning the exclusion of evidence under s. 24(2) of the *Charter*. I have identified these elsewhere[103] but would summarize them here as follows:

- The test in *R. v. Collins*[104] for the exclusion of evidence under ss. 24(2) does not place a heavy onus on government to justify rights infringement, nor does it require that the rights infringement be minimal. Instead, it requires a general, accused-centered examination of the fairness of the trial if the evidence is admitted, an assessment of the "seriousness" of the breach of rights without any requirement that the breach be minimal and, finally, a general, unstructured review of whether "the administration of justice would be better served by admission or exclusion of the evidence". This is to be contrasted with the approach under s. 1 of the *Charter* which is well-structured and, particularly in criminal cases, places a heavy onus on government to justify rights infringement – in particular, the onus of proving that rights have been minimally impaired.

- The first branch of the *Collins* test is whether the admission of the evidence will affect trial fairness. The case law that has developed under the "fairness of the trial" consideration places considerable – some would justifiably say inordinate – emphasis on whether the evidence was real evidence that existed independently of the *Charter* breach or whether it was evidence that was conscripted from the accused.[105]

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[102] *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*, 2002 BCSC 1509 (S.C.).
[103] D. Stratas, "The Law of Evidence and the *Charter*" in Law Society of Upper Canada, *Special Lectures 2003: The Law of Evidence* (Toronto: Irwin Law, 2004).
[104] *R. v. Collins*, [1987] 1 S.C.R. 265.
[105] *R. v. Stillman*, [1997] 1 S.C.R. 607.

- At the root of the "fairness of the trial" consideration is the concern about self-incrimination and this is the reason for the concern about whether the accused has been "conscripted" into creating or supplying evidence.[106] Under the Supreme Court's approach in *Stillman*,[107] if the evidence is conscriptive, its use at the trial will be unfair and will be excluded from the proceedings under ss. 24(2) without any consideration of the seriousness of the violation or whether its admission would bring the administration of justice into disrepute.[108] This has been criticized.[109] Automatic rules under ss. 24(2) seem at odds with the very text of ss. 24(2) which mandates a discretionary consideration based on the examination of "all the circumstances". In effect, the accused's rights against self-incrimination automatically outweigh the public interest in having a determination on the merits. Rights against self-incrimination are put on a higher level than other *Charter* rights, such as the right to privacy under s. 8. This creates a *de facto* hierarchy of rights under ss. 24(2), quite contrary to many statements of the Supreme Court opposing the creation of a hierarchy of rights.[110]

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[106] *R. v. Collins*, *supra*, n. 104, at p. 287: "the situation is very different with respect to cases where, after a violation of the *Charter*, the accused is conscripted against himself through a confession or other evidence emanating from him. The use of such evidence would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination". The notion of self-incrimination is very broad, much broader than statements, and extends to the production of bodily samples. In the U.S., self-incrimination extends only to statements made and not the taking of bodily samples: *Schmerber v. California*, 384 U.S. 757 (1966). The rationale for extending the concept of self-incrimination in Canadian law to include the taking of bodily samples lies in the belief that "the compelled production of bodily parts or substances is just as great an invasion of the essence of the person as is a compelled conscripted statement", an "invasion of the body is … the ultimate invasion of personal dignity and privacy" and "the innate dignity of the individual": *R. v. Stillman*, *supra*, n. 102, at paras. 86-88.

[107] There have been numerous criticisms of *Stillman*: see, *e.g.*, K. Roach, "Here We Go Again: Reviving the Real Evidence Distinction under Section 24(2)", (1998), 42 Crim. L.Q. 397-398; M. Davies, "Alternative Approaches to the Exclusion of Evidence under s. 24(2) of the *Charter*" (2002). 46 Crim. L.Q. pp. 21-39.

[108] See, *e.g.*, *R. v. A.J.R.* (1994), 94 C.C.C. (3d) 168, at 181 (Ont. C.A.); *R. v. Burlingham*, [1995] 2 S.C.R. 206, at para. 29 ("Once impugned evidence has been found to come within the trial fairness rationale, exclusion is virtually certain to follow."). In *R. v. Stillman*, *supra*, n. 105, at para. 70 the "fairness of the trial" criterion favoured exclusion and so "[i]n the circumstances, it was unnecessary and inappropriate to consider the seriousness of the breach"; if "it is determined that the admission of evidence obtained in violation of a *Charter* right would render a trial unfair then the evidence must be excluded without consideration of the other *Collins* factors" (at para. 72).

