Docket: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA and ASSEMBLY OF FIRST NATIONS

Complainants

-and-

CANADIAN HUMAN RIGHTS COMMISSION

Commission

-and-

ATTORNEY GENERAL OF CANADA
(representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

-and-

CHIEFS OF ONTARIO and
NISHNAWBE ASKI NATION

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TAB 1

2000 SCC 44 (CanLII)

The British Columbia Human Rights Commission, the Commissioner of Investigation and Mediation, the British Columbia Human Rights Tribunal and Andrea Willis *Appellants*

v.

Robin Blencoe *Respondent*

and

Irene Schell *Intervener*

and

The Attorney General for Ontario, the Attorney General of British Columbia, the Saskatchewan Human Rights Commission, the Ontario Human Rights Commission, the Nova Scotia Human Rights Commission, the Manitoba Human Rights Commission, the Canadian Human Rights Commission, the Commission des droits de la personne et des droits de la jeunesse, the British Columbia Human Rights Coalition and the Women's Legal Education and Action Fund *Interveners*

INDEXED AS: BLENCOE *v.* BRITISH COLUMBIA (HUMAN RIGHTS COMMISSION)

Neutral citation: 2000 SCC 44.

File No.: 26789.

2000: January 24; 2000: October 5.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL

Constitutional law — Charter of Rights — Application — Human Rights Commission — Commission implementing specific governmental program and exercising statutory authority — Commission independent

La British Columbia Human Rights Commission, le Commissioner of Investigation and Mediation, le British Columbia Human Rights Tribunal et Andrea Willis *Appelants*

c.

Robin Blencoe *Intimé*

et

Irene Schell *Intervenante*

et

Le procureur général de l'Ontario, le procureur général de la Colombie-Britannique, la Saskatchewan Human Rights Commission, la Commission ontarienne des droits de la personne, la Nova Scotia Human Rights Commission, la Commission des droits de la personne du Manitoba, la Commission canadienne des droits de la personne, la Commission des droits de la personne et des droits de la jeunesse, la British Columbia Human Rights Coalition et le Fonds d'action et d'éducation juridiques pour les femmes *Intervenants*

RÉPERTORIÉ: BLENCOE *c.* COLOMBIE-BRITANNIQUE (HUMAN RIGHTS COMMISSION)

Référence neutre: 2000 CSC 44.

N° du greffe: 26789.

2000: 24 janvier; 2000: 5 octobre.

Présents: Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit constitutionnel — Charte des droits — Application — Commission des droits de la personne — Commission mettant en œuvre un programme gouvernemental particulier et exerçant un pouvoir conféré par la loi

from government and acting judicially — Whether Canadian Charter of Rights and Freedoms applicable to Commission's actions — Canadian Charter of Rights and Freedoms, s. 32.

Constitutional law — Charter of Rights — Liberty and security of person — Sexual harassment complaints filed against respondent before Human Rights Commission — Lengthy delay in processing complaints — Whether respondent's constitutional rights to liberty and security of person engaged — Canadian Charter of Rights and Freedoms, s. 7.

Administrative law — Abuse of process — Delay — Sexual harassment complaints filed against respondent before Human Rights Commission — Lengthy delay in processing complaints — Whether respondent's ability to have fair hearing compromised — Whether lengthy delay amounted to denial of natural justice or abuse of process.

In March 1995, while serving as a minister in the Government of British Columbia, the respondent was accused by one of his assistants of sexual harassment. A month later, the premier removed the respondent from Cabinet and dismissed him from the NDP caucus. In July and August of 1995, two complaints of discriminatory conduct in the form of sexual harassment were filed with the British Columbia Council of Human Rights (now the British Columbia Human Rights Commission) against the respondent by two other women, W and S. The complaints centered around various incidents of sexual harassment alleged to have occurred between March 1993 and March 1995. The respondent was informed of the first complaint in July 1995 and of the second in September 1995. After the Commission's investigation, hearings were scheduled before the British Columbia Human Rights Tribunal in March 1998, over 30 months after the initial complaints were filed.

Following the allegations against the respondent, media attention was intense. He suffered from severe depression. He did not stand for re-election in 1996. Considering himself "unemployable" in British Columbia due to the outstanding human rights complaints against him, the respondent commenced judicial review proceedings in November 1997 to have the complaints stayed. He claimed that the Commission had lost jurisdiction due to unreasonable delay in processing the complaints. The respondent alleged that the unreasona-

— Commission indépendante du gouvernement et agissant de manière judiciaire — La Charte canadienne des droits et libertés s'applique-t-elle aux actes de la Commission? — Charte canadienne des droits et libertés, art. 32.

Droit constitutionnel — Charte des droits — Liberté et sécurité de la personne — Plaintes de harcèlement sexuel déposées contre l'intimé auprès de la Commission des droits de la personne — Long délai écoulé dans le traitement des plaintes — Les droits constitutionnels de l'intimé à la liberté et à la sécurité de sa personne s'appliquent-ils? — Charte canadienne des droits et libertés, art. 7.

Droit administratif — Abus de procédure — Délai — Plaintes de harcèlement sexuel déposées contre l'intimé auprès de la Commission des droits de la personne — Long délai écoulé dans le traitement des plaintes — La capacité de l'intimé d'obtenir une audience équitable a-t-elle été compromise? — Le long délai écoulé constituait-il un déni de justice naturelle ou un abus de procédure?

En mars 1995, alors qu'il était ministre au sein du gouvernement de la Colombie-Britannique, l'intimé a été accusé de harcèlement sexuel par l'une de ses adjointes. Un mois plus tard, le premier ministre l'excluait du Cabinet et du caucus du NPD. En juillet et en août 1995, deux autres femmes, W et S, ont déposé devant le British Columbia Council of Human Rights (maintenant la British Columbia Human Rights Commission) deux plaintes de discrimination sous forme de harcèlement sexuel contre l'intimé. Les plaintes concernaient divers épisodes de harcèlement sexuel qui seraient survenus entre mars 1993 et mars 1995. L'intimé a été informé de la première plainte en juillet 1995 et de la seconde en septembre 1995. À la suite de l'enquête de la Commission, des audiences devant le British Columbia Human Rights Tribunal ont été fixées au mois de mars 1998, soit plus de 30 mois après le dépôt des plaintes initiales.

Les allégations formulées contre l'intimé ont suscité une attention intense de la part des médias. Il a fait une grave dépression. Il n'a pas sollicité un nouveau mandat en 1996. Se disant «inapte au travail» en Colombie-Britannique en raison des plaintes fondées sur les droits de la personne qui pesaient toujours contre lui, l'intimé a présenté, en novembre 1997, une demande de contrôle judiciaire en vue d'obtenir l'arrêt des procédures relatives aux plaintes. Il a fait valoir que la Commission avait perdu compétence en raison d'un délai déraisonna-

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ble delay caused serious prejudice to him and his family which amounted to an abuse of process and a denial of natural justice. His petition was dismissed by the Supreme Court of British Columbia. A majority of the Court of Appeal allowed the respondent's appeal and directed that the human rights proceedings against him be stayed. The majority found that the respondent had been deprived of his right under s. 7 of the *Canadian Charter of Rights and Freedoms* to security of the person in a manner which was not in accordance with the principles of fundamental justice.

Held (Iacobucci, Binnie, Arbour and LeBel JJ. dissenting in part): The appeal should be allowed.

Per McLachlin C.J. and L'Heureux-Dubé, Gonthier, Major and Bastarache JJ.: The *Charter* applies to the actions of the British Columbia Human Rights Commission. The Commission is created by statute and all of its actions are taken pursuant to statutory authority. Bodies exercising statutory authority are bound by the *Charter* even though they may be independent of government. The Commission in this case is both implementing a specific government program and exercising powers of statutory compulsion. Further, the Commission cannot escape *Charter* scrutiny merely because it exercises judicial functions. The ultimate source of authority is government. The Commission is carrying out the legislative scheme of the *Human Rights Code* and must act within the limits of its enabling statute. There is clearly a "governmental quality" to the functions of a human rights commission which is created by government to promote equality in society generally. It is the administration of a governmental program that calls for *Charter* scrutiny.

Section 7 of the *Charter* can extend beyond the sphere of criminal law, at least where there is state action which directly engages the justice system and its administration. If a case arises in the human rights context which, on its facts, meets the usual s. 7 threshold requirements, there is no specific bar against such a claim and s. 7 may be engaged.

In order for s. 7 to be triggered, one must first establish that the interest in respect of which the respondent asserted his claim falls within the ambit of s. 7. The liberty interest protected by s. 7 is no longer restricted to mere freedom from physical restraint. "Liberty" is engaged where state compulsions or prohibitions affect

ble dans le traitement des plaintes. L'intimé a allégué que ce délai déraisonnable avait causé à sa famille et à lui-même un préjudice grave équivalant à un abus de procédure et à un déni de justice naturelle. Sa demande a été rejetée par la Cour suprême de la Colombie-Britannique. La Cour d'appel, à la majorité, a accueilli l'appel de l'intimé et a ordonné l'arrêt des procédures en matière de droits de la personne qui avaient été engagées contre lui. Les juges majoritaires ont conclu que l'intimé avait été privé, d'une manière non conforme aux principes de justice fondamentale, du droit à la sécurité de sa personne que lui garantit l'art. 7 de la *Charte canadienne des droits et libertés*.

Arrêt (les juges Iacobucci, Binnie, Arbour et LeBel sont dissidents en partie): Le pourvoi est accueilli.

Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Major et Bastarache: La *Charte* s'applique aux actes de la British Columbia Human Rights Commission. La Commission a été créée par une loi et elle accomplit tous ses actes en vertu du pouvoir que lui confère la loi en cause. L'organisme qui exerce un pouvoir conféré par une loi est assujetti à la *Charte* même s'il peut être indépendant du gouvernement. La Commission dont il est question en l'espèce met en œuvre un programme gouvernemental particulier et exerce des pouvoirs de contrainte émanant de la loi. En outre, la Commission ne peut pas échapper à un examen fondé sur la *Charte* du seul fait qu'elle exerce des fonctions judiciaires. L'origine du pouvoir accordé est en fin de compte le gouvernement. La Commission applique le régime législatif du *Human Rights Code* et doit agir dans les limites de sa loi habilitante. Les fonctions d'une commission des droits de la personne créée par le gouvernement pour promouvoir l'égalité dans la société en général sont clairement de «nature gouvernementale». C'est l'application d'un programme gouvernemental qui commande l'examen fondé sur la *Charte*.

L'article 7 de la *Charte* peut déborder le cadre du droit criminel, au moins dans le cas d'un acte gouvernemental intéressant directement le système judiciaire et l'administration de la justice. Rien ne s'oppose à ce que cet article s'applique à une affaire en matière de droits de la personne qui, sur le plan des faits, respecte les conditions préliminaires de son application.

Pour que l'art. 7 s'applique, il faut d'abord prouver que le droit visé par l'allégation de l'intimé relève de l'art. 7. Le droit à la liberté garanti par l'art. 7 ne s'entend plus uniquement de l'absence de toute contrainte physique. La «liberté» est en cause lorsque des contraintes ou des interdictions de l'État influent sur les

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important and fundamental life choices. The s. 7 liberty interest protects an individual's personal autonomy. In our free and democratic society, individuals are entitled to make decisions of fundamental importance free from state interference. Such personal autonomy, however, is not synonymous with unconstrained freedom. Here, the state has not prevented the respondent from making any "fundamental personal choices". Therefore, the interests sought to be protected in this case do not fall within the "liberty" interest protected by s. 7.

choix importants et fondamentaux qu'une personne peut faire dans sa vie. Le droit à la liberté garanti par l'art. 7 protège l'autonomie personnelle. Dans notre société libre et démocratique, chacun a le droit de prendre des décisions d'importance fondamentale sans intervention de l'État. Cette autonomie personnelle n'est toutefois pas synonyme de liberté illimitée. Dans la présente affaire, l'État n'a pas empêché l'intimé de faire des «choix personnels fondamentaux». Par conséquent, les droits que l'on cherche à protéger en l'espèce ne font pas partie du droit «à la liberté» garanti par l'art. 7.

The right to security of the person guaranteed by s. 7 protects the psychological integrity of an individual. However, in order for this right to be triggered, the psychological harm must result from the actions of the state and it must be serious. In this case, the direct cause of the harm to the respondent was not the state-caused delay in the human rights process. While the respondent has suffered serious prejudice in connection with the allegations of sexual harassment against him, for s. 7 to be engaged there must be a sufficient causal connection between the state-caused delay and the prejudice suffered. The most prejudicial impact on the respondent was caused not by the actions of the Commission but rather by the events prior to the complaints — the allegations of the respondent's assistant — which caused the respondent to be ousted from Cabinet and caucus as well as the actions by non-governmental actors such as the press. The harm to the respondent resulted from the publicity surrounding the allegations themselves, coupled with the political fallout which ensued. When the respondent began to experience stigma, the human rights proceedings had yet to commence. Further, there is a pending civil suit against the respondent for sexual harassment and W's complaint against the Government on these very same issues. The prolongation of stigma from ongoing publicity was likely regardless of the delay in the human rights proceedings. At best, the respondent was deprived of a speedy opportunity to clear his name. Lastly, the human rights process did not seriously exacerbate the respondent's prejudice. It is difficult to see how procedural delay could have seriously increased damage already done to the respondent's reputation.

Le droit à la sécurité de la personne garanti par l'art. 7 protège l'intégrité psychologique d'une personne. Cependant, pour que ce droit soit en cause, le préjudice psychologique doit résulter d'un acte de l'État et doit être grave. En l'espèce, la cause directe du préjudice subi par l'intimé n'était pas le délai imputable à l'État dans le déroulement du processus en matière de droits de la personne. Bien que les allégations de harcèlement sexuel dont l'intimé a fait l'objet lui aient causé un préjudice grave, il doit y avoir un lien de causalité suffisant entre le délai imputable à l'État et le préjudice subi pour que l'art. 7 s'applique. L'effet le plus préjudiciable sur l'intimé résulte non pas des actes de la Commission, mais plutôt d'événements antérieurs au dépôt des plaintes — les allégations de l'adjointe de l'intimé — qui ont entraîné son expulsion du Cabinet et du caucus, ainsi que du comportement d'acteurs non gouvernementaux comme les journalistes. Le préjudice subi par l'intimé est imputable à la publicité ayant entouré les allégations elles-mêmes et aux retombées politiques qui ont suivi. Les procédures en matière de droits de la personne n'avaient pas encore commencé lorsque l'intimé a commencé à être victime d'une stigmatisation. En outre, l'intimé fait toujours l'objet de poursuites civiles pour harcèlement sexuel et W a déposé une plainte contre le gouvernement pour les mêmes motifs. Il était probable que la stigmatisation résultant de la publicité incessante se poursuivrait peu importe le délai écoulé dans les procédures en matière de droits de la personne. Au mieux, l'intimé a été privé de la possibilité de se disculper rapidement. Enfin, le processus en matière de droits de la personne n'a pas sérieusement aggravé le préjudice subi par l'intimé. On voit mal comment un délai de procédure pourrait avoir sérieusement accru le préjudice déjà causé à la réputation de l'intimé.

Even accepting that the outstanding complaints may have contributed to the respondent's stigma to some degree, thereby causing some of his suffering, and assuming without deciding that there is a sufficient nexus between the state-caused delay and the prejudice to the respondent, the state interference with the respon-

Même si on reconnaît que les plaintes dont l'intimé faisait l'objet peuvent avoir contribué jusqu'à un certain point à sa stigmatisation et avoir ainsi causé certaines de ses souffrances, et même si on présume, sans pour autant le décider, qu'il existe un lien suffisant entre le délai imputable à l'État et le préjudice subi par l'intimé,

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dent's psychological integrity did not amount to a violation of his right to security of the person. First, the s. 7 rights of "liberty and security of the person" do not include a generalized right to dignity, or more specifically a right to be free from the stigma associated with a human rights complaint. While respect for the inherent dignity of persons is clearly an essential value in our free and democratic society which must guide the courts in interpreting the *Charter*, this does not mean that dignity is elevated to a free-standing constitutional right protected by s. 7. The notion of "dignity" is better understood as an underlying value. Like dignity, reputation is not a free-standing right. Neither is freedom from stigma. Second, the state has not interfered with the ability of the respondent and his family to make essential life choices. In order for security of the person to be triggered in this case, the impugned state action must have had a serious and profound effect on the respondent's psychological integrity. It is only in exceptional cases where the state interferes in profoundly intimate and personal choices of an individual that state-caused delay in human rights proceedings could trigger the s. 7 security of the person interest. Here, the alleged right to be free from stigma associated with a human rights complaint does not fall within this narrow sphere. The state has not interfered with the respondent's right to make decisions that affect his fundamental being. The prejudice to the respondent is essentially confined to his personal hardship.

There is no constitutional right outside the criminal context to be "tried" within a reasonable time. The majority of the Court of Appeal erred in transplanting s. 11(*b*) principles set out in the criminal law context to human rights proceedings under s. 7. Not only are there fundamental differences between criminal and human rights proceedings, but, more importantly, s. 11(*b*) of the *Charter* is restricted to a pending criminal case.

There are remedies available in the administrative law context to deal with state-caused delay in human rights proceedings. However, delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. There must be proof of significant prejudice which results from an unacceptable delay. Here, the respondent's ability to have a fair hearing has

l'atteinte de l'État à l'intégrité psychologique de l'intimé ne constituait pas une atteinte à son droit à la sécurité de sa personne. Premièrement, les droits «à la liberté et à la sécurité de [l]a personne» garantis par l'art. 7 ne comportent pas un droit général à la dignité ou, plus précisément, un droit à la protection contre la stigmatisation liée à une plainte fondée sur les droits de la personne. Bien que le respect de la dignité inhérente des gens soit nettement une valeur essentielle de notre société libre et démocratique, qui doit guider les tribunaux dans l'interprétation de la *Charte*, cela ne signifie pas pour autant que l'on fait de la dignité un droit constitutionnel distinct garanti par l'art. 7. Il vaut mieux considérer la notion de «dignité» comme une valeur sous-jacente. À l'instar de la dignité, la réputation n'est pas un droit distinct. La protection contre la stigmatisation ne l'est pas non plus. Deuxièmement, l'État n'a pas porté atteinte à la capacité de l'intimé et des membres de sa famille de faire des choix essentiels dans leur vie. Pour que la sécurité de la personne soit en cause en l'espèce, l'acte reproché à l'État doit avoir eu des répercussions graves et profondes sur l'intégrité psychologique de l'intimé. Ce n'est que dans les cas exceptionnels où l'État s'ingère dans des choix profondément intimes et personnels d'un individu que le délai imputable à l'État, dans des procédures en matière de droits de la personne, pourrait déclencher l'application du droit à la sécurité de la personne garanti par l'art. 7. En l'espèce, le droit allégué à la protection contre la stigmatisation liée à une plainte fondée sur les droits de la personne ne fait pas partie de cette catégorie restreinte. L'État n'a pas porté atteinte au droit de l'intimé de prendre des décisions touchant son être fondamental. Le préjudice subi par l'intimé se limite essentiellement à ses difficultés personnelles.

Le droit constitutionnel d'être «jugé» dans un délai raisonnable ne s'applique qu'en matière criminelle. La Cour d'appel à la majorité a eu tort de transposer dans des procédures en matière de droits de la personne fondées sur l'art. 7 des principes énoncés relativement à l'al. 11*b*) dans le contexte du droit criminel. Non seulement y a-t-il des différences fondamentales entre des procédures criminelles et des procédures en matière de droits de la personne, mais encore l'al. 11*b*) de la *Charte* ne s'applique qu'aux affaires criminelles pendantes.

Le droit administratif offre des réparations en ce qui concerne le délai imputable à l'État dans des procédures en matière de droits de la personne. Cependant, le délai ne justifie pas, à lui seul, un arrêt des procédures comme l'abus de procédure en common law. Il faut prouver qu'un délai inacceptable a causé un préjudice important. Dans la présente affaire, la capacité de l'intimé d'obte-

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not been compromised. Proof of prejudice has not been demonstrated to be of sufficient magnitude to impact on the fairness of the hearing. Unacceptable delay may also amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised. Where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly caused a significant prejudice to amount to an abuse of process. It must be a delay that would, in the circumstances of the case, bring the human rights system into disrepute. A court must be satisfied that the proceedings are contrary to the interests of justice. There may also be abuse of process where conduct is oppressive. A stay is not the only remedy available for abuse of process in administrative law proceedings and a respondent asking for a stay bears a heavy burden. In this case, the respondent did not demonstrate that the delay was unacceptable to the point of being so oppressive as to taint the proceedings. While the stress and stigma resulting from an inordinate delay may contribute to an abuse of process, the delay in processing the complaints was not inordinate.

The determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the case and its complexity, the purpose and nature of the proceedings, and whether the respondent contributed to the delay or waived the delay. Here, although the Commission took longer than is desirable to process the complaints, the delay was not so inordinate as to amount to an abuse of process. The case may not have been an extremely complicated one, but the various steps necessary to protect the respondents in the context of the human rights complaints system take time. The trial judge found that only the 24-month period between the filing of the complaints and the end of the investigation process should be considered for the delay, stating that the Human Rights Tribunal could not be criticized for not setting the hearing dates earlier as the respondent did not press for earlier dates. During that 24-month period, there was no extended period without any activity in the processing of the complaints, except for an inexplicable five months of inaction. The respondent challenged the lateness of the complaints and brought forward allegations of bad faith and, as a result, the process was delayed by eight months. The Commission should not be held responsible for contributing to this part of the delay. When all the relevant factors are taken into account, in particular the ongoing communication between the par-

nir une audience équitable n'a pas été compromise. Il n'a pas été établi que le préjudice subi est assez important pour nuire à l'équité de l'audience. Un délai inacceptable peut également constituer un abus de procédure dans certaines circonstances, même lorsque l'équité de l'audience n'a pas été compromise. Pour constituer un abus de procédure dans les cas où il n'y a aucune atteinte à l'équité de l'audience, le délai doit être manifestement inacceptable et avoir directement causé un préjudice important. Il doit s'agir d'un délai qui, dans les circonstances de l'affaire, déconsidérerait le régime de protection des droits de la personne. La cour doit être convaincue que les procédures sont contraires à l'intérêt de la justice. Il peut également y avoir abus de procédure lorsque la conduite est oppressive. L'arrêt des procédures n'est pas la seule réparation possible dans le cas d'un abus de procédure en matière de droit administratif, et la personne faisant l'objet d'une plainte qui demande l'arrêt des procédures doit s'acquitter d'un lourd fardeau de preuve. En l'espèce, l'intimé n'a pas établi que le délai était inacceptable au point d'être oppressif et de vicier les procédures. Même si le stress et la stigmatisation résultant d'un délai excessif peuvent entraîner un abus de procédure, le délai écoulé dans le traitement des plaintes n'était pas excessif.

La question de savoir si un délai est excessif dépend non pas uniquement de la longueur de ce délai, mais de facteurs contextuels, dont la nature de l'affaire et sa complexité, de l'objet et de la nature des procédures ainsi que de la question de savoir si la personne visée par les procédures a contribué ou renoncé au délai. Dans la présente affaire, même si la Commission a pris plus de temps que ce qui est souhaitable pour traiter les plaintes, le délai écoulé n'était pas excessif au point de constituer un abus de procédure. Même s'il se peut que l'affaire n'ait pas été extrêmement compliquée, les diverses étapes nécessaires pour assurer la protection de la personne qui fait l'objet d'une plainte fondée sur les droits de la personne allongent d'autant le processus. Le juge de première instance a conclu que seule la période de 24 mois comprise entre le dépôt des plaintes et la fin de l'enquête pouvait être prise en considération pour calculer le délai, disant qu'on ne pouvait reprocher au Tribunal des droits de la personne de ne pas avoir fixé des dates d'audience plus rapprochées, étant donné que l'intimé ne lui avait pas demandé de le faire. Au cours de ces 24 mois, il n'y a pas eu de période prolongée d'inactivité dans le traitement des plaintes, si ce n'est une période inexplicable de cinq mois d'inactivité. L'intimé a présenté une contestation fondée sur le caractère tardif des plaintes et a allégué la mauvaise foi, de sorte que le processus a été retardé de huit mois. La Commis-

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ties, the delay in processing the complaints is not one that would offend the community's sense of decency and fairness. Nevertheless, in light of the lack of diligence displayed by the Commission, the Court's discretion under s. 47 of the *Supreme Court Act* should be exercised to award costs against the Commission in favour of the respondent and the complainants.

sion ne devrait pas être tenue responsable d'avoir contribué à cette partie du délai. Lorsque tous les facteurs pertinents sont pris en considération, notamment la communication constante entre les parties, le délai écoulé dans le traitement des plaintes n'est pas de ceux qui heurteraient le sens de la justice et de la décence de la société. Néanmoins, vu l'absence de diligence manifestée par la Commission, il y a lieu de lui ordonner de payer les dépens de l'intimé et des plaignantes en vertu du pouvoir discrétionnaire que l'art. 47 de la *Loi sur la Cour suprême* confère à notre Cour.

Per Iacobucci, Binnie, Arbour and LeBel JJ. (dissenting in part): This matter should be resolved on the basis of administrative law principles. It is therefore unnecessary to express a definite opinion on the application of s. 7 of the *Charter*.

Les juges Iacobucci, Binnie, Arbour et LeBel (dissidents en partie): La présente affaire devrait être réglée en fonction des principes du droit administratif. Il est donc inutile d'exprimer une opinion précise sur l'application de l'art. 7 de la *Charte*.

Administrative delay that is determined to be unreasonable based on its length, its causes, and its effects is abusive and contrary to administrative law principles. Unreasonable delays must be identified within the specific circumstances of every case because not all delay is the same and not all administrative bodies are the same. In order to differentiate reasonable and unreasonable delay, courts must remain alive not only to the needs of administrative systems under strain, but also to their good faith efforts to provide procedural protections to alleged wrongdoers. In assessing the reasonableness of an administrative delay, three main factors should be balanced: (1) the time taken compared to the inherent time requirements of the matter before the particular administrative body; (2) the causes of delay beyond the inherent time requirements of the matter; and (3) the impact of the delay. A consideration of these factors imposes a contextual analysis.

Le délai administratif jugé déraisonnable en raison de sa durée, de ses causes et de ses effets est abusif et contraire aux principes du droit administratif. Il faut déterminer si un délai est déraisonnable en fonction des circonstances particulières de chaque cas, car les délais ne sont pas tous les mêmes et les organismes administratifs diffèrent les uns des autres. Pour distinguer un délai raisonnable d'un délai déraisonnable, les tribunaux doivent être conscients non seulement des besoins des régimes administratifs soumis à des contraintes, mais aussi des efforts qu'ils déploient de bonne foi en vue d'offrir des protections procédurales aux présumés contrevenants. Pour évaluer le caractère raisonnable d'un délai administratif, trois facteurs principaux doivent être appréciés: (1) le délai écoulé par rapport au délai inhérent à l'affaire dont est saisi l'organisme administratif en cause, (2) les causes de la prolongation du délai inhérent à l'affaire, et (3) l'incidence du délai. L'examen de ces facteurs commande une analyse contextuelle.

Here, inefficiency in the Human Rights Commission's handling of this matter has led to abuse of process. First, although serious, the allegations of sexual discrimination against the respondent did not raise complex issues and were not of a nature that could justify a prolonged investigation. There was little to investigate. Even though the inherent time requirements were minimal, in all it took the Commission approximately two years to determine that the complaints should go to a hearing. The time from the initial filing of the complaints to the scheduled hearing was approximately 32 months. While it is true that the Commission's decision to send the matter to a hearing involved a number of steps, nothing in the inherent time requirements of the case came close to requiring the delay that occurred. Second, although the respondent sought to use the

La façon inefficace dont la Commission des droits de la personne a traité la présente affaire a donné lieu à un abus de procédure. Premièrement, quoique graves, les allégations de discrimination sexuelle dont faisait l'objet l'intimé ne soulevaient pas des questions complexes et n'étaient pas de nature à justifier la tenue d'une enquête prolongée. Il y avait peu matière à enquête. Même si le délai inhérent était minime, il a fallu environ deux ans en tout à la Commission pour décider que les plaintes feraient l'objet d'une audience. Environ 32 mois se sont écoulés entre le dépôt initial des plaintes et la date fixée pour leur audition. Même s'il est vrai que la Commission a dû franchir un certain nombre d'étapes pour décider que l'affaire ferait l'objet d'une audience, le délai inhérent à l'affaire était loin de correspondre à celui qui s'est écoulé. Deuxièmement, même si l'intimé a tenté

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defences available to him, he did not become responsible for the sheer inefficiency of the Commission in dealing with these matters. There was serious delay on both complaints despite the respondent's efforts to find a way to end it. The Commission admits that it cannot explain what was going on for five months of the time that it was dealing with the allegations against the respondent. This five-month lapse is the high mark of the Commission's ineptitude. Third, although the administrative delay was not the only cause of the prejudice suffered by the respondent, it contributed significantly to its aggravation and the Commission did nothing to minimize the impact of the delay. The Commission's conduct in dealing with this matter was less than acceptable. Further, the inefficient and delay-filled process at the Commission harmed all parties involved in the process, including the complainants. In the end, the specific and unexplained delay entitles the respondent to a remedy.

The choice of the appropriate remedy requires a careful analysis of the circumstances of the case and imposes a balancing exercise between competing interests. In human rights proceedings, the interest of the respondent, that of the complainants, and the public interest of the community itself must be considered. The courts must also consider the stage of the proceedings which has been affected by the delay. A distinction must be drawn between the process leading to the hearing and the hearing itself. A different balance between conflicting interests may have to be found at different stages of the administrative process. A stay of proceedings should not generally appear as the sole or even the preferred form of redress. It should be limited to those situations that compromise the very fairness of the hearing and to those cases where the delay in the conduct of the process leading to the hearing would amount to a gross or shocking abuse of the process. In those two situations, the interest of the respondent and the protection of the integrity of the legal system become the paramount considerations. More limited and narrowly focused remedies will be appropriate when it appears that the hearing will remain fair, in spite of the delay, and when the delay has not risen to the level of a shocking abuse, notwithstanding its seriousness. The first objective of any intervention by a court should be to make things happen, where the administrative process is not working adequately. An order for an expedited hearing would be the most practical and effective means of judicial action.

d'invoquer les moyens de défense dont il disposait, il n'est pas devenu responsable de l'inefficacité pure et simple dont la Commission a fait preuve en traitant ces questions. Les deux plaintes ont fait l'objet d'un délai important malgré les efforts de l'intimé pour y mettre fin. La Commission reconnaît qu'elle ne peut pas expliquer ce qui s'est passé durant les cinq mois au cours desquels elle a traité les allégations formulées contre l'intimé. Cet intervalle de cinq mois est le paroxysme de l'ineptie dont la Commission a fait preuve. Troisièmement, même si le délai administratif n'a pas été la seule cause du préjudice subi par l'intimé, il a beaucoup contribué à son aggravation et la Commission n'a rien fait pour réduire au minimum l'incidence du délai. La conduite adoptée par la Commission en traitant cette affaire était moins qu'acceptable. En outre, l'inefficacité et les multiples délais qui ont caractérisé le processus devant la Commission ont lésé toutes les parties à ce processus, y compris les plaignantes. En définitive, le délai inexpliqué en cause justifie d'accorder une réparation à l'intimé.

Le choix de la réparation appropriée requiert une analyse minutieuse des circonstances de l'affaire et commande une évaluation d'intérêts opposés. Dans les procédures en matière de droits de la personne, il faut tenir compte de l'intérêt de l'intimé, de celui des plaignantes et de celui de la collectivité même. Les tribunaux judiciaires doivent également prendre en considération l'étape des procédures qui est touchée par le délai. Une distinction doit être établie entre les procédures menant à l'audience et l'audience elle-même. Une évaluation des intérêts opposés peut se révéler nécessaire à chacune des étapes des procédures administratives. L'arrêt des procédures ne devrait pas généralement être considéré comme la seule réparation possible ni même comme la forme de réparation préférée. Il devrait être limité aux cas où l'équité même de l'audience est compromise et où le délai dans les procédures menant à l'audience constituerait un abus de procédure grossier ou scandaleux. Dans les deux cas, l'intérêt de l'intimé et la protection de l'intégrité du système judiciaire deviennent les facteurs prépondérants. Des réparations plus limitées et mieux ciblées sont appropriées lorsqu'il appert que le délai ne portera pas atteinte à l'équité de l'audience et qu'il ne constitue pas un abus scandaleux en dépit de sa gravité. Toute intervention d'un tribunal judiciaire devrait, d'abord et avant tout, viser à faire avancer les choses lorsque les procédures administratives ne se déroulent pas adéquatement. L'intervention judiciaire la plus pratique et efficace serait d'ordonner la tenue d'une

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An order for costs is a third kind of remedy. It will not address the delay directly, but some of its consequences.

In this case, a stay of proceedings appears both excessive and unfair. First, in spite of the seriousness of the problems faced by the respondent, the delay does not seem to compromise the fairness of the hearing. The delay rather concerns the process leading to the hearing. This delay arises from a variety of causes that do not evince an intent on the part of the Commission to harm the respondent wilfully, but rather demonstrate grave negligence and significant structural problems in the processing of the complaints. Second, a stay of proceedings in a situation that does not compromise the fairness of the hearing or amount to shocking or gross abuse requires the consideration of the interest of the complainants. The Court of Appeal completely omitted any consideration of this interest. Here, an order for an expedited hearing should have been considered as the remedy of choice. The stay should be lifted and the Commission should be ordered to pay costs on a party-to-party basis to the respondent in this Court and in the British Columbia courts. It is fair and appropriate to use the power conferred by s. 47 of the *Supreme Court Act*, as the respondent has established that the process initiated against him was deeply flawed and that its defects justified his search for a remedy, at least in administrative law.

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audience accélérée. L'adjudication de dépens est la troisième réparation possible. Elle touche non pas le délai directement, mais plutôt certaines de ses conséquences.

En l'espèce, l'arrêt des procédures paraît à la fois excessif et inéquitable. Premièrement, malgré la gravité des difficultés éprouvées par l'intimé, le délai ne semble pas compromettre l'équité de l'audience. Il concerne plutôt les procédures menant à l'audience. Ce délai est dû à une gamme de causes qui traduisent non pas l'intention de la Commission de léser délibérément l'intimé, mais plutôt une négligence grave et l'existence de problèmes structurels importants en matière de traitement des plaintes. Deuxièmement, pour ordonner l'arrêt des procédures dans le cas où l'équité de l'audience n'est pas compromise ou dans celui où il n'y a pas d'abus scandaleux ou grossier, il faut tenir compte de l'intérêt du plaignant. La Cour d'appel a complètement omis de tenir compte de cet intérêt. En l'espèce, l'ordonnance enjoignant de tenir une audience accélérée aurait dû être envisagée à titre de réparation appropriée. Il y a lieu d'annuler l'arrêt des procédures et d'ordonner à la Commission de payer à l'intimé des dépens comme entre parties devant notre Cour et les tribunaux de la Colombie-Britannique. Il est juste et opportun d'exercer le pouvoir conféré par l'art. 47 de la *Loi sur la Cour suprême*, étant donné que l'intimé a établi que les procédures engagées contre lui étaient entachées de vices importants qui le justifiaient de demander une réparation au moins fondée sur le droit administratif.

Jurisprudence

Citée par le juge Bastarache

Arrêts non suivis: *Nisbett c. Manitoba (Human Rights Commission)* (1993), 101 D.L.R. (4th) 744; *Lignes aériennes Canadien International Ltée c. Canada (Commission des droits de la personne)*, [1996] 1 C.F. 638; *Saskatchewan Human Rights Commission c. Kodellas* (1989), 60 D.L.R. (4th) 143; **arrêts examinés:** *Misra c. College of Physicians & Surgeons of Saskatchewan* (1988), 52 D.L.R. (4th) 477; *Stefani c. College of Dental Surgeons (British Columbia)* (1996), 44 Admin. L.R. (2d) 122; *Brown c. Assn. of Professional Engineers and Geoscientists of British Columbia*, [1994] B.C.J. No. 2037 (QL); *Ratzlaff c. British Columbia (Medical Services Commission)* (1996), 17 B.C.L.R. (3d) 336; **arrêts mentionnés:** *Eldridge c. Colombie-Britannique (Procureur général)*, [1997] 3 R.C.S. 624; *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038; *Douglas/Kwantlen Faculty Assn. c. Douglas College*, [1990] 3 R.C.S. 570; *Mills c. La Reine*, [1986] 1 R.C.S. 863; *R. c. Rahey*, [1987] 1 R.C.S.

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APPEAL from a judgment of the British Columbia Court of Appeal (1998), 49 B.C.L.R. (3d) 216, 160 D.L.R. (4th) 303, 107 B.C.A.C. 162, 174 W.A.C. 162, 7 Admin. L.R. (3d) 220, 31 C.H.R.R. D/175, 53 C.R.R. (2d) 189, [1998] 9 W.W.R. 457, [1998] B.C.J. No. 1092 (QL), allowing an appeal from a decision of the British Columbia Supreme Court (1998), 49 B.C.L.R. (3d) 201, 35 C.C.E.L. (2d) 41, 30 C.H.R.R. D/439, [1999] 1 W.W.R. 139, [1998] B.C.J. No. 320 (QL), dismissing the respondent's petition for judicial review and order that proceedings be terminated due to delay. Appeal allowed, Iacobucci, Binnie, Arbour and LeBel JJ. dissenting in part.

John J. L. Hunter, Q.C., Thomas F. Beasley, K. Michael Stephens and *Stephanie L. McHugh*, for the appellants the British Columbia Human Rights

Evans, J. M., H. N. Janisch and David J. Mullan. *Administrative Law: Cases, Text, and Materials*, 4th ed. Toronto: Edmond Montgomery, 1995.

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POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (1998), 49 B.C.L.R. (3d) 216, 160 D.L.R. (4th) 303, 107 B.C.A.C. 162, 174 W.A.C. 162, 7 Admin. L.R. (3d) 220, 31 C.H.R.R. D/175, 53 C.R.R. (2d) 189, [1998] 9 W.W.R. 457, [1998] B.C.J. No. 1092 (QL), qui a accueilli un appel interjeté contre une décision de la Cour suprême de la Colombie-Britannique (1998), 49 B.C.L.R. (3d) 201, 35 C.C.E.L. (2d) 41, 30 C.H.R.R. D/439, [1999] 1 W.W.R. 139, [1998] B.C.J. No. 320 (QL), qui avait rejeté la demande de contrôle judiciaire et d'ordonnance mettant fin aux procédures pour cause de délai, que l'intimé avait présentée. Pourvoi accueilli, les juges Iacobucci, Binnie, Arbour et LeBel sont dissidents en partie.

John J. L. Hunter, c.r., Thomas F. Beasley, K. Michael Stephens et *Stephanie L. McHugh*, pour les appelants la British Columbia Human Rights

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Commission and the Commissioner of Investigation and Mediation.

Written submissions only by *Susan E. Ross*, for the appellant the British Columbia Human Rights Tribunal.

Robert B. Farvolden, for the appellant Andrea Willis.

Joseph J. Arvay, Q.C., for the respondent.

Mark C. Stacey and *Rosy M. Mondin*, for the intervener Irene Schell.

Hart Schwartz, for the intervener the Attorney General for Ontario.

Harvey M. Groberman, Q.C., for the intervener the Attorney General of British Columbia.

Milton Woodard, Q.C., for the intervener the Saskatchewan Human Rights Commission.

Cathryn Pike and *Jennifer Scott*, for the intervener the Ontario Human Rights Commission.

Lara J. Morris and *Maureen E. Shebib*, for the intervener the Nova Scotia Human Rights Commission.

Aaron L. Berg and *Denis Guénette*, for the intervener the Manitoba Human Rights Commission.

Fiona Keith, for the intervener the Canadian Human Rights Commission.

Hélène Tessier, for the intervener the Commission des droits de la personne et des droits de la jeunesse.

Frances Kelly and *James Pozer*, for the intervener the British Columbia Human Rights Coalition.

Jennifer L. Conkie and *Dianne Pothier*, for the intervener the Women's Legal Education and Action Fund.

Commission et le Commissioner of Investigation and Mediation.

Argumentation écrite seulement par *Susan E. Ross*, pour l'appelant le British Columbia Human Rights Tribunal.

Robert B. Farvolden, pour l'appelante Andrea Willis.

Joseph J. Arvay, c.r., pour l'intimé.

Mark C. Stacey et *Rosy M. Mondin*, pour l'intervenante Irene Schell.

Hart Schwartz, pour l'intervenant le procureur général de l'Ontario.

Harvey M. Groberman, c.r., pour l'intervenant le procureur général de la Colombie-Britannique.

Milton Woodard, c.r., pour l'intervenante la Saskatchewan Human Rights Commission.

Cathryn Pike et *Jennifer Scott*, pour l'intervenante la Commission ontarienne des droits de la personne.

Lara J. Morris et *Maureen E. Shebib*, pour l'intervenante la Nova Scotia Human Rights Commission.

Aaron L. Berg et *Denis Guénette*, pour l'intervenante la Commission des droits de la personne du Manitoba.

Fiona Keith, pour l'intervenante la Commission canadienne des droits de la personne.

Hélène Tessier, pour l'intervenante la Commission des droits de la personne et des droits de la jeunesse.

Frances Kelly et *James Pozer*, pour l'intervenante la British Columbia Human Rights Coalition.

Jennifer L. Conkie et *Dianne Pothier*, pour l'intervenant le Fonds d'action et d'éducation juridiques pour les femmes.

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The judgment of McLachlin C.J. and L'Heureux-Dubé, Gonthier, Major and Bastarache JJ. was delivered by

BASTARACHE J. —

I. Introduction

1 This case raises the issue of whether the respondent's rights to "liberty and security of the person" under s. 7 of the *Canadian Charter of Rights and Freedoms* were violated by state-caused delay in the human rights proceedings against him. In the alternative, should this Court find that s. 7 of the *Charter* was not engaged, it must be determined whether the respondent was entitled to a remedy pursuant to principles of administrative law, notwithstanding that he had not been prejudiced in his ability to respond to the complaints against him.

2 I have concluded that the respondent's rights to liberty and security of the person were not implicated in the circumstances of this case. There is therefore no need to determine whether the alleged violation was in accordance with the principles of fundamental justice. While I accept that, under administrative law principles, a denial of natural justice may occur for reasons other than procedural unfairness to the respondent, I find that there has been no denial of natural justice or abuse of process in the circumstances of this case.

II. Factual Background

3 In 1995, the respondent, Robin Blencoe, had been a member of the British Columbia legislature for 12 years. In March of that year the respondent's assistant, Fran Yanor, went public with allegations that the respondent had sexually harassed her. Following this allegation, the respondent stepped down as Minister, but remained in Cabinet pending the results of an inquiry. On April 4, 1995, Premier Harcourt removed the respondent from Cabinet and dismissed him from the New Democratic Party caucus. Subsequently, in July and August of 1995, two sexual harassment complaints were filed with the British Columbia Coun-

Version française du jugement du juge en chef McLachlin et des juges L'Heureux-Dubé, Gonthier, Major et Bastarache rendu par

LE JUGE BASTARACHE —

I. Introduction

Le présent pourvoi porte sur la question de savoir si le délai imputable à l'État dans les procédures en matière de droits de la personne engagées contre l'intimé a porté atteinte aux droits de ce dernier «à la liberté et à la sécurité de sa personne», que lui garantit l'art. 7 de la *Charte canadienne des droits et libertés*. Subsidiairement, si jamais notre Cour ne conclut pas à l'application de l'art. 7 de la *Charte* en l'espèce, il faudra déterminer si l'intimé a droit à une réparation fondée sur les principes du droit administratif, même s'il n'a pas été porté atteinte à sa capacité de répondre aux plaintes portées contre lui.

J'arrive à la conclusion que les droits de l'intimé à la liberté et à la sécurité de sa personne ne sont pas en cause dans la présente affaire. Il est donc inutile de déterminer si l'atteinte alléguée est conforme aux principes de justice fondamentale. Bien que je convienne que, selon les principes du droit administratif, il peut y avoir déni de justice naturelle pour des raisons autres que l'iniquité procédurale, je juge qu'il n'y a eu ni déni de justice naturelle ni abus de procédure dans les circonstances de la présente affaire.

II. Les faits

En 1995, l'intimé, Robin Blencoe, était député à l'assemblée législative de la Colombie-Britannique depuis 12 ans. En mars de la même année, son adjointe, Fran Yanor, l'a accusé publiquement de harcèlement sexuel. L'intimé a alors abandonné son poste de ministre, mais a continué de faire partie du Cabinet jusqu'à ce que les résultats d'une enquête soient connus. Le 4 avril suivant, le premier ministre Harcourt a exclu l'intimé du Cabinet et du caucus du Nouveau Parti Démocratique. En juillet et en août 1995, l'appelante Andrea Willis et l'intervenante Irene Schell ont déposé devant le British Columbia Council of Human Rights (le

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cil of Human Rights ("Council" or "Commission") against the respondent and the provincial Crown under the *Human Rights Act*, S.B.C. 1984, c. 22 (now the *Human Rights Code*, R.S.B.C. 1996, c. 210, since January 1, 1997) (also referred to as the "Act" or the "Code") by the appellant Andrea Willis and the intervener, Irene Schell ("Complaints" or "Complaint").

The Complaints centered around various incidents of sexual harassment alleged to have occurred between March 1993 and March 1995. It is not necessary, for the purposes of this appeal, that I comment on the particulars of the Complaints in any detail. In brief, Ms. Willis worked as a senior clerk in the respondent's ministerial office and alleged that the respondent discriminated against her because of her sex with respect to terms and conditions of her employment, causing her to resign. The alleged incidents occurred in August 1994 and March 1995. Ms. Schell represented a government-funded sports association with which the respondent had contact in his ministerial capacity. She alleged that the respondent had discriminated against her because of her sex with respect to a service or facility customarily available to the public. The alleged incidents occurred in March 1993 and on several occasions in July 1993 and July 1994.

While the events that followed in the human rights proceedings are lengthy, they nevertheless merit recitation in some detail in order to adequately address the alleged delay in the process. The following are what I consider to be the most relevant facts regarding each of the Complaints.

A. *The Schell Complaint*

The Schell Complaint dealt with conduct which allegedly occurred more than six months before the Complaint was filed. For this reason, a threshold issue of timeliness arose pursuant to s. 13(1)(d) of the Act. By letter dated July 20, 1995, the respondent's counsel was informed that the Commission was considering whether to proceed with the investigation of the Schell Complaint and that timeliness submissions should be made. Letters were sent by the respondent on July 21 and July

«Conseil» ou la «Commission») deux plaintes de harcèlement sexuel contre l'intimé et Sa Majesté du chef de la province en application de la *Human Rights Act*, S.B.C. 1984, ch. 22 (désormais le *Human Rights Code*, R.S.B.C. 1996, ch. 210, depuis le 1er janvier 1997) (également désigné sous le nom de «Loi» ou de «Code») (les «plaintes» ou la «plainte»).

4 Les plaintes concernaient divers épisodes de harcèlement sexuel qui seraient survenus entre mars 1993 et mars 1995. Il n'est pas nécessaire, aux fins du présent pourvoi, que je m'attarde aux détails des plaintes. En résumé, Mme Willis occupait le poste de commis principal au bureau du ministre Blencoe et elle a allégué que ce dernier avait fait preuve de discrimination sexuelle à son égard relativement à ses conditions de travail, ce qui l'aurait amenée à démissionner. Les épisodes en cause se seraient produits en août 1994 et en mars 1995. Pour sa part, Mme Schell représentait une association sportive financée par l'État, avec laquelle l'intimé était en rapport en sa qualité de ministre. Elle a prétendu que l'intimé avait fait preuve de discrimination sexuelle à son égard relativement à des services ou à des installations habituellement accessibles au public. Les épisodes en question se seraient produits en mars 1993 et à maintes reprises en juillet 1993 et en juillet 1994.

5 Malgré la longueur des procédures en matière de droits de la personne qui ont suivi, il y a lieu néanmoins de les relater de façon assez détaillée pour bien examiner l'allégation de délai. Les faits qui suivent sont, à mon avis, les plus pertinents en ce qui concerne chacune des plaintes.

A. *La plainte de Mme Schell*

6 La plainte de Mme Schell porte sur une conduite qui aurait été adoptée plus de six mois avant le dépôt de ladite plainte, ce qui soulève la question préliminaire du respect du délai imparti à l'al. 13(1)d) de la Loi. Dans une lettre datée du 20 juillet 1995, la Commission a informé l'avocat de l'intimé qu'elle se demandait si elle devait enquêter sur la plainte de Mme Schell, et que des observations devraient être formulées concernant la question du respect du délai imparti. Les 21 et 28

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28, 1995, requesting particulars of the Complaint. Particulars were provided by the Commission by letter dated August 2, 1995.

juillet 1995, l'intimé a envoyé des lettres dans lesquelles il demandait des précisions sur la plainte. La Commission a accédé à sa demande par lettre datée du 2 août 1995.

7 On August 31, 1995, the respondent's counsel notified the Commission that the respondent would not provide a detailed submission on the timeliness issue until Ms. Schell discharged the onus of proving that her Complaint was filed in good faith. The Commission informed the respondent that it was not necessary for Ms. Schell to adduce further material on this matter. The respondent subsequently provided substantive submissions on the timeliness issue on September 22, 1995.

Le 31 août 1995, l'avocat de l'intimé a informé la Commission que son client ne présenterait des observations détaillées sur la question du respect du délai que lorsque Mme Schell se serait acquittée de son obligation de prouver que la plainte avait été portée de bonne foi. La Commission a avisé l'intimé que Mme Schell n'avait pas à produire d'autres documents à ce propos. Par la suite, le 22 septembre 1995, l'intimé a fourni des observations de fond sur la question du respect du délai imparti.

8 On November 14, 1995, the respondent was informed that the Commission had received Ms. Schell's submissions on October 11, 1995, and that the submissions of both parties were being considered. The respondent had not been forwarded a copy of Ms. Schell's submissions. Following two requests for such by Mr. Blencoe, the Commission provided him with a copy of this document on December 15, 1995, stating that the production of such document was a departure from normal procedures. On February 8, 1996, the respondent provided the Commission with a response to Ms. Schell's timeliness submissions.

Le 14 novembre 1995, l'intimé a appris que la Commission avait reçu les observations de Mme Schell le 11 octobre 1995 et que les observations des deux parties étaient examinées. L'intimé n'avait pas obtenu copie des observations de Mme Schell. Le 15 décembre 1995, après deux demandes formulées en ce sens par M. Blencoe, la Commission lui a fait parvenir une copie du document demandé en lui précisant qu'il s'agissait d'une entorse à la procédure habituelle. Le 8 février 1996, l'intimé a fait parvenir à la Commission une réponse aux observations de Mme Schell concernant le respect du délai imparti.

9 On February 21, 1996, the respondent was informed that the Council had decided to proceed with the investigation and that he had 30 days to provide a full response to the allegations. In letters dated March 1 and March 27, 1996, the respondent requested the initial correspondence between Ms. Schell and the Commission. The respondent maintained that he would not respond to the particulars of allegation until such correspondence was produced. On April 1, 1996, the respondent was informed that such documents would not be disclosed and that the investigation would continue on the basis of existing materials if no response was received by April 10, 1996. A general denial to the allegations was given by the respondent on April 10, 1996. On June 19, 1996, the respondent received a letter from the Commission in response to his request regarding how long he would be required to wait for a hearing date. He was

Le 21 février 1996, l'intimé a appris que le Conseil avait décidé d'enquêter sur la plainte et qu'il disposait de 30 jours pour fournir une réponse complète aux allégations. Dans des lettres datées du 1er et du 27 mars 1996, l'intimé a réclamé la correspondance initiale entre Mme Schell et la Commission. L'intimé a maintenu qu'il ne répondrait aux détails des allégations que lorsque cette correspondance aurait été produite. Le 1er avril 1996, l'intimé a été informé que ces documents ne seraient pas communiqués et que l'enquête se poursuivrait en fonction des documents existants si aucune réponse n'était reçue au plus tard le 10 avril 1996. L'intimé a présenté une dénégation générale des allégations le 10 avril 1996. Le 19 juin de la même année, l'intimé a reçu une lettre dans laquelle la Commission répondait à sa demande concernant le temps qu'il lui faudrait attendre avant qu'une date d'audience soit fixée. Il

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informed that a hearing could not be scheduled until the Commission determined that a hearing was required.

On September 6, 1996, the respondent was notified that an investigator had been assigned to the Schell Complaint. By letter dated November 8, 1996, the Commission wrote to the respondent, requesting a response to certain information obtained in the course of investigating the Schell Complaint. Such information was provided by the respondent on December 23, 1996. On March 4, 1997, Mr. Blencoe's counsel was provided with a copy of the investigation report and asked for a written response by April 8, 1997. Such response was given on March 27, 1997. On April 15, 1997, the respondent was provided with the submissions received from Ms. Schell in response to the investigation report. Mr. Blencoe was requested to reply by May 15, 1997. Such response was provided on May 14, 1997.

By letter dated July 3, 1997, the respondent was notified that the Schell Complaint would be referred to the British Columbia Human Rights Tribunal ("Tribunal") for a hearing, without specifying the hearing date. That ended the involvement of the Commission in the Complaint. On September 10, 1997, the respondent was informed that the hearing was set for March 4, 5 and 6, 1998 and a pre-hearing conference in November of 1997. The hearing was thus scheduled to take place approximately 32 months after the initial Complaint was filed.

B. *The Willis Complaint*

The respondent was informed of the Willis Complaint by letter dated September 11, 1995. The respondent challenged the timeliness of the Complaint and asked the Council to make a decision pursuant to s. 13(1)(d) of the Act. The respondent was asked to provide submissions on timeliness within 15 days of the letter dated September 21, 1995. Such submissions were provided by Mr. Blencoe on October 11, 1995 with respect to both Complaints. On December 21, 1995, the respondent was sent a copy of Ms. Willis's submissions on timeliness which were dated October

a appris qu'une telle date ne pourrait être fixée que lorsque la Commission aurait conclu à la nécessité de tenir une audience.

10 Le 6 septembre 1996, l'intimé a été avisé qu'un enquêteur avait été chargé d'examiner la plainte de Mme Schell. Le 8 novembre 1996, la Commission a fait parvenir à l'intimé une lettre dans laquelle elle lui demandait de réagir à certains renseignements obtenus pendant l'enquête relative à la plainte de Mme Schell. L'intimé a accédé à cette demande le 23 décembre 1996. Le 4 mars 1997, on a remis à l'avocat de M. Blencoe un exemplaire du rapport d'enquête et on lui a demandé d'y répondre par écrit au plus tard le 8 avril 1997, ce qu'il a fait le 27 mars de la même année. Le 15 avril 1997, l'intimé a obtenu copie des observations que Mme Schell avait transmises en réponse au rapport d'enquête. On a demandé à M. Blencoe d'y répliquer au plus tard le 15 mai 1997, ce qu'il a fait le 14 mai de la même année.

11 Dans une lettre datée du 3 juillet 1997, l'intimé a été avisé que la plainte de Mme Schell serait renvoyée au British Columbia Human Rights Tribunal (le «Tribunal») pour qu'il tienne une audience, sans que la date de cette audience ne soit toutefois précisée. La Commission était dès lors dessaisie de la plainte. Le 10 septembre 1997, l'intimé a appris que l'audience se déroulerait les 4, 5 et 6 mars 1998 et qu'une conférence préparatoire aurait lieu en novembre 1997. L'audience devait donc débuter environ 32 mois après le dépôt de la plainte initiale.

B. *La plainte de Mme Willis*

12 Dans une lettre datée du 11 septembre 1995, l'intimé a été informé de la plainte de Mme Willis. L'intimé a fait valoir que la plainte n'avait pas été déposée dans le délai imparti et a demandé au Conseil de rendre une décision fondée sur l'al. 13(1)d) de la Loi. Dans une lettre datée du 21 septembre 1995, on lui a demandé de présenter dans les 15 jours suivants des observations sur la question du respect du délai imparti. Monsieur Blencoe a présenté des observations sur les deux plaintes le 11 octobre 1995. Le 21 décembre suivant, l'intimé a obtenu copie des observations de Mme Willis sur

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16, 1995. It was standard practice of the Council not to give respondents the complainant's response submissions.

13 On January 9, 1996, the respondent wrote to the Council, requesting that it refrain from making a decision regarding timeliness until he could reply to Ms. Willis's submissions. The respondent challenged both the timeliness of the Complaints and whether they were made in good faith. He declined to provide his response until such preliminary issues were addressed, contending that the Complaints should not be addressed at all. The Council concluded that the Complaints were timely, that there was no evidence of bad faith, and that the Complaints should be fully investigated. On January 11, 1996, the respondent was notified that the Commission was proceeding with its investigation of the Willis Complaint. The decision to proceed with this Complaint had been reached by the Council more than three weeks earlier, on December 18, 1995. The delay was said to have resulted from Council not returning the decision on timeliness file to the case management secretary and a temporary backlog in the clerical area.

14 On January 29, 1996, the respondent informed the Council that he was prepared to waive the investigation stage of the process and asked that the Council set the matter for hearing. However, this waiver was not feasible since the respondent was not prepared to concede that there was a sufficient evidentiary basis to warrant a hearing.

15 In April 1996, Mr. Blencoe's counsel inquired as to when the hearing was expected to occur. In June 1996, he was informed that this could not be determined until the investigation was completed. The respondent was also informed that no investigator had been assigned to the Willis Complaint at that time and that there was a backlog of investigation files. By letter dated September 6, 1996, Mr. Blencoe was informed that an investigator had been assigned to the Willis Complaint. On November 8, 1996, Mr. Blencoe was asked to respond to

le respect du délai imparti, lesquelles étaient datées du 16 octobre 1995. Le Conseil n'avait pas coutume de communiquer les observations d'un plaignant à la personne qui fait l'objet de la plainte.

Le 9 janvier 1996, l'intimé a écrit au Conseil pour lui demander de s'abstenir de rendre une décision concernant le respect du délai imparti jusqu'à ce qu'il puisse répondre aux observations de Mme Willis. Il soutenait que les plaintes n'avaient pas été déposées dans le délai imparti et qu'elles n'avaient pas été portées de bonne foi. Il refusait de produire sa réponse tant que ces questions préliminaires n'auraient pas été tranchées et il prétendait qu'il n'y avait absolument pas lieu d'examiner les plaintes. Le Conseil a conclu que les plaintes avaient été déposées à temps, qu'il n'y avait aucune preuve de mauvaise foi et que les plaintes devraient faire l'objet d'une enquête complète. Le 11 janvier 1996, l'intimé a été avisé que la Commission enquêtait sur la plainte de Mme Willis. La décision d'enquêter sur la plainte avait été prise par le Conseil plus de trois semaines auparavant, soit le 18 décembre 1995. On a expliqué le délai écoulé par l'omission du Conseil de retourner le dossier de la décision sur le respect du délai imparti au fonctionnaire responsable de la gestion des dossiers et par un retard temporaire dans l'exécution des fonctions administratives.

Le 29 janvier 1996, l'intimé a informé le Conseil qu'il était disposé à renoncer à l'étape de l'enquête et il lui a demandé d'inscrire l'affaire à son rôle. Cependant, cette renonciation n'était pas possible puisque l'intimé n'était pas prêt à reconnaître qu'il y avait une preuve suffisante pour justifier la tenue d'une audience.

En avril 1996, l'avocat de M. Blencoe s'est informé de la date à laquelle l'audience était censée avoir lieu. En juin de la même année, il a appris que cette date ne pourrait être fixée que lorsque l'enquête serait terminée. Il a également appris qu'aucun enquêteur n'avait encore été chargé d'examiner la plainte de Mme Willis et que le traitement des dossiers d'enquête accusait un retard. Dans une lettre datée du 6 septembre 1996, on a informé l'intimé qu'un enquêteur avait été chargé d'examiner la plainte de Mme Willis.

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certain information obtained during the investigation. Such response was given on December 23, 1996. On March 3, 1997, the respondent was provided with a completed investigation report and asked for written responses which were provided by the respondent on March 27, 1997. In April 1997, the respondent was sent the submissions of Ms. Willis. He replied to them on May 14, 1997.

Le 8 novembre 1996, on a demandé à M. Blencoe de réagir à certains renseignements obtenus pendant l'enquête, ce qu'il a fait le 23 décembre suivant. Le 3 mars 1997, on a remis à l'intimé une copie du rapport d'enquête et on lui a demandé d'y répondre par écrit, ce qu'il a fait le 27 mars suivant. En avril 1997, l'intimé a obtenu copie des observations de Mme Willis, et il y a répondu le 14 mai suivant.

On July 3, 1997, the respondent was informed that the Willis Complaint would be referred to the Tribunal for hearing. That ended the involvement of the Commission in the Complaint. On September 10, 1997, the respondent was notified that the hearing was set for March 18, 19 and 20, 1998 and a pre-hearing conference in November 1997. The hearing was thus scheduled to take place approximately 32 months after the initial Complaint was filed.

16 Le 3 juillet 1997, l'intimé a appris que la plainte de Mme Willis serait renvoyée au Tribunal pour qu'il tienne une audience. La Commission était dès lors dessaisie de la plainte. Le 10 septembre 1997, l'intimé a été avisé que l'audience se déroulerait les 18, 19 et 20 mars 1998 et qu'une conférence préparatoire aurait lieu en novembre 1997. L'audience devait donc débuter environ 32 mois après le dépôt de la plainte initiale.

Subsequent to the allegations of sex discrimination, the respondent and his family have been hounded by the media. Mr. Blencoe has suffered from severe depression and both he and his wife have sought psychological counselling. The respondent did not stand for re-election when his province went to the polls in 1996. Mr. Blencoe and his wife decided to move their family to Ontario in August 1996, in order to escape the media attention and seek employment. In May 1997, the family returned to Victoria, allegedly because they could not escape the harassment of the media which followed them to Ontario and because the respondent's wife received an excellent job offer in British Columbia. The respondent continues to be clinically depressed and has been prescribed medication. He was prevented from coaching his youngest son's soccer team on the grounds that the soccer association did not want him working with children. The respondent considers himself "unemployable" in British Columbia, due to the outstanding human rights Complaints against him.

17 À la suite des allégations de discrimination sexuelle, l'intimé et les membres de sa famille ont été traqués par les médias. Monsieur Blencoe a fait une grave dépression, et son épouse et lui ont tous les deux eu recours aux services d'un psychologue. L'intimé n'a pas sollicité un nouveau mandat lors du scrutin provincial de 1996. En août 1996, M. Blencoe et son épouse ont décidé d'aller s'établir en Ontario afin d'échapper à l'attention des médias et de trouver du travail. En mai 1997, la famille est revenue à Victoria, apparemment parce qu'elle ne pouvait pas échapper au harcèlement des médias qui les avaient suivis jusqu'en Ontario et que l'épouse de l'intimé s'était vu offrir un emploi très intéressant en Colombie-Britannique. L'intimé souffre toujours de dépression clinique et consomme des médicaments sur ordonnance. Il n'a pas pu entraîner l'équipe de soccer de son fils cadet parce que l'association responsable ne voulait pas qu'il côtoie des enfants. L'intimé se dit «inapte au travail» en Colombie-Britannique en raison des plaintes fondées sur les droits de la personne qui pèsent toujours contre lui.

On November 27, 1997, the respondent commenced proceedings for judicial review, claiming that the Commission had lost jurisdiction due to unreasonable delay in processing the human rights

18 Le 27 novembre 1997, l'intimé a présenté une demande de contrôle judiciaire en faisant valoir que la Commission avait perdu compétence en raison d'un délai déraisonnable dans le traitement des

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Complaints. The respondent alleged that the unreasonable delay caused serious prejudice to him and his family which amounted to an abuse of process and a denial of natural justice.

plaintes fondées sur les droits de la personne. Il a allégué que ce délai déraisonnable avait causé à sa famille et à lui-même un préjudice grave équivalant à un abus de procédure et à un déni de justice naturelle.

III. Judicial History

A. *British Columbia Supreme Court* (1998), 49 B.C.L.R. (3d) 201

19 The respondent's application for judicial review was dismissed by Lowry J. on February 11, 1998. The question before the court was whether, given the time that had elapsed since the Complaints were first made to the Commission, personal hardship attributable to the stigma attached to the allegations justified the supervisory intervention of the court. The respondent also alleged that, because two prospective witnesses had died and the memories of other witnesses had faded, he would be unable to obtain a fair hearing. The respondent did not make an express s. 7 argument before the lower court, but relied instead on principles of natural justice, pursuant to administrative law jurisprudence and common law protections against undue delay. The respondent did however cite s. 7 jurisprudence to support his claim that the prejudice he suffered was analogous to the prejudice that justifies a stay of proceedings in the s. 7 context.

20 Lowry J. recognized that the allegations of sexual harassment had significantly affected the respondent's life and that his political career appeared to be finished. However, he added that it was difficult to determine to what extent such prejudice could be fairly attributed to any delay in the proceedings.

21 Lowry J. rejected the contention that, absent any application of the *Charter*, personal hardship attributable to unacceptable delay in an administrative process could, standing alone, constitute prejudice that entitled a respondent to prerogative relief. He held that delay will only constitute a denial of natural justice if the result of the delay is to directly prejudice the ability of an affected party

III. Historique des procédures judiciaires

A. *Cour suprême de la Colombie-Britannique* (1998), 49 B.C.L.R. (3d) 201

Le 11 février 1998, le juge Lowry a rejeté la demande de contrôle judiciaire de l'intimé. La cour était appelée à décider si, en raison du délai écoulé depuis le dépôt initial des plaintes à la Commission, les difficultés personnelles imputables à la stigmatisation liée aux allégations justifiaient un contrôle judiciaire. L'intimé prétendait également que, du fait que deux témoins éventuels étaient décédés et que la mémoire d'autres témoins avait décliné, il ne pourrait pas obtenir une audience équitable. Il n'a avancé aucun argument explicitement fondé sur l'art. 7 devant le tribunal inférieur, préférant invoquer les principes de justice naturelle, conformément à la jurisprudence en matière de droit administratif et aux protections que la common law offre contre les délais injustifiés. Il a cependant invoqué la jurisprudence relative à l'art. 7 à l'appui de son allégation que le préjudice qu'il subissait s'apparentait à celui qui justifie un arrêt des procédures dans le contexte de l'art. 7.

Le juge Lowry a reconnu que les allégations de harcèlement sexuel avaient sensiblement perturbé l'existence de l'intimé et semblaient avoir mis un terme à sa carrière politique. Il a toutefois ajouté qu'il était difficile de déterminer dans quelle mesure le préjudice subi pouvait être attribué, à juste titre, à un délai dans le déroulement des procédures.

Le juge Lowry a rejeté la prétention que, en l'absence de toute application de la *Charte*, les difficultés personnelles imputables à un délai inacceptable dans le déroulement d'un processus administratif pouvaient, à elles seules, conférer à l'intimé le droit à un bref de prérogative. Il a conclu qu'un délai ne constitue un déni de justice naturelle pour une partie que s'il porte atteinte

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to respond. He concluded that Mr. Blencoe's ability to have a fair hearing had not been prejudiced, since he was able to respond to the Complaints in an evidentiary sense.

directement à sa capacité de se défendre. Il a conclu qu'il n'y avait eu aucune atteinte à la capacité de M. Blencoe d'obtenir une audience équitable étant donné qu'il était en mesure de répondre aux plaintes en produisant des éléments de preuve.

Apart from an unexplained five-month period in the human rights process, Lowry J. found that there had been no extended period of inactivity in the processing of the Complaints from receipt to referral. Communication had been ongoing between the Commission, solicitors and complainants, and the respondent had not been ignored. Lowry J. thus concluded that there had been no "unacceptable delay" in the human rights process. He also noted that the respondent had not brought any of his personal hardship to the Commission's attention, nor had he requested a prioritization of the Complaints on that basis.

22 Outre le délai inexpliqué de cinq mois dans le déroulement du processus en matière de droits de la personne, le juge Lowry a estimé qu'il n'y avait eu aucune période d'inactivité prolongée dans le traitement des plaintes entre leur dépôt et leur renvoi pour audience. La communication avait été constante entre la Commission, les avocats et les plaignantes, et l'intimé n'avait pas été tenu à l'écart. Le juge Lowry a donc conclu qu'il n'y avait pas eu de «délai inacceptable» dans le déroulement du processus en cause. Il a également souligné que l'intimé n'avait ni fait part de ses difficultés personnelles à la Commission ni demandé que l'on donne la priorité aux plaintes pour ce motif.

B. *British Columbia Court of Appeal* (1998), 49 B.C.L.R. (3d) 216

B. *Cour d'appel de la Colombie-Britannique* (1998), 49 B.C.L.R. (3d) 216

Before the Court of Appeal, Mr. Blencoe expressly argued that his s. 7 rights to liberty and security of the person were violated due to the length of the delay in resolving the Complaints against him. On May 11, 1998, the Court of Appeal (McEachern C.J.B.C. and Prowse J.A. for the majority, in separate concurring reasons) allowed the appeal and directed that the human rights proceedings against the respondent be stayed. Lambert J.A., in dissent, would have upheld the judgment of the British Columbia Supreme Court.

23 En Cour d'appel, M. Blencoe a expressément soutenu que les droits à la liberté et à la sécurité de sa personne que lui garantit l'art. 7 ont été violés en raison de la longueur du délai écoulé sans que les plaintes portées contre lui n'aient été réglées. Le 11 mai 1998, la Cour d'appel (le juge en chef McEachern et le juge Prowse s'exprimant, au nom de la majorité, dans des motifs concordants distincts) a accueilli l'appel et ordonné l'arrêt des procédures en matière de droits de la personne qui avaient été engagées contre l'intimé. Le juge Lambert, dissident, aurait confirmé le jugement de la Cour suprême de la Colombie-Britannique.

(a) Majority Decision of McEachern C.J.B.C.

a) La décision majoritaire du juge en chef McEachern

McEachern C.J.B.C. concluded that the undue delay and the continued prejudice to privacy and human dignity could not be in accordance with the principles of fundamental justice (para. 104). McEachern C.J.B.C. found that the delay could not be attributed to Mr. Blencoe since he was unable to

24 Le juge en chef McEachern a conclu que le délai injustifié et l'atteinte constante à la vie privée et à la dignité de la personne ne pouvaient pas être conformes aux principes de justice fondamentale (par. 104). Il a jugé que le délai ne pouvait pas être imputé à M. Blencoe étant donné qu'il ne pouvait

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identify any steps taken by the respondent to which he was not entitled in defending himself. McEachern C.J.B.C. opined that the Complaints were not complex, but were rather of the type that are "quickly resolved by courts and tribunals all the time" (para. 37), such that "a week at the outside would have sufficed" to complete the investigation (para. 51). He added (at paras. 47 and 51):

> . . . a delay of over 30 months from the date of the complaints to a hearing on the merits is far too long. If Mr. Blencoe had been charged in the criminal courts with this type of sexual assault, the charge would very likely be dismissed on grounds of delay . . . .
>
> As I have already commented, the investigation was necessarily one-dimensional as there were no eyewitnesses, and a week at the outside would have sufficed.

25 Turning to the issue of prejudice, McEachern C.J.B.C. found that but for these proceedings, "it might reasonably be expected that the overwhelming [media] attention would have died away and [Blencoe] and his family could have attempted to reconstruct their lives" (para. 53). He considered the contention that the prejudice suffered by the respondent was not caused by the delay, but rather by his dismissal from Cabinet. In this connection McEachern C.J.B.C. held that the Supreme Court of Canada has elevated the "exacerbation" of an existing deprivation to the same level as the creation of the deprivation itself. He held that the excessive delay both created a substantial stigma against the accused and exacerbated an existing state of affairs, thus triggering the s. 7 right to security of the person.

26 McEachern C.J.B.C. noted that the jurisprudence surrounding the application of s. 7 in a non-penal context was "fraught with considerable difficulty" (para. 60). He identified two competing streams of jurisprudence as to the scope of s. 7 in the Supreme Court. First, McEachern C.J.B.C. described what he referred to as the "judicial domain" school, which limits s. 7 protection to criminal proceedings. This approach was then contrasted with a broader approach to s. 7 which pro-

pas dire que ce dernier avait pris des mesures qu'il n'avait pas le droit de prendre pour se défendre. Il s'est dit d'avis que les plaintes n'étaient pas complexes, mais qu'elles étaient plutôt du genre de celles que [TRADUCTION] «les tribunaux judiciaires et les tribunaux administratifs règlent toujours rapidement» (par. 37), de sorte qu'«il aurait suffi tout au plus d'une semaine» pour effectuer l'enquête (par. 51). Il a ajouté ce qui suit (aux par. 47 et 51):

> [TRADUCTION] . . . un délai de plus de 30 mois entre le dépôt des plaintes et la tenue d'une audience au fond est beaucoup trop long. Si M. Blencoe avait été accusé au criminel de ce genre d'agression sexuelle, l'accusation serait fort probablement rejetée pour des raisons de délai . . .
>
> Comme je l'ai déjà expliqué, l'enquête était nécessairement unidimensionnelle puisqu'il n'y avait aucun témoin oculaire, et il aurait suffi tout au plus d'une semaine.

Au sujet de la question du préjudice, le juge en chef McEachern a conclu que, n'eût été de ces procédures, [TRADUCTION] «on aurait pu raisonnablement s'attendre à ce que l'attention [médiatique] considérable s'estompe et à ce que [Blencoe] et les membres de sa famille puissent tenter de retrouver une vie normale» (par. 53). Il a examiné la prétention que le préjudice subi par l'intimé résultait non pas du délai, mais plutôt de son exclusion du Cabinet. Le juge en chef McEachern a conclu, à cet égard, que la Cour suprême du Canada a placé sur un pied d'égalité l'«aggravation» d'une atteinte existante et le fait de porter atteinte. Il a estimé que le délai excessif avait à la fois considérablement stigmatisé l'accusé et aggravé une situation déjà existante, de sorte que le droit à la sécurité de la personne garanti par l'art. 7 s'appliquait.

Le juge en chef McEachern a fait remarquer que la jurisprudence entourant l'application de l'art. 7 dans un contexte non pénal [TRADUCTION] «posait de grandes difficultés» (par. 60). Il a relevé, au sujet de la portée de l'art. 7, deux courants opposés dans la jurisprudence de la Cour suprême. Premièrement, le juge en chef McEachern a parlé de ce qu'il a appelé l'école du «domaine judiciaire» qui limite la protection de l'art. 7 aux procédures criminelles. Il a ensuite comparé ce point de vue avec

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tects an individual's right to "human dignity" and "privacy" outside the arena of criminal proceedings. McEachern C.J.B.C. adopted the more expansive approach (at para. 101):

> . . . I feel constrained to follow what I regard as the emerging, preferred view in the Supreme Court of Canada that s. 7, under the rubric of liberty and security of the person, operates to protect both the privacy and dignity of citizens against the stigma of undue, prolonged humiliation and public degradation of the kind suffered by [Blencoe] here. Everyone can be made answerable, according to law, for his or her conduct or misconduct, but a process established by law to provide accountability and appropriate remedies cannot be completely open-ended in the sense that human dignity, even for wrongdoers if such is the case, can be compromised for as long as it has occurred in this case.

une interprétation plus large de l'art. 7 qui protège le droit de chacun à la «dignité» et à la «vie privée» ailleurs que dans le seul contexte de procédures criminelles. Le juge en chef McEachern s'est dit favorable à l'interprétation plus libérale (au par. 101):

> [TRADUCTION] . . . je me sens contraint à suivre ce qui me semble être la nouvelle interprétation préconisée par la Cour suprême du Canada, selon laquelle, au chapitre de la liberté et de la sécurité de la personne, l'art. 7 a pour effet de protéger à la fois la vie privée et la dignité des citoyens contre la stigmatisation découlant d'un opprobre prolongé et injustifié comme celui dont [M. Blencoe] a été victime. Suivant la loi, n'importe qui peut être tenu responsable de sa conduite ou de son inconduite, mais le processus établi par la loi pour statuer sur la responsabilité et accorder un redressement approprié ne peut avoir une durée totalement indéterminée au point où la dignité d'une personne, même fautive, peut être compromise aussi longtemps qu'elle l'a été en l'espèce.

(b) Concurring Majority Judgment of Prowse J.A.

Prowse J.A. held that the allegations in this case were analogous to allegations of sexual assault and thus engaged s. 7 of the *Charter*. Having regard to the nature of the allegations and the extent of the prejudice suffered by Mr. Blencoe, she agreed with McEachern C.J.B.C. that the delay of over 30 months was unreasonable and breached the respondent's right to security of the person in a manner not in accordance with the principles of fundamental justice.

b) Le jugement majoritaire concordant du juge Prowse

27 Le juge Prowse a conclu que les allégations formulées en l'espèce s'apparentaient à des allégations d'agression sexuelle et faisaient donc intervenir l'art. 7 de la *Charte*. Compte tenu de la nature des allégations et de l'étendue du préjudice subi par M. Blencoe, elle a convenu avec le juge en chef McEachern que le délai de plus de 30 mois était déraisonnable et portait atteinte, d'une manière non conforme aux principes de justice fondamentale, au droit de l'intimé à la sécurité de sa personne.

(c) Dissenting Reasons of Lambert J.A.

In determining whether the delay was unacceptable, for the purposes of an assessment of natural justice, Lambert J.A. held that such decision was an issue of fact which was decided by the lower court. Consequently, he stated that Lowry J.'s decision should only be interfered with if there was a misconception of the evidence or if the decision was palpably wrong, neither of which had occurred in this case. On the legal question of which sorts of

c) Les motifs dissidents du juge Lambert

28 La question de savoir si le délai était inacceptable au regard des principes de justice naturelle était, selon le juge Lambert, une question de fait que le tribunal inférieur avait tranchée. Il a donc affirmé qu'il n'y aurait lieu de modifier la décision du juge Lowry que s'il y avait eu mauvaise interprétation de la preuve ou décision manifestement erronée, ce qui n'était pas le cas en l'espèce. Quant à la question de droit qui est de savoir quels genres

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prejudice affect natural justice, Lambert J.A. agreed with Lowry J. that prejudice arising from delay must go to the intrinsic fairness of the hearing process and not merely to extrinsic factors such as stigma, stress or other forms of suffering.

de préjudice sont contraires aux principes de justice naturelle, le juge Lambert a convenu avec le juge Lowry que le préjudice découlant d'un délai doit se rapporter à l'équité intrinsèque de la procédure d'audition et non seulement à un facteur extrinsèque comme la stigmatisation, le stress ou d'autres formes de souffrance.

29 Turning to the *Charter* issue, Lambert J.A. found it unnecessary to decide whether s. 7 of the *Charter* applies to non-criminal proceedings or whether suffering induced by stigmatization, stress and disruption of family life can constitute a deprivation of liberty or security of the person in the human rights context. He found that the stigma suffered by Mr. Blencoe, the stress and anxiety related thereto, the media publicity, and Mr. Blencoe's lack of employment, could not be attributed to the human rights process, nor were they exacerbated by a breach of the principles of fundamental justice. Lambert J.A. emphasized that Mr. Blencoe's rights and expectations had to be balanced against those of the two complainants, in the context of the public interest in upholding an effective human rights process. Concluding that the principles of fundamental justice arising in the human rights process were not breached, Lambert J.A. would have found that the respondent was not entitled to relief under ss. 7 and 24 of the *Charter*.

En ce qui concerne la question relative à la *Charte*, le juge Lambert a décidé qu'il était inutile de déterminer si l'art. 7 de la *Charte* s'applique dans des procédures non criminelles ou si les souffrances dues à la stigmatisation, au stress et à la perturbation de la vie familiale peuvent constituer une atteinte à la liberté ou à la sécurité de la personne dans le contexte des droits de la personne. Il a conclu que la stigmatisation dont M. Blencoe a été victime, le stress et l'angoisse qui en ont résulté, la couverture médiatique et le fait que M. Blencoe n'avait plus d'emploi n'étaient pas attribuables au processus en matière de droits de la personne et n'avaient pas été aggravés par une violation des principes de justice fondamentale. Le juge Lambert a souligné que les droits et les attentes de M. Blencoe devaient être soupesés en fonction de ceux des deux plaignantes et de l'intérêt du public dans le maintien d'un processus efficace en matière de droits de la personne. Après avoir conclu qu'il n'y avait eu aucune violation des principes de justice fondamentale qui s'appliquent en matière de droits de la personne, le juge Lambert aurait conclu que l'intimé n'avait pas droit à une réparation fondée sur les art. 7 et 24 de la *Charte*.

IV. Relevant Constitutional Provisions

IV. Dispositions constitutionnelles pertinentes

30 *Canadian Charter of Rights and Freedoms*

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

11. Any person charged with an offence has the right

. . .

(*b*) to be tried within a reasonable time;

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7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

11. Tout inculpé a le droit:

. . .

b) d'être jugé dans un délai raisonnable;

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24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

32. (1) This Charter applies

(*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

32. (1) La présente charte s'applique:

a) au Parlement et au gouvernement du Canada, pour tous les domaines relevant du Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-Ouest;

b) à la législature et au gouvernement de chaque province, pour tous les domaines relevant de cette législature.

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V. Issues

The following are the central issues to be determined for the disposition of this appeal:

A. Does the *Charter* apply to the actions of the British Columbia Human Rights Commission?

B. Have the respondent's s. 7 rights to liberty and security of the person been violated by state-caused delay in the human rights proceedings?

C. If the respondent's s. 7 rights were not engaged, or if the state's actions were in accordance with the principles of fundamental justice, was the respondent entitled to a remedy pursuant to administrative law principles where the delay did not interfere with the right to a fair hearing?

D. If the respondent is entitled to a *Charter* or administrative law remedy, was the stay of proceedings an appropriate remedy in the circumstances of this case?

V. Questions en litige

31 Notre Cour est appelée, aux fins du présent pourvoi, à trancher les questions centrales suivantes:

A. La *Charte* s'applique-t-elle aux actes de la British Columbia Human Rights Commission?

B. Le délai imputable à l'État dans les procédures en matière de droits de la personne a-t-il porté atteinte aux droits de l'intimé à la liberté et à la sécurité de sa personne garantis par l'art. 7?

C. Si les droits garantis à l'intimé par l'art. 7 n'étaient pas en cause ou si les actes de l'État étaient conformes aux principes de justice fondamentale, l'intimé avait-il droit à une réparation fondée sur les principes du droit administratif dans la mesure où le délai écoulé n'a pas porté atteinte à son droit à une audience équitable?

D. Si l'intimé a droit à une réparation fondée sur la *Charte* ou sur le droit administratif, l'arrêt des procédures était-il la réparation appropriée eu égard aux circonstances de la présente affaire?

VI. Analysis

A. *Does the Charter Apply to the Actions of the British Columbia Human Rights Commission?*

The scope of the *Charter*'s application is delineated by s. 32(1) of the *Charter* which states:

VI. Analyse

A. *La Charte s'applique-t-elle aux actes de la British Columbia Human Rights Commission?*

32 La portée de la *Charte* est délimitée par son par. 32(1), dont voici le libellé:

32. (1) This Charter applies

(*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

32. (1) La présente charte s'applique:

a) au Parlement et au gouvernement du Canada, pour tous les domaines relevant du Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-Ouest;

b) à la législature et au gouvernement de chaque province, pour tous les domaines relevant de cette législature.

It is clear that both the federal Parliament and provincial legislatures are bound by the *Charter*. However, one threshold issue which has been raised in this case is whether the Commission and the Tribunal are agents of government pursuant to s. 32 of the *Charter*. The following three factors have been put forth to support the argument that these bodies are not bound by the *Charter*: (i) the organizations in question are required to be independent of government; (ii) the challenge in this case is not to any statutory provisions that might be said to be within the legislative sphere; and (iii) the organizations in question must act judicially since their functions are analogous to those exercised by courts of law.

Il est clair que le Parlement du Canada et les législatures provinciales sont assujettis à la *Charte*. Cependant, une question préliminaire que soulève la présente affaire est de savoir si la Commission et le Tribunal sont des mandataires du gouvernement aux fins de l'art. 32 de la *Charte*. Les trois facteurs suivants ont été avancés à l'appui de l'argument voulant que ces organismes ne soient pas assujettis à la *Charte*: (i) les organismes en cause doivent être indépendants du gouvernement, (ii) la contestation en l'espèce ne vise pas une disposition dont on pourrait dire qu'elle ressortit au pouvoir législatif et (iii) les organismes en question doivent agir d'une manière judiciaire, étant donné que leurs fonctions sont analogues à celles d'une cour de justice.

33 For the reasons I address below, these claims are misguided with respect to their approach to the application of the *Charter*. Furthermore, for the purposes of this appeal, it is only necessary to address the *Charter*'s applicability to the actions of the Commission since the prejudice suffered by the respondent is alleged to have resulted from unreasonable delay in the actions of the Commission.

Pour les raisons exposées ci-après, ces prétentions s'appuient sur une façon erronée d'aborder l'application de la *Charte*. De plus, aux fins du présent pourvoi, il est seulement nécessaire d'examiner l'applicabilité de la *Charte* aux actes de la Commission, étant donné que le préjudice subi par l'intimé serait imputable au fait que la Commission n'a pas agi dans un délai raisonnable.

34 The mere fact that a body is independent of government is not determinative of the *Charter*'s application, nor is the fact that a statutory provision is not impugned. Being autonomous or independent from government is not a conclusive basis upon which to hold that the *Charter* does not apply.

Le seul fait qu'un organisme soit indépendant du gouvernement n'est pas décisif en ce qui concerne l'application de la *Charte*, pas plus que ne l'est le fait qu'aucune disposition législative n'est contestée. L'autonomie ou l'indépendance vis-à-vis du gouvernement ne permet pas de conclure à l'inapplication de la *Charte*.

35 Bodies exercising statutory authority are bound by the *Charter* even though they may be independent of government. This was confirmed by

L'organisme qui exerce un pouvoir conféré par une loi est assujetti à la *Charte* même s'il peut être indépendant du gouvernement. Le juge La Forest

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La Forest J., speaking for a unanimous Court in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 21:

There is no doubt, however, that the *Charter* also applies to action taken under statutory authority. The rationale for this rule flows inexorably from the logical structure of s. 32. As Professor Hogg explains in his *Constitutional Law of Canada* (3rd ed. 1992 (loose-leaf)), vol. 1, at pp. 34-8.3 and 34-9:

> Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the Charter, neither body can authorize action which would be in breach of the Charter. Thus, the limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority.

There is no doubt that the Commission is created by statute and that all of its actions are taken pursuant to statutory authority.

One distinctive feature of actions taken under statutory authority is that they involve a power of compulsion not possessed by private individuals (P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 34-12). Clearly the Commission possesses more extensive powers than a natural person. The Commission's authority is not derived from the consent of the parties. The *Human Rights Code* grants various powers to the Commission to both investigate complaints and decide how to deal with such complaints. Section 24 of the Code specifically allows the Commissioner to compel the production of documents. The relevant portions of this section state:

24 (1) For the purpose of investigating a complaint, the commissioner of investigation and mediation or a human rights officer may

l'a confirmé en rendant l'arrêt unanime de notre Cour *Eldridge c. Colombie-Britannique (Procureur général)*, [1997] 3 R.C.S. 624, au par. 21:

Toutefois, il ne fait aucun doute que la *Charte* s'applique aussi aux actes accomplis en vertu de pouvoirs conférés par la loi. La justification de cette règle découle inexorablement de la structure logique de l'art. 32. Comme l'explique le professeur Hogg dans *Constitutional Law of Canada* (3e éd. 1992 (feuilles mobiles)), vol. 1, aux pp. 34-8.3 et 34-9:

> [TRADUCTION] Les mesures prises en vertu d'un pouvoir statutaire ne sont valides que si elles se situent à l'intérieur de la portée de ce pouvoir. Puisque ni le Parlement ni une législature ne peuvent eux-mêmes adopter une loi qui contrevient à la Charte, ni l'un ni l'autre ne peuvent autoriser des mesures qui contreviendraient à la Charte. Ainsi, les limites que la Charte impose à un pouvoir statutaire s'étendront à la famille des autres pouvoirs statutaires et s'appliqueront aux règlements, aux statuts, aux ordonnances, aux décisions et à toutes les autres mesures (législatives, administratives ou judiciaires) dont la validité dépend d'un pouvoir statutaire.

Il ne fait aucun doute que la Commission a été créée par une loi et qu'elle accomplit tous ses actes en vertu du pouvoir que lui confère la loi en cause.

36 L'un des traits distinctifs des actes accomplis en vertu d'un pouvoir conféré par la loi est qu'ils comportent un pouvoir de contrainte que n'ont pas les particuliers (P. W. Hogg, *Constitutional Law of Canada* (éd. feuilles mobiles), vol. 2, à la p. 34-12). Il est clair que les pouvoirs de la Commission sont plus étendus que ceux d'une personne physique. Sa compétence ne découle pas du consentement des parties. Le *Human Rights Code* habilite, de diverses manières, la Commission à enquêter sur des plaintes et à décider de la façon de les traiter. L'article 24 du Code permet expressément au commissaire d'exiger la production de documents. En voici les extraits pertinents:

[TRADUCTION]

24 (1) Lorsqu'il l'enquête relative à une plainte, le commissaire aux enquêtes et à la médiation ou un agent des droits de la personne peut

(a) require the production of books, documents, correspondence or other records that relate or may relate to the complaint, and

(b) make any inquiry relating to the complaint of any person, in writing or orally.

(2) If a person refuses to

(a) comply with a demand under subsection (1) (a) for the production of books, documents, correspondence or other records, or

(b) respond to an inquiry made under subsection (1) (b),

the commissioner of investigation and mediation or a human rights officer may apply to the Supreme Court for an order requiring the person to comply with the demand or respond to the inquiry.

. . .

(4) For the purpose of investigating a complaint, the commissioner of investigation and mediation or a human rights officer may, with the consent of the owner or occupier, enter and inspect any premises that in the opinion of that commissioner or the human rights officer may provide information relating to the complaint.

37 The Commission in this case cannot therefore escape *Charter* scrutiny merely because it is not part of government or controlled by government. In *Eldridge*, a unanimous Court concluded that a hospital was bound by the *Charter* since it was implementing a specific government policy or program. The Commission in this case is both implementing a specific government program and exercising powers of statutory compulsion.

38 With respect to the claim that the Commission exercises judicial functions and is thereby not subject to the *Charter*, the decision of this Court in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, is conclusive. Lamer J. (as he then was), in partial dissent but speaking for a unanimous Court on this point, held that the *Charter* applies to the orders of a statutorily appointed labour arbitrator. This determination was not open

a) exiger la production de livres, documents, lettres ou autres dossiers qui se rapportent ou peuvent se rapporter à la plainte, et

b) poser des questions par écrit ou de vive voix relativement à la plainte.

(2) Si une personne refuse

a) d'obtempérer à une demande de production de livres, documents, lettres ou autres dossiers, fondée sur l'alinéa (1)a), ou

b) de répondre à une question posée en vertu de l'alinéa (1)b),

le commissaire aux enquêtes et à la médiation ou un agent des droits de la personne peut demander à la Cour suprême d'ordonner à la personne en cause d'obtempérer à la demande ou de répondre à la question.

. . .

(4) Lorsqu'il enquête sur une plainte, le commissaire aux enquêtes et à la médiation ou un agent des droits de la personne peut, avec le consentement du propriétaire ou de l'occupant, inspecter des locaux si, à son avis, cette inspection peut permettre d'obtenir des renseignements concernant la plainte.

En l'espèce, la Commission ne peut pas échapper à un examen fondé sur la *Charte* du seul fait qu'elle ne fait pas partie du gouvernement ou qu'elle n'est pas sous son contrôle. Dans l'arrêt *Eldridge*, notre Cour a conclu à l'unanimité qu'un hôpital était assujetti à la *Charte* parce qu'il mettait en œuvre une politique ou un programme gouvernemental particulier. La commission dont il est question en l'espèce met en œuvre un programme gouvernemental particulier et exerce des pouvoirs de contrainte émanant de la loi.

L'arrêt de notre Cour *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038, est concluant en ce qui concerne la prétention que la Commission exerce des fonctions judiciaires et n'est donc pas assujettie à la *Charte*. Le juge Lamer (plus tard Juge en chef), dissident en partie, mais s'exprimant au nom de toute la Cour sur ce point, a décidé que la *Charte* s'applique aux ordonnances d'un arbitre en matière de relations

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to challenge, as expressed by Lamer J., at pp. 1077-78:

> The fact that the *Charter* applies to the order made by the adjudicator in the case at bar is not, in my opinion, open to question. The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives all his powers from the statute. [Emphasis added.]

The facts in *Slaight* and the case at bar share at least one salient feature: the labour arbitrator (in *Slaight*) and the Commission (in the case at bar) each exercise governmental powers conferred upon them by a legislative body. The ultimate source of authority in each of these cases is government. All of the Commission's powers are derived from the statute. The Commission is carrying out the legislative scheme of the *Human Rights Code*. It is putting into place a government program or a specific statutory scheme established by government to implement government policy (see *Eldridge*, *supra*, at paras. 37 and 44, and *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, at p. 584). The Commission must act within the limits of its enabling statute. There is clearly a "governmental quality" to the functions of a human rights commission which is created by government to promote equality in society generally.

Thus, notwithstanding that the Commission may have adjudicatory characteristics, it is a statutory creature and its actions fall under the authority of the *Human Rights Code*. The state has instituted an administrative structure, through a legislative scheme, to effectuate a governmental program to provide redress against discrimination. It is the administration of a governmental program that calls for *Charter* scrutiny. Once a complaint is brought before the Commission, the subsequent administrative proceedings must comply with the *Charter*. These entities are subject to *Charter* scrutiny in the performance of their functions just as government would be in like circumstances. To hold otherwise would allow the legislative branch to circumvent the *Charter* by establishing statutory

du travail désigné en application d'une loi. Cette décision était incontestable, comme l'a dit le juge Lamer à la p. 1077:

> Le fait que la *Charte* s'applique à l'ordonnance rendue par l'arbitre en l'espèce ne fait, à mon avis, aucun doute. L'arbitre est en effet une créature de la loi; il est nommé en vertu d'une disposition législative et tire tous ses pouvoirs de la loi. [Je souligne.]

39 Les faits de l'affaire *Slaight* et ceux de la présente affaire ont au moins une caractéristique commune prédominante: l'arbitre en matière de relations du travail (dans *Slaight*) et la Commission (en l'espèce) exercent tous les deux des pouvoirs gouvernementaux conférés par un corps législatif. Dans chaque cas, l'origine du pouvoir accordé est en fin de compte le gouvernement. La Commission tire tous ses pouvoirs de la loi. Elle applique le régime législatif du *Human Rights Code*. Elle met en œuvre un programme gouvernemental ou un régime législatif particulier établi par le gouvernement pour l'application de sa politique (voir *Eldridge*, précité, aux par. 37 et 44, et *Douglas/Kwantlen Faculty Assn. c. Douglas College*, [1990] 3 R.C.S. 570, à la p. 584). La Commission doit agir dans les limites de sa loi habilitante. Les fonctions d'une commission des droits de la personne créée par le gouvernement pour promouvoir l'égalité dans la société en général sont clairement de «nature gouvernementale».

40 Donc, même si elle peut avoir certaines caractéristiques d'un tribunal, la Commission est une créature de la loi et ses actes sont assujettis au *Human Rights Code*. L'État a créé par voie législative un organisme administratif chargé de mettre en œuvre un programme gouvernemental destiné à remédier à la discrimination. C'est l'application d'un programme gouvernemental qui commande l'examen fondé sur la *Charte*. Une fois la Commission saisie d'une plainte, les procédures administratives qui suivent doivent respecter la *Charte*. L'exercice des fonctions de telles entités peut faire l'objet d'un examen fondé sur la *Charte* tout comme pourrait le faire l'exercice des fonctions d'un gouvernement dans les mêmes circonstances. Conclure le contraire permettrait au pouvoir légis-

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bodies that are immune to *Charter* scrutiny. The above analysis leads inexorably to the conclusion that the *Charter* applies to the actions of the Commission.

B. *Have the Respondent's Section 7 Rights to Liberty and Security of the Person Been Violated by State-caused Delay in Human Rights Proceedings?*

(a) Court of Appeal Decisions on This Issue

41 Four appellate courts have dealt with the issue of whether s. 7 of the *Charter* applies in circumstances similar to the case at bar, including the decision under appeal. The majority of the Court of Appeal in *Blencoe* followed the decision in *Saskatchewan Human Rights Commission v. Kodellas* (1989), 60 D.L.R. (4th) 143 (Sask. C.A.), to hold that s. 7 of the *Charter* was violated. However, the Manitoba Court of Appeal in *Nisbett v. Manitoba (Human Rights Commission)* (1993), 101 D.L.R. (4th) 744, and the Federal Court of Appeal in *Canadian Airlines International Ltd. v. Canada (Human Rights Commission)*, [1996] 1 F.C. 638, refused to follow *Kodellas*, holding that s. 7 cannot be applied to the consequences of delays in human rights proceedings.

42 In *Kodellas*, between the date of the first complaint and the date fixed for the hearing, almost four years had elapsed and three years and two months had elapsed with respect to the second complaint. Bayda C.J.S., dissenting in part with respect to the appropriate remedy, held that the delay violated Mr. Kodellas's s. 7 security of the person. In reaching this conclusion, Bayda C.J.S. referred to the dissenting judgment of Lamer J. in *Mills v. The Queen*, [1986] 1 S.C.R. 863 (hereinafter "*Mills* (1986)"), at p. 919, and reiterated in *R. v. Rahey*, [1987] 1 S.C.R. 588, at p. 605, where, in the context of s. 11(*b*) of the *Charter*, security of the person encompasses protection against

latif de contourner la *Charte* en créant des organismes qui ne peuvent pas faire l'objet d'un tel examen. L'analyse qui précède mène inexorablement à la conclusion que la *Charte* s'applique aux actes de la Commission.

B. *Le retard imputable à l'État dans les procédures en matière de droits de la personne a-t-il porté atteinte aux droits de l'intimé à la liberté et à la sécurité de sa personne garantis par l'art. 7?*

a) La jurisprudence des cours d'appel sur ce point

Quatre cours d'appel ont statué sur la question de savoir si l'art. 7 de la *Charte* s'applique dans des circonstances semblables à celles de la présente affaire, y compris la cour d'appel dans l'arrêt qui fait l'objet du présent pourvoi. Dans l'affaire *Blencoe*, les juges majoritaires de la Cour d'appel ont suivi l'arrêt *Saskatchewan Human Rights Commission c. Kodellas* (1989), 60 D.L.R. (4th) 143 (C.A. Sask.), et ont conclu qu'il y avait violation de l'art. 7 de la *Charte*. Toutefois, la Cour d'appel du Manitoba dans *Nisbett c. Manitoba (Human Rights Commission)* (1993), 101 D.L.R. (4th) 744, et la Cour d'appel fédérale dans *Lignes aériennes Canadien International Ltée c. Canada (Commission des droits de la personne)*, [1996] 1 C.F. 638, ont refusé de suivre l'arrêt *Kodellas* et ont conclu que l'art. 7 ne peut pas s'appliquer aux conséquences d'un délai dans des procédures en matière de droits de la personne.

Dans l'affaire *Kodellas*, près de quatre années s'étaient écoulées entre le dépôt de la première plainte et la date fixée pour la tenue de l'audience, alors que trois années et deux mois s'étaient écoulées dans le cas de la deuxième plainte. Le juge en chef Bayda, dissident en partie au sujet de la réparation appropriée, a conclu que le délai écoulé portait atteinte au droit de M. Kodellas à la sécurité de sa personne garanti par l'art. 7. En tirant cette conclusion, le juge en chef Bayda a mentionné les motifs dissidents du juge Lamer dans *Mills c. La Reine*, [1986] 1 R.C.S. 863 (ci-après l'«arrêt *Mills* de 1986»), à la p. 919, repris dans *R. c. Rahey*, [1987] 1 R.C.S. 588, à la p. 605, selon lesquels la

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"overlong subjection to the vexations and vicissitudes of a pending criminal accusation" (*Kodellas*, at p. 152). The unreasonable delay in *Kodellas* was found to result in two forms of prejudice to Mr. Kodellas. First, it extended his psychological trauma. Second, it reduced Mr. Kodellas's chances of a fair hearing (*Kodellas*, at p. 161).

sécurité de la personne, dans le contexte de l'al. 11*b*) de la *Charte*, englobe la protection contre [TRADUCTION] «un assujettissement trop long aux vexations et aux vicissitudes d'une accusation criminelle pendante» (*Kodellas*, à la p. 152). Il a été jugé, dans *Kodellas*, que le délai déraisonnable avait causé deux formes de préjudice à M. Kodellas: premièrement, il avait prolongé son traumatisme psychologique et, deuxièmement, il avait réduit les chances de M. Kodellas d'obtenir une audience équitable (*Kodellas*, à la p. 161).

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43 In *Nisbett*, the Manitoba Court of Appeal denied relief sought by a medical doctor to prohibit the hearing of his employee's complaint of sexual harassment that had been outstanding for over three years. This decision was reached despite the stigma attached to the allegations which was described as "anxiety, the strain on family life, the disruption of his professional practice, the quest for evidence of similar conduct from former employees, the damage to his personal dignity and professional standing, the loss of self-esteem, and the continuing uncertainty as to the final outcome of the proceedings" (*Nisbett*, at p. 749) (quoting from the trial judgment (1992), 90 D.L.R. (4th) 672, at p. 679). The Manitoba Court of Appeal refused to follow *Kodellas*, questioning whether the impact of a criminal proceeding for sexual assault can be equated with a human rights proceeding on allegations of sex discrimination for the purposes of s. 7. The Court of Appeal concluded that s. 7 had no application to non-penal proceedings under human rights legislation and that s. 11 of the *Charter* was restricted to criminal cases.

Dans l'arrêt *Nisbett*, la Cour d'appel du Manitoba a refusé d'interdire, à la demande d'un médecin, l'audition de la plainte de harcèlement sexuel que l'employée de ce dernier avait déposée plus de trois ans auparavant. Elle a rendu cette décision malgré les stigmates liés aux allégations, qui avait été décrits comme étant [TRADUCTION] «l'angoisse, la perturbation de la vie familiale et de la vie professionnelle, la recherche d'une preuve de comportement similaire auprès d'anciennes employées, l'atteinte à la dignité personnelle et à la réputation professionnelle, la perte d'estime de soi et l'incertitude continuelle quant à l'issue finale des procédures» (*Nisbett*, à la p. 749 (citation provenant du jugement de première instance (1992), 90 D.L.R. (4th) 672, à la p. 679)). Doutant que l'incidence de procédures criminelles en matière d'agression sexuelle puisse être assimilée, aux fins de l'application de l'art. 7, à celle de procédures en matière de droits de la personne relatives à des allégations de discrimination sexuelle, la Cour d'appel du Manitoba a refusé de suivre l'arrêt *Kodellas*. Elle a statué que l'art. 7 ne s'appliquait pas à des procédures non pénales fondées sur une loi relative aux droits de la personne et que l'art. 11 de la *Charte* ne s'appliquait qu'en matière criminelle.

44 In *Canadian Airlines*, there was a 50-month delay between the filing of the complaint and the appointment of a tribunal to investigate. The Federal Court of Appeal also refused to follow *Kodellas*, and concluded that s. 7 did not apply to administrative proceedings of a non-criminal nature.

Dans *Lignes aériennes Canadien*, un délai de 50 mois s'était écoulé entre le dépôt de la plainte et la désignation des membres du tribunal chargé de faire enquête. La Cour d'appel fédérale y a également refusé de suivre l'arrêt *Kodellas* et a conclu que l'art. 7 ne s'appliquait pas à des procédures administratives de nature non criminelle.

(b) Applicability of Section 7 Outside the Criminal Context

45 Although there have been some decisions of this Court which may have supported the position that s. 7 of the *Charter* is restricted to the sphere of criminal law, there is no longer any doubt that s. 7 of the *Charter* is not confined to the penal context. This was most recently affirmed by this Court in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, where Lamer C.J. stated that the protection of security of the person extends beyond the criminal law (at para. 58). He later added (at para. 65):

> . . . s. 7 is not limited solely to purely criminal or penal matters. There are other ways in which the government, in the course of the administration of justice, can deprive a person of their s. 7 rights to liberty and security of the person, i.e., civil committal to a mental institution: see *B. (R.)*, *supra*, at para. 22.

46 Thus, to the extent that the above decisions of *Nisbett* and *Canadian Airlines* stand for the proposition that s. 7 can never apply outside the criminal realm, they are incorrect. Section 7 can extend beyond the sphere of criminal law, at least where there is "state action which directly engages the justice system and its administration" (*G. (J.)*, at para. 66). If a case arises in the human rights context which, on its facts, meets the usual s. 7 threshold requirements, there is no specific bar against such a claim and s. 7 may be engaged. The question to be addressed, however, is not whether delays in human rights proceedings can engage s. 7 of the *Charter* but rather, whether the respondent's s. 7 rights were actually engaged by delays in the circumstances of this case. Various parties in this case seem to have conflated the delay issue with the threshold s. 7 issue. However, whether the respondent's s. 7 rights to life, liberty and security of the person are engaged is a separate issue from whether the delay itself was unreasonable. I will now examine whether the s. 7 threshold requirements have been met and whether the

b) Applicabilité de l'art. 7 dans un contexte autre que celui du droit criminel

Même si, dans certains arrêts, notre Cour a pu adhérer au point de vue que l'art. 7 de la *Charte* ne s'applique que dans le domaine du droit criminel, il ne fait plus aucun doute que cette disposition n'est pas limitée au contexte pénal. C'est ce que confirmait tout récemment notre Cour dans *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G. (J.)*, [1999] 3 R.C.S. 46, où le juge en chef Lamer a affirmé que la protection de la sécurité de la personne déborde le cadre du droit criminel (au par. 58). Plus loin, il a ajouté ce qui suit (au par. 65):

> . . . l'art. 7 n'est pas limité aux affaires purement criminelles ou pénales. Dans le cours de l'administration de la justice, il existe d'autres façons par lesquelles l'État peut priver un individu du droit à la liberté et à la sécurité de la personne garanti à l'art. 7, par exemple l'internement dans un établissement psychiatrique: voir *B. (R.)*, précité, au par. 22.

Ainsi, les arrêts *Nisbett* et *Lignes aériennes Canadien*, précités, sont erronés dans la mesure où ils permettent d'affirmer que l'art. 7 ne s'applique qu'en matière criminelle. L'article 7 peut déborder le cadre du droit criminel, au moins dans le cas d'un «acte gouvernemental intéressant directement le système judiciaire et l'administration de la justice» (*G. (J.)*, au par. 66). Rien ne s'oppose à ce que cet article s'applique à une affaire en matière des droits de la personne qui, sur le plan des faits, respecte les conditions préliminaires de son application. La question qui se pose toutefois est de savoir non pas si des délais dans des procédures en matière de droits de la personne peuvent déclencher l'application de l'art. 7 de la *Charte*, mais plutôt si, dans les circonstances de la présente affaire, des délais ont porté atteinte aux droits garantis à l'intimé par l'art. 7. Différentes parties à la présente affaire semblent avoir confondu la question du délai avec la question préliminaire de l'art. 7. Toutefois, la question de savoir si les droits de l'intimé à la vie, à la liberté et à la sécurité de sa personne s'appliquent est distincte de celle de savoir si le délai lui-même était déraisonnable. Je vais maintenant examiner si les conditions prélimi-

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respondent has demonstrated a breach of his s. 7 rights.

(c) Section 7 — General Principles

Section 7 of the *Charter* provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Thus, before it is even possible to address the issue of whether the respondent's s. 7 rights were infringed in a manner not in accordance with the principles of fundamental justice, one must first establish that the interest in respect of which the respondent asserted his claim falls within the ambit of s. 7. These two steps in the s. 7 analysis have been set out by La Forest J. in *R. v. Beare*, [1988] 2 S.C.R. 387, at p. 401, as follows:

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

Thus, if no interest in the respondent's life, liberty or security of the person is implicated, the s. 7 analysis stops there. It is at the first stage in the s. 7 analysis that I have the greatest problem with the respondent's s. 7 arguments.

McEachern C.J.B.C. collapsed the s. 7 interests of "liberty" and "security of the person" into a single right protecting a person's dignity against the stigma of undue, prolonged humiliation and public degradation of the kind suffered by the respondent. In *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at pp. 204-5, Wilson J. emphasized that "life, liberty and security of the person" are three distinct interests, and that it is incumbent on the Court to give meaning to each of these elements. This statement was endorsed by Lamer J. for a majority of this Court in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 500. In addressing the issue of whether the respondent's s. 7 rights have been breached in this case, I also prefer to keep the interests protected by s. 7 analytically distinct to the extent possible. For the

naires de l'application de l'art. 7 sont remplies et si l'intimé a démontré qu'il y a eu violation des droits que lui garantit cet article.

c) Article 7 — Principes généraux

47 L'article 7 de la *Charte* prévoit ceci: «[c]hacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.» Ainsi, avant même que l'on puisse se demander si les droits garantis à l'intimé par l'art. 7 ont fait l'objet d'une atteinte non conforme aux principes de justice fondamentale, il faut d'abord prouver que le droit visé par l'allégation de l'intimé relève de l'art. 7. Dans l'arrêt *R. c. Beare*, [1988] 2 R.C.S. 387, à la p. 401, le juge La Forest a énoncé ainsi ces deux étapes de l'analyse fondée sur l'art. 7:

> Pour que l'article puisse entrer en jeu, il faut constater d'abord qu'il a été porté atteinte au droit «à la vie, à la liberté et à la sécurité [d'une] personne» et, en second lieu, que cette atteinte est contraire aux principes de justice fondamentale.

Par conséquent, si le droit de l'intimé à la vie, à la liberté ou à la sécurité de sa personne n'est pas en cause, l'analyse fondée sur l'art. 7 prend fin. C'est à la première étape de cette analyse que les arguments de l'intimé relatifs à l'art. 7 me posent le plus de difficultés.

48 Le juge en chef McEachern a fondu le droit «à la liberté» et le droit «à la sécurité de [l]a personne» en un seul droit à la protection de la dignité de la personne contre la stigmatisation découlant d'un opprobre prolongé et injustifié comme celui dont l'intimé a été victime. Dans *Singh c. Ministre de l'Emploi et de l'Immigration*, [1985] 1 R.C.S. 177, aux pp. 204 et 205, le juge Wilson a insisté sur le fait que «la vie, la liberté et la sécurité de la personne» constituent trois droits distincts et qu'il incombe à notre Cour de préciser le sens de chacun de ces droits. Le juge Lamer a souscrit à cet énoncé au nom de notre Cour à la majorité dans le *Renvoi: Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486, à la p. 500. Pour déterminer si, en l'espèce, il a été porté atteinte aux droits de l'intimé garantis par l'art. 7, je préfère, dans la mesure du

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purposes of this appeal, the outcome is dependent upon the meaning to be given to the interests of "liberty" and "security of the person".

(d) Liberty Interest

49 The liberty interest protected by s. 7 of the *Charter* is no longer restricted to mere freedom from physical restraint. Members of this Court have found that "liberty" is engaged where state compulsions or prohibitions affect important and fundamental life choices. This applies for example where persons are compelled to appear at a particular time and place for fingerprinting (*Beare, supra*); to produce documents or testify (*Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425); and not to loiter in particular areas (*R. v. Heywood*, [1994] 3 S.C.R. 761). In our free and democratic society, individuals are entitled to make decisions of fundamental importance free from state interference. In *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 80, La Forest J., with whom L'Heureux-Dubé, Gonthier and McLachlin JJ. agreed, emphasized that the liberty interest protected by s. 7 must be interpreted broadly and in accordance with the principles and values underlying the *Charter* as a whole and that it protects an individual's personal autonomy:

> . . . liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance.

50 In *R. v. Morgentaler*, [1988] 1 S.C.R. 30, Wilson J., speaking for herself alone, was of the opinion that s. 251 of the *Criminal Code* violated not only a woman's right to security of the person but her s. 7 liberty interest as well. She indicated that the liberty interest is rooted in fundamental notions of human dignity, personal autonomy, privacy and

possible, cloisonner ces droits aux fins de l'analyse. L'issue du présent pourvoi dépend du sens donné aux droits «à la liberté» et «à la sécurité de [l]a personne».

d) Droit à la liberté

Le droit à la liberté garanti par l'art. 7 de la *Charte* ne s'entend plus uniquement de l'absence de toute contrainte physique. Des juges de notre Cour ont conclu que la «liberté» est en cause lorsque des contraintes ou des interdictions de l'État influent sur les choix importants et fondamentaux qu'une personne peut faire dans sa vie. Une telle situation existe, par exemple, lorsque des personnes doivent se présenter à un endroit et à un moment précis pour faire prendre leurs empreintes digitales (*Beare*, précité), produire des documents ou témoigner (*Thomson Newspapers Ltd. c. Canada (Directeur des enquêtes et recherches, Commission sur les pratiques restrictives du commerce)*, [1990] 1 R.C.S. 425), et lorsque des personnes doivent s'abstenir de flâner dans certains lieux (*R. c. Heywood*, [1994] 3 R.C.S. 761). Dans notre société libre et démocratique, chacun a le droit de prendre des décisions d'importance fondamentale sans intervention de l'État. Dans *B. (R.) c. Children's Aid Society of Metropolitan Toronto*, [1995] 1 R.C.S. 315, au par. 80, le juge La Forest, avec l'assentiment des juges L'Heureux-Dubé, Gonthier et McLachlin, souligne que le droit à la liberté garanti par l'art. 7 protège l'autonomie personnelle et qu'il doit être interprété largement et en conformité avec les principes et les valeurs qui sous-tendent la *Charte* dans son ensemble:

> . . . la liberté ne signifie pas simplement l'absence de toute contrainte physique. Dans une société libre et démocratique, l'individu doit avoir suffisamment d'autonomie personnelle pour vivre sa propre vie et prendre des décisions qui sont d'importance fondamentale pour sa personne.

Dans *R. c. Morgentaler*, [1988] 1 R.C.S. 30, le juge Wilson, s'exprimant uniquement en son propre nom, était d'avis que l'art. 251 du *Code criminel* violait non seulement le droit d'une femme à la sécurité de sa personne, mais également son droit à la liberté garanti par l'art. 7. Elle a indiqué que le droit à la liberté prend racine dans les concepts

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choice in decisions regarding an individual's fundamental being. She conveyed this as follows, at p. 166:

> Thus, an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in *Singh*, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.

The above passage was endorsed by La Forest J. in *B. (R.)*, *supra*, at para. 80. This Court in *B. (R.)* was asked to decide whether the s. 7 liberty interest protects the rights of parents to choose medical treatment for their children. The above passage from Wilson J. was applied by La Forest J. to individual interests of fundamental importance in our society such as the parental interest in caring for one's children.

In *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 66, La Forest J., writing for L'Heureux-Dubé J. and McLachlin J. (as she then was), reiterated his position that the right to liberty in s. 7 protects the individual's right to make inherently private choices and that choosing where to establish one's home is one such inherently personal choice:

> The foregoing discussion serves simply to reiterate my general view that the right to liberty enshrined in s. 7 of the *Charter* protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference. I must emphasize here that, as the tenor of my comments in *B. (R.)* should indicate, I do not by any means regard this sphere of autonomy as being so wide as to encompass any and all decisions that individuals might make in conducting their affairs. Indeed, such a view would run contrary to the basic idea, expressed both at the outset of these reasons and in my reasons in *B. (R.)*, that individuals cannot, in any organized society, be guaranteed an unbridled freedom to do whatever they please. Moreover, I do not even consider that the sphere of autonomy includes within its

fondamentaux de la dignité humaine, de l'autonomie personnelle, de la vie privée et du choix des décisions concernant l'être fondamental de l'individu. Voici ce qu'elle a dit, à la p. 166:

> Ainsi, un aspect du respect de la dignité humaine sur lequel la *Charte* est fondée est le droit de prendre des décisions personnelles fondamentales sans intervention de l'État. Ce droit constitue une composante cruciale du droit à la liberté. La liberté, comme nous l'avons dit dans l'arrêt *Singh*, est un terme susceptible d'une acception fort large. À mon avis, ce droit, bien interprété, confère à l'individu une marge d'autonomie dans la prise de décisions d'importance fondamentale pour sa personne.

Le juge La Forest a adopté cet extrait dans l'arrêt *B. (R.)*, précité, au par. 80. Dans cette affaire, notre Cour était appelée à décider si le droit à la liberté garanti par l'art. 7 protège le droit des parents de choisir un traitement médical pour leurs enfants. Le juge La Forest a appliqué l'extrait précité des motifs du juge Wilson aux droits individuels qui revêtent une importance fondamentale dans notre société, comme le droit des parents de prendre soin de leurs enfants.

51 Dans l'arrêt *Godbout c. Longueuil (Ville)*, [1997] 3 R.C.S. 844, au par. 66, le juge La Forest, s'exprimant au nom du juge L'Heureux-Dubé et du juge McLachlin (maintenant Juge en chef), a réitéré son point de vue selon lequel le droit à la liberté garanti par l'art. 7 protège le droit de chacun de faire des choix intrinsèquement privés, y compris le choix d'un lieu pour établir sa demeure:

> L'analyse qui précède ne fait que répéter mon opinion générale selon laquelle la protection du droit à la liberté garanti par l'art. 7 de la *Charte* s'étend au droit à une sphère irréductible d'autonomie personnelle où les individus peuvent prendre des décisions intrinsèquement privées sans intervention de l'État. Comme les propos que j'ai tenus dans l'arrêt *B. (R.)* l'indiquent, je n'entends pas par là, je le précise, que cette sphère d'autonomie est vaste au point d'englober toute décision qu'un individu peut prendre dans la conduite de ses affaires. Une telle opinion, en effet, irait à l'encontre du principe fondamental que j'ai formulé au début des présents motifs et dans les motifs de l'arrêt *B. (R.)*, selon lequel nul ne peut, dans une société organisée, prétendre à la garantie de la liberté absolue d'agir comme il lui plaît. J'estime même que cette sphère d'autonomie ne protège

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scope every matter that might, however vaguely, be described as "private". Rather, as I see it, the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence. As I have already explained, I took the view in *B. (R.)* that parental decisions respecting the medical care provided to their children fall within this narrow class of inherently personal matters. In my view, choosing where to establish one's home is, likewise, a quintessentially private decision going to the very heart of personal or individual autonomy. [Emphasis added.]

pas tout ce qui peut, même vaguement, être qualifié de «privé». Je suis plutôt d'avis que l'autonomie protégée par le droit à la liberté garanti par l'art. 7 ne comprend que les sujets qui peuvent à juste titre être qualifiés de fondamentalement ou d'essentiellement personnels et qui impliquent, par leur nature même, des choix fondamentaux participant de l'essence même de ce que signifie la jouissance de la dignité et de l'indépendance individuelles. Comme je l'ai déjà mentionné, j'ai exprimé, dans l'arrêt *B.(R.)*, l'opinion voulant que les décisions des parents quant aux soins médicaux administrés à leurs enfants appartiennent à cette catégorie limitée de sujets fondamentalement personnels. À mon avis, le choix d'un lieu pour établir sa demeure est, de la même façon, une décision essentiellement privée qui tient de la nature même de l'autonomie personnelle. [Je souligne.]

La Forest J. therefore spoke in *Godbout* of a narrow sphere of inherently personal decision-making deserving of the law's protection. Choosing where to establish one's home fell within that narrow class according to three members of this Court.

Dans l'arrêt *Godbout*, le juge La Forest a donc parlé d'une catégorie limitée de décisions intrinsèquement personnelles qui méritent la protection de la loi. Selon trois juges de notre Cour, le choix d'un lieu pour établir sa demeure faisait partie de cette catégorie limitée.

52 Dissenting at the New Brunswick Court of Appeal in *G. (J.)*, I also favoured a more generous approach to the liberty interest that would protect personal rights that are inherent to the individual and consistent with the essential values of our society (*New Brunswick (Minister of Health and Community Services) v. J.G.* (1997), 187 N.B.R. (2d) 81, at para. 49). In this vein, the parental interest in raising and caring for one's children would be protected. I however agreed with La Forest J.'s caution that the liberty interest would encompass only those decisions that are of fundamental importance.

Dissident en Cour d'appel du Nouveau Brunswick dans l'affaire *G. (J.)*, j'ai également préconisé une interprétation plus généreuse du droit à la liberté qui protégerait les droits personnels qui sont inhérents à l'individu et conformes aux valeurs essentielles de notre société (*Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. J.G.* (1997), 187 R.N.-B. (2e) 81, au par. 49). Dans le même ordre d'idées, le droit des parents d'éduquer leurs enfants et d'en prendre soin serait protégé. J'ai cependant souscrit à la mise en garde du juge La Forest selon laquelle le droit à la liberté n'engloberait que les décisions qui revêtent une importance fondamentale.

53 Professor Hogg, *supra*, at p. 44-9, supports a more cautious approach to the interpretation of s. 7 such that s. 7 does not become a residual right which envelopes all of the legal rights in the *Charter*. Professor Hogg also addresses the deliberate omission of "property" from "life, liberty and security of the person" in s. 7, and states, at p. 44-12:

Le professeur Hogg, *op. cit.*, à la p. 44-9, préconise une interprétation plus prudente de l'art. 7 de manière à éviter que cet article confère un droit résiduel englobant toutes les garanties juridiques de la *Charte*. Le professeur Hogg aborde aussi la question de l'omission délibérée de garantir, à l'art. 7, le droit à la «propriété», en sus du droit «à la vie, à la liberté et à la sécurité de [l]a personne», et affirme, à la p. 44-12:

It also requires . . . that those terms [liberty and security of the person] be interpreted as excluding economic lib-

[TRADUCTION] Cela exige en outre [. . .] que ces termes [liberté et sécurité de [l]a personne] soient interprétés

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erty and economic security; otherwise, property, having been shut out of the front door, would enter by the back.

comme excluant la liberté et la sécurité économiques; sinon, refoulée à la porte avant, la propriété entrerait par la porte arrière.

Although an individual has the right to make fundamental personal choices free from state interference, such personal autonomy is not synonymous with unconstrained freedom. In the circumstances of this case, the state has not prevented the respondent from making any "fundamental personal choices". The interests sought to be protected in this case do not in my opinion fall within the "liberty" interest protected by s. 7.

54 Même si un individu a le droit de faire des choix personnels fondamentaux sans intervention de l'État, cette autonomie personnelle n'est pas synonyme de liberté illimitée. Dans les circonstances de la présente affaire, l'État n'a pas empêché l'intimé de faire des «choix personnels fondamentaux». À mon avis, les droits que l'on cherche à protéger en l'espèce ne font pas partie du droit «à la liberté» garanti par l'art. 7.

(e) Security of the Person

e) Sécurité de la personne

In the criminal context, this Court has held that state interference with bodily integrity and serious state-imposed psychological stress constitute a breach of an individual's security of the person. In this context, security of the person has been held to protect both the physical and psychological integrity of the individual (*Morgentaler*, *supra*, at p. 56, *per* Dickson C.J., and at p. 173, *per* Wilson J.; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 587, *per* Sopinka J.; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, at p. 1177, *per* Lamer J.). These decisions relate to situations where the state has taken steps to interfere, through criminal legislation, with personal autonomy and a person's ability to control his or her own physical or psychological integrity such as prohibiting assisted suicide and regulating abortion.

55 Notre Cour a statué, en matière criminelle, que l'atteinte de l'État à l'intégrité corporelle et la tension psychologique grave causée par l'État constituent une atteinte à la sécurité de la personne. Dans ce contexte, il a été jugé que la sécurité de la personne vise à la fois l'intégrité physique et l'intégrité psychologique (*Morgentaler*, précité, à la p. 56, le juge en chef Dickson, et à la p. 173, le juge Wilson; *Rodriguez c. Colombie-Britannique (Procureur général)*, [1993] 3 R.C.S. 519, à la p. 587, le juge Sopinka; *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123, à la p. 1177, le juge Lamer). Ces arrêts concernent des situations où l'État a légiféré au criminel dans le but de s'ingérer dans l'autonomie personnelle et la capacité d'une personne de maîtriser sa propre intégrité physique ou psychologique, en interdisant notamment l'aide au suicide et en réglementant l'avortement.

The principle that the right to security of the person encompasses serious state-imposed psychological stress has recently been reiterated by this Court in *G. (J.)*, *supra*. At issue in *G. (J.)* was whether relieving a parent of the custody of his or her children restricts a parent's right to security of the person. Lamer C.J. held that the parental interest in raising one's children is one of fundamental personal importance. State removal of a child from parental custody thus constitutes direct state interference with the psychological integrity of the parent, amounting to a "gross intrusion" into the private and intimate sphere of the parent-child

56 Récemment, dans l'arrêt *G. (J.)*, précité, notre Cour a réitéré le principe voulant que le droit à la sécurité de la personne vise la tension psychologique grave causée par l'État. La question en litige dans cette affaire était de savoir si le retrait de la garde d'un enfant portait atteinte au droit du parent à la sécurité de sa personne. Le juge en chef Lamer a conclu que le droit des parents d'élever leurs enfants est un droit personnel d'une importance fondamentale. Le retrait de la garde d'un enfant par l'État constitue donc une atteinte directe à l'intégrité psychologique du parent équivalant à une «intrusion flagrante» dans le domaine privé et

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relationship (at para. 61). Lamer C.J. concluded that s. 7 guarantees every parent the right to a fair hearing where the state seeks to obtain custody of their children (at para. 55). However, the former Chief Justice also set boundaries in *G. (J.)* for cases where one's psychological integrity is infringed upon. He referred to the attempt to delineate such boundaries as "an inexact science" (para. 59).

intime du lien parent-enfant (au par. 61). Le juge en chef Lamer a conclu que l'art. 7 garantit aux parents le droit à une audience équitable lorsque l'État demande la garde de leurs enfants (au par. 55). Cependant, il a également établi, dans l'arrêt *G. (J.)*, des limites applicables aux cas où il y a atteinte à l'intégrité psychologique d'une personne. Il a affirmé que la tentative d'établir de telles limites n'est pas une «science exacte» (par. 59).

57 Not all state interference with an individual's psychological integrity will engage s. 7. Where the psychological integrity of a person is at issue, security of the person is restricted to "serious state-imposed psychological stress" (Dickson C.J. in *Morgentaler*, *supra*, at p. 56). I think Lamer C.J. was correct in his assertion that Dickson C.J. was seeking to convey something qualitative about the type of state interference that would rise to the level of infringing s. 7 (*G. (J.)*, at para. 59). The words "serious state-imposed psychological stress" delineate two requirements that must be met in order for security of the person to be triggered. First, the psychological harm must be state imposed, meaning that the harm must result from the actions of the state. Second, the psychological prejudice must be serious. Not all forms of psychological prejudice caused by government will lead to automatic s. 7 violations. These two requirements will be examined in turn.

Les atteintes de l'État à l'intégrité psychologique d'une personne ne font pas toutes intervenir l'art. 7. Lorsque l'intégrité physique d'une personne est en cause, la sécurité de la personne se limite à la «tension psychologique grave causée par l'État» (le juge en chef Dickson dans *Morgentaler*, précité, à la p. 56). Je crois que le juge en chef Lamer a eu raison de dire que le juge en chef Dickson tentait d'exprimer en termes qualitatifs le type d'ingérence de l'État susceptible de violer l'art. 7 (*G. (J.)*, au par. 59). Selon l'expression «tension psychologique grave causée par l'État», deux conditions doivent être remplies que la sécurité de la personne soit en cause. Premièrement, le préjudice psychologique doit être causé par l'État, c'est-à-dire qu'il doit résulter d'un acte de l'État. Deuxièmement, le préjudice psychologique doit être grave. Les formes que prend le préjudice psychologique causé par le gouvernement n'entraînent pas toutes automatiquement des violations de l'art. 7. Je vais examiner successivement ces deux conditions.

(i) *Was the Harm to Mr. Blencoe the Result of State-Caused the Human Rights Process?*

(i) *Le préjudice subi par M. Blencoe résulte-t-il d'un délai imputable à l'État dans le déroulement du processus en matière de droits de la personne?*

58 In *G. (J.)*, Lamer C.J. found direct state interference with the psychological integrity of the parent, describing the government action in that case as "direct state interference with the parent-child relationship" (para. 61). Later, at para. 66, Lamer C.J. referred to a child custody application as "an example of state action which directly engages the justice system and its administration" (emphasis added). He stressed that not every state action

Dans *G. (J.)*, le juge en chef Lamer a conclu qu'il y avait eu atteinte directe de l'État à l'intégrité psychologique du parent, qualifiant la mesure prise dans cette affaire par le gouvernement d'«ingérence directe de l'État dans le lien parent-enfant» (par. 61). Plus loin, au par. 66, il a dit que les demandes de garde d'enfants sont «un exemple d'acte gouvernemental intéressant directement le système judiciaire et l'administration de la justice»

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which interferes with the parent-child relationship would have triggered s. 7.

(je souligne). Il a souligné que les actes de l'État qui constituent une ingérence dans le lien parent-enfant ne déclenchent pas tous l'application de l'art. 7.

59 Stress, anxiety and stigma may arise from any criminal trial, human rights allegation, or even a civil action, regardless of whether the trial or process occurs within a reasonable time. We are therefore not concerned in this case with all such prejudice but only that impairment which can be said to flow from the delay in the human rights process. It would be inappropriate to hold government accountable for harms that are brought about by third parties who are not in any sense acting as agents of the state.

Un procès criminel, une allégation en matière de droits de la personne ou même une action au civil peut être une cause de stress, d'angoisse et de stigmatisation même lorsque le procès ou les procédures se déroulent dans un délai raisonnable. Ce qui nous intéresse en l'espèce n'est pas tout préjudice de cette nature, mais seulement l'atteinte qui, peut-on dire, résulte du délai écoulé dans le déroulement du processus en matière de droits de la personne. Il serait inopportun de tenir le gouvernement responsable du préjudice causé par un tiers qui n'est aucunement un mandataire de l'État.

60 While it is incontrovertible that the respondent has suffered serious prejudice in connection with the allegations of sexual harassment against him, there must be a sufficient causal connection between the state-caused delay and the prejudice suffered by the respondent for s. 7 to be triggered. In *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 447, Dickson J. (as he then was) concluded that the causal link between the actions of government and the alleged *Charter* violation was too "uncertain, speculative and hypothetical to sustain a cause of action". In separate concurring reasons, Wilson J. also conveyed the need to have some type of direct causation between the actions of the state and the resulting deprivation. She stated, at p. 490:

> It is not necessary to accept the restrictive interpretation advanced by Pratte J., which would limit s. 7 to protection against arbitrary arrest or detention, in order to agree that the central concern of the section is direct impingement by government upon the life, liberty and personal security of individual citizens. At the very least, it seems to me, there must be a strong presumption that governmental action which concerns the relations of the state with other states, and which is therefore not directed at any member of the immediate political community, was never intended to be caught by s. 7 even although such action may have the incidental effect of increasing the risk of death or injury that individuals generally have to face. [Emphasis added.]

Bien que les allégations de harcèlement sexuel dont l'intimé a fait l'objet lui aient indéniablement causé un préjudice grave, il doit y avoir un lien de causalité suffisant entre le délai imputable à l'État et le préjudice subi par l'intimé pour que l'art. 7 s'applique. Dans *Operation Dismantle Inc. c. La Reine*, [1985] 1 R.C.S. 441, à la p. 447, le juge Dickson (plus tard Juge en chef) a conclu que le lien de causalité entre les actes du gouvernement et la violation alléguée de la *Charte* était «trop incertain, trop conjectural et trop hypothétique pour étayer une cause d'action». Dans des motifs concordants distincts, le juge Wilson a également fait état de la nécessité d'un lien direct quelconque entre les actes de l'État et l'atteinte qui en a résulté. Voici ce qu'elle a dit, à la p. 490:

> Il n'est pas nécessaire de souscrire à l'interprétation restrictive avancée par le juge Pratte, qui limiterait l'art. 7 à une protection contre les arrestations ou les détentions arbitraires, pour convenir que l'article a pour objet central l'ingérence directe du gouvernement dans la vie, la liberté et la sécurité personnelle des citoyens. À tout le moins, me semble-t-il, il doit y avoir une forte présomption qu'on n'a jamais voulu qu'une action gouvernementale relative aux relations de l'État avec d'autres États, et qui donc n'est dirigée contre aucun membre de la collectivité politique immédiate, tombe sous le coup de l'art. 7 même si cette action peut avoir l'effet incident d'accroître le risque de mort ou de préjudice auquel les gens doivent faire face en général. [Je souligne.]

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61 The appellants submit that the nexus between the harm to the respondent and the alleged delay in processing the Complaints is remote. They assert that the largest measure of prejudice to Mr. Blencoe resulted not from any delay but from the publicity surrounding the events, especially his dismissal from Cabinet and later from the NDP caucus. They add that the respondent himself fought the allegations against him in the public domain. For the reasons I set out below, I also have doubts whether, on the facts, the psychological harm suffered by the respondent can be seen as the result of state-caused delay in the human rights process.

Les appelants soutiennent que le lien entre le préjudice subi par l'intimé et le délai qui se serait écoulé dans le traitement des plaintes est ténu. Selon eux, la majeure partie du préjudice causé à M. Blencoe résultait non pas d'un délai mais de la publicité qui a entouré, plus particulièrement, son exclusion du Cabinet et, par la suite, du caucus du NPD. Ils ajoutent que l'intimé a lui-même réfuté publiquement les allégations dont il faisait l'objet. Pour les motifs indiqués ci-après, je doute également qu'il soit possible, d'après les faits, de considérer que le préjudice psychologique subi par l'intimé a résulté d'un délai imputable à l'État dans le déroulement du processus en matière de droits de la personne.

62 On March 1, 1995, the respondent was informed by Premier Harcourt that his former assistant, Fran Yanor, made sexual harassment allegations against him. This allegation was made public one week later. On March 9, 1995, Mr. Blencoe stepped down as Minister but remained in Cabinet, pending the results of an inquiry. He issued a press release, "vehemently denying the harassment allegations". On March 10, 1995, the national and provincial press began running stories about the respondent's resignation and allegations against him by Ms. Yanor and two other women. On April 4, 1995, Premier Harcourt removed the respondent from Cabinet and dismissed him from the NDP caucus.

Le 1er mars 1995, l'intimé a été informé par le premier ministre Harcourt que son ancienne adjointe, Fran Yanor, avait formulé des allégations de harcèlement sexuel contre lui. Ces allégations ont été rendues publiques une semaine plus tard. Le 9 mars 1995, M. Blencoe a démissionné de son poste de ministre, tout en continuant de faire partie du Cabinet, jusqu'à ce que les résultats de l'enquête soient connus. Il a diffusé un communiqué de presse dans lequel il [TRADUCTION] «niait catégoriquement les allégations de harcèlement». Le 10 mars 1995, la presse nationale et la presse provinciale ont commencé à faire état de la démission de l'intimé et des allégations formulées contre lui par Mme Yanor et deux autres femmes. Le 4 avril de la même année, le premier ministre Harcourt a exclu l'intimé du Cabinet et, ensuite, du caucus du NPD.

63 While the respondent was only notified of the Schell and Willis Complaints in July and September of 1995, the record demonstrates that Mr. Blencoe had suffered the following prejudice or "stigmatization" prior to that time: Mr. Blencoe and his family were hounded by the media from the time that the Yanor harassment allegations were made public; the respondent and his wife feared press leaks and stopped speaking to persons outside their close circle of family and friends; Mr. Blencoe's children were subjected to insults and name-calling at school; and Mr. Blencoe was under the care of a physician and was prescribed

Quoique l'intimé Blencoe n'ait été avisé des plaintes de Mmes Schell et Willis qu'en juillet et en septembre 1995, il ressort du dossier qu'il avait déjà été victime d'un préjudice ou d'une «stigmatisation»: M. Blencoe et les membres de sa famille ont été traqués par les médias dès que les allégations de harcèlement de Mme Yanor eurent été rendues publiques; craignant les indiscrétions de la presse, l'intimé et son épouse n'ont plus parlé qu'à leurs proches; les enfants de M. Blencoe ont fait l'objet d'insultes et de railleries à l'école; M. Blencoe a été suivi par un médecin qui lui a prescrit des antidépresseurs dès avril 1995.

antidepressants by April of 1995. The respondent himself admits that from mid-March 1995 until August 1995, he was "extremely unwell". From April 11, 1995, to September 7, 1995, the respondent was on medical leave from the legislature. In the Fall of 1995, Mr. Blencoe considered whether to run in the upcoming election. Since he suspected that Premier Harcourt would refuse to sign his nomination papers, he decided not to seek the NDP nomination in his riding and resigned from the party on December 29, 1995. All of these events had occurred prior to any delays in the proceedings.

L'intimé lui-même reconnaît que, à partir de la mi-mars jusqu'au mois d'août 1995, il allait [TRADUCTION] «très mal». Du 11 avril au 7 septembre 1995, il s'est absenté de l'assemblée législative pour cause de maladie. À l'automne de 1995, M. Blencoe s'est demandé s'il solliciterait un nouveau mandat lors du prochain scrutin. Comme il s'attendait à ce que le premier ministre Harcourt refuse de signer sa mise en candidature, il a décidé de ne pas se porter candidat du NPD dans sa circonscription et a démissionné du parti le 29 décembre 1995. Tous ces événements ont précédé quelque délai que ce soit dans les procédures.

There is no question that the respondent's life and that of his family have been terribly affected by the allegations of sexual harassment against him. His political career appears to be finished and, as professed by Lowry J., "[t]he impact on his family of what has seemed at times an unrelenting media coverage has been traumatic" (para. 12). The respondent attributes this prejudice to the delay in the human rights proceedings. McEachern C.J.B.C. agreed, stating (at para. 53) that:

> There can be no doubt that [Blencoe] was severely wounded by the publicity surrounding his dismissal from the Cabinet. Such is the price of public life. But for these proceedings, however, it might reasonably be expected that the overwhelming attention would have died away and [Blencoe] and his family could have attempted to reconstruct their lives. [Emphasis added.]

With respect, I cannot agree with McEachern C.J.B.C.'s speculation that the respondent would have been able to reconstruct his life but for the proceedings (or I should say, delay in the proceedings). A higher level of certainty is required than "might reasonably be expected" in order to find that government has caused a deprivation of an individual's *Charter* rights.

Based on the above facts, the Willis and Schell allegations were clearly not the first events in the sexual harassment claims against the respondent. Lambert J.A. asserted that "[t]he human rights pro-

64 Il ne fait aucun doute que les allégations de harcèlement sexuel ont terriblement nui à la vie personnelle de l'intimé et à celle des membres de sa famille. Sa carrière politique semble terminée et, comme l'a affirmé le juge Lowry, [TRADUCTION] «ce qui s'apparentait par moments à un acharnement médiatique a été traumatisant pour les membres de sa famille» (par. 12). L'intimé attribue ce préjudice au délai écoulé dans le déroulement des procédures en matière de droits de la personne. Le juge en chef McEachern lui a donné raison (au par. 53):

> [TRADUCTION] On ne saurait douter que [Blencoe] a profondément souffert de la publicité qui a entouré son exclusion du Cabinet. Tels sont les aléas de la vie publique. Or, n'eût été des procédures, on aurait pu raisonnablement s'attendre à ce que l'attention considérable s'estompe et à ce que [Blencoe] et les membres de sa famille puissent tenter de retrouver une vie normale. [Je souligne.]

En toute déférence, je ne puis souscrire à la supposition du juge en chef McEachern que l'intimé aurait pu retrouver une vie normale n'eût été des procédures (ou, devrais-je dire, du délai écoulé dans les procédures). Pour conclure que le gouvernement a porté atteinte aux droits d'une personne garantis par la *Charte*, il faut plus de certitude que ce à quoi [TRADUCTION] «on aurait pu raisonnablement s'attendre».

65 D'après les faits susmentionnés, les allégations de Mmes Willis et Schell ne constituaient manifestement pas les premiers maillons de la chaîne des événements relatifs aux plaintes de harcèlement

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cess started with the complaints in *April, 1995*" (para. 5 (emphasis in original)). Based on the record, however, it is clear that the Willis and Schell Complaints were only filed with the Commission in July and August of that year. The respondent himself asserts that the complaints to the Premier's office are what resulted in his removal from Cabinet and caucus. He makes this assertion to support his contention that the date from which the delay should be computed should pre-date the official Complaints to the Commission. This argument rather undermines the respondent's assertion that the state caused his prejudice. The central event leading to the intense media scrutiny was the dismissal of the respondent from Cabinet and caucus in April 1995, following the allegations of Fran Yanor. At that time, there had been no complaints to the Commission. The Yanor allegations are thus more closely tied to the dismissal from Cabinet, and consequently the stigma. I therefore find that the most prejudicial impact on Mr. Blencoe was caused not by the actions of the Commission but rather by the events prior to the Complaints which caused the respondent to be ousted from Cabinet and caucus as well as the result of actions by non-governmental actors such as the press, employers and a soccer association. The harm to the respondent resulted from the publicity surrounding the allegations themselves coupled with the political fall-out which ensued rather than any delay in the human rights proceedings which had yet to commence at the time that the respondent began to experience stigma.

sexuel contre l'intimé. Le juge Lambert a dit que [TRADUCTION] «[l]e processus en matière de droits de la personne a été enclenché par le dépôt des plaintes en *avril 1995*» (par. 5 (en italique dans l'original)). Toutefois, selon le dossier, il est clair que la Commission n'a été saisie des plaintes de Mmes Willis et Schell qu'en juillet et en août de la même année. L'intimé lui-même affirme que ce sont les plaintes reçues au bureau du premier ministre qui ont entraîné son exclusion du Cabinet et du caucus. Cette affirmation vise à étayer sa prétention que la date à partir de laquelle le délai devrait être calculé est antérieure au dépôt officiel des plaintes à la Commission. Cet argument mine plutôt sa prétention que l'État est à l'origine du préjudice qu'il a subi. L'événement central à l'origine de la grande couverture médiatique a été l'exclusion de l'intimé du Cabinet et du caucus en avril 1995, à la suite des allégations de Fran Yanor. À l'époque, la Commission n'avait encore été saisie d'aucune plainte. Les allégations de Mme Yanor sont donc plus étroitement liées à l'exclusion du Cabinet et, par conséquent, à la stigmatisation. Je conclus donc que l'effet le plus préjudiciable sur M. Blencoe résulte non pas des actes de la Commission, mais plutôt d'événements antérieurs au dépôt des plaintes qui ont entraîné son expulsion du Cabinet et du caucus, ainsi que du comportement d'acteurs non gouvernementaux comme les journalistes, les employeurs et une association de soccer. Le préjudice subi par l'intimé est imputable à la publicité ayant entouré les allégations elles-mêmes et aux retombées politiques qui ont suivi, et non pas à un délai dans les procédures en matière de droit de la personne qui n'avait pas encore commencé à s'écouler lorsque l'intimé a commencé à être victime d'une stigmatisation.

66 Lambert J.A. rejected the connection between the delay and the prejudice. Although recognizing that the respondent and his family had suffered dreadfully, Lambert J.A. found that "[n]one of that stigma was brought about by the processes under the *Human Rights Act* or the *Human Rights Code*. Nor, in my opinion, was it much exacerbated by those processes" (para. 29). Lambert J.A. was also of the opinion that the stigma would not come to

Le juge Lambert a écarté tout lien entre le délai écoulé et le préjudice subi. Tout en reconnaissant que l'intimé et les membres de sa famille avaient souffert terriblement, il a conclu que [TRADUCTION] «[c]ette stigmatisation n'était aucunement imputable aux procédures fondées sur la *Human Rights Act* ou le *Human Rights Code*. À mon sens, ces procédures ne l'ont pas beaucoup aggravée non plus» (par. 29). Le juge Lambert était aussi d'avis

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an end after the Tribunal had made its decision, "no matter the content of that decision" (para. 29).

I am in agreement with Lowry J. and Lambert J.A. on this issue. My understanding is that there remains a civil suit pending against Mr. Blencoe for sexual harassment and that Ms. Willis's Complaint against the Government on these very same issues has not been stayed. The prolongation of stigma from this ongoing publicity was therefore likely regardless of the delay in the human rights proceedings. At best, the respondent was deprived of a speedy opportunity to clear his name.

While I conclude that the delay in the human rights process was not the direct cause of the respondent's prejudice, another question which arises is whether it exacerbated his prejudice. According to McEachern C.J.B.C., the excessive delay in the human rights proceedings both created a stigma against Mr. Blencoe and exacerbated an existing prejudice, which, according to the majority of the Court of Appeal, is tantamount to the creation of the prejudice itself. McEachern C.J.B.C. relied on the decision of this Court in *Rodriguez*, *supra*, to find that the Commission's exacerbation of the deprivation of security of the person that Mr. Blencoe suffered at the hands of the media, triggered s. 7 (at para. 56). The respondent similarly argues that the delay exacerbated the stigmatization, claiming that additional media stories surfaced each time there was a new development in the processing of the Complaints. He relies on this Court's decision in *Morgentaler*, *supra*, to support the position that it is sufficient if the delay is "a contributing cause" of the prejudice.

First, with respect to this "contributing cause" argument, I find it very difficult to equate the situations in *Rodriguez* and *Morgentaler* with that in the case at bar. In *Rodriguez*, the Crown had erroneously characterized Mrs. Rodriguez's deprivation of security of the person as caused not by government but by her physical disabilities. In rejecting that argument, Sopinka J. held that the *Criminal Code* prohibition at s. 241(*b*) would con-

que la stigmatisation ne prendrait pas fin dès que le Tribunal aurait rendu sa décision [TRADUCTION] «quelle qu'elle soit» (par. 29).

67 Je partage l'avis des juges Lowry et Lambert à cet égard. Si je comprends bien, M. Blencoe fait toujours l'objet de poursuites civiles pour harcèlement sexuel, et la plainte que Mme Willis a déposée contre le gouvernement pour les mêmes motifs n'a pas été suspendue. Il était donc probable que la stigmatisation résultant de cette publicité incessante se poursuivrait peu importe le délai écoulé dans les procédures en matière de droits de la personne. Au mieux, l'intimé a été privé de la possibilité de se disculper rapidement.

68 Même si je conclus que le délai écoulé dans le déroulement du processus en matière de droits de la personne n'a pas été la cause directe du préjudice subi par l'intimé, une autre question qui se pose est de savoir s'il a aggravé ce préjudice. Selon le juge en chef McEachern, le délai excessif dans les procédures en matière de droits de la personne a à la fois stigmatisé M. Blencoe et aggravé un préjudice existant, ce qui, selon la Cour d'appel à la majorité, équivaut au fait même de causer le préjudice. Le juge en chef McEachern s'est fondé sur l'arrêt *Rodriguez*, précité, de notre Cour pour conclure que l'aggravation, par la Commission, de l'atteinte que les médias portaient à la sécurité de la personne de M. Blencoe déclenchait l'application de l'art. 7 (au par. 56). De même, l'intimé fait valoir que le délai a aggravé la stigmatisation du fait que l'affaire refaisait surface dans les médias chaque fois qu'il y avait du nouveau dans le traitement des plaintes. Il s'appuie sur l'arrêt *Morgentaler*, précité, de notre Cour pour affirmer qu'il suffit que le délai écoulé soit un «facteur qui a contribué» au préjudice.

69 Premièrement, en ce qui concerne l'argument du «facteur qui a contribué», il me semble très difficile d'assimiler les situations dans les affaires *Rodriguez* et *Morgentaler* à celle qui existe en l'espèce. Dans l'affaire *Rodriguez*, le ministère public avait imputé à tort l'atteinte à la sécurité de la personne de Mme Rodriguez non pas au gouvernement, mais à ses déficiences physiques. En rejetant cet argument, le juge Sopinka a conclu que l'inter-

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tribute to Mrs. Rodriguez's distress if she was prevented from managing her death (at p. 584). A *Criminal Code* prohibition therefore directly deprived Mrs. Rodriguez of the ability to terminate her life. The Court in *Rodriguez* surely did not eliminate the need to establish a relationship between the harm complained of and the state action. In *Rodriguez*, all of the members of the Court agreed that government actions deprived Mrs. Rodriguez of the right to terminate her life at the time of her choosing. In the absence of government involvement, Mrs. Rodriguez would not have suffered a deprivation of her s. 7 rights. The same cannot be said of the facts in the case at bar.

diction prévue à l'al. 241*b*) du *Code criminel* contribuerait à la souffrance de Mme Rodriguez si on l'empêchait de gérer sa mort (à la p. 584). Une interdiction du *Code criminel* empêchait donc directement Mme Rodriguez de mettre fin à ses jours. Dans l'affaire *Rodriguez*, notre Cour n'a sûrement pas éliminé la nécessité d'établir l'existence d'un lien entre le préjudice reproché et l'acte de l'État. Tous les juges de notre Cour ont reconnu que des actes de l'État portaient atteinte au droit de Mme Rodriguez de mettre fin à ses jours au moment qu'elle jugerait opportun. N'eût été le rôle de l'État, il n'y aurait eu aucune atteinte aux droits garantis à Mme Rodriguez par l'art. 7. On ne peut en dire autant des circonstances de la présente affaire.

70 In the same vein, the *Morgentaler* case dealt with direct state interference with a woman's bodily integrity in that the delays in obtaining therapeutic abortions were caused by the mandatory procedures in s. 251 of the *Criminal Code* and resulted in a higher probability of complications and greater health risks to women. In that case, it could not have been argued that the cause of the deprivation is a woman's pregnancy rather than the *Criminal Code* prohibition. The decisions in *Morgentaler* and *Rodriguez* do not, in my opinion, obviate the need to establish a significant connection between the harm and the impugned state action to invoke the *Charter*.

Dans le même ordre d'idées, l'affaire *Morgentaler* portait sur l'atteinte directe de l'État à l'intégrité corporelle des femmes, étant donné que le délai requis pour obtenir un avortement thérapeutique résultait de la procédure prescrite par l'art. 251 du *Code criminel* et augmentait le risque de complications et le danger pour la santé des femmes. Dans cette affaire, on n'aurait pas pu faire valoir que l'atteinte était imputable à la grossesse plutôt qu'à l'interdiction du *Code criminel*. Les arrêts *Morgentaler* et *Rodriguez* ne permettent pas, à mon avis, d'échapper à l'obligation d'établir l'existence d'un lien important entre le préjudice et l'acte reproché à l'État pour pouvoir invoquer la *Charte*.

71 Moreover, even accepting this exacerbation argument, it is difficult to see how the respondent's prejudice was seriously exacerbated by the delays. In the absence of delays in the proceedings, the respondent would nevertheless have faced unproven allegations of sexual harassment and discrimination and suffered stigma as a result. It is thus clear that the respondent's reputation was harmed prior to the filing of the Complaints with the Commission. The delays in the proceedings could only have extended the time that rumours were circulating. As previously mentioned, the continuation of the concurrent complaint and civil action must also be considered. As professed by L'Heureux-Dubé J. in *R. v. O'Connor*, [1995] 4

En outre, même si l'argument de l'aggravation est retenu, il est difficile de voir comment le délai a aggravé sérieusement le préjudice subi par l'intimé. Même en l'absence de tout délai dans les procédures, l'intimé aurait fait face à des allégations non prouvées de harcèlement et de discrimination sexuels et aurait été stigmatisé en conséquence. Il est donc clair qu'il y a eu atteinte à la réputation de l'intimé avant le dépôt des plaintes devant la Commission. Le délai dans les procédures n'a pu contribuer qu'à prolonger la période pendant laquelle des rumeurs ont circulé. Comme je l'ai déjà mentionné, il faut également prendre en considération le fait que la plainte et les poursuites au civil concomitantes avaient toujours cours.

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S.C.R. 411, at para. 119, with respect to privacy, "once invaded, it can seldom be regained". Much the same is true of reputation; it is quickly ruined and difficult to re-establish. It is thus difficult to see how procedural delay could have seriously increased the damage to the respondent's reputation that had already been done. The true prejudice to the respondent in this case may only be the lost opportunity to clear his name rapidly.

Comme le juge L'Heureux-Dubé l'a affirmé, au sujet de la vie privée, dans *R. c. O'Connor*, [1995] 4 R.C.S. 411, au par. 119, «dès qu'on y a porté atteinte, on peut rarement la regagner dans son intégralité». Il en va généralement de même de la réputation; elle peut être ternie rapidement, mais elle est difficile à rétablir. On voit mal comment un délai de procédure pourrait avoir sérieusement accru le préjudice déjà causé à la réputation de l'intimé. Il se peut que le véritable préjudice qui a été causé à l'intimé en l'espèce ait seulement été la perte de la possibilité de se disculper rapidement.

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72 At trial, Lowry J. made the following finding concerning the cause of Mr. Blencoe's suffering (at para. 13):

> The stigma attached to the outstanding complaints has certainly contributed in large measure to the very real hardship Mr. Blencoe has experienced. His public profile as a Minister of the Crown rendered him particularly vulnerable to the media attention that has been focused on him and his family, and the hardship has, in the result, been protracted and severe.

En première instance, le juge Lowry a conclu ce qui suit au sujet de la cause des souffrances de M. Blencoe (au par. 13):

> [TRADUCTION] La stigmatisation liée aux plaintes dont M. Blencoe faisait l'objet a sûrement contribué dans une large mesure aux difficultés très réelles qu'il a éprouvées. Du fait de sa visibilité en tant que ministre du gouvernement, il était davantage exposé à l'attention que les médias lui ont portée à lui-même et à sa famille, ce qui explique la longueur et la gravité des difficultés qui ont résulté.

73 Perhaps this statement supports the view that the outstanding Complaints did contribute to the stigma to some degree and that it was therefore a cause of the respondent's suffering. Because I find in the next section that the state has not directly intruded into a private and intimate sphere of the respondent's life, I assume without deciding that there is a sufficient nexus between the state-caused delay and the prejudice to Mr. Blencoe. I now turn to the question of whether this interference amounts to a violation of the respondent's security of the person.

Cet énoncé confirme peut-être que les plaintes dont M. Blencoe faisait l'objet ont jusqu'à un certain point contribué à la stigmatisation et qu'elles ont donc été l'une des causes de ses souffrances. Étant donné que je conclus ci-après que l'État ne s'est pas directement immiscé dans la vie privée et intime de l'intimé, je présume, sans pour autant le décider, qu'il existe un lien suffisant entre le délai imputable à l'État et le préjudice subi par M. Blencoe. Je vais maintenant passer à la question de savoir si cette immixtion constitue une atteinte à la sécurité de la personne de l'intimé.

(ii) *Quality of the Interference*

(ii) *Qualité de l'immixtion*

74 McEachern C.J.B.C. concluded that liberty and security of the person under s. 7 protect both the privacy and dignity of individuals against the stigma of undue, prolonged humiliation and public degradation of the kind suffered by Mr. Blencoe (at para. 101). He therefore conflated s. 7 into a general right to dignity and protection against the stigma of undue, prolonged humiliation and public degradation suffered as a result of an administra-

Le juge en chef McEachern a conclu que le droit à la liberté et à la sécurité de la personne garanti par l'art. 7 protège à la fois la vie privée et la dignité de l'individu contre la stigmatisation découlant d'un opprobre prolongé et injustifié comme celui dont M. Blencoe a été victime (au par. 101). Il a donc considéré que l'art. 7 confère un droit général à la dignité et à la protection contre l'opprobre prolongé et injustifié qui résulte de

tive proceeding. The question which arises is whether the rights of "liberty and security of the person" protected by s. 7 of the *Charter* include a generalized right to dignity, or more specifically, a right to be free from stigma associated with a human rights complaint? In my opinion, they do not.

75 The "right to dignity" accepted by McEachern C.J.B.C. essentially rests on several ideas. First, it is based on previous statements by this Court as to the importance and value of dignity. Second, it is based on the recognition in cases such as *Morgentaler* and *O'Connor* that state-induced psychological stress can infringe s. 7. Third, McEachern C.J.B.C. imports the notion of "stigma" as developed under s. 11(*b*) of the *Charter* in the criminal law context. Each of these bases for a generalized right to dignity under s. 7 will be addressed in turn.

1. Dignity

76 The *Charter* and the rights it guarantees are inextricably bound to concepts of human dignity. Indeed, notions of human dignity underlie almost every right guaranteed by the *Charter* (*Morgentaler*, *supra*, at pp. 164-66, *per* Wilson J.). As professed by Dickson C.J. in his discussion of s. 1 of the *Charter* in *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified. [Emphasis added.]

procédures administratives. La question qui se pose est de savoir si les droits «à la liberté et à [l]a sécurité de la personne» garantis par l'art. 7 de la *Charte* comportent un droit général à la dignité ou, plus précisément, un droit à la protection contre la stigmatisation liée à une plainte fondée sur les droits de la personne? Selon moi, ils ne comportent pas un tel droit.

Le «droit à la dignité» reconnu par le juge en chef McEachern repose essentiellement sur diverses idées. Premièrement, il s'appuie sur les propos que notre Cour a déjà tenus au sujet de l'importance et de la valeur de la dignité. Deuxièmement, il est fondé sur la reconnaissance, dans des affaires comme *Morgentaler* et *O'Connor*, que la tension psychologique causée par l'État peut violer l'art. 7. Troisièmement, le juge en chef McEachern transpose dans le contexte du droit criminel la notion de «stigmatisation» conçue sous le régime de l'al. 11*b*) de la *Charte*. Ces trois fondements d'un droit général à la dignité sous le régime de l'art. 7 seront examinés successivement.

1. Dignité

La *Charte* et les droits qu'elle garantit sont inextricablement liés à la notion de dignité humaine. En fait, cette notion sous-tend presque tous les droits garantis par la *Charte* (*Morgentaler*, précité, aux pp. 164 à 166, le juge Wilson). Comme le juge en chef Dickson l'a dit en analysant l'article premier de la *Charte* dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103, à la p. 136:

> Les tribunaux doivent être guidés par des valeurs et des principes essentiels à une société libre et démocratique, lesquels comprennent, selon moi, le respect de la dignité inhérente de l'être humain, la promotion de la justice et de l'égalité sociales, l'acceptation d'une grande diversité de croyances, le respect de chaque culture et de chaque groupe et la foi dans les institutions sociales et politiques qui favorisent la participation des particuliers et des groupes dans la société. Les valeurs et les principes sous-jacents d'une société libre et démocratique sont à l'origine des droits et libertés garantis par la *Charte* et constituent la norme fondamentale en fonction de laquelle on doit établir qu'une restriction d'un droit ou d'une liberté constitue, malgré son effet, une limite raisonnable dont la justification peut se démontrer. [Je souligne.]

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In *Rodriguez*, *supra*, Sopinka J. states that it is unquestioned that respect for human dignity is an underlying principle upon which our society is based (at p. 592). In *O'Connor*, *supra*, at para. 63, L'Heureux-Dubé J. states that, "[t]his Court has repeatedly recognized that human dignity is at the heart of the *Charter*". More recently, this Court has stated in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 51, that the purpose of s. 15(1) of the *Charter*, "is to prevent the violation of essential human dignity and freedom". Respect for the inherent dignity of persons is clearly an essential value in our free and democratic society which must guide the courts in interpreting the *Charter*. This does not mean, however, that dignity is elevated to a free-standing constitutional right protected by s. 7 of the *Charter*. Dignity has never been recognized by this Court as an independent right but has rather been viewed as finding expression in rights, such as equality, privacy or protection from state compulsion. In cases such as *Morgentaler*, *Rodriguez* and *B. (R.)*, dignity was linked to personal autonomy over one's body or interference with fundamental personal choices. Indeed, dignity is often involved where the ability to make fundamental choices is at stake.

77 Dans l'arrêt *Rodriguez*, précité, le juge Sopinka affirme qu'on ne conteste pas que le respect de la dignité humaine est un principe fondamental de notre société (à la p. 592). Dans l'arrêt *O'Connor*, précité, au par. 63, le juge L'Heureux-Dubé précise que «[n]otre Cour a reconnu à plusieurs reprises que la dignité humaine est au cœur de la *Charte*». Plus récemment, dans l'arrêt *Law c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1999] 1 R.C.S. 497, au par. 51, notre Cour a statué que le par. 15(1) de la *Charte* a pour objet «d'empêcher toute atteinte à la dignité et à la liberté humaines essentielles». Le respect de la dignité inhérente des gens est nettement une valeur essentielle de notre société libre et démocratique, qui doit guider les tribunaux dans l'interprétation de la *Charte*. Cela ne signifie pas, cependant, que l'on fait de la dignité un droit constitutionnel distinct garanti par l'art. 7 de la *Charte*. La dignité n'a jamais été reconnue comme un droit indépendant par notre Cour, mais a plutôt été perçue comme s'exprimant dans des droits comme celui à l'égalité, à la vie privée ou à la protection contre la contrainte de l'État. Dans des affaires comme *Morgentaler*, *Rodriguez* et *B. (R.)*, la dignité était liée à l'autonomie de la personne relativement à la maîtrise de son corps ou à l'ingérence dans des choix personnels fondamentaux. En fait, la dignité est souvent en cause lorsque la capacité de faire des choix fondamentaux est compromise.

In my view, the notion of "dignity" in the decisions of this Court is better understood not as an autonomous *Charter* right, but rather, as an underlying value. In *Beare*, *supra*, at p. 401, La Forest J. cautions that s. 7 must not be interpreted too broadly, stating that:

> Like other provisions of the *Charter*, s. 7 must be construed in light of the interests it was meant to protect. It should be given a generous interpretation, but it is important not to overshoot the actual purpose of the right in question. . . .

While this statement may have been *obiter* since the case was decided on the principles of fundamental justice, this caution with respect to the interpretation of "life, liberty and security of the person" is relevant nevertheless. La Forest J. chose

78 À mon sens, il vaut mieux considérer la notion de «dignité» que l'on trouve dans la jurisprudence de notre Cour comme une valeur sous-jacente que comme un droit autonome garanti par la *Charte*. Dans l'arrêt *Beare*, précité, à la p. 401, le juge La Forest prévient que l'art. 7 ne doit pas être interprété de façon trop large:

> Comme d'autres dispositions de la *Charte*, l'art. 7 doit être interprété en fonction des intérêts qu'il est censé protéger. Il doit recevoir une interprétation généreuse, mais il est important de ne pas outrepasser le but réel du droit en question . . .

Bien qu'elle ait pu être faite de manière incidente étant donné que l'affaire était tranchée en fonction des principes de justice fondamentale, cette mise en garde concernant l'interprétation du droit «à la vie, à la liberté et à la sécurité de [l]a personne» est

not to base his finding of a s. 7 deprivation on any principle of "dignity or self-respect", as did Bayda C.J.S. of the Court of Appeal in that case. La Forest J. chose instead to find a deprivation of liberty and security of the person for the reasons of Cameron J.A. in the court below, based on the statutory requirement that a person surrender himself into the custody of the authorities and submit to bodily intrusions on pain of arrest and prosecution. La Forest J. conveys this, at p. 402:

> The Court of Appeal, we saw, found that the impugned provisions constituted an infringement of the right guaranteed by the opening words of s. 7, the majority because fingerprinting offends the "dignity and self-respect" of at least those persons who because of their self-perception or the perception of the community would feel demeaned by being thus treated. In short, the majority thought that being subjected to fingerprinting was to be treated like a criminal. This approach appears to be broad and indefinite and to introduce an undesirable notion of differentiation among those subjected to the procedure. For my part, I prefer the more specific finding of Cameron J.A. that the impugned provisions infringe the rights guaranteed by s. 7 because they require a person to appear at a specific time and place and oblige that person to go through an identification process on pain of imprisonment for failure to comply. [Emphasis added.]

79 According to the respondent, the human dignity of a person is closely tied to a person's reputation and privacy interests. Indeed, much of the harm which has been suffered by Mr. Blencoe in this case has been the damage which has been done to his reputation. Essentially, the respondent argues that his reputation has been ruined through the stigma he has suffered as a result of the publicity relating to the human rights proceedings against him. While this Court found in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, that reputation was a concept underlying *Charter* rights, it too is not an independent *Charter* right in and of itself (at para. 120):

néanmoins pertinente. Dans cette affaire, le juge La Forest n'a pas choisi, comme l'avait fait le juge en chef Bayda de la Cour d'appel, de fonder sa conclusion à une violation de l'art. 7 sur un principe quelconque de «dignité ou de respect de soi». Il a plutôt conclu à l'existence d'une atteinte à la liberté et à la sécurité de la personne pour les motifs exprimés par le juge Cameron de la Cour d'appel, compte tenu de l'exigence légale qu'une personne se rende aux autorités, se soumette à la détention et subisse des atteintes physiques sous peine d'emprisonnement et de poursuites. Le juge La Forest dit ceci, à la p. 402:

> La Cour d'appel, nous l'avons vu, a jugé que les dispositions attaquées portaient atteinte au droit garanti par la première partie de l'art. 7, la majorité estimant que la prise des empreintes digitales est une atteinte «à la dignité et au respect de soi» dans le cas, à tout le moins, des personnes qui, à cause de leur propre perception ou de la perception de la collectivité se sentent humiliées par un tel traitement. En bref, la majorité pensait qu'être soumis à la prise d'empreintes digitales, c'était être traité comme un criminel. Cette vision des choses est large et indéfinie et introduit un élément regrettable de différenciation entre les diverses personnes qui sont soumises à la procédure. Pour ma part, je préfère la constatation plus précise du juge Cameron, que les dispositions attaquées enfreignent les droits garantis par l'art. 7 parce qu'elles obligent une personne à comparaître à une date et dans un lieu précis, et à subir une procédure d'identification sous peine d'emprisonnement en cas de refus d'obtempérer. [Je souligne.]

Selon l'intimé, la dignité d'une personne est étroitement liée à sa réputation et à son droit à la vie privée. En réalité, l'atteinte à la réputation représente une bonne partie du préjudice subi par M. Blencoe en l'espèce. L'intimé fait essentiellement valoir que la stigmatisation résultant de la publicité qui a entouré les procédures en matière de droit de la personne engagées contre lui a contribué à ruiner sa réputation. Même si notre Cour a conclu, dans *Hill c. Église de scientologie de Toronto*, [1995] 2 R.C.S. 1130, que la réputation est un concept qui sous-tend les droits garantis par la *Charte*, elle n'est pas non plus elle-même un droit indépendant garanti par la *Charte* (au par. 120):

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Although it is not specifically mentioned in the *Charter*, the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the *Charter* rights. It follows that the protection of the good reputation of an individual is of fundamental importance to our democratic society. [Emphasis added.]

Bien qu'elle ne soit pas expressément mentionnée dans la *Charte*, la bonne réputation de l'individu représente et reflète sa dignité inhérente, concept qui sous-tend tous les droits garantis par la *Charte*. La protection de la bonne réputation d'un individu est donc d'importance fondamentale dans notre société démocratique. [Je souligne.]

80 Respect for a person's reputation, like respect for dignity of the person, is a value that underlies the *Charter*. These two values do not support the respondent's proposition that protection of reputation or freedom from the stigma associated with human rights complaints are independent constitutional s. 7 rights. Moreover, the above passages from *Hill* regarding the protection of reputation were made in the context of a defamation case. Defamation laws are intended to protect reputation. Dignity and reputation are not self-standing rights. Neither is freedom from stigma. I would therefore agree with the following passage from *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, *supra*, at p. 1170, wherein Lamer J. cautioned:

If liberty or security of the person under s. 7 of the *Charter* were defined in terms of attributes such as dignity, self-worth and emotional well-being, it seems that liberty under s. 7 would be all inclusive. In such a state of affairs there would be serious reason to question the independent existence in the *Charter* of other rights and freedoms such as freedom of religion and conscience or freedom of expression.

Le respect de la réputation d'une personne, tout comme le respect de sa dignité, est une valeur qui sous-tend la *Charte*. Ces deux valeurs n'étayent pas l'argument de l'intimé que la protection de la réputation ou la protection contre la stigmatisation liée à une plainte fondée sur les droits de la personne constitue un droit constitutionnel indépendant garanti par l'art. 7. En outre, les extraits précités de l'arrêt *Hill* concernant la protection de la réputation ont pour contexte une poursuite en diffamation. Les règles en matière de diffamation visent à protéger la réputation. La dignité et la réputation ne sont pas des droits distincts. La protection contre la stigmatisation ne l'est pas non plus. Je souscrirais donc à l'extrait suivant du *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel*, précité, à la p. 1170, où le juge Lamer a fait la mise en garde suivante:

Si la liberté ou la sécurité de la personne en vertu de l'art. 7 de la *Charte* étaient définies en fonction d'attributs comme la dignité, la valorisation et le bien-être sur le plan émotionnel, il semble que la liberté en vertu de l'art. 7 aurait une portée illimitée. Si tel était le cas, on pourrait sérieusement mettre en doute l'existence indépendante, dans la *Charte*, d'autres droits et libertés comme la liberté de conscience et de religion ou la liberté d'expression.

2. State Interference with Psychological Integrity

2. Atteinte de l'État à l'intégrité psychologique

81 In order for security of the person to be triggered in this case, the impugned state action must have had a serious and profound effect on the respondent's psychological integrity (*G. (J.)*, *supra*, at para. 60). There must be state interference with an individual interest of fundamental importance (at para. 61). Lamer C.J. stated in *G. (J.)*, at para. 59:

It is clear that the right to security of the person does not protect the individual from the ordinary stresses and

Pour que la sécurité de la personne soit en cause en l'espèce, l'acte reproché à l'État doit avoir eu des répercussions graves et profondes sur l'intégrité psychologique de l'intimé (*G. (J.)*, précité, au par. 60). L'État doit avoir porté atteinte à un droit individuel d'importance fondamentale (au par. 61). Dans l'arrêt *G. (J.)*, précité, au par. 59, le juge en chef Lamer a dit ce qui suit:

Il est manifeste que le droit à la sécurité de la personne ne protège pas l'individu contre les tensions et les

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anxieties that a person of reasonable sensibility would suffer as a result of government action. If the right were interpreted with such broad sweep, countless government initiatives could be challenged on the ground that they infringe the right to security of the person, massively expanding the scope of judicial review, and, in the process, trivializing what it means for a right to be constitutionally protected.

He went on to state (at paras. 63-64):

> Not every state action which interferes with the parent-child relationship will restrict a parent's right to security of the person. For example, a parent's security of the person is not restricted when, without more, his or her child is sentenced to jail or conscripted into the army. Nor is it restricted when the child is negligently shot and killed by a police officer: see *Augustus v. Gosset*, [1996] 3 S.C.R. 268.
>
> While the parent may suffer significant stress and anxiety as a result of the interference with the relationship occasioned by these actions, the quality of the "injury" to the parent is distinguishable from that in the present case. In the aforementioned examples, the state is making no pronouncement as to the parent's fitness or parental status, nor is it usurping the parental role or prying into the intimacies of the relationship. In short, the state is not directly interfering with the psychological integrity of the parent *qua* parent. The different effect on the psychological integrity of the parent in the above examples leads me to the conclusion that no constitutional rights of the parent are engaged. [Emphasis added.]

82 The quality of the injury must therefore be assessed. In my opinion, all of the cases which have come within the broad interpretation of "security of the person" outside of the penal context differ markedly from the interests that are at issue in this case. Violations of security of the person in this context include only serious psychological incursions resulting from state interference with an individual interest of fundamental importance.

83 It is only in exceptional cases where the state interferes in profoundly intimate and personal choices of an individual that state-caused delay in human rights proceedings could trigger the s. 7 security of the person interest. While these funda-

angoisses ordinaires qu'une personne ayant une sensibilité raisonnable éprouverait par suite d'un acte gouvernemental. Si le droit était interprété de manière aussi large, d'innombrables initiatives gouvernementales pourraient être contestées au motif qu'elles violent le droit à la sécurité de la personne, ce qui élargirait considérablement l'étendue du contrôle judiciaire, et partant, banaliserait la protection constitutionnelle des droits.

Il a ajouté ceci (aux par. 63 et 64):

> Les actes par lesquels l'État s'ingère dans le lien parent-enfant ne restreignent pas tous le droit d'un parent à la sécurité de sa personne. Par exemple, ce droit n'est pas restreint du seul fait que l'enfant est condamné à la prison ou enrôlé dans l'armée par conscription. Pas plus qu'il ne l'est lorsque l'enfant est abattu par négligence par un agent de police: *Augustus c. Gosset*, [1996] 3 R.C.S. 268.
>
> Bien que l'ingérence de l'État puisse constituer une source de tension et d'angoisse importantes pour le parent, la nature du «préjudice» causé au parent par ces actes peut être distinguée de celle qui est visée dans la présente affaire. Dans les exemples susmentionnés, l'État ne se prononce pas sur l'aptitude du père ou de la mère ni sur sa qualité de parent, il n'usurpe pas non plus sur le rôle parental ni ne cherche à s'ingérer dans l'intimité du lien parent-enfant. En résumé, l'État ne porte pas directement atteinte à l'intégrité psychologique du parent en tant que parent. La répercussion différente sur l'intégrité psychologique des parents dans les exemples susmentionnés m'amène à conclure que les droits constitutionnels des parents n'entrent pas en jeu. [Je souligne.]

Le préjudice doit donc être évalué sur le plan qualitatif. À mon avis, la présente affaire, en raison des droits qui sont en cause, diffère sensiblement de toutes les affaires non pénales que l'on a considérées comme n'étant pas visées par la notion de «sécurité de la personne», à l'issue d'une interprétation large de cette notion. L'atteinte à la sécurité de la personne dans le présent contexte n'englobe que l'atteinte grave à l'intégrité psychologique résultant de l'atteinte de l'État à un droit individuel d'importance fondamentale.

Ce n'est que dans des cas exceptionnels où l'État s'ingère dans des choix profondément intimes et personnels d'un individu que le délai imputable à l'État, dans des procédures en matière de droits de la personne, pourrait déclencher l'ap-

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mental personal choices would include the right to make decisions concerning one's body free from state interference or the prospect of losing guardianship of one's children, they would not easily include the type of stress, anxiety and stigma that result from administrative or civil proceedings.

plication du droit à la sécurité de la personne garanti par l'art. 7. Même si ces choix personnels fondamentaux comprenaient le droit de prendre des décisions concernant son propre corps sans intervention de l'État ou sans risque de perdre la garde d'un enfant, ils pourraient difficilement inclure le genre de stress, d'angoisse et de stigmatisation qui résulte de procédures administratives ou civiles.

In *O'Connor*, *supra*, this Court dealt with the disclosure of therapeutic records of a complainant in a sexual assault case. L'Heureux-Dubé J. described the psychological trauma that could be faced by sexual assault victims if forced to disclose their therapeutic records, at para. 112:

Dans l'arrêt *O'Connor*, précité, notre Cour était appelée à se prononcer sur la communication du dossier thérapeutique d'une plaignante dans une affaire d'agression sexuelle. Le juge L'Heureux-Dubé a décrit le traumatisme psychique auquel pouvaient faire face les victimes d'agression sexuelle tenues de communiquer leurs dossiers thérapeutiques (au par. 112):

These people must contemplate the threat of disclosing to the very person accused of assaulting them in the first place, and quite possibly in open court, records containing intensely private aspects of their lives, possibly containing thoughts and statements which have never even been shared with the closest of friends or family.

Elles doivent envisager la menace de divulguer à la personne accusée de les avoir agressées en premier lieu, et très probablement en pleine cour, des dossiers contenant des aspects totalement privés de leur vie, contenant probablement des pensées et des déclarations qui n'ont jamais été partagées avec leurs amis les plus intimes ou leur famille.

Such a situation amounts to direct state interference with a complainant's psychological integrity. Moreover, *O'Connor* was reached primarily on the basis of privacy concerns and animated by principles protected by s. 8 of the *Charter*. In *O'Connor*, at para. 110, L'Heureux-Dubé J. listed the cases in which the Court "expressed sympathy" for the idea that s. 7 includes a right to privacy. But she concluded that people have only a "reasonable expectation of privacy" (emphasis deleted) because privacy "must be balanced against legitimate societal needs" (para. 117). However, unlike sexual assault victims who may be said to have a reasonable expectation of privacy in their therapeutic records, the Commission in this case has not invaded any of the respondent's privacy interests. If there was any invasion of the respondent's privacy, it cannot be said to have resulted from state action. Moreover, when one assumes a very prominent public office as the respondent has, it is arguable that a certain amount of public scrutiny is to be expected. The respondent injected himself into the public realm and the public scrutiny that it entailed. An individ-

Il s'agit là d'une atteinte directe de l'État à l'intégrité psychologique d'une plaignante. De plus, l'arrêt *O'Connor* était fondé principalement sur des préoccupations en matière de vie privée et s'inspirait de principes protégés par l'art. 8 de la *Charte*. Dans cet arrêt, au par. 110, le juge L'Heureux-Dubé a énuméré les affaires dans lesquelles notre Cour «a favorisé» l'idée que l'art. 7 garantit notamment un droit à la vie privée. Elle a cependant conclu que les gens n'ont qu'une «attente raisonnable en matière de protection de la vie privée» (soulignement omis), car la protection de la vie privée «doit être pondérée en tenant compte des besoins légitimes de la société» (par. 117). Toutefois, à la différence des victimes d'agression sexuelle dont on peut dire qu'elles ont, à l'égard de leurs dossiers thérapeutiques, une attente raisonnable en matière de protection de leur vie privée, la Commission en l'espèce n'a pas porté atteinte au droit à la vie privée de l'intimé. S'il y a eu atteinte au droit à la vie privée de l'intimé, on ne saurait dire qu'elle résulte d'un acte de l'État. En outre, on peut soutenir que la personne

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ual can have no more than a reasonable expectation of privacy.

qui occupe une charge publique aussi importante que celle de l'intimé peut s'attendre à être exposée, dans une certaine mesure, à l'attention du public. L'intimé s'est lancé lui-même dans le domaine des affaires publiques et s'est exposé lui-même à l'attention qui s'y rattache. Nul ne peut avoir davantage qu'une attente raisonnable en matière de protection de la vie privée.

85 Where the therapeutic relationship between a sexual assault complainant and his or her physician is threatened by the disclosure of private records, this Court has recently held that security of the person is implicated (*R. v. Mills*, [1999] 3 S.C.R. 668 (hereinafter "*Mills* (1999)"), at para. 85). However, this is because the therapeutic relationship between doctor and patient is crucial to the patient's psychological integrity. This relationship must be protected to safeguard the mental integrity of patients and to thereby aid victims in recovering from their trauma. To disclose confidential records would undermine this relationship and jeopardize the victim's psychological integrity.

Notre Cour a récemment statué que la sécurité de la personne est en cause lorsque la relation thérapeutique entre l'auteur d'une plainte d'agression sexuelle et son médecin est compromise par la communication de dossiers privés (*R. c. Mills*, [1999] 3 R.C.S. 668 (ci-après l'«arrêt *Mills* de 1999»), au par. 85). Il en est cependant ainsi parce que la relation thérapeutique entre le médecin et le patient est essentielle à l'intégrité psychologique de ce dernier. Cette relation doit être protégée afin de préserver l'intégrité mentale des patients et d'aider ainsi les victimes à se remettre de leur traumatisme. La communication de dossiers confidentiels minerait la relation et compromettrait l'intégrité psychologique de la victime.

86 Few interests are as compelling as, and basic to individual autonomy than, a woman's choice to terminate her pregnancy, an individual's decision to terminate his or her life, the right to raise one's children, and the ability of sexual assault victims to seek therapy without fear of their private records being disclosed. Such interests are indeed basic to individual dignity. But the alleged right to be free from stigma associated with a human rights complaint does not fall within this narrow sphere. The state has not interfered with the respondent's right to make decisions that affect his fundamental being. The prejudice to the respondent in this case, as recognized by Lowry J., at para. 10, is essentially confined to his personal hardship. He is not "employable" as a politician, he and his family have moved residences twice, his financial resources are depleted, and he has suffered physically and psychologically. However, the state has not interfered with the respondent and his family's ability to make essential life choices. To accept that the prejudice suffered by the respondent in this case amounts to state interference with his security

Peu d'intérêts sont aussi impérieux et essentiels à l'autonomie individuelle que le choix d'une femme d'interrompre sa grossesse, la décision d'une personne de mettre fin à ses jours, le droit d'élever ses enfants et la capacité des victimes d'agression sexuelle de recourir à une thérapie sans craindre que leurs dossiers privés soient communiqués. Ces intérêts sont vraiment essentiels à la dignité individuelle. Toutefois, le droit allégué à la protection contre la stigmatisation liée à une plainte fondée sur les droits de la personne ne fait pas partie de cette catégorie restreinte. L'État n'a pas porté atteinte au droit de l'intimé de prendre des décisions touchant son être fondamental. Comme l'a reconnu le juge Lowry au par. 10, le préjudice subi par l'intimé en l'espèce se limite essentiellement à ses difficultés personnelles. Il est «inapte au travail» de politicien, sa famille et lui ont changé de lieu de résidence deux fois, il a épuisé ses ressources financières et il a souffert tant physiquement que psychologiquement. Cependant, l'État n'a pas porté atteinte à la capacité de l'intimé et des membres de sa famille de faire des

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of the person would be to stretch the meaning of this right.

3. Importing the Notion of "Stigma" from the Criminal Law Context

In *Mills* (1986), *supra*, at pp. 919-20, Lamer J., in dissent, found that the combination of loss of privacy, stigma, and disruption of family life engaged an individual's security of the person in the context of s. 11(*b*) of the *Charter*, stating that:

> . . . security of the person is not restricted to physical integrity; rather, it encompasses protection against "overlong subjection to the vexations and vicissitudes of a pending criminal accusation". . . . These include stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction.

However, it must be emphasized that this statement was made in the context of s. 11(*b*) of the *Charter* which provides that a person charged with an offence has the right "to be tried within a reasonable time". The qualifier to this right is that it applies to individuals who have been "charged with an offence". The s. 11(*b*) right therefore has no application in civil or administrative proceedings. This Court has often cautioned against the direct application of criminal justice standards in the administrative law area. We should not blur concepts which under our *Charter* are clearly distinct. The s. 11(*b*) guarantee of a right to an accused person to be tried within a reasonable time cannot be imported into s. 7. There is no analogous provision to s. 11(*b*) which applies to administrative proceedings, nor is there a constitutional right outside the criminal context to be "tried" within a reasonable time.