[109] L'Heureux-Dubé, J. (dissenting) in *R. v. Stillman*, *supra*, n. 105, at 384-387.

[110] *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 877; *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157; *R. v. Mills*, [1999] 3 S.C.R. 668; *United States of America v. Kwok*, [2001] 1

- The law concerning "conscriptive evidence" can be confusing. While bodily samples will often be considered to be conscriptive evidence that implicates trial fairness, there are some circumstances that are exceptions: for example, minimally-intrusive provision of samples, such as fingerprints or breath samples, are seen as conscripted evidence that does not implicate trial fairness.[111] The taking of hair samples is not minimally-intrusive in this sense; hair samples are conscripted evidence that does implicate trial fairness.[112] This creates some arbitrariness: for the purposes of the "trial fairness" factor under ss. 24(2), the law treats hair samples in the same way as a confession exacted through physical violence.

- There are also some other seeming inconsistencies in the case law. Making an incriminating statement in contravention of ss. 7 or 10 is "conscriptive".[113] On the other hand, making an incriminating statement voluntarily to an undercover police officer wearing a body pack without a search warrant and thus contrary to s. 8 is not "conscriptive".[114]

- The use of the "but for" definition of conscriptive evidence places the burden on the Crown of showing that the evidence would have been found but for the participation of the accused. This has been criticized as requiring the Court to engage in a distracting, hypothetical inquiry which is a "time-consuming distraction" from the *Collins* factors.[115] It could also be criticized as being inconsistent with the "seriousness of the *Charter* breach" factor: if the evidence were discoverable "but for" the *Charter* breach, the *Charter* breach is more serious.

- The second *Collins* factor is the seriousness of the *Charter* breach that has been committed. The case law concerning seriousness of the *Charter* breach does not impose a requirement of minimal impairment, such as the requirement found in the justification test developed under s. 1.[116] Indeed, in many cases, the focus of inquiry is not the seriousness of the breach

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S.C.R. 532, at para. 82; *Gosselin v. Quebec (Attorney General)*, *supra*, n. 5, at para. 344 *per* Arbour J.

[111] *R. v. Stillman*, *supra*, n. 105, at para. 90.

[112] *Ibid.*

[113] *R. v. Manninen*, [1987] 1 S.C.R. 1233; *R. v. McKenzie* (2002), 3 C.R. (6th) 317 (Ont. C.A.).

[114] *R. v. Wijesinha*, [1995] 3 S.C.R. 422, as explained by Cory J. in *R. v. Stillman*, *supra*, n. 105, at paras. 96-97.

[115] P. Hogg, *Constitutional Law of Canada* (4th ed.) at 968.

[116] *R. v. Oakes*, [1986] 1 S.C.R. 103.

itself or the effect on the accused but rather whether law enforcement personnel acted in good faith.

- On a number of occasions, the Supreme Court has set out the purpose behind examining the seriousness of the *Charter* breach, but it has not always been consistent. It has said that the objective is to deter bad faith decision-making by police[117] or to promote "decency of investigative techniques"[118] but, confusingly, it has also said that ss. 24(2) is not to be seen as a "remedy for police misconduct"[119] or "to deter police conduct".[120] It has also simply said that the courts "should be reluctant to admit evidence that shows signs of being obtained by an abuse of common law and *Charter* rights by the police".[121]

- The final consideration in the *Collins* test is whether the administration of justice would be better served by admission or exclusion of the evidence. The case law here suggests that a dominant consideration is the need to convict the guilty, particularly where serious offences are concerned. This approach has been criticized by the Supreme Court[122] but frequently the decisions of the Court seem to adopt that very approach. The emphasis on the need to convict those guilty of serious offences has been criticized as transforming ss. 24(2) into a remedy available only for those charged with minor offences – or as one commentator put it, a "Petty Thieves' Bill of Rights".[123]

- In cases where the "trial fairness" criterion does not favour exclusion but the seriousness of the *Charter* breach criterion does favour exclusion, the role of the court in assessing this branch of the test is to balance the seriousness of the *Charter* breach against the seriousness of the offence[124]