Lamer C.J. later reiterated this statement from *Mills* (1986) in *G. (J.)*, at para. 62. In so doing, however, this Court did not make freedom from stigma a free-standing right. Nor did it establish

choix essentiels dans leur vie. Accepter que le préjudice subi par l'intimé en l'espèce équivaut à une atteinte de l'État au droit qu'il a à la sécurité de sa personne serait forcer le sens de ce droit.

3. Transposition de la notion de «stigmatisation» dans le contexte du droit criminel

87 Dans l'arrêt *Mills* de 1986, précité, aux pp. 919 et 920, le juge Lamer, dissident, a conclu que, prises ensemble, l'atteinte à la vie privée, la stigmatisation et les perturbations de la vie familiale mettaient en cause la sécurité de la personne dans le contexte de l'al. 11*b*) de la *Charte*:

> . . . la notion de sécurité de la personne ne se limite pas à l'intégrité physique; elle englobe aussi celle de protection contre [TRADUCTION] «un assujettissement trop long aux vexations et aux vicissitudes d'une accusation criminelle pendante». [. . .] Celles-ci comprennent la stigmatisation de l'accusé, l'atteinte à la vie privée, la tension et l'angoisse résultant d'une multitude de facteurs, y compris éventuellement les perturbations de la vie familiale, sociale et professionnelle, les frais de justice et l'incertitude face à l'issue et face à la peine.

88 Il faut cependant souligner que ces propos ont été tenus dans le contexte de l'al. 11*b*) de la *Charte*, qui prévoit que tout inculpé a le droit «d'être jugé dans un délai raisonnable». Pour que ce droit s'applique, il faut que la personne en question soit «inculpée». Le droit garanti par l'al. 11*b*) ne s'applique donc pas dans le cas de procédures civiles ou administratives. Notre Cour a souvent fait des mises en garde contre l'application directe en droit administratif des normes de la justice criminelle. Nous devrions éviter de confondre des notions qui, suivant notre *Charte*, sont clairement distinctes. Le droit d'être jugé dans un délai raisonnable que l'al. 11*b*) garantit à tout inculpé ne peut être transposé dans l'art. 7. Aucune disposition analogue à l'al. 11*b*) ne s'applique aux procédures administratives, et le droit constitutionnel d'être «jugé» dans un délai raisonnable ne s'applique qu'en matière criminelle.

89 Par la suite, le juge en chef Lamer a réitéré, au par. 62 de l'arrêt *G. (J.)*, cet énoncé tiré de l'arrêt *Mills* de 1986. Ce faisant, notre Cour n'a toutefois pas fait de la protection contre la stigmatisation un

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that respondents in sexual harassment proceedings suffer so greatly that s. 11(*b*) principles should apply to them. As will be demonstrated below, the nature of the harm caused by human rights delay is different.

droit distinct. Elle n'a pas non plus décidé que les personnes visées par des procédures en matière de harcèlement sexuel souffrent à tel point que les principes de l'al. 11*b*) devraient s'appliquer à elles. Comme nous le verrons plus loin, le préjudice causé par un délai dans des procédures en matière de droits de la personne diffère sur le plan de sa nature.

90 In *Kodellas*, *supra*, the Saskatchewan Court of Appeal clearly equated criminal sexual assault charges with human rights sex discrimination complaints. Bayda C.J.S. (dissenting on another issue) conveyed this as follows, at pp. 152-53:

Dans l'arrêt *Kodellas*, précité, la Cour d'appel de la Saskatchewan a clairement assimilé les accusations criminelles d'agression sexuelle à des plaintes de discrimination sexuelle fondées sur les droits de la personne. Le juge en chef Bayda (dissident sur un autre point) s'est exprimé ainsi, aux pp. 152 et 153:

For the purpose of determining the effect upon the "security of the person" I see no logical distinction of substance between the subjection to the vexations and vicissitudes of "a pending criminal accusation" based upon sexual harassment and sexual assault and the subjection to the vexations and vicissitudes of a pending accusation in penal (*i.e.*, *quasi*-criminal) proceedings under s. 35(2) of the Code, of discrimination based upon sexual harassment and sexual assault. It is but a small step from there to find that for the same purpose no distinction of substance can be made between an accusation in a penal proceeding under the Code and an identical accusation in remedial proceedings under ss. 27 to 33 of the Code. Whether they occur in a criminal context, or in the context of a penal proceeding, such as that provided for in the Code, or in the context of remedial proceedings (which, as will be shown later, is the context relevant to this case) the "vexations and vicissitudes" will invariably "include stigmatization of the (alleged discriminator), loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction". This is so because the hurt to the alleged discriminator emanates from the accusation, not from the type of proceedings in which the accusation is made. After all, it matters not a whit to all of the relevant actors — the public, the persons who are the source of the hurt, those who are indirectly affected by the hurt (such as the alleged discriminator's family) and the alleged discriminator, who is directly affected by the hurt and who is the subject and direct object of the hurt — whether the

[TRADUCTION] Pour déterminer l'incidence sur la «sécurité de la personne», je ne vois aucune distinction logique, sur le plan du fond, entre l'assujettissement aux vexations et aux vicissitudes d'une «accusation criminelle pendante» fondée sur le harcèlement sexuel et l'agression sexuelle, et l'assujettissement aux vexations et aux vicissitudes d'une accusation pendante de discrimination fondée sur le harcèlement sexuel et l'agression sexuelle, qui a été portée en matière pénale (c'est-à-dire quasi criminelle) en vertu du par. 35(2) du Code. Partant, il n'y a qu'un pas à faire pour conclure que, à des fins identiques, aucune distinction de fond ne peut être établie entre une accusation portée dans des procédures pénales fondées sur le Code et une accusation identique portée dans des procédures engagées en vertu des art. 27 à 33 du Code dans le but d'obtenir un redressement. Qu'elles soient occasionnées dans le contexte de procédures criminelles ou dans celui de procédures pénales, comme celles que prévoit le Code, ou encore dans celui de procédures visant l'obtention d'un redressement (qui, nous le verrons plus loin, est le contexte pertinent en l'espèce), les «vexations» et les «vicissitudes» comprennent immanquablement «la stigmatisation de (l'auteur allégué de la discrimination), l'atteinte à la vie privée, la tension et l'angoisse résultant d'une multitude de facteurs, y compris éventuellement les perturbations de la vie familiale, sociale et professionnelle, les frais de justice et l'incertitude face à l'issue et à la peine». Il en est ainsi parce que le mal causé à l'auteur allégué de la discrimination découle de l'accusation, et non du genre de procédures dans lesquelles l'accusation est portée. Après tout, il est parfaitement égal à tous les acteurs pertinents — le public, les personnes qui sont à l'origine du mal causé, celles qui sont indirectement touchées par ce mal (comme les membres de la famille de l'auteur

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accusation is made in one procedural forum or another. What matters is the *fact* of the accusation. . . .

In determining whether prejudice occurred in a given situation, it is important to note that it is in the very nature of this form of prejudice (*i.e.*, feelings of mental hurt or "stigmatization") that it arises automatically upon a formal accusation being made. Lamer J. in *Rahey*, while elucidating this form of prejudice (in the context of s. 11(*b*) of the Charter), recognized this when he said at p. [609]:

> With respect to the security of the person, I do not believe that actual impairment need be proven by the accused to render the section operative. An objective standard is the only realistic means through which the security interest of the accused may be protected under the section. Otherwise, each individual accused would have the burden of demonstrating that he or she has subjectively suffered a form of anxiety, stress or stigmatization as a result of the criminal charge. We are dealing largely with the impairment of mental well-being, a matter which can only be established with considerable difficulty at considerable cost. [Underlining added; italics in original.]

The majority of the Court of Appeal in the case at bar followed the above reasoning in *Kodellas*. The effect of the Appeal Court decision in *Blencoe* was to import a requirement for a hearing within a reasonable time into the processing of human rights complaints. Although the majority of the Court of Appeal disclaimed a direct s. 11(*b*) right, numerous references were made in its reasons, equating sexual harassment proceedings to criminal proceedings for sexual assault where s. 11(*b*) would apply. Indeed, the majority speaks of "this type of sexual assault" (para. 47), "stigma against the accused" (para. 56), "prosecution of these complaints" (para. 58), a "straightforward case of sexual assault" (para. 102), "[allegations] which are tantamount to . . . sexual assault" (para. 108), and "unproven charges of sexual harassment" (para. 57). The basis for the majority of the Court of Appeal's reasons in this case is the treatment of

allégué de la discrimination) et l'auteur allégué de la discrimination, qui est directement touché par le mal et qui en est directement victime — que l'accusation soit portée dans le cadre de l'une ou l'autre instance. Ce qui importe, c'est le *fait* de l'accusation. . .

Pour déterminer si un préjudice a été causé dans une situation donnée, il importe de souligner qu'il est dans la nature même de cette forme de préjudice (c'est-à-dire le sentiment de souffrance morale ou de «stigmatisation») qu'elle prenne naissance dès qu'une accusation officielle est portée. Dans *Rahey*, le juge Lamer l'a reconnu en expliquant cette forme de préjudice (dans le contexte de l'application de l'al. 11*b*) de la Charte), à la p. [609]:

> Au sujet de la sécurité de la personne, je ne crois pas que ce soit à l'inculpé qu'il incombe de prouver qu'il y a effectivement eu atteinte pour que l'article soit applicable. Une norme objective est le seul moyen réaliste de protéger, en vertu de cet article, l'intérêt du prévenu en matière de sécurité. Autrement, chaque prévenu aurait la charge de démontrer qu'il ou elle a subjectivement souffert d'angoisse, de tension ou de stigmates par suite d'une accusation criminelle. Nous avons largement affaire à un préjudice moral, ce qui ne peut être établi qu'au prix de difficultés et de frais considérables. [Je souligne; en italique dans l'original.]

91 Dans la présente affaire, la Cour d'appel à la majorité a suivi le raisonnement susmentionné de l'arrêt *Kodellas*. L'arrêt *Blencoe* de la Cour d'appel a eu pour effet de transposer dans le traitement d'une plainte en matière de droits de la personne l'exigence qu'une audience ait lieu dans un délai raisonnable. Bien qu'elle ait écarté l'application directe d'un droit garanti par l'al. 11*b*), la Cour d'appel à la majorité a assimilé, à maintes reprises dans ses motifs, les procédures relatives au harcèlement sexuel à des procédures criminelles en matière d'agression sexuelle où l'al. 11*b*) s'appliquerait. En fait, les juges majoritaires parlent de [TRADUCTION] «ce genre d'agression sexuelle» (par. 47), de «stigmatisation de l'accusé» (par. 56), de «poursuites relatives à ces plaintes» (par. 58), de «simple cas d'agression sexuelle» (par. 102), d'«[allégations] équivalant à [. . .] une accusation d'agression sexuelle» (par. 108) et d'«accusations non prouvées de harcèlement sexuel» (par. 57). En l'espèce, les motifs majoritaires de la Cour d'appel reposent sur l'assimilation des plaintes de harcèle-

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sexual harassment human rights complaints as akin to a pending criminal sexual assault charge.

ment sexuel fondées sur les droits de la personne à une accusation criminelle pendante d'agression sexuelle.

92 With respect, the Court of Appeal in *Kodellas* and the majority of the Court of Appeal in the case at bar have erred in transplanting s. 11(*b*) principles set out in the criminal law context to human rights proceedings under s. 7. Not only are there fundamental differences between criminal proceedings and human rights proceedings that the majority failed to recognize, but, more importantly, s. 11(*b*) of the *Charter* is restricted to a pending criminal case. The effect of the Court of Appeal's decision was to extract an element of s. 11(*b*) — the element of stigma, which may be sufficient in the context of criminal proceedings and s. 11(*b*), to create a deprivation of the security of the person — and apply it to a process that differs with respect to objectives, consequences and procedures. As this Court has recently confirmed in *Mills* (1999), *supra*, at paras. 61 and 64, *Charter* rights must be interpreted and defined in a contextual manner, because they often inform, and are informed by, other similarly deserving rights and values at play in particular circumstances. The Court of Appeal has failed to examine the rights protected by s. 7 in the context of this case.

En toute déférence, la Cour d'appel dans l'arrêt *Kodellas* et la Cour d'appel à la majorité en l'espèce ont eu tort de transposer dans des procédures en matière de droits de la personne fondées sur l'art. 7 des principes énoncés relativement à l'al. 11*b*) dans le contexte du droit criminel. Non seulement y a-t-il des différences fondamentales entre des procédures criminelles et des procédures en matière de droits de la personne, que les juges majoritaires n'ont pas reconnues, mais encore l'al. 11*b*) de la *Charte* ne s'applique qu'aux affaires criminelles pendantes. L'arrêt de la Cour d'appel a eu pour effet d'extirper un élément de l'al. 11*b*) — celui de la stigmatisation qui peut suffire, dans le contexte de procédures criminelles et de l'al. 11*b*), pour qu'il y ait atteinte à la sécurité de la personne — et de l'appliquer à un processus différent sur le plan des objectifs, des conséquences et de la procédure. Comme notre Cour l'a récemment confirmé dans l'arrêt *Mills* de 1999, précité, aux par. 61 et 64, les droits garantis par la *Charte* doivent être interprétés et définis en fonction du contexte, car ils sous-tendent ou s'inspirent souvent d'autres droits ou valeurs aussi louables qui sont en jeu dans des circonstances particulières. La Cour d'appel n'a pas examiné les droits garantis par l'art. 7 dans le contexte de la présente affaire.

93 In the criminal law context, the test to be applied under s. 11(*b*) is an objective one, and prejudice may be inferred from unreasonable delay. This stands in sharp contrast to the two-tiered approach to s. 7 of the *Charter*, where the mere passage of time in resolving a complaint does not automatically give rise to the kind of prejudice that is presumed to follow from the laying of a charge under s. 11(*b*) of the *Charter*. In this regard, Lamer J.'s comments in *Mills* (1986), *supra*, are premised on the fact that there has already been an "overlong subjection to the vexations and vicissitudes of a pending criminal accusation" (p. 919). This is a finding that would be made not at the threshold stage of the s. 7 analysis but is rather to be examined at the principles of fundamental justice

Dans le contexte du droit criminel, le critère applicable suivant l'al. 11*b*) est objectif et il est possible de déduire qu'un délai déraisonnable a causé un préjudice. Cela contraste fortement avec l'interprétation en deux étapes de l'art. 7 de la *Charte*, selon laquelle le seul fait qu'un délai s'écoule entre le dépôt de la plainte et son règlement ne cause pas automatiquement le genre de préjudice qui est présumé résulter du dépôt d'une accusation fondée sur l'al. 11*b*) de la *Charte*. À cet égard, dans les observations qu'il formule dans l'arrêt *Mills* de 1986, précité, le juge Lamer tient pour acquis qu'il y a déjà eu «assujettissement trop long aux vexations et au vicissitudes d'une accusation criminelle pendante» (p. 919). Il s'agit là d'une conclusion qui serait tirée non pas à l'étape

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stage. The Court of Appeal in *Kodellas* and in the case at bar erred in conflating the two stages of the s. 7 analysis. Philip Bryden similarly concluded that the two stages of the s. 7 analysis were merged by the majority of the Court of Appeal in this case ("*Blencoe* v. *British Columbia (Human Rights Commission)*: A Case Comment" (1999), 33 *U.B.C. L. Rev.* 153, at p. 158):

> In my view, Chief Justice McEachern's formulation of when s. 7 applies tends to conflate the threshold question of whether liberty or personal security have been denied with the ultimate question of whether the process in place satisfies the requirements of fundamental justice. The main reason we use threshold tests for the applicability of constitutional protection is to focus our attention on the situations where we believe the special safeguards associated with constitutional protection are needed.

In discussing the nature and purpose of s. 11(*b*), Lamer J. emphasized in *Mills* (1986), *supra*, that the need for protecting the individual in such cases arises "from the nature of the criminal justice system and of our society" (p. 920). He described the criminal justice process as "adversarial and conflictual" and states that the very nature of the criminal process will heighten the stress and anxiety that results from a criminal charge. In contrast to the criminal realm, the filing of a human rights complaint implies no suspicion of wrongdoing on the part of the state. The investigation by the Commission is aimed solely at determining what took place and ultimately to settle the matter in a non-adversarial manner. The purpose of human rights proceedings is not to punish but to eradicate discrimination. Tribunal orders are compensatory rather than punitive. The investigation period in the human rights process is not one where the Commission "prosecutes" the respondent. The Commission has an investigative and conciliatory role until the time comes to make a recommendation whether to refer the complaint to the Tribunal for hearing. These human rights proceedings are designed to vindicate private rights and address grievances. As stated by Dickson C.J. in *Canada*

préliminaire de l'analyse de l'art. 7, mais plutôt à l'étape de l'examen des principes de justice fondamentale. Dans l'arrêt *Kodellas* et en l'espèce, la Cour d'appel a commis une erreur en confondant les deux étapes de l'analyse de l'art. 7. Philip Bryden a lui aussi conclu que la Cour d'appel à la majorité en l'espèce avait confondu les deux étapes de l'analyse de l'art. 7 («*Blencoe* v. *British Columbia (Human Rights Commission)*: A Case Comment» (1999), 33 *U.B.C. L. Rev.* 153, à la p. 158):

> [TRADUCTION] À mon avis, en précisant les cas où l'art. 7 s'applique, le juge en chef McEachern tend à confondre la question préliminaire de savoir s'il y a eu atteinte au droit à la liberté ou à la sécurité de la personne avec la question de savoir, en fin de compte, si la procédure établie satisfait aux exigences de la justice fondamentale. Si nous utilisons des critères préliminaires d'applicabilité de la protection constitutionnelle, c'est principalement pour nous concentrer sur les situations où, croyons-nous, les garanties spéciales liées à la protection constitutionnelle sont requises.

94 En analysant la nature et l'objet de l'al. 11*b*) dans l'arrêt *Mills* de 1986, précité, le juge Lamer a souligné que la nécessité de protéger l'individu en pareils cas «tient à la nature même du système de la justice criminelle et de notre société» (p. 920). Il a dit que la justice criminelle procède selon une procédure «contradictoire et conflictuelle» et que la nature même du processus en matière criminelle intensifie le stress et l'angoisse résultant d'une accusation criminelle. Contrairement à ce qui se passe en matière criminelle, le dépôt d'une plainte fondée sur les droits de la personne n'implique aucun soupçon de méfait de la part de l'État. L'enquête menée par la Commission vise uniquement à déterminer ce qui s'est passé et, en fin de compte, à régler l'affaire selon une procédure non contradictoire. L'objectif des procédures en matière de droits de la personne est non pas de punir, mais de mettre fin à la discrimination. Les ordonnances du Tribunal sont de nature compensatoire et non punitive. Lors de l'enquête liée au processus en matière de droits de la personne, la Commission ne «poursuit» pas la personne qui fait l'objet d'une plainte. Elle joue un rôle d'enquêteur et de médiateur jusqu'au moment où il y a lieu de recommander ou non de renvoyer la plainte au Tribunal pour qu'il

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(Human Rights Commission) v. Taylor, [1990] 3 S.C.R. 892, at p. 917:

It is essential, however, to recognize that, as an instrument especially designed to prevent the spread of prejudice and to foster tolerance and equality in the community, the *Canadian Human Rights Act* is very different from the *Criminal Code*. The aim of human rights legislation, and of s. 13(1), is not to bring the full force of the state's power against a blameworthy individual for the purpose of imposing punishment. Instead, provisions found in human rights statutes generally operate in a less confrontational manner, allowing for a conciliatory settlement if possible and, where discrimination exists, gearing remedial responses more towards compensating the victim.

95 In criminal proceedings, the accusation alone may engage a security interest because of the grave social and personal consequences to the accused — including potential loss of physical liberty, subjection to social stigma and ostracism from the community — which are the unavoidable consequences of an open and adversarial judicial system. However, this Court in *Taylor*, *supra*, at pp. 932-33, has commented directly on the diminished role of stigma in the human rights context:

. . . the present appeal concerns an infringement of s. 2(*b*) in the context of a human rights statute. The chill placed upon open expression in such a context will ordinarily be less severe than that occasioned where criminal legislation is involved, for attached to a criminal conviction is a significant degree of stigma and punishment, whereas the extent of opprobrium connected with the finding of discrimination is much diminished and the aim or remedial measures is more upon compensation and protection of the victim. As was stated in *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, at p. 1134, under a human rights regime:

> It is the (discriminatory) practice itself which is sought to be precluded. The purpose of the Act is not to punish wrongdoing but to prevent discrimination.

tienne une audience. Ces procédures en matière de droits de la personne sont conçues pour faire valoir des droits privés et redresser des torts. Comme l'a dit le juge en chef Dickson dans *Canada (Commission des droits de la personne) c. Taylor*, [1990] 3 R.C.S. 892, à la p. 917:

Il est essentiel toutefois de reconnaître qu'en tant qu'outil expressément conçu pour empêcher la propagation des préjugés et pour favoriser la tolérance et l'égalité au sein de la collectivité, la *Loi canadienne sur les droits de la personne* diffère nettement du *Code criminel*. La législation sur les droits de la personne, et en particulier le par. 13(1), n'a pas pour objet de faire exercer contre une personne fautive le plein pouvoir de l'État dans le but de lui infliger un châtiment. Au contraire, les dispositions des lois sur les droits de la personne tendent plutôt, en règle générale, à éviter ce genre d'affrontement en permettant autant que possible un règlement par voie de conciliation et, lorsqu'il y a discrimination, en prévoyant des redressements destinés davantage à indemniser la victime.

Dans des procédures criminelles, l'accusation peut à elle seule faire intervenir un droit à la sécurité en raison de ses graves conséquences sociales et personnelles sur l'accusé — dont le risque d'être privé de liberté, ainsi que la stigmatisation et l'exclusion sociales — qu'entraîne inévitablement un système judiciaire public et contradictoire. Toutefois, dans l'arrêt *Taylor*, précité, aux pp. 932 et 933, notre Cour a commenté directement le rôle moins important de la stigmatisation dans le contexte des droits de la personne:

. . . le présent pourvoi concerne une atteinte à l'al. 2*b*) résultant d'une loi sur les droits de la personne. La paralysie de la libre expression dans un tel contexte sera normalement moins grave que s'il s'agissait d'une loi pénale, car toute déclaration de culpabilité, au pénal, s'accompagne de stigmates et de peines importants, alors que l'opprobre attaché à une conclusion de discrimination est beaucoup moins grand et qu'en outre les mesures réparatrices visent plutôt la compensation et la protection de la victime. Comme le dit l'arrêt *Compagnie des chemins de fer nationaux du Canada c. Canada (Commission canadienne des droits de la personne)*, [1987] 1 R.C.S. 1114, à la p. 1134, sous le régime d'une loi sur les droits de la personne:

> C'est l'acte discriminatoire lui-même que l'on veut prévenir. La loi n'a pas pour objet de punir la faute, mais bien de prévenir la discrimination.

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The last point is an important one and it deserves to be underscored. There is no indication that the purpose of the *Canadian Human Rights Act* is to assign or to punish moral blameworthiness.

Ce dernier point est important et mérite d'être souligné. Rien n'indique que l'objet de la *Loi canadienne sur les droits de la personne* soit d'attribuer une responsabilité morale ou de la punir.

96 I do not doubt that parties in human rights sex discrimination proceedings experience some level of stress and disruption of their lives as a consequence of allegations of complainants. Even accepting that the stress and anxiety experienced by the respondent in this case was linked to delays in the proceedings, I cannot conclude that the scope of his security of the person protected by s. 7 of the *Charter* covers such emotional effects nor that they can be equated with the kind of stigma contemplated in *Mills* (1986), *supra*, of an overlong and vexatious pending criminal trial or in *G. (J.)*, *supra*, where the state sought to remove a child from his or her parents. If the purpose of the impugned proceedings is to provide a vehicle or act as an arbiter for redressing private rights, some amount of stress and stigma attached to the proceedings must be accepted. This will also be the case when dealing with the regulation of a business, profession, or other activity. A civil suit involving fraud, defamation or the tort of sexual battery will also be "stigmatizing". The Commission's investigations are not public, the respondent is asked to provide his version of events, and communication goes back and forth. While the respondent may be vilified by the press, there is no "stigmatizing" state pronouncement as to his "fitness" that would carry with it serious consequences such as those in *G. (J.)*. There is thus no constitutional right or freedom against such stigma protected by the s. 7 rights to "liberty" or "security of the person".

Je ne doute pas que les parties à des procédures relatives à des plaintes de discrimination sexuelle fondées sur les droits de la personne éprouvent un certain stress et voient leur existence perturbée en raison des allégations des plaignants. Même en acceptant que le stress et l'angoisse ressentis par l'intimé en l'espèce étaient liés au délai dans les procédures, je suis incapable de conclure que la sécurité de sa personne garantie par l'art. 7 de la *Charte* englobe une telle incidence sur le plan émotif ou que cette incidence est assimilable au genre de stigmatisation prévu dans l'arrêt *Mills* de 1986, précité, qui résulte d'un procès criminel trop long et vexatoire, ou dans l'arrêt *G. (J.)*, précité, où l'État cherchait à retirer la garde d'un enfant à ses parents. Si les procédures contestées visent à fournir un moyen de faire valoir des droits privés, ou à faire fonction d'arbitre en la matière, le stress et la stigmatisation liés à ces procédures sont acceptables jusqu'à un certain point. Il en va également de même lorsqu'il s'agit de réglementer une activité commerciale, professionnelle ou autre. Les poursuites civiles pour fraude, diffamation ou voies de fait de nature sexuelle sont également «stigmatisantes». Les enquêtes menées par la Commission ne sont pas publiques, la personne qui fait l'objet de la plainte est appelée à donner sa version des faits et l'information circule dans les deux sens. Même si la personne qui fait l'objet de la plainte peut être vilipendée par la presse, l'État ne rend, relativement à son «aptitude», aucune décision «stigmatisante» qui aurait des conséquences graves comme dans l'affaire *G. (J.)*. Le droit à la «liberté» ou à la «sécurité de [l]a personne» garanti par l'art. 7 ne comporte donc aucun droit constitutionnel à la protection contre d'une telle stigmatisation.

(f) Conclusion on Liberty and Security of the Person

f) Conclusion relative à la liberté et à la sécurité de la personne

97 To summarize, the stress, stigma and anxiety suffered by the respondent did not deprive him of his right to liberty or security of the person. The

En résumé, le stress et l'angoisse que l'intimé a éprouvés et la stigmatisation dont il a été victime n'ont pas porté atteinte à son droit à la liberté ou à

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framers of the *Charter* chose to employ the words, "life, liberty and security of the person", thus limiting s. 7 rights to these three interests. While notions of dignity and reputation underlie many *Charter* rights, they are not stand-alone rights that trigger s. 7 in and of themselves. Freedom from the type of anxiety, stress and stigma suffered by the respondent in this case should not be elevated to the stature of a constitutionally protected s. 7 right.

la sécurité de sa personne. Les rédacteurs de la *Charte* ont choisi d'utiliser les termes «vie, [. . .] liberté et [. . .] sécurité de [l]a personne», de sorte que l'art. 7 ne garantit que ces trois droits. Même si des notions de dignité et de réputation sous-tendent maints droits garantis par la *Charte*, ce ne sont pas des droits distincts qui déclenchent en soi l'application de l'art. 7. La protection contre le genre d'angoisse et de stress que l'intimé a éprouvés et contre le genre de stigmatisation dont il a été victime en l'espèce ne devrait pas être élevée au rang de droit constitutionnel garanti par l'art. 7.

98 My conclusion that the respondent is unable to cross the first threshold of the s. 7 *Charter* analysis in the circumstances of this case should not be construed as a holding that state-caused delays in human rights proceedings can never trigger an individual's s. 7 rights. It may well be that s. 7 rights can be engaged by a human rights process in a particular case. I leave open the possibility that in other circumstances, delays in the human rights process may violate s. 7 of the *Charter*.

Ma conclusion que l'intimé ne peut pas franchir la première étape préliminaire de l'analyse de l'art. 7 de la *Charte* dans les circonstances de la présente affaire ne doit pas être interprétée comme signifiant que les délais imputables à l'État dans des procédures en matière de droits de la personne ne peuvent jamais faire intervenir les droits que l'art. 7 garantit à une personne. Il peut bien arriver, dans certains cas, qu'un processus en matière de droits de la personne fasse intervenir les droits garantis par l'art. 7. Je n'écarte pas la possibilité que, dans d'autres circonstances, les délais dans le processus en matière de droits de la personne violent l'art. 7 de la *Charte*.

99 Because of my conclusion that there was no deprivation of the respondent's right to liberty or security of the person, I need not proceed to the second stage of the analysis to determine whether the alleged deprivation was in accordance with the principles of fundamental justice. However, for the reasons that immediately follow in the administrative law section, I express the view that the delay, in the circumstances of this case, would not have violated the principles of fundamental justice.

Étant donné que j'ai conclu, dans un premier temps, qu'il n'y a eu aucune atteinte au droit de l'intimé à la liberté ou à la sécurité de sa personne, je n'ai pas à décider, dans un deuxième temps, si l'atteinte alléguée était conforme aux principes de justice fondamentale. Toutefois, pour les motifs exposés immédiatement après la partie relative au droit administratif, j'estime que, dans les circonstances de la présente affaire, le délai écoulé n'aurait pas violé les principes de justice fondamentale.

C. *Was the Respondent Entitled to a Remedy Pursuant to Administrative Law Principles?*

C. *L'intimé avait-il droit à une réparation fondée sur les principes du droit administratif?*

100 While I have concluded that the respondent is not entitled to a remedy under the *Charter*, I must still address the issue of whether the respondent is entitled to a remedy under principles of administrative law. This issue was pleaded before Lowry J. of the British Columbia Supreme Court. Counsel

Bien que j'aie conclu que l'intimé n'a droit à aucune réparation fondée sur la *Charte*, il me reste à déterminer s'il a droit à une réparation fondée sur les principes du droit administratif. La question a été débattue devant le juge Lowry de la Cour suprême de la Colombie-Britannique. À l'au-

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were advised by us during the hearing that, notwithstanding that pleadings were not made before this Court on administrative law *per se*, we were nevertheless prepared to deal with this issue. The question to be addressed in this section is whether the delay in this case could amount to a denial of natural justice even where the respondent's ability to have a fair hearing has not been compromised.

(a) Prejudice to the Fairness of the Hearing

In my view, there are appropriate remedies available in the administrative law context to deal with state-caused delay in human rights proceedings. However, delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. Staying proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period (see: *R. v. L. (W.K.)*, [1991] 1 S.C.R. 1091, at p. 1100; *Akthar v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 32 (C.A.). In the administrative law context, there must be proof of significant prejudice which results from an unacceptable delay.

There is no doubt that the principles of natural justice and the duty of fairness are part of every administrative proceeding. Where delay impairs a party's ability to answer the complaint against him or her, because, for example, memories have faded, essential witnesses have died or are unavailable, or evidence has been lost, then administrative delay may be invoked to impugn the validity of the administrative proceedings and provide a remedy (D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at p. 9-67; W. Wade and C. Forsyth, *Administrative Law* (7th ed. 1994), at pp. 435-36). It is thus accepted that the principles of natural justice and the duty of fairness include the right to a fair hearing and that undue delay in the processing of an administrative proceeding that impairs the fairness of the hearing can be remedied (see, for example, J. M. Evans, H. N. Janisch and D. J. Mullan, *Administrative Law: Cases, Text, and Materials* (4th ed. 1995), at p. 256; Wade and Forsyth, *supra*, at pp. 435-36; *Nisbett*, *supra*, at p. 756; *Canadian*

dience, nous avons informé les avocats que, bien que les plaidoiries devant notre Cour n'aient pas porté sur le droit administratif même, nous étions néanmoins disposés à examiner cette question. Il nous faut décider, dans la présente partie, si le délai écoulé en l'espèce peut constituer un déni de justice naturelle même si la capacité de l'intimé d'obtenir une audience équitable n'a pas été compromise.

a) Atteinte à l'équité de l'audience

101 Selon moi, le droit administratif offre des réparations appropriées en ce qui concerne le délai imputable à l'État dans des procédures en matière de droits de la personne. Cependant, le délai ne justifie pas, à lui seul, un arrêt des procédures comme l'abus de procédure en common law. Mettre fin aux procédures simplement en raison du délai écoulé reviendrait à imposer une prescription d'origine judiciaire (voir: *R. c. L. (W.K.)*, [1991] 1 R.C.S. 1091, à la p. 1100; *Akthar c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1991] 3 C.F. 32 (C.A.). En droit administratif, il faut prouver qu'un délai inacceptable a causé un préjudice important.

102 Il n'y a aucun doute que les principes de justice naturelle et l'obligation d'agir équitablement s'appliquent à toutes les procédures administratives. Lorsqu'un délai compromet la capacité d'une partie de répondre à la plainte portée contre elle, notamment parce que ses souvenirs se sont estompés, parce que des témoins essentiels sont décédés ou ne sont pas disponibles ou parce que des éléments de preuve ont été perdus, le délai dans les procédures administratives peut être invoqué pour contester la validité de ces procédures et pour justifier réparation (D. J. M. Brown et J. M. Evans, *Judicial Review of Administrative Action in Canada* (feuilles mobiles), à la p. 9-67; W. Wade et C. Forsyth, *Administrative Law* (7e éd. 1994), aux pp. 435 et 436). Il est donc reconnu que les principes de justice naturelle et l'obligation d'agir équitablement comprennent le droit à une audience équitable et qu'il est possible de remédier au délai injustifié dans des procédures administratives qui compromettent l'équité de l'audience (voir, par exemple, J. M. Evans, H. N. Janisch et

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Airlines, *supra*; *Ford Motor Co. of Canada v. Ontario (Human Rights Commission)* (1995), 24 C.H.R.R. D/464 (Ont. Div. Ct.); *Freedman v. College of Physicians & Surgeons (New Brunswick)* (1996), 41 Admin. L.R. (2d) 196 (N.B.Q.B.)).

D. J. Mullan, *Administrative Law: Cases, Text, and Materials* (4e éd. 1995), à la p. 256; Wade et Forsyth, *op. cit.*, aux pp. 435 et 436; *Nisbett*, précité, à la p. 756; *Lignes aériennes Canadien*, précité; *Ford Motor Co. of Canada c. Ontario (Human Rights Commission)* (1995), 24 C.H.R.R. D/464 (C. div. Ont.); *Freedman c. College of Physicians & Surgeons (New Brunswick)* (1996), 41 Admin. L.R. (2d) 196 (B.R.N.-B.)).

103 The respondent argued before the British Columbia Supreme Court that the delay in the administrative process caused him prejudice that amounted to a denial of natural justice in that he could no longer receive a fair hearing. He alleged that two witnesses had died and that the memories of many witnesses might be impaired by the passage of time. Lowry J. referred to these claims as "vague assertions that fall far short of establishing an inability to prove facts necessary to respond to the complaints" (para. 10). Lowry J. concluded that the respondent's opportunity to make full answer and defence had not been compromised and thereby refused to terminate the proceedings.

L'intimé a fait valoir, devant la Cour suprême de la Colombie-Britannique, que le délai écoulé dans le déroulement du processus administratif lui avait causé un préjudice équivalant à un déni de justice naturelle du fait qu'il n'était plus en mesure d'obtenir une audience équitable. Il a allégué que deux témoins étaient décédés et que les souvenirs de bien des témoins avaient pu s'estomper avec le temps. Le juge Lowry a qualifié ces allégations de [TRADUCTION] «vagues assertions n'établissant pas l'incapacité de prouver des faits nécessaires pour répondre aux plaintes» (par. 10). Il a conclu que la possibilité de l'intimé de présenter une défense pleine et entière n'avait pas été compromise et il a donc refusé de mettre fin aux procédures.

104 The respondent also argued before Lowry J. that he was not provided with a copy of Ms. Schell's timeliness submissions for a two-month period and that he had not received proper disclosure. Lowry J. did not consider the respondent prejudiced in this regard. With respect to the alleged failure to disclose information to the respondent, this is not, in my opinion, a case in which the unfairness is so obvious that there would be a denial of natural justice, or in which there was an abuse of process such that it would be inappropriate to put the respondent through hearings before the Tribunal. I would therefore adopt the finding of Lowry J. that the delay in this case is not such that it would necessarily result in a hearing that lacks the essential elements of fairness. The respondent's right to a fair hearing has not been jeopardized. Proof of prejudice has not been demonstrated to be of sufficient magnitude to impact on the fairness of the hearing. This is a finding of fact made by the trial judge that has not, in my opinion, been successfully attacked on appeal. The question which must

L'intimé a aussi fait valoir devant le juge Lowry qu'il avait dû attendre deux mois avant d'obtenir copie des observations de Mme Schell concernant le respect du délai imparti et que la divulgation qui lui avait été faite n'était pas suffisante. Le juge Lowry n'a pas considéré que l'intimé avait subi un préjudice à cet égard. En ce qui concerne l'omission alléguée de divulguer des renseignements à l'intimé, il ne s'agit pas, à mon sens, d'un cas où l'iniquité est si manifeste qu'il y aurait déni de justice naturelle ni d'un cas où il y a eu abus de procédure tel qu'il serait inapproprié de contraindre l'intimé à se présenter à une audience devant le Tribunal. Je suis donc d'avis de souscrire à la conclusion du juge Lowry que le délai en l'espèce n'est pas nécessairement de nature à entraîner la tenue d'une audience dépourvue des éléments requis pour être équitable. Le droit de l'intimé à une audience équitable n'a pas été compromis. Il n'a pas été établi que le préjudice subi est assez important pour nuire à l'équité de l'audience. Il s'agit là d'une conclusion de fait du juge de pre-

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be addressed is therefore whether the delay in this case could amount to a denial of natural justice or an abuse of process even where the respondent has not been prejudiced in an evidentiary sense.

(b) Other Forms of Prejudice

It is trite law that there is a general duty of fairness resting on all public decision-makers (*Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, at p. 628). The human rights processes at issue in this case must have been conducted in a manner that is entirely consistent with the principles of natural justice and procedural fairness. Perhaps the best illustration of the traditional meaning of this duty of fairness in administrative law can be discerned from the following words of Dickson J. in *Martineau*, at p. 631:

> In the final analysis, the simple question to be answered is this: Did the tribunal on the facts of the particular case act fairly toward the person claiming to be aggrieved? It seems to me that this is the underlying question which the courts have sought to answer in all the cases dealing with natural justice and with fairness.

Throughout the authorities in this area, terms such as "natural justice", "procedural fairness", "abuse of process", and "abuse of discretion" are employed. In *Martineau*, at p. 629, Dickson J. (writing for three judges, while all nine concurred in the result), stated that "the drawing of a distinction between a duty to act fairly, and a duty to act in accordance with the rules of natural justice, yields an unwieldy conceptual framework". With regard to these terms, I would adopt the following words of Sherstobitoff J.A. of the Saskatchewan Court of Appeal in *Misra v. College of Physicians & Surgeons of Saskatchewan* (1988), 52 D.L.R. (4th) 477, at p. 490:

> There are two common denominators in each of the terms. The first is the impossibility of precise definition because of their breadth and the wide array of circum-

mière instance qui n'a pas été contestée avec succès en appel. La question qui doit être examinée est donc de savoir si le délai écoulé en l'espèce pourrait constituer un déni de justice naturelle ou un abus de procédure même si l'intimé n'a subi aucun préjudice sur le plan de la preuve.

b) Autres formes de préjudice

105 Il est bien établi en droit que les instances décisionnelles publiques ont toutes l'obligation générale d'agir équitablement (*Martineau c. Comité de discipline de l'Institution de Matsqui*, [1980] 1 R.C.S. 602, à la p. 628). Les procédures en matière de droits de la personne, dont il est question en l'espèce, doivent s'être déroulées d'une manière tout à fait conforme aux principes de justice naturelle et d'équité procédurale. Les propos suivants du juge Dickson dans l'arrêt *Martineau*, à la p. 631, illustrent peut-être le mieux le sens traditionnel de l'obligation d'agir équitablement en droit administratif:

> En conclusion, la simple question à laquelle il faut répondre est celle-ci: compte tenu des faits de ce cas particulier, le tribunal a-t-il agi équitablement à l'égard de la personne qui se prétend lésée? Il me semble que c'est la question sous-jacente à laquelle les cours ont tenté de répondre dans toutes les affaires concernant la justice naturelle et l'équité.

106 Dans la jurisprudence qui existe en la matière, on trouve des expressions comme «justice naturelle», «équité procédurale», «abus de procédure» et «abus de pouvoir discrétionnaire». Dans l'arrêt *Martineau*, à la p. 629, le juge Dickson (s'exprimant au nom de trois juges, alors que les neuf juges souscrivaient tous au résultat) a dit que «tracer une distinction entre une obligation d'agir équitablement et celle d'agir selon les règles de justice naturelle conduit à un cadre conceptuel de maniement difficile». En ce qui concerne ces expressions, je suis d'avis de souscrire aux propos suivants du juge Sherstobitoff de la Cour d'appel de la Saskatchewan, dans *Misra c. College of Physicians & Surgeons of Saskatchewan* (1988), 52 D.L.R. (4th) 477, à la p. 490:

> [TRADUCTION] Il existe deux dénominateurs communs à chacune des expressions. Le premier est l'impossibilité de les définir avec exactitude en raison de leur portée et

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stances which may bring them into play. The other is the concept of "fairness" or "fair play". They clearly overlap. Unreasonable delay is a possible basis upon which to raise any of them.

de la vaste gamme de circonstances susceptibles de les mettre en jeu. Le deuxième est le chevauchement manifeste des notions d'«équité» et de «franc-jeu». Un délai déraisonnable pourrait justifier d'invoquer l'une ou l'autre.

107 The respondent contends that the delay in the human rights proceedings constitutes a breach of procedural fairness amounting to a denial of natural justice and resulting in an abuse of process. The question is whether one can look to the psychological and sociological harm caused by the delay rather than merely to the procedural or legal effect, namely, whether the ability to make full answer and defence has been compromised, to determine whether there has been a denial of natural justice. This issue is a difficult one and there is no clear authority in this area.

L'intimé soutient que le délai dans les procédures en matière de droits de la personne constitue une atteinte à l'équité procédurale qui équivaut à un déni de justice naturelle et qui entraîne un abus de procédure. Il s'agit de savoir si, aux fins de déterminer s'il y a eu déni de justice naturelle, on peut tenir compte du préjudice psychologique et sociologique causé par le délai et non seulement de l'incidence procédurale ou juridique, c'est-à-dire de la question de savoir si la capacité de présenter une défense pleine et entière a été compromise. Cette question est difficile et il n'y a aucune jurisprudence claire en la matière.

108 In cases where the *Charter* was held not to apply, most courts and tribunals did not go further to decide whether the stress and stigma resulting from an unacceptable delay were so significant as to amount to an abuse of process. On the other hand, where courts did go further, they most often adopted a narrow approach to the principles of natural justice. For example, in *Nisbett*, *supra*, the Manitoba Court of Appeal concluded that delay may amount to an abuse of process that the law will remedy only where "on the record there has been demonstrated evidence of prejudice of sufficient magnitude to impact on the fairness of the hearing" (p. 757). In *Canadian Airlines*, *supra*, the Federal Court of Appeal followed *Nisbett*, concluding that the prejudice must be such "as to deprive a party of his right to a full and complete defence" (p. 641). In the case at bar, Lowry J. for the British Columbia Supreme Court, found that unless there was prejudice to hearing fairness, the type of personal hardship and psychological prejudice suffered by Mr. Blencoe could not give rise to a breach of natural justice (at para. 31):

Dans les affaires où ils ont jugé que la *Charte* ne s'appliquait pas, la plupart des tribunaux judiciaires et des tribunaux administratifs ne sont pas allés jusqu'à déterminer si le stress et la stigmatisation découlant d'un délai inacceptable étaient importants au point de constituer un abus de procédure. Par contre, les tribunaux judiciaires qui l'ont fait ont le plus souvent interprété de manière restrictive les principes de justice naturelle. Par exemple, dans l'arrêt *Nisbett*, précité, la Cour d'appel du Manitoba a conclu que le délai peut constituer un abus de procédure auquel la loi ne remédie que si, [TRADUCTION] «d'après le dossier, il a été établi que le préjudice subi est assez important pour nuire à l'équité de l'audience» (p. 757). Dans *Lignes aériennes Canadien*, précité, la Cour d'appel fédérale a suivi l'arrêt *Nisbett* et a conclu que le préjudice doit être tel «qu'il prive une partie de son droit à une défense pleine et entière» (p. 641). S'exprimant en l'espèce au nom de la Cour suprême de la Colombie-Britannique, le juge Lowry a conclu que, à moins qu'une atteinte ne soit portée à l'équité de l'audience, les difficultés personnelles que M. Blencoe a éprouvées et le préjudice psychologique qu'il a subi n'étaient pas de nature à donner naissance à un déni de justice naturelle (au par. 31):

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. . . it cannot be said that the personal hardship Mr. Blencoe has suffered, albeit protracted by the time the administrative process has taken, gives rise to any *Charter* considerations. To my mind, it then becomes difficult to see how it can nonetheless be said to be a prejudice giving rise to a denial of natural justice. If it were, there would have been no need for the *Kodellas* court to resort to section 7 of the *Charter*. And, having rejected the applicability of section 7, the *Nisbett* court would have been bound to consider whether the personal hardship in that case constituted a prejudice that supported the prerogative relief sought.

[TRADUCTION] . . . on ne peut pas dire que les difficultés personnelles que M. Blencoe a éprouvées, même si elles se sont prolongées à cause de la longueur du processus administratif, font intervenir des considérations fondées sur la *Charte*. Il est alors difficile, à mon sens, de voir comment on peut néanmoins dire qu'elles constituent un préjudice qui donne naissance à un déni de justice naturelle. Si c'était le cas, la cour, dans l'affaire *Kodellas*, n'aurait pas eu besoin de recourir à l'art. 7 de la *Charte*. Et, après avoir écarté la possibilité d'appliquer l'art. 7, la cour, dans *Nisbett*, aurait été tenue d'examiner si les difficultés personnelles dans cette affaire constituaient un préjudice justifiant la délivrance du bref de prérogative demandé.

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However, courts and tribunals have also referred to other types of prejudice than trial fairness, holding that, where a commission or tribunal has abused its process to the detriment of an individual, a court has the discretion to grant a remedy. For example, in *Stefani v. College of Dental Surgeons (British Columbia)* (1996), 44 Admin. L.R. (2d) 122 (B.C.S.C.), a variety of effects on the petitioner were examined, including a cloud over his professional reputation resulting from a delay of two years and three months between the receipt of the complaint and the inspection, and an additional six- or seven-month delay which followed. However, the delay in that case had also resulted in an inability for the petitioner to have a fair hearing.

109 Cependant, les tribunaux judiciaires et les tribunaux administratifs ont aussi mentionné d'autres types de préjudice que l'atteinte à l'équité du procès et ont statué que, dans le cas où une commission ou un tribunal administratif abuse de sa procédure au détriment d'une personne, un tribunal judiciaire a le pouvoir discrétionnaire d'accorder un redressement. Par exemple, dans *Stefani c. College of Dental Surgeons (British Columbia)* (1996), 44 Admin. L.R. (2d) 122 (C.S.C.-B.), diverses répercussions sur le requérant ont été examinées, y compris l'atteinte à sa réputation professionnelle qui résultait du délai de deux ans et trois mois écoulé entre le dépôt de la plainte et le début de l'inspection, et du délai supplémentaire de six ou sept mois qui a suivi. Toutefois, le délai écoulé dans cette affaire avait également eu pour effet d'empêcher le requérant d'obtenir une audience équitable.

We have also been referred to the case of *Brown v. Assn. of Professional Engineers and Geoscientists of British Columbia*, [1994] B.C.J. No. 2037 (QL), where the British Columbia Supreme Court referred to the petitioner's right to a fair trial having been jeopardized as well as the petitioner suffering harm to his reputation. In *Brown*, it took three years to serve the petitioner with notice of the inquiry after receiving the complaints. The delays were in no part caused by the petitioner.

110 On nous a aussi mentionné la décision *Brown c. Assn. of Professional Engineers and Geoscientists of British Columbia*, [1994] B.C.J. No. 2037 (QL), où la Cour suprême de la Colombie-Britannique a décidé qu'il y avait eu atteinte à la réputation du requérant et à son droit à un procès équitable. Dans cette affaire, trois ans s'étaient écoulés entre le dépôt des plaintes et la signification d'un avis d'enquête au requérant. Le délai écoulé n'était aucunement imputable à ce dernier.

In *Misra*, *supra*, a college disciplinary board elected to await the completion of criminal proceedings against Misra, while suspending him from the practice of medicine in the interim five-

111 Dans *Misra*, précité, le comité de discipline d'un ordre avait décidé d'attendre la fin des procédures criminelles engagées contre M. Misra et, dans l'intervalle, de lui retirer son permis d'exercer la

year period. After five years, the criminal proceedings were abandoned and the board council decided to hold a hearing. Sherstobitoff J.A. held for the court that (at p. 490):

> The concept of natural justice or procedural fairness as outlined by Dickson J. in *Martineau* is broad enough to encompass principles which, in other contexts, have been termed abuse of discretion or abuse of process because of delay and related matters. A court, in exercising its supervisory function over an administrative tribunal is entitled to prohibit abuse of that tribunal's process in cases of unfairness or oppression caused or contributed to by delay resulting in a denial of natural justice.

112 The Court of Appeal found that Misra's ability to defend himself would likely be impaired and that he had already been punished by virtue of the five-year suspension (at pp. 492-93). It is clear, however, that in *Misra* the court felt that it is only in exceptional cases that delay will amount to unfairness. Moreover, in *Misra*, an essential part of the prejudice suffered was the result of the lengthy suspension. Finally, the court also concluded that there was prejudice to Misra's right to a fair hearing due to the passage of a five-year period.

113 In *Ratzlaff v. British Columbia (Medical Services Commission)* (1996), 17 B.C.L.R. (3d) 336, Hollinrake J.A. for the British Columbia Court of Appeal agreed with the appellant that, "where the delay is so egregious that it amounts to an abuse of power or can be said to be oppressive, the fact that the hearing itself will be a fair one is of little or no consequence" (para. 19). At issue in *Ratzlaff* was a lengthy delay in processing disciplinary charges against a physician that had affected how the physician arranged his finances. In not restricting abuse of process to procedural unfairness, Hollinrake J.A. stated, at paras. 22-23:

> Abuse of power is a broader notion, akin to oppression. It encompasses procedural unfairness, conduct equivalent to breach of contract or of representation, and, in my view, unjust delay. I should add that not all lengthy delays are unjust; regard must be had to the

médecine. Les procédures criminelles ont été abandonnées au bout de cinq ans et le comité a décidé de tenir une audience. Le juge Sherstobitoff a conclu ce qui suit, au nom de la cour (à la p. 490):

> [TRADUCTION] La notion de justice naturelle ou d'équité procédurale dont le juge Dickson fait état dans l'arrêt *Martineau* est assez large pour faire obstacle à ce que l'on a qualifié, dans d'autres contextes, d'abus de pouvoir discrétionnaire ou d'abus de procédure causé par un délai et d'autres éléments connexes. En exerçant son rôle de surveillance d'un tribunal administratif, une cour de justice peut interdire que l'on abuse de la procédure de ce tribunal dans les cas où il y a iniquité ou oppression imputable en totalité ou en partie à un délai qui entraîne un déni de justice naturelle.

La Cour d'appel a conclu que la capacité de M. Misra de se défendre serait vraisemblablement compromise et que sa suspension de cinq ans avait déjà eu pour effet de le punir (aux pp. 492 et 493). Cependant, il est clair que, dans l'affaire *Misra*, la Cour d'appel a jugé qu'un délai ne constitue une iniquité que dans des cas exceptionnels. De plus, dans cette affaire, un élément essentiel du préjudice subi découlait de la durée prolongée de la suspension. Enfin, la cour a aussi conclu que le délai de cinq ans avait porté atteinte au droit de M. Misra à la tenue d'une audience équitable.

Dans l'arrêt *Ratzlaff c. British Columbia (Medical Services Commission)* (1996), 17 B.C.L.R. (3d) 336, le juge Hollinrake de la Cour d'appel de la Colombie-Britannique a convenu avec l'appelant que [TRADUCTION] «lorsque le délai est énorme au point de constituer un abus de pouvoir ou de pouvoir être qualifié d'oppressif, le fait que l'audience elle-même sera équitable importe peu ou pas du tout» (par. 19). Dans cette affaire, un long délai dans le traitement des accusations d'infraction disciplinaire portées contre un médecin avait eu une incidence sur la planification financière de ce dernier. En s'abstenant de limiter l'abus de procédure à l'iniquité procédurale, le juge Hollinrake a affirmé ceci, aux par. 22 et 23:

> [TRADUCTION] La notion d'abus de pouvoir est large et s'apparente à l'oppression. Elle englobe l'iniquité procédurale, la conduite équivalant à la rupture d'un contrat ou à une fausse déclaration et, à mon avis, le délai injustifié. J'ajouterais que tous les délais ne sont pas injusti-

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causes of delay, and to resulting reasonable changes of position.

Where a party in the position of the appellant relies on delay as amounting to an abuse of power it is incumbent on that party to demonstrate a resulting change of position. In my opinion, the very fact that the appellant continued with his practice as he did and throughout the whole period of time in issue is sufficient to establish such a change of position.

Ratzlaff differs from the case at bar in that the physician carried on his practice thinking that his problems were behind him. He had even retired thinking that his billing disputes were over. Moreover, the chambers judge found that the physician had literally requested that action be taken but that it was three years before the Commission even communicated with him (para. 11). In all, it had been seven years before the physician had received a hearing notice.

I would be prepared to recognize that unacceptable delay may amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised. Where inordinate delay has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process. The doctrine of abuse of process is not limited to acts giving rise to an unfair hearing; there may be cases of abuse of process for other than evidentiary reasons brought about by delay. It must however be emphasized that few lengthy delays will meet this threshold. I caution that in cases where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly caused a significant prejudice to amount to an abuse of process. It must be a delay that would, in the circumstances of the case, bring the human rights system into disrepute. The difficult question before us is in deciding what is an "unacceptable delay" that amounts to an abuse of process.

fiés; il faut tenir compte des causes du délai ainsi que des changements raisonnables de situation qui en ont résulté.

Lorsqu'une partie qui se trouve dans la situation de l'appelant soutient qu'un délai constitue un abus de pouvoir, il lui incombe de prouver qu'il en a résulté un changement de situation. Selon moi, le fait même que l'appelant a continué d'exercer sa profession pendant toute la période en cause suffit pour établir un tel changement de situation.

114 L'arrêt *Ratzlaff* diffère de la présente affaire du fait que le médecin avait continué d'exercer sa profession en pensant que ses problèmes étaient réglés. Il avait même pris sa retraite en croyant que ses litiges en matière de facturation étaient terminés. En outre, le juge en chambre a conclu que le médecin avait expressément demandé que des mesures soient prises, mais que trois années s'étaient écoulées avant même que la commission communique avec lui (au par. 11). En tout, sept années s'étaient écoulées avant que le médecin reçoive un avis d'audience.

115 Je serais disposé à reconnaître qu'un délai inacceptable peut constituer un abus de procédure dans certaines circonstances, même lorsque l'équité de l'audience n'a pas été compromise. Dans le cas où un délai excessif a causé directement un préjudice psychologique important à une personne ou entaché sa réputation au point de déconsidérer le régime de protection des droits de la personne, le préjudice subi peut être suffisant pour constituer un abus de procédure. L'abus de procédure ne s'entend pas que d'un acte qui donne lieu à une audience inéquitable et il peut englober d'autres cas que celui où le délai cause des difficultés sur le plan de la preuve. Il faut toutefois souligner que rares sont les longs délais qui satisfont à ce critère préliminaire. Ainsi, pour constituer un abus de procédure dans les cas où il n'y a aucune atteinte à l'équité de l'audience, le délai doit être manifestement inacceptable et avoir directement causé un préjudice important. Il doit s'agir d'un délai qui, dans les circonstances de l'affaire, déconsidérerait le régime de protection des droits de la personne. La question difficile dont nous sommes saisis est de savoir quel «délai inacceptable» constitue un abus de procédure.

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(c) Abuse of Process — Principles

116 The respondent's case is that there has been an unacceptable delay in the administrative process which has caused him to be prejudiced by the stigma attached to the two Complaints to an extent that justifies the process being terminated now. Abuse of process is a common law principle invoked principally to stay proceedings where to allow them to continue would be oppressive. As stated by Brown and Evans, *supra*, at pp. 9-71 and 9-72:

> The stringency of the requirements for showing that delay constitutes a breach of fairness would seem to be due, at least in part, to the drastic nature of the only appropriate remedy. Unlike other instances of procedural unfairness where it is open to a court to remit the matter for redetermination in a procedurally fair manner, the remedy for undue delay will usually be to prevent the tribunal from exercising its legislative authority, either by prohibiting it from proceeding with the hearing, or by quashing the resulting decision. [Emphasis added.]

117 In the context of a breach of s. 11(*b*) of the *Charter*, a stay has been found to constitute the only possible remedy (*R. v. Askov*, [1990] 2 S.C.R. 1199). The respondent asked for the same remedy in his administrative law proceedings before Lowry J. There is, however, no support for the notion that a stay is the only remedy available in administrative law proceedings. A stay accords very little importance to the interest of implementing the *Human Rights Code* and giving effect to the complainants' rights to have their cases heard. Other remedies are available for abuse of process. Where a respondent asks for a stay, he or she will have to bear a heavy burden. The discussion that follows often links abuse of process and the remedy of a stay because the stay, as I have said, is the only applicable remedy in the context of a s. 11(*b*) application. Nevertheless, I wish to underline that my inquiry here is directed only at the determination of the existence of an abuse of process on the facts of this case.

c) Abus de procédure — Principes

L'intimé soutient que, vu qu'il a été tellement lésé par le délai inacceptable dans le processus administratif et par la stigmatisation qui en a découlé par suite des deux plaintes portées contre lui, l'arrêt des procédures est maintenant justifié. L'abus de procédure est une notion de common law qui est invoquée principalement pour mettre fin à des procédures lorsqu'il serait oppressif de permettre leur continuation. Comme l'ont affirmé Brown et Evans, *op. cit.*, aux pp. 9-71 et 9-72:

> [TRADUCTION] La rigueur de l'exigence de démontrer que le délai constitue un manquement à l'obligation d'agir équitablement semblerait attribuable, du moins en partie, à la nature radicale du seul redressement approprié. Contrairement à d'autres cas d'iniquité procédurale où la cour peut renvoyer l'affaire pour qu'elle soit tranchée à nouveau d'une manière équitable sur le plan de la procédure, le redressement prévu en cas de délai injustifié consiste généralement à empêcher le tribunal administratif d'exercer le pouvoir qu'il tient de la loi, soit en lui interdisant de tenir l'audience, soit en annulant la décision rendue à l'issue de celle-ci. [Je souligne.]

Dans le contexte d'une violation de l'al. 11*b*) de la *Charte*, l'arrêt des procédures a été considéré comme étant la seule réparation possible (*R. c. Askov*, [1990] 2 R.C.S. 1199). L'intimé a demandé la même réparation dans le cadre de ses procédures en matière de droit administratif devant le juge Lowry. Cependant, rien ne justifie l'idée que l'arrêt des procédures est la seule réparation possible dans des procédures en matière de droit administratif. Lorsqu'on ordonne un arrêt des procédures, on accorde très peu d'importance à l'intérêt qu'il y a à appliquer le *Human Righs Code* et à faire respecter le droit du plaignant d'être entendu. D'autres réparations peuvent être accordées dans le cas d'un abus de procédure. La personne faisant l'objet d'une plainte qui demande l'arrêt des procédures doit s'acquitter d'un lourd fardeau de preuve. L'analyse qui suit lie souvent abus de procédure et arrêt des procédures parce que ce dernier est, comme je l'ai dit, la seule réparation possible dans le contexte de l'application de l'al. 11*b*). Je tiens néanmoins à souligner que mon examen ici ne vise qu'à déterminer s'il y a eu abus de procédure d'après les faits de la présente affaire.

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In *R. v. Jewitt*, [1985] 2 S.C.R. 128, this Court unanimously affirmed that the doctrine of abuse of process was available in criminal proceedings. In so doing, and as professed by L'Heureux-Dubé J. in *R. v. Power*, [1994] 1 S.C.R. 601, at p. 613, the Court borrowed the comments of Dubin J.A. in *R. v. Young* (1984), 40 C.R. (3d) 289 (Ont. C.A.), in describing the abuse of process doctrine, stating that a stay of proceedings should be granted where "compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency" or where the proceedings are "oppressive or vexatious". The Court also adopted the Ontario Court of Appeal's warning in *Young* that this is a power which can be exercised only in the "clearest of cases" (p. 614). This was reiterated on many occasions by this Court (see, for example, *R. v. Potvin*, [1993] 2 S.C.R. 880; *R. v. Scott*, [1990] 3 S.C.R. 979; *Power*, *supra*).

118 Dans l'arrêt *R. c. Jewitt*, [1985] 2 R.C.S. 128, notre Cour a confirmé à l'unanimité la possibilité d'appliquer la règle de l'abus de procédure en matière criminelle. Ce faisant, et comme l'a dit le juge L'Heureux-Dubé dans *R. c. Power*, [1994] 1 R.C.S. 601, aux pp. 613 et 614, notre Cour a repris les observations du juge Dubin dans *R. c. Young* (1984), 40 C.R. (3d) 289 (C.A. Ont.), pour décrire la règle de l'abus de procédure, en affirmant que l'arrêt des procédures devrait être ordonné lorsque «forcer le prévenu à subir son procès violerait les principes de justice fondamentaux qui sous-tendent le sens du franc-jeu et de la décence qu'a la société» ou lorsque la procédure est «oppressive ou vexatoire». La Cour a également fait sienne la mise en garde de la Cour d'appel de l'Ontario dans *Young*, selon laquelle il s'agit d'un pouvoir qui ne peut être exercé que dans les «cas les plus manifestes» (p. 614). Notre Cour a réitéré cela à maintes reprises (voir, par exemple, *R. c. Potvin*, [1993] 2 R.C.S. 880; *R. c. Scott*, [1990] 3 R.C.S. 979; *Power*, précité).

In *R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667, L'Heureux-Dubé J. explained the underlying purpose of the doctrine of abuse of process as follows:

> Under the doctrine of abuse of process, the unfair or oppressive treatment of an appellant disentitles the Crown to carry on with the prosecution of the charge. The prosecution is set aside, not on the merits (see *Jewitt*, *supra*, at p. 148), but because it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the court. The doctrine is one of the safeguards designed to ensure "that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society" (*Rothman v. The Queen*, [1981] 1 S.C.R. 640, at p. 689, *per* Lamer J.) It acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfil its function. Consequently, where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings. [Emphasis added.]

119 Dans *R. c. Conway*, [1989] 1 R.C.S. 1659, à la p. 1667, le juge L'Heureux-Dubé a expliqué ainsi la fin qui sous-tend la règle ou doctrine de l'abus de procédure:

> Suivant la doctrine de l'abus de procédure, le traitement injuste ou oppressif d'un accusé prive le ministère public du droit de continuer les poursuites relatives à l'accusation. Les poursuites sont suspendues, non à la suite d'une décision sur le fond (voir *Jewitt*, précité, à la p. 148), mais parce qu'elles sont à ce point viciées que leur permettre de suivre leur cours compromettrait l'intégrité du tribunal. Cette doctrine est l'une des garanties destinées à assurer «que la répression du crime par la condamnation du coupable se fait d'une façon qui reflète nos valeurs fondamentales en tant que société» (*Rothman c. La Reine*, [1981] 1 R.C.S. 640, à la p. 689, le juge Lamer). C'est là reconnaître que les tribunaux doivent avoir le respect et le soutien de la collectivité pour que l'administration de la justice criminelle puisse adéquatement remplir sa fonction. Par conséquent, lorsque l'atteinte au franc-jeu et à la décence est disproportionnée à l'intérêt de la société d'assurer que les infractions criminelles soient efficacement poursuivies, l'administration de la justice est mieux servie par l'arrêt des procédures. [Je souligne.]

120 In order to find an abuse of process, 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" (Brown and Evans, *supra*, at p. 9-68). According to L'Heureux-Dubé J. in *Power*, *supra*, at p. 616, "abuse of process" has been characterized in the jurisprudence as a process tainted to such a degree that it amounts to one of the clearest of cases. In my opinion, this would apply equally to abuse of process in administrative proceedings. For there to be abuse of process, the proceedings must, in the words of L'Heureux-Dubé J., be "unfair to the point that they are contrary to the interests of justice" (p. 616). "Cases of this nature will be extremely rare" (*Power*, *supra*, at p. 616). In the administrative context, there may be abuse of process where conduct is equally oppressive.

Pour conclure qu'il y a eu abus de procédure, la cour doit être convaincue que [TRADUCTION] «le préjudice qui serait causé à l'intérêt du public dans l'équité du processus administratif, si les procédures suivaient leur cours, excéderait celui qui serait causé à l'intérêt du public dans l'application de la loi, s'il était mis fin à ces procédures» (Brown et Evans, *op. cit.*, à la p. 9-68). Le juge L'Heureux-Dubé affirme dans *Power*, précité, à la p. 616, que, d'après la jurisprudence, il y a «abus de procédure» lorsque la situation est à ce point viciée qu'elle constitue l'un des cas les plus manifestes. À mon sens, cela s'appliquerait autant à l'abus de procédure en matière administrative. Pour reprendre les termes employés par le juge L'Heureux-Dubé, il y a abus de procédure lorsque les procédures sont «injustes au point qu'elles sont contraires à l'intérêt de la justice» (p. 616). «Les cas de cette nature seront toutefois extrêmement rares» (*Power*, précité, à la p. 616). Dans le contexte administratif, il peut y avoir abus de procédure lorsque la conduite est tout aussi oppressive.

(d) Was the Delay Unacceptable?

d) Le délai écoulé était-il inacceptable?

121 To constitute a breach of the duty of fairness, the delay must have been unreasonable or inordinate (Brown and Evans, *supra*, at p. 9-68). There is no abuse of process by delay *per se*. The respondent must demonstrate that the delay was unacceptable to the point of being so oppressive as to taint the proceedings. While I am prepared to accept that the stress and stigma resulting from an inordinate delay may contribute to an abuse of process, I am not convinced that the delay in this case was "inordinate".

Pour qu'il y ait manquement à l'obligation d'agir équitablement, le délai doit être déraisonnable ou excessif (Brown et Evans, *op. cit.*, à la p. 9-68). Le délai ne constitue pas en soi un abus de procédure. La personne visée par des procédures doit établir que le délai était inacceptable au point d'être oppressif et de vicier les procédures en cause. Bien que je sois disposé à reconnaître que le stress et la stigmatisation résultant d'un délai excessif peuvent entraîner un abus de procédure, je ne suis pas convaincu que le délai écoulé en l'espèce était «excessif».

122 The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. As previously mentioned, the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the

La question de savoir si un délai est devenu excessif dépend de la nature de l'affaire et de sa complexité, des faits et des questions en litige, de l'objet et de la nature des procédures, de la question de savoir si la personne visée par les procédures a contribué ou renoncé au délai, et d'autres circonstances de l'affaire. Comme nous l'avons vu, la question de savoir si un délai est excessif et s'il est susceptible de heurter le sens de l'équité de la collectivité dépend non pas uniquement de la longueur de ce délai, mais de facteurs contextuels,

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community's sense of fairness would be offended by the delay.

With respect to the actual length of the delay in this case and whether it had been "unacceptable", Lowry J. noted that, unlike the cases to which he had been referred, there was no extended period without any activity in the processing of the Complaints from receipt to referral, except for an inexplicable five-month period of inaction from April 10, 1996, when the respondent provided his substantive response to the Complaints, to September 6, 1996, when human rights officers were assigned to investigate the Complaints. The Commission's counsel provided no explanation or excuses for this five-month gap at the oral hearing. However, according to a letter to the complainant and the respondent dated March 6, 1996, the Council referred to a period of "adjustment" where investigative resources were being transferred from the Employment Standards Branch to the Council and that from then on the Council was to conduct its own investigations. This letter also stated that some investigations would be commenced prior to April 1, 1996, beginning with those complaints that had experienced the longest delays. The Council stated that it appreciated the parties' patience in waiting to be notified as to when the investigation would begin. Lowry J. found that, other than during this five-month period, communication had been ongoing between the Council, solicitors and complainants, and the respondent had not been ignored. There had been a continuous dialogue between the parties (at para. 39).

With respect to calculating the delay, Lowry J. found that the only time that could be considered for the delay was between the filing of the Complaint to the end of the investigation process, in July. He stated that the Tribunal could not be criticized for not setting the hearing dates earlier as the respondent did not press for earlier dates, did not question the fixed dates and cancelled the prehearing conference. While the respondent did at one point inquire as to whether one of the Complaints could be set for hearing without investiga-

dont la nature des différents droits en jeu dans les procédures.

123 En ce qui concerne la longueur du délai en l'espèce et la question de savoir si elle est «inacceptable», le juge Lowry a fait remarquer que, contrairement aux affaires qui lui ont été mentionnées, il n'y avait pas eu de période prolongée d'inactivité dans le traitement des plaintes entre leur dépôt et leur renvoi au Tribunal, à l'exception d'une période inexplicable de cinq mois d'inactivité comprise entre le 10 avril 1996, date à laquelle l'intimé a répondu aux plaintes sur le fond, et le 6 septembre 1996, date à laquelle des agents des droits de la personne ont été chargés d'enquêter sur les plaintes. À l'audience, l'avocat de la Commission n'a fourni aucune explication ni aucune excuse au sujet de cet intervalle de cinq mois. Toutefois, dans une lettre datée du 6 mars 1996 et adressée à la plaignante et à l'intimé, le Conseil a parlé d'une période d'«ajustement» pendant laquelle des enquêteurs de la division des normes d'emploi avaient été mutés chez lui pour qu'il mène dorénavant ses propres enquêtes. La lettre précisait également que certaines enquêtes débuteraient avant le 1er avril 1996 et que la priorité serait accordée aux plaintes dont l'examen avait le plus tardé. Le Conseil remerciait les parties de la patience dont elles feraient preuve en attendant d'être informées de l'ouverture de l'enquête. Le juge Lowry a conclu que, en dehors de cette période de cinq mois, la communication avait été constante entre la Commission, les avocats et les plaignantes, et que l'intimé n'avait pas été tenu à l'écart. Le dialogue s'était poursuivi de façon ininterrompue entre les parties (au par. 39).

124 Au sujet du calcul du délai, le juge Lowry a conclu que seule la période comprise entre le dépôt de la plainte et la fin de l'enquête, en juillet, pouvait être prise en considération. Il a dit qu'on ne pouvait reprocher au Tribunal de ne pas avoir fixé des dates d'audience plus rapprochées, étant donné que l'intimé ne lui avait pas demandé de le faire, qu'il n'avait pas contesté les dates fixées ni annulé la conférence préparatoire à l'audience. Même si, à un moment donné, l'intimé M. Blencoe s'était enquis de la possibilité de faire inscrire au rôle

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tion, this would have required a concession that there was sufficient evidence to warrant a hearing, a concession which Mr. Blencoe was not prepared to make. Following Lowry J.'s reasoning, the delay would be computed until July 1997, thus reducing the delay from 32 months to 24 months.

l'une des plaintes sans qu'une enquête n'ait lieu, il aurait fallu qu'il reconnaisse que la preuve était suffisante pour justifier la tenue d'une audience, ce qu'il n'était pas disposé à faire. Selon le raisonnement du juge Lowry, le délai serait calculé jusqu'en juillet 1997, de sorte qu'il passerait de 32 mois à 24 mois.

125 During those 24 months, the Commission also had to deal with a challenge by the respondent as to the lateness of the Complaints and his accusation that the Complaints were in bad faith. The respondent refused to respond to the allegations until this determination was made. As a result, the process was delayed for some eight months. The respondent was perfectly entitled to bring forward allegations of bad faith and to question the timeliness of the Complaints. However, the Commission should not be held responsible for contributing to this part of the delay. In this regard, Lowry J. stated (at para. 42):

> It is not suggested that Mr. Blencoe was not entitled to challenge the complaints, as he did at the outset, but having done so, and having been unsuccessful, it is not in my view open to him now to claim that the events of the eight months elapsed contributed to an unacceptable delay.

Thus, while the respondent was entitled to take the steps he did, the Court of Appeal wrongly considered the delay attributable to the aforementioned challenges in computing the delay caused by the Commission. Clearly much of this delay resulted from the respondent's actions, though there appear to be other delays caused by the Commission. As expressed by Lambert J.A., at para. 29, some of the delay was attributable to the Commission, some to the respondent, but very little of it was attributable to either of the two complainants — Ms. Schell or Ms. Willis.

126 The arguments advanced by the parties before us rely heavily on criminal judgments where delay was considered in the context of s. 11(*b*) or s. 7 of the *Charter*. It must be kept in mind, as mentioned in paras. 93-95, that the human rights process of receiving complaints, investigating them, determining whether they are substantial enough to

Au cours de ces 24 mois, la Commission a également été saisie d'une contestation de l'intimé fondée sur le caractère tardif des plaintes, et de son argument que ces plaintes avaient été portées de mauvaise foi. Il refusait de répondre aux allégations jusqu'à ce que l'on ait statué sur ces points. Le processus a donc été retardé d'environ huit mois. L'intimé avait parfaitement le droit d'alléguer la mauvaise foi et le non-respect du délai imparti pour porter plainte. Cependant, la Commission ne devrait pas être tenue responsable d'avoir contribué à cette partie du délai. Voici ce que le juge Lowry a dit à ce sujet (au par. 42):

> [TRADUCTION] On n'affirme pas que M. Blencoe n'avait pas le droit de contester les plaintes comme il l'a fait au départ, mais j'estime qu'il ne peut pas, après avoir exercé ce droit en vain, prétendre maintenant que les événements qui sont survenus pendant les huit mois qui se sont écoulés ont contribué à l'écoulement d'un délai inacceptable.

Donc, même si l'intimé avait le droit de faire les démarches qu'il a faites, la Cour d'appel a eu tort de tenir compte du délai attribuable aux contestations susmentionnées pour calculer le délai imputable à la Commission. Il est clair que ce délai résulte en bonne partie des actes de l'intimé, quoique la Commission semble avoir eu par ailleurs sa part de responsabilité. Comme l'a dit le juge Lambert, au par. 29, le délai était attribuable en partie à la Commission et en partie à l'intimé, mais il l'était très peu à l'une ou l'autre des deux plaignantes, Mme Schell ou Mme Willis.

Les arguments que les parties ont avancés devant nous s'appuient en grande partie sur des jugements en matière criminelle où un délai était examiné à la lumière de l'al. 11*b*) ou de l'art. 7 de la *Charte*. Comme je l'ai mentionné aux par. 93 à 95, il faut se rappeler que le processus consistant à recevoir des plaintes fondées sur les droits de la

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investigate and report and then to refer the matter to the Tribunal for hearing is a very different process from the criminal process. The British Columbia human rights process is designed to protect respondents by ensuring that cases are not adjudicated unless there is some basis for the claims to go forward and unless the issue cannot be disposed of prior to adjudication. Pursuant to s. 27 of the *Human Rights Code*, the Commission may dismiss a complaint if, *inter alia*, it is brought too late, the acts alleged do not contravene the Code, there is no reasonable basis for referring the complaint to a hearing, if it does not appear to be in the interest of the group bringing the complaint, the complaint was filed for improper motives or if the complaint was made in bad faith. The Commission therefore performs a gatekeeping or screening function, preventing those cases that are trivial or insubstantial from proceeding. There is also the goal of settlement through mediation which is lacking in the criminal context. The human rights process thus takes a great deal more time prior to referring a complaint to the Tribunal for hearing.

personne, à enquêter à leur sujet, à déterminer si elles justifient la tenue d'une enquête, à rédiger un rapport et à renvoyer l'affaire au Tribunal pour qu'il l'entende est fort différent du processus en matière criminelle. Le processus en matière de droits de la personne qui a cours en Colombie-Britannique est conçu pour protéger les personnes qui font l'objet d'une plainte en assurant qu'une audience ne sera tenue que si la plainte a un minimum de fondement et que si la question ne peut pas être réglée préalablement. Selon l'art. 27 du *Human Rights Code*, la Commission peut notamment rejeter une plainte si elle est présentée tardivement, si les faits allégués ne contreviennent pas au Code, s'il n'y a aucun motif raisonnable de la renvoyer pour audience, si elle semble contraire aux intérêts du groupe qui porte plainte ou encore si elle a été portée de mauvaise foi ou pour des motifs répréhensibles. La Commission exerce donc une fonction de contrôle ou de tri et empêche ainsi les affaires frivoles ou sans fondement de suivre leur cours. Il y a également l'objectif de règlement par la médiation qui est absent du contexte du droit criminel. Le processus en matière de droits de la personne qui précède le renvoi de la plainte au Tribunal pour qu'il tienne une audience est donc beaucoup plus long.

The principles of natural justice also require that both sides be given an opportunity to participate in reviewing documents at various stages in the process and to review the investigation report. The parties therefore have a chance to make submissions before a referral is made to the Tribunal. These steps in the process take time. Indeed, the Commission was under a statutory obligation to proceed as it did. The process itself was not challenged in this case. True, the Commission took longer than is desirable to process these Complaints. I am not condoning that. Nevertheless, McEachern C.J.B.C. has exaggerated in stating that "a week at the outside would have sufficed" to investigate these Complaints (para. 51). While the case may not have been an extremely complicated one, these stages are necessary for the protection

127 Les principes de justice naturelle exigent en outre que les deux parties puissent examiner les documents aux différentes étapes du processus et prendre connaissance du rapport d'enquête. Les parties ont donc la possibilité de présenter des observations avant que l'affaire soit renvoyée au Tribunal. Ces étapes allongent d'autant le processus. En réalité, la Commission était tenue par la loi de procéder comme elle l'a fait. Le processus comme tel n'a pas été contesté en l'espèce. Il est vrai que la Commission a pris plus de temps que ce qui est souhaitable pour traiter les plaintes, ce qui n'est pas excusable selon moi. Toutefois, le juge en chef McEachern a exagéré lorsqu'il a dit [TRADUCTION] «qu'il aurait suffi tout au plus d'une semaine» pour enquêter sur ces plaintes (par. 51). Même s'il se peut que l'affaire n'ait pas été extrêmement compliquée, ces étapes sont nécessaires pour assurer la protection de la personne qui fait l'objet d'une plainte fondée sur les droits de la per-

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of the respondents in the context of the human rights complaints system.

128 The Commission seems to have handled the Complaints against Mr. Blencoe in the same manner as it handles all of its human rights complaints. The respondent argues that the Commission should have been sensitive to his particular needs and to have consequently expedited his Complaints on a priority basis. However, as professed by Lowry J., there is, "little if anything in the record to suggest that Mr. Blencoe raised with the Commission any of the hardship he has suffered or that he sought to be afforded any priority on that basis" (para. 45).

129 In *Kodellas*, *supra*, the Saskatchewan Court of Appeal held that the determination of whether the delay is unreasonable is, in part, a comparative one whereby one can compare the length of delay in the case at bar with the length of time normally taken for processing in the same jurisdiction and in other jurisdictions in Canada. While this factor has limited weight, I would note that in this regard, on average, it takes the Canadian Human Rights Commission 27 months to resolve a complaint (J. Simpson, "Human Rights Commission Mill Grinds Slowly", *The Globe & Mail* (October 1, 1998), p. A18, as quoted in R. E. Hawkins, "Reputational Review III: Delay, Disrepute and Human Rights Commissions" (2000), 25 *Queen's L.J.* 599, at p. 600). In Ontario, the average length of complaints, according to the *Annual Report 1997-1998 of the Ontario Human Rights Commission* (1998), at p. 24, is 19.9 months. The respondent's counsel at the oral hearing quoted a report of the British Columbia Ministry where the average time to get to a hearing in British Columbia is three years.

130 The delay in the case at bar should be compared to that in analogous cases. In *Nisbett*, the sexual harassment complaint had been outstanding for approximately three years. In *Canadian Airlines*, there was a 50-month delay between the filing of the complaint and the appointment of an investigator. In *Stefani*, there was a delay of two years and

sonne, lorsque vient le temps d'examiner cette plainte.

La Commission semble avoir traité les plaintes portées contre M. Blencoe de la même manière qu'elle le fait pour toutes les autres plaintes fondées sur les droits de la personne dont elle est saisie. L'intimé fait valoir qu'elle aurait dû tenir compte de ses besoins particuliers et, par conséquent, traiter en priorité les plaintes dont il faisait l'objet. Cependant, comme l'a affirmé le juge Lowry, [TRADUCTION] «il n'y a que peu ou pas d'éléments du dossier qui indiquent que M. Blencoe a informé la Commission des difficultés qu'il éprouvait ou qu'il a demandé qu'on lui accorde la priorité pour ce motif» (par. 45).

Dans *Kodellas*, précité, la Cour d'appel de la Saskatchewan a statué que l'exercice consistant à déterminer si un délai est déraisonnable est en partie comparatif, du fait qu'il permet de comparer la durée du délai dans l'affaire en cause au délai qui est normalement nécessaire pour procéder dans le même ressort ou ailleurs au Canada. Bien que ce facteur ait une importance limitée, je tiens à souligner, à cet égard, que la Commission canadienne des droits de la personne met en moyenne 27 mois à régler une plainte (J. Simpson, «Human Rights Commission Mill Grinds Slowly», *The Globe & Mail* (1er octobre 1998), p. A18, cité dans R. E. Hawkins, «Reputational Review III: Delay, Disrepute and Human Rights Commissions» (2000), 25 *Queen's L.J.* 599, à la p. 600). En Ontario, selon le *Rapport annuel 1997-1998 de la Commission ontarienne des droits de la personne* (1998), à la p. 26, la durée moyenne du traitement d'une plainte est de 19,9 mois. À l'audience, l'avocat de l'intimé a cité un rapport du ministère responsable en Colombie-Britannique selon lequel le délai d'obtention d'une audience dans la province est en moyenne de trois ans.

Le délai écoulé en l'espèce devrait être comparé à celui constaté dans des affaires analogues. Dans l'affaire *Nisbett*, environ trois années s'étaient écoulées depuis le dépôt de la plainte de harcèlement sexuel. Dans l'affaire *Lignes aériennes Canadien*, 50 mois s'étaient écoulés entre le dépôt de la plainte et la désignation d'un enquêteur. Dans

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three months between the complaint and the inspection and an additional six- or seven-month delay which followed. In *Brown*, a three-year period had elapsed prior to serving the petitioner with notice of the inquiry. In *Misra*, there was a five-year delay during which time Misra was suspended from the practice of medicine. Finally, in *Ratzlaff*, it had been seven years before the physician received a hearing notice.

l'affaire *Stefani*, deux ans et trois mois s'étaient écoulés entre le dépôt de la plainte et le début de l'inspection, à quoi s'étaient ajoutés six ou sept mois supplémentaires. Dans l'affaire *Brown*, trois années s'étaient écoulées avant qu'un avis d'enquête soit signifié au requérant. Dans l'affaire *Misra*, un délai de cinq ans s'était écoulé, pendant lequel M. Misra s'était vu retirer son permis d'exercer la médecine. Enfin, dans l'affaire *Ratzlaff*, sept ans s'étaient écoulés avant que le médecin reçoive un avis d'audience.

A review of the facts in this case demonstrates that, unlike the aforementioned cases where there was complete inactivity for extremely lengthy periods, the communication between the parties in the case at bar was ongoing. While Lowry J. acknowledged the five-month delay of inactivity, on balance, he found no unacceptable delay and considered the time that elapsed to be nothing more "than the time required to process complaints of this kind given the limitations imposed by the resources available" (para. 47). Lowry J. concluded as follows (at para. 49):

> In my view, it cannot be said that the Commission or the Tribunal have acted unfairly toward Mr. Blencoe. They have caused neither an unacceptable delay in the process nor a prejudice to him whereby fairness of the hearings scheduled to be conducted next month have been compromised. There has been no denial of natural justice and, accordingly, Mr. Blencoe's petition for judicial review cannot succeed.

131 L'examen des faits en l'espèce démontre que, contrairement aux affaires susmentionnées où il y a eu des périodes d'inactivité complète extrêmement longues, la communication entre les parties est demeurée constante. Bien qu'il ait reconnu que le dossier était demeuré inactif pendant cinq mois, le juge Lowry a jugé que ce délai n'était pas inacceptable en fin de compte et qu'il ne représentait rien de plus [TRADUCTION] «que le temps nécessaire pour traiter les plaintes de ce genre compte tenu des limites imposées par les ressources disponibles» (par. 47). Le juge Lowry a tiré la conclusion suivante (au par. 49):

> [TRADUCTION] À mon avis, on ne peut dire que la Commission ou le Tribunal ont été inéquitables envers M. Blencoe. Ni l'un ni l'autre n'est à l'origine d'un délai inacceptable ou n'a causé à M. Blencoe un préjudice qui aurait eu pour effet de compromettre l'équité des audiences qui devaient avoir lieu le mois suivant. Il n'y a pas eu de déni de justice naturelle et, en conséquence, la demande de contrôle judiciaire présentée par M. Blencoe ne peut être accueillie.

As expressed by Salmon L.J. in *Allen v. Sir Alfred McAlpine & Sons, Ltd.*, [1968] 1 All E.R. 543 (C.A.), at p. 561, "it should not be too difficult to recognise inordinate delay when it occurs". In my opinion, the five-month inexplicable delay or even the 24-month period from the filing of the Complaints to the referral to the Tribunal was not so inordinate or inexcusable as to amount to an abuse of process. Taking into account the ongoing communication between the parties, the delay in this case does not strike me as one that would offend the community's sense of decency and fairness. While I would not presume to fix a specified period for a reasonable delay, I am satisfied that

132 Comme l'a dit le lord juge Salmon dans *Allen c. Sir Alfred McAlpine & Sons, Ltd.*, [1968] 1 All E.R. 543 (C.A.), à la p. 561, [TRADUCTION] «il ne devrait pas être trop difficile de reconnaître un délai excessif lorsqu'il se produit». Selon moi, le délai inexplicable de cinq mois ou même le délai de 24 mois qui s'est écoulé entre le dépôt des plaintes et le renvoi au Tribunal n'était ni excessif ni inexcusable au point de constituer un abus de procédure. Vu la communication constante entre les parties, le délai en l'espèce ne me paraît pas être de ceux qui heurteraient le sens de la justice et de la décence de la société. Même si je ne saurais préciser la durée d'un délai raisonnable, je suis

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the delay in this case was not so inordinate as to amount to an abuse of process.

133 As noted in the discussion pertaining to the application of s. 7 of the *Charter* (paras. 59 to 72), I am also concerned with the causal connection in this case. There must be more than merely a lengthy delay for an abuse of process; the delay must have caused actual prejudice of such magnitude that the public's sense of decency and fairness is affected. While Mr. Blencoe and his family have suffered obvious prejudice since the various sexual harassment allegations against him were made public, as explained above, I am not convinced that such prejudice can be said to result directly from the delay in the human rights proceedings. As in the *Charter* analysis above, I have simply assumed without deciding, for the purpose of my analysis, that the delay caused by the Commission was a contributory cause of the respondent's prejudice.

VII. Conclusion

134 To summarize, it cannot be said that the respondent's s. 7 rights were violated nor that the conduct of the Commission amounted to an abuse of process. However, I emphasize that nothing in these reasons has any bearing on the merits of the case before the Tribunal.

135 Nevertheless, I am very concerned with the lack of efficiency of the Commission and its lack of commitment to deal more expeditiously with complaints. Lack of resources cannot explain every delay in giving information, appointing inquiry officers, filing reports, etc.; nor can it justify inordinate delay where it is found to exist. The fact that most human rights commissions experience serious delays will not justify breaches of the principles of natural justice in appropriate cases. In *R. v. Morin*, [1992] 1 S.C.R. 771, at p. 795, the Court stated that in the context of s. 11(*b*) of the *Charter*, the government "has a constitutional obligation to commit sufficient resources to prevent unreasona-

convaincu que le délai en l'espèce n'était pas excessif au point de constituer un abus de procédure.

Comme je l'ai souligné en procédant à l'analyse concernant l'application de l'art. 7 de la *Charte* (par. 59 à 72), je suis également préoccupé par la question du lien causal en l'espèce. Pour qu'il y ait abus de procédure, le délai écoulé doit, outre sa longue durée, avoir causé un préjudice réel d'une telle ampleur qu'il heurte le sens de la justice et de la décence du public. Bien que M. Blencoe et les membres de sa famille aient manifestement subi un préjudice en raison de la publicité qui a entouré les diverses allégations de harcèlement sexuel, comme je l'ai expliqué précédemment, je ne suis pas convaincu qu'on peut dire que ce préjudice résulte directement du délai écoulé dans les procédures en matière de droits de la personne. Comme je l'ai fait dans l'analyse précédente relative à la *Charte*, j'ai simplement tenu pour acquis, sans pour autant le décider, aux fins de mon analyse, que le délai imputable à la Commission avait contribué à causer un préjudice à l'intimé.

VII. Conclusion

En résumé, on ne saurait dire qu'il y a eu atteinte aux droits garantis à l'intimé par l'art. 7 ou que la conduite de la Commission a constitué un abus de procédure. Cependant, je souligne que les présents motifs ne devraient avoir aucune incidence sur le bien-fondé de l'affaire devant le Tribunal.

Je suis néanmoins très préoccupé par l'inefficacité de la Commission et par l'absence d'engagement de sa part à traiter plus rapidement les plaintes dont elle est saisie. Le manque de ressources ne peut pas expliquer tous les délais en matière de communication des renseignements, de désignation d'enquêteurs, de dépôt de rapports, etc.; il ne peut pas justifier non plus un délai jugé excessif. Le fait que la plupart des commissions des droits de la personne connaissent de sérieux délais ne justifie pas la violation des principes de justice naturelle dans des cas appropriés. Dans l'arrêt *R. c. Morin*, [1992] 1 R.C.S. 771, à la p. 795, la Cour a dit, au sujet de l'application de l'al. 11*b*) de

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ble delay". The demands of natural justice are apposite.

la *Charte*, que le gouvernement «a l'obligation constitutionnelle d'attribuer des ressources suffisantes pour prévenir tout délai déraisonnable». Les exigences de la justice naturelle sont pertinentes.

I would allow the appeal. The Court of Appeal decision is set aside and the Tribunal should proceed with the hearing of the Complaints on their merits. Considering the lack of diligence displayed by the Commission, I would nevertheless exercise the Court's discretion under s. 47 of the *Supreme Court Act*, R.S.C., 1985, c. S-26, to award costs against the appellant Commission in favour of Robin Blencoe, Andrea Willis and Irene Schell.

136 Je suis d'avis d'accueillir le pourvoi. L'arrêt de la Cour d'appel est annulé et le Tribunal devrait procéder à l'audition des plaintes au fond. Toutefois, vu l'absence de diligence manifestée par la Commission appelante, je suis d'avis de lui ordonner de payer les dépens de Robin Blencoe, Andrea Willis et Irene Schell, en vertu du pouvoir discrétionnaire que l'art. 47 de la *Loi sur la Cour suprême*, L.R.C. (1985), ch. S-26, confère à notre Cour.