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[117] *R. v. Burlingham*, *supra*, n. 108, at 231. Deterrence is the primary objective of the jurisprudence in the United States: see, *e.g*, *United States v. Elkins*, 364 U.S. 206, at 217; *Segura v. United States* 468 U.S. 796 (1984); *Illinois v. Krull* 480 U.S. 340 (1987).
[118] *R. v. Burlingham*, *supra*, n. 108, at 401, 408 *per* Iacobucci, J.
[119] *R. v. Collins*, *supra*, n. 104, at 281.
[120] *R. v. Genest*, [1989] 1 S.C.R. 59 at 91.
[121] *Ibid.*, at 91.
[122] *R. v. Evans*, [1991] 1 S.C.R. 869, at 873.
[123] M. Davies, *supra*, n. 10, at 268.
[124] See, *e.g.*, *R. v. Tessling* (2003), 63 O.R. (3d) 1 (C.A.), at paras. 80-83; *R. v. Fawthrop* (2002), 166 C.C.C. (3d) 97 (Ont. C.A.), at para. 46; *R. v. Kitaitchik* (2002), 166 C.C.C. (3d) 14 (Ont. C.A.), at para. 47.

along with the importance and reliability of the evidence obtained.[125] Unfortunately, this requires courts to engage in highly subjective assessments of which criminal offences are more important than others[126] and to take into account and weigh the very evidence that ss. 24(2) suggests should not even be considered.[127]

- One could perhaps now argue that the s. 24(2) test for exclusion of evidence does not sufficiently vindicate *Charter* rights and vindication of *Charter* rights has now achieved greater prominence in light of the *Doucet-Boudreau* decision.

In my view, while there are many good criticisms of the s. 24(2) test, the test is far too settled and any significant change would be too disruptive. A clear challenge to the Supreme Court to re-evaluate its law in this area almost a decade ago has been completely ignored.[128] I expect that on May 28, 2009, we will all still be applying the Collins factors in a manner similar to how we are doing it now.

Another interesting question is whether on May 28, 2009, an alternative ground for the exclusion of evidence will have developed further – namely, the exclusion of evidence on the ground that its admission would violate trial fairness under s. 11(d) of the *Charter* and exclusion of evidence as an "appropriate and just" remedy under s. 24(1) of the *Charter*.

The law in this area has been developing over the last decade.[129] A majority of the Supreme Court made it clear that a judge has a discretion to exclude evidence that would, if admitted, undermine a fair trial. The remedy has been made

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[125] *R. v. O'Connor* (2002), 170 C.C.C. (3d) 365 (Ont. C.A.), at para. 86; *R. v. Fliss*, [2002] 1 S.C.R. 535, at para. 86 (S.C.C.); *R. v. Fawthrop*, *ibid.*, at para. 46; *R. v. Kitaitchik*, *ibid.*, at para. 47.

[126] For example, in *R. v. Tessling*, *supra*, n. 124, at para. 77, the Court found that since the Supreme Court of Canada dealt with a marijuana offence and considered it serious in *R. v. Plant*, [1993] 3 S.C.R. 281, "there has been public, judicial, and political recognition that marijuana is at the lower end of the hierarchy of harmful drugs".

[127] In *R. v. O'Connor*, *supra*, n. 125, at para. 86 the Court noted that the evidence was an essential component of the Crown's case.

[128] *R. v. Burlingham*, *supra*, n. 108, *per* L'Heureux-Dubé J.

[129] *R. v. Corbett* [1988] 1 S.C.R. 670; *Thomson Newspapers v. Canada (Director of Investigation and Research)*, [1990] 1 S.C.R. 425, *per* La Forest J. at 559-560; *R. v. Harrer*, [1995] 3 S.C.R. 562; *R. v. White*, [1999] 2 S.C.R. 417; *R. v. Barouche* (1996), 28 O.R. (3d) 737 (C.A.), appeal to the Supreme Court of Canada dismissed (1997), 32 O.R. (3d) 320.

available not only to protect trial fairness but also to protect the integrity of trial processes.[130]

However, the strong likelihood is that in May 28, 2009 this ground of excluding evidence will remain a difficult one to establish, likely reserved to those cases where s. 24(2) for one reason or another does not apply or is inapt. The threshold for a finding of unfairness to trigger this ground of relief is very high.[131] An interesting issue for courts in the year ahead will be whether the broad words of the Supreme Court in *Doucet-Boudreau* about the need to ensure that *Charter* rights are vindicated under s. 24(1) will have any liberalizing effect on this s. 24(1) remedy of exclusion of evidence. To date, the precise application of this remedy has been hard to define[132] and one of the challenges over the next five years will be to define it further.

Reassessment of administrative law standards of review?

In recent cases, Justice LeBel has placed two general issues on the table for our consideration:

- Is the "pragmatic and functional" approach to the determination of the standard of review the appropriate methodology in all administrative law contexts?

- Should courts move to a two standard system of judicial review, correctness and a revised unified standard of reasonableness?

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[130] *R. v. Xenos* (1991), 70 C.C.C. (3d) 362, at 374-75 (Que. C.A.). In *R. v. Hornick*, [2002] O.J. No. 1170, at para. 121 (C.J.) the Court confirmed that trial fairness under ss. 24(1) is broader than the concept of trial fairness under ss. 24(2) as discussed in such cases as *Stillman*, *supra*, n. 105. For example, it includes the concept of abuse of process.

[131] *R.* v. *Harrer*, *supra*, n. 129, at para. 51: this ground for exclusion is available in cases where "to admit the evidence would be so grossly unfair as to repudiate the values underlying our trial system and condone procedures which are anathema to the Canadian conscience." See also *R. v. Miaponoose* (1996), 110 C.C.C. (3d) 445, at 458 (Ont. C.A.); *R. v. Buric* (1996), 28 O.R. (3d) 737 (C.A.); *R. v. Gagnon* (2000), 147 C.C.C. (3d) 193 (Ont. C.A.); *R. v. Strano*, [2001] O.J. No. 404 (C.J.); *R. v. Bjellebo*, [1999] O.J. No. 965 (S.C.J.), at paras. 267-281 (relief not granted on the facts of the case).

[132] *R. v. Harrer*, *supra*, n. 129, at para. 23 *per* La Forest J.: "the general principle that an accused is entitled to a fair trial cannot be entirely reduced to specific rules." *R. v. Buric*, *supra*, n. 131: "the general principle that an accused is entitled to a fair trial cannot be entirely reduced to specific rules. A discretion exists because existing rules do not cover every situation, and may not adequately protect an accused's right to a fair trial. When the specific rules are not sufficient, the constitutional discretion referred to by La Forest J. can be exercised."

He raised the first question in *Chamberlain v. Surrey School District No. 36*.[133] In his view, while the "pragmatic and functional" approach has been "a useful tool in reviewing adjudicative or quasi-judicial decisions made by administrative tribunals", it is of limited use in the different context in *Chamberlain*. *Chamberlain* was concerned not with an adjudicative or quasi-judicial decision of an administrative tribunal but instead with a board of education, an elected body with a delegated power to make policy decisions.

In his view, the decisions or actions of an elected body of this kind will be invalidated if they are plainly contrary to the express or implied limitations on its powers. But the "pragmatic and functional" approach to judicial review, developed with a quite different kind of administrative body in mind "is not only unnecessary, but may also lead both to practical difficulties and to uncertainties about the proper basis of judicial review".[134] In his view, the types of considerations covered under the "pragmatic and functional" approach – the presence or absence of a privative clause in the legislation, the specialized nature of the subject matter, the expertise of the tribunal, the legislature's reasons for entrusting this decision to the tribunal and the nature of the question – do not translate well when one is dealing with "a policy decision made by an elected body whose function is to run local schools with the input of the local community".[135]

In this regard, Justice LeBel wrote:

> One would not expect to find a privative clause in connection with the Board's decisions, and the absence of one in the statute in no way signals that the legislature expected intervention by the courts in the Board's day-to-day business to be possible. Expertise is another factor which is more apposite in the adjudicative context than it is here. Trustees are authorized to make decisions not because they have any special expertise, but because they represent the community. Their level of expertise does not indicate anything about the extent of their discretion.[136]

As an elected policy body entrusted by the Legislature with a decision that has political and adjudicative aspects, the Board in *Chamberlain* was entitled to a high level of deference.

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[133] *Supra*, n. 19, at paras. 190-205.
[134] *Ibid.*, at para. 191.
[135] *Ibid.*, at paras. 192-193.
[136] *Ibid.*, at para. 193.