The reasons of Iacobucci, Binnie, Arbour and LeBel JJ. were delivered by

Version française des motifs des juges Iacobucci, Binnie, Arbour et LeBel rendus par

137 LEBEL J. (dissenting in part) — The reasons of Justice Bastarache fully review the judicial history and the factual background of this case, and I do not intend to summarize them again. I shall refer only to such elements of the evidence and of the history of this case, as may be required, for the purpose of my analysis.

137 LE JUGE LEBEL (dissident en partie) — Dans ses motifs, le juge Bastarache fait un examen complet des procédures et des faits de la présente affaire, de sorte que je ne compte pas les résumer à nouveau. Je vais mentionner seulement les éléments de preuve et les faits qui seront nécessaires pour les fins de mon analyse.

I. The Issues

I. Les questions en litige

138 The parties have fought this case mainly on *Charter* issues. In the end, this approach turned into a constitutional problem, something that it was not. The important and determinative issue should have been the role of judicial review and administrative law principles in the control of undue delay in administrative tribunal proceedings. Given that human rights commissions are administrative law creations, the first place we should look for solutions to problems in their processes is in the realm of administrative law. If the relevant administrative law remedy had been applied, the trial judge should have found that there had been undue delay in the process of the British Columbia Human Rights Commission (formerly the British Columbia Council of Human Rights), that this delay was abusive, and that some

138 L'argumentation des parties a surtout porté sur des questions relatives à la *Charte canadienne des droits et libertés*. En définitive, le problème qui se posait est, de ce fait, devenu à tort un problème constitutionnel. La question importante et déterminante aurait dû être celle du rôle que le contrôle judiciaire et les principes du droit administratif jouent en matière de prévention des délais injustifiés dans des procédures devant un tribunal administratif. Étant donné que les commissions des droits de la personne sont des créatures du droit administratif, c'est dans le domaine du droit administratif qu'il nous faut d'abord chercher des solutions aux problèmes que posent leurs procédures. Si la réparation appropriée en droit administratif avait été appliquée, le juge de première instance aurait dû conclure qu'il y a eu délai injustifié dans les procédures de la British Columbia Human Rights Commission (auparavant British Columbia Council of Human Rights) («Commission des

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form of remedy should have been granted to the respondent Blencoe.

droits de la personne de la Colombie-Britannique» ou «Commission»), que ce délai était excessif et qu'une forme quelconque de réparation devait être accordée à l'intimé Blencoe.

139 Nevertheless, I agree that a stay of proceedings was not warranted in the circumstances of the case and should be lifted, as suggested by Bastarache J. Such a remedy took no consideration of the interest of the complainants Irene Schell and Andrea Willis in the proceedings of the British Columbia Human Rights Commission ("Commission"). Nobody benefits from delay, but the interests of innocent parties must influence our choice of remedy. The Court of Appeal seems to have dealt with this case as if it were a pure conflict between the respondent and the state, without taking into account that the complainants Schell and Willis also had an important interest in an efficient disposition of their allegations against Blencoe and in the correct and timely application of the appropriate administrative law remedies.

Je conviens néanmoins qu'un arrêt des procédures n'était pas justifié dans les circonstances de l'affaire et qu'il devrait être annulé, comme le propose le juge Bastarache. Cette réparation ne tenait aucun compte de l'intérêt que les plaignantes Irene Schell et Andrea Willis avaient dans les procédures de la Commission des droits de la personne de la Colombie-Britannique. Un délai n'est avantageux pour personne, mais les intérêts de parties innocentes doivent influencer notre choix d'une réparation. La Cour d'appel semble avoir considéré qu'il s'agissait en l'espèce d'un simple différend entre l'intimé et l'État, sans tenir compte du fait que les plaignantes Schell et Willis avaient elles aussi considérablement intérêt à ce qu'il soit statué efficacement sur leurs allégations contre Blencoe et à ce que les réparations appropriées en droit administratif soient accordées correctement et en temps opportun.

II. The Administrative Law Doctrine of Abuse of Process and the Control of Undue Delay

II. La règle de l'abus de procédure en droit administratif et la prévention des délais injustifiés

140 Unnecessary delay in judicial and administrative proceedings has long been an enemy of a free and fair society. At some point, it is a foe that has plagued the life of almost all courts and administrative tribunals. It's a problem that must be brought under control if we are to maintain an effective system of justice, worthy of the confidence of Canadians. The tools for this task are not to be found only in the *Canadian Charter of Rights and Freedoms*, but also in the principles of a flexible and evolving administrative law system.

Ce n'est pas d'hier que les délais inutiles dans les procédures judiciaires et les procédures administratives sont qualifiés de contraires à une société libre et équitable. Il s'agit jusqu'à un certain point d'un fléau qui touche presque tous les tribunaux judiciaires et les tribunaux administratifs. C'est un problème qu'il faut régler pour assurer le maintien d'un système de justice efficace et digne de la confiance des Canadiens et des Canadiennes. La solution à ce problème réside non seulement dans l'application de la *Charte*, mais également dans celle des principes d'un régime de droit administratif souple et en évolution constante.

141 The legal doctrines that have developed both under the common law and under the *Charter* to respond to delay are certainly not simple. But the facts of this case point to one inescapable conclusion: the respondent, Robin Blencoe, faced unreasonable delay that violated administrative law principles of fairness in the management of the

Les règles juridiques qui ont été établies en vertu de la common law et de la *Charte* afin de remédier au problème des délais ne sont sûrement pas simples. Cependant, les faits de la présente affaire amènent inévitablement à conclure que l'intimé, Robin Blencoe, a été victime d'un délai déraisonnable contraire aux principes, reconnus en

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process of an administrative tribunal or body. Those principles concern not only the fairness of the hearing and of the final decision, but the very conduct of the procedures leading to the disposition in the matter. In these reasons, I shall now examine those principles and the nature of the remedy that appears just and appropriate after giving due consideration to the interests of all parties concerned by this long and frustrating judicial debate.

droit administratif, de l'équité en matière de gestion des procédures d'un tribunal ou d'un organisme administratif. Ces principes concernent non seulement l'équité de l'audience et de la décision finale, mais encore le déroulement même des procédures menant au règlement de l'affaire. Dans les présents motifs, je vais maintenant examiner ces principes et la nature de la réparation qui paraît juste et appropriée, compte tenu, comme il se doit, des intérêts de toutes les parties touchées par ce long et frustrant débat judiciaire.

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III. The Application for Judicial Review

III. La demande de contrôle judiciaire

This case came before the courts when Blencoe brought a petition for judicial review. Lowry J., in the British Columbia Supreme Court, denied any remedy under administrative law principles because, in his opinion, Blencoe had not established any prejudice that related "directly to the ability to respond to the complaint in an evidentiary sense" ((1998), 49 B.C.L.R. (3d) 201, at para. 37). Judicial review would thus be essentially limited to assessing the impact of the delay on the hearing and the decision.

142 Les procédures devant les tribunaux ont commencé avec le dépôt par Blencoe d'une demande de contrôle judiciaire. Le juge Lowry de la Cour suprême de la Colombie-Britannique a refusé toute réparation fondée sur les principes du droit administratif parce que, à son avis, Blencoe n'avait pas établi l'existence d'un préjudice lié [TRADUCTION] «directement à sa capacité de répondre à la plainte en produisant des éléments de preuve» ((1998), 49 B.C.L.R. (3d) 201, au par. 37). Ainsi, le contrôle judiciaire consisterait essentiellement à évaluer l'incidence du délai sur l'audience et la décision.

Some case law did support this approach. In *Nisbett v. Manitoba (Human Rights Commission)* (1993), 101 D.L.R. (4th) 744, the Manitoba Court of Appeal searched for delay that caused prejudice to an individual's right to a fair and full hearing. In *Ford Motor Co. of Canada v. Ontario (Human Rights Commission)* (1995), 24 C.H.R.R. D/464, at p. 466, the Ontario Divisional Court explicitly followed the *Nisbett* analysis.

143 Une partie de la jurisprudence appuyait ce point de vue. Dans l'arrêt *Nisbett c. Manitoba (Human Rights Commission)* (1993), 101 D.L.R. (4th) 744, la Cour d'appel du Manitoba s'est demandé si un délai avait porté atteinte au droit d'une personne à une audience complète et équitable. Dans *Ford Motor Co. of Canada c. Ontario (Human Rights Commission)* (1995), 24 C.H.R.R. D/464, à la p. 466, la Cour divisionnaire de l'Ontario a explicitement suivi l'analyse effectuée dans l'arrêt *Nisbett*.

However, these decisions seem to have been exceptions in an otherwise steady progression toward a broader vision of administrative law abuse of process doctrine and the remedies that it provides for unreasonable delay. Administrative law abuse of process doctrine is fundamentally about protecting people from unfair treatment by administrative agencies. In *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, at p. 631, Dickson J. (as he then was)

144 Toutefois, ces décisions semblent avoir constitué des accidents de parcours dans une évolution par ailleurs constante vers une conception plus large de la règle de l'abus de procédure en droit administratif et des réparations qu'elle offre en cas de délai déraisonnable. Cette règle de l'abus de procédure en droit administratif vise fondamentalement à protéger les gens contre tout traitement inéquitable de la part d'organismes administratifs. Dans l'arrêt *Martineau c. Comité de discipline de l'Insti-*

described the administrative law principle of fairness in these classic terms:

> In the final analysis, the simple question to be answered is this: Did the tribunal on the facts of the particular case act fairly toward the person claiming to be aggrieved? It seems to me that this is the underlying question which the courts have sought to answer in all the cases dealing with natural justice and fairness.

When we ask whether there has been an administrative law abuse of process, we ask the same fundamental question: has an administrative agency treated people inordinately badly?

IV. Historical Context

145 This question, however, does not exist outside of a legal historical context, through which we must trace the role of courts on these kinds of questions up to the present day. Two fundamental aspects of the common law's history are relevant to the rules in this area: (1) the common law system's abhorrence of delay; and (2) the common law's development as to the power of courts to monitor the processes of administrative bodies.

146 The notion that justice delayed is justice denied reaches back to the mists of time. In *Magna Carta* in 1215, King John promised: "To none will we sell, to none will we deny, or delay, right or justice" (emphasis added). As La Forest J. put it, the right to a speedy trial has been "a right known to the common law . . . for more than 750 years" (*R. v. Rahey*, [1987] 1 S.C.R. 588, at p. 636). In criminal law cases, this Court had no difficulty determining in *R. v. Askov*, [1990] 2 S.C.R. 1199, at p. 1227, that "the right to be tried within a reasonable time is an aspect of fundamental justice protected by s. 7 of the *Charter*". Outside the criminal law context, legislators have devised limitation periods, and courts have developed equitable doctrines such as that of laches. For centuries, those working with our legal system have recognized

tution de Matsqui, [1980] 1 R.C.S. 602, à la p. 631, le juge Dickson (plus tard Juge en chef) a décrit le principe de l'équité en droit administratif en ces termes classiques:

> En conclusion, la simple question à laquelle il faut répondre est celle-ci: compte tenu des faits de ce cas particulier, le tribunal a-t-il agi équitablement à l'égard de la personne qui se prétend lésée? Il me semble que c'est la question sous-jacente à laquelle les cours ont tenté de répondre dans toutes les affaires concernant la justice naturelle et l'équité.

Lorsque nous nous demandons s'il y a eu abus de procédure selon le droit administratif, nous nous posons la même question fondamentale: un organisme administratif a-t-il traité des gens excessivement mal?

IV. Le contexte historique

La question ne se pose cependant pas en dehors d'un contexte juridique historique dans lequel nous devons examiner le rôle que les tribunaux judiciaires ont joué jusqu'à ce jour en la matière. Deux aspects fondamentaux de l'histoire de la common law sont pertinents quant aux règles applicables dans ce domaine: (1) l'aversion de la common law pour les délais, et (2) l'évolution de la common law en ce qui concerne le pouvoir des tribunaux judiciaires de surveiller les procédures d'organismes administratifs.

L'idée que la justice différée est un déni de justice ne date pas d'hier. Dans la *Magna Carta* de 1215, le roi Jean a pris l'engagement suivant: [TRADUCTION] «À aucun nous ne vendrons, à aucun nous ne refuserons ni différerons droit ou justice» (je souligne). Comme l'a dit le juge La Forest, le droit à un procès expéditif «est connu en *common law* depuis plus de 750 ans» (*R. c. Rahey*, [1987] 1 R.C.S. 588, à la p. 636). En matière de droit criminel, notre Cour n'a pas hésité à conclure, dans l'arrêt *R. c. Askov*, [1990] 2 R.C.S. 1199, à la p. 1227, que «le droit d'être jugé dans un délai raisonnable est un aspect de la justice fondamentale garantie en vertu de l'art. 7 de la *Charte*». En dehors du contexte du droit criminel, le législateur a établi des délais de prescription, et les cours de justice, des règles d'*equity* comme celle du manque de dili-

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that unnecessary delay strikes against its core values and have done everything within their powers to combat it, albeit not always with complete success.

gence. Depuis des siècles, les gens qui œuvrent dans notre système juridique reconnaissent que les délais inutiles vont à l'encontre des valeurs fondamentales qui le sous-tendent et ils font tout ce qu'ils peuvent pour les éliminer, même s'ils ne parviennent pas toujours à le faire complètement.

Under the common law, courts have gradually developed the power to monitor the processes of administrative bodies and their legality. There is today no doubt that "[t]he superior courts have the inherent power to review the legality of administrative actions" (D. P. Jones and A. S. de Villars, *Principles of Administrative Law* (3rd ed. 1999), at p. 6). Unnecessary delay is not excluded from the scope of judicial review.

147 Sous le régime de la common law, les cours de justice se sont progressivement donné le pouvoir de surveiller les procédures des organismes administratifs et leur légalité. Il ne fait désormais aucun doute que [TRADUCTION] «[l]es cours supérieures ont le pouvoir inhérent d'examiner la légalité de mesures administratives» (D. P. Jones et A. S. de Villars, *Principles of Administrative Law* (3e éd. 1999), à la p. 6). Les délais inutiles n'échappent pas au contrôle judiciaire.

This supervisory power over administrative processes developed from the very beginnings of the prerogative writ most apropos in the case before us. Mandamus is a storied writ. At its origins, it empowered the Court of King's Bench to order a court or an administrative body to do its duty: Sir W. Holdsworth, *A History of English Law* (7th ed. 1956), vol. I, at p. 229; W. Blackstone, *Commentaries on the Laws of England* (4th ed. 1768), Book III, at p. 110. In the original cases that recognized it, the writ was used largely to prevent the procedurally illegitimate exclusion of citizens who were members of certain disliked groups from municipal offices: see *Bagg's Case* (1615), 11 Co. Rep. 93b, 77 E.R. 1271; and *Andover Case* (1700), Holt. K.B. 441, 90 E.R. 1143, at p. 1143. But there was always the possibility of something much greater in the writ, and Lord Mansfield would go so far as to announce its prospective use "upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one" (*R. v. Barker* (1762), 3 Burr. 1265, 97 E.R. 823, at pp. 824-25 (emphasis added). Cf. *Bagg's Case*, *supra*, at pp. 1277-78, referring generally to "misgovernment".) The writ always promised the possibility of ensuring that governmental officers would not shirk their duty to keep processes operating efficiently. Perhaps significantly, the very words of the original form of the writ referred to

148 Ce pouvoir de surveillance des procédures administratives qui remonte aux origines du bref de prérogative est des plus à-propos en l'espèce. Le mandamus possède une longue histoire. À l'origine, il habilitait la Cour du Banc du Roi à ordonner à un tribunal judiciaire ou à un organisme administratif de faire son devoir: sir W. Holdsworth, *A History of English Law* (7e éd. 1956), vol. I, à la p. 229; W. Blackstone, *Commentaries on the Laws of England* (4e éd. 1768), livre III, à la p. 110. Dans les premières affaires où il a été appliqué, le bref a servi en grande partie à empêcher que des membres de groupes abhorrés soient écartés illégitimement d'une charge municipale: voir *Bagg's Case* (1615), 11 Co. Rep. 93b, 77 E.R. 1271, et *Andover Case* (1700), Holt. K.B. 441, 90 E.R. 1143, à la p. 1143. Cependant, il était toujours possible que le bref ait une portée plus grande, et lord Mansfield a même dit qu'il pourrait être utilisé [TRADUCTION] «chaque fois que la common law ne prévoit aucune réparation particulière et que la justice et le bon gouvernement exigent qu'il y ait réparation» (*R. c. Barker* (1762), 3 Burr. 1265, 97 E.R. 823, aux pp. 824 et 825 (je souligne). Comparer avec *Bagg's Case*, précité, aux pp. 1277 et 1278, où il est généralement question de [TRADUCTION] «mauvais gouvernement»). Grâce au bref, il était toujours possible de veiller à ce qu'un fonctionnaire de l'État ne manque pas à son obligation de veiller au déroulement efficace des procédures. Ce qui peut être

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"debitam et festinam justiciam" — due and speedy justice (Holdsworth, *supra*, app. XV, at p. 659).

V. Modern Developments

149 Today, there is no doubt that mandamus may be used to control procedural delays. In the middle of the last century, a British Columbia Court of Appeal judgment recognized the principles behind mandamus, stating that "[t]he high prerogative writ of mandamus was brought into being to supply defects in administering justice" (*The King ex rel. Lee v. Workmen's Compensation Board*, [1942] 2 D.L.R. 665, at p. 678). It went on to note that the granting of mandamus was "to be governed by considerations which tend to the speedy and inexpensive as well as efficacious administration of justice" (at p. 678, cited with approval in *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561). Members of our Court have on occasion alluded to the use of mandamus specifically to control delay. (See notably: *R. v. Bradley*, [1941] S.C.R. 270, at p. 277, *per* Duff C.J.; *Rourke v. The Queen*, [1978] 1 S.C.R. 1021, at p. 1027, *per* Laskin C.J.; and *Rahey*, *supra*, at pp. 624-25, *per* Wilson J., and p. 631, *per* La Forest J.) And there exists a specific line of case law in the administrative context of immigration law that endorses just such a development, particularly where delay creates hardship: 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. In such a context in *Bhatnager v. Minister of Employment and Immigration*, [1985] 2 F.C. 315 (T.D.), at p. 317, Strayer J. offers this widely quoted statement:

significatif, le libellé même du bref original parlait de «*debitam et festinam justiciam*» — justice régulière et expéditive (Holdsworth, *op. cit.*, app. XV, à la p. 659).

V. Évolution récente

De nos jours, il ne fait aucun doute que le mandamus peut servir à limiter les délais procéduraux. Au milieu du siècle dernier, la Cour d'appel de la Colombie-Britannique a reconnu, dans un arrêt, les principes qui sous-tendent le mandamus en disant que [TRADUCTION] «[l]a raison d'être du bref de prérogative qu'est le mandamus est de remédier aux vices de l'administration de la justice» (*The King ex rel. Lee c. Workmen's Compensation Board*, [1942] 2 D.L.R. 665, à la p. 678). La Cour d'appel a ajouté que la délivrance d'un mandamus devait être [TRADUCTION] «régie par des considérations qui contribuent à une administration de la justice expéditive, peu coûteuse et efficace» (à la p. 678, cité avec approbation dans *Harelkin c. Université de Regina*, [1979] 2 R.C.S. 561). Il est arrivé que des juges de notre Cour fassent allusion à l'utilisation du mandamus dans le but précis de limiter un délai. (Voir notamment les arrêts *R. c. Bradley*, [1941] R.C.S. 270, à la p. 277, le juge en chef Duff; *Rourke c. La Reine*, [1978] 1 R.C.S. 1021, à la p. 1027, le juge en chef Laskin; *Rahey*, précité, aux pp. 624 et 625, le juge Wilson, et à la p. 631, le juge La Forest.) En outre, il existe, dans le contexte administratif du droit de l'immigration, un courant jurisprudentiel particulier qui sanctionne une telle évolution, spécialement lorsque le délai cause des difficultés: par exemple, *Muia c. Canada (Ministre de la Citoyenneté et de l'Immigration)* (1996), 113 F.T.R. 234; *Dass c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1996] 2 C.F. 410 (C.A.), au par. 24; *Dee c. Canada (Ministre de la Citoyenneté et de l'Immigration)* (1998), 46 Imm. L.R. (2d) 278 (C.F. 1re inst.); *Kiani c. Canada (Ministre de la Citoyenneté et de l'Immigration)* (1999), 50 Imm. L.R. (2d) 81 (C.F. 1re inst.), au par. 34. C'est dans ce contexte que, dans *Bhatnager c. Ministre de l'Emploi et de l'Immigration*, [1985] 2 C.F. 315 (1re inst.), à la p. 317, le juge Strayer a tenu les propos suivants qui sont souvent cités:

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But *mandamus* can issue to require that some decision be made. Normally this would arise where there has been a specific refusal to make a decision, but it may also happen where there has been a long delay in the making of a decision without adequate explanation. [Emphasis added.]

Mais un bref de *mandamus* peut être délivré pour exiger qu'une décision soit rendue. Normalement, il en est ainsi lorsqu'il y a eu refus exprès de rendre une décision, mais ce peut être également le cas lorsqu'on tarde beaucoup à rendre une décision sans donner d'explication suffisante. [Je souligne.]

150 The common law system has always abhorred delay. In our system's development of the courts' supervisory role over administrative processes through mandamus, we see a crystallizing potential to compel government officers to do their duty and, in so doing, to avoid delay in administrative processes. The historical context in which our case law is rooted is a soil of well-established principles. This ground's more modern seedlings must now be examined.

150 La common law a toujours eu les délais en aversion. Dans notre régime de common law, la reconnaissance du rôle de surveillance par voie de mandamus que les cours de justice exercent sur les procédures administratives est perçue comme traduisant la possibilité de contraindre les fonctionnaires de l'État à faire leur devoir et, ce faisant, à éviter les délais dans le déroulement des procédures administratives. Le contexte historique dans lequel s'insère notre jurisprudence est constitué de principes bien établis. Il faut maintenant examiner la jurisprudence plus récente qui en a émané.

VI. Undue Delay and Procedural Fairness

VI. Délai injustifié et équité procédurale

151 English case law began in the last decades to bring these old streams of the common law together. In *R. v. Secretary of State for the Home Department, Ex parte Phansopkar*, [1976] Q.B. 606, the English Court of Appeal was prepared to act against unreasonable delay based on the *Magna Carta* itself, as reinforced by the *European Convention on Human Rights*. In *Re Preston*, [1985] A.C. 835, the House of Lords made clear that there could be judicial review of any delay amounting to an abuse of power or breach of natural justice. In *R. v. Chief Constable of the Merseyside Police, Ex parte Calveley*, [1986] 1 Q.B. 424, the English Court of Appeal applied this to a lengthy delay in notifying police officers of disciplinary charges against them. In the judgment of May L.J., at pp. 439-40, this was abusive and a breach of fairness because it disregarded the possibility of prejudice accruing to the officers on account of the delay. Unreasonable delay in administrative processes triggers the ancient rights of individuals who suffer prejudice as a result, and it gives the courts good reason to intervene against injustice. The modern English position, stated by W. Wade and C. Forsyth, *Administrative Law* (7th ed. 1994), at p. 649, is clear: "A statutory duty must be per-

151 Au cours des dernières décennies, les tribunaux britanniques ont commencé à réaliser la synthèse de ces vieux courants de common law. Dans *R. c. Secretary of State for the Home Department, Ex parte Phansopkar*, [1976] 1 Q.B. 606, la Cour d'appel d'Angleterre était disposée à réagir aux délais déraisonnables en se fondant sur la *Magna Carta* elle-même, telle qu'elle est renforcée par la *Convention européenne des droits de l'homme*. Dans *Re Preston*, [1985] A.C. 835, la Chambre des lords a précisé qu'il pouvait y avoir contrôle judiciaire de tout délai équivalant à un abus de pouvoir ou à un déni de justice naturelle. Dans *R. c. Chief Constable of the Merseyside Police, Ex parte Calveley*, [1986] Q.B. 424, la Cour d'appel d'Angleterre a appliqué cela au long délai écoulé avant que des policiers soient avisés des accusations d'infraction disciplinaire portées contre eux. Selon le lord juge May, aux pp. 439 et 440, il y avait eu abus et iniquité du fait qu'on n'avait pas tenu compte du préjudice que le délai pourrait causer aux policiers. Le délai déraisonnable dans des procédures administratives met en jeu les droits de longue date que possèdent les personnes qu'il lèse, et il donne aux tribunaux une bonne raison d'intervenir pour remédier à toute injustice qui peut avoir

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formed without unreasonable delay, and this may be enforced by mandamus" (emphasis added).

été causée. Le point de vue qui a cours actuellement en Angleterre selon W. Wade et C. Forsyth, *Administrative Law* (7e éd. 1994), à la p. 649, est clair: [TRADUCTION] «Une obligation légale doit être exécutée sans délai déraisonnable, et pareille exécution peut être obtenue par voie de mandamus» (je souligne).

152 With the few exceptions I noted at the outset of these reasons, modern Canadian courts have begun building on those historical principles and the developments in the English case law discussed above to develop a framework within which they may assess unreasonable delay. First, courts have linked the idea of procedural fairness with a bar on abuse of process through unreasonable delay: e.g., *Misra v. College of Physicians & Surgeons of Saskatchewan* (1988), 52 D.L.R. (4th) 477 (Sask. C.A.) (leave to appeal to SCC granted, [1989] 1 S.C.R. viii, but appeal later discontinued, [1992] 1 S.C.R. vii). Second, even on a traditional analysis, courts have expressed their preparedness to consider different kinds of adverse effects of delay, such as damage to individuals' reputations or other aspects of their lives, in conjunction with the traditionally recognized effects on the hearing: see, e.g., *Brown v. Assn. of Professional Engineers and Geoscientists of British Columbia*, [1994] B.C.J. No. 2037 (QL) (S.C.); and *Stefani v. College of Dental Surgeons (British Columbia)* (1996), 44 Admin. L.R. (2d) 122 (B.C.S.C.).

Sauf les quelques exceptions que j'ai mentionnées au début des présents motifs, les tribunaux canadiens modernes ont commencé à s'appuyer sur ces principes historiques et sur l'évolution de la jurisprudence anglaise mentionnée plus haut pour établir un cadre leur permettant de déterminer si un délai est déraisonnable. Premièrement, ils ont lié la notion d'équité procédurale à l'interdiction de tout abus de procédure découlant d'un délai déraisonnable: par exemple, *Misra c. College of Physicians & Surgeons of Saskatchewan* (1988), 52 D.L.R. (4th) 477 (C.A. Sask.) (autorisation de pourvoi accordée par la CSC, [1989] 1 R.C.S. viii, mais désistement ultérieur, [1992] 1 R.C.S. vii). Deuxièmement, même dans le cadre d'une analyse traditionnelle, les tribunaux ont affirmé qu'ils étaient disposés à tenir compte de divers types d'effet préjudiciable du délai, comme l'atteinte à la réputation ou d'autres préjudices personnels, conjointement avec ses effets traditionnellement reconnus sur l'audience: voir, par exemple, *Brown c. Assn. of Professional Engineers and Geoscientists of British Columbia*, [1994] B.C.J. No. 2037 (QL) (C.S.), et *Stefani c. College of Dental Surgeons (British Columbia)* (1996), 44 Admin. L.R. (2d) 122 (C.S.C.-B.).

153 Third, these two evolutions have become fused along with a realization that other adverse effects can create an abusive situation independently of evidentiary prejudice. In *Ratzlaff v. British Columbia (Medical Services Commission)* (1996), 17 B.C.L.R. (3d) 336 (C.A.), at para. 22, Hollinrake J.A. set out a theoretical framework within which the courts may consider unreasonable delay, along with some of the relevant factors in assessing it:

Troisièmement, outre ces deux évolutions, on s'est rendu compte que d'autres effets préjudiciables peuvent engendrer une situation abusive indépendamment du préjudice lié à la possibilité de présenter des éléments de preuve. Dans *Ratzlaff c. British Columbia (Medical Services Commission)* (1996), 17 B.C.L.R. (3d) 336 (C.A.), au par. 22, le juge Hollinrake a énoncé un cadre théorique à l'intérieur duquel les tribunaux pourraient déterminer si un délai est déraisonnable, ainsi que certains facteurs à prendre en considération à cette fin:

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Abuse of power is a broader notion, akin to oppression. It encompasses procedural unfairness, conduct equivalent to breach of contract or of representation, and, in my view, unjust delay. I should add that not all lengthy delays are unjust; regard must be had to the causes of delay, and to resulting reasonable changes of position. [Emphasis added.]

[TRADUCTION] La notion d'abus de pouvoir est large et s'apparente à l'oppression. Elle englobe l'iniquité procédurale, la conduite équivalant à la rupture d'un contrat ou à une fausse déclaration et, à mon avis, le délai injustifié. J'ajouterais que tous les délais ne sont pas injustifiés; il faut tenir compte des causes du délai ainsi que des changements raisonnables de situation qui en ont résulté. [Je souligne.]

This analytical method, in which unreasonable delay is assimilated to a type of abuse, helped Hollinrake J.A. to recognize that adverse effects other than on hearing fairness can be considered independently. He writes at para. 19, "where the delay is so egregious that it amounts to an abuse of power or can be said to be oppressive, the fact that the hearing itself will be a fair one is of little or no consequence".

Cette méthode analytique, dans laquelle le délai déraisonnable est assimilé à une sorte d'abus, a aidé le juge Hollinrake à reconnaître que des effets préjudiciables autres que celui sur l'équité de l'audience peuvent être pris en considération indépendamment. Il écrit, au par. 19, que [TRADUCTION] «lorsque le délai est énorme au point de constituer un abus de pouvoir ou de pouvoir être qualifié d'oppressif, le fait que l'audience elle-même sera équitable importe peu ou pas du tout».

Abusive administrative delay is wrong and it does not matter if it wrecks only your life and not your hearing. The cases that have been part of this evolution have sometimes expressed the point differently, but the key consideration is this: administrative delay that is determined to be unreasonable based on its length, its causes, and its effects is abusive and contrary to the administrative law principles that exist and should be applied in a fair and efficient legal system.

154 Le délai administratif abusif est répréhensible, et ce, peu importe qu'il ne ruine que la vie d'une personne sans affecter l'audition à laquelle elle a droit. La jurisprudence associée à cette évolution expose parfois ce point de vue différemment, mais le facteur clé est le suivant: le délai administratif jugé déraisonnable en raison de sa durée, de ses causes et de ses effets est abusif et contraire aux principes du droit administratif qui existent et qui devraient s'appliquer dans un système juridique équitable et efficace.

Unreasonable delay is not limited to situations that bring the human rights system into disrepute either by prejudicing the fairness of a hearing or by otherwise rising above a threshold of shocking abuse. Otherwise, there would not be any remedy for an individual suffering from unreasonable delay unless this same individual were unlucky enough to have suffered sufficiently to meet an additional, external test of disrepute resulting to the human rights system. Such a limitation may arise from a fear that the main remedy available would be the blunt instrument of the stay of proceedings. However, as we will see below, a remedy other than a stay may be appropriate in other cases where ongoing delay is abusive. It is true that some of the cases that have most developed the doctrine of abusive delay involved lengthier periods of time that, in conjunction with other factors,

155 Un délai n'est pas déraisonnable uniquement dans le cas où le régime de protection des droits de la personne est déconsidéré en raison d'une atteinte à l'équité de l'audience ou du fait que le délai a franchi le seuil d'un abus scandaleux. Si c'était le cas, la personne lésée par un délai injustifié ne disposerait d'aucun recours à moins d'avoir eu la malchance d'être suffisamment lésée pour satisfaire à un autre critère externe, celui de la déconsidération du régime de protection des droits de la personne. Pareille restriction peut découler de la crainte que la principale réparation disponible ne soit l'arrêt pur et simple des procédures. Cependant, comme nous le verrons plus loin, une réparation différente de l'arrêt des procédures peut convenir dans d'autres cas où le délai qui s'écoule est abusif. Il est vrai que, dans certaines des décisions qui ont le plus contribué à l'établissement de la

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warranted stays of proceedings. (see, e.g., the cases cited by Bastarache J. at paras. 117-18). They were cases that passed the highest threshold of abusiveness. Because of this, they did not discuss a lower threshold of unreasonable delay that might warrant some kind of judicial action and different, less radical, remedies than a stay in the administrative proceedings.

règle du délai abusif, il était question de périodes plus longues qui, en plus d'autres facteurs, justifiaient l'arrêt des procédures (voir, par exemple, la jurisprudence citée par le juge Bastarache, aux par. 117 et 118). Il s'agissait de cas qui satisfaisaient au critère le plus rigoureux du caractère abusif. À cause de cela, on n'y analysait pas le critère moins rigoureux du délai déraisonnable qui pourrait justifier une forme quelconque d'intervention judiciaire et d'autres réparations moins radicales que l'arrêt des procédures administratives.

VII. Assessing Unreasonable Delay

156 The authorities and policy considerations that have been reviewed thus far confirm that modern administrative law is deeply averse to unreasonable delay. But nobody suggests the elimination of all delay *per se* — and with good reason. At the limit, a prohibition on delay *per se* would ban any and all delay. This would be an absurd result that would undermine rather than uphold a fair judicial system. Such an approach would, for example, deny parties on both sides the chance to prepare for the hearing (cf. *R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1694). Thus, unreasonable delays must be identified within the specific circumstances of every case.

157 In assessing a particular delay in the process of a specific administrative body, we must keep in mind two principles: (1) not all delay is the same; and (2) not all administrative bodies are the same. First, there are different kinds of delay. There are two kinds of delay in an administrative context: general delay and individual delay. Each of these, in turn, may encompass both necessary and unnecessary delay. General delay may include certain kinds of delay due to substantive and procedural complexities inherent in the kind of matter the tribunal deals with, but it may also include delays from systemic problems. Individual delay may relate to the special complexity of a particular decision, but it may also include delays from inattention to a particular file. (See generally: S. N. McMurtrie, "The Waiting Game — The Parliamentary Commissioner's Response to Delay in

VII. Détermination du délai déraisonnable

La doctrine, la jurisprudence et les considérations de principe qui ont été examinées jusqu'ici confirment la profonde aversion du droit administratif moderne pour le délai déraisonnable. Cependant, personne ne propose l'élimination de tout délai en soi, et ce, pour une bonne raison. À la limite, l'interdiction du délai en soi aurait pour effet d'interdire tout délai. Ce serait un résultat absurde qui minerait un système judiciaire équitable au lieu de le préserver. Une telle approche priverait notamment les deux parties de la possibilité de se préparer pour l'audience (comparer avec *R. c. Conway*, [1989] 1 R.C.S. 1659, à la p. 1694). Il faut donc déterminer si un délai est déraisonnable en fonction des circonstances particulières de chaque cas.

Pour évaluer un délai dans les procédures d'un organisme administratif donné, il faut conserver deux principes à l'esprit: (1) les délais ne sont pas tous les mêmes, et (2) les organismes administratifs diffèrent les uns des autres. Premièrement, il existe différents types de délai. Dans le contexte administratif, il y en a deux: le délai général et le délai particulier. Chacun d'eux peut englober à son tour le délai nécessaire et le délai inutile. Le délai général peut comprendre certains types de délai dus à des difficultés de fond et de procédure inhérentes au genre d'affaire dont le tribunal est saisi, mais il peut aussi comprendre les délais dus à des problèmes systémiques. Le délai particulier peut être lié à la complexité particulière d'une décision donnée, mais il peut aussi comprendre le délai imputable au manque d'attention accordée à un dossier. (Voir, de manière générale, S. N.

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Administrative Procedures", [1997] *Public Law* 159; and L. S. Skiffington, "Federal Administrative Delay: Judicial Remedies and Application in the Natural Resource Context" (1982), 28 *Rocky Mtn. Min. L. Inst.* 671.)

McMurtrie, «The Waiting Game — The Parliamentary Commissioner's Response to Delay in Administrative Procedures», [1997] *Public Law* 159, et L. S. Skiffington, «Federal Administrative Delay: Judicial Remedies and Application in the Natural Resource Context» (1982), 28 *Rocky Mtn. Min. L. Inst.* 671.)

Second, not all administrative bodies are the same. Indeed, this is an understatement. At first glance, labour boards, police commissions, and milk control boards may seem to have about as much in common as assembly lines, cops, and cows! Administrative bodies do, of course, have some common features, but the diversity of their powers, mandate and structure is such that to apply particular standards from one context to another might well be entirely inappropriate. Thus, inevitably, a court's assessment of a particular delay in a particular case before a particular administrative body has to depend on a number of contextual analytic factors.

158 Deuxièmement, les organismes administratifs diffèrent les uns des autres. En fait, c'est le moins qu'on puisse dire. À première vue, un conseil des relations de travail, une commission de police et un office de contrôle laitier peuvent paraître avoir autant de points en commun qu'une ligne d'assemblage, un policier et une vache! Les organismes administratifs ont évidemment certaines caractéristiques en commun, mais en raison de la diversité de leurs attributions, de leur mandat et de leur organisation, il peut être totalement inapproprié d'appliquer les mêmes normes d'un contexte à l'autre. Par conséquent, l'évaluation judiciaire d'un délai dans une affaire particulière dont est saisi un organisme administratif donné doit inévitablement tenir compte d'un certain nombre de facteurs d'analyse contextuels.

In order to differentiate reasonable and unreasonable delay, a balancing exercise becomes necessary. Courts must, indeed, remain alive not only to the needs of administrative systems under strain, but also to their good faith efforts to provide procedural protections to alleged wrongdoers. One must approach matters with some common sense and ask whether a lengthy delay that profoundly harms an individual's life is really justified in the circumstances of a given case.

159 Pour distinguer un délai raisonnable d'un délai déraisonnable, une évaluation s'impose. Les tribunaux doivent en effet être conscients non seulement des besoins des régimes administratifs soumis à des contraintes, mais aussi des efforts qu'ils déploient de bonne foi en vue d'offrir des protections procédurales aux présumés contrevenants. Il faut faire preuve de bon sens et se demander si le long délai qui ruine profondément l'existence d'une personne est véritablement justifié dans les circonstances d'une affaire donnée.

As indicated above, the central factors toward which the modern administrative law cases as a whole propel us are length, cause, and effects. Approaching these now with a more refined understanding of different kinds and contexts of delay, we see three main factors to be balanced in assessing the reasonableness of an administrative delay:

160 Comme nous l'avons vu, les principaux facteurs dont l'ensemble de la jurisprudence moderne en droit administratif nous invite à tenir compte sont la longueur, la cause et les effets. Grâce à une meilleure compréhension des différents types de délai et des différents contextes dans lesquels ils se situent, nous considérons que, pour évaluer le caractère raisonnable d'un délai administratif, trois facteurs principaux doivent être appréciés:

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(1) the time taken compared to the inherent time requirements of the matter before the particular administrative body, which would encompass legal complexities (including the presence of any especially complex systemic issues) and factual complexities (including the need to gather large amounts of information or technical data), as well as reasonable periods of time for procedural safeguards that protect parties or the public;

(2) the causes of delay beyond the inherent time requirements of the matter, which would include consideration of such elements as whether the affected individual contributed to or waived parts of the delay and whether the administrative body used as efficiently as possible those resources it had available; and

(3) the impact of the delay, considered as encompassing both prejudice in an evidentiary sense and other harms to the lives of real people impacted by the ongoing delay. This may also include a consideration of the efforts by various parties to minimize negative impacts by providing information or interim solutions.

(See generally: *Ratzlaff*, *supra*, at p. 346; *Saskatchewan (Human Rights Commission) v. Kodellas* (1989), 60 D.L.R. (4th) 143 (Sask. C.A.); *R. v. Morin*, [1992] 1 S.C.R. 771; McMurtrie, *supra*; and Skiffington, *supra*.) Obviously, considering all of these factors imposes a contextual analysis. Thus, our Court should avoid setting specific time limits in such matters. A judge should consider the specific content of the case he or she is hearing and make an assessment that takes into account the three main factors that have been identified above.

(1) le délai écoulé par rapport au délai inhérent à l'affaire dont est saisi l'organisme administratif en cause, ce qui comprendrait la complexité juridique (y compris l'existence de questions systémiques particulièrement complexes) et la complexité factuelle (y compris la nécessité de recueillir de grandes quantités de renseignements ou de données techniques), ainsi que les délais raisonnables pour que les parties ou le public bénéficient de garanties procédurales;

(2) les causes de la prolongation du délai inhérent à l'affaire, ce qui comprendrait notamment l'examen de la question de savoir si la personne touchée a contribué ou renoncé à certaines parties du délai, et celle de savoir si l'organisme administratif a utilisé aussi efficacement que possible les ressources dont il disposait;

(3) l'incidence du délai, considérée comme englobant le préjudice sur le plan de la preuve et les autres atteintes à l'existence des personnes touchées par le délai qui s'écoule. Cela peut également comprendre l'examen des efforts que les différentes parties ont déployés pour réduire au minimum les effets négatifs en fournissant des renseignements ou en apportant des solutions provisoires.

(Voir, de manière générale, *Ratzlaff*, précité, à la p. 346; *Saskatchewan (Human Rights Commission) c. Kodellas* (1989), 60 D.L.R. (4th) 143 (C.A. Sask.); *R. c. Morin*, [1992] 1 R.C.S. 771; McMurtrie, *loc. cit.*; Skiffington, *loc. cit.*) L'examen de ces facteurs commande, de toute évidence, une analyse contextuelle. Notre Cour devrait donc éviter d'imposer des délais précis en la matière. Un juge devrait examiner les faits particuliers de l'affaire dont il est saisi et faire une évaluation qui tienne compte des trois principaux facteurs décrits plus haut.

161 A number of parties have raised the objection that the consideration of some of those factors may extend "special treatment" to certain kinds of individuals, whether these be people who commit more stigmatizing wrongs or who are more susceptible to harms like damage to their reputations. Some interveners were afraid that the application of such factors might indeed require preferential

Plusieurs parties ont soulevé l'objection selon laquelle l'examen de certains de ces facteurs peut avoir pour effet d'accorder un «traitement particulier» à certaines personnes, qu'il s'agisse de gens qui commettent des fautes plus stigmatisantes ou de gens qui sont plus exposés à des préjudices comme l'atteinte à la réputation. Certains intervenants craignaient que l'application de tels facteurs

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treatment for powerful and influential people. These objections and fears are misplaced. It appears sound administrative practice for decision-making bodies to recognize the relevance of the identified factors while deciding how to process a particular case. For example, task forces analysing delay report that it is simply a good case management practice to send to different tracks cases of differing levels of complexity: see, e.g., Brookings Task Force on Civil Justice Reform, *Justice for All: Reducing Costs and Delay in Civil Litigation* (1989), at p. 3. Similarly, it only makes sense for administrative bodies seeking to minimize their negative impacts on real people to consider the ramifications of their failure to act expeditiously. In any event, every case should be processed with due dispatch.

n'exige, en fait, que des personnes puissantes et influentes jouissent d'un traitement préférentiel. Ces objections et ces craintes ne sont pas fondées. Le fait qu'un organisme décideur reconnaisse la pertinence des facteurs décrits pour décider de la façon de traiter une affaire donnée semble être une saine pratique administrative. Par exemple, des groupes de travail qui analysent les délais signalent qu'une bonne pratique de gestion des dossiers consiste simplement à traiter différemment des affaires comportant des niveaux de complexité différents: voir, par exemple, Brookings Task Force on Civil Justice Reform, *Justice for All: Reducing Costs and Delay in Civil Litigation* (1989), à la p. 3. De même, il est seulement logique qu'un organisme administratif qui cherche à réduire au minimum son incidence négative sur des personnes tienne compte des conséquences de son omission d'agir rapidement. Quoi qu'il en soit, toute affaire devrait être traitée avec célérité.

VIII. Delays Before the British Columbia Human Rights Commission in This Case

VIII. Délai écoulé en l'espèce dans les procédures devant la Commission des droits de la personne de la Colombie-Britannique

Unreasonable delay in administrative proceedings is illegal under administrative law. It is a breach of the duty to conduct administrative proceedings fairly. Because of the highly contextual nature of any assessment of delay, I turn now to an analysis of the identified factors in the case at bar. I eventually conclude that inefficiency in the Commission's handling of this matter has led to abuse of process that must be addressed with the appropriate remedies in the circumstances of the case and in consideration of the interests of the complainants.

162 En droit administratif, le délai déraisonnable dans des procédures administratives est illégal. Il constitue un manquement à l'obligation d'assurer un déroulement équitable des procédures. Vu le caractère hautement contextuel de l'évaluation du délai, je vais maintenant analyser les facteurs décrits dans la présente affaire. Je conclus, en définitive, que la façon inefficace dont la Commission a traité la présente affaire a donné lieu à un abus de procédure auquel il faut remédier en accordant la réparation appropriée dans les circonstances de l'affaire et en tenant compte des intérêts des plaignantes.

A. *Length of Delay*

A. *La longueur du délai*

The first factor to be considered is the time taken relative to the inherent time requirements of the matter. In the Court of Appeal, McEachern C.J.B.C. characterized the allegations in the case at bar as "relatively simple complaints" ((1998), 49 B.C.L.R. (3d) 216, at para. 37), stated that "[t]hese kinds of disputes are quickly resolved by courts and tribunals all the time, and there are no complex

163 Le premier facteur à prendre en considération est le délai écoulé par rapport au délai inhérent à l'affaire. Le juge en chef McEachern de la Cour d'appel de la Colombie-Britannique a qualifié les allégations en l'espèce de [TRADUCTION] «plaintes relativement simples» ((1998), 49 B.C.L.R. (3d) 216, au par. 37). Il a affirmé que «[l]es tribunaux judiciaires et les tribunaux administratifs règlent

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legal or factual issues" (para. 37), and concluded that "a week at the outside would have sufficed" (para. 51) for the investigation. Although McEachern C.J.B.C. perhaps puts matters a bit optimistically in suggesting that the investigation could have been wrapped up within a week, there is a good measure of truth in what he says.

toujours rapidement ce genre de différend, et qu'aucune question juridique ou factuelle complexe ne se pose» (par. 37) et a conclu qu'«il aurait suffi tout au plus d'une semaine» (par. 51) pour effectuer l'enquête. Bien que le juge en chef McEachern soit quelque peu optimiste lorsqu'il laisse entendre que l'enquête aurait pu être complétée en moins d'une semaine, il y a une grande part de vérité dans ce qu'il dit.

164 At this point, a closer scrutiny of the facts is necessary in order to establish the inherent time requirements of the case. Different kinds of "allegations of sexual discrimination" may be more or less complex. A pay equity case might properly involve complex statistical analysis and innovative legal arguments and take time for those reasons. A case about other forms of well-concealed systemic discrimination might involve numerous witnesses and take time for that reason. But other cases that involve "allegations of sexual harassment" between individuals may have few complex legal or factual elements and thus appropriately should take much less time.

À ce stade, un examen plus minutieux des faits s'impose pour déterminer le délai inhérent à l'affaire. Une «allégation de discrimination sexuelle» peut être plus ou moins complexe selon le cas. Une affaire d'équité salariale pourrait requérir, à juste titre, une analyse statistique complexe et une argumentation juridique novatrice, et durer ainsi un certain temps. Une affaire portant sur d'autres formes de discrimination systémique bien dissimulée pourrait faire intervenir de nombreux témoins et se prolonger pour cette raison. Cependant, il se peut que d'autres affaires où il est question d'«allégations de harcèlement sexuel» entre des personnes comportent peu d'éléments juridiques ou factuels complexes et durent éventuellement moins longtemps.

165 Considering the complexity of the allegations should not be seen to reflect in any way on their merits. This being said, the case at bar falls within a relatively less complex category. The allegations with respect to Willis, an aide to Blencoe, were that Blencoe made sexual overtures to her and inappropriately kissed her when she came to work one evening in August 1994 and that he had subsequently put his arm on her arm in a sexual manner in March 1995. The allegations with respect to Schell were that Blencoe in March 1993 had inappropriately kissed and hugged Schell, who worked for a sports organization deriving funding from Blencoe's ministry, and that he had subsequently on several occasions between July 1993 and July 1994 given her unwanted attention by inviting her for a drink. There were no other direct witnesses to any of the incidents, although there was some corroborating evidence from a small number of other

La complexité des allégations ne devrait pas être perçue comme ayant une incidence quelconque sur leur bien-fondé. Cela dit, le présent dossier tombe dans la catégorie des affaires relativement moins complexes. Il était allégué, au sujet de Willis, une adjointe de Blencoe, que ce dernier lui avait fait des avances sexuelles et l'avait embrassée inopportunément lorsqu'elle s'était rendue au bureau pour y travailler un soir du mois d'août 1994, et qu'en mars 1995 il avait appuyé son bras contre le sien dans un dessein apparemment sexuel. Il était allégué, au sujet de Schell, qu'en mars 1993 Blencoe l'avait embrassée et étreinte inopportunément alors qu'elle travaillait pour une association sportive financée par le ministère de Blencoe, et qu'à maintes reprises, entre juillet 1993 et juillet 1994, il lui avait accordé une attention non souhaitée en l'invitant à prendre un verre. Personne d'autre n'a été directement témoin de ces incidents, bien qu'il y ait eu témoignage corroborant de la part d'un petit nombre d'autres personnes. Les allégations

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witnesses. Blencoe denied some aspects of the allegations and admitted others.

ont fait l'objet de dénégations de la part de Blencoe à certains égards et d'aveux à d'autres égards.

Recognizing that this case is far less complex than many other sexual discrimination cases does not alleviate the seriousness of the allegations, but it is clear from the record that the allegations were not of a nature that could justify a prolonged investigation. Ultimately, the case was about a "he said/she said" scenario concerning which there should have been an adjudication. In this sense, there was little or nothing to investigate, and there was no reason for the pre-hearing investigation to take a long period of time.

166 La reconnaissance que la présente affaire est beaucoup moins complexe que bien d'autres affaires de discrimination sexuelle n'atténue pas la gravité des allégations, mais il ressort clairement du dossier que ces allégations n'étaient pas de nature à justifier la tenue d'une enquête prolongée. En fin de compte, il était question de versions opposées des faits, qui auraient dû donner lieu à une décision. Il y avait donc peu ou pas matière à enquête, de sorte que rien ne justifiait que l'enquête préalable à l'audience se prolonge.

Lowry J. expressed serious misgivings about the delays in this case. He wrote at para. 46:

> It may well be that the structure of the Commission should be such that, given the nature of the complaints made by Ms. Schell and Ms. Willis, two years would not be required to determine that they warrant a hearing. [Emphasis added.]

167 Le juge Lowry a exprimé de sérieuses réserves au sujet du délai écoulé en l'espèce. Il a écrit, au par. 46:

> [TRADUCTION] Il se peut fort bien que la Commission doive être organisée de telle sorte que, compte tenu de la nature des plaintes de Mmes Schell et Willis, deux années ne soient pas nécessaires pour déterminer si elles justifient la tenue d'une audience. [Je souligne.]

While Lowry J. went on to attribute the delay to a lack of resources, he questioned the effectiveness of the Commission, and his finding that two years was an inappropriately long time confirms my conclusion on this branch of the analysis. The inherent time requirements in this case were minimal.

Bien qu'il ait ensuite imputé le délai à un manque de ressources, le juge Lowry a mis en doute l'efficacité de la Commission, et sa conclusion qu'un délai de deux ans était trop long confirme la mienne en ce qui a trait à ce volet de l'analyse. Le délai inhérent à la présente affaire était minime.

By contrast, the time taken was anything but minimal. After five to six months spent on determining that it could hear the complaints, and once Blencoe had a chance to respond, the Commission then mysteriously took the five months from April 1996 to September 1996 to appoint the same investigator who had been working on the file all along despite having told Blencoe that it expected to do so within two months (appellants' record, at p. 229). The investigation took some four months. The trial judge found at para. 44 that this investigation was concluded in January 1997. Given this finding, then after this conclusion of the investigation, it apparently took the investigator another two months to write and forward a 12-page

168 Par contre, le délai écoulé était loin d'être minime. Après avoir mis cinq à six mois à décider qu'elle pourrait entendre les plaintes et après que Blencoe eut obtenu la possibilité de répondre, la Commission a mystérieusement mis cinq mois, soit d'avril à septembre 1996, à désigner le même enquêteur qui s'était occupé jusque-là du dossier, même si elle avait auparavant dit à Blencoe qu'elle s'attendait à le faire dans un délai de deux mois (dossier des appelants, à la p. 229). L'enquête a duré environ quatre mois. Le juge de première instance a conclu, au par. 44, que l'enquête avait pris fin en janvier 1997. Compte tenu de cette conclusion, après la fin de l'enquête, l'enquêteur aurait alors mis deux autres mois à rédiger un rapport de

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report in early March 1997, and this only after letters from Blencoe's lawyer asking about the delay (appellants' record, at pp. 322-35). After another four months, in July 1997, the Commission finally told Blencoe that the matter would proceed to a Tribunal hearing. It then took another two months to get a date set for the hearing, which was scheduled to be some six months later in March 1998. In all, the time for the Commission to make the determination that the complaints should go to a hearing was approximately two years. The time from the initial filing of the complaints to the scheduled hearing was approximately 32 months. While it is true that the Commission's decision to send the matter to a hearing involved a number of steps, every one of these steps involved a significant delay.

12 pages qui a été transmis au début du mois de mars 1997, et ce, uniquement après que l'avocat de Blencoe eut envoyé des lettres dans lesquelles il posait des questions au sujet du délai écoulé (dossier des appelants, aux pp. 322 à 335). Quatre autres mois plus tard, en juillet 1997, la Commission a finalement avisé Blencoe que le Tribunal procéderait à l'audition de l'affaire. Deux autres mois se sont ensuite écoulés avant qu'une date d'audience soit fixée au mois de mars 1998, soit quelque six mois plus tard. En tout, il a fallu environ deux ans à la Commission pour décider que les plaintes feraient l'objet d'une audience. Environ 32 mois se sont écoulés entre le dépôt initial des plaintes et la date fixée pour leur audition. Même s'il est vrai que la Commission a dû franchir un certain nombre d'étapes pour décider que l'affaire ferait l'objet d'une audience, chacune de ces étapes a comporté un délai considérable.

169 A particularly egregious example of the Commission's unacceptable lack of diligence may be found in the events during the period from October 16, 1995 to December 21, 1995. During that time, the Commission breached procedural fairness by failing to send to Blencoe Willis's October 16 response to his submissions on the timeliness of her complaint. In response to an inquiry, Blencoe received the Commission's letter dated December 21 on December 27. Although the December 21 letter denied that a decision had been made on this issue, a January 22, 1996 letter revealed that the Commission had actually already made the decision on December 18, before it even sent Blencoe the documents to which he had wished to reply and that the Commission had possessed for three months (see pp. 290-300 of the appellants' record). The Commission essentially failed even to keep those affected by its decisions up to date with what was going on.

Les événements qui se sont déroulés entre le 16 octobre et le 21 décembre 1995 sont un exemple particulièrement frappant du manque inacceptable de diligence de la Commission. Au cours de cette période, la Commission a manqué à son obligation d'équité procédurale en ne transmettant pas à Blencoe la réponse du 16 octobre que Willis avait donnée à ses observations concernant le respect du délai imparti pour déposer la plainte. À la suite d'une demande de renseignements, Blencoe a reçu, le 27 décembre, la lettre de la Commission datée du 21 décembre. Même si, dans la lettre du 21 décembre, on niait qu'une décision avait été prise à ce sujet, une lettre datée du 22 janvier 1996 a révélé que la Commission avait déjà pris une décision le 18 décembre 1995, avant même d'envoyer à Blencoe les documents auxquels il voulait répondre et qu'elle avait en sa possession depuis trois mois (voir les pp. 290 à 300 du dossier des appelants). La Commission a essentiellement omis de tenir au courant de la situation les personnes touchées par ses décisions.

170 Regardless of any arguments that parts of the time were necessary for procedural safeguards, the facts are that the Commission was slow at every step along the way. This eventually added up to a delay measured in years for a decision that was not

Indépendamment de tout argument que le délai était en partie nécessaire pour offrir des garanties procédurales, il reste que la Commission a été lente à toutes les étapes. Il lui a fallu, en définitive, plusieurs années pour prendre une décision non

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inherently complex. Although a few letters back and forth might have been appropriate, nothing in the inherent time requirements of the case came close to requiring the delay that occurred.

B. *Cause of the Delay*

The second factor that we must consider is the cause of delay beyond the inherent time requirements of the matter. It is true that Blencoe sought to use those defences available to him, including an argument about whether the complaints had been correctly filed within the limitation period provided by the statute. But in so doing, he did not become responsible for the sheer inefficiency of the Commission in dealing with these and other matters.

A measure of Blencoe's determination to seek an end to the delay is that even after matters had been delayed to this point largely on account of the Commission's failures to comply with basic procedural fairness, he offered to forego the investigative stage of the complaints to bring them to a hearing. In so doing, we may infer that he made clear to the Commission that he was seeking a way past the delay and red tape in which his life had become bound. In his request, he was rebuffed, as the Commission would have required him to make major concessions on the existence of a *prima facie* case against him, if he wanted to proceed to the hearing. (Although Blencoe made the offer only on the Willis complaint, this seems to be explained by the fact that he was simultaneously trying to find out whether a decision on the timeliness issue in the Schell complaint had been made without notification as had occurred with the Willis complaint (see the appellants' record at pp. 220 and 301).) On numerous other occasions as well, Blencoe asked about when there would be a decision on the complaints. Indeed, Blencoe's inquiries of this nature comprise a significant number of the letters in the record. There can be no doubt that there was serious delay on both complaints and that Blencoe tried to find a way to end it. After being thus rebuffed, his counsel was under no obligation to beg and cry for an expedited hear-

complexe en soi. Même si un certain échange de correspondance avait pu être approprié, le délai inhérent à l'affaire était loin de correspondre à celui qui s'est écoulé.

B. *La cause du délai*

171 Le deuxième facteur que nous devrons prendre en considération est la cause de la prolongation du délai inhérent à l'affaire. Il est vrai que Blencoe a tenté d'invoquer les moyens de défense dont il disposait, y compris l'argument de la question de savoir si les plaintes avaient été dûment déposées dans le délai prévu par la loi. Toutefois, ce faisant, il n'est pas devenu responsable de l'inefficacité pure et simple dont la Commission a fait preuve en traitant ces plaintes et d'autres questions.

172 Blencoe a montré à quel point il était déterminé à mettre fin au délai en offrant de renoncer à l'étape de l'enquête sur les plaintes et de passer directement à une audience, même si les choses avaient jusque-là traîné en longueur surtout à cause du manquement de la Commission à son obligation fondamentale d'équité procédurale. On peut déduire que, ce faisant, il a clairement signifié à la Commission qu'il souhaitait en finir avec les délais et les formalités administratives qui lui empoisonnaient la vie. Il a essuyé une rebuffade à ce sujet étant donné que, pour passer directement à l'audience, la Commission l'aurait obligé à faire des concessions importantes au sujet de l'existence d'une preuve *prima facie* contre lui. (Quoique Blencoe n'ait fait cette offre qu'à l'égard de la plainte de Willis, cela semble s'expliquer par le fait qu'il tentait, en même temps, de découvrir si une décision concernant le respect du délai imparti dans le cas de la plainte de Schell avait été rendue à son insu comme cela s'était produit relativement à la plainte de Willis (voir les pp. 220 et 301 du dossier des appelants).) Comme l'atteste un grand nombre de lettres versées au dossier, Blencoe a aussi maintes fois demandé à quel moment une décision serait rendue sur les plaintes. Il ne fait aucun doute que les deux plaintes ont fait l'objet d'un délai important auquel Blencoe a tenté de mettre fin. Après cette rebuffade, il n'était plus

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ing to demonstrate to the Human Rights Commission the seriousness of his requests.

173 A further measure of the Commission's behaviour with respect to delay is that even at the Supreme Court of Canada, the Commission admits that it cannot explain what was going on for five months of the time that it was dealing with the allegations against Blencoe. On a matter that ideally should not even have taken five months, a five-month period of unexplained delay remains surprising and troubling. Lowry J. characterized this period as a "five-month hiatus when there appears to have been no activity in relation to the complaints" (para. 47). After the gap, the Commission sent Blencoe a letter dated September 6, 1996 to advise him that it was appointing the same person as investigator as had up to that point been dealing with the pre-investigation report. In other words, in five months, nothing happened. This five-month lapse is just the high mark of the Commission's ineptitude.

C. *Impact of Delay on the Respondent*

174 The third factor that we must consider is the harm accruing as a result of the delay. Although Lowry J. found "that no clear case of prejudice in terms of an inability to defend has been made out" (para. 10), there is no doubt that Blencoe and his family suffered serious harm in other ways. Lowry J. went so far as to write at para. 50:

> There is, however, substance to the contention that the hardship Mr. Blencoe, his wife, and his children have suffered, and continue to suffer, is markedly disproportionate to the value there can now be in an adjudicated resolution. [Emphasis added.]

175 There can be no doubt about the impact of the allegations on the respondent and his family. The respondent's career is finished. He and his family have been chased twice across the country in their

nécessaire que l'avocat de Blencoe s'efforce de convaincre la Commission du sérieux des demandes de son client en faisant des pieds et des mains pour obtenir rapidement la tenue d'une audience.

Une autre exemple de la conduite que la Commission adopte en matière de délais est que, même devant la Cour suprême du Canada, elle reconnaît qu'elle ne peut pas expliquer ce qui s'est passé durant les cinq mois au cours desquels elle a traité les allégations formulées contre Blencoe. Dans une affaire qui, idéalement, n'aurait même pas dû se prolonger pendant cinq mois, un délai inexpliqué de cinq mois est à la fois étonnant et troublant. Le juge Lowry a qualifié cette période de [TRADUCTION] «vide de cinq mois pendant lequel rien ne semble s'être passé relativement aux plaintes» (par. 47). Après cette période, la Commission a envoyé à Blencoe une lettre datée du 6 septembre 1996 l'informant qu'elle désignait à titre d'enquêteur la personne qui, jusque-là, s'était occupée du rapport préalable à l'enquête. En d'autres termes, rien ne s'est passé pendant cinq mois. Cet intervalle n'est que le paroxysme de l'ineptie dont la Commission a fait preuve.

C. *L'incidence du délai sur l'intimé*

Le troisième facteur que nous devons prendre en considération est le préjudice résultant du délai. Même si le juge Lowry a conclu [TRADUCTION] «qu'il n'y a aucune preuve manifeste de préjudice en ce qui concerne la capacité de se défendre» (par. 10), il n'y a pas doute que Blencoe et sa famille ont subi un grave préjudice à d'autres égards. Le juge Lowry va jusqu'à écrire, au par. 50:

> [TRADUCTION] Il y a toutefois de quoi prétendre que les difficultés que M. Blencoe, son épouse et ses enfants ont éprouvées et qu'ils continuent d'éprouver sont nettement disproportionnées à l'avantage qu'il peut maintenant y avoir d'obtenir une décision sur l'affaire. [Je souligne.]

Il n'y a aucun doute que les allégations ont une incidence sur l'intimé et sa famille. La carrière de l'intimé est terminée. Sa famille et lui ont été traqués à deux reprises lorsqu'ils ont tenté de

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attempts to make a new life. He was under medical care for clinical depression for many months. In the wake of the outstanding complaints before the Commission, even such a normal aspect of life as coaching his youngest son's soccer team has been denied to Blencoe, since he has faced stigmatization in the form of presumed guilt as a sexual harasser. As Lowry J. wrote at para. 13:

> The point need not be further stressed. The stigma attached to the outstanding complaints has certainly contributed in large measure to the very real hardship Mr. Blencoe has experienced. His public profile as a Minister of the Crown rendered him particularly vulnerable to the media attention that has been focused on him and his family, and the hardship has, in the result, been protracted and severe. [Emphasis added.]

Although I do not deny that Blencoe might have taken additional steps to make the Commission more fully aware of the impact on him of continued delay, he did try to move matters along. The Commission showed next to no regard for the possible impacts of its delays, often taking long periods of time even to respond to requests for information as to the progress of the file. It certainly did nothing to minimize the impact of the delay on the respondent.

It is true that administrative delay was not the only cause of the prejudice suffered by the respondent. Nevertheless, it contributed significantly to its aggravation. It must be added, though, that this delay also frustrated the complainants in their desire for a quick disposition of their complaints. Finally, the inefficient and delay-filled process at the Commission linked with the specific blunders made in the management of those particular complaints harmed all parties involved in this sorry process. Its flaws were such that it may rightly be termed to have been abusive in respect of the respondent. In this connection, I note that my colleague, Bastarache J., despite coming to the conclusion that the conduct of the Commission did not amount to an abuse of process, nevertheless found it necessary to award costs against the Commission in light of the "lack of diligence [it] displayed"

refaire leur vie ailleurs au pays. Pendant plusieurs mois, il a eu recours à des soins médicaux pour traiter une dépression clinique. À la suite des plaintes déposées devant la Commission, Blencoe a même été empêché d'exercer une activité aussi normale qu'entraîner l'équipe de soccer de son fils cadet en raison de la stigmatisation liée au fait d'être présumé coupable de harcèlement sexuel. Comme l'a écrit le juge Lowry, au par. 13:

> [TRADUCTION] Il n'y a pas lieu d'insister davantage sur ce point. La stigmatisation liée aux plaintes dont M. Blencoe faisait l'objet a sûrement contribué dans une large mesure aux difficultés très réelles qu'il a éprouvées. Du fait de sa visibilité en tant que ministre du gouvernement, il était davantage exposé à l'attention que les médias lui ont portée à lui-même et à sa famille, ce qui explique la longueur et la gravité des difficultés qui ont résulté. [Je souligne.]

176 Bien que je ne nie pas que Blencoe aurait pu prendre d'autres mesures pour que la Commission soit plus consciente de l'incidence que le délai avait sur lui, il reste qu'il a tenté de faire avancer les choses. La Commission s'est montrée presque indifférente aux effets possibles de ses délais, en mettant même souvent beaucoup de temps à répondre suite à des demandes de renseignements sur l'évolution du dossier. Elle n'a sûrement rien fait pour réduire au minimum l'incidence du délai sur l'intimé.

177 Il est vrai que le délai administratif n'a pas été la seule cause du préjudice subi par l'intimé. Néanmoins, il a beaucoup contribué à son aggravation. Il faut cependant ajouter que ce délai a également déjoué la volonté des plaignantes de voir leurs plaintes réglées rapidement. Enfin, l'inefficacité et les multiples délais qui ont caractérisé le processus devant la Commission et qui sont liés, en particulier, aux gaffes commises dans la gestion de ces plaintes ont lésé toutes les parties à ce processus déplorable. La procédure a été à ce point viciée qu'on peut à juste titre la qualifier d'abusive à l'égard de l'intimé. À cet égard, je constate que, même s'il conclut que la conduite qu'elle a adoptée n'a pas constitué un abus de procédure, mon collègue le juge Bastarache a néanmoins jugé nécessaire de condamner la Commission à payer des dépens en raison de «l'absence de diligence

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(para. 136). In my view, this further demonstrates the tension in this appeal and the fact that the conduct of the Commission in dealing with this matter was less than acceptable.

[qu'elle a] manifestée» (par. 136). À mon avis, cela est un autre indice de la tension qui existait en l'espèce et du caractère moins qu'acceptable de la conduite adoptée par la Commission en traitant cette affaire.

IX. Administrative Remedy

IX. Réparation issue du droit administratif

178 In the end, the specific and unexplained delay entitles Blencoe to some kind of remedy. The choice of the appropriate redress requires, though, a careful analysis of the circumstances of the case, in order to identify the causes and nature of the delay and its impact on the process, because the courts always have some discretion on orders of remedies founded on the old prerogative writs. The selection of an appropriate remedy may also impose a delicate balancing exercise between competing interests. In proceedings like those that gave rise to this appeal, we must factor in the interest of the respondent, that of the complainants themselves and finally, the public interest of the community itself which wants basic rights enforced efficiently but fairly. As we have seen above, the courts must also consider the stage of the proceedings which has been affected by the delay. A distinction must be drawn between the process leading to the hearing and the hearing itself. A different balance between conflicting interests may have to be found at different stages of the administrative process.

En définitive, le délai inexpliqué en cause justifie d'accorder une forme de réparation à Blencoe. Toutefois, le choix de la réparation appropriée requiert une analyse minutieuse des circonstances de l'affaire afin de déterminer les causes et la nature du délai ainsi que son incidence sur les procédures, étant donné que les tribunaux judiciaires détiennent toujours un certain pouvoir discrétionnaire en matière de réparations fondées sur les anciens brefs de prérogative. Le choix d'une réparation appropriée peut aussi commander une évaluation délicate d'intérêts opposés. Dans des procédures comme celles à l'origine du présent pourvoi, il nous faut tenir compte de l'intérêt de l'intimé, de celui des plaignantes et, enfin, de celui de la collectivité, laquelle souhaite une application efficace, mais équitable, des droits fondamentaux. Comme nous l'avons vu, les tribunaux judiciaires doivent également prendre en considération l'étape des procédures qui est touchée par le délai. Une distinction doit être établie entre les procédures menant à l'audience et l'audience elle-même. Une évaluation des intérêts opposés peut se révéler nécessaire à chacune des étapes des procédures administratives.

179 Several kinds of remedies are available either to prevent or remedy abusive delay within an administrative process. The main forms of redress that we need address here are a stay of proceedings, orders for an expedited hearing and costs.

Plusieurs types de réparation permettent de prévenir le délai abusif dans des procédures administratives, ou d'y remédier. Les principales formes de réparation qu'il nous faut examiner en l'espèce sont l'arrêt des procédures, l'ordonnance enjoignant de tenir une audience accélérée et l'adjudication de dépens.

180 Whoever asks for a stay of proceedings carries a heavy burden. In a human rights proceeding, such an order not only stops the proceedings and negates the public interest in the enforcement of human rights legislation, but it also affects, in a radical way, the interest of the complainants who lose the opportunity to have their complaints heard

Quiconque demande l'arrêt des procédures assume un lourd fardeau. Dans des procédures en matière de droits de la personne, en plus de mettre fin aux procédures et d'être contraire à l'intérêt du public dans l'application de la législation relatives aux droits de la personne, une telle ordonnance va, en outre, radicalement à l'encontre de l'intérêt du

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and dealt with. The stay of proceedings should not generally appear as the sole or even the preferred form of redress: see *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 68. A more prudent approach would limit it to those situations that compromise the very fairness of the hearing and to those cases where the delay in the conduct of the process leading to it would amount to a gross or shocking abuse of the process. In those two situations, the interest of the respondent and the protection of the integrity of the legal system become the paramount considerations. The interest of the complainants would undoubtedly be grievously affected by a stay, but the prime concern in such cases becomes the safeguarding of the basic rights of the respondent engaged in a human rights proceeding and the preservation of the essential fairness of the process itself: see *Ratzlaff*, *supra*, at para. 19. Whatever its consequences, a stay may thus become the sole appropriate remedy in those circumstances.

plaignant qui perd la possibilité de voir sa plainte entendue et réglée. L'arrêt des procédures ne devrait pas généralement être considéré comme la seule réparation possible ni même comme la forme de réparation préférée: voir *R. c. O'Connor*, [1995] 4 R.C.S. 411, au par. 68. Il serait plus prudent de limiter l'arrêt des procédures aux cas où l'équité même de l'audience est compromise et où le délai dans les procédures menant à l'audience constituerait un abus de procédure grossier ou scandaleux. Dans les deux cas, l'intérêt de l'intimé et la protection de l'intégrité du système judiciaire deviennent les facteurs prépondérants. L'arrêt des procédures porterait sans doute gravement atteinte à l'intérêt des plaignantes, mais la principale préoccupation, en pareil cas, devient la protection des droits fondamentaux de l'intimé impliqué dans des procédures en matière de droits de la personne et la protection de l'équité essentielle des procédures mêmes: voir *Ratzlaff*, précité, au par. 19. Quelles qu'en soient les conséquences, l'arrêt des procédures peut donc devenir la seule réparation appropriée dans ces circonstances.

I note that my approach on the matter of a stay here is consistent with the approach that our Court has adopted in the slightly different context in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391. There, the Court, following *O'Connor*, *supra*, recognized a stay as appropriate in situations where the fairness of the hearing had been compromised as well as in situations falling within a residual category. For a residual case to give rise to a stay, the Court held in *Tobiass*, at paras. 90-91 that a stay could be granted where it was the only reasonable means of stopping an abuse that would be perpetuated and aggravated through the conduct of a trial. For a stay to be appropriate as a remedy for an abuse that has already occurred, the abuse must rise to a level such that the mere carrying forward of the case will offend society's sense of justice (*Tobiass*, at para. 91): i.e., in my analysis, where there is a gross or shocking abuse, or where the societal interest in proceeding does not outweigh the considerations I have enumerated.

181 Je souligne que mon point de vue concernant la question d'un arrêt des procédures en l'espèce est conforme à celui que notre Cour a adopté dans le contexte légèrement différent de l'arrêt *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Tobiass*, [1997] 3 R.C.S. 391. Dans cet arrêt, la Cour a suivi l'arrêt *O'Connor*, précité, et a reconnu qu'un arrêt des procédures peut être ordonné dans les cas où l'équité de l'audience a été compromise et dans ceux qui relèvent d'une catégorie résiduelle. En ce qui concerne l'arrêt en vertu d'une catégorie résiduelle, la Cour a statué, aux par. 90 et 91 de l'arrêt *Tobiass*, qu'il pourrait être accordé si c'était le seul moyen raisonnable de mettre fin à un abus que le déroulement d'un procès contribuerait à perpétuer ou à aggraver. Pour qu'un arrêt puisse être ordonné afin de remédier à un abus déjà commis, l'abus doit être tel que la seule poursuite de l'affaire choquera le sens de la justice de la société (*Tobiass*, au par. 91): autrement dit, il convient de l'ordonner, selon moi, lorsqu'il y a abus grossier ou scandaleux ou encore lorsque l'intérêt de la société dans la poursuite de l'affaire ne l'emporte pas sur les considérations que j'ai énumérées.

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182 The approach of the courts should change when it appears that the hearing will remain fair, in spite of the delay and when the delay has not risen to the level of a shocking abuse, notwithstanding its seriousness. More limited and narrowly focused remedies would then become appropriate. In the context of a judicial review procedure akin to mandamus, the first objective of any intervention by a court should be to make things happen, where the administrative process is not working adequately. An order for an expedited hearing within such time frame and with such conditions as the Court might set would be the most practical and effective means of judicial action. Used at the right moment, such a remedy may safeguard the interest of all parties to the process. A litigant who believes he or she is facing undue delay should probably take that route rather than letting the process decay in the hope of stopping the old process on some future date.

L'approche des tribunaux judiciaires devrait changer lorsqu'il appert que le délai ne portera pas atteinte à l'équité de l'audience et qu'il ne constitue pas un abus scandaleux en dépit de sa gravité. Des réparations plus limitées et mieux ciblées seraient alors appropriées. Dans le contexte d'un contrôle judiciaire analogue au mandamus, toute intervention d'un tribunal judiciaire devrait, d'abord et avant tout, viser à faire avancer les choses lorsque les procédures administratives ne se déroulent pas adéquatement. L'intervention judiciaire la plus pratique et efficace serait d'ordonner la tenue d'une audience accélérée dans un délai et aux conditions prescrites par la cour. Si elle est accordée au bon moment, cette réparation peut protéger les intérêts de toutes les parties en cause. La partie qui se croit victime d'un délai injustifié devrait probablement procéder de cette façon plutôt que de laisser la situation se détériorer dans l'espoir de pouvoir mettre fin aux procédures ultérieurement.

183 An order for costs is a third kind of remedy. It will not address the delay directly, but some of its consequences. If a party must resort to the courts to secure a timely hearing or to speed up the process in which he or she is engaged, some form of compensation for costs should at least be considered by the courts in their discretion. Whenever parties are compelled to seek judicial interventions to safeguard their rights, costs must be considered to compensate at least in part the time, money and efforts expended in obtaining redress. Even if costs cannot indemnify the party for all the losses and prejudice arising from administrative delay, they afford at least a measure of compensation.

L'adjudication de dépens est la troisième réparation possible. Elle touche non pas le délai directement, mais plutôt certaines de ses conséquences. Si une partie doit recourir aux tribunaux pour obtenir la tenue d'une audience en temps opportun ou pour accélérer les procédures dans lesquelles elle est impliquée, les tribunaux devraient au moins pouvoir envisager la possibilité d'accorder une forme quelconque d'indemnisation des dépens. Chaque fois qu'une partie doit faire appel à une cour de justice pour faire respecter ses droits, les dépens doivent être pris en compte pour compenser, du moins en partie, le temps, l'argent et les efforts consacrés à l'obtention d'une réparation. Même si les dépens ne permettent pas d'indemniser la partie de toutes les pertes et de tout le préjudice résultant d'un délai administratif, ils assurent au moins une certaine indemnisation.

184 In the present appeal, the remedy of a pure stay of proceeding appears both excessive and unfair. First, in spite of the seriousness of the problems faced by Blencoe, the delay does not seem to compromise the fairness of the hearing. As the trial judge found at para. 10, the respondent has not established that the delay has deprived him of evi-

En l'espèce, la réparation consistant à ordonner l'arrêt pur et simple des procédures paraît à la fois excessive et inéquitable. Premièrement, malgré la gravité des difficultés éprouvées par Blencoe, le délai ne semble pas compromettre l'équité de l'audience. Comme le juge de première instance l'a conclu, au par. 10, l'intimé n'a pas établi que le

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dence or information important to his defence. The delay rather concerns the process leading to the hearing. It arises from a variety of causes that do not evince an intent from the Commission to harm him wilfully, but rather demonstrate grave negligence and important structural problems in the processing of the complaints. Second, a stay of proceedings in a situation that does not compromise the fairness of the hearing and does not amount to shocking or gross abuse requires the consideration of the interest of the complainants in the choice of the proper remedy (*Tobiass*, *supra*, at para. 92). In the present matter, the judgment of the Court of Appeal completely omitted any consideration of this interest (see para. 39). The lifting of the stay is thus both justified and necessary.

However, rejecting the stay as a proper remedy in the present case does not mean that Blencoe should be deprived of any redress. On the contrary, an order for an expedited hearing should have been considered as the remedy of choice. There will be some irony in granting such a remedy more than five years after the proceedings began. Such an outcome offers the respondent little solace. Nevertheless, in spite of its rather symbolic value, at the present stage of the proceedings, it appears as a critically important remedy that should have been used at an earlier stage to prod the Commission along and to control the inefficiency of its process.

In spite of the partial success of this appeal, as I agree that the stay should be lifted, Blencoe is entitled to some compensation in the form of costs in our Court and in the courts below. Section 47 of the *Supreme Court Act*, R.S.C., 1985, c. S-26, grants our Court broad discretion when awarding costs. In the present case, it would be both fair and appropriate to use this power as the respondent has established that the process initiated against him was deeply flawed and that its defects justified his search for a remedy, at least in administrative law. He had to fight for his rights, and it would be unfair for him to bear the costs personally.

délai l'a privé d'un élément de preuve ou d'un renseignement important pour sa défense. Le délai concerne plutôt les procédures menant à l'audience. Il est dû à une gamme de causes qui traduisent non pas l'intention de la Commission de léser délibérément l'intimé, mais plutôt une négligence grave et l'existence de problèmes structurels importants en matière de traitement des plaintes. Deuxièmement, pour ordonner l'arrêt des procédures dans le cas où l'équité de l'audience n'est pas compromise et où il n'y a pas d'abus scandaleux ou grossier, il faut tenir compte l'intérêt du plaignant dans le choix de la réparation appropriée (*Tobiass*, précité, au par. 92). Dans la présente affaire, la Cour d'appel a complètement omis de tenir compte de cet intérêt (voir le par. 39). L'annulation de l'arrêt des procédures est donc à la fois justifiée et nécessaire.

185 Cependant, le rejet de l'arrêt des procédures à titre de réparation appropriée en l'espèce ne signifie pas pour autant que Blencoe devrait être privé de toute réparation. Au contraire, l'ordonnance enjoignant de tenir une audience accélérée aurait dû être envisagée à titre de réparation appropriée. Il est quelque peu ironique d'accorder une telle réparation plus de cinq ans après le début des procédures. Un tel résultat offre une mince consolation à l'intimé. Néanmoins, malgré sa valeur plutôt symbolique à l'étape actuelle des procédures, cette réparation apparaît comme une mesure d'une importance cruciale et aurait dû être accordée plus tôt pour inciter la Commission à agir et pour remédier à l'inefficacité de ses procédures.

186 En dépit de la réussite partielle du présent appel et étant donné que je conviens qu'il y a lieu d'annuler l'arrêt des procédures, Blencoe a droit à une indemnisation sous forme de dépens devant notre Cour et les tribunaux d'instance inférieure. L'article 47 de la *Loi sur la Cour suprême*, L.R.C. (1985), ch. S-26, investit notre Cour d'un large pouvoir discrétionnaire en matière d'adjudication de dépens. En l'espèce, il serait à la fois juste et opportun d'exercer ce pouvoir étant donné que l'intimé a établi que les procédures engagées contre lui étaient entachées de vices importants qui le justifiaient de demander une réparation au moins

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Although ultimately unsuccessful in his application for a stay, Blencoe brought to the attention of the courts the grave deficiency of the administrative processes of the Commission. He should at least not be penalized for this mixture of success and failure (e.g., *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 726).

fondée sur le droit administratif. Il a dû lutter pour faire respecter ses droits et il serait injuste qu'il assume personnellement les frais de cette lutte. Même si sa demande d'arrêt des procédures a finalement été rejetée, Blencoe a attiré l'attention des tribunaux sur les graves lacunes des procédures administratives de la Commission. Il n'y a pas lieu, à tout le moins, de le pénaliser en raison de ce mélange de réussite et d'échec (par exemple, *Schachter c. Canada*, [1992] 2 R.C.S. 679, à la p. 726).

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X. Section 7 of the *Charter*

X. L'article 7 de la *Charte*

187 The application of the general principles of administrative law would have justified the intervention of the trial court without any need to demonstrate a breach of an interest protected by s. 7 of the *Charter*. As I think that this matter should have been resolved on the basis of administrative law principles, I do not think I have to express a definite opinion on the application of s. 7 of the *Charter* in the present case.

L'application des principes généraux du droit administratif aurait justifié l'intervention du tribunal de première instance sans qu'il ne soit nécessaire de démontrer l'existence d'une atteinte à un droit garanti par l'art. 7 de la *Charte*. Comme j'estime que la présente affaire aurait dû être réglée en fonction des principes du droit administratif, il me paraît inutile d'exprimer une opinion précise sur l'application de l'art. 7 de la *Charte* en l'espèce.

188 We must remember though that s. 7 expresses some of the basic values of the *Charter*. It is certainly true that we must avoid collapsing the contents of the *Charter* and perhaps of Canadian law into a flexible and complex provision like s. 7. But its importance is such for the definition of substantive and procedural guarantees in Canadian law that it would be dangerous to freeze the development of this part of the law. The full impact of s. 7 will remain difficult to foresee and assess for a long while yet. Our Court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the *Charter*. At the same time, the Court should remind litigants that not every case can be reduced to a *Charter* case.

Nous devons toutefois nous rappeler que l'art. 7 énonce certaines valeurs fondamentales de la *Charte*. Il est sûrement vrai qu'il nous faut éviter de ramener la *Charte*, voire le droit canadien, à une disposition souple et complexe comme l'art. 7. Toutefois, son importance est telle pour la définition des garanties de fond et de procédure en droit canadien qu'il serait périlleux de bloquer l'évolution de cette partie du droit. Il restera difficile pendant encore assez longtemps de prévoir et d'évaluer toutes les répercussions de l'art. 7. Notre Cour devrait être consciente de la nécessité de maintenir une certaine souplesse dans l'interprétation de l'art. 7 de la *Charte* et dans l'évolution de son application. En même temps, notre Cour devrait rappeler aux parties que les affaires ne peuvent pas toutes être plaidées sur le fondement de la *Charte*.

189 Assuming that the *Charter* must solve every legal problem would be a recipe for freezing and sterilizing the natural and necessary evolution of the common law and of the civil law in this country. In the present appeal, the absence of a *Charter* remedy does not mean that administrative law

Supposer que tout problème juridique doit se régler en fonction de la *Charte* contribuerait à bloquer et à stériliser l'évolution naturelle et nécessaire de la common law et du droit civil dans notre pays. Comme nous l'avons vu, l'absence en l'espèce d'une réparation fondée sur la *Charte* ne

remedies could not have been identified and applied, as we have seen above.

signifie pas qu'aucune réparation n'aurait pu être trouvée et accordée en application du droit administratif.

XI. Disposition

XI. Dispositif

For these reasons, I would allow the appeal in part, lift the stay of proceedings and order an expedited hearing of the complainants Schell and Willis. I would also order the appellant British Columbia Human Rights Commission to pay costs on a party-to-party basis to the respondent Blencoe in this Court and in the British Columbia courts.

190 Pour ces motifs, je suis d'avis d'accueillir le pourvoi en partie, d'annuler l'arrêt des procédures et d'ordonner la tenue d'une audition accélérée des plaintes de Schell et Willis. Je suis également d'avis d'ordonner à l'appelante, la Commission des droits de la personnes de la Colombie-Britannique, de payer à l'intimé Blencoe des dépens comme entre parties devant notre Cour et les tribunaux de la Colombie-Britannique.

Appeal allowed with costs against the appellant Commission, IACOBUCCI, BINNIE, ARBOUR *and* LEBEL JJ. *dissenting in part.*

Pourvoi accueilli avec dépens contre la Commission appelante, les juges IACOBUCCI, BINNIE, ARBOUR *et* LEBEL *sont dissidents en partie.*

Solicitors for the appellants the British Columbia Human Rights Commission and the Commissioner of Investigation and Mediation: Davis & Company, Vancouver.

Procureurs des appelants la British Columbia Human Rights Commission et le Commissioner of Investigation and Mediation: Davis & Company, Vancouver.

Solicitors for the appellant the British Columbia Human Rights Tribunal: Morley & Ross, Victoria.

Procureurs de l'appelant le British Columbia Human Rights Tribunal: Morley & Ross, Victoria.

Solicitor for the appellant Andrea Willis: Robert B. Farvolden, Victoria.

Procureur de l'appelante Andrea Willis: Robert B. Farvolden, Victoria.

Solicitors for the respondent: Arvay Finlay, Victoria.

Procureurs de l'intimé: Arvay Finlay, Victoria.

Solicitors for the intervener Irene Schell: Allard & Company, Vancouver.

Procureurs de l'intervenante Irene Schell: Allard & Company, Vancouver.

Solicitor for the intervener the Attorney General of British Columbia: The Ministry of the Attorney General, Victoria.

Procureur de l'intervenant le procureur général de l'Ontario: Le ministère du Procureur général, Toronto.

Solicitor for the intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto.

Procureur de l'intervenant le procureur général de la Colombie-Britannique: Le ministère du Procureur général, Victoria.

Solicitor for the intervener the Saskatchewan Human Rights Commission: Milton Woodard, Saskatoon.

Procureur de l'intervenante la Saskatchewan Human Rights Commission: Milton Woodard, Saskatoon.

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Solicitors for the intervener the Ontario Human Rights Commission: Cathryn Pike and Jennifer Scott, Toronto.

Solicitor for the intervener the Nova Scotia Human Rights Commission: Lara J. Morris, Halifax.

Solicitor for the intervener the Manitoba Human Rights Commission: Manitoba Justice, Winnipeg.

Solicitor for the intervener the Canadian Human Rights Commission: Fiona Keith, Ottawa.

Solicitor for the intervener the Commission des droits de la personne et des droits de la jeunesse: Hélène Tessier, Montréal.

Solicitor for the intervener the British Columbia Human Rights Coalition: Community Legal Assistance Society, Vancouver.

Solicitors for the intervener the Women's Legal Education and Action Fund: Jennifer L. Conkie and Dianne Pothier, Vancouver.

Procureurs de l'intervenante la Commission ontarienne des droits de la personne: Cathryn Pike et Jennifer Scott, Toronto.

Procureur de l'intervenante la Nova Scotia Human Rights Commission: Lara J. Morris, Halifax.

Procureur de l'intervenante la Commission des droits de la personne du Manitoba: Justice Manitoba, Winnipeg.

Procureur de l'intervenante la Commission canadienne des droits de la personne: Fiona Keith, Ottawa.

Procureur de l'intervenante la Commission des droits de la personne et des droits de la jeunesse: Hélène Tessier, Montréal.

Procureur de l'intervenante la British Columbia Human Rights Coalition: Community Legal Assistance Society, Vancouver.

Procureurs de l'intervenant le Fonds d'action et d'éducation juridiques pour les femmes: Jennifer L. Conkie et Dianne Pothier, Vancouver.

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TAB 2

Federal Court of Appeal | Cour d'appel fédérale

Date: 20091020

Docket: A-144-08

Citation: 2009 FCA 300

2009 FCA 300 (CanLII)

CORAM: **BLAIS C.J.**
NADON J.A.
PELLETIER J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

ROBERT ARSENAULT, JOSEPH AYLWARD, WAYNE AYLWARD, JAMES BUOTE, BERNARD DIXON, CLIFFORD DOUCETTE, KENNETH FRASER, TERRANCE GALLANT, DEVIN GAUDET, CASEY GAVIN, JAMIE PETER GAUDET, RODNEY GAUDET, TAYLOR GAUDET, GAVIN, SIDNEY GAVIN, DONALD HARPER, CARTER HUTT, TERRY LLEWELLYN, IVAN MACDONALD, LANCE MACDONALD, WAYNE MACINTYRE, DAVID MCISAAC, GORDON MACLEOD, DONALD MAYHEW, AUSTIN O'MEARA

Respondents

Heard at Charlottetown, P.E.I., on June 11, 2009.

Judgment delivered at Ottawa, Ontario, on October 20, 2009.

REASONS FOR JUDGMENT BY:	NADON J.A.
CONCURRED IN BY:	BLAIS C.J.
CONCURRING REASONS BY:	PELLETIER J.A.

Federal Court of Appeal | Cour d'appel fédérale

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Respondents

REASONS FOR JUDGMENT

NADON J.A.

[1] This is an appeal from a decision of Blanchard J. of the Federal Court, 2008 FC 492, dated April 16, 2008, pursuant to which he ordered the Minister of Fisheries and Oceans (the "Minister") to implement the 2006 Management Plan for Snow Crab Areas 12, 18, 25 and 26 (the "Management Plan"). More particularly, Blanchard J. ordered the Minister to pay to the respondents

their share of the $37.4 million of financial assistance provided in the Management Plan for traditional crabbers.

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[2] The main issue raised by this appeal is whether the Minister was bound by the Management Plan which he approved on March 30, 2006. In other words, did the Management Plan create rights which the respondents were entitled to enforce against the Minister? For the reasons that follow, that question should be answered in the negative.

THE FACTS

[3] The facts pertinent to this appeal can be summarized as follows.

[4] On September 17, 1999, the Supreme Court of Canada rendered its decision in *R. v. Marshall*, [1999] 3 S.C.R. 456, wherein it held that pursuant to the treaties of 1760-61 entered into by the Crown and the Mi'kmaq Indians, the First Nations signatories were entitled to engage in traditional resource harvesting activities for the purpose of earning a moderate livelihood.