In my view, Justice LeBel's concerns about the applicability of the "pragmatic and functional" approach to the context of an elected Board that makes policy decisions are valid. The considerations covered under that approach simply do not make much sense in that context; in short, applying the "pragmatic and functional" approach in that context is neither pragmatic nor functional. The key consideration must be what the Legislature intended. Applying the "pragmatic and functional" approach in this context diverts attention from the primary consideration, which must be what the legislature intended concerning decisions made by this elected body.

Justice LeBel raised the second question – whether courts should move to a two standard system of judicial review – in *Toronto (City) v. C.U.P.E., Local 79*[137] and *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*.[138] In these cases, Justice LeBel, with the concurrence of Justice Deschamps, addressed "the growing criticism with the ways in which the standards of review currently available within the pragmatic and functional framework are conceived of and applied". The central issue, in his opinion, was that:

> …the patent unreasonableness standard does not currently provide sufficiently clear parameters for reviewing courts to apply in assessing the decisions of administrative adjudicators. From the beginning, patent unreasonableness at times shaded uncomfortably into what should presumably be its antithesis, the correctness review. Moreover, it is increasingly difficult to distinguish from what is ostensibly its less deferential counterpart, reasonableness *simpliciter*. It remains to be seen how these difficulties can be addressed.[139]

As his opinion in *Toronto (City) v. C.U.P.E., Local 79* demonstrates, he is not alone in raising these questions.[140] In his view, "The Court cannot remain unresponsive to sustained concerns or criticism coming from the legal community in relation to the state of Canadian jurisprudence in this important part of the law."[141] He then proceeds to enumerate a number of difficulties in the

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[137] *Supra*, n. 19.
[138] *Supra*, n. 19.
[139] *Toronto (City) v. C.U.P.E., Local 79*, *supra*, n. 19, at para. 66.
[140] D. J. Mullan, "Recent Developments in Standard of Review", in Canadian Bar Association (Ontario), *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners* (2000), at p. 26; J. G. Cowan, "The Standard of Review: The Common Sense Evolution?", paper presented to the Administrative Law Section Meeting, Ontario Bar Association, January 21, 2003, at p. 28; F. A. V. Falzon, "Standard of Review on Judicial Review or Appeal", in *Administrative Justice Review Background Papers: Background Papers prepared by Administrative Justice Project for the Attorney General of British Columbia* (2002), at pp. 32-33; *Miller v. Workers' Compensation Commission (Nfld.)* (1997), 154 Nfld. & P.E.I.R. 52 (Nfld. S.C.T.D.), at para. 27.
[141] *Toronto (City) v. C.U.P.E., Local 79*, *supra*, n. 19, at para. 64.

jurisprudence, including the tendency when applying the patent unreasonableness standard to assess the correctness of a decision thereby blurring the patent unreasonableness standard with the correctness standard[142] and the difficulty in discerning a difference between the patent unreasonableness standard and the reasonableness *simpliciter* standard.[143]

Justice LeBel's concerns here have considerable merit. I would add this: quite aside from the conceptual problems that Justice LeBel identifies, there are serious practical concerns regarding the ability of lawyers and courts to follow the approach in a practical, cost-effective way. The whole "pragmatic and functional" approach has achieved a level of abstraction and complexity that calls into question its workability. The reasoning in our factums, and indeed in some decisions,[144] resembles a run through an obstacle course, a run conducted for the purpose of working one's way through the Supreme Court's analytical framework rather than getting at the real issue: what level of curial deference the Legislature intended. The run through the obstacle course is not made any easier by the fact that the Supreme Court has released several difficult standard of review cases in the Supreme Court every year for the past several years, with the law often subtlely changing.[145]

If the "pragmatic and functional" approach is indeed pragmatic and functional, why does it so often create sharp debate in courts, sometimes as if nothing has ever been written on the subject before? A truly pragmatic and functional test would not have to be considered and refined by the Supreme Court so often, and so often in the same contexts.

Sometimes the delineation of an intricate legal test is counterproductive because of the elusive nature of the concepts in issue. The delineation of an intricate five point test for determining the standard of care in negligence would be nothing more than an invitation for endless quibbling about each of the five points in the

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[142] *Ibid.*, at paras. 96-99.
[143] *Ibid.*, at paras. 101-133.
[144] See, *e.g.*, *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2002] 4 F.C. 3 (C.A.).
[145] Since January 2004, the Supreme Court has released seven cases dealing with the standard of review: *I.A.T.S.E., Stage Local 56 v. Société de la Place des Arts de Montréal*, 2004 SCC 2; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19; *Penetanguishene Mental Health Centre v. Ontario (Attorney General)*, 2004 SCC 20; *Pinet v. St. Thomas Psychiatric Hospital*, 2004 SCC 21; *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, *supra*, n. 19; *Cartaway Resources Corp. (Re)*, 2004 SCC 26; *Alberta Union of Provincial Employees v. Lethbridge Community College*, 2004 SCC 28.

test, rather than a focused, efficient discussion concerning the standard of care. The concept of appropriate deference is similarly elusive.

And in the end I suspect that all that is really going on is this: when courts see a tribunal decision that in their experience and judgment warrants interference, they decide to interfere, crafting their reasons in the required form of words dictated by the "pragmatic and functional" approach.

In the end, other jurisdictions have not shackled themselves with such an intricate approach to the standard of review, so why should we?[146]

In *CUPE v. Toronto (City)*, Justice LeBel concluded his provocative opinion with the following words:

> Administrative law has developed considerably over the last 25 years since *CUPE*. This evolution, which reflects a strong sense of deference to administrative decision makers and an acknowledgment of the importance of their role, has given rise to some problems or concerns. It remains to be seen, in an appropriate case, what should be the solution to these difficulties. Should courts move to a two standard system of judicial review, correctness and a revised unified standard of reasonableness? Should we attempt to more clearly define the nature and scope of each standard or rethink their relationship and application? This is perhaps some of the work which lies ahead for courts, building on the developments of recent years as well as on the legal tradition which created the framework of the present law of judicial review.[147]

So far, the Supreme Court has not taken up these questions, but I hope that it will do so sometime over the next five years.

Justiciability

The law in Ontario at the present time is that there are certain government decisions, such as Crown prerogative decisions concerning national defence or the bestowal of honours, that are immune from administrative law judicial review.[148]

In an appropriate case, I believe that this standpoint is open to challenge. It reflects a view that there are some executive decisions that can be immune from the purview of the courts, a view that may be outmoded after our 1982

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[146] *Cf.* the United States: see Strauss, *supra*, n. 78.
[147] *Supra*, n. 19, at para. 134.
[148] *Black v. Canada (Prime Minister)* (2000), 47 O.R. (3d) 532 (S.C.J.), aff'd (2001), 54 O.R. (3d) 215 (C.A.).

constitutional reforms which clearly established the overseeing role of our judicial branch. A foreign case, thus far not cited in Ontario, stands for this very proposition.[149] In that case, the court held that Crown prerogatives became fully reviewable after the introduction of a written constitution that reworked the relationship between the courts and the executive.

Remedies for breaches of quasi-constitutional law and underlying constitutional principles

Courts may have to consider in the near future and perhaps before May 28, 2009 a particularly thorny question: what remedies exist for violations of the *Canadian Bill of Rights*[150] and the underlying constitutional principles recognized in the *Secession Reference*?[151] Section 24(1) of the *Charter*, discussed in *Doucet-Boudreau*, applies only to violations of the *Charter*.

Recently the Supreme Court held, citing *Doucet-Boudreau*, that the enforcement of the quasi-constitutional *Quebec Charter*[152] "can lead to the imposition of affirmative or negative obligations designed to correct or bring an end to situations that are incompatible with the *Quebec Charter*"[153] but this ruling could be distinguished on the basis of the broad statutory jurisdiction in s. 50 of the *Quebec Charter* to grant appropriate remedies "where consistent with the public interest". The Supreme Court also held that any remedy must be fashioned in a manner consistent with public law principles, many of which have been developed in the constitutional context.[154]

In the case of the *Canadian Bill of Rights*, s. 2 sets out a remedy: legislation is to "be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared". This suggests a remedial jurisdiction parallelling that

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[149] *Pharmaceutical Manufacturers Association of SA and another In re: the ex parte application of the President of the Republic of South Africa and others*, 2000 (2) S.A. 674; 2000 (3) B.C.L.R. 241; [2000] Z.A.C.C. 1 (South African Constitutional Court).
[150] S.C. 1960, c. 44.
[151] *Supra*, n. 101.
[152] *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12.
[153] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, *supra*, n. 18, at para. 26.
[154] *Ibid.*, at para. 15: "the appropriate remedy for a violation cannot be chosen without taking into account the constitutional framework and principles governing the organization and practices of Canada's public institutions so that the relationships between the various components of the legal hierarchy applicable to the situation under Quebec law are articulated appropriately."