[5] As a result of the Supreme Court's decision in *Marshall, supra*, the Government of Canada put into place in 2001 the "Marshall Response Initiative" (the "Marshall Initiative") which comprised a number of components and was funded by Parliament through the usual processes for appropriations. As part of the Marshall Initiative, the Department of Fisheries and Oceans (the "Department") entered into fishing agreements with First Nations so as to grant them communal

fisheries access in Canadian Atlantic commercial fisheries, including the snow crab fishery, and to enable them to acquire the means and skills required to compete successfully in commercial fishing.

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[6] One of the components of the Marshall Initiative was a voluntary license retirement program pursuant to which traditional fishers, including traditional crabbers, would relinquish their fishing licenses which were then to be made available to First Nations. The Department's purpose in seeking the voluntary surrender of fishing licenses was to avoid putting excess pressure on fishing resources.

[7] Twelve of the 30 fisheries agreements concluded with First Nations provided them with access to snow crab. Specifically, the agreements provided First Nations with access to a total of 15.8% of the available total allowable catch (the "TAC").

[8] From 2002 to March 2006, when the Marshall Initiative was scheduled to end, only ten snow crab licenses had been retired under the retirement program, representing 4.96% of the total snow crab access provided for in the fisheries agreements entered into with First Nations, thus leaving a shortfall of 10.85% in voluntary retirement quotas to offset the access provided to First Nations. In other words, offers made by the Department to traditional crabbers to retire their fishing licenses for a specified financial assistance did not meet with much success.

[9] Consequently, the Marshall Initiative was extended to March 31, 2007. In that light and considering the lack of interest shown by traditional crabbers to voluntarily retire their licenses, a

Memorandum dated March 29, 2006, was placed before the Minister seeking his decision with regard to a number of options available to deal with, *inter alia*, financial assistance to traditional crabbers to offset the retirement quotas acquired for First Nations under the Marshall Initiative. Specifically, the Minister was requested to consider the following options:

1. the maintenance of the sharing arrangements that existed in 2005, with no financial assistance to traditional crabbers;
2. the payment of $37.4 million in financial assistance to traditional crabbers to offset 10.85% of the TAC needed to fulfill the First Nations share and the adjustment of the TAC shares that would see 15.186% for First Nations, 65.182% for traditional crabbers, 4.0% for snow crab fishing area 18 fisheries and 15.% for new access;
3. financial assistance of $37.4 million with no adjustment to the sharing arrangement which prevailed in 2005.

[10] The Memorandum recommended to the Minister that he approve option 2. On March 30, 2006, the Minister penned his concurrence to the departmental recommendation. The Minister also approved a TAC of 27,869 tonnes if certain management activities were implemented or a TAC of 20,862 tonnes should no management activities be implemented.

[11] On March 30, 2006, the Management Plan was issued by the Minister. He announced that for the coming year, the TAC would be shared between traditional crabbers, First Nations and new entrants into the fishery, and that this approach resulted in a reduction of the percentage of the TAC to which traditional crabbers had been entitled to in previous years. The Minister also announced

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that he had approved financial assistance in the sum of $37.4 million which would be offered to traditional crabbers to compensate them for their share of the TAC which had now been transferred to First Nations.

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[12] Subsequently, by way of letters dated July 11, 2006, the respondents were informed of the financial assistance which had now been made available and their entitlement to a share thereof. I hereby reproduce the letter written to Robert Arsenault, one of the respondents:

> Negotiations between the Department of Fisheries and Oceans and the First Nations undertaken under the Marshall Response Initiative are now over. The parties were able to determine the level of access to be allocated to First Nations for snow crab in areas 12, 18, 25 and 26. The access allocated to First Nations is 15.81% of the Total Allowable Catch (TAC) available and, with the participants of 10 traditional enterprises holding the equivalent of 4.96% of the TAC available, the shortfall is reduced to 10.85%.
>
> In order to close the file before the end of the program (March 31, 2007), the Minister announced, in a news release dated March 30, 2006, a final solution regarding the First Nations' access to snow crab and $37.4 million in financial assistance for traditional fleets. This assistance will be distributed to traditional crab fishers, based on their allocation, in order to grant access to snow crab to First Nations on a provincial basis.
>
> The Department of Fisheries and Oceans is prepared to provide you financial assistance in the amount of $72,481 to relinquish your eligibility to receive part of the snow crab allocation related to license #024375. You will find attached three copies of the Financial Assistance Agreement that should be returned to the department (return envelop included). As soon as DFO will have received the 3 signed copies of the Agreement, a cheque will be processed and a copy of the signed Agreement by DFO will be returned to you for your file.
>
> […]
>
> [Emphasis added]

[13] As appears from the above letter, three copies of a document entitled "Financial Assistance Agreement to Provide Access to Snow Crab for Aboriginals, Areas 12, 18, 25/26" (the

"Agreement") were enclosed. The recipient was required, in order to receive financial assistance, to sign three copies of the Agreement and return them to the Department.

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[14] Not having received a response from the respondents, Department officials wrote to them on March 15, 2007, reminding them that they were entitled to financial assistance under the Marshall Initiative and that they should return three copies of the Agreement, duly signed, to the Department. Shortly thereafter, on March 21, 2007, the respondents wrote to Department officials, requesting the payment of their share of the financial assistance provided in the Management Plan and making it clear that they did not intend to sign the Agreement.

[15] Further correspondence was exchanged between the respondents and Department officials, but to no avail, between March 21 and March 31, 2007, at which time the Marshall Initiative expired. Hence, the respondents have not received any financial assistance to compensate them for the reduction in their share of the TAC.

[16] The respondents, traditional crabbers from Prince Edward Island, take issue with the implementation of the Management Plan announced by the Minister on March 30, 2006. They argue, *inter alia*, that the release requested by Department officials, found at clause 9 of the Agreement, did not form part of the Management Plan and, thus, they were entitled to refuse to sign the Agreement. Clause 9 of the Agreement reads as follows:

> 9. In consideration for the payment herein, the Recipient here releases Her Majesty the Queen in Right of Canada and Her Ministers, officers, employees and agents from any and all claims, suits, actions or demands of any nature that the Recipient has or may have and that are related to or arise from this Agreement.

[17] Hence, on April 20, 2007, the respondents brought an application before the Federal Court seeking, *inter alia*, a writ of *mandamus* requiring the Minister to pay them the financial assistance provided in the Management Plan.

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DECISION OF THE FEDERAL COURT

[18] Blanchard J. allowed the respondent's application for judicial review in part. He ordered the Minister to implement the Management Plan, as approved on March 30, 2006, without the requirement that the respondents sign the release form.

[19] Blanchard J. was satisfied that the requirements for the issuance of a writ of *mandamus* had been demonstrated. More particularly, he was of the view that following the Minister's approval and announcement of the Management Plan, his discretionary power was spent and, as a result, he was legally bound to implement it. In Blanchard J.'s view, since the Management Plan did not contain any requirement that a release be signed by the respondents, this requirement could not be imposed on them. In so concluding, Blanchard J. relied on sections 7 and 9 of the *Fisheries Act*, R.S. 1985, c. F-14 (the "Act") and held that the Management Plan could only be revised or revoked under the specific statutory conditions found in section 9.

[20] Further, Blanchard J. concluded that a public legal duty was owed to the respondents, that there was a clear right to the performance of that duty, that there was no other adequate remedy available to the respondents and that the balance of convenience favoured the respondents.

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SUBMISSIONS OF THE PARTIES

[21] In favour of their respective positions on this appeal, the parties make the following arguments.

[22] The appellant submits that Blanchard J. erred in determining that the respondents had established the requisite elements for the issuance of a writ of *mandamus* and, in particular, that the approval of the Management Plan created an enforceable legal duty.

[23] According to the appellant, Blanchard J. erred in holding that the Management Plan is a binding legal document; rather, the appellant submits that the Management Plan is a discretionary policy instrument that could not fetter the Minister's discretion in the management of the fishery and of the Initiative.

[24] Furthermore, the appellant contends that the other elements required for the issuance of a writ of *mandamus* were not satisfied: no duty was owed to the respondents, the respondents had not satisfied the conditions precedent giving rise to the alleged duty to provide financial assistance without condition, there did exist alternative remedies and the balance of convenience favoured the appellant.

[25] The respondents disagree completely with the view put forward by the appellant. They submit that Blanchard J. did not err in finding that all the requisite elements for the issuance of a writ of *mandamus* had been met and in ordering the Minister to implement the Management Plan as

announced. They argue that the Management Plan was a final and binding exercise of discretion, not a statement of policy.

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[26] In particular, the respondents contend that there is no evidence that the Minister changed his mind after announcing the Management Plan, but that it was frustrated by officials of the Department of Justice who implemented the requirement to sign a release. The respondents also allege that the appellant is withholding requested information on the basis of cabinet confidence which relates to the terms of the Initiative. As a consequence of the appellant's refusal to produce the documentation, the respondents urge this Court to draw an adverse inference from the appellant's conduct.

THE ISSUES

[27] The issues raised in this appeal are twofold:

1. What is the standard of appellate review?
2. Did Blanchard J. err in holding that the respondents had established the requisite elements for the issuance of a writ of *mandamus* and, in particular, that the approval of the Management Plan created an enforceable legal duty?

LEGISLATION

[28] Before addressing these two issues, it will be useful to reproduce sections 7 and 9 of the Act:

7. (1) Subject to subsection (2), the Minister may, in his absolute discretion, wherever the exclusive right of fishing does not already exist by law, issue or authorize	**7.** (1) En l'absence d'exclusivité du droit de pêche conférée par la loi, le ministre peut, à discrétion, octroyer des baux et permis de pêche ainsi que des licences

to be issued leases and licences for fisheries or fishing, wherever situated or carried on.	d'exploitation de pêcheries — ou en permettre l'octroi —, indépendamment du lieu de l'exploitation ou de l'activité de pêche.
(2) Except as otherwise provided in this Act, leases or licences for any term exceeding nine years shall be issued only under the authority of the Governor in Council.	(2) Sous réserve des autres dispositions de la présente loi, l'octroi de baux, permis et licences pour un terme supérieur à neuf ans est subordonné à l'autorisation du gouverneur général en conseil.
[…]	[…]
9. The Minister may suspend or cancel any lease or licence issued under the authority of this Act, if *(a)* the Minister has ascertained that the operations under the lease or licence were not conducted in conformity with its provisions; and *(b)* no proceedings under this Act have been commenced with respect to the operations under the lease or licence.	**9.** Le ministre peut suspendre ou révoquer tous baux, permis ou licences consentis en vertu de la présente loi si : *a)* d'une part, il constate un manquement à leurs dispositions; *b)* d'autre part, aucune procédure prévue à la présente loi n'a été engagée à l'égard des opérations qu'ils visent.

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ANALYSIS

1. What is the standard of appellate review?

[29] The appellant submits, on the basis of *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, that the applicable standard of review is correctness. In their submission, this appeal raises questions of law or of mixed fact and law where the question of law is readily extricable.

[30] The respondents submit, to the contrary, that Blanchard J.'s decision was in part discretionary and that, as a result, a measure of deference must be afforded to those discretionary aspects of his decision. The respondents contend that the applicable standard comes from this

Court's decision in *Apotex Inc. v. Canada (Governor in Council)*, 207 FCA 374, at paragraph 15: the appellate court may substitute its discretion for that of the lower court if the lower court judge gave insufficient weight to relevant factors or proceeded on a wrong principle of law, or if the judge seriously misapprehended the facts, or where an obvious injustice would otherwise result. In making this contention, the respondents do not say which parts of the judge's decision were discretionary and which parts were not. Nor do the respondents state which standard should apply to the non discretionary parts of Blanchard J.'s decision.

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[31] As I need only address the question of whether the judge erred in holding that the Management Plan created an enforceable legal duty in order to dispose of the appeal and that that question is clearly a question of law in respect of which the judge had to give the correct answer, the applicable standard is, without a doubt, that of correctness. In any event, even if the applicable standard were the standard enunciated by this Court in *Apotex, supra*, I would have no difficulty concluding that Blanchard J. proceeded on a wrong principle of law in finding that the respondents had established the requisite elements for the issuance of a writ of *mandamus*.

2. Did Blanchard J. err in holding that the respondents had established the requisite elements for the issuance of a writ of mandamus and, in particular, that the approval of the Management Plan created an enforceable legal duty?

[32] In *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 (C.A.), affirmed by the Supreme Court of Canada in [1994] 3 S.C.R. 110, this Court established the requirements that must be satisfied before a writ of *mandamus* can issue. At pages 766 to 769, Robertson J.A. sets out those requirements in the following terms:

> 1. There must be a public legal duty to act:
> 2. The duty must be owed to the applicant:
> 3. There is a clear right to the performance of that duty, in particular:
> (a) the applicant has satisfied all conditions precedent giving rise to the duty;
> (b) there was a prior demand for performance of the duty, a reasonable time to comply with the demand, and a subsequent refusal which can be either expressed or implied;
> 4. Where the duty sought to be enforced is discretionary, the following rules apply:
> (a) in exercising a discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith;
> (b) *mandamus* is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";
> (c) in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", considerations;
> (d) *mandamus* is unavailable to compel the exercise of a "fettered discretion" in a particular way; and
> (e) *mandamus* is only available when the decision-maker's discretion is "spent"; i.e., the applicant has a vested right to the performance of the duty.
> 5. No other adequate remedy is available to the applicant:
> 6. The order sought will be of some practical value or effect:
> 7. The court in the exercise of its discretion finds no equitable bar to the relief sought:
> 8. On a "balance of convenience" an order in the nature of *mandamus* favours the applicant: […]
>
> [Citations omitted]

[33] In the present matter, I am satisfied that the Minister did not have a "public legal duty to act" and, thus, Blanchard J. erred in concluding that the respondents had established that the required elements for the issuance of a writ of *mandamus* had been met. In my respectful view, the Management Plan was not a binding legal document and, as a result, it was not enforceable by the respondents.

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[34] The Management Plan is at the heart of this appeal. By its issuance, the Minister made it known to interested parties and, in particular, to traditional crabbers, what policy and practice he had decided to adopt or intended to adopt for the coming year. The announcement made on March 30, 2006, is brief and I therefore reproduce it in full:

> **Hearn Announces 2006 Snow Crab Management Plan in Southern Gulf for Crab Fishing Areas 12, 18, 25 and 26**
>
> March 30, 2006
>
> **Moncton** – The Honourable Loyola Hearn, Minister of Fisheries and Oceans (DFO), today announced the 2006 Snow Crab Management Plan for Snow Crab Areas (CFAs) 12, 18, 25 and 26, in the southern Gulf of St. Lawrence.
>
> The total allowable catch (TAC) will be set at 25,869 tonnes (t) if enhanced management activities are in place. "I am aware that industry was looking for a higher level of TAC. However, I believe it is important to apply a prudent approach, as the biomass is currently decreasing and a more cautious approach is likely in 2007", stated the Minister.
>
> The Department is presently reviewing proposals received for enhanced management activities. If these activities doe not proceed, the TAC will be set at 20,862 t. The Department's review will be completed in the coming days and further information will be provided to industry.
>
> Further to the provision of "permanent" access to this fishery and the stabilisation of the levels until 2009, the available TAC is allocated as follows: First Nations receive 15.816%; the traditional fleets receive 65.182%; CFA 18 fishers receive 4.002% and new access receives 15%. The distribution of the TAC takes into account a permanent solution to the quota shortfall required for First Nations and financial assistance of $37.4M to the traditional fleets. When added to the voluntary licence retirement programs, traditional fishers have received payments of over $55 million for quota provided to First Nations under the Marshall Response Initiative.
>
> The management measures from 2005 will be rolled over in 2006. They include dockside monitoring, 30% at-sea coverage, Vessel Monitoring System (VMS), and the Irving Whale exclusion zone. The implementation of the comprehensive soft shell crab protocol will be in place if enhanced management activities proceed. The requests from industry for changes to the management measures will be discussed in the context of a future multi-year plan.

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> The Department will turn its attention to consultations with stakeholders, after the fishery, on the development of a long-term management strategy with a preference for establishing a co-management approach will all of the key harvester groups. Discussions could include such issues as the conduct of joint scientific research, the concept of TAC decision rules, development of a strategy for managing the fishery which takes into account fishing efforts in the context of a decreasing biomass and funding for enhanced management of the fishery.
>
> The opening date will be set by DFO taking into consideration operational requirements and a recommendation from the industry-led Ice-Committee. The last day of fishing will be July 15, 2006.

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[35] As can be seen from the Minister's announcement, the Management Plan deals with a number of issues, including the TAC for the coming year and the compensation he intends to offer to traditional crabbers whose share of the TAC was reduced by reason of the Marshall Initiative.

[36] The reasoning which led Blanchard J. to conclude that the Minister was legally bound to implement the Management Plan appears clearly from paragraph 32 of his Reasons, where he states:

> [32] Following the decision in *Marshall*, the Minister had a legal obligation to accommodate First Nations fishers. To do so and properly manage the resource, he had no alternative but to reduce the quotas of the traditional crabbers. The Minister was under no obligation to pay any compensation to the traditional crabbers for the reduction in their quotas. However, once he elected to provide financial assistance to them under the MRI and incorporate the financial assistance package as part of the Management Plan, then the financial assistance package became part of his discretionary decision. <u>Once the Management Plan was announced, the Minister's discretionary power under the Act was expended and the Plan could only be revised or revoked under the specific statutory conditions found in s. 9 of the Act.</u> Those conditions find no application here. In these circumstances, the Minister had a public legal duty to implement the Management Plan as announced. The legal duty flows from the Minister's statutory obligation to manage, conserve and develop the fishery under the Act.
>
> [Emphasis added]

[37] The learned Judge appears to have treated the Management Plan as a matter akin to the issuance of a license under section 7 of the Act. In other words, as in the case of a license, once the Management Plan was announced/issued, the Minister's discretion was at an end. In my view, the Judge was wrong in so concluding. I cannot possibly see how sections 7 and 9 of the Act can find application in the present matter since those provisions, on their clear wording, only apply to the Minister's absolute discretion to issue or authorize the issuance of fishing licenses (section 7) and, in the circumstances set out at paragraphs 9(a) and (b) of the Act, to the Minister's power to suspend or cancel a license. There can be no room to argue that the Management Plan falls within the ambit of those two provisions.

[38] Rather, the Management Plan can only be viewed, in my respectful opinion, as a statement or an expression of the Minister's intent or as a guideline with respect to those matters that are discussed therein. Its clear intent is to outline those management and conservation practices and measures which the Minister believes are necessary for the coming year. Further, it is trite law that the Minister's policy does not, and cannot, fetter his discretion with regard to the matters dealt with in the policy. In *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 at page 6 to 8, McIntyre J., writing for the Court, made the following remarks concerning the Minister's discretion under section 8 of the *Export and Import Permits Act*, R.S.C. 1979, c. E-17, which remarks are entirely apposite in the present matter:

> […] The discretion is given by the Statute and the formulation and adoption of general policy guidelines cannot confine it. There is nothing improper or unlawful for the Minister charged with responsibility for the administration of the general scheme provided for in the Act and Regulations to formulate and to state general requirements for the granting of import permits. <u>It will be helpful to applicants for permits to know in general terms what the policy and practice of the Minister will be. To give the guidelines the effect contended for by the</u>

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> appellant would be to elevate ministerial directions to the level of law and fetter the Minister in the exercise of his discretion. […]
>
> […]
>
> In construing statutes such as those under consideration in this appeal, which provide for far-reaching and frequently complicated administrative schemes, the judicial approach should be to endeavour within the scope and legislation to give effect to its provisions so that the administrative agencies created may function effectively, as the legislation intended. In my view, in dealing with legislation of this nature, the courts should, wherever possible, avoid a narrow, technical construction, and endeavour to make effective the legislative intent as applied to the administrative scheme involved. It is, as well, a clearly-established rule that the courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere. […]

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[39] In my view, the Minister's powers to issue the Management Plan stem from his general authority to manage the fishery, as exemplified by section 4 of the *Department of Fisheries and Oceans Act*, R.S. 1985, c. F-15, which provides that:

4. (1) The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to *(a)* sea coast and inland fisheries; *(b)* fishing and recreational harbours; *(c)* hydrography and marine sciences; and (d) the coordination of the policies and programs of the Government of Canada respecting oceans.	**4.** 1) Les pouvoirs et fonctions du ministre s'étendent d'une façon générale à tous les domaines de compétence du Parlement non attribués de droit à d'autres ministères ou organismes fédéraux et liés : *a)* à la pêche côtière et à la pêche dans les eaux internes; *b)* aux ports de pêche et de plaisance; *c)* à l'hydrographie et aux sciences de la mer; *d)* à la coordination des plans et programmes du gouvernement fédéral touchant aux océans.

(2) The powers, duties and functions of the Minister also extend to and include such other matters, relating to oceans and over which Parliament has jurisdiction, as are by law assigned to the Minister.	(2) Les pouvoirs et fonctions du ministre s'étendent en outre aux domaines de compétence du Parlement liés aux océans et qui lui sont attribués de droit.

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[40] Further, the Management Plan is consistent with the Minister's obligations to manage, conserve and develop the fishery on behalf of Canadians and in the public interest. At paragraph 37 of his Reasons for a unanimous Supreme Court of Canada in *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12, Major J. made the following remarks:

> […] Canada's fisheries are a "common property resource", belonging to all the people of Canada. Under the Fisheries Act, it is the Minister's duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest (s. 43). […]

[41] In *Carpenter Fishing Corp. v. Canada*, [1998] 2 F.C. 548, this Court, at paragraph 28 of its Reasons, discussed the nature of a fishing quota policy imposed by the Minister. Décary J.A., who wrote the Reasons for the Court, indicated that a quota policy, in contrast to a fishing licence granted under s. 7 of the Act, was a discretionary decision and that judicial review thereof was greatly limited. He further indicated that the Minister could issue policy guidelines as long as he did not fetter his discretion with respect to the granting of licenses "by treating the guidelines as binding upon him". His full remarks are as follows:

> 28. The imposition of a quota policy (as opposed to the granting of a specific licence) is a discretionary decision in the nature of policy or legislative action. <u>Policy guidelines outlining the general requirements for the granting of licences are not regulations; nor do they have the force of law.</u> It flows from the decision of the Supreme Court of Canada in *Maple Lodge Farms v. Government of Canada* and from the decision of this Court in *Canadian assn. of Regulated Importers v. Canada (Attorney General)*, that the Minister, provided he does not fetter his discretion to grant a licence by treating the guidelines as binding upon him, may

> validly and properly indicate the kind of considerations by which he will be guided as a general rule when allocating quotas. These discretionary policy guidelines are not subject to judicial review, save according to the three exceptions set out in *Maple Lodge Farms*: bad faith, non-conformity with the principles of natural justice where the application is required by statute and reliance placed upon considerations that are irrelevant or extraneous to the statutory purpose.
>
> [Emphasis added]

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[42] Further, in *Carpenter, supra*, Décary J.A. emphasized at paragraph 37 of his Reasons the importance of affording the Minister broad discretion in the exercise of his powers in relation to the establishment of a fishing quota policy:

> **37.** It follows that when examining the exercise by the Minister of his powers, duties, functions and discretion in relation to the establishment and implementation of a fishing quota policy, courts should recognize, and give effect to, the avowed intent of Parliament and of the Governor in Council to confer to the Minister the widest possible freedom to manoeuvre. It is only when actions of the Ministry otherwise authorized by the *Fisheries Act* are clearly beyond the broad purposes permitted under the Act that courts should intervene.

[43] I therefore respectfully believe that Blanchard J. erred in law or that he proceeded on a wrong principle of law in finding that the Minister's discretion was spent when he approved the Management Plan. The Management Plan is an expression of policy, not a decision to grant permits under section 7, and the Minister's discretion is thus not exhausted by the approval thereof. The Minister was not bound by his policy and he could, at any time, make changes thereto. Consequently, whether the Minister turned his mind to a release of liability condition when he issued the Management Plan or whether it was an afterthought resulting from suggestions made by Department officials is, in my view, of no help to the respondents, as the Minister could not fetter his discretion when he issued the Management Plan.

[44] As a result, the fact that the Management Plan, as announced on March 30, 2006, did not require Department officials to obtain a release of liability from the respondents before financial assistance would be provided to them does not constitute a basis for finding that the Minister was bound to implement the Management Plan.

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DISPOSITION

[45] For these reasons, I would therefore allow the appeal with costs and, rendering the judgment which ought to have been rendered, I would dismiss the respondents' judicial review application, also with costs.

"M. Nadon"
J.A.

"I agree.
Pierre Blais C.J."

<u>PELLETIER J.A.</u> (Concurring Reasons)

[46] I have read in draft the reasons of my colleague Nadon J.A. and though I come to the same conclusion as he does, I do so for different reasons.

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[47] In my view, it is misleading to speak of the Snow Crab Management Plan (which, like my colleague and the application judge, I will refer to as the Management Plan) as though it were a single decision. The Management Plan, as set out in the press release, had a number of components:

- the Total Allowable Catch (TAC) was set at 25,869 tonnes if certain conservation measures were in place, 20,862 tonnes if they were not.

- the TAC was allocated among stakeholders as follows: First Nations, 15.816%; the traditional fleets, 65.182%; CFA 18 fishers, 4.002% and new access 15%.

- certain management measures from the previous years were continued: dockside monitoring, 30% at-sea coverage, Vessel Monitoring System (VMS), the Irving Whale exclusion zone and implementation of the comprehensive soft shell crab protocol if enhanced management measures were in place.

- the opening date of the season was to be set in consultation with an industry group; the closing date was set at July 15, 2006.

- financial assistance of $37.4 was available for the traditional fishery.

[48] While some of these measures are related, nonetheless each represents a discrete decision which was to have effect in the 2006 fishery. Various statutory or regulatory authorizations or approvals were involved. The issuance of fishing licences with a reduced quota was an exercise of the statutory discretion found at section 7 of the *Fisheries Act* R.S.C. 1985 c. F-14 (the Act). The funding of the compensation plan required a Parliamentary appropriation. Other measures may

have required other types of regulatory approvals or authorizations. In other words, the Management Plan was not a single decision, or a one-time exercise of discretion.

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[49] To the extent that the Management Plan represented decisions taken, it is not a policy, that is, a guide to future decision-making. The decisions had been taken. Only their implementation remained. Any rights which arose as a result of the Management Plan arose as a result of the decisions which were actually taken. As a result, I do not think that one can say that the Management Plan created no legal duties because it was simply policy. Various rights and duties flowed from each of the decisions taken. For example, the traditional crabbers' licences were issued, subject to a lower quota than they had been in the past. The TAC was fixed at a given level, subject to modification if certain conservation measures were in place. Each of these decisions had legal consequences.

[50] The issue in this appeal is whether the decision to offer compensation to the traditional crabbers in conjunction with the a reduction in the quota attached to their licences created a right, on the part of the crabbers, to receive that compensation free of any limitation on their future claims for compensation and a corresponding public legal duty, on the part of the Minister, to pay the compensation without requiring the crabbers to surrender any rights to further compensation.

[51] The crabbers assert that the source of their rights is the Memorandum dated March 29, 2006, in which certain options were laid before the Minister together with a departmental recommendation, and the Minister's selection of one of those options. The crabbers' describe this

ministerial approval as a Ministerial Order. For example, under the heading "public legal duty to act" in their Memorandum, the crabbers say:

> 43. There is no issue as to the Minister's authority to issue the Ministerial Order that the Judgment under appeal enforces.
>
> 44. Upon issuing his Order, the Minister created a public legal duty for his officials to distribute financial assistance to traditional snow crabbers from snow crab areas 12, 18, 25 and 26. It is important to note that in issuing the order, the Minster did not impose any conditions on the release of the said financial assistance.
>
> 45. Being traditional crabbers in the affected areas, the aforementioned legal duty was owed to the Respondents.

[52] The crabbers' view is that by indicating his concurrence with the departmental recommendation, the Minister was ordering the department to implement that recommendation exactly as he had approved it.

[53] The application judge linked the compensation plan to the issuance of the crabber's fishing licences, reasoning that since the compensation was intimately linked with the reduction of the crabbers' quotas, the two elements were but aspects of a single decision under the Act. The application judge considered that the decision was in substance a decision with respect to fishing licences, which provided the statutory basis for the public legal duty to act.

[54] In my view, neither analysis withstands scrutiny. The crabbers' position is that on a proper construction of the Minister's decision, it did not include the requirement that crabbers waive their right to additional compensation in order to obtain the benefit of the compensation being offered. Since this is a matter of the interpretation of the document, it is a question of law and is a matter on

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which no deference is owed, either to the application judge or to the crabbers. There is nothing in the document itself which supports the conclusion that the payment to the crabbers was to be made unconditionally. The recognition that the crabbers would not be happy with the amount proposed and that they would expect to receive more from litigation is nothing more than an acknowledgement of the known facts. It is not an argument for or against the proposition that the funds were to be paid unconditionally.

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[55] It is, I believe, simply unrealistic to assume that in signing off on Option 2, the Minister was thereby fixing all the terms of the compensation plan. He was simply authorizing the continuance of the existing compensation plan in the circumstances where quota re-allocation on the basis of voluntary surrender had been abandoned. The details of the administration of the plan were, as they had always been, in the hands of department officials and their legal advisers. Had the ministry wished to recommend that the payments be made unconditionally, it would have done so and had the Minister wished to insist that the payment be made unconditionally, he would have done so as well. It is unlikely that the Minister would authorize a partial payment to the crabbers which would exhaust the appropriation for the Marshall initiative without addressing his mind to the absence of Parliamentary authority for the balance of any amounts to be paid. In my view, the crabbers have misinterpreted the document on which they base their claim for mandamus.

[56] The application judge did not adopt the crabbers' claim of a right to *mandamus* based on a public legal duty arising from a ministerial directive. He acknowledged that a public legal duty was one arising in a statute or a regulation: see *Arsenault v. Canada (Attorney General)* 2008 FC 492,

[2008] F.C.J. No. 604 at paragraph 27. As noted above, he found the public legal duty to act by conflating the right to compensation with the issuance of fishing licences subject to reduced quotas.

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[57] The crabbers had no legal right to any particular amount of quota. This flows from the nature of fishing licences, in respect of whose issuance the Minister has the broadest discretion: see *Comeau's Sea Foods Ltd v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12, [1997] S.C.J. No.5, at paragraph 49. Consequently, if there is no vested right to a given quota, there can be no right to compensation arising purely from the fact of loss of quota. As a result, the decision to offer compensation for lost quota is not one which is based on a statute or a regulation. In fact, the crabbers allege in their action that their right to compensation is a matter of contract. The exercise of the minister's discretion to issue fishing licences with reduced quota under section 7 of the Act did not result in a public legal duty to pay compensation for the lost quota. There being no public legal duty, the crabbers are not entitled to an order of *mandamus*.

[58] I would therefore allow the appeal with costs and set aside the decision of the Federal Court judge.

"J.D. Denis Pelletier"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-144-08
STYLE OF CAUSE:	A.G.C. v. ROBERT ARSENAULT ET AL
PLACE OF HEARING:	Charlottetown, P.E.I.
DATE OF HEARING:	June 11, 2009
REASONS FOR JUDGMENT BY:	NADON J.A.
CONCURRED IN BY:	BLAIS C.J.
CONCURRING REASONS BY:	PELLETIER J.A.
DATED:	October 20, 2009

APPEARANCES:

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TAB 3

Federal Court of Appeal

Cour d'appel fédérale

Date: 20130225

Docket: A-39-13

Citation: 2013 FCA 55

2013 FCA 55 (CanLII)

CORAM: **SHARLOW J.A.**
STRATAS J.A.
WEBB J.A.

BETWEEN:

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Appellant

and

YVES LEBON

Respondent

Heard at Toronto, Ontario, on February 25, 2013.

Judgment delivered from the Bench at Toronto, Ontario, on February 25, 2013.

REASONS FOR JUDGMENT OF THE COURT BY: STRATAS J.A.

Federal Court of Appeal

Cour d'appel fédérale

Date: 20130225

Docket: A-39-13

Citation: 2013 FCA 55

2013 FCA 55 (CanLII)

CORAM: **SHARLOW J.A.**
STRATAS J.A.
WEBB J.A.

BETWEEN:

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Appellant

and

YVES LEBON

Respondent

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on February 25, 2013)

STRATAS J.A.

[1] Over four years ago, Mr. LeBon, a Canadian citizen presently in a low security jail in the United States, applied to be transferred to a Canadian facility. The *International Transfer of Offenders Act*, S.C. 2004, c. 21, permits and governs such applications.

[2] Under this Act, the Minister is to determine each application using a fixed set of factors set out in section 10 of the Act, guided by the Act's purpose, namely "to contribute to the administration of justice and the rehabilitation of offenders and their reintegration into the community by enabling offenders to serve their sentences in the country of which they are citizens or nationals."

[3] The Minister refused Mr. LeBon's application. He found that one of the section 10 factors against transfer – the risk of commission of a "criminal organization offence" in the future – was present. All other factors raised by the evidence were in favour of transfer.

[4] This Court quashed the Minister's refusal because in his reasons he did not demonstrate a weighing of the section 10 factors, as he was required to do. In particular, he did not explain why the factors favouring transfer should not prevail. Accordingly, this Court found that the Minister did not give reasons as he was supposed to do under subsection 11(2) of the Act. Further, his reasons were not "transparent" and "intelligible," as they are supposed to be. This Court remitted the matter to the Minister for re-decision. See *LeBon v. Canada (Attorney General)*, 2012 FCA 132, rev'g 2011 FC 1018.

[5] In his re-decision, the Minister again refused Mr. LeBon's application for transfer.

[6] The Federal Court quashed the Minister's re-decision: 2012 FC 1500. The Federal Court found that the Minister "only paid lip service" to this Court's reasons, "basically reassert[ing] his previous reasoning," showing a "closed mind" and "intransigency" (at paragraphs 13 and 15). The

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Federal Court also found that the refusal was substantively unreasonable: not only had the Minister failed to articulate an acceptable basis for finding there was a significant risk that Mr. LeBon would commit a "criminal organization offence," there was no rational support in the record to support such a finding (at paragraphs 18-23).

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[7] Rather than sending the matter back to the Minister, the Federal Court issued a mandatory order. It required the Minister within 45 days to accept Mr. Le Bon's transfer request and confirm in writing to Mr. LeBon that all reasonable steps had been taken for his prompt transfer to a correctional facility in Canada.

[8] The Minister appeals to this Court. Just after the Minister launched his appeal, he sought a stay of the Federal Court's judgment pending appeal. Although this Court noted the harm suffered by Mr. LeBon over the last four years, it granted the stay: 2013 FCA 18.

[9] In this Court, the Minister contests the Federal Court's findings that the Minister displayed a "closed mind" and "intransigency" in his re-decision and paid "lip service" to this Court's earlier decision. We consider these factual findings supportable on the basis of the record.

[10] In this Court, the Minister does not contest the Federal Court's finding that his re-decision is substantively unreasonable. The only live issue placed before us is whether, as a matter of law, it was open to the Federal Court to make a mandatory order, rather than sending the matter back for another re-decision.

[11] In effect, the Minister submits that the Federal Court was constrained: all the Federal Court could do is send the matter back to the Minister, giving him a third chance to make a decision that would follow Parliament's law and the Courts' decisions.

[12] For the reasons that follow, and despite the able and professional submissions of Ms. Lawrence, counsel for the Minister, we do not accept that the Federal Court was so constrained.

[13] In their memoranda in this Court, the parties drew upon a narrow line of cases where the Federal Courts had issued "directed verdicts" to administrative tribunals: see, *e.g.*, *Canada (Minister of Human Resources Development) v. Rafuse*, 2002 FCA 31; *Simmons v. Canada (Minister of National Revenue)*, 2006 FC 130. By direction issued in advance of the hearing of this appeal, this Court noted that this line of cases is part of the general law of *mandamus* and invited the parties to make wider submissions at the hearing concerning the availability of *mandamus* in these circumstances. We have received and considered those submissions.

[14] In our view, in these circumstances, the Federal Court had at least two sources of power to exercise its discretion in favour of making a mandatory order (*mandamus*):

- As mentioned above, the Federal Court found the Minister's conclusion that there was a significant risk that Mr. LeBon would commit a "criminal organization offence" to be unsupported by the evidence, and the Crown does not contest this. With that factor off the table, all that remained were factors supporting the transfer. In these circumstances, it was open to the Federal Court to conclude on this evidence

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that the only lawful exercise of discretion is the granting of transfer. In such circumstances, *mandamus* lies: *Apotex v. Canada (Attorney General)*, [1994] 3 S.C.R. 1100, aff'g [1994] 1 F.C. 742 at pages 767-768 (C.A.) (principles 3, 4(d) and 4(e)), approved on this point in *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772 at paragraph 41.

- In the unusual circumstances of this case, *mandamus* is also available to prevent the further delay and harm that would be caused to Mr. LeBon if the Minister were given a third chance to decide this matter in accordance with law, in circumstances where the Minister did not follow this Court's earlier decision, paid "lip service" to it, and displayed a "closed mind" and "intransigency": see *Pointon v. British Columbia (Superintendent of Motor Vehicles)*, 2002 BCCA 516 at paragraph 27 (there is a jurisdiction to grant *mandamus* in exceptional circumstances where delay would result in harm); see also the authorities cited in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307 at paragraph 148 (there is a jurisdiction, centuries-old, to grant *mandamus* in exceptional cases of mal-administration) (*per* LeBel J., dissenting, the majority not disagreeing with the existence of the jurisdiction).

[15] We also find that the Federal Court's exercise of discretion in favour of making a mandatory order against the Minister (*mandamus*) had a foundation in the evidentiary record. Thus, there is no basis for this Court to interfere with the Federal Court's exercise of discretion: *Trinity Western*, *supra* at paragraph 40.

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[16] In paragraph 2 of its judgment, the Federal Court set a 45-day period for the Minister to comply with the judgment it made. This 45-day period has elapsed. In the circumstances, the Federal Court's judgment will be varied as follows:

(a) in paragraph 2, the words "within 45 days" shall be replaced with "forthwith"; and

(b) in paragraph 3, the words "to confirm in writing to the applicant that all reasonable steps have been taken for his prompt transfer to a correctional facility in Canada" shall be replaced by the words "the Minister is directed to do everything in his power to effect the transfer of the applicant to a correctional facility in Canada in March 2013 or, if not possible, at the earliest possible time thereafter."

[17] The appeal will otherwise be dismissed, with costs fixed at $8,900, inclusive of disbursements and taxes.

"David Stratas"
J.A.

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FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-39-13

APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE MARTINEAU DATED DECEMBER 20, 2012, DOCKET NO. T-1414-12

STYLE OF CAUSE:	Minister of Public Safety and Emergency Preparedness v. Yves LeBon
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 25, 2013
REASONS FOR JUDGMENT OF THE COURT BY:	Sharlow, Stratas and Webb JJ.A.
DELIVERED FROM THE BENCH BY:	Stratas J.A.

APPEARANCES:

Catherine A. Lawrence	FOR THE APPELLANT
Yavar Hameed	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada	FOR THE APPELLANT
Hameed & Farrokhzad Ottawa, Ontario	FOR THE RESPONDENT

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TAB 4

Action Travail des Femmes *Appellant*

v.

Canadian National Railway Company *Respondent*

and

Canadian Human Rights Commission *Mis en cause*

and

Attorney General of Canada *Intervener*

and between

Canadian Human Rights Commission *Appellant*

v.

Canadian National Railway Company *Respondent*

and

Action Travail des Femmes, Denis Lemieux, Nicole Duval-Hesler, Joan Wallace and the Attorney General of Canada *Mis en cause*

INDEXED AS: CANADIAN NATIONAL RAILWAY CO. *v.* CANADA (CANADIAN HUMAN RIGHTS COMMISSION)

File Nos: 19499, 19500.

1986: November 5, 6; 1987: June 25.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Chouinard*, Lamer, Wilson, Le Dain and La Forest JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Civil rights — Discrimination — Employment — Systemic discrimination against an identifiable group — Human Rights Tribunal imposing employment equity program on employer — Tribunal's order setting employment goal and fixing hiring quota — Whether the Tribunal had jurisdiction to make such order — Canadian Human Rights Act, S.C. 1976-77, c. 33, ss. 2, 15(1), 41(2)(a).

* Chouinard J. took no part in the judgment.

Action Travail des Femmes *Appelante*

c.

Compagnie des chemins de fer nationaux du Canada *Intimée*

et

Commission canadienne des droits de la personne *Mise en cause*

et

Le procureur général du Canada *Intervenant*

et entre

Commission canadienne des droits de la personne *Appelante*

c.

Compagnie des chemins de fer nationaux du Canada *Intimée*

et

Action Travail des Femmes, Denis Lemieux, Nicole Duval-Hesler, Joan Wallace et le procureur général du Canada *Mis en cause*

RÉPERTORIÉ: COMPAGNIE DES CHEMINS DE FER NATIONAUX DU CANADA *c.* CANADA (COMMISSION CANADIENNE DES DROITS DE LA PERSONNE)

N^os du greffe: 19499, 19500.

1986: 5, 6 novembre; 1987: 25 juin.

Présents: Le juge en chef Dickson et les juges Beetz, Estey, McIntyre, Chouinard*, Lamer, Wilson, Le Dain et La Forest.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Libertés publiques — Discrimination — Emploi — Discrimination systémique contre un groupe identifiable — Imposition par un tribunal des droits de la personne d'un programme d'équité en matière d'emploi à un employeur — Ordonnance du tribunal fixant un objectif d'emploi et des contingentements d'embauche — Le tribunal est-il compétent pour rendre une telle ordonnance? — Loi canadienne sur les droits de la personne, S.C. 1976-77, chap. 33, art. 2, 15(1), 41(2)a).

* Le juge Chouinard n'a pas pris part au jugement.

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Statutes — Interpretation — Human rights legislation — Legislation to be given a broad interpretation to fulfil its purposes — Canadian Human Rights Act, S.C. 1976-77, c. 33.

Action Travail des Femmes alleged that CN was guilty of discriminatory hiring and promotion practices contrary to s. 10 of the *Canadian Human Rights Act* by denying employment opportunities to women in certain unskilled blue-collar positions. A Human Rights Tribunal constituted under s. 39 of the Act studied the complaint, found that the evidence indicated clearly that the recruitment, hiring and promotion policies at CN prevented and discouraged women from working on blue-collar jobs, and concluded that it was essential to impose upon CN a special employment program. In particular, paragraph 2 of the Special Temporary Measures Order required CN to increase to 13 per cent—the national average—the proportion of women working in non-traditional occupations, and until that goal was achieved, to hire at least one woman for every four non-traditional jobs filled in the future. CN's application to the Federal Court of Appeal under s. 28 of the *Federal Court Act* to review the Tribunal's decision was allowed and paragraph 2 of the Special Temporary Measures Order was set aside. The majority of the Court held that the Tribunal exceeded its jurisdiction under s. 41(2)(*a*) of the *Canadian Human Rights Act* in making that part of the Order because the Tribunal's power under that section is limited to prescribing measures for the purpose of preventing in the future the recurrence of discriminatory practices which had been found to exist and not to remedy the consequences of past discrimination. This appeal is to determine whether the Tribunal has the power under s. 41(2)(*a*) to impose upon an employer an "employment equity program" to address the problem of "systemic discrimination" in the hiring and promotion of a disadvantaged group, in this case women.

Held: The appeal is allowed and the cross-appeal dismissed.

The Order made by the Tribunal was within its jurisdiction under s. 41(2)(*a*) of the Act. The purpose of the Act, stated in s. 2, is not to punish wrongdoing but to prevent discrimination against identifiable protected groups and the Act must receive a fair, large and liberal interpretation to advance and fulfil its purpose. Under s. 41(2)(*a*), the Tribunal may order the "adoption of a special program ... referred to in subsection 15(1)", a

Législation — Interprétation — Législation sur les droits de la personne — Interprétation large de la législation pour qu'elle réalise ses objets — Loi canadienne sur les droits de la personne, S.C. 1976-77, chap. 33.

Action Travail des Femmes prétend que le CN s'est rendu coupable d'actes discriminatoires en matière d'embauche et de promotions, contrairement à l'art. 10 de la *Loi canadienne sur les droits de la personne*, en refusant aux femmes la possibilité d'occuper certains emplois manuels non spécialisés. Un tribunal des droits de la personne constitué en vertu de l'art. 39 de la Loi a étudié la plainte, constaté qu'il y avait des preuves manifestes que les politiques de recrutement, d'embauche et de promotion du CN empêchaient et décourageaient les femmes d'occuper des emplois manuels et a conclu qu'il était essentiel d'imposer au CN un programme spécial d'emploi. En particulier, le deuxième paragraphe des mesures temporaires spéciales de l'ordonnance enjoint au CN d'augmenter à 13 pour 100—la moyenne nationale—la main-d'œuvre féminine dans les postes non traditionnels et, jusqu'à ce que ce but soit atteint, d'embaucher au moins une femme sur quatre postes non traditionnels à être comblés à l'avenir. La demande d'examen et d'annulation de la décision du tribunal, que le CN a adressée à la Cour d'appel fédérale en vertu de l'art. 28 de la *Loi sur la Cour fédérale*, a été accueillie et le paragraphe 2 des mesures temporaires spéciales a été radié. La Cour, à la majorité, a jugé que le tribunal avait excédé la compétence que lui confère l'al. 41(2)*a*) de la *Loi canadienne sur les droits de la personne* en rendant cette ordonnance, car son pouvoir en vertu de cet article se limitait à prescrire des mesures destinées à prévenir la récurrence des actes discriminatoires constatés et non de remédier aux conséquences d'actes discriminatoires antérieurs. Le pourvoi a pour objet de déterminer si le tribunal a le pouvoir, en vertu de l'al. 41(2)*a*), d'imposer à un employeur un «programme d'équité en matière d'emploi» pour répondre au problème de la «discrimination systémique» dans l'embauche et la promotion d'un groupe désavantagé, dans ce cas-ci les femmes.

Arrêt: Le pourvoi est accueilli et le pourvoi incident rejeté.

Le tribunal, en rendant son ordonnance, a respecté les limites de la compétence que lui confère l'al. 41(2)*a*) de la Loi. L'objet de la Loi, énoncé à l'art. 2, n'est pas de punir une faute mais bien de prévenir la discrimination au détriment de groupes identifiables protégés, et elle doit recevoir une interprétation juste, large et libérale afin de promouvoir cet objet. En vertu de l'al. 41(2)*a*), le tribunal peut ordonner «l'adoption d'une proposition

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section designed to meet the problem of systemic discrimination, "to prevent the same or a similar [discriminatory] practice occurring in the future". An employment equity program, such as the one in the present case, is designed to break a continuing cycle of systemic discrimination. The goal is not to compensate past victims or even to provide new opportunities for specific individuals who have been unfairly refused jobs or promotion in the past. Rather, an employment equity program is an attempt to ensure that future applicants and workers from the affected group will not face the same insidious barriers that blocked their forebears. In any employment equity program, there simply cannot be a radical dissociation of "remedy" and "prevention" for there is no prevention without some form of remedy. Although the dominant purpose of such programs is always to improve the situation of the target group in the future, it is essential, in attempting to combat systemic discrimination, to look to the past patterns of discrimination and to destroy those patterns. In this case, it is an uncontradicted fact that the hiring and promotion policies of CN and the enormous problems faced by the tiny minority of women in the blue-collar work force amounted to a systematic denial of women's equal employment opportunities. The employment equity program ordered by the Tribunal, including paragraph 2 of the Special Temporary Measures, was rationally designed to combat such systemic discrimination by preventing "the same or similar practice occurring in the future" and, therefore, fell within the scope of s. 41(2)(*a*).

relative à des programmes [...] spéciaux visés au paragraphe 15(1)», paragraphe conçu pour répondre à la discrimination systémique, pour «prévenir les actes [discriminatoires] semblables». Un programme d'équité en matière d'emploi, comme celui ordonné par le tribunal en l'espèce, est conçu pour rompre le cercle vicieux de la discrimination systémique. L'objectif n'est pas d'indemniser les victimes ni même d'ouvrir de nouveaux horizons à des individus particuliers qui, par le passé, se sont vu refuser inéquitablement un emploi ou une promotion. Plutôt, le programme d'équité en matière d'emploi tente de faire en sorte qu'à l'avenir les postulants et les travailleurs du groupe touché n'aient pas à faire face aux mêmes barrières insidieuses qui ont arrêté leurs prédécesseurs. Toutefois, dans tout programme d'équité en matière d'emploi, on ne peut tout simplement pas dissocier radicalement la «réparation» de la «prévention», puisqu'il ne peut y avoir prévention sans une forme quelconque de réparation. Si l'objet dominant de ces programmes est toujours d'améliorer la situation future du groupe visé, il est essentiel de s'attaquer aux anciens régimes discriminatoires et de les détruire. En l'espèce, c'est un fait incontesté que les politiques d'embauche et de promotion du CN et les problèmes considérables auxquels doit faire face la faible minorité de femmes dans les emplois manuels reviennent à dénier systématiquement aux femmes l'égalité des chances en matière d'emploi. Le programme d'équité en matière d'emploi ordonné par le tribunal, y compris le paragraphe 2 des mesures spéciales temporaires, était logiquement conçu pour combattre une telle discrimination systémique par la prévention d'«actes semblables» et, donc, est conforme à l'al. 41(2)*a*).

Cases Cited

Referred to: *Bhinder v. Canadian National Railway Co.*, [1985] 2 S.C.R. 561, aff'g [1983] 2 F.C. 531; *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145; *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150; *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536; *Canadian Odeon Theatres Ltd. v. Saskatchewan Human Rights Commission*, [1985] 3 W.W.R. 717.

Jurisprudence

Arrêts mentionnés: *Bhinder c. Compagnie des chemins de fer nationaux du Canada*, [1985] 2 R.C.S. 561, conf. [1983] 2 C.F. 531; *Insurance Corporation of British Columbia c. Heerspink*, [1982] 2 R.C.S. 145; *Winnipeg School Division No. 1 c. Craton*, [1985] 2 R.C.S. 150; *Commission ontarienne des droits de la personne c. Simpsons-Sears Ltd.*, [1985] 2 R.C.S. 536; *Canadian Odeon Theatres Ltd. v. Saskatchewan Human Rights Commission*, [1985] 3 W.W.R. 717.

Statutes and Regulations Cited

Canadian Human Rights Act, S.C. 1976-77, c. 33, ss. 2, 10, 15(1), 39, 41(2)(*a*), (*b*), (*c*), (*d*).
Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, s. 28.
Interpretation Act, R.S.C. 1970, c. I-23, s. 11.
Ontario Human Rights Code, R.S.O. 1980, c. 340.

Lois et règlements cités

Code ontarien des droits de la personne, L.R.O. 1980, chap. 340.
Loi canadienne sur les droits de la personne, S.C. 1976-77, chap. 33, art. 2, 10, 15(1), 39, 41(2)*a*), *b*), *c*), *d*).
Loi d'interprétation, S.R.C. 1970, chap. I-23, art. 11.
Loi sur la Cour fédérale, S.R.C. 1970 (2e Supp.), chap. 10, art. 28.

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Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.

Greschner, Donna and Ken Norman. "Notes of Cases" (1985), 63 *Can. Bar Rev.* 805.

Tarnopolsky, Walter S. *Discrimination and the Law in Canada*. Toronto: R. De Boo, 1982.

APPEAL from a judgment of the Federal Court of Appeal, [1985] 1 F.C. 96, 20 D.L.R. (4th) 668, 61 N.R. 354, allowing CN's application under s. 28 of the *Federal Court Act* and setting aside part of the Human Rights Tribunal's Order. Appeal allowed and cross-appeal dismissed.

Hélène Lebel, Q.C., for Action Travail des Femmes.

Alphonse Giard, Q.C., Rolland Boudreau, Q.C., and *Anne Bétournay*, for the Canadian National Railway Co.

René Duval and *Anne Trotier*, for the Canadian Human Rights Commission.

The judgment of the Court was delivered by

THE CHIEF JUSTICE—This case raises the important question whether a Human Rights Tribunal appointed under s. 39 of the *Canadian Human Rights Act*, S.C. 1976-77, c. 33 (the Act), has the power under s. 41(2)(*a*) to impose upon an employer, in this case Canadian National Railway Co., a program tailored specifically to address the problem of "systemic discrimination" in the hiring and promotion of a disadvantaged group, in this case women. I am content to adopt the vocabulary of the *Report of the Commission on Equality in Employment* (1984), authored by Judge Rosalie

Doctrine citée

Abella, Rosalie S. *Rapport de la Commission sur l'égalité en matière d'emploi*, Ottawa: Ministère des Approvisionnements et Services du Canada, 1984.

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Blumrosen, Alfred W. «Quotas, Common Sense and Law in Labour Relations: Three Dimensions of Equal Opportunity». In *Some Civil Liberties Issues of the Seventies*. Edited by Walter S. Tarnopolsky. Toronto: Osgoode Hall Law School, York University, 1975.

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POURVOI contre un arrêt de la Cour d'appel fédérale, [1985] 1 C.F. 96, 20 D.L.R. (4th) 668, 61 N.R. 354, qui a accueilli la demande du CN fondée sur l'art. 28 de la *Loi sur la Cour fédérale* et annulé en partie l'ordonnance du Tribunal des droits de la personne. Pourvoi accueilli et pourvoi incident rejeté.

Hélène Lebel, c.r., pour Action Travail des Femmes.

Alphonse Giard, c.r., Rolland Boudreau, c.r., et *Anne Bétournay*, pour la Compagnie des chemins de fer nationaux du Canada.

René Duval et *Anne Trotier*, pour la Commission canadienne des droits de la personne.

Version française du jugement de la Cour rendu par

LE JUGE EN CHEF—Cette affaire pose l'importante question de savoir si un tribunal des droits de la personne constitué en vertu de l'art. 39 de la *Loi canadienne sur les droits de la personne*, S.C. 1976-77, chap. 33 (ci-après la Loi), a le pouvoir, en vertu de l'al. 41(2)*a*), d'imposer à un employeur, en l'occurrence la Compagnie des chemins de fer nationaux du Canada (ci-après le «Canadien National» ou le «CN»), un programme conçu expressément pour répondre au problème de la «discrimination systémique» dans l'embauche et la promotion d'un groupe désavantagé, dans ce

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Abella (the Abella Report) and to describe such programs as "employment equity programs".

Action Travail des Femmes, a public interest pressure group originally funded by the federal government but now incorporated and financed independently, alleged that Canadian National was guilty of discriminatory hiring and promotion practices contrary to s. 10 of the Act by denying employment opportunities to women in certain unskilled, blue-collar positions. Section 10 of the Act reads:

10. It is a discriminatory practice for an employer or an employee organization

(*a*) to establish or pursue a policy or practice, or

(*b*) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,

that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

I

The Facts

A Human Rights Tribunal was constituted in July 1981 to study the complaint lodged by Action Travail des Femmes. The complaint reads as follows:

A.T.F. has reasonable grounds to believe that CN in the St. Lawrence Region has established or pursued a policy or practice that deprives or tends to deprive a class of individuals of employment opportunities because they are female.

The complaint was not that of a single complainant or even of a series of individual complainants; it was a complaint of systemic discrimination practised against an identifiable group.

The Tribunal received testimony from 50 witnesses during 33 days of hearings and, in due course, rendered a decision of some 175 pages. The decision records in detail the evidence of Mr. Yvon

cas-ci les femmes. Je me contenterai d'adopter le vocabulaire du *Rapport de la Commission sur l'égalité en matière d'emploi* (1984), dont l'auteur est le juge Rosalie Abella (ci-après le rapport Abella), et de désigner de tels programmes sous le nom de «programmes d'équité en matière d'emploi».

Action Travail des Femmes, un groupe de pression d'intérêt public qui était financé à l'origine par le gouvernement fédéral, mais qui est maintenant constitué en société et assure son propre financement, prétend que le Canadien National s'est rendu coupable d'actes discriminatoires en matière d'embauche et de promotion, contrairement à l'art. 10 de la Loi, en refusant aux femmes la possibilité d'occuper certains emplois manuels non spécialisés. L'article 10 de la Loi porte:

10. Constitue un acte discriminatoire le fait pour l'employeur ou l'association d'employés

a) de fixer ou d'appliquer des lignes de conduite, ou

b) de conclure des ententes, touchant le recrutement, les mises en rapport, l'engagement, les promotions, la formation, l'apprentissage, les mutations ou tout autre aspect d'un emploi présent ou éventuel

pour un motif de distinction illicite, d'une manière susceptible d'annihiler les chances d'emploi ou d'avancement d'un individu ou d'une catégorie d'individus.

I

Les faits

Un tribunal des droits de la personne a été constitué en juillet 1981 pour examiner la plainte déposée par Action Travail des Femmes. Voici le texte de cette plainte:

[TRADUCTION] A.T.F. a des motifs raisonnables de croire que le CN de la région du St-Laurent a fixé ou appliqué des lignes de conduite susceptibles d'annuler les chances d'emploi ou d'avancement d'individus pour le motif qu'il s'agit de personnes de sexe féminin.

La plainte n'est pas le fait d'une seule plaignante ni même de plusieurs plaignantes individuelles; il s'agit d'une plainte de discrimination systémique dont fait l'objet un groupe identifiable.

Le tribunal a entendu les témoignages de 50 personnes au cours de 33 jours d'audience et a finalement rendu une décision de quelque 175 pages. La décision rapporte en détail le témoi-

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Masse, Vice-President of the St. Lawrence Region of Canadian National. Mr. Masse spoke of a study, apparently prepared in 1974 at the request of the then President of CN, Mr. Robert Bandeen, entitled "Canadian National Action Programs—Women", and commonly referred to as the Boyle/Kirkman Report. The Report identified three problems:

1. Lack of Definitive Executive Management Commitment

Top management's interest on the issue of women has not been communicated effectively nor have direct actions demonstrated their concern. The majority of managers are understandably perplexed regarding the current and future role of women within CN. CN managers across the system await a definitive policy statement with specific action programs. Executive management must commit themselves to begin to encourage their subordinates to change the environment to one which truly provides equal opportunity. They must convince both men and women that a special emphasis program is needed to utilize the talents of CN women. These actions must begin now in order to assure CN of a new, qualified management resource in the future.

2. Traditional beliefs by managers and women in the many negative myths and stereotypes about working women

Our interviews revealed a disturbing degree of negative attitudes resulting in obvious discriminatory behavior. For example, the majority of women seeking employment are channeled into secretarial positions, whereas, men are guided toward clerical positions which most often lead to promotions to higher level clerical jobs and/or middle management positions. In job bidding situations, women are frequently strongly discouraged from bidding on traditional men's job. Until the negative environment that these attitudes create is improved, equal opportunity for women will never occur.

3. Current personnel policies and procedures

These policies are limited and ineffective as they relate to the majority of women at CN.

The Report revealed that in the early 1970s women workers comprised one third of the total

gnage de M. Yvon Masse, vice-président de la région du St-Laurent du Canadien National. Monsieur Masse a parlé d'une étude, qui aurait été rédigée en 1974 à la demande du président du CN de l'époque, M. Robert Bandeen, intitulée «Canadian National Action Programs—Women», communément désignée sous le nom de rapport Boyle-Kirkman. Le rapport a reconnu l'existence de trois problèmes:

[TRADUCTION]

1. Absence d'engagement définitif de la part des cadres supérieurs

L'intérêt des cadres supérieurs pour la question des femmes ne s'est pas traduit dans les faits ni par aucune action directe. La majorité des cadres reste, on le comprendra, perplexe face au rôle actuel et futur des femmes au CN. Les cadres du CN, à tous les échelons, attendent encore l'énoncé d'une politique définitive comportant des programmes d'action spécifiques. Les cadres supérieurs doivent s'engager à encourager leurs subordonnés à modifier l'environnement de façon à ce qu'il y ait égalité réelle des chances. Ils doivent convaincre tant les hommes que les femmes de la nécessité d'un programme mettant spécialement l'accent sur l'utilisation des talents des femmes au CN. Ces actions doivent commencer dès maintenant si l'on veut assurer au CN de nouvelles ressources qualifiées en gestion pour l'avenir.

2. Persistance au sein de la direction et chez les femmes d'un grand nombre de mythes et de stéréotypes négatifs traditionnels au sujet des femmes au travail

Nos entrevues ont révélé un nombre troublant d'attitudes négatives à la source d'un comportement discriminatoire évident. Par exemple, la majorité des femmes qui sollicitent un emploi sont dirigées vers des postes de secrétaire, alors que les hommes sont guidés vers des emplois de bureau qui conduisent la plupart du temps à des promotions à des postes plus élevés et à des postes de cadres intermédiaires. En matière de postulation, les femmes sont souvent fortement découragées de solliciter des emplois traditionnellement réservés aux hommes. Tant que l'environnement négatif que ces attitudes créent ne sera pas amélioré, l'égalité des chances pour les femmes ne pourra se réaliser.

3. Politiques et méthodes actuelles relatives au personnel

Ces politiques sont limitées et inefficaces pour ce qui est de la majorité des femmes au CN.

Le rapport révèle qu'au début des années 1970, le tiers de la main-d'œuvre totale du Canada était

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labour force in Canada, holding 14.3 per cent of managerial positions, 41.2 per cent of professional and technical positions, and 72 per cent of all clerical jobs nation-wide. In contrast to the national employment statistics, women constituted approximately 4 per cent of the total CN work force and held less than 0.5 per cent of the senior management jobs.

The attitudes of male personnel at CN towards women were reviewed extensively in the Report. Examples follow:

1. "Women are generally disruptive to the work-force."
2. "Women aren't tough enough to handle supervisory jobs. They fail miserably under pressure."
3. "The best jobs for women are coach cleaners—That's second nature to them."
4. "One big problem adding women to train crews would be policing the morals in the cabooses."
5. Work in the yards is too physically demanding. The weather is too harsh."
6. "Women cannot do the physical aspects of a CN conductor's job. There's too much handling of drunks, transients and undesirables."
7. "Women have no drive, no ambition, no initiative."
8. "A woman can't combine a career and family responsibilities."
9. "The 'old boy network' for promotions is very strong at CN. This naturally inhibits women's advancement."
10. "My department is all male—they don't want a woman snooping around."
11. "Railroading is a man's sport—there's no room for women."
12. "Unless I'm forced, I won't take a woman."

The Report also included a small number of comments from male CN employees which tended to

composé de femmes qui étaient titulaires de 14,3 pour 100 des postes de direction, de 41,2 pour 100 des postes de techniciens et de professionnels et de 72 pour 100 des postes de commis de bureau dans l'ensemble du pays. Comparativement à ces statistiques nationales en matière d'emploi, les femmes ne représentaient qu'environ 4 pour 100 de la main-d'œuvre totale du CN et n'y détenaient que moins de 0,5 pour 100 des postes de cadres supérieurs.

Le rapport étudie en profondeur les attitudes du personnel masculin du CN envers les femmes. Voici quelques exemples:

[TRADUCTION]

1. «Les femmes ont une influence néfaste sur la main-d'œuvre.»
2. «Les femmes n'ont pas la force de caractère suffisante pour occuper des postes de surveillance. Elles cèdent misérablement sous l'effet de la contrainte.»
3. «Les meilleurs emplois pour les femmes consistent à nettoyer les wagons, c'est chez elles une seconde nature.»
4. «L'un des gros problèmes que susciterait la présence de femmes dans les équipages de trains serait de veiller au maintien des bonnes mœurs dans les fourgons de queue.»
5. «Le travail dans les gares de triage est trop exigeant physiquement. Le climat est trop dur.»
6. «Les femmes ne peuvent assumer les aspects physiques du métier de conducteur au CN. Il y a trop d'ivrognes, de vagabonds et d'indésirables dont il faut s'occuper.»
7. «Les femmes manquent de dynamisme, d'ambition, d'initiative.»
8. «Une femme ne peut combiner carrière et responsabilités familiales.»
9. «Le réseau des «vieux copains» pour les promotions est très fort au CN. Cela nuit naturellement à l'avancement des femmes.»
10. «Il n'y a que des hommes dans mon département, ils ne veulent pas de femmes qui s'immisceront dans leurs affaires.»
11. «Les chemins de fer, ça regarde les hommes, il n'y a pas de place pour les femmes.»
12. «À moins qu'on m'y force, je n'accepterai pas de femmes.»

Le rapport comporte aussi un petit nombre d'observations d'employés du CN qui tendent à favori-

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favour the participation of women in the CN work force:

1. "Women are a vast, untapped resource we have overlooked until now."

2. "Women are the same as men—as long as they do the job, they should get hired, developed and promoted."

3. "We are guilty of unconscious discrimination against women by never identifying and developing their talents."

Women at CN were very conscious of the generally negative attitude of male supervisors, the Report revealed:

1. "We always hear—'You're taking a job from a man.' "
2. "We're at the mercy of the individual supervisor. If he's against women, we're sunk."
3. "When my Supervisor heard that he had to take two women, you should have heard the uproar he made in front of us."

The Boyle/Kirkman Report concluded with specific recommendations concerning the recruitment of women to CN:

CN needs to adopt a well-planned, aggressive program for the recruitment of women.

The following are some suggested actions which could be included in the recruitment program:

A. Establish numeric objectives by level for the recruitment of women.
B. Train all the personnel recruiters about how to interview women effectively.
C. Develop new avenues for locating women:

(1) Advertise in women's periodicals

(2) Work with women's search agencies

(3) Specify women candidates wanted from all search agencies

(4) Encourage women referrals from employees

(5) Identify an individual within Personnel who could provide immediate follow-up on resumes

ser l'intégration des femmes à la main-d'œuvre du CN:

[TRADUCTION]

1. «Les femmes constituent une vaste ressource inexploitée dont nous n'avons pas tenu compte jusqu'à maintenant.»
2. «Les femmes sont comme les hommes, si elles peuvent faire le travail, elles devraient être embauchées, formées et obtenir des promotions.»
3. «Nous nous rendons coupables de discrimination inconsciente envers les femmes en ne cherchant jamais à connaître et à développer leurs talents.»

Les femmes au CN sont très conscientes de l'attitude généralement négative des surveillants; voici ce que le rapport révèle:

[TRADUCTION]

1. «On nous dit toujours: «Vous prenez la place d'un homme.»»
2. «Nous sommes à la merci de notre surveillant. S'il est contre les femmes, nous sommes foutues.»
3. «Lorsque mon surveillant a appris qu'il lui faudrait accepter deux femmes, vous auriez dû entendre la tempête de protestations qu'il a faites devant nous.»

En conclusion, le rapport Boyle-Kirkman fait des recommandations précises concernant le recrutement des femmes au CN:

[TRADUCTION] Il est nécessaire que le CN adopte un programme dynamique et bien planifié de recrutement pour les femmes.

Voici quelques suggestions de mesures qui pourraient être prises dans le cadre de ce programme de recrutement:

A. Fixer des objectifs numériques par niveau de travail pour le recrutement de femmes.
B. Former tous les recruteurs du bureau du personnel sur la façon d'interviewer les femmes efficacement.
C. Mettre au point de nouveaux moyens d'aller chercher des femmes:

(1) Faire de la publicité dans les périodiques destinés aux femmes

(2) Coopérer avec les agences de placement pour femmes

(3) Spécifier que toutes les agences de placement sont invitées à soumettre des candidates

(4) Encourager la recommandation de femmes par les employés

(5) Confier spécifiquement à un membre du bureau du personnel la tâche d'assurer le suivi

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and other leads regarding potential women candidates. Be prepared to act fast.

In July, 1978 a document entitled "Equal Opportunities Program" was sent to senior managers of the St. Lawrence Region of CN by Mr. Masse, enumerating three overarching objectives with respect to the participation of women in CN:

1. An increase in the total number of female employees at CN;
2. An increase in the number of female management employees;
3. An increase in the number of females in positions for which men only were traditionally hired.

The 1978 document contained a rather general program of action with five elements:

1. Hire female employees;
2. Increase receptiveness to female employees at CN;
3. Support the female employees at CN in their efforts to adapt and progress;
4. Project a public image of a company that is in favour of hiring female employees;
5. Periodically analyse the evolution of female manpower at CN.

It should be noted that these objectives were far less rigorous than those recommended in the CN-commissioned Boyle/Kirkman Report.

In January 1979, CN published a study entitled "Women in CN Status Report" which concluded that, systemically, progress had been slow, and in fact hardly merited being called "progress" at all. In spite of a decrease in the number of men in the CN work force, the number of women as a percentage of the work force had only increased by 1.61 per cent since 1974 when the Boyle/Kirkman Report was prepared. One section of the 1979 review carried this rubric: "Lingering Belief that Men Have First Claim to Jobs".

By February 18, 1982, 155 complaints against CN had been lodged with the Human Rights Commission. In due course, the Commission set up

immédiat aux curriculum vitae et autres renseignements concernant d'éventuelles candidates. Être prêt à agir rapidement.

En juillet 1978, M. Masse a envoyé aux cadres supérieurs de la région du St-Laurent du CN, un document intitulé «Programme possibilités égales» qui énumérait trois objectifs généraux concernant la participation des femmes au CN:

1. hausser le nombre total de femmes à l'emploi du CN;
2. hausser le nombre de femmes cadres;
3. hausser le nombre de femmes dans des emplois traditionnellement réservés aux hommes.

Le document de 1978 énonçait un programme d'action plutôt général en cinq points:

1. Engager du personnel féminin;
2. Approfondir notre attitude réceptive envers les femmes au travail au CN;
3. Supporter les femmes à l'emploi du CN dans leur adaptation et efforts de progrès;
4. Donner à la société l'image d'une entreprise favorable à l'embauche des femmes;
5. Analyser périodiquement l'évolution de la main-d'œuvre féminine au CN.

On remarquera que ces objectifs étaient beaucoup moins rigoureux que les recommandations du rapport Boyle-Kirkman qui a fait suite à l'étude commandée par le CN.

En janvier 1979, le CN a publié une étude intitulée «Women in CN Status Report» qui concluait que, dans l'ensemble, les progrès avaient été lents et en fait ne méritaient guère d'être qualifiés de «progrès». En dépit de la diminution du nombre d'hommes dans la main-d'œuvre du CN, le nombre de femmes, en tant que pourcentage de la main-d'œuvre, ne s'était accru que de 1,61 pour 100 depuis 1974, c'est-à-dire depuis le moment où le rapport Boyle-Kirkman avait été rédigé. Une section de l'étude de 1979 portait le titre suivant: [TRADUCTION] «Persistance de la conviction que les hommes doivent avoir la priorité en matière d'emploi».

Le 18 février 1982, 155 plaintes contre le CN avaient été déposées devant la Commission des droits de la personne. Finalement, la Commission

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the Human Rights Tribunal to consider the "class" complaint set out above.

Thirteen women testified before the Tribunal as to their experience as candidates or employees with CN. One of the witnesses, Ms. Carla Nemeroff, detailed some of the problems she faced as the only woman in her work place:

> They told me they did not want me there. How did they behave? Well, they tried to confuse me. Instead of telling me things like two or three moves at a time, which is all you have to do, they would tell me about 15 moves in a row, like talking really quickly, using the numbers, like this "take a locomotive, put it there, go here, go there", you know, like really—so that I would get confused, or they would tell me to jump off the train at a switch, I would get off at the switch, and they would leave me at the switch, and they would not tell me what they were doing, they would leave me there, or they would just go off on break, and they would not tell me they were going on break. Sometimes they would leave me at a switch, or at an engine. They would say "go release the brakes on that engine and wait for my signal"; I would never hear the signal, they would go off and eat lunch and leave me there. They used to do that all the time.

According to the testimony, women were subjected to extremely unpleasant treatment by their male colleagues:

> Another time, a few guys—we were on break sort of hanging around outside because it was warm out; a few guys jumped me and pretended they were going to rape me. I found that quite offensive.

> Then, another time, I was bringing a train into the shop—you see, I was not a cleaner any more; I was signalling, and I was bringing a train into the shop. The boss yelled out something obscene to distract me from my work, and it was very dangerous.

By the end of 1981, there were only 57 women in "blue-collar" posts in the St. Lawrence Region of CN, being a mere 0.7 per cent of the blue-collar labour force in the region. There were 276 women occupying unskilled jobs in all the regions where CN operated, again amounting to only 0.7 per cent of the unskilled work force. By contrast, women represented, in 1981, 40.7 per cent of the total Canadian labour force. At the time, women constituted only 6.11 per cent of the total work force

a constitué un tribunal des droits de la personne pour examiner la plainte «collective» précitée.

Treize femmes sont venues raconter devant le tribunal leurs expériences comme candidates ou employées du CN. L'une des témoins, Mlle Carla Nemeroff, a exposé en détail certains des problèmes auxquels elle a dû faire face en tant qu'unique femme dans son milieu de travail:

> [TRADUCTION] Ils m'ont dit qu'ils ne voulaient pas de moi. Comment se sont-ils comportés? Et bien, ils ont essayé de m'embrouiller. Au lieu de m'apprendre deux ou trois choses à la fois, ce qui est tout ce que vous avez à faire, ils m'enseignaient 15 manœuvres de suite, comme en parlant très rapidement, en utilisant des chiffres, comme «prenez une locomotive, amenez-la là-bas, venez ici, allez là-bas.» Vous comprenez? Vraiment! Pour m'embrouiller. Ou ils me disaient de sauter du train à un poste d'aiguillage; je descendais à l'aiguillage et ils me laissaient là. Ils ne me disaient pas ce qu'ils faisaient, ils me laissaient là, ou ils partaient tout simplement à la pause sans me dire où ils allaient. Parfois, ils me laissaient à un poste d'aiguillage ou près d'une locomotive. Ils disaient «allez relâcher les freins de cette locomotive et attendez mon signal». Le signal n'arrivait jamais; ils s'en allaient et ils allaient manger et ils me laissaient là. Ils faisaient cela tout le temps.

D'après ce témoignage, les femmes faisaient l'objet d'un traitement extrêmement déplaisant de la part de leurs collègues masculins.

> [TRADUCTION] Une autre fois, quelques gars—c'était la pause et nous flânions en quelque sorte à l'extérieur parce qu'il faisait chaud—quelques gars m'ont sauté dessus en faisant semblant qu'ils allaient me violer. J'ai trouvé cela des plus offensant.

> Puis, une autre fois, j'amenais un train à l'atelier—vous voyez, je n'étais plus préposée au nettoyage; j'étais à la signalisation et je faisais entrer un train à l'atelier. Le chef m'a crié quelque chose d'obscène pour me distraire de mon travail, et c'était très dangereux.

À la fin de 1981, seulement 57 femmes occupaient des emplois manuels dans la région du St-Laurent du CN, ce qui représentait à peine 0,7 pour 100 des travailleurs manuels de cette région. Il y avait 276 femmes qui occupaient des emplois non spécialisés dans l'ensemble des régions où le CN exerce ses activités, ce qui représentait ici encore à peine 0,7 pour 100 de la main-d'œuvre non spécialisée. En 1981, par contre, les femmes représentaient 40,7 pour 100 de l'ensemble de la

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of CN. Among blue-collar workers in Canada, 13 per cent were women during the period January to May 1982, yet female applicants for blue-collar jobs at CN constituted only 5 per cent of the total applicant pool.

The markedly low rate of female participation in so-called "non-traditional" occupations at Canadian National, namely occupations in which women typically have been significantly under-represented considering their proportion in the work force as a whole, was not fortuitous. The evidence before the Tribunal established clearly that the recruitment, hiring and promotion policies at Canadian National prevented and discouraged women from working on blue-collar jobs. The Tribunal held, a finding not challenged in this Court, that CN had not made any real effort to inform women in general of the possibility of filling non-traditional positions in the company. For example, the evidence indicated that Canadian National's recruitment program with respect to skilled crafts and trade workers was limited largely to sending representatives to technical schools where there were almost no women. When women presented themselves at the personnel office, the interviews had a decidedly "chilling effect" on female involvement in non-traditional employment; women were expressly encouraged to apply only for secretarial jobs. According to some of the testimony, women applying for employment were never told clearly the qualifications which they needed to fill the blue-collar job openings. Another hurdle placed in the way of some applicants, including those seeking employment as coach cleaners, was to require experience in soldering. Moreover, the personnel office did not itself do any hiring for blue-collar jobs. Instead, it forwarded names to the area foreman, and Canadian National had no means of controlling the decision of the foreman to hire or not to hire a woman. The

main-d'œuvre au Canada. À l'époque, les femmes ne représentaient que 6,11 pour 100 de l'ensemble de la main-d'œuvre du CN. Au cours de la période comprise entre janvier et mai 1982, les femmes constituaient 13 pour 100 de la main-d'œuvre ouvrière au Canada et pourtant les candidates pour des emplois manuels au CN ne représentaient que 5 pour 100 du nombre total de candidats.

Ce taux remarquablement faible de la participation féminine dans les métiers dit «non traditionnels» au Canadien National, notamment dans des métiers où les femmes ont habituellement été fort sous-représentées compte tenu du pourcentage de la main-d'œuvre globale qu'elles représentent, n'est pas fortuit. La preuve dont le tribunal a été saisi établit clairement que les politiques de recrutement, d'embauche et de promotion du Canadien National ont empêché et découragé les femmes d'occuper des emplois manuels. Le tribunal en est venu à la conclusion, qui n'a pas été contestée devant cette Cour, que le CN n'avait pas vraiment fait d'efforts pour informer les femmes en général de la possibilité d'occuper des emplois non traditionnels au sein de la compagnie. Par exemple, il ressort de la preuve que le programme de recrutement du Canadien National dans le cas des corps de métiers était largement limité à l'envoi de représentants dans les écoles techniques où il n'y avait presque aucune femme. Lorsque des femmes se présentaient au bureau du personnel, les entrevues avaient décidément un «effet de douche froide» sur la participation de femmes dans des secteurs non traditionnels; on encourageait expressément les femmes à ne postuler que des emplois de secrétaire. D'après certains témoignages, on ne disait jamais clairement aux femmes qui sollicitaient un emploi quelles étaient les conditions à remplir pour obtenir les emplois manuels disponibles. Un autre obstacle imposé à certaines candidates, y compris celles sollicitant un poste de préposé au nettoyage des wagons, consistait à exiger une expérience de la soudure. En outre, le bureau du personnel ne s'occupait pas lui-même de l'embauche de travailleurs manuels. Au lieu de cela, il faisait parvenir les noms des candidats au contremaître du secteur et ainsi le Canadien National n'avait aucun moyen de contrôler la décision du contremaître d'engager ou non une femme. Il est

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evidence indicated that the foremen were typically unreceptive to female candidates.

II

The Earlier Judgments

1. *The Human Rights Tribunal*

The Human Rights Tribunal concluded that it was essential to impose upon CN a special employment program if the proportion of women in blue-collar jobs at CN was to mirror even roughly the proportion of women in similar jobs across the country, namely 13 per cent. It should be stressed that this goal appears to be modest considering that the 13 per cent participation rate of women in blue-collar jobs across Canada at the time arguably constituted a significant under-representation of women in that segment of the labour market.

For greater clarity, the Tribunal stated that its objective was simply to increase to 13 per cent the female work force in non-traditional jobs at CN in the St. Lawrence Region. To that end, the Tribunal made the following order:

ORDER

FOR THE ABOVE REASONS this Tribunal, concluding that there are in the St Lawrence Region of CN certain hiring policies or practices that are discriminatory for the purpose of section 10 of the Canadian Human Rights Act, and that these practices are not based on *bona fide* occupational requirements for the purpose of section 14 of the said Act, makes the following order, according to the powers conferred upon it by section 41:

PERMANENT MEASURES FOR NEUTRALIZATION OF CURRENT POLICIES AND PRACTICES

1. CN shall immediately discontinue the use of the Bennett test for entry level positions other than apprentice positions, and, within one year of the time of this decision and for the same positions, shall discontinue all mechanical aptitude tests that have a negative impact on

ressorti de la preuve que les contremaîtres étaient habituellement défavorables aux femmes candidates.

II

Les jugements antérieurs

1. *Le tribunal des droits de la personne*

Le tribunal des droits de la personne a conclu qu'il était essentiel d'imposer au CN un programme spécial d'emploi si l'on voulait que le pourcentage des femmes détenant des emplois manuels au CN reflète au moins approximativement le pourcentage de celles détenant des emplois similaires dans l'ensemble du pays, soit 13 pour 100. On devrait souligner que cet objectif semble modeste si l'on considère que ce 13 pour 100 de femmes cols bleus dans l'ensemble du Canada à l'époque constituait certes une forte sous-représentation des femmes dans ce secteur du marché du travail.

Pour plus de clarté, le tribunal a déclaré que son objectif consistait simplement à hausser jusqu'à 13 pour 100 la main-d'œuvre féminine occupant des postes non traditionnels au CN dans la région du St-Laurent. À cette fin, le tribunal a rendu l'ordonnance suivante:

ORDONNANCE

POUR LES MOTIFS PRÉCITÉS, ce tribunal, concluant à l'existence au CN, dans la région du St-Laurent, de certaines pratiques ou lignes de conduite d'embauche qui sont discriminatoires au sens de l'article 10 de la Loi canadienne sur les droits de la personne, et concluant de plus que ces lignes de conduite ne sont pas fondées sur des exigences professionnelles normales au sens de l'article 14 de ladite loi, rend l'ordonnance suivante, selon les pouvoirs qui lui sont conférés par l'article 41 de ladite loi:

MESURES PERMANENTES DE NEUTRALISATION DE POLITIQUES ET PRATIQUES COURANTES

1. Le CN devra cesser immédiatement l'utilisation du test Bennett pour les postes d'entrée autres que les postes d'apprentis de même que, dans un délai d'un an à compter de la présente décision et à l'endroit des mêmes postes, cesser l'utilisation de tous tests d'aptitude méca-

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women and are not warranted by the aptitude requirements of the positions being applied for.

2. CN shall immediately discontinue all practices pursued by foremen or others in which female candidates undergo physical tests not required of male candidates, mainly the test which consists of lifting a brakeshoe with one arm.

3. CN shall immediately discontinue the requirement for welding experience for all entry level positions, with the exception of apprentice positions.

4. CN shall modify its system for the dissemination of information on positions available. More specifically, within the period of one year it shall take the most suitable measures to inform the general public of all positions available.

5. CN shall immediately change the reception practices in its employment office to give female candidates complete, specific and objective information on the real requirements of non-traditional positions.

6. CN shall immediately modify its system of interviewing candidates; in particular, it shall ensure that those responsible for conducting such interviews are given strict instructions to treat all candidates in the same way, regardless of their sex.

7. Should CN wish to continue to grant foremen the power to refuse to hire persons already accepted by the employment office, it shall immediately issue a specific directive to the effect that no one shall be rejected on the basis of sex.

8. CN shall continue to implement the measures already adopted in its directive on sexual harassment with a view to eliminating from the workplace all forms of sexual harassment and discrimination.

SPECIAL TEMPORARY MEASURES

1. Within the period of one year and until the percentage of women in non-traditional jobs at CN has reached 13, CN shall undertake an information and publicity campaign inviting women in particular to apply for non-traditional positions.

2. Whereas we feel that the process of change in CN's St Lawrence Region must be accelerated and preferential measures for women are required;

nique qui ont un impact négatif pour les femmes sans être justifiés par les aptitudes requises pour les emplois postulés par les candidates.

2. Le CN devra cesser immédiatement toute pratique des contremaîtres ou de tout autre responsable visant à exiger des candidates féminines des tests physiques non imposés aux candidats masculins et notamment le test consistant à soulever d'une main une mâchoire de freins.

3. Le CN devra cesser immédiatement d'exiger des candidats une expérience déjà acquise en soudure pour tous les postes d'entrée, à l'exception des postes d'apprentis.

4. Le CN devra modifier son système de diffusion des renseignements relatifs aux emplois disponibles. Plus particulièrement, il devra, dans un délai d'un an, prendre les moyens d'information et de publicité les plus appropriés auprès du public en général pour annoncer tout poste disponible.

5. Le CN devra modifier dès maintenant les pratiques d'accueil du bureau d'embauche pour donner aux candidates féminines des informations complètes, précises et objectives sur les exigences réelles des emplois non traditionnels.

6. Le CN devra modifier dès maintenant son système d'entrevue des candidats; plus particulièrement, il devra veiller à ce que les responsables de ces entrevues aient de strictes instructions visant à traiter de la même façon tous les candidats, sans égard à leur sexe.

7. Dans la mesure où le CN voudrait continuer d'accorder aux contremaîtres le pouvoir de refuser d'embaucher des personnes déjà acceptées par le bureau d'embauche, le CN devra émettre dans l'immédiat une directive précise à leur endroit, à l'effet que nul ne peut être refusé pour des motifs de discrimination sexuelle.

8. Le CN devra poursuivre les mesures déjà adoptées dans le cadre de sa directive sur le harcèlement sexuel visant à éliminer du lieu de travail toute forme de harcèlement et de discrimination sexuels.

MESURES SPÉCIALES TEMPORAIRES

1. Le CN devra, dans un délai d'un an et jusqu'à ce que le pourcentage de femmes dans les emplois non traditionnels au CN ait atteint 13%, entreprendre une campagne d'information et de publicité pour inviter en particulier les femmes à poser leur candidature à des postes non traditionnels.

2. Considérant qu'il nous apparaît que le processus de changement dans la région du St-Laurent au CN doit être accéléré et que des mesures préférentielles visant les femmes s'imposent.

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—Whereas the employer must be given a certain measure of flexibility in view of the uncertainty surrounding the question of how many qualified female workers are available;

—Whereas ideally, in order to create as soon as possible a critical mass that would allow the system to continue to correct itself, we would be inclined to require over the coming years, until the objective of 13% is achieved, the hiring of women to fill at least one non-traditional position out of every three;

Whereas for the sake of giving more latitude and flexibility to CN in the methods employed to achieve the desired objective, we feel that it would be more prudent to require a ratio lower than one in three for the hiring of women for non-traditional positions at CN;

ACCORDINGLY, Canadian National is ordered to hire at least one woman for every four non-traditional positions filled in the future. This measure shall take effect only when CN employees who have been laid off but who are subject to recall have been recalled by CN, but not before one year has elapsed from the time of this decision, in order to give CN a reasonable length of time to adopt measures to comply with this order. When it is in effect, daily adherence to the one-in-four ratio will not be required, in order to give the employer more choice in the selection of candidates. However, it must be complied with over each quarterly period until the desired objective of having 13% of non-traditional positions filled by women is achieved.

3. Within a period of two months of this decision, CN shall appoint a person responsible with full powers to ensure the application of the special temporary measures and to carry out any other duties assigned to him by CN to implement this decision.

SUBMISSION OF DATA

CN SHALL SUBMIT TO THE COMMISSION:

1. Within 20 days of the introduction of the above-mentioned special temporary measures, an initial inventory of the number of blue-collar workers in the CN's St Lawrence Region, by sex and by position.

2. Within 20 days of the end of each quarterly period after the above-mentioned special temporary measures have begun to be applied, and for the entire duration of

Considérant par ailleurs qu'il faut laisser à l'employeur une certaine flexibilité vu l'incertitude devant laquelle nous nous trouvons sur l'ampleur du bassin de main-d'œuvre féminine qualifiée disponible.

Considérant qu'idéalement, pour créer le plus tôt possible une masse critique qui permettrait au système de continuer à se corriger par lui-même, nous serions enclins à exiger qu'au cours des prochaines années, et jusqu'à ce que l'objectif de 13% soit atteint, au moins un poste non traditionnel sur trois soit confié, à l'embauche, à une femme.

Considérant cependant qu'afin de donner plus de latitude et de flexibilité au CN dans les moyens à prendre pour atteindre l'objectif désiré, il nous apparaît plus prudent de fixer un nombre minimal d'embauche féminine plus faible qu'un sur trois des postes non traditionnels à être comblés au CN dorénavant.

EN CONSÉQUENCE, il est ordonné au Canadien National d'embaucher au moins une femme sur quatre postes non traditionnels à être comblés à l'avenir. Cette mesure n'entrera en vigueur que lorsque les employés du CN actuellement mis à pied mais sujets à rappel auront été rappelés par le CN, mais, dans tous les cas, pas avant l'expiration d'un délai d'un an à compter de la présente décision, afin de donner au CN un délai raisonnable pour adopter les mesures nécessaires pour se conformer à cette ordonnance. Une fois en vigueur, la proportion d'un sur quatre n'aura pas à être respectée quotidiennement, ce afin de permettre à l'employeur un meilleur choix dans la sélection des candidats. Elle devra cependant être respectée dans l'ensemble de chaque période trimestrielle, jusqu'à ce que l'objectif désiré de 13% de femmes dans les postes non traditionnels soit atteint.

3. Dans un délai de deux mois à compter de la présente décision, le CN devra nommer un responsable avec pleins pouvoirs pour assurer la mise en vigueur des mesures spéciales temporaires et réaliser tout autre mandat qui pourrait lui être confié par le CN relativement à la mise en œuvre de la présente décision.

PRODUCTION DE DONNÉES

LE CN DEVRA SOUMETTRE À LA COMMISSION:

1. Dans les vingt (20) jours suivant la mise en application des mesures spéciales temporaires susdites, un relevé initial du nombre d'employés «cols bleus» dans la région du St-Laurent au CN, par sexe et par fonction.

2. Dans les vingt (20) jours suivant la fin de chaque période trimestrielle à compter de la mise en application des mesures spéciales temporaires susdites et pendant

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the said measures, after forwarding a copy to ATF, a report containing:

(a) a list indicating the name, sex, title and duties, date hired and employment sector of every person hired in the St Lawrence Region during the previous quarter;

(b) a detailed statement of the efforts made by CN to recruit female candidates for non-traditional positions during the previous quarter;

(c) a breakdown, by sex, of: the total number of persons who applied for non-traditional positions at CN during the previous quarter; and the total number of persons who completed, underwent or failed every test or written examination to fill a non-traditional position. This list shall include the score and rank of every person who passed the test or examination;

(d) the name, sex and changes in titles and duties, or changes in status of every employee hired for non-traditional positions after the special temporary measures come into force.

3. A statement giving the name, official title and date of appointment of the person in charge of applying the above-mentioned special temporary measures, within twenty days of his or her appointment.

It will be observed that the first part of the Order required CN to cease certain discriminatory hiring and employment practices and to alter others; the second part set a goal of 13 per cent female participation in the targeted job positions, and established a requirement to hire at least one woman to fill every four job openings until that goal was reached; and the third part required the filing of periodic reports with the Commission.

2. *The Federal Court of Appeal*

Canadian National made an application to the Federal Court of Appeal under s. 28 of the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, to review and set aside the Decision of the Tribunal on the following grounds:

1. That the Tribunal appointed by the Canadian Human Rights Commission erred in law by basing its Decision on erroneous findings of fact, made without regard for the material before it. Such findings are contrary to, and unsupported by the evidence.

toute la durée desdites mesures, après en avoir transmis une copie à ATF, un rapport comprenant:

a) une liste indiquant les noms, sexe, titres et fonctions, date d'embauche et secteur de travail de toute personne embauchée dans la région du St-Laurent pendant le trimestre précédent;

b) une déclaration détaillée faisant état des efforts entrepris par le CN pour recruter des candidates féminines dans des postes non traditionnels pendant le trimestre précédent;

c) le nombre total de personnes ayant posé leur candidature à des postes non traditionnels au CN pendant le trimestre précédent, par sexe; le nombre total de personnes ayant complété, passé ou échoué tout test ou examen écrit pour fins d'embauche à un poste non traditionnel. Cette liste devra comprendre les résultats et le rang de toute personne ayant réussi le test ou examen;

d) les noms, sexe et tous changements de titres et fonctions, ou changement de statut des employés embauchés à des postes non traditionnels après l'entrée en vigueur des mesures spéciales temporaires.