of s. 52 of the *Constitution Act, 1982*. Is there scope for injunctive relief or mandatory orders based on the *Canadian Bill of Rights*? Do courts have any inherent jurisdiction or common law jurisdiction that can be invoked to enforce *Canadian Bill of Rights* standards? Or must there be a statutory grant of jurisdiction, similar to s. 50 of the *Quebec Charter*, to give broader forms of relief. These questions may assume greater importance in light of an important *Canadian Bill of Rights* case before the Supreme Court at the present time, particularly if the Court upholds the s. 2(e) (fair hearing) claims in the case and broadens the application of the *Canadian Bill of Rights*.[155]

The underlying constitutional principles identified in the *Secession Reference*, namely the principles of federalism, democracy, constitutionalism and the rule of law and respect for minorities, can be invoked to challenge legislation or administrative decisions. What remedies apply? Since the underlying constitutional principles are part of the Constitution of Canada, s. 52 of the *Constitution Act, 1867* certainly applies and so legislation or administrative decisions may be declared to be of "no force or effect".[156] Suspension of such a declaration would also appear to be available.[157] The underlying principles also create values that administrative decision-makers may have to take into account.[158] What other remedies are available? Perhaps by May 28, 2009 we will have an answer to that question, though very few cases since 1998 have invoked the underlying constitutional principles.

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.[159] It answered this in the affirmative, by confirming that if a tribunal has an implied

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[155] *Canada (Attorney General) v. Air Canada* (S.C.C. No. 29660), an appeal from (2003), 222 D.L.R. (4th) 385 (Qué. C.A.) at paras. 39-50.

[156] See, *e.g.*, the declaration in *Polewsky v. Home Hardware*, *supra*, n. 12, that the Rule of Law and the common law constitutional right of access to justice compels the enactment of statutory provisions that permit persons to proceed *in forma pauperis* in the Small Claims Court.

[157] See *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, where a declaration of invalidity was suspended, a power perhaps emanating from the inherent jurisdiction of the Court.

[158] *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 56 O.R. (3d) 505 (C.A.) (Commission was required by the fundamental principles of the Constitution to give serious weight and consideration to the importance of the Montfort Hospital as an institution to the survival of the Franco-Ontarian minority.)

[159] *Nova Scotia (Workers' Compensation Board) v. Martin*, *supra*, n. 6.

power to determine *any* legal questions, it has the jurisdiction to decide the constitutional validity of its provisions.[160] In answering this question, it resolved years of uncertainty.[161] 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 them under statute.[162] 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.[163]

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.[164] 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 between now and May 28, 2009, but that the challenge will face difficulty in light

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[160] *Ibid*. at para. 48.

[161] 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. 6, ended this distinction – an authorization, express or implied, to determine questions of law is sufficient.

[162] *R. v. 974649 Ontario Inc.*, *supra*, n. 26.

[163] 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.

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

of the Supreme Court's ruling in *R. v. Hynes*,[165] 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.[166]

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 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.[167]

As each tribunal has different functions and structures, I expect that between now and May 28, 2009 there will be a plethora of litigation applying these cases and testing whether particular tribunals have s. 24 remedial powers.

The use of Charter values in developing jurisprudence

Although s. 32 provides that the *Charter* applies to Parliament and the legislatures and although the case law is clear that the *Charter* does not apply to purely private disputes, it is interesting that the Supreme Court in the *Sierra Club* case has recently applied a constitutional "fair trial" right to the private civil litigation context.[168] It has not always been so welcoming to the introduction of *Charter* values into the private civil litigation context.[169]

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[165] [2001] 3 S.C.R. 623.
[166] *R. v. Hynes*, *ibid.*, and *R. v. 974649 Ontario Inc.*, *supra*, n. 26.
[167] See *supra*, n. 163.
[168] *Sierra Club*, *supra*, n. 101, at para. 50. The approach is reminiscent of that urged by the Supreme Court in *R. v. Salituro*, [1991] 3 S.C.R. 654, at 675.
[169] *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130.

While constitutional principles have been held to be matters that administrative tribunals are to take into account when considering applicable legislation governing their discretions,[170] other cases seem opposed to that approach.[171]

The Canadian approach on this issue seems at odds with the approach of some foreign courts, some of which have been very aggressive in using constitutional principles to develop private law jurisprudence.[172] Over the next five years, it will be interesting to see the extent to which Canadian courts build upon the approach taken in the *Sierra Club* case and foreign cases and start using *Charter* values to modify our common law.

Clarification of 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*.[173]

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.[174]

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.[175]

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[170] *Lalonde*, *supra*, n. 158.
[171] *Criminal Lawyers' Association*, *supra*, n. 101, citing *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, per Lamer J. at 1078; *Symes v. Canada*, [1993] 4 S.C.R. 695 at 752; *R. v. Zundel*, [1992] 2 S.C.R. 731, per McLachlin J. at 771; *Bell Express Vu Jasper Partnership v. Rex*, [2002] 2 S.C.R. 559 at 598-599.
[172] See, e.g., *Campbell (Appellant) v. MGN Limited (Respondents)*, unreported, H.L., May 6, 2004. (The 3:2 majority aggressively used provisions from the European Convention on Human Rights to define a tort of breach of privacy.)
[173] [2002] 2 S.C.R. 235.
[174] *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, *supra*, n. 141.

Pure questions of law determined by an administrative tribunal are reviewable on a correctness standard.[176] 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.[177]

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*,[178] 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.[179] The Court broadly declared that *Housen v. Nikolaisen* "applies to Charter cases in the same way as to other cases".[180]

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*[181] and in *R. v. Chang*,[182] the

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[175] *Martin*, *supra*, n. 6, para. 31; *Paul v. British Columbia (Forest Appeals Commssion)*, [2003] 2 S.C.R. 585.

[176] *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, *supra*, n. 6, applying *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, *supra*, n. 161, 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.

[177] *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 (*Semble*, 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.)

[178] 2003 FCA 473.

[179] *Ibid.*, at para. 16.

[180] *Ibid.*

[181] [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

Court of Appeal for Ontario and the 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 deference[183], though in some cases the standard is expressed at different levels.[184] 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,[185] whether a press ban or sealing order should be made,[186] whether a prosecution constitutes an abuse of process under s. 7[187] and whether reasonable and probable grounds are present.[188]

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

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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 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."

[182] 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."

[183] *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".

[184] Compare the standard discussed in *Buhay*, *ibid.*, with the standard expressed in *R. v. Stillman*, n. 105, 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".

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

[186] *Dagenais v. Canadian Broadcasting Corporation*, *supra*, n. 110, paras. 188-189.

[187] Semble, *R. v. Regan*, *supra*, n. 54. 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.

[188] *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).

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.[189]

In *Westcoast Energy Inc. v. Canada (National Energy Board)*,[190] 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*[191] 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.[192] It then proceeded to examine the issue without much deference[193] and it did the same in the companion case of *Ling*.[194]

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

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[189] *R. v. Ngo*, (2003) 175 C.C.C. (3d) 290, 2003 ABCA 121.
[190] [1998] 1 S.C.R. 322.
[191] *Supra*, n. 66.
[192] *Ibid.*, at para. 100.
[193] *Ibid.*, at paras. 100-105.
[194] *Supra*, n. 67.

review for questions of interpretation of their own legislation[195] but does this change when questions of interpretation are embued 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.[196]

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"?[197]

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.[198] 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."[199] This makes sense: the rigid application of that rule would deny appellate courts their proper role in developing legal principles of general application.[200] Perhaps the same can be said for certain questions of mixed fact and constitutional law.

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[195] *Macdonell v. Quebec (Commission d'accès à l'information)*, [2002] 3 S.C.R. 661.
[196] *Supra*, n. 190, at para. 40.
[197] *Doucet-Boudreau*, *supra*, n. 8, para. 36, citing McLachlin J. in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 136.
[198] *RJR*, *supra*, n. 197, at para. 174, *per* La Forest J. dissenting.
[199] *Ibid.*, at para. 81.
[200] *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. 197.

Concluding comments

The past couple of years have been exciting for those of us who follow the development of public law remedies. A quick review of the footnotes in this paper shows that most of the key cases in this area were decided in 2002 or later.

This leads me to make one final prediction: over the next five years, much of the law cited in this paper is likely to be modified, qualified or supplemented. Now is *definitely* not the time to write a definitive text on public law remedies!