3. Dans les vingt (20) jours suivant sa nomination, une déclaration indiquant le nom, le titre officiel et la date de nomination du responsable chargé de l'application des mesures temporaires spéciales susdites.

On remarquera que la première partie de l'ordonnance enjoint au CN de mettre fin à certaines pratiques discriminatoires en matière d'embauche et d'emploi et d'en modifier d'autres; la seconde partie fixe à 13 pour 100 le pourcentage cible de femmes dans les postes visés et oblige à embaucher au moins une femme pour combler un poste vacant sur quatre jusqu'à ce que cet objectif soit atteint; enfin, la troisième partie exige le dépôt de rapports périodiques auprès de la Commission.

2. *La Cour d'appel fédérale*

Le Canadien National s'est fondé sur l'art. 28 de la *Loi sur la Cour fédérale*, S.R.C. 1970 (2e Supp.), chap. 10, pour demander à la Cour d'appel fédérale d'examiner et d'annuler la décision du tribunal sur la foi des moyens suivants:

[TRADUCTION]

1. Le tribunal constitué par la Commission canadienne des droits de la personne a commis une erreur de droit en fondant sa décision sur des constatations de fait erronées qui ne tiennent aucun compte des pièces dont il était saisi. Ces constatations sont contraires à la preuve soumise qui ne les étaye pas.

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2. That the Tribunal appointed by the Canadian Human Rights Commission erred in law and exceeded its jurisdiction by imposing upon your Applicant a specific and detailed program containing mandatory quotas to redress alleged discriminatory practices, contrary to Section 41 of the Canadian Human Rights Act.

3. That the Tribunal appointed by the Canadian Human Rights Commission erred in law and exceeded its jurisdiction by ordering that your Applicant carry out said program without consultation with the Canadian Human Rights Commission as required by Section 41(2)(a) of the Canadian Human Rights Act.

In fact, both before the Federal Court of Appeal and before this Court, issue was joined primarily on the second ground of appeal, the jurisdiction of the Tribunal under s. 41(2)(*a*) of the *Canadian Human Rights Act* to make the impugned order.

Section 41(2) reads:

41. (1) ...

(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, subject to subsection (4) and section 42, it may make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in such order any of the following terms that it considers appropriate:

(*a*) that such person cease such discriminatory practice and, in consultation with the Commission on the general purposes thereof, take measures, including adoption of a special program, plan or arrangement referred to in subsection 15(1), to prevent the same or a similar practice occurring in the future;

(*b*) that such person make available to the victim of the discriminatory practice on the first reasonable occasion such rights, opportunities or privileges as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice;

(*c*) that such person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and any expenses incurred by the victim as a result of the discriminatory practice; and

(*d*) that such person compensate the victim, as the Tribunal may consider proper, for any or all additional cost of obtaining alternative goods, services, facili-

2. Le tribunal constitué par la Commission canadienne des droits de la personne a commis une erreur de droit et a outrepassé sa compétence en imposant à la requérante un programme précis et détaillé comportant des quotas obligatoires pour remédier aux actes discriminatoires allégués, contrairement à l'art. 41 de la Loi canadienne sur les droits de la personne.

3. Le tribunal constitué par la Commission canadienne des droits de la personne a commis une erreur de droit et a outrepassé sa compétence en ordonnant à la requérante de mettre en œuvre ledit programme sans consulter la Commission canadienne des droits de la personne, comme le requiert l'al. 41(2)a) de la Loi canadienne sur les droits de la personne.

En fait, tant devant la Cour d'appel fédérale que devant nous, la contestation a été liée principalement quant au second moyen d'appel, soit la compétence du tribunal, en vertu de l'al. 41(2)*a*) de la *Loi canadienne sur les droits de la personne*, pour rendre l'ordonnance contestée.

Le paragraphe 41(2) porte:

41. (1) ...

(2) À l'issue de son enquête, le tribunal qui juge la plainte fondée peut, sous réserve du paragraphe (4) et de l'article 42, ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire

a) de mettre fin à l'acte et de prendre des mesures destinées à prévenir les actes semblables, et ce, en consultation avec la Commission relativement à l'objet général de ces mesures; celles-ci peuvent comprendre l'adoption d'une proposition relative à des programmes, des plans ou des arrangements spéciaux visés au paragraphe 15(1);

b) d'accorder à la victime, à la première occasion raisonnable, les droits, chances ou avantages dont, de l'avis du tribunal, l'acte l'a privée;

c) d'indemniser la victime de la totalité, ou de la fraction qu'il juge indiquée, des pertes de salaire et des dépenses entraînées par l'acte; et

d) d'indemniser la victime de la totalité, ou de la fraction qu'il fixe, des frais supplémentaires causés, pour recourir à d'autres biens, services, installations

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ties or accommodation and any expenses incurred by the victim as a result of the discriminatory practice.

Hugessen J. allowed the application and set aside part of the Tribunal's Order, [1985] 1 F.C. 96. Insofar as the Tribunal's findings of discrimination were concerned, Hugessen J. was satisfied that no ground had been shown which would justify intervention by the Court under the provisions of s. 28 of the *Federal Court Act*. Likewise, he was not persuaded that the Tribunal committed any excess of jurisdiction in Parts 1 and 3 of the Order under review.

The only part of the Order which gave him concern was the "Special Temporary Measures" section contained in Part 2 and, in particular, paragraph 2 thereof, which imposed a hiring goal of 25 per cent on CN until such time as the goal of 13 per cent female involvement in the non-traditional work force had been achieved.

Justice Hugessen's judgment turned on his interpretation of the words "take measures . . . to prevent" in the English text, and "*prendre des mesures destinées à prévenir*" in the French text of s. 41(2)(*a*). The crux of the judgment, it appears to me, is found in the following short paragraph which draws a sharp and determinative distinction between "prevention" and "cure" (at p. 102):

> The sole permissible purpose for the order is prevention: it is not cure. The text requires that the order look to the avoidance of future evil. It does not allow restitution for past wrongs.

Hugessen J. quoted s. 15(1) of the Act, to which s. 41(2)(*a*) makes reference. It is the subsection which deals expressly with employment equity programs and it reads:

> **15.** (1) It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be or are based on or related to the race, national or ethnic origin, colour, religion, age, sex, marital status or physical

ou moyens d'hébergement, et des dépenses entraînées par l'acte.

Le juge Hugessen a accueilli la demande et annulé en partie l'ordonnance du tribunal: [1985] 1 C.F. 96. En ce qui concernait les constatations de discrimination du tribunal, le juge Hugessen était convaincu qu'on n'avait établi aucun motif justifiant l'intervention de la cour en vertu des dispositions de l'art. 28 de la *Loi sur la Cour fédérale*. De même, on n'a pas réussi à le persuader que le tribunal avait outrepassé sa compétence dans les première et troisième parties de l'ordonnance en cause.

La seule partie de l'ordonnance qui le préoccupait était la section intitulée «Mesures spéciales temporaires» contenue dans la deuxième partie et, notamment, son paragraphe 2, qui impose au CN un objectif d'embauche de 25 pour 100 jusqu'à ce que l'objectif de 13 pour 100 de main-d'œuvre féminine dans des emplois non traditionnels ait été atteint.

L'opinion du juge Hugessen reposait sur son interprétation des termes «prendre des mesures destinées à prévenir» de la version française et «*take measures* [. . .] *to prevent*» de la version anglaise, qui figurent à l'al. 41(2)*a*). On trouve le fondement de son opinion, me semble-t-il, dans le petit paragraphe suivant qui établit une distinction nette et décisive entre «prévention» et «réparation» (à la p. 102):

> Le seul objectif permis que peut viser l'ordonnance est la prévention et non la réparation. Le texte de loi exige de l'ordonnance qu'elle prévienne la répétition d'actes discriminatoires. Il ne permet pas de réparer les préjudices déjà causés.

Le juge Hugessen a cité le par. 15(1) de la Loi, auquel renvoie l'al. 41(2)*a*). C'est ce paragraphe qui traite expressément des programmes d'équité en matière d'emploi; il est ainsi conçu:

> **15.** (1) Ne constitue pas un acte discriminatoire le fait d'adopter ou de mettre en œuvre des programmes ou des plans ou de prendre des arrangements spéciaux destinés à supprimer, diminuer ou prévenir les désavantages que subit ou peut vraisemblablement subir un groupe d'individus pour des motifs fondés directement ou indirectement sur leur race, leur origine nationale ou ethnique, leur couleur, leur religion, leur âge, leur sexe,

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handicap of members of that group, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.

leur situation de famille ou leur handicap physique en améliorant leurs chances d'emploi ou d'avancement ou en leur facilitant l'accès à des biens, des services, installations ou moyens d'hébergement.

Hugessen J. dealt with s. 15(1) by stating that the programs which s. 15(1) protects as non-discriminatory are voluntary in nature; by contrast, the measures which s. 41(2)(*a*) permits are imposed by order of the Tribunal. Section 41(2)(*a*) is limited to prevention in the future whereas s. 15(1) allows "the sins of the fathers to be visited upon the sons". He therefore held that when the Tribunal exercises its power under s. 41 to order the adoption of a program envisaged by s. 15, it can only order that kind of program which will meet the purposive requirements of s. 41. Hugessen J. was willing to concede that the fixing of a goal of 13 per cent women in non-traditional posts in CN in the St. Lawrence Region was a legitimate means of setting a measurable standard against which the achievement of the ultimate purpose of the order could be tested, but he emphasized that the purpose, as required by law, could only be the prevention of future acts of discrimination.

Le juge Hugessen a traité le par. 15(1) en disant que les programmes que cette disposition considère comme non discriminatoires sont volontaires par nature; par contre, les mesures que vise l'al. 41(2)*a*) sont imposées par ordonnance du tribunal. L'alinéa 41(2)*a*) se limite à la prévention des actes à venir alors que le par. 15(1) permet de «punir les enfants pour les péchés de leurs pères». Il conclut donc que, lorsque le tribunal exerce le pouvoir que lui confère l'art. 41 d'ordonner l'adoption d'un programme envisagé à l'art. 15, il ne peut ordonner que l'adoption de programmes conformes aux objectifs visés par l'art. 41. Le juge Hugessen était disposé à admettre que le fait de fixer un objectif de 13 pour 100 de femmes dans des postes non traditionnels au CN, pour la région du St-Laurent, constituait un moyen légitime d'établir une norme mesurable permettant de vérifier si l'objectif ultime de l'ordonnance avait été atteint, mais il a souligné que cet objectif, suivant la Loi, ne pouvait être que la prévention de futurs actes discriminatoires.

The judge went on to examine the requirement that until the goal was achieved, CN had to hire one woman for each four entries into its unskilled blue-collar labour force. He quoted *inter alia* the following passage from the decision of the Tribunal:

> It will be difficult in the case of CN to remedy the marked disparity resulting from years of discriminatory practices. It is to be hoped that, with time, the imbalance will be reduced. However, it is our view that this will not be possible without the imposition of an affirmative action program.

He concluded (at p. 104):

> There is nothing of prevention in this. The measure imposed is, and is stated to be, a catch-up provision whose purpose can only be to remedy the effects of past discriminatory practices. That purpose is not one which is permitted by section 41.

Hugessen J. confessed to a "certain sense of frustration" in coming to the conclusion that the Tri-

Il a ensuite examiné l'obligation qui était imposée au CN d'embaucher, jusqu'à ce que cet objectif soit atteint, une femme sur quatre nouveaux employés venant s'ajouter à sa main-d'œuvre manuelle non spécialisée. Il a cité notamment le passage suivant de la décision du tribunal:

> Il sera difficile dans le cas du CN de remédier à la disproportion marquée qui résulte de pratiques suivies depuis des années. Il faut espérer qu'avec le temps, le déséquilibre sera réduit, mais il nous apparaît que la chose ne sera pas possible sans l'imposition d'un programme d'action positive dans le cas qui nous occupe.

Il a conclut en disant ceci (à la p. 104):

> Cela n'a rien à voir avec la prévention. Suivant les mots mêmes du tribunal, la mesure imposée est une mesure de rattrapage dont l'objectif ne peut être que de remédier aux conséquences des actes discriminatoires déjà commis. Or, cet objectif ne fait pas partie de ceux que l'article 41 autorise.

Le juge Hugessen a avoué ressentir «un certain sentiment d'insatisfaction» à conclure que le tribu-

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bunal had exceeded its powers in making the order, stating: "On a purely impressionistic basis, neither the goal of 13% nor the imposed hiring quota of 25% strike me as being *per se* unreasonable".

I have dealt at some length with the judgment of Hugessen J. because (i) it is the majority judgment of the Court and (ii) with great respect, I disagree with it. Pratte J., in a short judgment, sided with Hugessen J. in the view that the Tribunal's power was limited to prescribing measures for the purpose of preventing the recurrence of the discriminatory practices which had been found to exist and not to remedy the consequences of past discrimination. Pratte J. would have gone further than Hugessen J., however, and would also have set aside the second and third parts of the Order of the Tribunal. MacGuigan J. wrote a strong and cogent dissent to which I will make reference below, concluding that the Order of the Tribunal was within its jurisdiction under s. 41(2)(*a*). It is a view which I share.

The Attorney General of Canada did not file a factum or make any representations in the proceedings before our Court.

III

Interpreting Human Rights Legislation

Let me emphasize at the outset that the Human Rights Tribunal's findings of fact that the hiring practices of Canadian National in the St. Lawrence Region constituted systemic discrimination are not at issue before this Court. Moreover, the argument that the Human Rights Tribunal lacked jurisdiction because the Commission failed first to consult with CN in breach of s. 41(2)(*a*) was not pursued with great vigour. In my view, the lack of emphasis upon that argument was wise for it holds no merit. The real controversy relates solely to the legality of the remedial order issued by the Human Rights Tribunal.

nal a outrepassé ses pouvoirs en rendant l'ordonnance, disant: «De prime abord, ni l'objectif de 13 %, ni le quota d'embauchage de 25 % ne m'apparaissent, en eux-mêmes, déraisonnables».

J'ai traité assez longuement de l'opinion du juge Hugessen parce que: (i) elle représente l'arrêt des juges formant la majorité de la Cour et (ii), avec beaucoup d'égards, je ne la partage pas. Le juge Pratte, dans une courte opinion, s'est rallié au juge Hugessen en se disant d'avis que le pouvoir du tribunal se limitait à prescrire des mesures destinées à prévenir la récurrence des actes discriminatoires constatés et non de remédier aux conséquences d'actes discriminatoires antérieurs. Toutefois, il serait allé plus loin que le juge Hugessen et aurait aussi annulé les seconde et troisième parties de l'ordonnance du tribunal. Le juge MacGuigan a inscrit une dissidence énergique et convaincante, à laquelle je me référerai plus loin, concluant que l'ordonnance du tribunal était conforme à sa compétence en vertu de l'al. 41(2)*a*). C'est une opinion que je partage.

Le procureur général du Canada n'a pas produit de mémoire et ne s'est pas fait entendre au cours du débat devant cette Cour.

III

L'interprétation de la législation sur les droits de la personne

Qu'il me soit permis, au départ, de souligner que les constatations de fait du tribunal des droits de la personne suivant lesquelles les pratiques d'embauche du Canadien National dans la région du St-Laurent constituent de la discrimination systémique, ne sont pas en cause devant nous. De plus, l'argument portant que le tribunal des droits de la personne n'avait pas compétence parce que la Commission n'a pas consulté le CN, contrairement à l'al. 41(2)*a*), n'a pas été invoqué avec beaucoup de vigueur. À mon avis, on a bien fait de ne pas insister là-dessus car l'argument est sans fondement. Le vrai litige porte uniquement sur la légalité de l'ordonnance réparatrice rendue par le tribunal des droits de la personne.

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I do not think the answer to the question posed in this appeal will be found by applying strict grammatical construction to the last twelve words of s. 41(2)(*a*). I say this for at least three reasons. First, such an approach renders meaningless the specific reference back to s. 15(1) contained in s. 41(2)(*a*). Section 15(1) of the Act is designed to save employment equity programs from attack on the ground of "reverse discrimination". If s. 41(2)(*a*) is read to limit the scope of such programs, no effective mandatory employment equity program could be undertaken in any circumstances, and the legislative protection offered to the principle of employment equity would be nullified. Second, in focussing solely upon the limited purposive aspect of s. 41(2)(*a*) itself, the dominant purpose of the *Canadian Human Rights Act* is ignored. Yet, we are not left in the dark as to the purpose of the Act as a whole. The drafters saw fit to include a specific statement of purpose in s. 2:

Je ne pense pas qu'on puisse répondre à la question soulevée dans le présent pourvoi au moyen d'une interprétation grammaticale stricte de l'expression «prévenir les actes semblables» de l'al. 41(2)*a*), et ce, pour au moins trois raisons. En premier lieu, une telle solution fait perdre tout son sens à la référence expresse au par. 15(1) que fait l'al. 41(2)*a*). Le paragraphe 15(1) de la Loi vise à protéger les programmes d'équité en matière d'emploi contre toute contestation pour le motif qu'ils constituent de la «discrimination à rebours». Si l'al. 41(2)*a*) était interprété de façon à limiter la portée de ces programmes, aucun programme d'équité en matière d'emploi obligatoire et efficace ne pourrait être mis en œuvre dans quelques circonstances que ce soit et la garantie législative apportée au principe de l'équité en matière d'emploi se trouverait annulée. En deuxième lieu, en ne s'intéressant qu'à l'aspect limité des objectifs de l'al. 41(2)*a*) lui-même, on oublie le but premier de la *Loi canadienne sur les droits de la personne*. Pourtant, on ne nous a pas laissé dans l'incertitude quant à l'objet général de la Loi. Ses rédacteurs ont jugé bon d'inclure une déclaration d'intention expresse à l'art. 2:

2. The purpose of this Act is to extend the present laws in Canada to give effect, within the purview of matters coming within the legislative authority of the Parliament of Canada, to the following principles:

(*a*) every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex or marital status, or conviction for an offence for which a pardon has been granted or by discriminatory employment practices based on physical handicap . . . .

2. La présente loi a pour objet de compléter la législation canadienne actuelle en donnant effet, dans le champ de compétence du Parlement du Canada, aux principes suivants:

a) tous ont droit, dans la mesure compatible avec leurs devoirs et obligations au sein de la société, à l'égalité des chances d'épanouissement, indépendamment des considérations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, la situation de famille ou l'état de personne graciée ou, en matière d'emploi, de leurs handicaps physiques;

Third, the case-law of this Court, some of which post-dates the judgment of the Federal Court of Appeal in the present proceedings, has a direct bearing on the outcome of this appeal. The Court has spoken on the proper interpretive attitude towards human rights codes and acts.

En troisième lieu, la jurisprudence de cette Cour, dont une partie est postérieure à l'arrêt rendu par la Cour d'appel fédérale en l'espèce, a une incidence directe sur l'issue du présent pourvoi. La Cour s'est prononcée sur l'attitude à adopter quand il s'agit d'interpréter des lois et des codes sur les droits de la personne.

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Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact. Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal *Interpretation Act* which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained. See s. 11 of the *Interpretation Act*, R.S.C. 1970, c. I-23, as amended. As Elmer A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87 has written:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The purposes of the Act would appear to be patently obvious, in light of the powerful language of s. 2. In order to promote the goal of equal opportunity for each individual to achieve "the life that he or she is able and wishes to have", the Act seeks to prevent all "discriminatory practices" based, *inter alia*, on sex. It is the practice itself which is sought to be precluded. The purpose of the Act is not to punish wrongdoing but to prevent discrimination.

The last point is an important one and it deserves to be underscored. There is no indication that the purpose of the *Canadian Human Rights Act* is to assign or to punish moral blameworthiness. No doubt, some people who discriminate do so out of wilful ignorance or animus. Many of the first anti-discrimination statutes focussed solely upon the behaviour of such individuals, requiring proof of "intent" to discriminate before imposing any sanctions. See Walter S. Tarnopolsky, *Discrimination and the Law in Canada* (1982), at pp.

La législation sur les droits de la personne vise notamment à favoriser l'essor des droits individuels d'importance vitale, lesquels sont susceptibles d'être mis à exécution, en dernière analyse, devant une cour de justice. Je reconnais qu'en interprétant la Loi, les termes qu'elle utilise doivent recevoir leur sens ordinaire, mais il est tout aussi important de reconnaître et de donner effet pleinement aux droits qui y sont énoncés. On ne devrait pas chercher par toutes sortes de façons à les minimiser ou à diminuer leur effet. Bien que cela puisse sembler banal, il peut être sage de se rappeler ce guide qu'offre la *Loi d'interprétation* fédérale lorsqu'elle précise que les textes de loi sont censés être réparateurs et doivent ainsi s'interpréter de la façon juste, large et libérale la plus propre à assurer la réalisation de leurs objets. Voir l'article 11 de la *Loi d'interprétation*, S.R.C. 1970, chap. I-23 et ses modifications. Comme Elmer A. Driedger l'a écrit à la p. 87 de *Construction of Statutes* (2nd ed. 1983):

> [TRADUCTION] De nos jours, un seul principe ou méthode prévaut pour l'interprétation d'une loi: les mots doivent être interprétés selon le contexte, dans leur acception logique courante en conformité avec l'esprit et l'objet de la loi et l'intention du législateur.

Les objets de la Loi sembleraient tout à fait évidents, compte tenu des termes puissants de l'art. 2. Pour que tous puissent avoir des chances égales d'«épanouissement», la Loi cherche à interdire «les considérations» fondées notamment sur le sexe. C'est l'acte discriminatoire lui-même que l'on veut prévenir. La Loi n'a pas pour objet de punir la faute, mais bien de prévenir la discrimination.

Ce dernier point est important et mérite d'être souligné. Rien n'indique que l'objet de la *Loi canadienne sur les droits de la personne* soit d'attribuer une responsabilité morale ou de la punir. Il ne fait pas de doute que certaines personnes qui établissent des distinctions illicites le font délibérément ou par ignorance volontaire. Parmi les premières lois antidiscriminatoires, beaucoup s'intéressaient uniquement au comportement des personnes de ce genre et exigeaient la preuve de l'«intention» d'établir une distinction illicite pour

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109-122. There were two major difficulties with this approach. One semantic problem was a continuing confusion of the notions of "intent" and "malice". The word "intent" was deprived of its meaning in common parlance and was used as a surrogate for "malice". "Intent" was not the simple willing of a consequence, but rather the desiring of harm.

This imputed meaning was coherent in the context of a statute designed to punish moral blameworthiness. However, as the second problem with a fault-based approach was revealed—that moral blame was too limited a concept to deal effectively with the problem of discrimination—an attempt was made by legislatures and courts to cleanse the word "intent" of its moral component. The emphasis upon formal causality was restored and the intent required to prove discrimination became the intent to cause a discriminatory result. The judgment of the Federal Court of Appeal in *Canadian National Railway Co. v. Canadian Human Rights Commission and Bhinder*, [1983] 2 F.C. 531, is an example of this approach (aff'd on different grounds in *Bhinder v. Canadian National Railway Co.*, [1985] 2 S.C.R. 561). The difficulty with this development was that "intent" had become so encrusted with the moral overtones of "malice" that it was often difficult to separate the two concepts. Moreover, the imputation of a requirement of "intent", even if unrelated to moral fault, failed to respond adequately to the many instances where the effect of policies and practices is discriminatory even if that effect is unintended and unforeseen. The stated purpose of human rights legislation (in the case of the Canadian Act, to prevent "discriminatory practices") was not fully implemented.

The first comprehensive judicial statement of the correct attitude towards the interpretation of human rights legislation can be found in *Insurance Corporation of British Columbia v. Heerspink*,

que puissent être imposées des sanctions. Voir Walter S. Tarnopolsky, *Discrimination and the Law in Canada* (1982), aux pp. 109 à 122. Cette conception soulevait deux difficultés majeures. Il y avait d'abord un problème de sémantique: la confusion permanente entre la notion d'«intention» et celle d'«intention de nuire». Le terme «intention» perdait son sens ordinaire pour devenir synonyme d'«intention de nuire». L'«intention» ne consistait plus simplement à vouloir une conséquence, c'était vouloir nuire.

Le sens attribué était logique dans le contexte d'une loi conçue pour punir la responsabilité morale. Toutefois, avec la révélation du second problème que suscitait une conception basée sur la faute, savoir que le blâme moral était un concept trop limité pour résoudre vraiment la question de la discrimination, les législateurs et les tribunaux ont tenté de dépouiller le terme «intention» de sa connotation morale. L'insistance sur la causalité formelle a été rétablie et l'intention requise pour prouver la discrimination est devenue l'intention d'arriver à un résultat discriminatoire. L'arrêt de la Cour d'appel fédérale *Compagnie des chemins de fer nationaux du Canada c. Commission canadienne des droits de la personne et Bhinder*, [1983] 2 C.F. 531, est un exemple de cette conception (confirmé pour des motifs différents dans l'arrêt *Bhinder c. Compagnie des chemins de fer nationaux du Canada*, [1985] 2 R.C.S. 561). La difficulté que posait ce changement, c'est que l'«intention» s'entourait tellement de la connotation morale d'«intention de nuire» qu'il devenait souvent difficile de séparer les deux concepts. De plus, l'imputation d'une exigence d'«intention», même non liée à la faute morale, ne répondrait pas adéquatement aux nombreux cas où des politiques et pratiques ont un effet discriminatoire, même si cet effet n'a été ni voulu ni prévu. L'objectif arrêté de la législation sur les droits de la personne (qui, dans le cas de la Loi canadienne, est d'empêcher les «actes discriminatoires») n'était pas entièrement réalisé.

Le premier énoncé judiciaire complet de l'attitude à adopter au sujet de l'interprétation de la législation sur les droits de la personne se retrouve dans l'arrêt *Insurance Corporation of British*

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[1982] 2 S.C.R. 145, at p. 158, where Lamer J. emphasized that a human rights code "is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law". This principle of interpretation was further articulated by McIntyre J., for a unanimous Court, in *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150, at p. 156:

> Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement.

The emphasis upon the "special nature" of human rights enactments was a strong indication of the Court's general attitude to the interpretation of such legislation.

In *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, the Court set out explicitly the governing principles in the interpretation of human rights statutes. Again writing for a unanimous Court, McIntyre J. held, at pp. 546-47:

> It is not, in my view, a sound approach to say that according to established rules of construction no broader meaning can be given to the Code than the narrowest interpretation of the words employed. The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment . . ., and give it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary—and it is for the courts to seek out its purpose and give it effect. The Code aims at the removal of discrimination.

There can be no doubt that Canadian human rights legislation is now typically drafted to avoid reference to intention. As noted previously, the

Columbia c. Heerspink, [1982] 2 R.C.S. 145, à la p. 158, où le juge Lamer souligne qu'un code des droits de la personne ne doit pas être considéré «comme n'importe quelle autre loi d'application générale, il faut le reconnaître pour ce qu'il est, c'est-à-dire une loi fondamentale.» Ce principe d'interprétation a été précisé davantage par le juge McIntyre, au nom d'une Cour unanime, dans l'arrêt *Winnipeg School Division No. 1 c. Craton*, [1985] 2 R.C.S. 150, à la p. 156:

> Une loi sur les droits de la personne est de nature spéciale et énonce une politique générale applicable à des questions d'intérêt général. Elle n'est pas de nature constitutionnelle, en ce sens qu'elle ne peut pas être modifiée, révisée ou abrogée par la législature. Elle est cependant d'une nature telle que seule une déclaration législative claire peut permettre de la modifier, de la réviser ou de l'abroger, ou encore de créer des exceptions à ses dispositions.

L'accent mis sur la «nature spéciale» des textes législatifs portant sur les droits de la personne constituait une forte indication de l'attitude générale que prendrait la Cour au sujet de l'interprétation de tels textes.

Dans l'arrêt *Commission ontarienne des droits de la personne c. Simpsons-Sears Ltd.*, [1985] 2 R.C.S. 536, la Cour énonce explicitement les principes applicables à l'interprétation des lois sur les droits de la personne. S'exprimant encore une fois au nom de la Cour à l'unanimité, le juge McIntyre conclut, aux pp. 546 et 547:

> Ce n'est pas, à mon avis, une bonne solution que d'affirmer que, selon les règles d'interprétation bien établies, on ne peut prêter au Code un sens plus large que le sens le plus étroit que peuvent avoir les termes qui y sont employés. Les règles d'interprétation acceptées sont suffisamment souples pour permettre à la Cour de reconnaître, en interprétant un code des droits de la personne, la nature et l'objet spéciaux de ce texte législatif [. . .] et de lui donner une interprétation qui permettra de promouvoir ses fins générales. Une loi de ce genre est d'une nature spéciale. Elle n'est pas vraiment de nature constitutionnelle, mais elle est certainement d'une nature qui sort de l'ordinaire. Il appartient aux tribunaux d'en rechercher l'objet et de le mettre en application. Le Code vise la suppression de la discrimination.

Il ne peut y avoir de doute que la législation canadienne sur les droits de la personne est normalement rédigée aujourd'hui de façon à éviter toute

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Canadian Human Rights Act is addressed to "discriminatory practices". The *Ontario Human Rights Code*, R.S.O. 1980, c. 340, seeks to uphold the "equal dignity" of all men and women by preventing discrimination. In *Simpsons-Sears*, at p. 547, this Court spoke clearly as to the purpose of the Ontario Code, holding that the reach was wider than intentional discrimination:

> It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.

The emphasis upon discriminatory effects was also held by this Court to be central to the purposes of the *Canadian Human Rights Act*: *Bhinder*, at p. 586, *per* McIntyre J. (with whom all other members of the Court concurred on this point).

A necessary implication of the focus upon discriminatory effects was recognized by the Court in *Simpsons-Sears*. At page 551, McIntyre J. held that, in determining whether an individual or entity had practised discrimination under the relevant legislation, it was appropriate for the Court to consider "adverse effect discrimination", which may be described as the imposition of obligations, penalties or restrictive conditions that result from a policy or practice which is on its face neutral but which has a disproportionately negative effect on an individual or group because of a special characteristic of that individual or group.

The rejection of a necessity to prove intent and the unequivocal adoption of the idea of "adverse effect discrimination" by the courts is the result of a commitment to the purposive interpretation of human rights legislation. An instructive example of the contemporary trend is found in the judgment of the Court of Appeal of Saskatchewan in *Canadian Odeon Theatres Ltd. v. Saskatchewan*

référence à l'intention. Comme on l'a déjà constaté, la *Loi canadienne sur les droits de la personne* vise certains «actes discriminatoires». Le *Code ontarien des droits de la personne*, L.R.O. 1980, chap. 340, veut promouvoir «l'égale dignité» de l'ensemble des hommes et des femmes par la prévention de la discrimination. Dans l'arrêt *Simpsons-Sears*, à la p. 547, cette Cour s'est exprimée clairement sur l'objet du Code ontarien, jugeant que sa portée va plus loin que la discrimination volontaire:

> C'est le résultat ou l'effet de la mesure dont on se plaint qui importe. Si elle crée effectivement de la discrimination, si elle a pour effet d'imposer à une personne ou à un groupe de personnes des obligations, des peines ou des conditions restrictives non imposées aux autres membres de la société, elle est discriminatoire.

La Cour a également jugé que l'accent mis sur les effets discriminatoires est primordial pour les fins de la *Loi canadienne sur les droits de la personne*: arrêt *Bhinder*, à la p. 586, le juge McIntyre (à l'avis duquel souscrivent, sur ce point, tous les autres membres de la Cour).

Dans l'arrêt *Simpsons-Sears*, la Cour a reconnu l'existence d'une conséquence nécessaire de l'accent mis sur les effets discriminatoires. À la page 551, le juge McIntyre conclut que pour déterminer si une personne morale ou physique s'est livrée à de la discrimination au sens de la loi pertinente, il convenait que la Cour examine la question de la «discrimination par suite d'un effet préjudiciable», qu'on peut définir comme l'imposition d'obligations, de peines ou de conditions restrictives résultant d'une politique ou d'une pratique qui est neutre à première vue, mais qui a un effet négatif disproportionné sur un individu ou un groupe d'individus en raison d'une caractéristique spéciale de cet individu ou de ce groupe d'individus.

Le rejet de la nécessité de prouver l'intention et l'adoption non équivoque de l'idée de «discrimination par suite d'un effet préjudiciable» par les tribunaux résultent de l'adoption de l'interprétation fondée sur l'objet de la législation sur les droits de la personne. On trouve un exemple instructif de la tendance contemporaine dans l'arrêt de la Cour d'appel de la Saskatchewan *Canadian*

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Human Rights Commission, [1985] 3 W.W.R. 717, where Vancise J.A. wrote at p. 735:

> Generally human rights legislation has been given a broad interpretation to ensure that the stated objects and purposes are fulfilled. A narrow restrictive interpretation which would defeat the purpose of the legislation, that is, the elimination of discrimination, should be avoided.

As discussed above, the Supreme Court in the *Simpsons-Sears* and *Bhinder* decisions has already recognized that Canadian human rights legislation is directed not only at intentional discrimination, but at unintentional discrimination as well. In particular, the prohibition of discrimination in the *Canadian Human Rights Act* has been held to reach situations of "adverse effect discrimination": *Bhinder*. But unintentional discrimination may occur in another form, with potentially greater consequences in terms of the number of people who are disadvantaged. Section 15(1) of the Act and, by extension s. 41(2)(*a*), was designed to meet this second problem of "systemic discrimination".

IV

Systemic Discrimination and the Special Temporary Measures Order

A thorough study of "systemic discrimination" in Canada is to be found in the Abella Report on equality in employment. The terms of reference of the Royal Commission instructed it "to inquire into the most efficient, effective and equitable means of promoting employment opportunities, eliminating systemic discrimination and assisting individuals to compete for employment opportunities on an equal basis." (Order in Council P.C. 1983-1924 of 24 June 1983). Although Judge Abella chose not to offer a precise definition of systemic discrimination, the essentials may be gleaned from the following comments, found at p. 2 of the Abella Report:

> Discrimination . . . means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics . . . .

Odeon Theatres Ltd. v. Saskatchewan Human Rights Commission, [1985] 3 W.W.R. 717, où le juge Vancise écrit, à la p. 735:

> [TRADUCTION] En général, la législation sur les droits de la personne a reçu une interprétation large afin d'assurer que ses objectifs déclarés soient atteints. Une interprétation restrictive contraire à l'objet de la législation, qui est d'éliminer la discrimination, devrait être évitée.

Comme nous l'avons vu, la Cour suprême, dans les arrêts *Simpsons-Sears* et *Bhinder*, a déjà reconnu que la législation canadienne sur les droits de la personne vise non seulement la discrimination volontaire mais aussi la discrimination involontaire. En particulier, il a été jugé que la prohibition de la discrimination par la *Loi canadienne sur les droits de la personne* vise aussi les cas de «discrimination par suite d'un effet préjudiciable»: arrêt *Bhinder*. Mais la discrimination involontaire peut prendre une autre forme et avoir des conséquences potentiellement plus graves sur le plan du nombre d'individus désavantagés. Le paragraphe 15(1) de la Loi et, par extension l'al. 41(2)*a*), ont été conçus pour répondre à ce second problème de «discrimination systémique».

IV

La discrimination systémique et l'ordonnance de mesures spéciales temporaires

On trouve une étude exhaustive de la «discrimination systémique» au Canada dans le rapport Abella sur l'égalité en matière d'emploi. La Commission royale avait pour mandat «d'enquêter sur les moyens les plus efficaces et équitables de promouvoir les chances d'emploi, d'éliminer la discrimination systémique et d'assurer à tous les mêmes possibilités de prétendre à un emploi . . . » (Décret C.P. 1983-1924 du 24 juin 1983.) Quoique le juge Abella ait choisi de ne pas donner une définition précise de la discrimination systémique, on peut en glaner l'essentiel dans les commentaires suivants, que l'on trouve à la p. 2 de son rapport:

> . . . la discrimination s'entend des pratiques ou des attitudes qui, de par leur conception ou par voie de conséquence, gênent l'accès des particuliers ou des groupes à des possibilités d'emplois, en raison de caractéristiques qui leur sont prêtées à tort . . .

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It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.

This is why it is important to look at the results of a system . . . .

In other words, systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural" forces, for example, that women "just can't do the job" (see the Abella Report, pp. 9-10). To combat systemic discrimination, it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged. The Tribunal sought to accomplish this objective through its "Special Temporary Measures" Order. Did it have the authority to do so?

Section 41(2) of the *Canadian Human Rights Act* lists the orders that a Tribunal may make if it determines that a person has engaged in a discriminatory practice. Among the potential orders is an order for "measures" to be taken under s. 41(2)(*a*) "including adoption of a special program, plan or arrangement referred to in subsection 15(1), to prevent the same or a similar practice occurring in the future." The "program, plan or arrangement" referred to in s. 15(1) is any mechanism "designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be or are based on or related to" *inter alia*, sex.

Because of his stated emphasis upon the "ordinary grammatical construction" of s. 41(2)(*a*),

La question n'est pas de savoir si la discrimination est intentionnelle ou si elle est simplement involontaire, c'est-à-dire découlant du système lui-même. Si des pratiques occasionnent des répercussions néfastes pour certains groupes, c'est une indication qu'elles sont peut-être discriminatoires. Voilà pourquoi il est important d'analyser les conséquences des pratiques et des systèmes d'emploi.

En d'autres termes, la discrimination systémique en matière d'emploi, c'est la discrimination qui résulte simplement de l'application des méthodes établies de recrutement, d'embauche et de promotion, dont ni l'une ni l'autre n'a été nécessairement conçue pour promouvoir la discrimination. La discrimination est alors renforcée par l'exclusion même du groupe désavantagé, du fait que l'exclusion favorise la conviction, tant à l'intérieur qu'à l'extérieur du groupe, qu'elle résulte de forces «naturelles», par exemple que les femmes «ne peuvent tout simplement pas faire le travail» (voir le rapport Abella, aux pp. 9 et 10). Pour combattre la discrimination systémique, il est essentiel de créer un climat dans lequel tant les pratiques que les attitudes négatives peuvent être contestées et découragées. Le tribunal a tenté d'atteindre cet objectif par son ordonnance de «mesures spéciales temporaires». Avait-il le pouvoir de le faire?

Le paragraphe 41(2) de la *Loi canadienne sur les droits de la personne* énumère les ordonnances qu'un tribunal peut rendre quand il constate qu'il y a eu acte discriminatoire. Parmi les ordonnances possibles, il y a l'ordonnance de «mesures» à prendre en vertu de l'al. 41(2)*a*), pour «prévenir les actes semblables,» y compris «l'adoption d'une proposition relative à des programmes, des plans ou des arrangements spéciaux visés au paragraphe 15(1)». Les «programmes, plans ou arrangements» dont il est question au par. 15(1), ce sont tous les mécanismes «destinés à supprimer, diminuer ou prévenir les désavantages que subit ou peut vraisemblablement subir un groupe d'individus pour des motifs fondés directement ou indirectement sur» le sexe notamment.

En raison de son insistance expresse sur «l'interprétation grammaticale ordinaire» de l'al. 41(2)*a*),

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Hugessen J., for the majority in the Federal Court of Appeal, offered this reading of the paragraph (at p. 102):

> Reduced to its essentials, this text permits the Tribunal to order the taking of measures aimed at preventing the future occurrence of a discriminatory practice on the part of a person found to have engaged in such a practice in the past.

He stressed that "[t]he sole permissible purpose for the order is prevention" and that the text "does not allow restitution for past wrongs." Therefore, the "program, plan or arrangement" authorized by reference to s. 15(1) would necessarily be limited by the language of s. 41(2)(*a*) to a mechanism designed "to prevent the same or a similar practice occurring in the future". Hugessen J. recognized the special difficulties involved in dealing with systemic discrimination (at p. 105):

> . . . I recognize that by its very nature systemic discrimination may require creative and imaginative preventive measures. Such discrimination has its roots, not in any deliberate desire to exclude from favour, but in attitudes, prejudices, mind sets and habits which may have been acquired over generations. It may well be that hiring quotas are a proper way to achieve the desired result.

Hugessen J. simply did not believe, without some precise factual showing, that specific hiring goals could be related to prevention, and thereby fall within s. 41(2)(*a*). The Special Temporary Measures ordered by the Tribunal were struck down because the employment objectives imposed in the Order were expressed in terms which, in Justice Hugessen's view, indicated that the objective was remedial and not preventive.

To evaluate this argument it is important to remember exactly what was ordered by the Human Rights Tribunal. The impugned section of the Order was headed "Special Temporary Measures" and the heart of the employment equity program was contained in paragraph 2:

> . . . Canadian National is ordered to hire at least one woman for every four non-traditional positions filled in the future . . . .When it is in effect, daily adherence to the one-in-four ratio will not be required in order to give the employer more choice in the selection of candidates.

le juge Hugessen, au nom de la majorité de la Cour d'appel fédérale, propose cette interprétation de l'alinéa (à la p. 102):

> En substance, ce texte permet au tribunal d'ordonner à la personne qu'il a trouvée coupable d'un acte discriminatoire de prendre des mesures destinées à prévenir la répétition de cet acte.

Il souligne que «[l]e seul objectif permis que peut viser l'ordonnance est la prévention» et que le texte «ne permet pas de réparer les préjudices déjà causés.» Par conséquent, les «programmes [. . .] plans [. . .] ou [. . .] arrangements» visés au par. 15(1) qui peuvent être adoptés seraient nécessairement limités, par le texte de l'al. 41(2)*a*), à un mécanisme conçu pour «prévenir les actes semblables». Le juge Hugessen reconnaît que la discrimination systémique soulève des difficultés particulières (à la p. 105):

> . . . je reconnais que, de par sa nature même, la discrimination systémique peut nécessiter l'adoption de mesures préventives innovatrices et imaginatives. De tels actes discriminatoires prennent leur source, non dans une volonté délibérée de défavoriser, mais dans les attitudes, préjugés, manières de penser, et habitudes qui ont pu s'installer au cours de plusieurs générations. Il se peut bien que les quotas d'embauchage soient une bonne façon de parvenir au résultat désiré.

Le juge Hugessen n'a tout simplement pas cru, en l'absence de faits précis, que des objectifs d'embauche spécifiques pouvaient être liés à la prévention et ainsi relever de l'al. 41(2)*a*). Les mesures spéciales temporaires ordonnées par le tribunal ont été annulées parce que les objectifs d'emploi y sont exprimés en des termes qui, aux yeux du juge Hugessen, indiquent qu'ils ont pour but de réparer et non de prévenir.

Pour évaluer cet argument, il importe de se souvenir exactement de la teneur de l'ordonnance du tribunal des droits de la personne. La section contestée de l'ordonnance est intitulée «Mesures spéciales temporaires» et le principe du programme d'équité en matière d'emploi est énoncé au deuxième paragraphe:

> . . . il est ordonné au Canadien National d'embaucher au moins une femme sur quatre postes non traditionnels à être comblés à l'avenir [. . .] Une fois en vigueur, la proportion d'un sur quatre n'aura pas à être respectée quotidiennement, ce afin de permettre à l'employeur un

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However, it must be complied with over each quarterly period until the desired objective of having 13% of non-traditional positions filled by women is achieved.

meilleur choix dans la sélection des candidats. Elle devra cependant être respectée dans l'ensemble de chaque période trimestrielle, jusqu'à ce que l'objectif désiré de 13 % de femmes dans les postes non traditionnels soit atteint.

It should be underscored once again that the objective of 13 per cent female participation was not arbitrary, for it corresponded to the national average of women involved in the non-traditional occupations.

Il est bon de rappeler une fois encore que cet objectif de 13 pour 100 de participation féminine n'était pas arbitraire; il correspondait à la moyenne nationale des femmes occupant des emplois non traditionnels.

In his dissenting opinion in the Federal Court of Appeal, MacGuigan J. accepted, as I do, that s. 41(2)(*a*) was designed to allow human rights tribunals to prevent future discrimination against identifiable protected groups, but he held that "prevention" is a broad term and that it is often necessary to refer to historical patterns of discrimination in order to design appropriate strategies for the future. He noted the deep roots of discrimination against women at CN. It is an uncontradicted fact that the hiring and promotion policies of CN and the enormous problems faced by the tiny minority of women in the blue-collar work force amounted to a systematic denial of women's equal employment opportunities.

Dans son opinion dissidente en Cour d'appel fédérale, le juge MacGuigan a reconnu, tout comme je le fais, que l'al. 41(2)*a*) a été conçu pour permettre aux tribunaux des droits de la personne d'empêcher que des groupes protégés identifiables ne soient à l'avenir victimes de discrimination, mais il a jugé que le terme «prévention» est fort général et qu'il est souvent nécessaire de se référer à des régimes historiques de discrimination pour concevoir les stratégies appropriées à l'avenir. Il a constaté que la discrimination dont étaient victimes les femmes au CN avait des racines profondes. C'est un fait incontesté que les politiques d'embauche et de promotion du CN et les problèmes considérables auxquels doit faire face la faible minorité de femmes cols bleus reviennent à dénier systématiquement aux femmes l'égalité des chances en matière d'emploi.

Justice MacGuigan's point is made abundantly clear when one considers the context in which the challenged order was issued. It bears repeating that the Tribunal had found that at the end of 1981 only 0.7 per cent of blue-collar jobs in the St. Lawrence Region of Canadian National were held by women. The Tribunal found furthermore that the small number of women in non-traditional jobs tended to perpetuate exclusion and, in effect, to cause additional discrimination. Moreover, Canadian National knew that its policies and practices, although perhaps not discriminatory in intent, were discriminatory in effect, yet had done nothing substantial to rectify the situation. When confronted with such a case of "systemic discrimination", it may be that the type of order issued by the Tribunal is the only means by which the purpose of the *Canadian Human Rights Act* can be met. In any program of employment equity,

Cette remarque du juge MacGuigan devient on ne peut plus claire lorsqu'on considère le contexte dans lequel l'ordonnance contestée a été rendue. Il vaut la peine de répéter que le tribunal avait constaté qu'à la fin de 1981 seulement 0,7 pour 100 des emplois manuels dans la région du St-Laurent du Canadien National étaient occupés par des femmes. Le tribunal a aussi constaté que le petit nombre de femmes occupant des emplois non traditionnels avait tendance à perpétuer leur exclusion et, en fait, à constituer une cause supplémentaire de discrimination. De plus, le Canadien National savait que ses politiques et pratiques, même si elles n'étaient peut-être pas volontairement discriminatoires, étaient effectivement discriminatoires, et pourtant il n'avait rien fait d'important pour remédier à la situation. Lorsqu'on a affaire à un tel cas de «discrimination systémique», il se peut qu'une ordonnance comme celle rendue

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there simply cannot be a radical dissociation of "remedy" and "prevention". Indeed there is no prevention without some form of remedy. The point was explained clearly by Professors Greschner and Norman in their Case Comment on the majority judgment of the Federal Court of Appeal in this case, found at (1985), 63 *Can. Bar Rev.* 805, at p. 812. They emphasize that an employment equity program

. . . tries to break the causal links between past inequalities suffered by a group and future perpetuation of the inequalities. It simultaneously looks to the past and to the future, with no gap between cure and prevention. Any such program will remedy past acts of discrimination against the group and prevent future acts at one and the same time. That is the very point of affirmative action.

This point demands repetition . . . .When a program is said to be aimed at remedying past acts of discrimination, such as by bringing women into blue-collar occupations, it necessarily is preventing future acts of discrimination because the presence of women will help break down generally the notion that such work is man's work and more specifically, will help change the practices within that workplace which resulted in the past discrimination against women. From the other perspective, when a program is said to be aimed at preventing future acts of discrimination (again by bringing women into blue-collar occupations), it necessarily is also remedying past acts of discrimination because women as a group suffered from the discrimination and are now benefitting from the program.

Unlike the remedies in s. 41(2)(*b*)-(*d*), the "remedy" under s. 41(2)(*a*) is directed towards a group and is therefore not merely compensatory but is itself prospective. The benefit is always designed to improve the situation for the group in the future, so that a successful employment equity program will render itself otiose.

To see more clearly why the Special Temporary Measures Order is prospective, it would be helpful

par le tribunal soit le seul moyen de réaliser l'objet de la *Loi canadienne sur les droits de la personne.* Dans tout programme d'équité en matière d'emploi, on ne peut tout simplement pas dissocier radicalement la «réparation» et la «prévention». En fait, il ne peut y avoir de prévention sans une forme quelconque de réparation. Les professeurs Greschner et Norman ont expliqué cela clairement dans leur commentaire de l'arrêt majoritaire de la Cour d'appel fédérale en l'espèce, qu'on trouve à (1985), 63 *R. du B. can.* 805, à la p. 812. Ils soulignent qu'un programme d'équité en matière d'emploi

[TRADUCTION] . . . tente de rompre les liens de causalité entre les inégalités antérieures, subies par un groupe, et leur perpétuation dans l'avenir. Il regarde simultanément vers le passé et vers le futur, sans qu'aucun fossé n'existe entre réparation et prévention. Tout programme de ce genre remédiera aux actes de discrimination antérieurs dont le groupe a été victime et empêchera en même temps que de tels actes soient accomplis à l'avenir. C'est le principe même de l'action positive.

Cela mérite d'être répété [. . .] Lorsqu'on dit qu'un programme vise à remédier à des actes discriminatoires antérieurs, en amenant des femmes à occuper des emplois manuels, il empêche forcément les actes de discrimination futurs du fait que la présence de femmes facilitera en général la disparition de la notion que ce genre de travail est un travail d'homme et, plus précisément, favorisera la disparition des pratiques qui, sur ces lieux du travail, occasionnaient par le passé la discrimination envers les femmes. Dans une autre perspective, lorsqu'on dit qu'un programme vise à empêcher les actes de discrimination futurs (en favorisant encore une fois l'accès des femmes à des postes manuels), il remédie par le fait même aussi aux actes de discrimination antérieurs parce que les femmes en tant que groupe ont été victimes de discrimination alors qu'elles profitent maintenant du programme.

Contrairement aux formes de réparation prévues aux al. *b*) à *d*) du par. 41(2), la «réparation» de l'al. 41(2)*a*) vise un groupe et est donc non seulement compensatoire, mais est elle-même prospective. L'avantage est toujours conçu pour améliorer la situation du groupe à l'avenir, de sorte que le programme d'équité en matière d'emploi qui réussit se rend lui-même inutile.

Pour mieux voir pourquoi l'ordonnance de mesures spéciales temporaires est prospective, il serait

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to review briefly the theoretical underpinnings of employment equity programs. I have already stressed that systemic discrimination is often unintentional. It results from the application of established practices and policies that, in effect, have a negative impact upon the hiring and advancement prospects of a particular group. It is compounded by the attitudes of managers and co-workers who accept stereotyped visions of the skills and "proper role" of the affected group, visions which lead to the firmly held conviction that members of that group are incapable of doing a particular job, even when that conclusion is objectively false. An employment equity program, such as the one ordered by the Tribunal in the present case, is designed to break a continuing cycle of systemic discrimination. The goal is not to compensate past victims or even to provide new opportunities for specific individuals who have been unfairly refused jobs or promotion in the past, although some such individuals may be beneficiaries of an employment equity scheme. Rather, an employment equity program is an attempt to ensure that future applicants and workers from the affected group will not face the same insidious barriers that blocked their forebears.

An employment equity program thus is designed to work in three ways. First, by countering the cumulative effects of systemic discrimination, such a program renders further discrimination pointless. To the extent that some intentional discrimination may be present, for example in the case of a foreman who controls hiring and who simply does not want women in the unit, a mandatory employment equity scheme places women in the unit despite the discriminatory intent of the foreman. His battle is lost.

Secondly, by placing members of the group that had previously been excluded into the heart of the work place and by allowing them to prove ability on the job, the employment equity scheme addresses the attitudinal problem of stereotyping. For example, if women are seen to be doing the job

utile d'étudier brièvement les fondements théoriques des programmes d'équité en matière d'emploi. J'ai déjà souligné que la discrimination systémique est souvent involontaire. Elle résulte de pratiques et de politiques établies qui, en fait, ont une incidence négative sur les perspectives d'embauche et d'avancement d'un groupe particulier. À cela s'ajoutent les attitudes des administrateurs et des collègues de travail qui acceptent une vision stéréotypée des compétences et du «rôle approprié» du groupe touché, laquelle vision conduit à la conviction ferme que les membres de ce groupe sont incapables de faire un certain travail, même si cette conclusion est objectivement fausse. Un programme d'équité en matière d'emploi, comme celui ordonné par le tribunal en l'espèce, est conçu pour rompre le cercle vicieux de la discrimination systémique. L'objectif n'est pas d'indemniser les victimes du passé ni même d'ouvrir de nouveaux horizons à des individus particuliers qui, par le passé, se sont vu refuser inéquitablement un emploi ou une promotion, quoique certains de ces individus puissent profiter d'un régime d'équité en matière d'emploi. Plutôt, le programme d'équité en matière d'emploi tente de faire en sorte qu'à l'avenir les postulants et les travailleurs du groupe touché n'aient pas à faire face aux mêmes barrières insidieuses qui ont arrêté leurs prédécesseurs.

Un programme d'équité en matière d'emploi comporte donc trois aspects. En premier lieu, en contrecarrant les effets cumulatifs de la discrimination systémique, un tel programme rend vaine toute discrimination supplémentaire. Dans la mesure où il existe une certaine discrimination volontaire, par exemple dans le cas d'un contremaître qui contrôle l'embauche et qui ne veut tout simplement pas de femmes dans son unité, le régime obligatoire d'équité en matière d'emploi permet d'avoir des femmes dans l'unité malgré les intentions discriminatoires du contremaître qui perd ainsi la bataille.

En second lieu, en plaçant des membres du groupe antérieurement exclu dans le milieu de travail et en leur permettant de prouver leurs capacités, le régime d'équité en matière d'emploi s'attaque au problème des attitudes stéréotypées. Par exemple, si l'on se rend compte que des

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of "brakeman" or heavy cleaner or signaller at Canadian National, it is no longer possible to see women as capable of fulfilling only certain traditional occupational roles. It will become more and more difficult to ascribe characteristics to an individual by reference to the stereotypical characteristics ascribed to all women.

Thirdly, an employment equity program helps to create what has been termed a "critical mass" of the previously excluded group in the work place. This "critical mass" has important effects. The presence of a significant number of individuals from the targeted group eliminates the problems of "tokenism"; it is no longer the case that one or two women, for example, will be seen to "represent" all women. See Carol Agocs, "Affirmative Action, Canadian Style" (1986), 12 *Canadian Public Policy—Analyse de politiques* 148, at p. 149. Moreover, women will not be so easily placed on the periphery of management concern. The "critical mass" also effectively remedies systemic inequities in the process of hiring:

> There is evidence that when sufficient minorities/women are employed in a given establishment, the informal processes of economic life, for example, the tendency to refer friends and relatives for employment, will help to produce a significant minority [or female] applicant flow.

(Alfred W. Blumrosen, "Quotas, Common Sense and Law in Labour Relations: Three Dimensions of Equal Opportunity", in Walter S. Tarnopolsky, ed., *Some Civil Liberties Issues of the Seventies* (1975), Toronto: Osgoode Hall Law School/York University, 5, at p. 15).

If increasing numbers of women apply for non-traditional jobs, the desire to work in blue-collar occupations will be less stigmatized. Personnel offices will be forced to treat women's applications for non-traditional jobs more seriously. In other words, once a "critical mass" of the previously excluded group has been created in the work force, there is a significant chance for the continuing self-correction of the system.

femmes sont «serre-freins» ou préposées aux gros travaux de nettoyage ou à la signalisation au Canadien National, il ne sera plus possible de considérer les femmes comme n'étant capables que d'occuper certains postes traditionnels. Il deviendra de plus en plus difficile d'attribuer à une seule personne les caractéristiques stéréotypées dont on affuble toutes les femmes.

En troisième lieu, un programme d'équité en matière d'emploi facilite la création de ce qu'on a appelé une «masse critique» du groupe antérieurement exclu de ce milieu de travail. Cette «masse critique» a des effets importants. La présence d'un nombre important de membres du groupe visé élimine les problèmes de «symbolisme»; on ne peut plus, par exemple, considérer qu'une ou deux femmes «représentent» toutes les femmes. Voir Carol Agocs, «Affirmative Action, Canadian Style» (1986), 12 *Canadian Public Policy—Analyse de politiques* 148, à la p. 149. En outre, il ne sera pas aussi facile pour la direction de reléguer la question des femmes au second rang de ses soucis. La «masse critique» remédie efficacement aussi aux inéquités systémiques dans l'embauche:

> [TRADUCTION] Il y a des preuves que lorsqu'un nombre suffisant d'individus minoritaires ou de femmes sont employés dans un établissement donné, le processus informel de la vie économique, par exemple la tendance à recommander des amis ou des parents comme candidat à l'emploi, facilite la production d'un flot important de candidats [féminins ou] minoritaires.

(Alfred W. Blumrosen, «Quotas, Common Sense and Law in Labour Relations: Three Dimensions of Equal Opportunity», dans Walter S. Tarnopolsky (éd.), *Some Civil Liberties Issues of the Seventies* (1975), Toronto: Osgoode Hall Law School/York University, 5, à la p. 15.)

Si un nombre croissant de femmes postulent des emplois non traditionnels, le goût d'occuper des emplois manuels paraîtra moins infamant. Les bureaux de personnel seront forcés de considérer plus sérieusement les candidatures des femmes pour des emplois non traditionnels. En d'autres termes, une fois qu'une «masse critique» du groupe antérieurement exclu aura été créée au sein de la main-d'œuvre, il y aura de bonnes chances pour que le système continue à se corriger lui-même.

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When the theoretical roots of employment equity programs are exposed, it is readily apparent that, in attempting to combat systemic discrimination, it is essential to look to the past patterns of discrimination and to destroy those patterns in order to prevent the same type of discrimination in the future. It is for this reason that the language of the Tribunal's Order for Special Temporary Measures may appear "remedial". In any case, as was stressed by MacGuigan J. in his dissent, the important question is not whether the Tribunal's order tracked the precise wording of s. 41(2)(*a*), but whether the actual measures ordered could be construed fairly to fall within the scope of the section. One should look to the substance of the order and not merely to its wording.

Lorsque les fondements théoriques des programmes d'équité en matière d'emploi sont énoncés, il appert rapidement que, lorsqu'on tente de combattre la discrimination systémique, il est essentiel de s'attaquer aux anciens régimes discriminatoires et de les détruire afin d'empêcher à l'avenir la résurgence de cette même discrimination. C'est pour cette raison que, dans sa formulation, l'ordonnance de mesures spéciales temporaires par le tribunal peut paraître «réparatrice». Quoi qu'il en soit, comme l'a souligné le juge MacGuigan dans ses motifs de dissidence, la question qui importe est de savoir non pas si l'ordonnance du tribunal suit le texte même de l'al. 41(2)*a*), mais plutôt si les mesures qu'on ordonne réellement de prendre peuvent, selon une interprétation honnête, tomber sous le coup de cette disposition. Ce qu'il faut examiner c'est le contenu de l'ordonnance et non simplement sa formulation.

For the sake of convenience, I will summarize my conclusions as to the validity of the employment equity program ordered by the Tribunal. To render future discrimination pointless, to destroy discriminatory stereotyping and to create the required "critical mass" of target group participation in the work force, it is essential to combat the effects of past systemic discrimination. In so doing, possibilities are created for the continuing amelioration of employment opportunities for the previously excluded group. The dominant purpose of employment equity programs is always to improve the situation of the target group in the future. MacGuigan J. stressed in his dissent that "the prevention of systemic discrimination will reasonably be thought to require systemic remedies" (p. 120). Systemic remedies must be built upon the experience of the past so as to prevent discrimination in the future. Specific hiring goals, as Hugessen J. recognized, are a rational attempt to impose a systemic remedy on a systemic problem. The Special Temporary Measures Order of the Tribunal thus meets the requirements of s. 41(2)(*a*) of the *Canadian Human Rights Act*. It is a "special program, plan or arrangement" within the meaning of s. 15(1) and therefore can be ordered under s. 41(2)(*a*). The employment equity order is rationally designed to combat systemic discrimination in the Canadian National St. Law-

Pour des motifs de commodité, je vais résumer mes conclusions sur la validité du programme d'équité en matière d'emploi ordonné par le tribunal. Pour rendre vaine toute discrimination future, détruire les stéréotypes discriminatoires et créer la «masse critique» requise d'intégration du groupe visé à la main-d'œuvre, il est essentiel de combattre les effets de la discrimination systémique antérieure. Ce faisant, on crée des possibilités d'amélioration permanente des chances d'emploi pour le groupe autrefois exclu. L'objet dominant des programmes d'équité en matière d'emploi est toujours d'améliorer la situation future du groupe visé. Le juge MacGuigan souligne, dans ses motifs de dissidence, qu'«on peut raisonnablement s'attendre à ce que la prévention de la discrimination systémique exige des sanctions à caractère systémique» (p. 120). Les sanctions systémiques doivent être fondées sur l'expérience du passé, afin d'empêcher la discrimination future. Des objectifs d'embauche précis, comme l'a reconnu le juge Hugessen, constituent une tentative rationnelle d'imposer un correctif systémique à un problème systémique. L'ordonnance de mesures spéciales temporaires du tribunal est donc conforme à l'al. 41(2)*a*) de la *Loi canadienne sur les droits de la personne*. Elle constitue un «programme, plan ou arrangement spécial» au sens du par. 15(1), qui peut donc être ordonné en vertu de l'al. 41(2)*a*). L'ordonnance

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rence Region by preventing "the same or a similar practice occurring in the future".

A secondary problem must now be addressed, the fact that the Order of the Tribunal was expressed in terms of an employment goal, rather than a hiring goal. This methodology might increase the belief that the Order was remedial and not, properly speaking, preventive. The Tribunal held, however, that the systemic discrimination at CN occurred not only in hiring but once women were on the job as well. The evidence revealed that there was a high level of publicly expressed male antipathy towards women which contributed to a high turnover rate amongst women in blue-collar jobs. As well, many male workers and supervisors saw any female worker in a non-traditional job as an upsetting phenomenon and as a "job thief". To the extent that promotion was dependent upon the evaluations of male supervisors, women were at a significant disadvantage. Moreover, because women generally had a low level of seniority, they were more likely to be laid off. For the employment equity program to be effective in creating the "critical mass" and in destroying stereotypes, the goals had to be expressed in terms of actual employment. Otherwise the reasonable objectives of the scheme would have been defeated. The dominant purpose remained to improve the employment situation for women at CN in the future.

V

The Cross-Appeal

Canadian National filed a cross-appeal by which it sought to set aside the entire decision and Order of the Tribunal for the reasons set out in the judgment of Pratte J. in the Federal Court of Appeal. In view of my disposition of the appeal, it is obviously unnecessary to discuss the merits of the cross-appeal.

d'équité en matière d'emploi est logiquement conçue pour combattre la discrimination systémique dans la région du St-Laurent du Canadien National par la prévention d'«actes semblables».

Il faut maintenant s'attaquer à un problème secondaire, savoir le fait que l'ordonnance du tribunal est exprimée en termes d'objectifs d'emploi plutôt que d'objectifs d'embauche. Cette méthodologie est susceptible d'apporter de l'eau au moulin de ceux qui croient que l'ordonnance est réparatrice et non, à proprement parler, préventive. Le tribunal a toutefois jugé qu'il y avait discrimination systémique au CN non seulement au moment de l'embauche, mais aussi en milieu de travail. La preuve a révélé une large mesure d'antipathie masculine exprimée publiquement à l'égard des femmes, ce qui a contribué à un taux élevé de roulement du personnel féminin dans les emplois manuels. De même, un bon nombre de travailleurs et de surveillants masculins considèrent qu'une femme dans un emploi non traditionnel est un phénomène dangereux et une «voleuse de job». Dans la mesure où les promotions dépendaient des évaluations de surveillants masculins, les femmes étaient en désavantage marqué. De plus, étant donné que les femmes en général avaient peu d'ancienneté, elles risquaient davantage d'être mises à pied. Pour que le programme d'équité en matière d'emploi parvienne à créer une «masse critique» et à détruire les stéréotypes, les objectifs devaient être exprimés en termes d'emplois véritables. Autrement, les objectifs raisonnables du régime auraient été contrecarrés. L'objectif dominant était toujours d'améliorer la situation future des femmes en matière d'emploi au CN.

V

Le pourvoi incident

Le Canadien National a formé un pourvoi incident en vue d'obtenir l'annulation de toute la décision et ordonnance du tribunal pour les raisons énoncées dans les motifs du juge Pratte de la Cour d'appel fédérale. Vu la solution que j'apporte au litige, il n'est manifestement pas nécessaire de se prononcer sur le fond du pouvoir incident.

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VI

Conclusion

I would allow the appeal with costs, reverse the decision of the Federal Court of Appeal and restore in its entirety the Order of the Human Rights Tribunal. The cross-appeal is therefore dismissed with costs.

Appeal allowed with costs and cross-appeal dismissed with costs.

Solicitors for Action Travail des Femmes: Rivest, Castiglio, Castiglio, LeBel & Schmidt, Montréal.

Solicitors for the Canadian National Railway Co.: Alphonse Giard and Rolland Boudreau, Montréal.

Solicitors for the Canadian Human Rights Commission: René Duval and Anne Trotier, Ottawa.

VI

Conclusion

Je suis d'avis d'accueillir le pourvoi avec dépens, d'infirmer l'arrêt de la Cour d'appel fédérale et de rétablir en son entier l'ordonnance du tribunal des droits de la personne. Le pourvoi incident est donc rejeté avec dépens.

Pourvoi accueilli avec dépens et pourvoi incident rejeté avec dépens.

Procureurs d'Action Travail des Femmes: Rivest, Castiglio, Castiglio, LeBel & Schmidt, Montréal.

Procureurs de la Compagnie des chemins de fer nationaux du Canada: Alphonse Giard et Rolland Boudreau, Montréal.

Procureurs de la Commission canadienne des droits de la personne: René Duval et Anne Trotier, Ottawa.

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TAB 5

Serge Giguère, ès qualités *Appellant*

v.

Chambre des notaires du Québec *Respondent*

and

Comité administratif de la Chambre des notaires du Québec *Intervener*

INDEXED AS: GIGUÈRE *v.* CHAMBRE DES NOTAIRES DU QUÉBEC

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File No.: 28901.

2003: June 5; 2004: January 29.

Present: McLachlin C.J. and Gonthier, Major, Bastarache, Binnie, LeBel and Deschamps JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Civil liability — Professional liability — Notaries — Indemnity fund — Elderly client selling property to notary for one dollar — Property later sold by notary for $550,000 — Sale annulled by court — Notary declaring bankruptcy — Claim against Indemnity Fund of Chambre des notaires — Administrative Committee of Chambre rejecting claim on ground that notary was acting in personal rather than professional capacity — Whether Administrative Committee's decision patently unreasonable — Regulation respecting the indemnity fund of the Chambre des notaires du Québec, R.R.Q. 1981, c. N-2, r. 8, s. 2.01 — Code of ethics of notaries, R.R.Q., c. N-2, r. 3, s. 4.02.01.

Civil liability — Professional liability — Notaries — Indemnity fund — Maximum indemnity payable for total claims against same notary established by regulation at $300,000 — Whether ceiling excludes any award of interest or additional indemnity under Civil Code — Civil Code of Québec, S.Q. 1991, c. 64, arts. 1617, 1619.

Serge Giguère, ès qualités *Appelant*

c.

Chambre des notaires du Québec *Intimée*

et

Comité administratif de la Chambre des notaires du Québec *Intervenant*

RÉPERTORIÉ : GIGUÈRE *c.* CHAMBRE DES NOTAIRES DU QUÉBEC

Référence neutre : 2004 CSC 1.

N^o^ du greffe : 28901.

2003 : 5 juin; 2004 : 29 janvier.

Présents : La juge en chef McLachlin et les juges Gonthier, Major, Bastarache, Binnie, LeBel et Deschamps.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Responsabilité civile — Responsabilité professionnelle — Notaires — Fonds d'indemnisation — Cliente âgée vendant à son notaire son immeuble pour la somme d'un dollar — Immeuble revendu par le notaire pour 550 000 $ — Vente annulée par le tribunal — Notaire déclarant faillite — Réclamation contre le Fonds d'indemnisation de la Chambre des notaires — Comité administratif de la Chambre refusant la réclamation au motif que le notaire agissait en sa qualité personnelle plutôt que professionnelle — La décision du Comité administratif est-elle manifestement déraisonnable? — Règlement sur le fonds d'indemnisation de la Chambre des notaires du Québec, R.R.Q. 1981, ch. N-2, r. 8, art. 2.01 — Code de déontologie des notaires, R.R.Q., ch. N-2, r. 3, art. 4.02.01.

Responsabilité civile — Responsabilité professionnelle — Notaires — Fonds d'indemnisation — Indemnité maximale payable pour le total des réclamations contre le même notaire fixée par règlement à 300 000 $ — Cette limite exclut-elle le versement des intérêts au taux légal et l'indemnité additionnelle prévus au Code civil du Québec? — Code civil du Québec, L.Q. 1991, ch. 64, art. 1617, 1619.

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By private writing, Mrs. H sold her home to her notary for $1 "and other good and valuable consideration". The notary, who had been handling H's affairs for many years, drafted the deed of sale himself. After the notary tried to sell the property, both H's brother and her nephew G, who was now H's curator under a protection order, filed a complaint with the syndic of the Chambre des notaires du Québec. The complaints were held to be unfounded. Meanwhile the notary sold the property for $550,000 and H died. The Superior Court annulled the sale and ordered the notary to reimburse H's succession over $1 million. The notary having declared bankruptcy, the succession claimed reimbursement from the Chambre's indemnity fund for the value of the house and other misappropriations. The Chambre's Indemnity Committee recommended that certain amounts be repaid to the succession, but recommended refusal of the claim in respect of the property on the ground that the notary was not acting in the exercise of his profession when he swindled it from H and therefore his actions did not come within the terms of the regulation governing the indemnity fund. The recommendations were later adopted by the Administrative Committee on behalf of the Chambre. The Superior Court dismissed the application for judicial review, concluding that the Administrative Committee's decision was not patently unreasonable. The Court of Appeal affirmed that decision.

Mme H a vendu, par acte sous seing privé, sa maison à son notaire pour un montant de un dollar « et autres bonnes et valables considérations ». Le notaire, qui s'occupait des affaires de H depuis de nombreuses années, a lui-même rédigé l'acte de vente. Après que le notaire eut tenté de vendre l'immeuble, le frère de H et son neveu G, devenu curateur de H en vertu d'une ordonnance de protection, ont déposé chacun une plainte auprès du syndic de la Chambre des notaires du Québec. Les plaintes ont été jugées non fondées. Dans l'intervalle, le notaire a vendu l'immeuble pour un montant de 550 000 $ et H est décédée. La Cour supérieure a annulé la vente et a ordonné au notaire de rembourser plus d'un million de dollars à la succession de H. Le notaire ayant fait faillite, la succession a demandé à la Chambre de lui rembourser, à même son fonds d'indemnisation, la valeur de l'immeuble et d'autres sommes détournées. Le Comité d'indemnisation de la Chambre a recommandé que la succession soit remboursée de certaines sommes, mais que soit rejetée la réclamation au titre de l'immeuble au motif que le notaire n'agissait pas dans l'exercice de sa profession lorsqu'il l'a acquis frauduleusement de H et, partant, sa conduite n'était pas visée par le règlement régissant le fonds d'indemnisation. Les recommandations ont été entérinées par le Comité administratif au nom de la Chambre. La Cour supérieure a rejeté la demande de contrôle judiciaire, concluant que la décision du Comité administratif n'était pas manifestement déraisonnable. La Cour d'appel a confirmé la décision.

Held (Deschamps J. dissenting): The appeal should be allowed.

Arrêt (la juge Deschamps est dissidente) : Le pourvoi est accueilli.

Per McLachlin C.J. and Gonthier, Major, Bastarache, Binnie and LeBel JJ.: The Administrative Committee's decision against indemnifying the succession on the ground that the notary was acting in a personal rather than a professional capacity is patently unreasonable. The Administrative Committee's error is predicated on a basic misunderstanding of the professional responsibilities of notaries in Quebec law, the relationship between H and the notary, and the purposes of the indemnity fund. So gross a legal error cannot be shielded by the privative clause in s. 4.03 of the Regulation respecting the indemnity fund.

La juge en chef McLachlin et les juges Gonthier, Major, Bastarache, Binnie et LeBel : La décision du Comité administratif refusant d'indemniser la succession au motif que le notaire agissait en sa qualité personnelle plutôt que professionnelle est manifestement déraisonnable. L'erreur commise par le Comité administratif est fondée sur une méconnaissance fondamentale des responsabilités professionnelles des notaires en droit québécois, de la relation entre H et son notaire, ainsi que du but de l'établissement du fonds d'indemnisation. Une erreur de droit à ce point grossière ne peut bénéficier de la protection de la clause privative contenue à l'art. 4.03 du règlement concernant le fonds d'indemnisation.

For all his false pretences of friendship, the notary was above all H's legal adviser within the meaning of the law. The professional, rather than personal, nature of the relationship is not only true as a matter of fact but required as a matter of law. The notary's professional duty to advise H impartially was engaged by this transaction. The requirement of notarial impartiality governs the duty of notaries to advise their clients and the parties to acts

Même s'il feignait d'entretenir des liens d'amitié avec H, le notaire était avant tout son conseiller juridique au sens de la loi. La nature professionnelle plutôt que personnelle de la relation ressort non seulement des faits, mais de la loi elle-même. Par la transaction, l'obligation professionnelle du notaire de conseiller H avec impartialité a été engagée. L'exigence d'impartialité à laquelle les notaires sont tenus sous-tend le devoir qu'ils ont de

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they prepare. The fact that this transaction occurred by private writing does not in any sense render it a personal act. The duty of an independent legal adviser remains the same in the circumstances. Any characterization of the transaction must also be considered in the light of the purposes of the indemnity fund. One of those purposes is to protect clients from misdeeds by notaries that, due to their intentional nature, will not be covered by professional liability insurance. By characterizing the transaction as personal, the two Committees took the notary's fraud outside the scope of the fund, thus revoking the very protection the fund is intended to give. This decision opens a gap between notaries' ethical obligations, as set out in s. 4.02.01(*b*) of the *Code of ethics of notaries*, and the remedy for breach of those obligations, which is supposed to be provided, in the last resort, by the indemnity fund.

Before this Court, the Chambre raised for the first time an argument to the effect that no indemnity was payable to the succession because the property does not come within the terms of the Regulation, since it is not "a sum of money or other security". There is no reason to believe that this limited understanding of "other security" actually informed the Committees' decisions. In any case, in view of the judgment annulling the sale, the deed of sale is deemed never to have existed. Under art. 1422 and 1701 C.C.Q., the concern is not with H's house but with its value and at least the proceeds the notary earned from selling it to third party purchasers. There is no disputing that those proceeds are sums of money. This matter should not be sent back to the Chambre so that it can decide this point. There is no dispute as to quantum and to send the matter back would serve to reward the Chambre for the tardiness with which it has raised this argument.

The maximum indemnity payable from the fund for the total claims against the same notary is $300,000. That limit is not a constraint on awards of interest at the legal rate under art. 1617 C.C.Q. and does not oust the Court's power to award an additional indemnity under art. 1619 C.C.Q. These articles seek to compensate creditors for not having access to their funds and to encourage debtors to restore such funds promptly. Here, the succession, having already received $112,535.96 out of these funds, is entitled to the amount of $187,464.04 plus interest at the legal rate and additional indemnity, both payable from May 3, 1996, being the date on which the Administrative Committee rendered its decision.

conseiller leurs clients et les parties à un acte qu'ils préparent. Le fait que cette transaction ait pris la forme d'un acte sous seing privé ne lui confère aucunement la qualité d'acte personnel. Le devoir de conseil désintéressé demeurait entier dans les circonstances. De plus, toute caractérisation de la transaction doit également tenir compte de la finalité du fonds d'indemnisation. Le fonds d'indemnisation vise notamment à protéger les clients contre les méfaits des notaires dont le caractère intentionnel aura pour effet de les exclure de la couverture offerte par l'assurance-responsabilité professionnelle. En qualifiant la transaction de personnelle, les deux comités ont situé la fraude du notaire hors du champ d'application du fonds, niant par le fait même la protection précise que le fonds vise à conférer. Cette décision crée une rupture entre les obligations déontologiques des notaires, énoncées à l'al. 4.02.01*b*) du *Code de déontologie des notaires*, et la réparation pour violation de ces obligations que le fonds d'indemnisation est censé fournir en dernier ressort.

Devant notre Cour, la Chambre a soulevé, pour la première fois, l'argument voulant qu'aucune indemnité n'était payable à la succession parce que l'immeuble, n'étant pas une « somme d'argent ou autre valeur », ne serait pas visé par le règlement. Rien ne permet de penser que les décisions des comités reposent sur cette interprétation restrictive de l'expression « autres valeurs ». Quoi qu'il en soit, vu le jugement prononçant l'annulation de la vente, l'acte de vente est réputé n'avoir jamais existé. Selon les art. 1422 et 1701 C.c.Q., il faut s'intéresser, non pas à la maison de H, mais bien à sa valeur et à tout le moins au produit qu'a obtenu le notaire de la vente à des tiers acheteurs. Nul ne peut contester que le produit de la vente constitue une somme d'argent. Il n'y a pas lieu de renvoyer l'affaire devant la Chambre pour qu'elle détermine cette question. Le quantum des dommages-intérêts ne cause aucun problème et un tel renvoi aurait pour effet de récompenser la Chambre pour la tardiveté de son argument.

L'indemnité maximale payable à même le fonds pour le total des réclamations contre le même notaire est de 300 000 $. Cette limite ne constitue pas une restriction à l'octroi de l'intérêt au taux légal en vertu de l'art. 1617 C.c.Q. et ne fait pas non plus échec au pouvoir de la Cour d'accorder une indemnité additionnelle en application de l'art. 1619 C.c.Q. Ces articles visent à compenser les créanciers privés des sommes qui leur sont dues et à inciter les débiteurs à leur remettre ces sommes promptement. En l'espèce, la succession ayant déjà obtenu 112 535,96 $, elle a droit à un montant de 187 464,04 $, auquel s'ajoutent les intérêts au taux légal et l'indemnité additionnelle, tous deux payables à compter du 3 mai 1996, soit la date à laquelle le Comité administratif a rendu sa décision.

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Per Deschamps J. (dissenting): The interpretation of s. 2.01 of the Regulation creating the indemnity fund adopted by the Administrative Committee is not unreasonable. The approach and conclusion adopted by the majority mean that administrative tribunals are left no margin for interpretation. Neither the analysis nor the conclusion made is in keeping with the strong privative clause, the expertise of the Committee's members, the nature of the issue, which is a simple claim for indemnification, or the purpose of the Regulation.

Four cumulative elements must be established in order to give rise to the protection afforded by s. 2.01 of the Regulation: (1) there must be *sums of money or other securities*; (2) they must have been *delivered* to the notary; (3) they must have been delivered *in the practice of his profession*; and (4) the notary must have *used* them *for purposes other* than those for which they had been delivered to him. The Administrative Committee's decision is not founded solely on its opinion that the notary was not acting in the practice of his profession. Even if the notary was acting in the practice of his profession, the other three conditions still have to be examined before ruling on the entitlement to indemnification. In the Committee's opinion, the claim should have been refused because three of the prerequisites to protection were not met. It was not necessary for the Committee to rule on the words "sums of money or other securities". Administrative tribunals cannot be expected to conduct an exhaustive examination of all possible grounds that could potentially support their decision. Moreover, equating the property with a sum of money imposes an *ex post facto* analysis of the property delivered. This interpretation does not square well with the context of the Regulation, which calls for the property to be characterized upon its delivery, rather than after its conversion or disposition.

A regulation explicitly specifying that coverage extends to sums of money or other securities delivered to a notary and used for purposes other than those authorized by the client can be interpreted differently from one that protects against any dishonest transaction. Since requirements (2) and (4) are difficult to reconcile with extortion or fraud, one could perhaps conclude that such acts are not covered by the Regulation. It is therefore not unreasonable to conclude that the unlawful act committed by the notary is more properly characterized as fraud, a dishonest transaction or a fraudulent tactic than as a misappropriation of funds, and that only a misappropriation of funds gives rise to indemnification under the fund.

Even if the Administrative Committee's decision was unreasonable, the case should be referred back to

La juge Deschamps (dissidente) : L'interprétation de l'art. 2.01du règlement qui prévoit la création du fonds d'indemnisation retenue par le Comité administratif n'est pas déraisonnable. L'approche et la conclusion adoptées par les juges majoritaires font que la marge interprétative laissée au tribunal administratif est nulle. Ni l'analyse de la disposition en cause, ni la conclusion retenue ne tiennent compte de la clause privative rigoureuse, de l'expertise des membres du Comité, de la nature de la question, qui est une simple demande d'indemnisation, ou de l'objet du règlement.

Quatre conditions cumulatives doivent être établies afin de donner ouverture à la protection offerte par l'art. 2.01 du règlement : (1) il doit s'agir de *sommes d'argent ou autres valeurs*; (2) elles doivent avoir été *remises* au notaire; (3) elles doivent lui avoir été remises *dans l'exercice de sa profession*; et (4) le notaire doit avoir *utilisé* ces sommes ou valeurs *à d'autres fins* que celles pour lesquelles elles lui avaient été remises. La décision du Comité administratif n'est pas uniquement fondée sur son opinion que le notaire n'agissait pas dans l'exercice de sa profession. Même si le notaire agissait dans l'exercice de sa profession, les trois autres conditions doivent être examinées avant de conclure au droit à l'indemnisation. Selon le Comité, la réclamation devait être refusée parce que trois des conditions requises n'étaient pas remplies. Il n'était pas nécessaire que le Comité se prononce sur l'expression « sommes d'argent ou autres valeurs ». On ne peut exiger des tribunaux administratifs qu'ils fassent une étude exhaustive de tous les motifs pouvant potentiellement justifier leur décision. De plus, faire une équation entre l'immeuble et une somme d'argent impose une analyse après coup de la nature du bien remis. Cette interprétation colle mal au contexte du règlement, qui dicte une qualification du bien lors de sa remise et non après sa transformation ou sa disposition.

Un règlement qui spécifie explicitement que la couverture vise les sommes ou autres valeurs remises à un notaire et utilisées à des fins autres que celles autorisées par le client peut être interprété différemment d'un autre qui protège contre toute opération malhonnête. Si les conditions (2) et (4) se prêtent mal à l'extorsion ou à l'obtention frauduleuse du bien, c'est peut-être parce que ces actions ne sont pas visées par le règlement. Il n'est donc pas déraisonnable de soutenir que l'acte illicite commis par le notaire s'apparente davantage à une fraude, à une opération malhonnête ou à une manœuvre dolosive qu'à un détournement de fonds et que seul ce dernier comportement ouvre droit à indemnisation par le fonds.

Même si la conclusion du Comité administratif était déraisonnable, le dossier devrait lui être retourné pour

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the Committee so that it could render a decision on the aspects of the case it has not yet ruled on. None of the exceptions that would allow a court to substitute its opinion for that of the administrative tribunal applies here. It would be difficult for the Court, without usurping the function of the Committee, to substitute its own judgment for that of the Committee with respect to the meaning of "sums of money or other securities". The fact that a considerable amount of time has passed since the Committee rendered its decision is not an exceptional circumstance that would warrant not remitting the case to the Committee. The delay is inherent to the judicial process. There is no special reason that would justify having the Court award compensation or determine the outcome of the claim. Such a conclusion would put the Court outside the boundaries of judicial review.

qu'il statue sur les aspects du dossier sur lesquels il ne s'est pas prononcé. En l'espèce, aucune des exceptions permettant à une cour de substituer son opinion à celle du tribunal administratif ne trouve application. La Cour peut difficilement, sans usurper la fonction du Comité, se substituer à lui quant au sens à donner à l'expression « sommes d'argent ou autres valeurs ». Le fait qu'un délai se soit écoulé depuis le moment où le Comité a prononcé sa décision n'est pas une circonstance exceptionnelle justifiant de ne pas retourner le dossier au Comité. Il s'agit du délai inhérent au processus judiciaire. Aucune justification particulière n'autorise la Cour à prononcer une condamnation pécuniaire ni à dicter le sort de la réclamation. Une telle conclusion déborde ici le cadre de la révision judiciaire.

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By Deschamps J. (dissenting)

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Règlement sur le fonds d'indemnisation de la Corporation professionnelle des administrateurs agréés du Québec, R.R.Q. 1981, ch. C-26, r. 12, art. 2.01.

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Règlement sur le fonds d'indemnisation de l'Ordre des comptables agréés du Québec, R.R.Q. 1981, ch. C-48, r. 6, art. 2.01.

Règlement sur le fonds d'indemnisation du Barreau du Québec, R.R.Q. 1981, ch. B-1, r. 6, art. 1.01.

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APPEAL from a judgment of the Quebec Court of Appeal, [2001] R.R.A. 876, [2001] Q.J. No. 3900 (QL), affirming a judgment of the Superior Court, [1997] R.J.Q. 1674, [1997] Q.J. No. 1038 (QL). Appeal allowed, Deschamps J. dissenting.

Jean-Paul Duquette, *Pascale Closson-Duquette* and *Marie-Noëlle Closson-Duquette*, for the appellant.

Sylvain Généreux and *Sophie Lauzon*, for the respondent.

No one appearing for the intervener.

English version of the judgment of McLachlin C.J. and Gonthier, Major, Bastarache, Binnie and LeBel JJ. were delivered by

GONTHIER J. — This appeal concerns the decision of the Administrative Committee of the Chambre des notaires du Québec (the "Administrative Committee") not to indemnify the succession of a woman defrauded by her notary. For the reasons that follow, I find that that decision is patently unreasonable and should be quashed. I also order the respondents to make the required indemnity.

I. Facts

Mrs. Marie-Rose Hamel Longpré was born in Sainte-Thérèse, Quebec in 1915. During the Second World War, she and her husband moved to the nearby town of Blainville, where they built a house for themselves. Her husband died in action in the 1940s, only a few years after the move. She never remarried and had no children.

Mrs. Hamel had a close relationship with her two notaries, Mr. Georges-Étienne Filiatrault and his son

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POURVOI contre un arrêt de la Cour d'appel du Québec, [2001] R.R.A. 876, [2001] J.Q. n° 3900 (QL), qui a confirmé un jugement de la Cour supérieure, [1997] R.J.Q. 1674, [1997] A.Q. n° 1038 (QL). Pourvoi accueilli, la juge Deschamps est dissidente.

Jean-Paul Duquette, *Pascale Closson-Duquette* et *Marie-Noëlle Closson-Duquette*, pour l'appelant.

Sylvain Généreux et *Sophie Lauzon*, pour l'intimée.

Personne n'a comparu pour l'intervenant.

Le jugement de la juge en chef McLachlin et des juges Gonthier, Major, Bastarache, Binnie et LeBel a été rendu par

1 LE JUGE GONTHIER — Le présent pourvoi vise la décision du Comité administratif de la Chambre des notaires du Québec (le « Comité administratif ») de ne pas indemniser la succession d'une femme spoliée par son notaire. Pour les motifs qui suivent, j'estime que cette décision est manifestement déraisonnable et qu'il y a lieu de l'annuler. J'ordonne également aux intimés de verser l'indemnité qui s'impose.

I. Faits

2 Mme Marie-Rose Hamel Longpré est née en 1915 à Sainte-Thérèse (Québec). C'est au cours de la Deuxième Guerre mondiale qu'elle s'est installée avec son mari dans la ville avoisinante de Blainville, où ils se sont construit une maison. Son mari est mort en service dans les années 40, soit quelques années seulement après le déménagement. Elle ne s'est jamais remariée et n'a jamais eu d'enfant.

3 Mme Hamel était très proche de ses deux notaires, Me Georges-Étienne Filiatrault et son fils

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Mr. Nolan Filiatrault. When Mrs. Hamel's husband died, it was Mr. Filiatrault, the father, who received the declaration of death. He continued to handle the widow's legal affairs, then passed them on to Mr. Filiatrault, his son. Mrs. Hamel's relationship with the two men lasted over 50 years.

Me Nolan Filiatrault. Lorsque le mari de Mme Hamel est décédé, c'est Me Filiatrault père qui a reçu la déclaration de décès. Celui-ci a continué à s'occuper des affaires d'ordre juridique de la veuve avant de les confier à Me Filiatrault fils. La relation qu'entretenait Mme Hamel avec les deux hommes a duré plus de 50 ans.

4 As she aged, Mrs. Hamel began to decline mentally. She suffered from delusions and paranoia. Still, she continued to live alone in her house. Mr. Nolan Filiatrault looked after her affairs. He cashed her pension cheques and tended to other business. He described himself and his father, now deceased, as Mrs. Hamel's only friends.

Avec l'âge, les facultés mentales de Mme Hamel ont commencé à décliner. Elle a souffert de délires et de paranoïa mais a continué à vivre seule dans sa maison. Me Nolan Filiatrault s'occupait de ses affaires. Il encaissait ses chèques de pension et lui rendait d'autres services. Selon ses dires, son père — aujourd'hui décédé — et lui étaient les seuls amis de Mme Hamel.

5 But Mr. Filiatrault's friendship came at a price. The notary, who has since been disciplined by the Chambre and struck from the roll, took advantage of Mrs. Hamel's compromised state to defraud her. He applied to the federal government for back payment of Mrs. Hamel's old age pension, for which she had not applied for fear of losing her widow's pension, then kept the back payment of over $17,000 for himself. He sold land owned by Mrs. Hamel and misused the proceeds. He even forged her signature to withdraw funds from a trust account in her name. Emboldened perhaps by the success of these scams, he next turned his attention to Mrs. Hamel's house.

L'amitié de Me Filiatrault avait cependant un prix. Le notaire, contre qui la Chambre a depuis pris des mesures disciplinaires et qui est maintenant radié du tableau de l'Ordre, a profité de l'état vulnérable de Mme Hamel pour la spolier. Il a réclamé du gouvernement fédéral, pour ensuite les conserver, les arrérages de la pension de vieillesse de Mme Hamel, qui s'élevaient à plus de 17 000 $ et qu'elle-même n'avait pas réclamés par crainte de perdre sa pension de veuve. Il a procédé à la vente d'un terrain appartenant à Mme Hamel et s'en est approprié le produit. Il est même allé jusqu'à contrefaire la signature de Mme Hamel pour retirer des fonds d'un compte en fidéicommis à son nom. Sans doute encouragé par la réussite de ces escroqueries, il s'est ensuite tourné vers la maison de Mme Hamel.

6 By private writing dated October 25, 1989, Mrs. Hamel sold her home to her notary for $1 [TRANSLATION] "and other good and valuable consideration" ("*et autres bonnes et valables considérations*"). Mr. Filiatrault drafted the deed of sale himself. Mrs. Hamel signed it, in her tremulous hand, on October 25, 1989. Under Mr. Filiatrault's signature one reads, "*Me Nolan Filiatrault, notaire*".

Par acte sous seing privé en date du 25 octobre 1989, Mme Hamel a vendu sa maison à son notaire pour un dollar « et autres bonnes et valables considérations ». Me Filiatrault a lui-même rédigé l'acte de vente. Mme Hamel l'a signé de sa main tremblante le 25 octobre 1989. On peut lire sous la signature de Me Filiatrault : « Me Nolan Filiatrault, notaire ».

7 Finally, Mr. Filiatrault instigated a protection proceeding in respect of Mrs. Hamel's person and property, although at this point there was little left, financially speaking, to protect. The proceeding was formally brought by Mrs. Hamel's nephew,

Finalement, Me Filiatrault a présenté une requête pour ouverture d'un régime de protection aux biens et à la personne de Mme Hamel, même s'il ne restait à ce stade que peu de choses à protéger sur le plan financier. L'instance a été formellement introduite

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Jean-Paul Giguère. It required an examination of Mrs. Hamel pursuant to art. 878 of the *Code of Civil Procedure*, R.S.Q., c. C-25. When asked whom she wanted to take care of her and her affairs, Mrs. Hamel replied, [TRANSLATION] "Mr. Filiatrault". When asked why, she said simply, [TRANSLATION] "Because I need a lawyer".

par le neveu de Mme Hamel, Jean-Paul Giguère. Mme Hamel devait subir une évaluation en application de l'art. 878 du *Code de procédure civile*, L.R.Q., ch. C-25. Interrogée sur l'identité de la personne qu'elle voulait voir prendre soin d'elle et de ses affaires, Mme Hamel a répondu : « Le notaire Filiatrault ». Quand on lui a demandé pourquoi, elle a simplement répondu : « Parce que ça prend un homme de loi ».

8 Mr. Filiatrault began trying to sell Mrs. Hamel's property almost as soon as he acquired it. His efforts aroused the suspicion of Mrs. Hamel's brother, Mr. Josephat Hamel. Mr. Hamel consulted his notary and wrote a letter of complaint to the syndic of the Chambre des notaires du Québec (the "Chambre"). So too did Mr. Giguère, who was now Mrs. Hamel's curator under the protection order. A representative of the Chambre (which is the respondent in this appeal) replied to Mr. Hamel nearly four months later. He said that he had spoken to Mr. Filiatrault about the matter and was satisfied Mr. Hamel's complaint was unfounded. He noted that Mrs. Hamel herself had made no complaint. He advised Mr. Hamel that the file was now closed. In a similar letter to counsel for Mr. Giguère, the Chambre's representative described the sale as a personal transaction between Mr. Filiatrault and Mrs. Hamel. Meanwhile Mr. Filiatrault sold the property in three parts for a total sale price of $550,000. Mrs. Hamel relocated to a seniors' residence.

Presque aussitôt après en avoir fait l'acquisition, Me Filiatrault tentait de vendre l'immeuble de Mme Hamel. Ses démarches ont éveillé les soupçons du frère de Mme Hamel, M. Josephat Hamel. M. Hamel a consulté son notaire et a déposé une plainte auprès du syndic de la Chambre des notaires du Québec (la « Chambre »). Devenu curateur de Mme Hamel en vertu de l'ordonnance de protection, M. Giguère en a fait autant. Un représentant de la Chambre (l'intimée en l'espèce) a répondu à M. Hamel près de quatre mois plus tard. Il l'a informé qu'il avait communiqué avec Me Filiatrault à ce sujet et qu'il estimait que sa plainte n'était pas fondée. Il a relevé que Mme Hamel elle-même n'avait jamais déposé de plainte et a avisé M. Hamel de la fermeture du dossier. Dans une lettre similaire adressée à l'avocat de M. Giguère, le représentant de la Chambre a qualifié la vente de transaction personnelle entre Me Filiatrault et Mme Hamel. Entre-temps, Me Filiatrault a vendu l'immeuble en trois parties pour un montant total de 550 000 $. Mme Hamel a emménagé dans un centre d'accueil.

9 Mr. Giguère continued to contest the sale. Finally in late 1995 Marx J. of the Superior Court of Quebec annulled the transaction. The evidence before him was that Mrs. Hamel had been legally incompetent since the late 1970s and that she placed blind trust in Mr. Filiatrault. She would sign anything he asked her to, when he did not simply forge her signature himself. Marx J.'s annulment of the deed of sale came too late for Mrs. Hamel, who died earlier that year. The court ordered Mr. Filiatrault to reimburse the Hamel succession (the "succession") over $1 million.

M. Giguère a maintenu sa contestation de la vente. Vers la fin de 1995, le juge Marx de la Cour supérieure du Québec prononçait l'annulation de la transaction. Selon la preuve, Mme Hamel a été frappée d'incapacité juridique dès la fin des années 70 et faisait aveuglément confiance à Me Filiatrault. Elle signait tout ce qu'il lui demandait de signer, quand lui-même ne contrefaisait pas tout simplement sa signature. L'annulation par le juge Marx de l'acte de vente est survenue trop tard pour Mme Hamel, qui est décédée plus tôt la même année. La cour a ordonné à Me Filiatrault de rembourser plus de un million de dollars à la succession Hamel (la « succession »).

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10 Predictably, Mr. Filiatrault was bankrupt. He could not reimburse the succession. Mrs. Hamel's heirs therefore looked to the Chambre. Like other professions in Quebec, notaries are under a statutory obligation to establish an indemnity fund: *Professional Code*, R.S.Q., c. C-26, s. 89. The Chambre's fund was established by the *Regulation respecting the indemnity fund of the Chambre des notaires du Québec*, R.R.Q. 1981, c. N-2, r. 8 (the "Regulation"). The succession claimed reimbursement from this fund, both in respect of Mrs. Hamel's house (a claim of $900,000) and other misappropriations. Following its ordinary procedure, the Chambre's Comité du fonds d'indemnisation (the "Indemnity Committee") studied the claim. It recommended that certain amounts be repaid to the succession, but recommended refusal of the claim in respect of Mrs. Hamel's house on the ground that Mr. Filiatrault was not acting in the exercise of his profession when he swindled it from Mrs. Hamel and therefore his actions did not come within the terms of the regulation governing the indemnity fund. The Indemnity Committee's recommendations were later adopted by the Administrative Committee on behalf of the Chambre.

Comme il fallait s'y attendre, Me Filiatrault a fait faillite. Il n'a pu rembourser la succession. Les héritiers de Mme Hamel se sont donc tournés vers la Chambre. Les notaires, comme d'autres professionnels au Québec, sont tenus par la loi d'établir un fonds d'indemnisation : *Code des professions*, L.R.Q., ch. C-26, art. 89. Le fonds de la Chambre a été établi en vertu du *Règlement sur le fonds d'indemnisation de la Chambre des notaires du Québec*, R.R.Q. 1981, ch. N-2, r. 8 (le « règlement »). La succession a demandé que lui soient remboursées, à même ce fonds, la valeur de la maison de Mme Hamel (une réclamation de 900 000 $) ainsi que d'autres sommes détournées. Suivant sa procédure habituelle, le Comité du fonds d'indemnisation de la Chambre (le « Comité d'indemnisation ») a examiné la réclamation. Il a recommandé que certaines sommes soient remboursées à la succession, mais que soit rejetée la réclamation au titre de la maison de Mme Hamel au motif que Me Filiatrault n'agissait pas dans l'exercice de sa profession lorsqu'il l'a acquise frauduleusement de Mme Hamel et que sa conduite n'était donc pas visée par le règlement régissant le fonds d'indemnisation. Les recommandations du Comité d'indemnisation ont par la suite été entérinées par le Comité administratif au nom de la Chambre.

11 Mr. Giguère, acting for the succession, sought judicial review of the Administrative Committee's decision. Hurtubise J. of the Superior Court refused the application. He noted in particular that the privative clause in s. 4.03 of the Regulation shielded the Administrative Committee's decisions from judicial review. He concluded that the Administrative Committee's decision was reviewable on a standard of patent unreasonableness, that the decision was not patently unreasonable, and that it must therefore stand. The succession's appeal to the Quebec Court of Appeal was dismissed. That appeal, and the appeal to this Court, were brought by Serge Giguère, who succeeded to the position of curator upon the death of Jean-Paul Giguère.

Agissant pour le compte de la succession, M. Giguère a sollicité la révision judiciaire de la décision du Comité administratif. Le juge Hurtubise de la Cour supérieure l'a débouté en soulignant que la clause privative contenue à l'art. 4.03 du règlement restreignait la révision judiciaire, et que la norme de contrôle applicable à la décision du Comité administratif était celle de la décision manifestement déraisonnable, que la décision n'était pas manifestement déraisonnable et qu'elle devait par conséquent être maintenue. La Cour d'appel du Québec a rejeté l'appel interjeté par la succession. Cet appel, tout comme le présent pourvoi, a été déposé par M. Serge Giguère, qui a repris l'instance à titre de curateur au décès de Jean-Paul Giguère.

II. Standard of Review

II. Norme de contrôle

12 The standard of review was not disputed before us. The parties agree that, given the privative clause

Les parties n'ont pas contesté devant nous la norme de contrôle applicable. Elles ont accepté

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in s. 4.03 of the Regulation, the standard of review is patent unreasonableness. The question at issue is whether the decision not to indemnify the succession was patently unreasonable.

qu'eu égard à la clause privative énoncée à l'art. 4.03 du règlement, la norme de contrôle applicable est celle de la décision manifestement déraisonnable. L'objet du pourvoi est de savoir s'il était manifestement déraisonnable de ne pas indemniser la succession.

III. Analysis

III. Analyse

13 The Indemnity Committee's decision not to indemnify the succession was based on the Indemnity Committee's interpretation of s. 2.01 of the Regulation, which interpretation was adopted by the Administrative Committee. Section 2.01 reads:

> The Bureau shall establish an indemnity fund to be used to reimburse the sums of money or other securities used by a notary for purposes other than those for which they had been delivered to him in the practice of his profession.

The two committees agreed that Mrs. Hamel's home was not delivered to Mr. Filiatrault in the practice of his profession. They characterized Mr. Filiatrault's defrauding of Mrs. Hamel as a personal rather than a professional act, and found that only professional acts may be indemnified out of the indemnity fund. With respect, I am of the view that this decision betrays a misunderstanding of the relationship between Mrs. Hamel and Mr. Filiatrault, the duties of notaries, and the nature of the indemnity fund, and that this Court cannot permit it to stand. The analysis of the relationship between Mrs. Hamel and Filiatrault is patently unreasonable and leads to a result which is also patently unreasonable. I would quash the decision and order the Chambre to indemnify the succession.

La décision du Comité d'indemnisation de ne pas indemniser la succession se fondait sur son interprétation de l'art. 2.01 du règlement, que le Comité administratif a retenue. L'article 2.01 prévoit :

> Le Bureau établit un fonds d'indemnisation devant servir à rembourser les sommes d'argent ou autres valeurs utilisées par un notaire à d'autres fins que celles pour lesquelles elles lui avaient été remises dans l'exercice de sa profession.

Les deux comités étaient d'avis que la maison de Mme Hamel n'avait pas été remise à Me Filiatrault dans l'exercice de sa profession. Ils ont caractérisé la fraude commise par Me Filiatrault à l'endroit de Mme Hamel comme un acte personnel plutôt que professionnel et ont conclu que seuls les actes professionnels étaient susceptibles d'indemnisation à même le fonds. Avec respect, je suis d'avis que cette décision méconnaît la relation entre Mme Hamel et Me Filiatrault, les devoirs incombant aux notaires et la nature du fonds d'indemnisation, et la Cour ne saurait en permettre le maintien. Il s'agit d'une analyse manifestement déraisonnable de la relation entre Mme Hamel et Me Filiatrault. Elle a conduit à un résultat tout aussi déraisonnable. Je suis d'avis d'annuler la décision et d'ordonner à la Chambre d'indemniser la succession.

A. *Notaries and the Indemnity Fund*

A. *Les notaires et le fonds d'indemnisation*

14 The law governing notaries at the time the events of this appeal took place was the *Notarial Act*, R.S.Q., c. N-2. Section 2(1) of that Act described notaries as "legal practitioners and public officers whose chief duty is to draw up and execute deeds and contracts to which the parties are bound or desire to give the character of authenticity attached to acts of the public authority and to assure the date thereof". Section 15(*b*) provided that one of the "chief duties

C'est la *Loi sur le notariat*, L.R.Q., ch. N-2, qui s'appliquait aux notaires à l'époque où sont survenus les événements relatifs au présent pourvoi. Au paragraphe 2(1) de cette loi, les notaires sont définis comme étant « des praticiens du droit et des officiers publics dont la principale fonction est de rédiger et de recevoir les actes et contrats auxquels les parties doivent ou veulent faire donner le caractère d'authenticité qui s'attache aux actes de

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of every notary" shall be "to observe in the practice of his profession the rules of the most scrupulous honesty and impartiality". The *Notarial Act* has now been largely repealed and replaced by the *Notaries Act*, R.S.Q., c. N-3. Yet the characterization of notaries as both legal advisers and public officers, and the notary's duty of impartiality, are restated in the new legislation at ss. 10 and 11, respectively.

l'autorité publique et en assurer la date ». L'alinéa 15*b*) dispose que l'un des « principaux devoirs d'un notaire » est « d'observer, dans l'exercice de sa profession, les règles de la probité et de l'impartialité la plus scrupuleuse ». La *Loi sur le notariat* a depuis été abrogée et remplacée en grande partie par la *Loi sur le notariat*, L.R.Q., ch. N-3. Cependant, les art. 10 et 11 de la nouvelle loi reprennent respectivement la qualité de conseiller juridique et d'officier public qu'ont les notaires ainsi que le devoir d'impartialité auquel ils sont soumis.

15 Complementing the *Notarial Act* was the *Code of ethics of notaries*, R.R.Q. 1981, c. N-2, r. 3 (the "Code"). The Code has since been repealed and replaced, but was in force at the time of the events at issue in this appeal. The Code affirmed the requirement of notarial impartiality at several points. Section 3.01.05 required a notary to give to clients or to parties to an act "disinterested, frank and honest" advice. Section 3.04.01 provided: "A notary must subordinate his personal interest to that of his client." Section 3.03.04 provided that a notary may not cease to act for the account of a client unless he has "sound and reasonable grounds", such as "the fact that the notary is in a situation of conflict of interest". These provisions of the Code are restated and, in some cases, expanded upon, in the new *Code of ethics of notaries*, O.C. 921-2002, (2002) 134 O.G. II, 4561. For instance, s. 30 of the new Code provides that no notary may be in a situation of conflict of interest, and defines a situation of conflict of interest as "where the interests are such that [the notary] may be inclined to give preference to some of them, or his judgment or loyalty may be unfavourably affected".

Le *Code de déontologie des notaires*, R.R.Q. 1981, ch. N-2, r. 3 (le « Code »), complétait la *Loi sur le notariat*. Le Code a depuis été abrogé et remplacé, mais il était en vigueur à l'époque où ont eu lieu les événements en cause dans le présent pourvoi. Le Code affirmait à plusieurs endroits l'exigence d'impartialité à laquelle le notaire était tenu. L'article 3.01.05 prévoyait que le notaire devait agir comme conseiller « désintéressé, franc et honnête » de ses clients ou des parties à un acte. L'article 3.04.01 était ainsi libellé : « Le notaire doit subordonner son intérêt personnel à celui de son client. » Conformément à l'art. 3.03.04, le notaire ne peut cesser d'agir pour le compte d'un client sauf pour un « motif juste et raisonnable », comme « le fait que le notaire soit en situation de conflit d'intérêts ». Ces dispositions du Code sont reprises et parfois élargies par le nouveau *Code de déontologie des notaires*, D. 921-2002, (2002) 134 G.O. II, 5969. Par exemple, l'art. 30 du nouveau Code dispose que le notaire ne peut être en situation de conflits d'intérêts et qu'il y a conflits d'intérêts « lorsque les intérêts sont tels [que le notaire] peut être porté à préférer certains d'entre eux et que son jugement ou sa loyauté peuvent être défavorablement affectés ».

16 The requirement of impartiality governs the duty of notaries to advise their clients and the parties to acts they prepare. As Roy explains: [TRANSLATION] "[n]otaries maintain their impartiality by informing each party to the act of the scope of the rights and obligations that may result from it": A. Roy, *Déontologie et procédure notariales* (2002), at p. 16. This duty to advise was found in Code s. 3.02.04, and is now declared in s. 11 of the *Notaries Act*, but it found its earliest expression in Quebec law in the

L'exigence d'impartialité sous-tend le devoir qu'ont les notaires de conseiller leurs clients et les parties aux actes qu'ils préparent. Comme l'explique le professeur Roy, « [l]e notaire est impartial lorsqu'il informe chacune des parties à l'acte de la portée des droits et des obligations susceptibles d'en résulter » : A. Roy, *Déontologie et procédure notariales* (2002), p. 16. Ce devoir de conseil, qui se trouvait à l'art. 3.02.04 du Code, est aujourd'hui consacré par l'art. 11 de la *Loi sur le notariat*, mais

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judgment of this Court in *Ayotte v. Boucher* (1883), 9 S.C.R. 460. Mr. Ayotte fraudulently procured the signature by Dr. Boucher's children of a deed that made them responsible for their dead father's debts. The deed was drawn up by a notary who, having prepared it, refused to receive it because he believed that Dr. Boucher's children would not sign it if they knew its true effect. Mr. Ayotte therefore sent for another notary. This second notary passed and executed the deed without giving Dr. Boucher's children any explanation of its legal effect. This Court annulled the deed and held that it is the duty of a notary to advise his clients of the legal consequences of their acts. Both notaries, Fournier J. explained, at p. 476, acted unlawfully,

[TRANSLATION] but the more blameworthy of the two is without doubt the one who, knowing perfectly well that the Appellant intended to commit an act of fraud, said and did nothing to stop him. In executing this deed drawn up in advance, the other notary could claim that he was under the impression that the parties had thoroughly discussed everything before he arrived. This apparently well documented explanation would clear him of any involvement in the fraud committed by the Appellant, but he nevertheless breached his professional duties by failing to ascertain for himself the nature of the agreements he was to authenticate. If a notary's duties were understood and practised in this manner, the profession would be a dangerous institution rather than one that is judge-like and so useful for society in general.

Abuses of notarial power such as this are not, sadly, a thing of the past. For this reason, the Chambre (like all professional bodies in Quebec) is required by the *Professional Code* to establish an indemnity fund. The purpose of this fund, and indeed the purpose of the *Professional Code* more generally, is the protection of the public: *Comité administratif de l'Ordre des comptables agréés du Québec v. Schwarz*, [2001] R.J.Q. 920 (C.A.), at paras. 112 and 117-18, *per* Fish J.A. (dissenting); *Hinkova v. Ordre des pharmaciens du Québec*, [2000] Q.J. No. 1445 (QL) (C.A.). The need for such a fund arises in part from the limits of professional liability insurance. Such insurance may protect professionals and their clients from the consequences of professional mistake, inadvertence and negligence, but

sa première formulation en droit québécois remonte à l'arrêt *Ayotte c. Boucher* (1883), 9 R.C.S. 460. Usant de manœuvres frauduleuses, M. Ayotte a pu amener les enfants de feu le Dr Boucher à signer un acte qui les rendait responsables des dettes de leur père. L'acte a été rédigé par un notaire qui, après l'avoir préparé, a refusé de le recevoir parce qu'il estimait que les enfants du Dr Boucher refuseraient de le signer s'ils en connaissaient la portée réelle. M. Ayotte a donc fait appel à un autre notaire. Ce second notaire a reçu l'acte sans expliquer aux enfants du Dr Boucher les conséquences juridiques qui en découlaient. La Cour a annulé l'acte et statué qu'il incombait au notaire de conseiller ses clients à propos des conséquences juridiques découlant de leurs actes. Les deux notaires ont agi contre la loi, explique le juge Fournier (p. 476) :

. . . mais le plus coupable est sans doute celui qui, connaissant parfaitement les intentions de l'Appelant de commettre un acte de dol, n'a rien dit ni rien fait pour l'empêcher. L'autre, en exécutant cet acte préparé d'avance, peut prétendre qu'il était sous l'impression que les parties s'étaient complètement expliquées avant son arrivée. Cette explication qui paraît assez bien prouvée peut servir à l'excuser de participation à la fraude commise par l'Appelant; mais il n'en a pas moins manqué à son devoir professionnel en ne s'assurant pas par lui-même de la nature des conventions auxquelles il devait donner la sanction de l'authenticité. Les devoirs du notaire ainsi compris et pratiqués en feraient une institution dangereuse au lieu de cette sorte de magistrature si utile à la société en général.

17 De telles situations d'abus de pouvoir par des notaires ne sont malheureusement pas que chose du passé. C'est pourquoi en vertu du *Code des professions*, la Chambre (comme tout ordre professionnel au Québec) est tenue d'établir un fonds d'indemnisation. L'établissement de ce fonds, et d'ailleurs le *Code des professions* dans son ensemble, vise à assurer la protection du public : *Comité administratif de l'Ordre des comptables agréés du Québec c. Schwarz*, [2001] R.J.Q. 920 (C.A.), par. 112 et 117-118, le juge Fish (dissident); *Hinkova c. Ordre des pharmaciens du Québec*, [2000] J.Q. n° 1445 (QL) (C.A.). La nécessité d'établir ce fonds s'explique notamment par les limites de l'assurance-responsabilité professionnelle. Grâce à une telle assurance, les professionnels et leurs clients peuvent

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generally does not cover intentional acts of misconduct. In this sense, statutory indemnity funds pick up where private insurance leaves off. This is not to say that malice or fraud are necessary preconditions of reimbursement from the indemnity fund. However, where such factors are present, professional liability insurance will generally be of no assistance. The only recourses left to victims in such cases will be lawsuits against the notary himself (who may be bankrupt or missing) and claims against the indemnity fund.

18 As I have noted, the notarial indemnity fund was established by the Regulation, s. 2.01 of which reads:

> The Bureau shall establish an indemnity fund to be used to reimburse the sums of money or other securities used by a notary for purposes other than those for which they had been delivered to him in the practice of his profession.

This provision is notably similar to s. 4.02.01(*b*) of the Code, which described as "derogatory to the dignity of the profession" an act of "misappropriating or using for purposes other than those authorized by the client the monies or securities entrusted to the notary in the practice of his profession". In my view, these two provisions must be read together. Section 4.02.01(*b*) of the Code establishes the ethical norm. Section 2.01 of the Regulation establishes the fund out of which violations of the ethical norm are remedied. The two provisions operate in tandem. See *Schwarz*, *supra*, at para. 92.

B. *The Administrative Committee's Decision*

19 I have noted that the Administrative Committee adopted the decision of the Indemnity Committee not to indemnify the succession in respect of Mrs. Hamel's home. This decision was pronounced in two stages.

20 First, on May 3, 1996, the Administrative Committee made the following declaration:

être à l'abri des conséquences découlant de l'erreur, de l'inadvertance et de la négligence professionnelles, mais non en général des actes intentionnels d'inconduite. En ce sens, le fonds d'indemnisation prévu par la loi paie ce que l'assurance privée ne couvre pas. Cela ne revient pas à faire de la malveillance ou de la fraude une condition préalable au remboursement à même le fonds d'indemnisation. Cependant, en présence de tels facteurs, l'assurance-responsabilité professionnelle ne sera généralement d'aucun secours. Les victimes n'auront alors d'autre recours que d'intenter des poursuites contre le notaire lui-même (qui peut avoir déclaré faillite ou qu'on ne peut retracer) et de réclamer le versement d'une indemnité à même le fonds d'indemnisation.

Comme je l'ai souligné, l'établissement du fonds d'indemnisation des notaires se fonde sur l'art. 2.01 du règlement, ainsi libellé :

> Le Bureau établit un fonds d'indemnisation devant servir à rembourser les sommes d'argent ou autres valeurs utilisées par un notaire à d'autres fins que celles pour lesquelles elles lui avaient été remises dans l'exercice de sa profession.

Cette disposition rejoint l'al. 4.02.01*b*) du Code, qui stipule que « sont dérogatoires à la dignité de la profession » les actes comportant « le détournement ou l'emploi pour des fins autres que celles indiquées par le client de deniers ou valeurs confiés au notaire dans l'exercice de sa profession ». À mon sens, ces deux dispositions doivent être interprétées ensemble. L'alinéa 4.02.01*b*) du Code pose la règle déontologique. L'article 2.01 du règlement prévoit l'établissement d'un fonds permettant d'accorder réparation en cas de manquement à la règle déontologique. Les deux dispositions s'appliquent ensemble. Voir *Schwarz*, précité, par. 92.

B. *La décision du Comité administratif*

Comme je le signale, le Comité administratif a entériné la décision du Comité d'indemnisation de ne pas indemniser la succession au titre de la maison de Mme Hamel. Cette décision a été rendue en deux étapes.

Tout d'abord, le 3 mai 1996, le Comité administratif a déclaré :

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[TRANSLATION] THAT the Administrative Committee note the recommendation that there be partial refusal of this claim for $900,000.00 representing the value of the property sold by Marie-Rose Hamel to Nolan Filiatrault, which sale was annulled pursuant to a judgment rendered by the Honourable Herbert Marx J.S.C. on December 4, 1995, since Nolan Filiatrault, whatever the nature of any actions he may have taken, in relation to the property concerned, was not acting in the practice of his profession within the meaning of the Regulation respecting the indemnity fund.

QUE le Comité administratif prenne acte de la recommandation à l'effet que soit refusée partiellement cette réclamation pour la somme de 900 000,00 $ représentant la valeur de l'immeuble ayant fait l'objet de la vente par Marie-Rose Hamel à Nolan Filiatrault et annulée aux termes du jugement rendu par l'Honorable Herbert Marx, J.C.S., le 4 décembre 1995, étant donné que Nolan Filiatrault, quelle que soit la nature des gestes qu'il ait pu poser, relativement à l'immeuble concerné, n'agissait pas dans l'exercice de sa profession au sens des termes du Règlement sur le fonds d'indemnisation;

Following this pronouncement, Mr. Giguère applied for judicial review of the Administrative Committee's decision.

M. Giguère a sollicité la révision judiciaire de la décision du Comité administratif.

Next, on December 13, 1996, the Administrative Committee made a second declaration, which read in part as follows:

Par la suite, le 13 décembre 1996, le Comité administratif émet une deuxième déclaration rédigée notamment en ces termes :

[TRANSLATION] WHEREAS Nolan Filiatrault was not acting "in the practice of his profession" within the meaning of the *Regulation respecting the indemnity fund of the Chambre des notaires du Québec*;

CONSIDÉRANT QUE monsieur Nolan Filiatrault n'était pas dans « l'exercice de sa profession » au sens où ces mots sont utilisés dans le *Règlement sur le fonds d'indemnisation de la Chambre des notaires du Québec*;

. . .

. . .

WHEREAS the property was not, in any way, "delivered" to Nolan Filiatrault "in the practice of his profession" within the meaning of the *Regulation respecting the indemnity fund of the Chambre des notaires du Québec*;

CONSIDÉRANT QUE cet immeuble n'a, de toute façon, pas été « remis » à monsieur Nolan Filiatrault « dans l'exercice de sa profession » au sens où ces mots sont employés dans le *Règlement sur le fonds d'indemnisation de la Chambre des notaires du Québec*;

WHEREAS the property was not "used" by Nolan Filiatrault "for purposes other than those for which [it] had been delivered to him" within the meaning of the *Regulation respecting the indemnity fund of the Chambre des notaires du Québec*;

CONSIDÉRANT QUE monsieur Nolan Filiatrault n'a pas « utilisé à d'autres fins » cet immeuble au sens où ces mots sont employés dans le *Règlement sur le fonds d'indemnisation de la Chambre des notaires du Québec*;

WHEREAS the Indemnity Fund Committee, in its recommendation, and the Administrative Committee took into account that witnesses could have been called to testify to what is alleged in Jean-Paul Giguère's application for mandamus, evocation and judicial review of November 1, 1996 and, in particular, the allegations made at paragraphs 10, 28, 31 and 42(1) through (5) of that application;

CONSIDÉRANT QU'il a été pris en considération par le Comité du fonds d'indemnisation dans sa recommandation et par le Comité administratif que des témoins auraient pu venir témoigner de ce qui est allégué dans la requête en mandamus, en évocation et en révision judiciaire de monsieur Jean-Paul Giguère du 1er novembre 1996 et, en particulier, de ce qui est allégué aux paragraphes 10, 28, 31 et 42(1) à (5) de cette requête;

Upon motion duly made and seconded, IT IS HEREBY UNANIMOUSLY RESOLVED:

Sur proposition dûment appuyée, IL EST RÉSOLU À L'UNANIMITÉ :

THAT the Administrative Committee ratify the recommendation of the Indemnity Fund Committee and consequently refuse the claim for the sum of $900,000 representing the value of the property sold by Marie-Rose Hamel to Nolan Filiatrault, that sale having been annulled

QUE le Comité administratif entérine la recommandation du Comité du fonds d'indemnisation et en conséquence que soit refusée cette réclamation pour la somme de 900 000 $ représentant la valeur de l'immeuble ayant fait l'objet de la vente par madame Marie-Rose Hamel

21

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pursuant to a judgment rendered by the Honourable Herbert Marx J.S.C. on December 4, 1995.

à monsieur Nolan Filiatrault laquelle vente a été annulée aux termes d'un jugement rendu par l'Honorable Herbert Marx J.C.S. le 4 décembre 1995.

22 The reference to Mr. Giguère's judicial review application is illuminating. The passages referred to by the Administrative Committee indicate that Mr. Giguère was prepared to prove to the Indemnity Committee, by way of witness testimony, several matters concerning Mrs. Hamel's mental competence and Mr. Filiatrault's professional conduct. In particular, Mr. Giguère was prepared to prove: that Mrs. Hamel, in signing the deed of sale, relied on her notary in his role as an impartial legal counsel; that a syndic of the Chambre des notaires had in his possession an authorization from Mrs. Hamel, dating from 1983, which he had failed to disclose and which had convinced him that the Hamel-Filiatrault transaction was outside of the scope of Mr. Filiatrault's notarial practice; that Mrs. Hamel had been notoriously mentally incompetent since at least 1975; and that Mrs. Hamel had absolute confidence in her notary. The Administrative Committee's decision makes clear that it considered the availability of this evidence in arriving at its conclusion. Yet it nevertheless refused the succession's claim.

La référence à la demande de révision judiciaire déposée par M. Giguère est révélatrice. Les extraits auxquels renvoie le Comité administratif indiquent que M. Giguère était disposé à prouver devant le Comité d'indemnisation, par déposition des témoins, plusieurs aspects liés aux aptitudes mentales de Mme Hamel et à la conduite professionnelle de Me Filiatrault. M. Giguère était tout particulièrement prêt à démontrer : que Mme Hamel a signé l'acte de vente en s'en remettant à son notaire en sa qualité de conseiller juridique impartial; qu'un syndic de la Chambre des notaires avait en sa possession une autorisation de Mme Hamel datant de 1983 qu'il avait omis de divulguer et qui l'avait convaincu que la transaction Hamel-Filiatrault ne relevait pas de la pratique notariale de Me Filiatrault; qu'il est notoire que Mme Hamel souffrait d'incapacité mentale depuis au moins 1975; que Mme Hamel avait une confiance absolue en son notaire. Il ressort de la décision du Comité administratif que celui-ci a tenu compte de la disponibilité de cette preuve en arrivant à sa conclusion. Il a néanmoins rejeté la réclamation de la succession.

23 The Administrative Committee's decision to refuse the succession's claim turned on its view that Mr. Filiatrault was not in the exercise of his profession when he advised and acted for Mrs. Hamel on the sale of her home. In the words of the Indemnity Committee (which were substantially repeated by the Administrative Committee in its decision of May 3, 1996), [TRANSLATION] "whatever the nature of any actions he may have taken in relation to that property, Nolan Filiatrault was acting in his personal capacity and not in the practice of his profession": minutes of the review meeting of the Indemnity Committee held at the head office of the Chambre des notaires du Québec, April 3-4, 1996; see also minutes of the 57th meeting of the Administrative Committee, May 3, 1996. The supposedly personal nature of Mr. Filiatrault's act demands scrutiny.

Le refus du Comité administratif de faire droit à la réclamation de la succession reposait sur sa perception que Me Filiatrault n'agissait pas dans l'exercice de sa profession lorsqu'il a conseillé Mme Hamel et agi pour son compte relativement à la vente de sa maison. Selon les propos du Comité d'indemnisation (qu'a essentiellement repris le Comité administratif dans sa décision du 3 mai 1996), « quelle que soit la nature des gestes qu'il ait pu poser relativement à cet immeuble, Nolan Filiatrault les a posés en sa qualité personnelle et non pas dans le cadre de l'exercice de sa profession » : procès-verbal de la réunion d'étude du Comité du fonds d'indemnisation tenue au siège social de la Chambre des notaires du Québec, 3-4 avril 1996; voir également le procès-verbal de la 57e réunion du Comité administratif, 3 mai 1996. La nature censément personnelle de l'acte posé par Me Filiatrault appelle un examen approfondi.

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One must first consider the nature of Mr. Filiatrault's relationship with Mrs. Hamel. For all his false pretences of friendship, Mr. Filiatrault was above all her legal adviser, as that term was used in s. 4(3) of the *Notarial Act* and is now used in s. 10 of the *Notaries Act*. She herself clearly viewed him as her legal adviser. She had long taken Mr. Filiatrault's advice on legal matters, just as she had taken his father's advice many years before. She pointedly described him as [TRANSLATION] "a lawyer". Most importantly, she accepted his legal advice when she signed the deed of sale by which she unwittingly transferred her home to him. I note that the deed of sale bore Mr. Filiatrault's official signature in the form required by s. 4(1) of the *Notarial Act*: the words "*Me Nolan Filiatrault, notaire*" appeared beneath the signature line. I note also that the Administrative Committee itself acknowledged, in its decision of December 13, 1996, that Mr. Giguère was prepared to prove the professional nature of the Hamel-Filiatrault relationship.

24 Il convient tout d'abord de se pencher sur la nature de la relation de Me Filiatrault avec Mme Hamel. Même s'il feignait d'entretenir des liens d'amitié avec elle, il était avant tout son conseiller juridique au sens du par. 4(3) de la *Loi sur le notariat* (N-2) et, aujourd'hui, de l'art. 10 de la *Loi sur le notariat* (N-3). Elle-même le considérait clairement comme son conseiller juridique. Elle a longtemps suivi les conseils juridiques de Me Filiatrault, tout comme elle avait suivi ceux du père de celui-ci bien des années auparavant. Elle l'a expressément qualifié d'« homme de loi ». Fait encore plus important, elle a accepté son conseil juridique lorsqu'elle a signé l'acte de vente par lequel elle lui cédait, sans le savoir, sa maison. Je remarque que l'acte de vente porte la signature officielle de Me Filiatrault en la forme requise par le par. 4(1) de la *Loi sur le notariat* : la mention « Me Nolan Filiatrault, notaire » apparaît sous la ligne réservée à la signature. Je constate également que, dans sa décision du 13 décembre 1996, le Comité administratif a lui-même reconnu que M. Giguère était disposé à établir la nature professionnelle de la relation Hamel-Filiatrault.

The professional, rather than personal, nature of the relationship is not only true as a matter of fact but required as a matter of law. I have already noted the statutory and ethical responsibilities of notaries to advise their clients impartially. Mr. Filiatrault's professional duty impartially to advise Mrs. Hamel was engaged by this transaction. In *Fortin v. Chrétien*, [2001] 2 S.C.R. 500, 2001 SCC 45, I had occasion to comment on the other branch of the Quebec legal profession, namely advocates. I said (at para. 17): "As persons in whom public trust is invested, advocates play a very special role in the community when they perform . . . acts reserved to them". The same is true of the role of notaries in the performance of acts reserved to them. It should go without saying that this role is a professional not a personal one. Personal transactions between legal professionals and their clients are not to be encouraged. If they occur, these transactions must be conducted with great caution by lawyers and notaries in order to avoid conflicts between their obligations arising from the position of trust they hold with their clients and their personal interests. The principles

25 La nature professionnelle plutôt que personnelle de la relation ressort non seulement des faits, mais de la loi elle-même. J'ai déjà fait état des responsabilités légales et déontologiques qui incombent aux notaires de conseiller leurs clients de manière impartiale. Par cette transaction, l'obligation professionnelle de Me Filiatrault de conseiller Mme Hamel avec impartialité a été engagée. Dans *Fortin c. Chrétien*, [2001] 2 R.C.S. 500, 2001 CSC 45, j'ai eu l'occasion de formuler des commentaires sur l'autre branche de la profession juridique au Québec, soit les avocats (par. 17) : « En tant que dépositaire de la confiance du public, l'avocat joue un rôle très particulier au sein de la collectivité lorsqu'il exerce [les] actes réservés ». Il en va de même des notaires qui exercent des actes réservés. Le fait qu'il s'agisse d'un rôle professionnel et non personnel devrait aller de soi. Les transactions personnelles entre les membres de la profession juridique et leurs clients ne peuvent être encouragées. Si elles se produisent, les avocats ou les notaires doivent les traiter avec une extrême prudence afin d'éviter des conflits entre les obligations qui naissent de la relation de

established by the Canadian Bar Association are instructive:

(a) The lawyer should not enter into a business transaction with the client or knowingly give to or acquire from the client an ownership, security or other pecuniary interest unless:

(i) the transaction is a fair and reasonable one and its terms are fully disclosed to the client in writing in a manner that is reasonably understood by the client;

(ii) the client is given a reasonable opportunity to seek independent legal advice about the transaction, the onus being on the lawyer to prove that the client's interests were protected by such independent advice; and

(iii) the client consents in writing to the transaction.

(b) The lawyer shall not enter into or continue a business transaction with the client if:

(i) the client expects or might reasonably be assumed to expect that the lawyer is protecting the client's interests;

(ii) there is a significant risk that the interests of the lawyer and the client may differ.

(Canadian Bar Association, *Code of Professional Conduct*, c. VI)

While the CBA's *Code of Professional Conduct* is not directly applicable to all notaries in Quebec, the principles enunciated here should nevertheless be borne in mind whenever a notary contemplates a business transaction with his client.

26 The fact that the transaction in question took the form of private writing must not obscure the issue. It has sometimes been suggested that a notary who proceeds by private writing, rather than by an authentic act, no longer acts in a professional capacity and is therefore not under the usual duty to give advice. Thus a note in the September 1911 volume of *La Revue du Notariat* explained:

[TRANSLATION] The case law is consistent in confirming that even if a notary, in the capacity of an adviser,

confiance avec leurs clients et leurs intérêts personnels. Les principes établis par l'Association du Barreau canadien nous éclairent à cet égard :

(a) L'avocat ne doit conclure aucune transaction d'affaires avec son client ou sciemment acquérir un droit de propriété, des valeurs ou tout autre intérêt pécuniaire d'un client, à moins que :

(i) la transaction ne soit honnête et raisonnable et que les termes de cette transaction ne soient complètement exposés au client par écrit, d'une manière que le client puisse raisonnablement comprendre;

(ii) le client n'ait eu une occasion raisonnable de demander un conseil juridique indépendant sur la transaction, l'avocat ayant le fardeau de prouver que les intérêts du client furent protégés par un tel avis indépendant; et que

(iii) le client ne consente par écrit à la transaction.

(b) L'avocat ne doit pas conclure ni poursuivre une transaction d'affaires avec un client, si :

(i) le client s'attend à ce que l'avocat protège ses intérêts ou peut raisonnablement le présumer;

(ii) il y a un risque important que les intérêts de l'avocat et ceux du client puissent diverger.

(Association du Barreau canadien, *Code de déontologie professionnelle*, ch. VI)

Bien que le *Code de déontologie professionnelle* de l'ABC ne s'applique pas directement à l'ensemble des notaires du Québec, il n'en reste pas moins que le notaire qui envisage de conclure une transaction d'affaires avec son client devrait garder à l'esprit les principes qui y sont énoncés.

Le fait que la transaction en question est effectuée sous forme d'acte sous seing privé ne doit pas faire perdre de vue la question en litige. On dit parfois que le notaire qui procède par acte sous seing privé, plutôt que par acte authentique, n'agit plus en sa qualité professionnelle et n'est donc pas assujetti à l'obligation de conseil qui lui incombe habituellement. Ainsi peut-on lire dans une note tirée de *La Revue du Notariat* de septembre 1911 :

D'après la jurisprudence constante, l'acte sous seing privé conserve strictement son caractère, alors même

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takes part in the drafting of a private writing, this in no way changes the essential character of the writing. The notary is no longer acting in his or her professional capacity, but rather as a mere adviser or agent of the parties; consequently, the act does not take on the character, status or effects of an authentic act. The fee for a notarial deed is not charged for drawing up the writing, and the notary assumes no responsibility for the form or substance of the writing. From a legal standpoint, the effects of the document are and remain those of a private writing.

(Anonymous, "Rôle du notaire dans l'acte sous seing privé" (1911), 14 *R. du N.* 56) I agree, of course, that the mere fact that a notary has drawn up the private writing does not render it an authentic act for the purposes of the *Civil Code*. But I cannot agree with the assertion that a notary may evade all professional responsibility simply by electing one form of writing over another. Indeed, the duty of an independent legal advisor remains the same in these circumstances regardless of the form of the writing. This conclusion follows from the principle animating this Court's decision in *Ayotte v. Boucher*, *supra*. It is also consistent with the doctrine, as Professor Marquis has demonstrated: P.-Y. Marquis, *La responsabilité civile du notaire* (1999), at pp. 168-69. I consider his conclusion on this point irrefutable:

[TRANSLATION] We do not believe that, in principle, the notary's duty to act as legal adviser should be associated exclusively with the particular form an act takes. . . . This informational obligation is an integral part of the profession. In all likelihood it cannot necessarily be set aside so easily.

We are also of the opinion that even if a notary, of his or her own accord or at a client's request, prefers to use a private writing instead of an authentic act, the notary is not thereby inevitably and automatically relieved of the duty to advise . . . We must instead take into account the specific circumstances of each case, the importance of the notary's contribution to the drafting of the act and the degree of trust that the client demonstrably placed in the notary.

In short, the fact that this transaction occurred by private writing does not in any sense render it a personal act rather than an act done by Mr. Filiatrault in the exercise of his profession. In this transaction as in all others, Mr. Filiatrault had a professional

qu'il est établi que le notaire a pu, à titre de conseil, participer à sa rédaction. Il n'agit plus là comme notaire, mais comme simple conseil ou mandataire des parties, et l'acte n'en acquiert pas pour cela ni le caractère, ni la valeur, ni les effets d'un acte authentique. De même que l'honoraire de l'acte notarié n'est pas dû pour sa rédaction, de même aucune responsabilité n'est encourue par le notaire tant pour la forme que pour le fond de l'acte. Et les effets au point de vue juridique en sont et restent ceux prévus par la loi pour les actes sous seing privé.

(Anonyme, « Rôle du notaire dans l'acte sous seing privé » (1911), 14 *R. du N.* 56) Certes, je conviens que le simple fait pour un notaire de rédiger un acte sous seing privé n'en fait pas pour autant un acte authentique au sens du *Code civil*. Mais je ne peux me rallier à la proposition qu'un notaire peut se soustraire à toute responsabilité professionnelle par le simple fait de choisir une forme d'acte plutôt qu'une autre. En effet, son devoir de conseil désintéressé demeure entier dans ces circonstances, sans égard à la forme de l'acte intervenu. Cette conclusion découle du principe qui sous-tend l'arrêt *Ayotte c. Boucher*, précité. Elle est également conforme à la doctrine, comme le démontre le professeur Marquis : P.-Y. Marquis, *La responsabilité civile du notaire* (1999), p. 168-169. J'estime irréfutable sa conclusion sur ce point :

Nous ne croyons pas qu'en principe le devoir notarial de conseil doive être rattaché exclusivement à une forme externe de l'acte plutôt qu'à une autre [. . .] Cette obligation d'information est partie intégrante de la profession. On ne saurait vraisemblablement l'écarter nécessairement d'une façon aussi aisée.

Nous pensons aussi que même si le notaire, de son propre choix ou à la demande d'un client, préfère utiliser l'acte sous seing privé au lieu de l'acte authentique, il n'est pas inévitablement et automatiquement pour autant déchargé de son obligation de conseil. [. . .] [T]out devra s'analyser en fonction des particularités de chaque espèce, de l'importance de la contribution du notaire à la rédaction de l'acte et du degré de confiance que le client aura réellement manifesté envers le praticien.

Bref, le fait que cette transaction ait pris la forme d'un acte sous seing privé ne lui confère aucunement la qualité d'acte personnel, plutôt que celle d'acte posé par Me Filiatrault dans l'exercice de sa profession. À l'égard de cette transaction et de

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duty impartially to advise his client. To think otherwise is not only mistaken. It is a serious misunderstanding of notaries' duties as described in the *Notarial Act*, the doctrine, and the jurisprudence.

toutes les autres, Me Filiatrault avait l'obligation professionnelle de conseiller sa cliente en toute impartialité. Penser autrement revient non seulement à faire fausse route, mais traduit du même coup une grave méconnaissance des devoirs propres aux notaires tels qu'ils sont énoncés dans la *Loi sur le notariat*, la doctrine et la jurisprudence.

27 Any characterization of the Hamel-Filiatrault transaction as personal rather than professional must also be considered in the light of the purposes of the indemnity fund. As I have explained, one of those purposes is to protect clients from misdeeds by notaries that, due to their intentional nature, will not be covered by professional liability insurance. The case at bar is a perfect example: the Indemnity Committee acknowledged the unrefuted evidence of Mr. Filiatrault's numerous false representations to Mrs. Hamel. Yet by characterizing the transaction as personal, the two Committees took Mr. Filiatrault's fraud outside the scope of the fund, thus revoking the very protection the fund is intended to give. This decision opens a gap between notaries' ethical obligations, as set out in s. 4.02.01(*b*) of the Code, and the remedy for breach of those obligations, which is supposed to be provided, in the last resort, by the indemnity fund. Not only is Mrs. Hamel left unprotected, but the purpose of the fund itself is frustrated.

Toute caractérisation de la transaction Hamel-Filiatrault comme étant de nature personnelle plutôt que professionnelle doit également tenir compte de la finalité du fonds d'indemnisation. Comme je l'ai expliqué, ce fonds vise notamment à protéger les clients de notaires ayant commis des méfaits qui ne sont pas couverts par l'assurance-responsabilité professionnelle en raison de leur caractère intentionnel. Le présent pourvoi en est un parfait exemple : le Comité d'indemnisation a admis la preuve irréfutée des nombreuses fausses représentations que Me Filiatrault a faites à Mme Hamel. Toutefois, en qualifiant la transaction de personnelle, les deux comités ont situé la fraude de Me Filiatrault hors du champ d'application du fonds, niant ainsi la protection même que le fonds vise à conférer. Cette décision crée une rupture entre les obligations déontologiques des notaires, prévues à l'al. 4.02.01*b*) du Code, et la réparation pour violation de ces obligations que le fonds d'indemnisation est censé fournir en dernier ressort. Non seulement Mme Hamel est-elle laissée sans protection aucune, mais on se trouve également à faire échec à l'objet même du fonds.

28 To conclude, the transaction by which Mrs. Hamel unwittingly sold her home to her notary for the derisory sum of $1 cannot in any sense be reasonably characterized as personal rather than professional. In accepting the Indemnity Committee's conclusion that Mr. Filiatrault's acts were personal rather than professional, and were therefore beyond the scope of the indemnity fund, the Administrative Committee made a fundamental error. One might object that it is a legal error and is shielded by the privative clause in Regulation s. 4.03. But it is so gross an error, predicated on such a basic misunderstanding of the professional responsibilities of notaries in Quebec law, the relationship between

En conclusion, on ne peut en aucune manière raisonnablement qualifier de personnelle plutôt que de professionnelle la transaction par laquelle Mme Hamel a, sans le savoir, vendu sa maison à son notaire pour la somme dérisoire de un dollar. Le Comité administratif a commis une erreur fondamentale en acceptant la conclusion du Comité d'indemnisation selon laquelle les actes posés par Me Filiatrault étaient de nature personnelle plutôt que professionnelle et qu'ils se situaient, de ce fait, hors du champ d'application du fonds d'indemnisation. On pourrait faire valoir en contrepartie qu'il s'agit d'une erreur de droit bénéficiant de la protection de la clause privative contenue à

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Mrs. Hamel and Mr. Filiatrault, and the purposes of the indemnity fund that this Court cannot permit it to stand. It is a patently unreasonable result.

l'art. 4.03 du règlement. Mais la Cour ne saurait laisser persister une erreur à ce point grossière, fondée sur une méconnaissance aussi fondamentale des responsabilités professionnelles des notaires en droit québécois, de la relation entre Mme Hamel et Me Filiatrault, ainsi que du but de l'établissement du fonds d'indemnisation. Il s'agit d'un résultat manifestement déraisonnable.

C. *Remedy*

C. *Réparation*

29 Given the patent unreasonableness of the Administrative Committee's decision, I would quash it. The only reason the Chambre gave for not indemnifying the succession was its patently unreasonable conclusion that Mr. Filiatrault was acting in a personal capacity when he defrauded Mrs. Hamel. If that was the only bar to indemnifying the succession, then it is clear the succession must now be indemnified.

Je suis d'avis d'annuler la décision du Comité administratif en raison de son caractère manifestement déraisonnable. Pour justifier son refus d'indemniser la succession, la Chambre n'a invoqué que sa conclusion manifestement déraisonnable selon laquelle Me Filiatrault agissait en sa qualité personnelle lorsqu'il a spolié Mme Hamel. Si le seul obstacle à l'indemnisation de la succession se résumait à cela, il est manifeste que la succession doit aujourd'hui être indemnisée.

30 In oral argument before this Court, counsel for the Chambre raised a new argument. Instead of seeking to defend the Administrative Committee's decision solely on its own terms, he raised a further argument to the effect that no indemnity was payable to the succession because Mrs. Hamel's house does not come within the terms of the Regulation. It is not, in the words of the Regulation, a sum of money or other security. Thus, even if the Chambre had not made its patently unreasonable decision, it would still not have been able to indemnify the succession.

À l'audition devant la Cour, l'avocat de la Chambre a invoqué un nouveau moyen. Au lieu de chercher à défendre la décision du Comité administratif telle qu'elle a été rendue, il a fait valoir qu'aucune indemnité n'est payable à la succession parce que la maison de Mme Hamel n'est pas visée par le règlement. Il ne s'agirait pas, au sens du règlement, d'une somme d'argent ou autre valeur. Par conséquent, même si elle n'avait pas rendu sa décision manifestement déraisonnable, la Chambre n'aurait quand même pas pu indemniser la succession.

31 There is no reason to believe that this limited understanding of "other security" advanced now by the respondent actually informed the Administrative Committee's decision (or, for that matter, the Indemnity Committee's decision). To the contrary, there is every reason to presume that the decision was taken entirely on the basis of the unreasonable characterization of Mr. Filiatrault's acts as personal rather than professional, for that is the only reason which the two Committees themselves gave.

Rien ne permet de penser que la décision du Comité administratif (ou d'ailleurs celle du Comité d'indemnisation) repose sur cette interprétation restrictive de l'expression « autres valeurs » que préconise maintenant l'intimée. Au contraire, il y a tout lieu de supposer que la décision a été prise sur le seul fondement de la caractérisation déraisonnable des actes posés par Me Filiatrault, à savoir qu'ils sont personnels plutôt que professionnels, puisqu'il s'agit là de l'unique raison que les deux comités ont eux-mêmes avancée.

32 In any case, this submission disregards the judgment of December 4, 1995 annulling the contract of

Quoi qu'il en soit, cet argument fait abstraction du jugement rendu le 4 décembre 1995 prononçant

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sale between Mr. Filiatrault and Mrs. Hamel. The relevant portions of this order are as follows.

[TRANSLATION] FOR THESE REASONS, THE COURT

ANNULS the deed of sale . . . insofar as the parties to this case are concerned . . . such that the Plaintiff [Mr. Giguère] ès qualités be substituted for the Defendant as creditor of the proceeds from later sales made in respect of the same property, without prejudice to the rights of third parties, including the purchasers;

ORDERS the Defendant to pay the Plaintiff ès qualités the sum of $900,000, plus interest and additional indemnities provided for under the Civil Code;

. . .

33 The legal consequences of annulling a contract are set out in the *Civil Code of Québec*, S.Q. 1991, c. 64. Article 1422 C.C.Q. provides: "A contract that is null is deemed never to have existed." Thus, as between Mrs. Hamel and Mr. Filiatrault, the deed of sale of October 25, 1989 is void and must be treated as having never occurred. Seen in the light of arts. 1422 and 1701, it is clear that our concern is not with Mrs. Hamel's house but with its value and at least the proceeds Mr. Filiatrault earned from selling it to third party purchasers. There is no disputing that those proceeds are sums of money.

34 It has been argued that this Court, having quashed the Administrative Committee's decision, should send the matter back for reconsideration of the "other security" point. Under the circumstances, I cannot agree with this approach. There is no dispute as to quantum (other than the questions of interest at the legal rate and additional indemnity, which I address below). This is the first time since these proceedings began in 1995 that the Chambre, either in its Committees or in the courts below, has raised an argument on the meaning of "other security". Indeed, the argument and the request that the matter be sent back for reconsideration could not have been raised any later than it was, for it came to us for the first time in oral argument at the hearing. This Court does not favour issues being raised for the first time in an appeal to this Court: *R. v.*

l'annulation du contrat de vente intervenu entre Me Filiatrault et Mme Hamel. Je reproduis les extraits pertinents du dispositif :

PAR CES MOTIFS, LE TRIBUNAL

ANNULE l'acte de vente [. . .] en autant que les parties à la présente cause sont concernées [. . .] de manière à ce que le présent demandeur [M. Giguère] ès qualités soit substitué au défendeur comme créancier de toute somme due en vertu des ventes postérieures faites du même immeuble sans préjudice aux droits des tiers dont les acquéreurs;

CONDAMNE la partie défenderesse à payer à la partie demanderesse, ès qualités la somme de 900,000 $, le tout avec intérêt et indemnité prévus au Code civil;

. . .

Les conséquences juridiques de l'annulation d'un contrat sont énoncées dans le *Code civil du Québec*, L.Q. 1991, ch. 64 (« C.c.Q. »). L'article 1422 C.c.Q. prévoit : « Le contrat frappé de nullité est réputé n'avoir jamais existé. » Par conséquent, entre Mme Hamel et Me Filiatrault, l'acte de vente du 25 octobre 1989 est nul et doit être considéré comme n'étant jamais intervenu. D'après les art. 1422 et 1701, il est clair que nous devons nous intéresser, non pas à la maison de Mme Hamel, mais bien à sa valeur et à tout le moins au produit qu'a obtenu Me Filiatrault de la vente à des tiers acheteurs. Nul ne conteste que ce produit constitue une somme d'argent.

On a fait valoir qu'ayant annulé la décision du Comité administratif, la Cour devrait renvoyer l'affaire pour réexamen de la question relative aux « autres valeurs ». Dans les circonstances de l'espèce, je ne peux me ranger à cet avis. Le quantum des dommages-intérêts ne pose aucune problème (sauf pour ce qui est de l'intérêt au taux légal et de l'indemnité additionnelle, dont je traiterai plus loin). C'est la première fois depuis que la réclamation a été présentée, en 1995, que la Chambre, soit devant ses comités ou en cour, soulève un argument fondé sur le sens de l'expression « autres valeurs ». En fait, cet argument non plus que la demande de renvoi n'aurait pu être soulevé plus tard puisque nous en avons été saisis pour la première fois en plaidoirie, lors de l'audition. La Cour ne croit pas que des questions litigieuses devraient être

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Potvin, [1993] 2 S.C.R. 880, at p. 916. Such belatedly raised arguments deprive the Court of the benefit of consideration by the courts below, and may have other undesirable consequences. Here, to send the matter back to the Chambre on this point would serve to reward it for the tardiness with which it has raised this argument. And of course it would delay matters even further. The succession has been seeking indemnity for eight years. It should not be made to wait any longer. I adopt as my own the words of LeBel J. (dissenting in part) in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, at para. 140:

> Unnecessary delay in judicial and administrative proceedings has long been an enemy of a free and fair society. At some point, it is a foe that has plagued the life of almost all courts and administrative tribunals. It's a problem that must be brought under control if we are to maintain an effective system of justice, worthy of the confidence of Canadians. The tools for this task are not to be found only in the *Canadian Charter of Rights and Freedoms*, but also in the principles of a flexible and evolving administrative law system.

Given the circumstances of this appeal, I would exercise this Court's discretion not to send the matter back for reconsideration by the Chambre.

D. *Quantum*

It remains to determine the amount of the indemnity. Section 4.04 of the Regulation (as amended by O.C. 645-86, May 14, 1986) provides, "[t]he maximum indemnity payable from the fund is established at 300 000 $ for the total claims against the same notary." The succession has already received $112,535.96 out of these funds. This leaves a difference of $187,464.04. The parties do not dispute that the value of Mrs. Hamel's property and the proceeds from it exceed that figure. The succession is therefore entitled to the entire amount.

soulevées pour la première fois lors d'un pourvoi formé devant elle : *R. c. Potvin*, [1993] 2 R.C.S. 880, p. 916. Des arguments soulevés aussi tardivement privent la Cour du bénéfice de l'examen antérieur des tribunaux et peuvent entraîner d'autres conséquences peu souhaitables. En l'espèce, renvoyer l'affaire devant la Chambre sur cette question aurait pour effet de la récompenser pour la tardiveté de son argument. Et il va sans dire que cela va retarder davantage le règlement du litige. La succession tente depuis huit ans d'obtenir une indemnité. Elle ne devrait pas avoir à attendre plus longtemps. Je fais miens les propos qu'a tenus le juge LeBel (dissident en partie) dans *Blencoe c. Colombie-Britannique (Human Rights Commission)*, [2000] 2 R.C.S. 307, 2000 CSC 44, par. 140 :

> Ce n'est pas d'hier que les délais inutiles dans les procédures judiciaires et les procédures administratives sont qualifiés de contraires à une société libre et équitable. Il s'agit jusqu'à un certain point d'un fléau qui touche presque tous les tribunaux judiciaires et les tribunaux administratifs. C'est un problème qu'il faut régler pour assurer le maintien d'un système de justice efficace et digne de la confiance des Canadiens et des Canadiennes. La solution à ce problème réside non seulement dans l'application de la *Charte*, mais également dans celle des principes d'un régime de droit administratif souple et en évolution constante.

35 Compte tenu des circonstances de l'espèce, je suis d'avis d'exercer le pouvoir discrétionnaire de la Cour et de refuser de renvoyer l'affaire à la Chambre pour réexamen.

D. *Quantum*

36 Il reste à établir le montant de l'indemnité. L'article 4.04 du règlement (modifié par le décret 645-86, 14 mai 1986) dispose que « [l]'indemnité maximale payable à même le fonds est établie à la somme de 300 000 $ pour le total des réclamations contre le même notaire ». La succession ayant reçu de ce fonds 112 535,96 $, la différence s'élève à 187 464,04 $. Les parties ne contestent pas que la valeur de l'immeuble de Mme Hamel et du produit de la vente de cet immeuble dépasse ce chiffre. La succession a donc droit au plein montant de la différence.

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37 The succession is also claiming interest at the legal rate as provided for by art. 1617 C.C.Q. plus the additional indemnity as provided for by art. 1619 C.C.Q. The Chambre contends that the $300,000 ceiling imposed by s. 4.04 of the Regulation excludes any award of interest or additional indemnity under the *Civil Code*. It submits that the indemnity funds are intended to reimburse misappropriated funds and not to pay interest on these funds. The Chambre cites no authority for either of these propositions.

La succession réclame en outre le versement des intérêts au taux légal, conformément à l'art. 1617 C.c.Q., de même que l'indemnité additionnelle prévue à l'art. 1619 C.c.Q. La Chambre soutient que la limite de 300 000 $ fixée par l'art. 4.04 du règlement exclut le versement des intérêts ou d'une indemnité additionnelle sous le régime du *Code civil*. Selon elle, le fonds d'indemnisation vise à rembourser les sommes détournées et non pas à verser des intérêts sur ces sommes. La Chambre ne cite aucune autorité à l'appui de l'une ou l'autre de ces propositions.

38 The Chambre's distinction between reimbursement and the payment of interest is erroneous. Interest is itself a form of reimbursement. It reimburses the creditor for the period in which she did not have possession of the funds that were owed to her. As Rand J. explained in *Reference as to the Validity of Section 6 of the Farm Security Act, 1944 of Saskatchewan*, [1947] S.C.R. 394, at p. 411, "[i]nterest is, in general terms, the return or consideration or compensation for the use or retention by one person of a sum of money, belonging to, in a colloquial sense, or owed to, another."

La Chambre fait erreur lorsqu'elle établit une distinction entre un remboursement et le versement des intérêts. L'intérêt constitue en soi une forme de remboursement. Le créancier se voit rembourser une certaine somme pour la période pendant laquelle il n'a pas été mis en possession des sommes qui lui étaient dues. Comme l'explique le juge Rand dans *Reference as to the Validity of Section 6 of the Farm Security Act, 1944 of Saskatchewan*, [1947] R.C.S. 394, p. 411, [TRADUCTION] « [d]e manière générale, l'intérêt est la contrepartie ou le dédommagement de l'utilisation ou la détention par une personne d'une certaine somme d'argent qui appartient, au sens courant de ce mot, à une autre ou qui lui est due. »

39 The right to be reimbursed or compensated for the retention of one's money by another is of great importance. Without it, a person in possession of another person's funds would have an incentive not to restore the funds to their rightful owner in a timely fashion. Instead, it would be in his interest to delay repayment and invest the funds for his own purposes. When, for whatever reason, he could no longer tarry, he could return the capital to its owner and keep the accrued interest for himself. This is obviously an unjust and undesirable situation. The *Civil Code* attempts to prevent this outcome by means of art. 1617. Accepting the Chambre's argument would amount to permitting it to rely on s. 4.04 of the Regulation to engage in just the sort of unjust delay I have described. I do not say that this is what the Chambre has done; I do not doubt its good faith. My point is simply that to accept the Chambre's argument would

Le droit d'une personne de se faire rembourser ou indemniser par suite de la détention par une autre d'une somme d'argent lui appartenant revêt une grande importance. En l'absence de ce droit, une personne en possession d'une somme d'argent appartenant à autrui serait incitée à ne pas la remettre à son propriétaire légitime en temps opportun. Au contraire, elle aurait tout intérêt à en reporter le remboursement et à l'investir à des fins personnelles. Lorsque, pour quelque motif que ce soit, il lui est impossible d'en retarder davantage le paiement, elle pourrait toujours remettre le capital à son propriétaire et conserver les intérêts courus. Manifestement, il s'agit là d'une situation injuste et non souhaitable. Le *Code civil* tente d'empêcher cette situation par l'entremise de l'art. 1617. Dans les faits, retenir l'argument de la Chambre équivaudrait à l'autoriser à invoquer l'art. 4.04 du règlement pour s'octroyer les délais injustes que je viens de

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open the way to potential abuse. I refuse to do so.

décrire. Je ne dis pas que c'est ce que la Chambre a fait; je ne doute aucunement de sa bonne foi. Je dis simplement qu'il pourrait y avoir des abus si on faisait droit à l'argument de la Chambre. Je refuse de le faire.

40 As I read s. 4.04 of the Regulation, the $300,000 limit is not a constraint on awards of interest at the legal rate under art. 1617 C.C.Q. Rather, it is a constraint on the award of indemnity that the Chambre itself may grant for the total claims against the same notary. That constraint applies not only to the Chambre but also to the remedy this Court is permitted to grant the succession. Although Mrs. Hamel's property was worth far more than $300,000, we may not order the Chambre to grant an indemnity greater than that amount. Section 4.04 does not prevent us, however, from granting the succession an award of interest at the legal rate.

Selon l'art. 4.04 du règlement, à mon sens, la limite de 300 000 $ ne constitue pas une restriction à l'octroi de l'intérêt au taux légal en vertu de l'art. 1617 C.c.Q. Il s'agit plutôt d'une restriction à l'indemnité que la Chambre elle-même peut accorder pour le total des réclamations contre le même notaire. Cette restriction s'applique non seulement à la Chambre, mais également à la réparation que la Cour peut consentir à la succession. Bien que la valeur de l'immeuble de Mme Hamel ait dépassé de loin 300 000 $, nous ne pouvons enjoindre à la Chambre d'accorder une indemnité plus élevée que cette somme. L'article 4.04 ne nous empêche pas cependant d'octroyer à la succession des intérêts calculés au taux légal.

41 Nor does s. 4.04 of the Regulation oust this Court's power under art. 1619 C.C.Q. to award an additional indemnity. Articles 1617 and 1619 both seek to compensate creditors for not having access to their funds and to encourage debtors to restore such funds promptly. In short, the additional indemnity represents compensation for the damage due to delay: *Travelers Insurance Co. of Canada v. Corriveau*, [1982] 2 S.C.R. 866, at p. 875; *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705, at p. 834. The need for an additional indemnity arises when the legal rate of interest fails adequately to compensate the creditor because it is lower than the going rates. As Baudouin and Deslauriers explain,

L'article 4.04 du règlement ne fait pas non plus échec au pouvoir dont dispose la Cour, en vertu de l'art. 1619 C.c.Q., d'accorder une indemnité additionnelle. Les articles 1617 et 1619 visent tous deux à indemniser les créanciers privés des sommes qui leur sont dues et à inciter les débiteurs à leur remettre ces sommes promptement. L'indemnité additionnelle représente l'indemnisation d'un dommage dû au retard : *Compagnie d'assurance Travelers du Canada c. Corriveau*, [1982] 2 R.C.S. 866, p. 875; *Laurentide Motels Ltd. c. Beauport (Ville)*, [1989] 1 R.C.S. 705, p. 834. L'octroi d'une indemnité additionnelle est nécessaire lorsque le taux d'intérêt légal ne permet pas d'indemniser adéquatement le créancier du fait qu'il est moins élevé que les taux en vigueur. Comme l'expliquent les auteurs Baudouin et Deslauriers,

[TRANSLATION] [i]n times of inflation, a legal rate of 5% was unrealistic, as it fell well short of the commercial rate or the rate that could be obtained on the open market. It was therefore not in the interest of a would-be debtor to pay the debt owed to his or her victim. It would take several years before the debtor would finally be ordered to pay the full amount, plus 5% interest. In the meantime, that money could instead be invested at a much higher

En période d'inflation, un taux légal de 5 % était irréaliste, parce qu'il s'écartait très substantiellement du taux commercial ou du « loyer » de l'argent qu'il était possible d'obtenir sur le marché libre. Un éventuel débiteur n'avait donc pas intérêt à acquitter sa dette à l'endroit de la victime. Il ne risquait qu'une condamnation, plusieurs années après, portant un taux d'intérêt de 5 %, alors que, pendant cette même période, il pouvait placer

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rate, a rate that was often more than twice the legal rate of 5%.

(J.-L. Baudouin and P. Deslauriers, *La responsabilité civile* (6th ed. 2003), at p. 419)

To deny the availability of additional indemnity on the ground of s. 4.04's $300,000 limit would give rise to the same potential abuses as I have already described in respect of the legal rate of interest.

42 I therefore conclude that the succession is entitled to the amount of $187,464.04 out of the indemnity fund plus interest at the legal rate and additional indemnity, both payable from the date of default. That date is May 3, 1996, being the date on which the Administrative Committee rendered its patently unreasonable decision not to indemnify the succession. The succession will also have its costs throughout.

English version of the reasons delivered by

43 Deschamps J. (dissenting) — There is no question that the notary, Mr. Filiatrault, behaved reprehensibly and shamefully abused his victim. However, our sympathy for the victim should not cause us to forget that the issue before the Court is limited to determining whether, according to a standard of review requiring great judicial deference, the lower courts erred in refusing to intervene and quash the decision of the Comité administratif de la Chambre des notaires (the "Committee").

44 With respect for the opinion of my colleagues, I am of the view that it would not be appropriate for the Court to intervene. In my view, s. 2.01 of the *Regulation respecting the indemnity fund of the Chambre des notaires du Québec*, R.R.Q. 1981, c. N-2, r. 8 (the "Regulation"), lends itself to more than one reasonable interpretation, and the interpretation adopted by the tribunal of competent jurisdiction is not unreasonable.

45 Even if I agreed with the majority that it would be appropriate for the Court to intervene, I would refer the case back to the Committee in order for it to deal with aspects of the claim it has not yet ruled

cette même somme à des taux représentant souvent plus du double.

(J.-L. Baudouin et P. Deslauriers, *La responsabilité civile* (6e éd. 2003), p. 419)

Priver une partie de l'indemnité additionnelle en invoquant la limite de 300 000 $ établie par l'art. 4.04 du règlement pourrait donner lieu aux abus dont j'ai déjà fait état relativement au taux d'intérêt légal.

Je conclus donc que la succession a droit à un montant de 187 464,04 $, payable à même le fonds d'indemnisation, auquel s'ajoutent les intérêts au taux légal et l'indemnité additionnelle, tous deux payables à compter de la date du manquement. J'établis cette date au 3 mai 1996, soit la date à laquelle le Comité administratif a rendu sa décision, manifestement déraisonnable, de ne pas indemniser la succession. La succession a également droit aux dépens devant toutes les cours.

Les motifs suivants ont été rendus par

La juge Deschamps (dissidente) — Il est acquis que la conduite du notaire Filiatrault est répréhensible et qu'il a abusé honteusement de sa victime. La sympathie qu'inspire la victime ne devrait cependant pas faire oublier que la question devant la Cour se limite à déterminer si, suivant une norme de contrôle requérant une grande retenue judiciaire, les instances inférieures ont fait erreur en refusant d'intervenir pour casser la décision du Comité administratif de la Chambre des notaires (le « Comité »).

En toute déférence, je suis d'avis qu'il n'est pas approprié d'intervenir. Selon moi, l'art. 2.01 du *Règlement sur le fonds d'indemnisation de la Chambre des notaires du Québec*, R.R.Q. 1981, ch. N-2, r. 8 (le « règlement »), est susceptible de plus d'une interprétation raisonnable, et celle retenue par le tribunal compétent n'est pas déraisonnable.

Toutefois, même si j'étais d'accord avec la majorité sur la pertinence d'une intervention judiciaire, je renverrais le dossier au Comité pour qu'il se prononce sur les aspects de la réclamation sur lesquels

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on. I believe that the majority position oversteps the boundaries of judicial review, which permits judges to examine the legality of a decision but only allows them to rule on the merits in limited cases.

I. More Than One Possible Interpretation of Section 2.01 of the Regulation

To determine the scope of the protection afforded by the Regulation, it is useful to recall the requirements which give rise to the application of s. 2.01 of the Regulation. The section reads as follows:

2.01. The Bureau shall establish an indemnity fund to be used to reimburse the sums of money or other securities used by a notary for purposes other than those for which they had been delivered to him in the practice of his profession.

Four elements must therefore be established in order to give rise to the protection: (1) there must be sums of money or other securities; (2) they must have been delivered to the notary; (3) they must have been delivered in the practice of his profession; and (4) the notary must have used them for purposes other than those for which they had been delivered to him.

Contrary to the majority's analysis, I cannot conclude that the Committee's decision was founded solely on its opinion that the notary was not acting in the practice of his profession.

Although brief, the December 13, 1996 decision of the Committee addresses three of the four elements in s. 2.01. These three elements are emphasized in the decision:

. . .

[TRANSLATION] WHEREAS Nolan Filiatrault was not acting "in the practice of his profession" within the meaning of the *Regulation respecting the indemnity fund of the Chambre des notaires du Québec*;

. . .

WHEREAS the property was not, in any way, "delivered" to Nolan Filiatrault "in the practice of his profession" within the meaning of the *Regulation respecting*

il n'a pas statué. J'estime, en effet, que la position majoritaire déborde les limites de la révision judiciaire, laquelle réserve au juge le soin d'examiner la légalité de la décision mais ne lui permet que dans des cas restreints de statuer lui-même sur le fond.

I. L'article 2.01 du règlement est susceptible de plus d'une interprétation

46 Pour déterminer la portée de la protection offerte par le règlement, il est utile de rappeler les conditions donnant ouverture à l'application de l'art. 2.01 du règlement. Cet article est ainsi libellé :

2.01. Le Bureau établit un fonds d'indemnisation devant servir à rembourser les sommes d'argent ou autres valeurs utilisées par un notaire à d'autres fins que celles pour lesquelles elles lui avaient été remises dans l'exercice de sa profession.

Quatre éléments doivent donc être établis afin de donner ouverture à la protection : (1) il doit s'agir de sommes d'argent ou autres valeurs; (2) elles doivent avoir été remises au notaire; (3) elles doivent lui avoir été remises dans l'exercice de sa profession; (4) le notaire doit les avoir utilisées à d'autres fins que celles pour lesquelles elles lui avaient été remises.

47 Contrairement à l'analyse faite par la majorité, je ne puis conclure que la décision du Comité ait uniquement été fondée sur son opinion que le notaire n'agissait pas dans l'exercice de sa profession.

48 Malgré son laconisme, la décision du 13 décembre 1996 du Comité traite tout de même de trois des quatre éléments prévus à l'art. 2.01. Ces trois éléments sont mis en relief dans la décision :

. . .

CONSIDÉRANT QUE monsieur Nolan Filiatrault n'était pas dans « l'exercice de sa profession » au sens où ces mots sont utilisés dans le *Règlement sur le fonds d'indemnisation de la Chambre des notaires du Québec*;

. . .

CONSIDÉRANT QUE cet immeuble n'a, de toute façon, pas été « remis » à monsieur Nolan Filiatrault « dans l'exercice de sa profession » au sens où ces mots sont

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the indemnity fund of the Chambre des notaires du Québec;

WHEREAS the property was not "used" by Nolan Filiatrault "for purposes other than those for which [it] had been delivered to him" within the meaning of the *Regulation respecting the indemnity fund of the Chambre des notaires du Québec*;

employés dans le *Règlement sur le fonds d'indemnisation de la Chambre des notaires du Québec*;

CONSIDÉRANT QUE monsieur Nolan Filiatrault n'a pas « utilisé à d'autres fins » cet immeuble au sens où ces mots sont employés dans le *Règlement sur le fonds d'indemnisation de la Chambre des notaires du Québec*;

. . .

. . .

49 Thus, even if I were of the opinion that the victim would never have had any dealings with Mr. Filiatrault had he not been her notary and, consequently, that he was acting in the practice of his profession, I could not conclude, because of the deference owed to administrative tribunals in a case such as this, that the Committee's decision justified the Court's intervention. There are other factors at play here.

Ainsi, même si j'étais d'avis que la victime n'aurait jamais fait affaire avec le fraudeur s'il n'avait pas été son notaire et qu'il agissait donc dans l'exercice de sa profession, je ne pourrais, en raison de la déférence due aux tribunaux administratifs dans une affaire comme celle-ci, conclure que la décision du Comité justifie l'intervention de la Cour. En effet, d'autres facteurs entrent en jeu.

50 The Committee concluded that the property had not been delivered to Mr. Filiatrault in the practice of his profession, and that he had not used it for purposes other than those for which it had been delivered. This conclusion is founded on several cumulative conditions. Consequently, even if, in the opinion of a court, one of the conditions was met, that does not mean that the victim must be indemnified. Assuming that the notary acted in the practice of his profession, the other three conditions still have to be examined before ruling on the entitlement to indemnification.

Le Comité a conclu que l'immeuble n'a pas été remis à Me Filiatrault dans l'exercice de sa profession et que le notaire n'a pas utilisé cet immeuble à d'autres fins que celles pour lesquelles il lui avait été remis. Cette conclusion repose sur plusieurs conditions cumulatives. En conséquence, même si, de l'avis d'un tribunal judiciaire, une des conditions est remplie, cela ne signifie pas que la victime doit être indemnisée. À supposer donc que le notaire ait agi dans l'exercice de ses fonctions, il faut examiner les trois autres conditions avant de conclure au droit à l'indemnisation.

51 A notary's use of property for a purpose other than that contemplated by the client upon delivery presupposes, on the one hand, that the client has voluntarily delivered the property for a specific purpose and, on the other, that the client has given instructions for its custody, management and disposition. Such delivery and instructions do not fit neatly in a case in which the client's property has been taken without his or her knowledge, through extortion or fraud, for example. Since the requirements are difficult to reconcile with these reprehensible acts, one could perhaps conclude that such acts are not covered by the Regulation and that an interpretation excluding them would be neither incorrect nor unreasonable. These observations apply to two of

L'utilisation par un notaire d'un bien à une fin autre que celle prévue par le client lors de la remise présuppose, d'une part, que le client a remis volontairement un bien pour une fin particulière et, d'autre part, qu'il a donné des instructions quant à sa garde, à sa gestion ou à sa disposition. Cette remise et ces instructions cadrent mal dans le cas où le bien a été soutiré au client à son insu, comme lors d'une extorsion ou d'une obtention frauduleuse de bien. Or, si les conditions se prêtent mal à ces actes répréhensibles, c'est peut-être qu'ils ne sont pas visés par le règlement et qu'une interprétation qui les exclurait ne serait pas incorrecte ni même déraisonnable. Ces remarques s'appliquent à deux des conditions de l'art. 2.01 du règlement

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the requirements under s. 2.01 of the Regulation that the Committee ruled on, but there is more.

The Committee did not consider the meaning of the words "sums of money or other securities". The respondent raised a new argument before this Court, submitting that the property cannot be characterised as "sums of money or other securities". My colleagues for the majority find that this argument comes too late and is without foundation. They reason that, since the contract of sale between the notary and the victim was annulled, our concern is not with the property, but rather the proceeds received by the notary when it was sold. The proceeds would then unquestionably constitute "sums of money" within the meaning of the Regulation (see para. 33 of the majority opinion). I find this approach inappropriate for a number of reasons.

First, this approach assumes that the argument necessarily had to be raised before the Committee and addressed by it. I cannot accept this position. Indeed, in the Committee's opinion, the claim should have been refused because three of the prerequisites to protection were not met. We must consider whether the Committee necessarily had to rule on the fourth prerequisite. Administrative tribunals cannot be expected to conduct an exhaustive examination of all possible grounds that could potentially support their decision in order to protect themselves against the intervention of a court of law. Such a requirement would considerably increase the scope of a tribunal's obligation to give reasons for its decisions.

Second, equating the property with a sum of money imposes an *ex post facto* analysis of the nature of the property delivered. This interpretation does not square well with the context of the Regulation, which calls for the property to be characterized upon its delivery, rather than after its conversion or disposition. This meaning results from reading s. 2.01 of the Regulation together with s. 89 of the *Professional Code*, R.S.Q., c. C-26, which requires professional orders to establish an indemnity fund. The first paragraph of this section reads as follows:

sur lesquelles le Comité s'est prononcé. Mais il y a plus.

52 Le Comité n'a pas étudié le sens de l'expression « sommes d'argent ou autres valeurs ». L'intimée, pour sa part, a plaidé pour la première fois devant la Cour que l'immeuble ne peut être ainsi caractérisé. Mes collègues de la majorité estiment que l'argument est tardif et qu'il ne saurait être fondé puisque, comme la vente intervenue entre le notaire et la victime a été annulée, il faudrait s'intéresser non à l'immeuble, mais à la somme reçue par le notaire lors de la revente. Cette somme serait incontestablement une « somm[e] d'argent » au sens du règlement (par. 33 de l'opinion majoritaire). Cette approche me paraît inappropriée pour de nombreuses raisons.

53 D'abord elle présume que l'argument devait nécessairement être soulevé devant le Comité ou traité par lui. Je ne puis accepter cette position. En effet, de l'avis du Comité, la réclamation devait être refusée parce que trois des conditions requises pour donner ouverture à la protection n'étaient pas remplies. Fallait-il nécessairement que le Comité se prononce sur la quatrième condition? On ne peut exiger des tribunaux administratifs qu'ils fassent une étude exhaustive de tous les motifs pouvant potentiellement justifier leur décision afin de se prémunir contre l'intervention d'un tribunal judiciaire. Une telle exigence alourdirait considérablement l'obligation qu'ils ont de motiver leurs décisions.

54 Ensuite, faire une équation entre l'immeuble et une somme d'argent impose une analyse après coup de la nature du bien remis. Cette interprétation colle mal au contexte du règlement, qui dicte une qualification du bien lors de sa remise et non après sa transformation ou sa disposition. En effet, ce sens ressort de la juxtaposition de l'art. 2.01 du règlement à l'art. 89 du *Code des professions*, L.R.Q., ch. C-26, qui impose aux ordres professionnels l'obligation de créer un fonds d'indemnisation. Le premier paragraphe de cet article est libellé en ces termes :

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89. The Bureau of an order whose members are called upon to hold sums of money or other securities for the account of their clients must, subject to the provisions of the Public Curator Act (chapter C-81) pertaining to unclaimed property, determine by regulation the terms, conditions and standards for receipt, custody and disposition of the sums of money and securities so held, and the terms, conditions and standards relating to the keeping and auditing of trust accounts, books and registers of such members. The regulation shall establish an indemnity fund to be used to repay the amounts of money or other securities used by a professional for purposes other than those for which they had been delivered to him in the practice of his profession and it shall fix the rules of administration and of investment of the sums of money making up the fund.

Under this section, a professional order must first establish the conditions for the reception, custody and disposition of sums of money or securities held by a professional, and then establish an indemnity fund. It would therefore appear that the property should be considered at its reception, rather than at the time of sale, as the regulation establishes the conditions for the reception, custody and disposition of property. I do not claim that this is the only reasonable interpretation, but it could, at the very least, have been the interpretation given by a duly constituted administrative tribunal.

55 Furthermore, since s. 2.01 of the Regulation has a considerable impact in Quebec, the administrative tribunal of competent jurisdiction must, first of all, consider how to interpret it. All professional orders in Quebec that are subject to s. 89 of the *Professional Code* have established identical coverage (see for example the Regulation in question here; the *Regulation respecting the indemnity fund of the Barreau du Québec*, R.R.Q. 1981, c. B-1, r. 6, s. 1.01; the *Regulation respecting the indemnity fund of the Ordre des comptables agréés du Québec*, R.R.Q. 1981, c. C-48, r. 6, s. 2.01; the *Regulation respecting the indemnity fund of the Corporation professionnelle des administrateurs agréés du Québec*, R.R.Q. 1981, c. C-26, r. 12, s. 2.01; the *Regulation respecting the indemnity fund of the Corporation professionnelle des comptables généraux licenciés du Québec*, R.R.Q. 1981, c. C-26, r. 33, s. 2.01; and the *Regulation respecting trust accounting by bailiffs and the indemnity fund*

89. Le Bureau d'un ordre dont les membres sont appelés à détenir des sommes d'argent ou autres valeurs pour le compte de leurs clients doit, sous réserve des dispositions de la Loi sur le curateur public (chapitre C-81) relatives aux biens non réclamés, déterminer par règlement les modalités et les normes de réception, de garde et de disposition des sommes et valeurs ainsi détenues, ainsi que celles relatives à la tenue et à la vérification des comptes en fidéicommis, livres et registres de ces membres. Ce règlement doit établir un fonds d'indemnisation devant servir à rembourser les sommes d'argent ou autres valeurs utilisées par un professionnel à d'autres fins que celles pour lesquelles elles lui avaient été remises dans l'exercice de sa profession, et il doit en fixer les règles d'administration et de placement des montants le constituant.

Selon cet article, l'ordre professionnel détermine d'abord les conditions de réception, de garde et de disposition des sommes ou valeurs détenues par un professionnel, pour ensuite établir un fonds d'indemnisation. Il semble donc que l'on doive considérer le bien lors de sa réception et non après qu'il a été vendu, puisque le règlement établit les conditions de réception, de garde et de disposition du bien. Je ne prétends pas qu'il s'agisse de la seule interprétation raisonnable, mais telle pourrait à tout le moins être celle d'un tribunal administratif dûment constitué.

De plus, comme l'impact de l'art. 2.01 du règlement revêt une importance considérable au Québec, le tribunal administratif compétent devrait, en premier lieu, procéder à l'exercice interprétatif. En effet, tous les ordres professionnels du Québec soumis à l'art. 89 du *Code des professions* ont adopté des couvertures identiques (voir, outre le règlement qui nous occupe, le *Règlement sur le fonds d'indemnisation du Barreau du Québec*, R.R.Q. 1981, ch. B-1, r. 6, art. 1.01; le *Règlement sur le fonds d'indemnisation de l'Ordre des comptables agréés du Québec*, R.R.Q. 1981, ch. C-48, r. 6, art. 2.01; le *Règlement sur le fonds d'indemnisation de la Corporation professionnelle des administrateurs agréés du Québec*, R.R.Q. 1981, ch. C-26, r. 12, art. 2.01; le *Règlement sur le fonds d'indemnisation de la Corporation professionnelle des comptables généraux licenciés du Québec*, R.R.Q. 1981, ch. C-26, r. 33, art. 2.01; et le *Règlement sur la comptabilité en fidéicommis des huissiers de justice et sur le fonds d'indemnisation*

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of the Chambre des huissiers de justice du Québec, O.C. 153-99, (1999) 131 O.G. II, 220, s. 21).

In other statutes, the legislature has established indemnity plans significantly different in scope from those required of professional orders. I am referring, for example, to such statutes as the *Real Estate Brokerage Act*, R.S.Q., c. C-73.1 (*Regulation respecting the application of the Real Estate Brokerage Act*, O.C. 1863-93, (1993) 125 O.G. II, 7041, ss. 28 *et seq*.), and the *Act respecting the distribution of financial products and services*, R.S.Q., c. D-9.2 (*Regulation respecting the eligibility of a claim submitted to the Fonds d'indemnisation des services financiers*, O.C. 831-99, (1999) 131 O.G. II, 2091). In these statutes, the right to indemnification appears to have a broader scope. Under s. 155 of the *Real Estate Brokerage Act*, the government may, by regulation, determine "the conditions of admissibility of claims . . . made to . . . the Fonds d'indemnisation . . . according to whether the claim or compensation pertains to fraud or a fraudulent transaction or to a misappropriation of funds or other property which, under this Act, must be deposited in a trust account" (emphasis added). Section 274 of the *Act respecting the distribution of financial products and services* provides that "[t]he object of the fund is to administer the sums of money deposited with it to compensate the victims of fraud, fraudulent tactics or embezzlement for which a firm, an independent representative or an independent partnership, is responsible" (emphasis added).

Upon reading these other Quebec statutes, it becomes apparent that a regulation explicitly specifying that coverage extends to sums of money or other securities delivered to a notary and used for purposes other than those authorized by the client can be interpreted differently from one that protects against any dishonest transaction, whatever form it might take.

In some provinces, the scope of coverage is broader than in Quebec. Such is the case with lawyers in Alberta and British Columbia. Section 31(4) of the *Legal Profession Act*, S.B.C. 1998, c. 9, lists three requirements governing eligibility

de la Chambre des huissiers de justice du Québec, D. 153-99, (1999) 131 G.O. II, 454, art. 21).

56 Dans d'autres lois, le législateur a prévu des régimes d'indemnisation dont la portée diffère sensiblement de celle imposée aux ordres professionnels. Il y a lieu de se reporter, entre autres, à la *Loi sur le courtage immobilier*, L.R.Q., ch. C-73.1 (*Règlement d'application de la Loi sur le courtage immobilier*, D. 1863-93, (1993) 125 G.O. II, 9059, art. 28 et suiv.), et à la *Loi sur la distribution de produits et services financiers*, L.R.Q., ch. D-9.2 (*Règlement sur l'admissibilité d'une réclamation au Fonds d'indemnisation des services financiers*, D. 831-99, (1999) 131 G.O. II, 3072). Dans ces lois, les contours du droit à l'indemnisation semblent plus étendus. En effet, l'art. 155 de la *Loi sur le courtage immobilier* prévoit que le gouvernement peut déterminer, par règlement, « les conditions d'admissibilité des réclamations adressées au Fonds d'indemnisation [. . .] selon qu'il s'agit d'une fraude ou d'une opération malhonnête, d'une part, ou d'un détournement de fonds ou d'autres biens qui, en application de la présente loi, doivent être déposés dans un compte en fidéicommis, d'autre part » (je souligne). L'article 274 de la *Loi sur la distribution de produits et services financiers* prévoit que « [l]e Fonds a pour objet d'administrer les sommes d'argent qui y sont déposées pour indemniser les victimes de fraude, de manœuvres dolosives ou de détournement de fonds dont est responsable un cabinet, un représentant autonome ou une société autonome » (je souligne).

57 Il ressort de ces autres lois québécoises qu'un règlement qui spécifie explicitement que la couverture vise les sommes ou autres valeurs remises à un notaire et utilisées à des fins autres que celles autorisées par le client peut être interprété différemment d'un autre qui protège contre toute opération malhonnête quelle que soit la forme qu'elle puisse prendre.

58 Dans quelques provinces canadiennes, la portée de la couverture est plus large qu'au Québec. Ainsi en va-t-il pour les avocats en Alberta et en Colombie-Britannique. Le paragraphe 31(4) de la *Legal Profession Act*, S.B.C. 1998, ch. 9, énumère

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for compensation: "(a) money or other property was entrusted to or was otherwise received by a lawyer in the lawyer's capacity as a barrister and solicitor, (b) the lawyer misappropriated or wrongfully converted the money or other property, and (c) a person sustained a pecuniary loss as a result of that misappropriation or wrongful conversion" (emphasis added). Section 89(2) of the *Legal Profession Act*, R.S.A. 2000, c. L-8, provides that "[i]f a member misappropriates or wrongfully converts money or other property entrusted to or received by a member in the member's capacity as a barrister and solicitor and in the course of the member's practice as a barrister and solicitor, a person entitled to the money or other property may submit a claim to the Society for compensation from the Assurance Fund" (emphasis added). In Ontario, the differences from the Quebec plan are even more apparent. Section 51(5) of the *Law Society Act*, R.S.O. 1990, c. L.8, reads as follows: "Convocation in its absolute discretion may make grants from the Compensation Fund in order to relieve or mitigate loss sustained by any person in consequence of dishonesty on the part of any member in connection with such member's law practice or in connection with any trust of which the member was or is a trustee. . . ." (emphasis added). The eligibility requirements of these plans are more flexible than those of the funds governed by s. 89 of the *Professional Code*. The contrast serves to highlight the distinctively less generous nature of the Quebec plan at issue here.

trois conditions d'admissibilité à l'indemnisation : [TRADUCTION] « a) un avocat s'est vu confier ou a autrement reçu des sommes d'argent ou d'autres biens en sa qualité d'avocat, b) l'avocat a détourné ou s'est approprié illicitement les sommes d'argent ou d'autres biens, c) l'intéressé a subi une perte pécuniaire par suite de ce détournement ou de cette appropriation illicite » (je souligne). Le paragraphe 89(2) de la *Legal Profession Act*, R.S.A. 2000, ch. L-8, prévoit que [TRADUCTION] « si un membre détourne ou s'approprie illicitement des sommes d'argent ou d'autres biens qui lui ont été confiés ou qu'il a reçus en sa qualité d'avocat, l'intéressé peut présenter au Barreau une réclamation demandant une indemnisation sur le fonds d'assurance » (je souligne). En Ontario, les différences avec le régime québécois sont encore plus évidentes. Le paragraphe 51(5) de la *Loi sur la Société du Barreau*, L.R.O. 1990, ch. L.8, dispose : « Le Conseil peut, à son entière discrétion, accorder une indemnité provenant du Fonds d'indemnisation, afin de dédommager partiellement ou intégralement une personne d'un préjudice subi en raison de la malhonnêteté d'un membre dans l'exercice de sa profession ou à l'égard d'un mandat de fiducie qui lui avait été confié . . . » (je souligne). Les conditions d'admissibilité de ces régimes sont plus souples que celles des fonds régis par l'art. 89 du *Code des professions*. Le contraste met en relief le caractère distinct, moins généreux, du régime québécois ici en cause.

59 Moreover, it is far from certain that the meaning of the expression "or other securities" in the English version of s. 2.01 of the Regulation would be sufficiently broad to include immovable property.

Par ailleurs, il est loin d'être certain que la portée de l'expression « *or other securities* » dans la version anglaise de l'art. 2.01 du règlement soit assez large pour inclure un bien immeuble.

60 Finally, the approach and conclusion adopted by the majority mean that administrative tribunals are left no margin for interpretation. This is a case in which we are not concerned about the opinion of a specialized decision-maker. According to the majority, the words "sums of money or other securities" could have only one meaning, only one reasonable or correct interpretation. In other words, this would be another case in which the correctness standard has been confused with standards requiring a greater degree of deference. As I believe I have shown, the

Enfin, l'approche et la conclusion adoptées par les juges majoritaires font que la marge interprétative laissée au tribunal administratif est nulle. Il s'agit d'un cas où l'on ne se soucie pas de l'opinion du décideur spécialisé. Aux termes du jugement de la majorité, l'expression « sommes d'argent ou autres valeurs » ne pourrait avoir qu'un sens, qu'une seule interprétation raisonnable ou correcte. Autrement dit, ce serait un autre cas où la norme de la décision correcte se confondrait avec les normes imposant une plus grande retenue. Pourtant, comme

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words "sums of money or other securities" could very well designate the property as it was characterized upon delivery. Neither the analysis nor the conclusion made is in keeping with the strong privative clause, the expertise of the Committee's members, the nature of the issue, which is a simple claim for indemnification, or the purpose of the Regulation, which has its origins in s. 89 of the *Professional Code*.

In my analysis, I have been careful to look to this Court's case law on the standard of review for guidance. According to the elements of the pragmatic and functional approach to which I alluded earlier, there can be no question that the decision is central to the Committee's jurisdiction and, consequently, that the Committee has a wide margin for interpretation. Moreover, the parties agreed that the applicable standard was one of the greatest deference.

In my opinion, it was not unreasonable for the Committee to conclude that the property was not delivered to the notary and that he did not use it for purposes other than those for which it had been delivered to him. This is not a case in which the Committee's decision has no rational basis, nor is it a case in which an error is apparent on the face of the record. In other words, it is not unreasonable to conclude that the unlawful act committed by Mr. Filiatrault is more properly characterized as fraud, a dishonest transaction or a fraudulent tactic than as a misappropriation of funds, and that only a misappropriation of funds gives rise to indemnification under the fund. It is far from obvious that the "*escroquerie*" (swindle), as the Court of Appeal called it, perpetrated by Mr. Filiatrault would fall within [TRANSLATION] "the scope of the right to indemnification" under s. 89 of the *Professional Code* and s. 2.01 of the Regulation.

II. Role of the Court in Judicial Review

As I have already mentioned, even if I had concluded that the decision was unreasonable, I would still have referred the case back to the Committee so

je crois l'avoir démontré, l'expression « sommes d'argent ou autres valeurs » peut très bien désigner le bien tel qu'il peut être caractérisé lors de la remise. Ni l'analyse de la disposition en cause ni la conclusion retenue ne tiennent compte de la clause privative rigoureuse, de l'expertise des membres du Comité, de la nature de la question, qui est une simple demande d'indemnisation, ou de l'objet du règlement, qui prend sa source dans l'art. 89 du *Code des professions*.

61 Dans mon analyse, je prends soin d'utiliser comme point de repère la jurisprudence de la Cour sur la norme de contrôle. Selon les éléments de l'approche pragmatique et fonctionnelle auxquels j'ai fait allusion plus haut, il est certain que la décision se situe au cœur de la compétence du Comité et qu'en conséquence celui-ci bénéficie, en principe, d'une large marge interprétative. Les parties ont d'ailleurs soutenu que la norme applicable est celle exigeant la plus grande retenue.

62 J'estime donc qu'il n'est pas déraisonnable pour le Comité de conclure que l'immeuble n'a pas été remis au notaire et que ce dernier ne l'a pas utilisé à d'autres fins que celles pour lesquelles il lui aurait été remis. Il ne s'agit ni d'un cas où la décision du Comité serait dépourvue de fondement rationnel, ni d'un cas où une erreur paraîtrait au vu du dossier. En d'autres termes, il n'est pas déraisonnable de soutenir que l'acte illicite commis par le notaire Filiatrault s'apparente davantage à une fraude, à une opération malhonnête ou à une manœuvre dolosive qu'à un détournement de fonds et que seul ce dernier comportement ouvre droit à indemnisation par le fonds. Il n'est donc pas évident que, pour reprendre l'expression de la Cour d'appel, « [l']escroquerie » concoctée par le notaire Filiatrault entre « dans le cadre du droit à l'indemnisation » prévu à l'art. 89 du *Code des professions* et à l'art. 2.01 du règlement.

II. Le rôle du tribunal en matière de révision judiciaire

63 Comme je l'ai mentionné ci-dessus, même si j'avais conclu que la décision était déraisonnable, j'aurais été d'avis de retourner le dossier au Comité

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that it could render a decision on the aspects of the case it had not yet ruled on.

64 I have difficulty conceiving how the Court could, without usurping the function of the Committee, substitute its own judgment for that of the Committee with respect to the meaning of "sums of money or other securities". There is no question that the Superior Court has very limited powers to review decisions that are central to the jurisdiction of an administrative tribunal. The appellant entitled his application [TRANSLATION] "application for mandamus, issuance of an order for evocation and judicial review". This is plainly not a case of mandamus. Evocation and judicial review are an exercise of the Superior Court's supervisory power over administrative tribunals. This power is based on art. 846 of the *Code of Civil Procedure*, R.S.Q., c. C-25. LeBel J.A. (as he then was) defined the scope and limits of judicial review in *Guilde des employés de Super Carnaval (Lévis) v. Tribunal du travail*, [1986] R.J.Q. 1556 (C.A.), at p. 1558:

> [TRANSLATION] As fundamental and broad as this jurisdiction [the superintending and reforming power of the Superior Court] may be, it nevertheless remains limited to reviewing the activities of lower tribunals and administrative bodies to ensure their regularity and legality and to uphold fundamental justice. A higher court will intervene to the extent required, but no more. The court may not assume the functions of lower tribunals. Evocation is an appeal to the general jurisdiction of the Superior Court to correct an irregularity or injustice. It is not a substitution of the Superior Court for the body or tribunal subject to judicial review. To conceive of judicial review as an instrument for substituting the Superior Court for lower tribunals would violate the limits of the Court's role and impinge upon the jurisdictional autonomy of entities subject to judicial review, as confirmed in recent case law of the Supreme Court of Canada. [Emphasis added.]

See also *Pelletier v. Cour du Québec*, [2002] R.J.Q. 2215 (C.A.); *Gardner v. Air Canada*, J.E. 99-1143 (C.A.); *Panneaux Vicply inc. v. Guindon*, J.E. 98-109 (C.A.).

65 Consequently, once it has been determined that an administrative tribunal has exceeded its jurisdiction by rendering an unreasonable decision on

pour qu'il statue sur les aspects du dossier sur lesquels il ne s'est pas prononcé.

En effet, je conçois difficilement comment la Cour peut, sans usurper la fonction du Comité, se substituer à lui quant au sens à donner à l'expression « sommes d'argent ou autres valeurs ». Il est acquis que la Cour supérieure dispose d'un pouvoir d'intervention très limité en matière de révision de décisions qui se situent au cœur de la compétence d'un tribunal administratif. L'appelant a intitulé sa demande « requête en mandamus, émission d'ordonnance en évocation et révision judiciaire ». Il ne s'agit pas, de toute évidence, d'un *mandamus*. Par ailleurs, l'évocation et la révision judiciaire font appel au pouvoir de contrôle par la Cour supérieure des tribunaux administratifs. Ce pouvoir se fonde sur l'art. 846 du *Code de procédure civile*, L.R.Q., ch. C-25. Le juge LeBel (maintenant juge de notre Cour) a bien circonscrit l'étendue et les limites du contrôle judiciaire dans *Guilde des employés de Super Carnaval (Lévis) c. Tribunal du travail*, [1986] R.J.Q. 1556 (C.A.), p. 1558 :

> Si fondamentale et si étendue que soit cette juridiction [pouvoir de contrôle et de surveillance de la Cour supérieure], elle demeure cependant un contrôle de régularité, de légalité et de protection de la justice fondamentale dans l'activité des tribunaux inférieurs et des corps administratifs. La Cour supérieure interviendra autant que nécessaire, mais pas davantage. Elle ne saurait s'arroger les fonctions propres des tribunaux inférieurs. Évocation veut dire appel à la juridiction générale de la Cour supérieure, pour corriger une irrégularité ou une injustice. Elle ne signifie pas la substitution de la Cour supérieure au corps ou au tribunal placé sous son contrôle judiciaire. Une telle conception du contrôle judiciaire comme instrument de substitution de la Cour supérieure au tribunal inférieur violerait les limites de son rôle et ne respecterait pas l'autonomie juridictionnelle des organismes soumis au contrôle judiciaire, que réaffirmait la jurisprudence récente de la Cour suprême du Canada. [Je souligne.]

Voir également *Pelletier c. Cour du Québec*, [2002] R.J.Q. 2215 (C.A.); *Gardner c. Air Canada*, J.E. 99-1143 (C.A.); *Panneaux Vicply inc. c. Guindon*, J.E. 98-109 (C.A.).

Par conséquent, une fois jugé que le décideur administratif a compromis sa juridiction en rendant une décision déraisonnable et qu'il subsiste

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a matter within its jurisdiction, the case must, in theory, be sent back to it: *Guilde*, *supra*; *Guindon*, *supra*; *Commissaire à la déontologie policière v. Bourdon*, [2000] R.J.Q. 2239 (C.A.); *Comité de déontologie policière v. Millette*, J.E. 2000-591 (C.A.); *Compagnie des transformateurs Philips Ltée v. Métallurgistes unis d'Amérique, local 7812*, [1985] C.A. 684.

A court of law may not substitute its decision for that of an administrative decision-maker lightly or arbitrarily. It must have serious grounds for doing so. A court of law may render a decision on the merits if returning the case to the administrative tribunal would be pointless: *Guindon*, *supra*; *Guilde*, *supra*. Such is also the case when, once an illegality has been corrected, the administrative decision-maker's jurisdiction has no foundation in law: *Guilde*, *supra*. The courts may also intervene in cases where, in light of the circumstances and the evidence in the record, only one interpretation or solution is possible, that is, where any other interpretation or solution would be unreasonable: *Matane (Ville de) v. Fraternité des policiers et pompiers de la Ville de Matane inc.*, [1987] R.J.Q. 315 (C.A.). It is also accepted that a case may not be sent back to the competent authority if it is no longer fit to act, such as in cases where there is a reasonable apprehension of bias: *Guindon*, *supra*; *Ordre des audioprothésistes du Québec v. Chanteur*, [1996] R.J.Q. 539 (C.A.); *Transformateurs Philips*, *supra*; *Guilde*, *supra*.

This rule is not enshrined in any statute. Nevertheless, throughout Canada, judicial review is founded on reviewing courts' deference to the expertise and discretion of administrative tribunals. In *Judicial Review of Administrative Action in Canada* (2003), authors D. J. M. Brown and J. M. Evans make the following comments on the role of a reviewing court (at para. 5:2210):

> Where the error is jurisdictional and is of such a nature that it cannot be corrected, an order remitting the matter to the tribunal would obviously not be appropriate. Where the error is made within jurisdiction, however, or where it involves a breach of procedural fairness, and notwithstanding that once a decision is quashed it is open

une matière relevant de sa compétence, le dossier doit, en principe, lui être retourné : *Guilde*, précité; *Guindon*, précité; *Commissaire à la déontologie policière c. Bourdon*, [2000] R.J.Q. 2239 (C.A.); *Comité de déontologie policière c. Millette*, J.E. 2000-591 (C.A.); *Compagnie des transformateurs Philips Ltée c. Métallurgistes unis d'Amérique, local 7812*, [1985] C.A. 684.

66 Une cour de justice ne peut substituer sa décision à celle d'un décideur administratif à la légère ou de manière arbitraire, sans justification sérieuse. Ainsi, un tribunal judiciaire peut statuer sur le fond si le renvoi au tribunal administratif s'avère inutile : *Guindon*, précité; *Guilde*, précité. C'est aussi le cas lorsque, une fois l'illégalité corrigée, le décideur administratif est sans compétence, faute d'assise juridique : *Guilde*, précité. Il en va de même lorsque, suivant les circonstances et la preuve au dossier, une seule interprétation ou solution est envisageable, c'est-à-dire que toute autre interprétation ou solution serait déraisonnable : *Matane (Ville de) c. Fraternité des policiers et pompiers de la Ville de Matane inc.*, [1987] R.J.Q. 315 (C.A.). Par ailleurs, il est également acquis que le dossier ne sera pas renvoyé à l'autorité compétente si celle-ci n'est plus en état d'agir, par exemple, s'il y a crainte raisonnable de partialité : *Guindon*, précité; *Ordre des audioprothésistes du Québec c. Chanteur*, [1996] R.J.Q. 539 (C.A.); *Transformateurs Philips*, précité; *Guilde*, précité.

67 Cette règle n'est pas enchâssée dans une loi. Il demeure cependant que, partout au Canada, le contrôle judiciaire est fondé sur le respect, par les tribunaux de révision, de l'expertise et de la discrétion des tribunaux administratifs. Les auteurs D. J. M. Brown et J. M. Evans, *Judicial Review of Administrative Action in Canada* (2003), commentent ainsi le rôle du tribunal siégeant en révision judiciaire (par. 5:2210) :

> [TRADUCTION] S'il s'agit d'une erreur juridictionnelle d'une nature telle qu'elle ne peut être corrigée, il ne conviendrait manifestement pas d'ordonner de renvoyer l'affaire au tribunal administratif. Par contre, si celui-ci a commis une erreur dans l'exercice de sa compétence ou s'il y a eu violation de l'équité procédurale, même si,

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to the decision-maker to proceed anew, the appropriate remedy may be to order that the matter be remitted for redetermination. . . . Moreover, even where a court has the express power to substitute its decision for that of an agency, as in the case of an appeal from an administrative decision, the court's lack of expertise may warrant an order remitting the matter to the agency for redetermination.

This Court generally follows this rule (*Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54). I see no reason to depart from it here.

68 None of the exceptions that would allow a court to substitute its opinion for that of the administrative tribunal applies here. On the contrary, everything weighs in favour of remitting the case to the Committee, since the Committee has not ruled on an issue, has the legal authority and necessary expertise to make a decision, and was not obliged to rule on this issue when it considered the case, as it had already given three reasons for refusing the claim. Finally, the fact that a considerable amount of time has passed since the Committee rendered its decision is not in my view an exceptional circumstance that would warrant not remitting the case to the Committee. The delay is inherent to the judicial process. If this delay were considered exceptional, all appeals to the Supreme Court, and perhaps all appeals to the Court of Appeal as well, would place the parties in exceptional circumstances.

69 There is another ground for remitting the present case. There is no special reason that would justify having the Court award compensation or determine the outcome of the claim. Such a conclusion would put us outside the boundaries of judicial review. The Court is not asked to consider the claim itself; the Court's function is limited to reviewing the legality of the Committee's decision. The task of examining the case in its entirety and reaching a decision is left to the administrative decision-maker.

III. Conclusion

70 To sum up, sympathy for the victim cannot in my view result in a casting aside of the rules of administrative law. When a tribunal acts within the

une fois la décision annulée, il est loisible au décideur d'entamer de nouvelles procédures, la réparation appropriée peut consister à ordonner le renvoi de l'affaire pour réexamen. [. . .] De plus, même si un tribunal judiciaire a le pouvoir exprès de substituer sa décision à celle d'un organe administratif, comme dans le cas d'un appel d'une décision administrative, le fait qu'il ne dispose pas d'expertise voulue peut justifier une ordonnance portant renvoi de l'affaire pour réexamen.

La Cour suit d'ailleurs habituellement cette règle (*Nouvelle-Écosse (Workers' Compensation Board) c. Martin*, [2003] 2 R.C.S. 504, 2003 CSC 54). Je ne vois pas de raison d'y déroger ici.

En l'espèce, aucune des exceptions permettant à une cour de substituer son opinion à celle du tribunal administratif ne trouve application. Au contraire, tout milite en faveur d'un renvoi parce que le Comité n'a pas statué sur une question, qu'il dispose de l'assise juridique et de l'expertise nécessaire pour se prononcer et qu'il n'était pas dans l'obligation de se prononcer sur cette question lorsqu'il a étudié le dossier puisqu'il avait déjà trois motifs fondant son refus. Finalement, le fait qu'un délai se soit écoulé depuis le moment où le Comité a prononcé sa décision ne me paraît pas être une circonstance exceptionnelle justifiant de ne pas retourner le dossier au Comité. Il s'agit du délai inhérent au processus judiciaire. Si le délai était considéré comme une circonstance exceptionnelle, les pourvois à la Cour suprême, et peut-être aussi ceux présentés à la Cour d'appel, placeraient les parties en situation d'exception.

Le renvoi du dossier s'impose pour une autre raison. En effet, aucune justification particulière n'autorise la Cour à prononcer une condamnation pécuniaire ni à dicter le sort de la réclamation. Une telle conclusion déborde ici le cadre de la révision judiciaire. La Cour n'est pas saisie de la réclamation elle-même; sa fonction est limitée à la révision de la légalité de la décision du Comité. La tâche d'examiner le dossier dans son entier et de statuer revient au décideur administratif.

III. Conclusion

En résumé, je ne puis me convaincre que la sympathie due à une victime puisse donner lieu à un bouleversement des règles du droit administratif.

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limits of its jurisdiction, the reviewing court must show deference and accept that a regulatory provision may have more than one interpretation. In the present case, the Committee could have provided more detailed reasons, but that cannot be used as a pretext for having this Court substitute its judgment for that of the Committee. The importance of the provision to be interpreted militates in favour of remitting the case to the tribunal. It is not the place of this Court to dictate to legislatures the extent of the protection clients of professionals should enjoy.

Dans un cas où un tribunal agit dans les limites de sa compétence, la cour de révision doit faire preuve de déférence et accepter qu'une disposition réglementaire puisse recevoir plus d'une interprétation. En l'espèce, le Comité aurait pu fournir des motifs plus élaborés, mais cette faille ne peut servir de prétexte pour que notre Cour se substitue à lui. L'importance de la disposition à interpréter devrait militer en faveur d'un renvoi. Le rôle de la Cour n'est pas de dicter aux législatures l'étendue de la protection dont les clients des professionnels doivent bénéficier.

ANNEX

Relevant Legislation

Professional Code, R.S.Q., c. C-26

89. The Bureau of an order whose members are called upon to hold sums of money or other securities for the account of their clients must, subject to the provisions of the Public Curator Act (chapter C-81) pertaining to unclaimed property, determine by regulation the terms, conditions and standards for receipt, custody and disposition of the sums of money and securities so held, and the terms, conditions and standards relating to the keeping and auditing of trust accounts, books and registers of such members. The regulation shall establish an indemnity fund to be used to repay the amounts of money or other securities used by a professional for purposes other than those for which they had been delivered to him in the practice of his profession and it shall fix the rules of administration and of investment of the sums of money making up the fund.

Regulation respecting the indemnity fund of the Chambre des notaires du Québec, R.R.Q. 1981, c. N-2, r. 8

2.01. The Bureau shall establish an indemnity fund to be used to reimburse the sums of money or other securities used by a notary for purposes other than those for which they had been delivered to him in the practice of his profession.

4.03. The Administrative Committee, upon the recommendation of the committee, shall decide whether it is expedient to allow a claim in whole or in part and, where necessary, shall fix the indemnity. Its decision is final.

4.04. The maximum indemnity payable from the fund is established at 300 000 $ for the total claims against the same notary. . . .

ANNEXE

Dispositions législatives pertinentes

Code des professions, L.R.Q., ch. C-26

89. Le Bureau d'un ordre dont les membres sont appelés à détenir des sommes d'argent ou autres valeurs pour le compte de leurs clients doit, sous réserve des dispositions de la Loi sur le curateur public (chapitre C-81) relatives aux biens non réclamés, déterminer par règlement les modalités et les normes de réception, de garde et de disposition des sommes et valeurs ainsi détenues, ainsi que celles relatives à la tenue et à la vérification des comptes en fidéicommis, livres et registres de ces membres. Ce règlement doit établir un fonds d'indemnisation devant servir à rembourser les sommes d'argent ou autres valeurs utilisées par un professionnel à d'autres fins que celles pour lesquelles elles lui avaient été remises dans l'exercice de sa profession, et il doit en fixer les règles d'administration et de placement des montants le constituant.

Règlement sur le fonds d'indemnisation de la Chambre des notaires du Québec, R.R.Q. 1981, ch. N-2, r. 8

2.01. Le Bureau établit un fonds d'indemnisation devant servir à rembourser les sommes d'argent ou autres valeurs utilisées par un notaire à d'autres fins que celles pour lesquelles elles lui avaient été remises dans l'exercice de sa profession.

4.03. Le Comité administratif, sur recommandation du comité, décide s'il y a lieu de faire droit en tout ou en partie à une réclamation et, le cas échéant, en fixe l'indemnité. Sa décision est définitive.

4.04. L'indemnité maximale payable à même le fonds est établie à la somme de 300 000 $ pour le total des réclamations contre le même notaire. . .

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Notarial Act, R.S.Q., c. N-2

2. (1) Notaries are legal practitioners and public officers whose chief duty is to draw up and execute deeds and contracts to which the parties are bound or desire to give the character of authenticity attached to acts of the public authority and to assure the date thereof.

4. (1) Every notary shall be called "notary" and his official signature shall include the word "notary" following his usual signature. . . .

15. The chief duties of every notary, in addition to those required of him by this Act, shall be:

. . .

(*b*) to observe in the practice of his profession the rules of the most scrupulous honesty and impartiality;

Code of ethics of notaries, R.R.Q. 1981, c. N-2, r. 3

3.01.05. A notary must give disinterested, frank and honest advice to his clients or parties.

3.03.04. Unless he has sound and reasonable grounds therefor, a notary may not cease to act for the account of a client. The following shall, in particular, constitute sound and reasonable grounds:

(*a*) loss of the client's confidence;

(*b*) the fact that the notary is in a situation of conflict of interest or in a situation such that his professional independence could be called in question;

(*c*) inducement by the client to perform illegal, unfair and fraudulent acts.

3.04.01. A notary must subordinate his personal interest to that of his client.

4.02.01. In addition to those referred to in sections 57 and 58 of the Professional Code, the following acts are derogatory to the dignity of the profession:

. . .

(*b*) misappropriating or using for purposes other than those authorized by the client the monies or securities entrusted to the notary in the practice of his profession;

Loi sur le notariat, L.R.Q., ch. N-2

2. 1. Les notaires sont des praticiens du droit et des officiers publics dont la principale fonction est de rédiger et de recevoir les actes et contrats auxquels les parties doivent ou veulent faire donner le caractère d'authenticité qui s'attache aux actes de l'autorité publique et en assurer la date.

4. 1. Tout notaire s'intitule « notaire » et sa signature officielle doit comprendre, à la suite de sa signature habituelle, le mot « notaire ».

15. Les principaux devoirs d'un notaire, outre ceux qui lui sont imposés par la présente loi, sont :

. . .

b) d'observer, dans l'exercice de sa profession, les règles de la probité et de l'impartialité la plus scrupuleuse;

Code de déontologie des notaires, R.R.Q. 1981, ch. N-2, r. 3

3.01.05. Le notaire doit agir comme conseiller désintéressé, franc et honnête de ses clients ou des parties.

3.03.04. Le notaire ne peut, sauf pour un motif juste et raisonnable, cesser d'agir pour le compte d'un client. Constituent notamment des motifs justes et raisonnables :

a) la perte de la confiance du client;

b) le fait que le notaire soit en situation de conflit d'intérêts ou dans un contexte tel que son indépendance professionnelle pourrait être mise en doute;

c) l'incitation, de la part du client, à l'accomplissement d'actes illégaux, injustes et frauduleux.

3.04.01. Le notaire doit subordonner son intérêt personnel à celui de son client.

4.02.01. En outre de ceux mentionnés aux articles 57 et 58 du Code des professions, sont dérogatoires à la dignité de la profession, les actes suivants :

. . .

b) le détournement ou l'emploi pour des fins autres que celles indiquées par le client de deniers ou valeurs confiés au notaire dans l'exercice de sa profession;

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Notaries Act, R.S.Q., c. N-3

10. A notary is a public officer and takes part in the administration of justice. A notary is also a legal adviser.

The mission of a notary, in his or her capacity as a public officer, is to execute acts which the parties wish or are required to endow with the authenticity attaching to acts of public authority, to provide such acts with a fixed date, and to keep all acts executed *en minute* in his or her notarial records and issue copies of or extracts from them.

11. In his or her role as a public officer, a notary is duty-bound to act impartially and to advise all parties to an act which the parties wish or are required to endow with authenticity.

Code of ethics of notaries, (2002) 134 O.G. II, 4561

18. No notary shall use for his own purposes the monies, securities, or other property entrusted to him in the practice of his profession. In particular, he shall not use them as a personal loan or security, or invest them to his own advantage, whether in his name, through an intermediary, or on behalf of a legal person in which he owns an interest.

30. No notary may be in a situation of conflict of interest.

A notary is in a situation of conflict of interest where the interests are such that he may be inclined to give preference to some of them, or his judgment or loyalty may be unfavourably affected.

As soon as the notary finds himself in a conflict of interest, he shall cease to perform his duties.

Civil Code of Québec, S.Q. 1991, c. 64

1422. A contract that is null is deemed never to have existed.

In such a case, each party is bound to restore to the other the prestations he has received.

1617. Damages which result from delay in the performance of an obligation to pay a sum of money consist of interest at the agreed rate or, in the absence of any agreement, at the legal rate.

The creditor is entitled to the damages from the date of default without having to prove that he has sustained any injury.

Loi sur le notariat, L.R.Q., ch. N-3

10. Le notaire est un officier public et collabore à l'administration de la justice. Il est également un conseiller juridique.

En sa qualité d'officier public, le notaire a pour mission de recevoir les actes auxquels les parties doivent ou veulent faire donner le caractère d'authenticité qui s'attache aux actes de l'autorité publique, d'en assurer la date et, s'il s'agit d'actes reçus en minute, d'en conserver le dépôt dans un greffe et d'en donner communication en délivrant des copies ou extraits de ces actes.

11. Dans le cadre de sa mission d'officier public, le notaire a le devoir d'agir avec impartialité et de conseiller toutes les parties à un acte auquel elles doivent ou veulent faire donner le caractère d'authenticité.

Code de déontologie des notaires, (2002) 134 G.O. II, 5969

18. Le notaire ne peut utiliser pour ses fins personnelles les fonds, valeurs et autres biens qui lui sont confiés dans l'exercice de sa profession. Ainsi, il ne peut notamment les utiliser comme emprunt personnel ou en garantie ni les placer à son profit, soit en son nom personnel, soit par personne interposée ou pour le compte d'une personne morale dans laquelle il détient un intérêt.

30. Le notaire ne peut être en situation de conflits d'intérêts.

Il est en situation de conflits d'intérêts lorsque les intérêts sont tels qu'il peut être porté à préférer certains d'entre eux et que son jugement ou sa loyauté peuvent être défavorablement affectés.

Dès qu'il constate qu'il se trouve dans une situation de conflits d'intérêts, le notaire doit cesser d'exercer ses fonctions.

Code civil du Québec, L.Q. 1991, ch. 64

1422. Le contrat frappé de nullité est réputé n'avoir jamais existé.

Chacune des parties est, dans ce cas, tenue de restituer à l'autre les prestations qu'elle a reçues.

1617. Les dommages-intérêts résultant du retard dans l'exécution d'une obligation de payer une somme d'argent consistent dans l'intérêt au taux convenu ou, à défaut de toute convention, au taux légal.

Le créancier y a droit à compter de la demeure sans être tenu de prouver qu'il a subi un préjudice.

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A creditor may stipulate, however, that he will be entitled to additional damages, provided he justifies them.

1619. An indemnity may be added to the amount of damages awarded for any reason, which is fixed by applying to the amount of the damages, from either of the dates used in computing the interest on them, a percentage equal to the excess of the rate of interest fixed for claims of the State under section 28 of the Act respecting the Ministère du Revenu over the rate of interest agreed by the parties or, in the absence of agreement, over the legal rate.

1701. In the case of total loss or alienation of property subject to restitution, the person liable to make the restitution is bound to return the value of the property, considered when it was received, or at the time of its loss or alienation, or at the time of its restitution, whichever value is the lowest, or, if the person is in bad faith or if the restitution is due to his fault, whichever value is the highest.

If the property has perished by superior force, however, the debtor is exempt from making restitution, but he shall then assign to the creditor, as the case may be, the indemnity he has received for the loss of the property or, if he has not already received it, the right to the indemnity. If the debtor is in bad faith or if the restitution is due to his fault, he is not exempt from making restitution unless the property would also have perished if it had been in the hands of the creditor.

Appeal allowed with costs, DESCHAMPS J. *dissenting.*

Solicitors for the appellant: Duquette & Closson-Duquette, Sainte-Thérèse, Quebec.

Solicitors for the respondent and the intervener: Joli-Cœur, Lacasse, Geoffrion, Jetté, Saint-Pierre, Montréal.

Le créancier peut, cependant, stipuler qu'il aura droit à des dommages-intérêts additionnels, à condition de les justifier.

1619. Il peut être ajouté aux dommages-intérêts accordés à quelque titre que ce soit, une indemnité fixée en appliquant à leur montant, à compter de l'une ou l'autre des dates servant à calculer les intérêts qu'ils portent, un pourcentage égal à l'excédent du taux d'intérêt fixé pour les créances de l'État en application de l'article 28 de la Loi sur le ministère du Revenu sur le taux d'intérêt convenu entre les parties ou, à défaut, sur le taux légal.

1701. En cas de perte totale ou d'aliénation du bien sujet à restitution, celui qui a l'obligation de restituer est tenu de rendre la valeur du bien, considérée au moment de sa réception, de sa perte ou aliénation, ou encore au moment de la restitution, suivant la moindre de ces valeurs; mais s'il est de mauvaise foi ou si la cause de restitution est due à sa faute, la restitution se fait suivant la valeur la plus élevée.

Le débiteur est cependant dispensé de toute restitution si le bien a péri par force majeure, mais il doit alors céder au créancier, le cas échéant, l'indemnité qu'il a reçue pour cette perte, ou le droit à cette indemnité s'il ne l'a pas déjà reçue; lorsque le débiteur est de mauvaise foi ou que la cause de restitution est due à sa faute, il n'est dispensé de la restitution que si le bien eût également péri entre les mains du créancier.

Pourvoi accueilli avec dépens, la juge DESCHAMPS *est dissidente.*

Procureurs de l'appelant : Duquette & Closson-Duquette, Sainte-Thérèse, Québec.

Procureurs de l'intimée et de l'intervenant : Joli-Cœur, Lacasse, Geoffrion, Jetté, Saint-Pierre, Montréal.

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TAB 6

Federal Court Cour fédérale

Date: 20130404

Docket: T-1045-11

Citation: 2013 FC 342

2013 FC 342 (CanLII)

Toronto, Ontario, April 4, 2013

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

PICTOU LANDING BAND COUNCIL
AND MAURINA BEADLE

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Pictou Landing Band Council and Ms. Maurina Beadle apply for judicial review of the decision of Ms. Barbara Robinson, Manager, Social Programs, Aboriginal Affairs and Northern Development Canada (AANDC), not to reimburse the Pictou Landing Band Council (PLBC) for in-home health care to one of its members beyond a normative standard of care identified by Ms. Robinson.

[2] The Applicants also request that the Court make an order pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], directing the Respondent to reimburse the PLBC for exceptional costs incurred providing home care to Jeremy Meawasige and his mother, Ms. Beadle, from May 27, 2010 to the present.

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[3] I have decided to grant the application for judicial review because I have determined Jordan's Principle is applicable in this case. Having decided as I have, I need not consider the application for an order for reimbursement pursuant to section 24(1) of the *Charter*.

[4] My reasons follow.

Background

[5] The Pictou Landing Band Council is the elected government of the Pictou Landing First Nation and makes governance decisions concerning its members, including the allocation of funding received from the federal government through block contribution agreements. This includes funding from AANDC and Health Canada to deliver continuing care services to members in need on the Pictou Landing Reserve.

[6] The other Applicant is Ms. Maurina Beadle, a 55 year-old member of the Pictou Landing First Nation. Her son, Jeremy Meawasige, is a teenager with multiple disabilities and high care needs. He has been diagnosed with hydrocephalus, cerebral palsy, spinal curvature and autism.

Jeremy can only speak a few words and cannot walk unassisted. He is incontinent and needs total personal care including showering, diapering, dressing, spoon feeding, and all personal hygiene needs. He can become self-abusive at times, and needs to be restrained for his own safety.

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[7] Jeremy lives on the Pictou Landing Indian Reserve. Ms. Beadle, his mother, is Jeremy's primary caregiver and she was able to care for her son in the family home without government support or assistance until Ms. Beadle suffered a stroke in May 2010.

[8] After her stroke, Ms. Beadle was unable to continue to care for Jeremy without assistance. She was hospitalized for several weeks, and when she was released, required a wheelchair and assistance with her own personal care. The PLBC immediately started providing 24 hour care for both Ms. Beadle and Jeremy in their home. Between May 27, 2010 and March 31, 2011, the PLBC spent $82,164.00 on in-home care services for Ms. Beadle and Jeremy.

[9] The PLBC continued to provide home care support to Ms. Beadle and Jeremy. In October 2010, the Pictou Landing Health Centre arranged for an assessment of the family's needs. Since that time, the Health Centre has provided the family with in-home services as recommended by the assessment. From Monday to Friday, a personal care worker is present from 8:30 a.m. to 11:30 p.m. Over the weekends, there is 24 hour care. This level of care meets Jeremy's need for 24-hour care, less what his family can provide. The family providers are Ms. Beadle, to the degree she has recovered from her stroke and Jeremy's older brother, Jonavan, who attends to assist.

[10] Ms. Beadle and her son Jeremy have a deep bond with each other. His mother is often the only person who can understand his communication and needs. She spent many hours training him to walk and helping him with special exercises. She discovered his love of music and sings to him when he is upset or does not want to cooperate. Her voice calms him and can make him desist in self-abusive behaviour. She takes him on the pow-wow trail, travelling to communities where pow-wows are held. She says Jeremy is happiest when he is dancing with other First Nations people and singing to traditional music. Jeremy has never engaged in self-abusive behaviour on those occasions.

[11] By February 2011, the costs associated with caring for the family were approximately $8,200 per month. This represented nearly 80% of the PLBC's total monthly budget for personal and home care services funded by AANDC under the Assisted Living Program (ALP) and by Health Canada under the Home and Community Care Program (HCCP).

The Assisted Living Program and the Home and Community Care Program

[12] The ALP is administered by the PLBC and has both an institutional and in-home care component. The ALP provides funding for non-medical, social support services to seniors, adults with chronic illness, and children and adults with disabilities (mental and physical) living on reserve and includes such things as attendant care, housekeeping, laundry, meal preparation, and non-medical transportation.

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[13] The Home and Community Care Program is also administered by the PLBC. Under the HCCP, the PLBC is required to prioritize and fund essential services before support services and Health Canada spells out what falls under each of these headings. The HCCP provides funding to assist with delivery of basic in-home health care services which require a licensed/certified health practitioner or the supervision of such a person. The PLBC determines how the contribution agreement dollars for the HCCP are spent in the provision of basic in-home health care services.

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[14] The ALP and the HCCP are programs designed to complement each other, but not to provide duplicate funding for the same service. If a type of care, such as respite care, is already being paid for by one of the programs, it will not be an eligible expense under the other.

[15] Under the current block contribution agreement between the PLBC and Aboriginal Affairs and Northern Development Canada [AANDC] the PLBC receives $55,552.00 for funding eligible ALP services. Under the block contribution agreement between PLBC and Health Canada, the PLBC receives $75,364.00.

Request for Funding

[16] On February 16, 2011, Ms. Philippa Pictou, the Health Director at the Pictou Landing First Nation Health Centre contacted Ms. Susan Ross, the Atlantic Regional Home and Community Care Coordinator at Health Canada. Ms. Pictou expressed her opinion that Jeremy's case met the definition of Jordan's Principle and asked Ms. Ross to participate in case conferencing regarding his needs.

[17] Jordan's Principle was developed in response to a sad case involving a severely disabled First Nation child who remained in a hospital for over two years due to jurisdictional disputes between different levels of government over payment of home care on his First Nation community. The child never had the opportunity to live in a family environment because he died before the dispute could be resolved. Jordan's Principle aims to prevent First Nations children from being denied prompt access to services because of jurisdiction disputes between different levels of government.

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[18] Jordan's Principle is a child-first principle that says the government department first contacted for a service readily available off reserve must pay for it while pursuing repayment of expenses. Jordan's Principle is a mechanism to prevent First Nations children from being denied equal access to benefits or protections available to other Canadians as a result of Aboriginal status.

[19] On February 28, 2011, a case conference was held regarding Jeremy's needs. In attendance were provincial care assessors from the Nova Scotia Department of Health and Wellness, the Pictou Landing Community Health Nurse, representatives of the PLBC, and Ms. Ross and Ms. Deborah Churchill on behalf of Canada.

[20] On April 19, 2011, a second case conference took place to discuss Jeremy's needs. Because Ms. Pictou had earlier requested that Jeremy's situation be considered a Jordan's Principle case, Ms. Barbara Robinson, the Jordan's Principal focal point for AANDC, was asked to participate. Both Ms. Ross and Ms. Robinson attended the second case conference, as did Mr. Troy Lees, a civil servant with the Nova Scotia provincial Department of Community Services.

[21] At the second case conference, Mr. Lees explained what the province would provide to a child with similar needs and circumstances off reserve. He explained there was a departmental directive that a family living off reserve could receive up to a maximum of $2,200 per month in respite services. Mr. Lees also stated that the province would not provide 24-hour care in the home by funding the equivalent to the costs of institutional care.

[22] On May 12, 2011, Ms. Pictou wrote to Health Canada and AANDC officials to formally request additional funding so that the PLBC could continue to provide home care services to Ms. Beadle and Jeremy. Attached to the request was a briefing note describing Ms. Beadle's and Jeremy's situation and their home care needs. Also attached was a copy of the Nova Scotia Supreme Court's March 29, 2011 decision in *Nova Scotia (Department of Community Services) v Boudreau*, 2011 NSSC 126, 302 NSR (2d) 50 [*Boudreau*].

[23] On May 27, 2011, Ms. Robinson, the Manager for Social Programs and the Jordan's Principle focal point for AANDC, emailed her decision to Ms. Pictou. The decision was delivered on behalf of both AANDC and Health Canada. In her decision, Ms. Robinson concluded there was no jurisdictional dispute in this matter as both levels of government agreed that the funding requested was above what would be provided to a child living on or off reserve. Ms. Robinson determined that Jeremy's case did not meet the federal definition of a Jordan's Principle case.

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Decision Under Review

[24] Ms. Robinson [the Manager] informed Ms. Pictou of her decision to refuse the PLBC's request for additional funding for Jeremy's case by an extensive email dated May 27, 2011. She advised that she had an opportunity to confer with provincial health authorities and verified that the request for the provision of 24-hour home care for Jeremy would exceed the normative standard of care.

[25] The Manager recognized the First Nation's right to enhance the services that are provided to this family through own source revenues, but emphasized that services that exceed the normative standard of care and which are outside of the federal funding authorities would not be reimbursed through the AANDC Assisted Living or Health Canada Home and Community Care Programs.

[26] The Manager went on to state that provincial officials had confirmed that Jeremy's care needs would meet the placement criteria for long term institutional care, and that depending upon the classification of the long term care facility, the expenses associated with Jeremy's care would be fully funded by the AANDC Assisted Living, Institutional Care Program and/or the Province of Nova Scotia. However, she recognized this was a personal decision and that Jeremy's mother did not wish to place her child in a long term care facility.

[27] The Manager concluded by noting that although the case did not meet the federal definition of a Jordan's Principle case, AANDC and Health Canada would continue to work with stakeholders and to participate in case conferencing as required.

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Relevant Legislation

[28] The *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 provides:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

[29] The *Social Assistance Act*, RSNS 1989, c 432 [*SAA*] provides:

> 9 (1) Subject to this Act and the regulations <u>the social services committee shall furnish assistance to all persons in need</u>, as defined by the social services committee, who reside in the municipal unit.
>
> [Emphasis added]

[30] The *Municipal Assistance Regulations*, NS Reg 76-81 provides:

> 1. In these regulations
>
> (e) "<u>assistance" means the provision of money, goods or services to a person in need, including</u>
>
> (i) items of basic requirement: food, clothing, shelter, fuel, utilities, household supplies and personal requirements,

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> (ii) items of special requirement: furniture, living allowances, moving allowances, special transportation, training allowances, special school requirements, special employment requirements, funeral and burial expenses and comforts allowances. The Director may approve other items of special requirement he deems essential to the well being of the recipient,
>
> (iii) health care services: reasonable medical, surgical, obstetrical, dental, optical and nursing services which are not covered under the Hospital Insurance Plan or under the Medical Services Insurance Plan,
>
> (iv) care in homes for special care,
>
> (v) social services, including family counselling, homemakers, home care and home nursing services,
>
> (vi) rehabilitation services;
>
> [Emphasis added]

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Arguments of the Parties

Applicants' Submissions

[31] The Applicants organized their submissions according to the issues they identified.

What is the appropriate standard of review?

[32] The Applicants submit the central issue raised in this judicial review is whether the decision-maker ought to have exercised her discretion to provide additional funding to the PLBC for continuing care services. The Applicants submit that in the particular circumstances of this case, a positive decision was necessary to ensure Jeremy and Ms. Beadle continue to receive equal benefit

under the law as guaranteed by section 15 of the *Charter*. The Applicants submit the appropriate standard of review for issues involving the *Charter* is invariably one of correctness.

[33] The Applicants also submit that the Respondent erred in law by failing to properly interpret and apply the Nova Scotia *SAA* in accordance with the jurisprudence of the Nova Scotia Supreme Court. As an error of law, the Applicants submit the standard of review on this issue must also be correctness.

[34] Finally, the Applicants allege that the impugned decision was based on a serious misapprehension of the evidence following a gravely flawed fact-finding process. The Applicants submit this Court has held that the Government of Canada may be held to a reasonableness standard when exercising discretionary power pursuant to contribution funding agreements with First Nations Bands.

Did the decision-maker err in law in interpreting and applying the Nova Scotia Social Assistance Act?

[35] The Applicants submit the ALP Manual and the relevant funding agreement with the PLBC both state that funding is provided to bands to ensure individuals living on reserve receive services "reasonably comparable" to those provided by the province. The Applicants submit the Respondent denied additional funding to the PLBC on the grounds that Jeremy and Ms. Beadle would only be entitled to home-care services to a maximum of $2,200 per month if they lived off reserve. The Applicants argue that in reaching this decision, the Respondent committed an error of law.

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[36] In Nova Scotia, social services and assistance for people with disabilities are provided under the *SAA*. Section 9 of the *SAA* states that, subject to regulations, the government "shall furnish assistance to all persons in need". Section 18 of the *SAA* provides the Governor in Council to make regulations pursuant to the *SAA*. Under s 1(e)(iv) of the *Municipal Assistance Regulations*, NS Reg 76-81 "assistance" is defined to include "home care".

[37] Nova Scotia's Direct Family Support Policy from 2006 states that the funding for respite to people with disabilities "shall not normally exceed" $2,200 per month. The Policy also states that additional funding may be granted in "exceptional circumstances". The Applicants submit Ms. Robinson conceded in cross-examination that Jeremy and Ms. Beadle met much of the criteria under the "exceptional circumstances" portion of the policy. However, the Applicants submit Ms. Robinson concluded this Policy did not reflect Nova Scotia's normative standard of care because a provincial official had issued a separate directive that stated that no funding in excess of $2,200 would ever be provided.

[38] The Applicants submit that in cross-examination Ms. Robinson also indicated that she had read the judgment in *Boudreau*, where the Nova Scotia Supreme Court concluded that the $2,200 monthly cap was not lawful or binding in any way.

[39] The Applicants cited from the Court decision in *Boudreau* at paras 61 & 62 stating:

> What does the SAA obligate the Department to do in the case at Bar? I note s. 27 of the SAA permits regulations "prescribing the maximum amount of assistance that may be granted" but no regulations relevant to the case at Bar are in place.

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> …
>
> How much "assistance" as defined in the Municipal Assistance Regulations, is the "care" obligation *vis-à-vis* Brian Boudreau? In my view, the obligations of the Department pursuant to the SAA and Regulations are met when the "assistance" reasonably meets the "need" in each specific case.
>
> [Emphasis added]

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[40] The Applicants submit that Ms. Robinson stated in cross-examination that the *Boudreau* judgment was "not relevant" to her decision. They submit this is an error of law and that the decision must be quashed for this reason alone.

Was the decision based on a serious misunderstanding of the evidence?

[41] The Applicants submit that even if the refusal to provide additional funding to the PLBC is not found to be discriminatory, the decision remains unreasonable as it was based on a serious misapprehension of evidence and on a gravely flawed fact finding process.

[42] The Applicants argue that the decision is unreasonable because it was based on an erroneous understanding of what was actually being requested by the PLBC. The Applicants point to Ms. Robinson's decision of May 27, 2011 to illustrate that Ms. Robinson denied the PLBC's request on the basis that 24 hour care was not available off reserve. However, the Applicants submit this was not what was requested by the PLBC.

[43] The Applicants point to a particular paragraph in Ms. Pictou's Briefing Note which was attached to the request for additional funding which states:

> Jeremy Meawasige's reasonable "need" for "homecare" is 24 hours a day, 7 days a week (less the time his family can reasonably attend to his care), but which department is obliged to meet his care needs?

The Applicants submit that this demonstrates that Ms. Robinson erred by characterizing the PLBC's request as funding for 24-hour services as well as additional assistance for meal preparation and light housekeeping.

[44] The Applicants argue that since Ms. Robinson failed to understand what was requested by the PLBC, it cannot be said that the request for additional funding was properly or fairly considered. The Applicants submit that Courts have held that a decision-maker's misapprehension of facts or evidence constitutes a palpable and overriding error. *Crane v Ontario (Director, Disability Support Program)*, (2006), 83 OR (3d) 321 (ON CA) at paras 35-36. The Applicants submit that in this case, Ms. Robinson's misapprehension of the PLBC's request not only affected the fact-finding process, but it formed the very basis for the denial of the request. The Applicants submit this amounts to an unreasonable error.

[45] The Applicants submit Ms. Robinson also ignored relevant information before her. The Applicants argue the provincial Home Care Policy confers up to $6,600 per month in home care services to people with disabilities, and is not capped at $2,200. The Applicants argue that presented

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with this evidence, Ms. Robinson's assertion that the normative standard of care off reserve is invariably limited to $2,200 per month is untenable and that this amounts to an error in law.

Did the decision-maker exercise her discretion in a manner that violated section 15(1) of the Charter?

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[46] The Applicants claim that the decision to deny additional funding to the PLBC so that it could continue providing Jeremy and Ms. Beadle with home care was discriminatory and contrary to s. 15(1) of the *Charter*. The Applicants submit that while the federal government may enter into contribution agreements with Band Councils to provide services, such agreements cannot supersede its obligations under the *Charter*. The Applicants also submit that the government's exercise of discretionary powers must conform to the *Charter*. The Applicants argue that Ms. Robinson had a duty to consider the requests for additional funding under the relevant agreements in a manner that respects the Beadles' rights to receive equal benefits compared to those residing off reserve in their province of residence.

[47] The Applicants submit that for First Nations people living on reserve, Jordan's Principle is a means by which the fundamental objectives of s. 15(1) can be achieved.

[48] The Applicants argue that the exceptional and unanticipated health needs of the Beadle family jeopardize the PLBC's ability to provide the services the family reasonably requires and would likely be entitled to off reserve. The Applicants submit that Ms. Robinson had a duty to exercise her discretion under the relevant funding agreements in a manner that conforms to s. 15(1) of the *Charter*.

[49] The Applicant also argues that infringement under s. 15(1) cannot be justified under s. 1 of the *Charter*.

Respondent's Submissions

[50] The Respondent's submissions are similarly organized according to the issues identified by the Respondent.

The standard of review is reasonableness

[51] The Respondent submits the question of whether the service provided by the PLBC exceeded the provincial normative standard of care is a question of fact and requires a decision maker to gather facts about the assistance needs of the claimant, the treatments required, and the nature of the disabilities at issue. The Respondent asserts that it also requires fact gathering about the services that are currently available to similar people living off reserve and gathering factual information from provincial authorities and the federal program requirements. The Respondent submits the decision maker is entitled to give significant weight to the definition of the normative standard of care provided by the provincial authorities.

With respect to the assessment of the request made by the Applicants, the Respondent submits the determination of what was actually requested is a question of fact. Ms. Robinson was required to review Jeremy's situation and determine what their request constituted based on all of the material submitted. The Respondent submits that the Supreme Court of Canada in *Dunsmuir v New*

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Brunswick, 2008 SCC 9 [*Dunsmuir*] has determined that where a question is a factual determination which depends purely on the weighing of evidence, the applicable standard of review is reasonableness. The Respondent submits that where, as here, the underlying factual and legal issues cannot be separated, the appropriate standard of review is still reasonableness. *Dunsmuir* at paras 53-54.

[52] The Respondent submits that the standard of reasonableness in the present case is particularly appropriate because the decision maker was asked to make a determination of eligibility under a federal policy for which she was the expert designated authority in a discrete and special administrative regime, with particular expertise, and with the unique ability to interact with provincial authorities whose cooperation is required to make the necessary determination. The Respondent submits that the reasonableness standard is the most reflective of the nature of the inquiry and the context in which it takes place.

[53] Regarding the *Charter* issue, the Respondent submits there is no standard of review of this issue in this Court. The Respondent argues that the *Charter* issue is a matter of constitutional law and not administrative law. This is the first time that the s. 15 argument has been raised in this matter. The Respondent submits this is the Court of first instance for the determination of the constitutional question.

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Jordan's Principle was not engaged in this case

[54] The Respondent submits that in order to determine whether Jordan's Principle was engaged, Ms. Robinson had to determine if there was a jurisdictional dispute between Canada and Nova Scotia regarding the provision of funding for Jeremy's care and if the funding provided by Canada met the normative standard of care in Nova Scotia.

[55] The Respondent submits there was no jurisdictional dispute. Both Canada and Nova Scotia agreed that Jeremy's situation entitled him to receive institutional care and the Province acknowledged it would pay for those services over and above federal authority.

[56] The Respondent argues that Ms. Robinson determined the normative standard of care for in-home services in Nova Scotia was $2,200 per month as a result of her consultation with provincial officials from multiple departments, and after raising with them the applicability of the *SAA*, the Direct Family Support Policy, the Health and Wellness Program, and the recent decision of the Nova Scotia Supreme Court in *Boudreau*. The Respondent submits Ms. Robinson brought all of the Applicants' concerns and arguments before the provincial officials who informed her that the amount Jeremy would receive if he lived off reserve would be no more than $2,200.

[57] The Respondent asserts that Ms. Robinson's approach to determining the normative standard of care was correct and her conclusion that the request was beyond the normative standard of care was reasonable. The Respondent submits the provincial officials were in the best position to

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say what services are available to residents of the province living off reserve and thus using this information as a basis for her decision was reasonable.

[58] Regarding the Applicants' submissions on the applicability of the *Boudreau* case, the Respondent submits *Boudreau* is a case about exceptional circumstances to the provincial standard of care but does not purport to change the standard of care itself. The provincial authority had already determined that Boudreau required in-home care in an amount less than what the PLBC has provided here. Also, the $2,200 limit had not previously been applied in Boudreau's case because he had been "grandfathered".

[59] The Respondent submits that the situation in *Boudreau* is quite different from Jeremy's because Boudreau was receiving exceptional circumstances funding prior to the October 2006 Directive from the Department of Community Services that indicated the maximum for respite in-home care was $2,200 per month, with no exceptions. Moreover, the Respondent submits Canada and Nova Scotia have already determined that the applicable standard for Jeremy is institutional, not respite care. The Respondent submits the Applicants are trying to use the *Boudreau* case to create a new standard of care that neither the Province nor Canada recognizes.

The request for additional funding was properly assessed

[60] The Respondent submits the evidence is clear that the Applicants requested the equivalent of 24-hour per day care, and only for Jeremy, contrary to the Applicants' arguments that Ms. Robinson misapprehended the request for additional funding.

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[61] The Respondent submits the Applicants allege that they requested only funding for in-home care 24 hours per day, 7 days per week, less what Jeremy's own family could provide. For this proposition, the Respondent notes the Applicants rely on a specific sentence in the Briefing Note Ms. Pictou prepared on Jeremy's case which was sent to Health Canada and AANDC.

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[62] The Respondent submits that in the immediately preceding paragraph in the Briefing Note, Ms. Pictou refers to 24 hour per day, 7 days a week care without any limitation regarding family assistance. Further, the Respondent argues that in the email with the formal request for additional funding (to which the Briefing Note was attached), Ms. Pictou stated:

> Even if it is not a Jordan's Principle case, I would like either the Federal or Provincial Government to reimburse us up to the level that he would qualify for if institutionalized (estimated by Community Services to be $350 per day).

[63] The Respondent submits it was reasonable for Ms. Robinson to conclude that the Applicants had requested the funding equivalent of 24 hour per day in-home care, and to verify whether that need was beyond the normative standard of care that the province would provide for in-home care for any Nova Scotian.

[64] Even if the Applicants' request could be interpreted as 24 hours minus what family members could provide (which is not admitted), the Respondent submits Ms. Robinson's factual finding that the Applicants' funding request exceeded the provincial standard for in-home care is reasonable given the evidence.

The decision does not violate section 15(1) of the Charter.

[65] The Respondent submits the decision not to grant the request for additional funding up to the daily rate of institutional care does not discriminate against Jeremy or any other First Nations child. First, the Respondent submits the benefit the Applicants requested is not a benefit provided by law. Under the ALP and HCCP, the PLBC has funding to provide their community with reasonably comparable services to those that would be available to the off reserve population. The Respondent submits funding for those benefits was and is available to Jeremy, and he is treated no differently from any other Nova Scotian with similar needs. There is no distinction on which a discrimination claim can rest.

[66] The Respondent submits that Jordan's Principle clearly is not engaged in this case. Jordan's Principle was adopted to ensure that no First Nations child would be denied services while governments debated over the jurisdictional responsibility to provide an eligible service. The Respondent argues that what is at stake in this case is not a jurisdictional dispute at all, but a claim that the PLBC's decision to provide in-home care to one of its members beyond the normative provincial standard of care legally obliges Canada to fund such services.

[67] The Respondent submits that the evidence clearly indicates that Jeremy's needs well exceed the levels of in-home care that would be available to anyone living off reserve in Nova Scotia. This was confirmed by the provincial officials who indicated that this level of in-home care would not be available and institutionalization would be the supported option. The Respondent submits this is not a case where the application of federal programs or policies denies a benefit that would otherwise be

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available to someone else. The Respondent argues that the Applicants are attempting to create a benefit out of the ALP and HCCP that simply does not exist at law.

[68] The Respondent submits that neither Ms. Robinson's decision, nor the structure of the ALP and HCCP funding itself creates any distinction between Jeremy and a person with similar disabilities and care needs that is not living on a reserve. The Respondent notes that under the ALP and the HCCP, Canada has elected to provide funding for services that are reasonably comparable with people living off reserve so that no such distinction will be created. In this regard, the Respondent submits Ms. Robinson was required to verify the provincial normative standard of care, and did so by specifically enquiring with the provincial authorities whether, if Jeremy was living off reserve, funding for his care needs could be provided in-home. The Respondent submits that the information provided to Ms. Robinson from the provincial authorities was clear that if Jeremy lived off reserve, the supported option would be institutionalization, and that the maximum funding he could receive for in-home care if he remained in the home was $2,200 per month.

Issues

[69] In my view the following issues arise in this case:

1. Was Jordan's Principle engaged in this case?
2. Did the Manager properly assess the request for funding?
3. Did the Manager exercise her discretion in a manner that violated section 15(1) of the *Charter*?

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Standard of Review

[70] The Supreme Court of Canada held in *Dunsmuir* that there are only two standards of review: correctness for questions of law and reasonableness involving questions of mixed fact and law and fact. *Dunsmuir* at paras 50 and 53.

[71] The Supreme Court also held that where the standard of review has been previously determined, a standard of review analysis need not be repeated. *Dunsmuir* at para 62.

[72] I have been unable to find any previous jurisprudence in which Jordan's Principle and the appropriate standard of review in determining the "normative standard of care off reserve" has been considered.

[73] I note that this matter involves questions of fact, and questions of mixed law and fact as they relate to a question of policy, that of Jordan's Principle. There is no privative provision and the matters are determined by an official designated as an AANDC departmental "focal point for Jordan's Principle" which is suggestive of expertise.

[74] The Manager was required to determine what it was that the PLBC was requesting. This was a factual determination based on the submissions of Ms. Philippa Pictou and information provided in case assessments. The Manager was also charged with determining whether this case met the criteria for a Jordan's Principle case. As the Jordan's Principle focal point for AANDC the Manager had a specialized expertise in this matter.

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[75] Finally, the Manager was required to determine the normative standard of care that would be available from provincial health authorities to individuals living off reserve in the same circumstances as Jeremy. There appears to be no specific procedure for her to follow to determine what the normative standard of care is. The Manager was not specifically tasked with interpreting and applying the *SAA* or any jurisprudence. Essentially, it was a fact-finding exercise which would attract a reasonableness standard of review.

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[76] In *Dunsmuir* questions of mixed fact and law and fact give rise to a standard of reasonableness. *Dunsmuir* at paras 50 and 53. Accordingly, I agree with the Respondent that the appropriate standard of review for the Manager's decision with respect to Jordan's Principle is reasonableness.

Analysis

[77] The issues in this case revolve around the question of on-reserve, in-home support for Jeremy, a First Nation child with multiple handicaps who was cared for by his mother until the time of her stroke.

[78] The Applicants submit Canadian children with disabilities and their families rely on continuing care generally provided by provincial governments according to provincial legislation. Provincial governments do not provide the same services to First Nations children who live on reserves. The federal government assumed responsibility for funding delivery of continuing care programs and services on reserve at levels reasonably comparable to those offered in the province of

residence. Such services have been historically funded and provided by the federal government through AANDC and Health Canada as a matter of policy.

[79] AANDC and Health Canada entered into a funding agreement with the PLBC to deliver services offered under the ALP and HCCP. The PLBC is required to administer the programs "according to provincial legislation and standards." The ALP funding agreement states the PLBC can seek additional funding in "exceptional circumstances" which are not "reasonably foreseen" at the time the agreement was entered into. The HCCP agreement has a similar clause which refers to necessary increases due to "unforeseen circumstances".

[80] Personal home care services off reserve for people with disabilities in Nova Scotia are governed by the *Social Assistance Act*. Section 9(1) of the *SAA* provides persons in need shall be provided with assistance, including home care and home nursing services. The Nova Scotia Department of Community Services implements the *SAA* and funds home care for people with disabilities through the Direct Family Support Policy. The policy provides that funding for home care shall not normally exceed $2,200 per month but states additional funding may be granted in exceptional circumstances.

Was Jordan's Principle engaged in this case?

[81] As stated above, Jordan's Principle was developed in response to a case involving a severely disabled First Nation child who remained in a hospital due to jurisdictional disputes between the federal and provincial governments over payment of home care services for Jordan in his First

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Nation community. The child never had the opportunity to live in a family environment because he died before the dispute could be resolved. Jordan's Principle aims to prevent First Nations children from being denied prompt access to services because of jurisdiction disputes between different levels of government.

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[82] Jordan's Principle says the government department first contacted for a service readily available off reserve must pay for it while pursuing repayment of expenses. While Jordan's Principle is not enacted by legislation, it has been approved by a unanimous vote of the House of Commons. Such a motion is not binding on the government.

[83] In order to understand the status of Jordan's Principle, it is helpful to have regard to the Hansard reports of the debate in the House of Commons. The private member's motion of May 18, 2007 reads:

> That, in the opinion of the House, the government should immediately adopt a child first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children.

The motion was further debated on October 31, 2007 and again on December 5, 2007. At that time, a member of the governing party stated:

> I support this motion, as does the government. I am pleased to report the Minister of Indian Affairs and Northern Development and officials in his department are working diligently with their partners in other federal departments, provincial and territorial governments, and first nations organizations on child and family services initiatives that will transform the commitment we make here today into a fact of daily life for first nations parents and their children.

> That is not all. In addition to implementing immediate, concrete measures to apply Jordan's principle in aboriginal communities, I would like to inform the House and my colleague that the government is also implementing other measures to improve the well-being of first nations children…

The vote in the House of Commons on December 12, 2007 was unanimous, recording Yeas: 262, Nays: 0.

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[84] Clearly, Jordan's principle was implemented by AANDC. Ms. Barbara Robinson, Manager – Social Programs, was designated the Jordan's Principle focal point for AANDC in Atlantic Canada. She described AANDC's implementation of Jordan's Principle in the following terms:

> Jordan's Principle is a child-first principle which exists to resolve jurisdictional disputes between the federal and provincial governments regarding health and social services for on-reserve First Nations children. It ensures that a child will continue to receive care while the jurisdictional dispute between the provincial and federal government is resolved but does not create a right to funding that is beyond the normative standard of care in the child's geographic location.
>
> Jordan's Principle applies when:
>
> a) The First Nations child is living on reserve (or ordinarily resident on reserve); and
>
> b) A First Nations child who has been assessed by health and social service professionals and has been found to have multiple disabilities requiring services from multiple service providers; and
>
> c) The case involves a jurisdictional dispute between a provincial government and the federal government; and
>
> d) Continuity of care – care for the child will continue even if there is a dispute about responsibility. The current service provider that is caring for the child will continue to pay for the necessary services until there is a resolution; and

> e) Services to the child are comparable to the standard of care set by the province – a child living on reserve (or ordinarily resident on reserve) should receive the same level of care as a child with similar needs living off-reserve in similar geographic locations.
>
> [Emphasis added]

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[85] The Respondent submits there is no evidence that a jurisdictional dispute exists between the Province of Nova Scotia and the federal government for the provision of in-home care services. Both provincial health authorities and AANDC and Health Canada agree that the maximum Jeremy would receive if he lived on or off the reserve is $2,200 for home care services.

[86] I do not think the principle in a Jordan's Principle case is to be read narrowly. The absence of a monetary dispute cannot be determinative where officials of both levels of government maintain an erroneous position on what is available to persons in need of such services in the province and both then assert there is no jurisdictional dispute.

[87] I would observe that the normative standard of care in this case encompasses the provincial rules for the range of services available to persons in Nova Scotia residing off reserve. Jordan's Principle would have been meant to include services for exceptional cases where allowed for in the province where the child is geographically located.

[88] While there is an administratively prescribed maximum level of $2,200 per month for in-home services in Nova Scotia, the statutorily mandated policy has been found to encompass exceptional cases that may exceed that maximum.

[89] In *Boudreau*, a Nova Scotia Court heard an application for a *certiorari* order by the Department of Community Services of the Assistance Appeal Board decision holding that Boudreau, a 34-year old adult off reserve with multiple handicaps, was entitled to receive increased home care services under the exceptional circumstances provision of the Direct Family Services Policy and also under section 9 of the *SSA*.

[90] The Court found the application for *certiorari* to be valid because the Appeal Board erred in referring to *Employment Support and Income Assistance Act* instead of the *SAA*. However, the Court declined to make a *certiorari* order because it found the Department of Family Community Services had a clear obligation to provide "assistance" to Boudreau as required by section 9 of the *SSA*. In the alternative, the Court found even if the respite decision by the Department was discretionary, the facts accepted established the assistance was essential and the Department's obligations included the additional funding requested.

[91] The effective result in *Boudreau* is that a person with multiple handicaps residing off reserve was entitled to receive home services assistance over the $2,200 maximum limit which the Court observed "cannot override the legislation and regulations".

[92] In the case at hand, the Manager stated in cross-examination that her legal authority to fund is rooted under the Treasury Board authority referencing the applicable provincial policy. She acknowledged she was told by provincial officials that the provincial policy provides they can fund above the $2,200 level but they can't because of the directive. She acknowledged she was informed the Department of Family Services provincial policy says there may be exceptional circumstances

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but provincial officials told her there would be no exceptional circumstances recognized. Ms. Robinson stated she needed to ensure she was following the provincial policy as it is being implemented.

[93] The Manager does not need to interpret the *SAA* and *Regulations*. She was clearly informed by provincial officials of the legislatively mandated policy. She knew the legislated provincial policy provided for exceptional circumstances. She knew the provincial officials were administratively disregarding the Department of Social Services legislated policy obligations. She also was put on notice by the PLBC of this issue as they had provided her with a copy the *Boudreau* decision. Ms. Robinson's mandate from Treasury Board does not extend to disregarding legislated provincial policy.

[94] Nova Scotia's Direct Family Support Policy states that the funding for respite to people with disabilities "shall not normally exceed" $2,200 per month. The Policy also states that additional funding may be granted in "exceptional circumstances". Finally, the Direct Family Support Policy explicitly states that First Nations children living on reserves are not eligible to services from the Province.

[95] As I stated, Jordan's principle is not to be narrowly interpreted.

[96] In this case, there is a legislatively mandated provincial assistance policy regarding provision of home care services for exceptional cases concerning persons with multiple handicaps which is not available on reserve.

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[97] The Nova Scotia Court held an off reserve person with multiple handicaps is entitled to receive home care services according to his needs. His needs were exceptional and the *SAA* and its *Regulations* provide for exceptional cases. Yet a severely handicapped teenager on a First Nation reserve is not eligible, under express provincial policy, to be considered despite being in similar dire straits. This, in my view, engages consideration under Jordan's Principle which exists precisely to address situations such as Jeremy's.

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[98] I find the Manager's finding that Jordan's Principle was not engaged is unreasonable.

Did the decision-maker properly assess the request for funding?

[99] The Manager took part in case conferences in which provincial health officials, First Nation officials and other AANDC and Health Canada officials took part. As a result of taking part in these case conferences, she had a full understanding of the issues and care needs Jeremy required. She was able to obtain opinions from the health assessors as to what was needed in Jeremy's case.

[100] I begin by addressing the factual issue in the PLBC request for funding. The monetary amount is necessarily linked to the extent of care home care support required for Jeremy although not for Ms. Beadle's personal needs who, presumably is within the normal scope of the ALP and HCCP funded home care services.

[101] The Applicants have stated that the request for additional funding was for "Jeremy Meawasige's reasonable 'need' for 'homecare' [as] 24 hours a day, 7 days a week, <u>less the time his</u>

family can reasonable attend to his care." [Emphasis added] This paragraph is found in the briefing note attached to the request for additional funding. On the other hand, the Respondent submits that the paragraph preceding the paragraph cited by the Applicants indicates that the request is for 24 hour care, 7 days a week.

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[102] It is clear from the PLBC's submissions that at the time of the Manager's decision, the Pictou Landing Health Centre provided the family with a personal care worker from 8:30 am to 11:30 pm from Monday to Friday, and 24 hour care over the weekends by an off reserve agency. As I understand it, the 24 hour care on the weekends was in response to the Pictou Landing Health Centre being closed over the weekend rather than the need for 24-hour home care. On the evidence, the request for in home support did not cover the overnight period during weekdays.

[103] Moreover, one has to have regard for the extent of family support. It must be remembered that, before her stroke, Ms. Beadle provided for all of Jeremy's needs without government assistance. Ms. Beadle has recovered to some extent from her stroke and helps Jeremy as she can. Jeremy's older brother stays overnight to also assist. When one considers the importance of Ms. Beadle to Jeremy's communicative and personal needs, it seems to me that the family support is not inconsequential. I find the request for Jeremy's in home support was not for 24 hours a day, 7 days a week.

[104] It is not entirely clear exactly what amount is being requested. I do note, as the Respondent pointed out, the PLBC requested it would like to be reimbursed up to the level that Jeremy would qualify for if institutionalized. This amount, as estimated by the Department of Community

Services, was $350 per day. The $350 per day represents the equivalent expense to have Jeremy live in an institution. However, it is clear the PLBC was not asking to institutionalize Jeremy; rather, it was proposing that as a means of quantifying the request for funding.

[105] The Manager was required to assess the factual circumstances, the submissions made and the recommendations and information provided by the in-home assessors. I conclude that the Manager erred in determining that what was being requested was 24 hour in home care. This was an unreasonable finding based on all the information provided.

Application of Jordan's Principle

[106] Issues involving Jordan's Principle are new. The principle requires the first agency contacted respond with child-first decisions leaving jurisdictional and funding decisions to be sorted out later. Parliament has unanimously endorsed Jordan's Principle and the government, while not bound by the House of Commons resolution, has undertaken to implement this important principle.

[107] The PLBC is required by its contributions agreements with AANDC and Health Canada to administer the programs and services "according to provincial legislation and standards". When Ms. Beadle suffered her stroke, the PLBC responded and provided the needed services for her and Jeremy.

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[108] The PLBC is a small First Nation with some 600 members. The exceptional circumstances here have required nearly 80% of the costs of the PLBC total monthly ALP and HCCP budget for personal and home care services. In short, this is not a cost that the PLBC can sustain.

[109] Jordan's Principle applies between the two levels of government. In this case the PLBC was delivering program and services as required by AANDC and Health Canada in accordance with provincial legislative standards. The PLBC is entitled to turn to the federal government and seek reimbursement for exceptional costs incurred because Jeremy's caregiver, his mother, can no longer care for him as she did before.

[110] I also note that the only other option for Jeremy would be institutionalization and separation from his mother and his community. His mother is the only person who, at times, is able to understand and communicate with him. Jeremy would be disconnected from his community and his culture. He, like sad little Jordan, would be institutionalized, removed from family and the only home he has known. He would be placed in the same situation as was little Jordan.

[111] I am satisfied that the federal government took on the obligation espoused in Jordan's Principle. As result, I come to much the same conclusions as the Court in *Boudreau*. The federal government contribution agreements required the PLBC to deliver programs and services in accordance with the same standards of provincial legislation and policy. The *SAA* and *Regulations* require the providing provincial department to provide assistance, home services, in accordance with the needs of the person who requires those services. PLBC did. Jeremy does. As a consequence, I conclude AANDC and Health Canada must provide reimbursement to the PLBC.

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[112] It is to be observed that AANDC does not deny that home services be provided for Jeremy; rather it denies funding home services above the $2,200 administratively imposed provincial maximum which the Court found in *Boudreau* cannot override provincial legislation and regulation.

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[113] The PLBC has met its obligations under its funding agreement with AANDC and Health Canada. The participating federal departments, particularly AANDC, have adopted Jordan's Principle. In my view, they are now required by their adoption of Jordan's Principle to fulfil this assumed obligation and adequately reimburse the PLBC for carrying out the terms of the funding agreements and in accordance with Jordan's Principle.

[114] In the alternative, much as in *Boudreau*, if the implementation of Jordan's Principle is discretionary, the federal government undertook to apply Jordan's Principle when exceptional circumstances arose. The facts of Jeremy's situation clearly establish the exceptional circumstances necessary to meet this requirement. The federal government cannot deny is obligation to provide additional funding not requested by PLBC for Jeremy.

[115] In either situation, the PLBC is, in my view, due reimbursement and additional funding from AANDC and Health Canada for Jeremy's needs. I note both AANC and Health Canada have expressed willingness to continue to work with PLBC to resolve the situation.

[116] Jordan's Principle is not an open ended principle. It requires complimentary social or health services be legally available to persons off reserve. It also requires assessment of the services and

costs that meet the needs of the on reserve First Nation child. The funding amount is not definitively determined in accordance with these requirements, in that the needs of Jeremy and Ms. Beadle are somewhat mixed, the case conferences did not appear to quantify the costs involved, and alternative reimbursement amounts were proposed. In result, the amount remains to be addressed by the parties.

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[117] I conclude the decision-maker did not properly assess the PLBC request for funding to meet Jeremy's needs. The request for judicial review succeeds and the Manager's decision is quashed.

[118] There remains the question of whether or not, in the circumstances, reconsideration should be ordered. Clearly, deference is due to the administrative entity that makes decisions within the realm of its expertise.

[119] In *Stetler v the Ontario Flue-Cured Tobacco Growers' Marketing Board*, 2009 ONCA 234 at paragraph 42, the Ontario Court of Appeal stated:

> While "[a] court may not substitute its decision for that of an administrative decision-maker lightly or arbitrarily", exceptional circumstances may warrant the court rendering a final decision on the merits. Such circumstances include situations where remitting a final decision would be "pointless", where the tribunal is no longer "fit to act", and cases where, "in light of the circumstances and the evidence in the record, only one interpretation or solution is possible, that is, where any other interpretation or solution would be unreasonable": *Giguère v. Chambre des notaires du Quebec,* 2004 SCC 1 (CanLII), [2004] 1 S.C.R. 3 at para. 66.

[120] When one considers Jordan's Principle calls for an immediate timely response regardless of jurisdictional questions and the exceptional circumstances that arise here in Jeremy's case, I am of the view this constitutes an exceptional circumstance warranting this Court to not remit the matter back for reconsideration but to direct the that the PLBC is entitled to reimbursement beyond the $2,200 maximum as it relates to Jeremy's needs for assistance. The remaining question is the amount of reimbursement which I consider must be left to the parties.

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Did the decision-maker exercise her discretion in a manner that violated section 15(1) of the Charter?

[121] Having decided as I did, I need not consider the *Charter* submissions by the Applicant and Respondent.

Costs

[122] In oral submissions, the Respondent did not oppose the Applicants' submission for costs, should the latter be successful, acknowledging the matter to be complex but suggesting the middle range of Column 3.

[123] I thank both parties for their able submissions in addressing this complex but important matter.

Conclusion

[124] I conclude the Manager failed to consider the application of Jordan's Principle in Jeremy's case as required.

[125] I also find the Manager's refusal of the PLBC reimbursement request was unreasonable.

[126] The application for judicial review is granted and I hereby quash the impugned decision.

[127] I do not remit the matter back for reconsideration but direct that the PLBC is entitled to reimbursement by the Respondent beyond the $2,200 maximum as it relates to Jeremy's needs for assistance.

[128] I would award costs to the Applicants for two counsel at the middle range of Column 3.

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JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The May 27, 2011 decision of the Manager is quashed.

3. I direct that Applicant PLBC is entitled to reimbursement beyond the $2,200 maximum by the Respondent as it relates to Jeremy's needs for assistance.

4. Costs for the Applicants for two counsel at the middle range of Column 3.

"Leonard S. Mandamin"
Judge

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FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1045-11
STYLE OF CAUSE:	PICTOU LANDING BAND COUNCIL AND MAURINA BEADLE v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	JUNE 11, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	MANDAMIN J.
DATED:	APRIL 4, 2013

APPEARANCES:

Paul Champ Anne Levesque	FOR THE APPLICANTS
Jonathan D.N. Tarlton Melissa Chan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Champ & Associates Ottawa, Ontario	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT

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TAB 7

T.D. 3/97
Decision rendered March 19, 1997

CANADIAN HUMAN RIGHTS ACT
(R.S.C. 1985, C.H-6 as amended)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

NATIONAL CAPITAL ALLIANCE ON RACE RELATIONS (NCARR)

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

HER MAJESTY THE QUEEN
AS REPRESENTED BY HEALTH AND WELFARE CANADA,
THE PUBLIC SERVICE COMMISSION
AND THE TREASURY BOARD

Respondent

- and -

PROFESSIONAL INSTITUTE OF THE PUBLIC
SERVICE OF CANADA

Interested Party

TRIBUNAL DECISION

Tribunal: J. Grant Sinclair, Q.C. Chairperson
Carol H.Y. Boxill, Member
Alvin Turner, Member

Appearances: Helen Beck and Prakash Diar, Counsel for the Canadian Human Rights Commission
Iyavar Chetty, Counsel for the National Capital Alliance on Race Relations

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Cynthia Sams, Counsel for the Professional Institute of the Public Service of Canada
Arnold Fradkin and Hélène Laurendeau, Counsel for Her Majesty the Queen

Dates and Location
of Hearing: December 4 to 8, December 18-21, 1995, January 10 to 12, January 15 to 19, February 5 to 8, February 26 to March 1, April 15 to 19, April 22 to 26, May 6 to 10, May 15 to 17 and May 23-24, 1996
Ottawa, Ontario

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I THE COMPLAINT

This case arises out of a complaint ("Complaint") filed by the National Capital Alliance on Race Relations ("NCARR") with the Canadian Human Rights Commission ("CHRC") dated September 16, 1992. NCARR is a non-profit organization whose mandate is to fight discrimination and racism through political action, education and where appropriate, through legal action. NCARR has an elected board of eight directors and an executive director who is responsible for the day to day operations. NCARR is located in Ottawa.

The Complaint alleges discrimination by Health and Welfare Canada, now Health Canada ("HC"), against persons who are visible minorities employed by HC contrary to section 10 of the Canadian Human Rights Act ("CHRA"). The Complaint reads as follows:

> Health and Welfare Canada discriminates against persons who are visible minorities by establishing employment policies and practices that deprive or tend to deprive persons who are visible minorities of employment opportunities in management and senior professional jobs on the basis of race, colour and ethnic origin contrary to section 10 of the Canadian Human Rights Act. This is indicated by the extremely low number of permanent visible minority employees in senior management positions and in the Administration and Foreign Service Category. It is especially supported by the concentration of visible minority employees at lower level positions within the Science and Professional category and their failure to be promoted equitably. This lack of promotions negatively affects their eligibility for appointments to senior management positions.

The parties in this Complaint are NCARR, CHRC, the Professional Institute of the Public Service of Canada ("PIPSC"), added as an interested party, (collectively the "Complainants") and Her Majesty the Queen as represented by Health and Welfare Canada, the Public Service Commission and the Treasury Board ("Respondent").

In alleging discrimination, the Complaint focused on the Scientific and Professional category ("S&P") and the Administrative and Foreign Service Category ("A&FS"), as opposed to the other occupational categories

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in HC. This is because it is from these two occupational categories from which senior management in HC is drawn. The evidence is that approximately 75% of senior management are recruited from the S&P category and 25% from the A&FS category.

II THE JURISDICTIONAL ISSUE

The Respondent's initial response to the Complaint before this Tribunal was to challenge both the Tribunal's jurisdiction to hear the Complaint and the Tribunal's jurisdiction to grant the remedy sought by the Complainants.

The Respondent argued that, to the extent this Complaint involves under-representation of a designated group, it is an issue of employment equity, not one of discrimination. Matters of employment equity are

specifically addressed under section 11 of the Financial Administration Act, ("FAA") and section 5.1 of the Public Service Employment Act ("PSEA"). This legislation provides a complete regime for dealing with employment equity issues within the Federal Government, and this Tribunal can not and should not deal with allegations of under-representation of visible minorities in HC.

In its closing argument, the Respondent shifted its position somewhat by submitting that the Tribunal has jurisdiction to hear the Complaint, but, if, at the end of the day, the only thing left for the Tribunal to support a finding of discrimination is statistical evidence of under-representation, the Tribunal loses jurisdiction to make that finding.

On remedy, the Respondent's position was that if the Tribunal makes a finding of discrimination within its jurisdiction, it is limited to making a cease and desist order. It can not go further and order such things as a remedial program or numerical targets or monitoring procedures because this is "employment equity country" and is forbidden territory for this Tribunal. Rather, the authority to impose this type of employment equity remedy is reserved to the Public Service Commission and the Treasury Board under the FAA and PSEA. In this respect, all this Tribunal can do is to declare that an employment equity program would be the appropriate remedy and leave it to the above agencies to devise and implement such a program.

The Respondent, in its preliminary objection, also objected to certain witnesses proposed by the Complainants giving evidence in this hearing.

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The reason for this objection was that to allow such evidence would result in a rehearing of the personal complaint of discrimination of the witness. We decided that this objection should be made at the time the evidence was given. The objection was made numerous times during the course of the hearing, was dealt with at the time, and no further comment is needed here.

We reserved our decision on the jurisdictional question until completion of the evidence and final arguments. It is clear that the Complainants' case is about systemic discrimination in HC staffing practices. Certainly statistical evidence of under-representation is one of the things that the Complainants relied upon to prove their case. But the Complainants have consistently taken the position that they are relying not just on numbers showing under-representation to support an inference of discrimination, but on the whole of the evidence presented and have asked the Tribunal to make its finding on that basis.

As will be seen in our following reasons, we have done just that. Even if the Respondent is correct in characterizing our jurisdiction as it did, we have exercised our jurisdiction within this framework.

In any case, we do not agree with this limitation on our jurisdiction as suggested by the Respondent. There is nothing in the CHRA and, in particular, section 40, which limits the jurisdiction of the CHRC or this Tribunal from hearing a complaint which involves a so-called employment equity issue. Section 50 of the CHRA requires the Tribunal to hold a hearing and inquire into the complaint in respect of which it was appointed.

To refuse jurisdiction to hear this Complaint would mean that the FAA and PSEA have paramountcy over the CHRA. This is not a tenable legal position as we point out later in these reasons when discussing

jurisdiction over remedy. Accordingly, that part of the Motion objecting to our jurisdiction to hear the Complaint is dismissed.

III THE EVIDENCE

(A) Statistical Evidence of Under-Representation of Visible Minorities

1. Evidence of Erika Boukamp Bosch

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The starting point of the Complainants' case is that, as of September 30, 1993, there was one visible minority in the senior management complement out of a total of 118 (0.8%) in HC. This was the evidence of Erika Boukamp Bosch, Chief, Statistical Analysis, Employment Equity Directorate, CHRC. Ms. Bosch was qualified as an expert in statistics, with a specialty in employment systems and occupational data.

(a) Definitions

It is useful at this point to define certain terms used by Ms. Bosch and other experts who gave evidence at the hearing. These terms are:

Availability - estimates of the number of persons of a designated employment equity group qualified to work for an employer. The estimates can be based on the internal or external labour pool from which employers can reasonably be expected to recruit, and is often expressed as a percentage of the total qualified labour pool.

Designated Groups - the four groups designated under Employment Equity legislation, women, aboriginals, persons with disabilities and visible minorities.

EX Group - management category in the Federal Public Service ("FPS").

EX Equivalent - senior levels in some occupational groups in the FPS which are considered to be equivalent to senior management but are not included in the EX group.

EX minus one and EX minus two - senior levels in some occupational groups, which are one and two levels below the EX group.

Feeder Group - senior levels in some occupational groups from which the employer may reasonably be expected to promote employees into the EX group. The feeder group consists of some of the EX Equivalent levels and the EX minus one and EX minus two levels.

Occupational Category - The grouping of occupations in the Federal Public Service. The FPS has one management category, the Executive Group (EX) and five non-executive categories, Scientific and Professional (S&P), Administrative and Foreign Service (A&FS), Technical (T), Administrative Support (AS) and Operations (O).

Occupational Group - The grouping of occupations within each occupational category. For example, in the S&P category, there are a number of occupational groups, Veterinary Medicine (VM), Biological Science (BI), Scientific Research (SR), Chemistry (CHEM), etc.

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Occupational Level - Each occupational group is divided into a number of levels, for example, Biologist 1 - 5, Chemist 1 - 5, etc.
Representation - the number or percentage of a designated group employed by an employer.

Under-Representation - representation of a designated group in an employer's work force below availability.

Utilization (Representation) Rate - the representation of a designated group in an employer's work force as a proportion of the group's availability, ie. representation divided by availability.

(b) Under-Representation of Visible Minorities in the EX group

Ms. Bosch testified that, as of September 30, 1993, the representation of visible minorities in the EX group of HC was 1/118 or 0.8%. Availability estimates for visible minorities for EX positions varied from 8.7% to 9.2%, depending upon whether it was the availability from within HC or from the FPS as a whole. These availability estimates suggest that, as of that date, HC should employ 10 or 11 (8.7% or 9.2% x 118) visible minorities in the EX group. Because the representation was only one, Ms. Bosch concluded that visible minorities were severely under-represented in the EX group, at less than 10% of their availability.

It should be noted that Ms. Bosch did not include in her totals anyone in the EX Equivalent group as part of management. She considered the EX Equivalent, EX minus one and EX minus two in both the S&P and A&FS categories to be the feeder groups for EX. The relevance of this will become apparent when we deal with the evidence of Adele Furrie, the statistical expert called by the Respondent.

(c) HC recruitment into EX positions

Ms. Bosch attempted to explain why, in her opinion, visible minorities were under-represented in HC management. She analyzed data from HC on the occupational group and level in the S&P category from which its EX members were recruited into the EX group. The data was as at April 12th, 1994 and at that date, there were 115 in the EX group, 63 recruited from within HC, 45 from the FPS and 7 from outside the FPS. Of the 63 from within HC, 33 were from the S&P category, and it is on this group that Ms. Bosch concentrated.

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Ms. Bosch compared each occupational group and level from which these managers were drawn to the availability of visible minorities in the same group. The availability estimates that she used were as at September 30, 1993.

Three different patterns emerged from Ms. Bosch's analysis. First, a majority of members of the EX group (17/33 or 52%) were recruited from three occupational groups with a fairly high representation of visible minorities in the feeder group, yet it appears that no visible minorities were recruited from this group.

Secondly, there was a very low recruitment of numbers into the EX group from occupational groups which had a very high representation of visible minorities. For example, only 3% of managers were recruited from

the BI group which has a 19% visible minority representation; and no managers from the VM group which has a 30% visible minority representation.

Thirdly, there was a very high recruitment from occupational groups with no representation of visible minorities.

(d) Under-Representation of Visible Minorities in the A&FS Category

Ms. Bosch also did an analysis of the data relating to the representation of visible minorities in the A&FS category. This information is relevant because the A&FS group is the source of 25% of the managers in this EX group. Because it is an important feeder group, if the visible minority representation is low, there will not be the critical mass to progress to the higher level positions and then to management.

Ms. Bosch concluded that visible minorities are severely under-represented in the A&FS category. In reaching her conclusion, she analyzed the representation, availability and utilization of visible minorities in all of the non-executive categories in HC in 1992. Although her focus was the A&FS non-EX category, Ms. Bosch reviewed them all to place the A&FS category in context.

The data indicates a utilization rate of 48% for the combined non-EX categories including the A&FS, and a utilization rate of 33% for the A&FS category that is, the representation of visible minorities in this category was only 33% of availability.

2. Evidence of Adele Furrie

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Ms. Furrie gave expert evidence for the Respondent in response to Ms. Bosch. Ms. Furrie is now a private consultant who spent most of her professional career in the FPS mainly with Statistics Canada. Ms. Furrie was qualified as an expert to give evidence on data analysis relating to visible minorities in the workplace in HC.

Ms. Furrie's approach differed from that of Ms. Bosch. Because the Complaint alleged discrimination from on or before September 8, 1992 and was continuing, Ms. Furrie analyzed data for the five years from March 31, 1991 to March 31, 1995. Further, because the Complaint alleged certain indicators for the discrimination, Ms. Furrie tested the validity of these indicators.

(a) Indicator One

The first indicator is in the Complaint that "discrimination is indicated by the extremely low number of visible minorities in senior management". Ms. Furrie had to calculate the number of persons in the EX group for the years that she considered. In calculating these numbers, she used a different base than Ms. Bosch. Ms. Furrie considered that management in HC should include those in the EX Group, those persons in selected EX Equivalent groups and levels in the S&P category. Her criteria for selection from the EX Equivalent was based on information obtained from HC and included comparable salary ranges to EX, significant management responsibilities, and exclusion from collective bargaining because of management responsibilities. By broadening the spectrum of positions considered, Ms. Furrie showed a higher number of persons in

senior management in HC than Ms. Bosch. To estimate the availability of visible minorities, Ms. Furrie used a similar approach to that of Ms. Bosch, except she looked at five years, not just one year.

Ms. Furrie's analysis of the data indicated that for 1991, EX/Ex Eq./SR.M. 197, VMS = 6.3%, Availability = 17 or 8.4%; 1992, EX/EX Eq./SR.M. 209, VMS = 9 or 4.3%, Availability = 18 or 9.2%; 1993, EX/EX Eq./SR.M. 216, VMS = 13 or 6%, Availability = 9.5%; 1994, EX/EX Eq./SR.M. 212, VMS = 12 or 5.7%, Availability = 19 or 9%; 1995, EX/EX Eq. 209, VMS = 10 or 4.8%, Availability = 19 or 9.1 %.

On the basis of this information, Ms. Furrie calculated the utilization rate for visible minorities in the EX group for the S&P category to be as follows: 1991 UR = 35.3% (6/17); 1992 UR = 50% (9/18); 1993 UR = 68.4% (13/19); 1994 UR = 63.2% (12/19); 1995

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UR = 52.6% (10/19). This is compared to the utilization rate of 10% as found by Ms. Bosch.

Having calculated the utilization rates for the years 1991 - 1995, Ms. Furrie concluded that the data does not support the allegation in the Complaint that there is an extremely low number of visible minorities in senior management. Ms. Furrie defined "low" by reference to a text book, The Canadian Class Structure, by Dennis Forcese, (pp. 53 - 54), which she found in her library at home, and which was used in one of her undergraduate sociology courses. According to this text, "low income" is defined as a level of income where 70% or more is spent on non-discretionary items. The corollary is that 30% or less is available for discretionary spending. Ms. Furrie adapted and adopted this definition and used it for her cut off point to measure extremely low. Since all of the utilization rates for the years 1991 - 1995 exceeded 30%, she concluded that the allegation of extremely low was not supported by the data.

In our view, both the conclusions of Ms. Bosch and Ms. Furrie on the question of under-representation are flawed. Dealing first with Ms. Bosch, she focused primarily on 1993 to reach her conclusion that visible minorities were severely under-represented. Her choice of 1993 is unfortunate since that particular year involved a major restructuring and reorganization which involved the transfer of the Welfare portion of the Department to another Department leaving only HC.

More significantly, Ms. Bosch included only one occupational group, the EX group, in her analysis of senior management. The result is that her calculations of the representation, availability and utilization of visible minorities are understated.

Ms. Furrie, on the other hand, included nine occupational groups (including the EX Group) in her calculations for senior management, four of which, in our opinion should not have been included. To this extent, Ms. Furrie overstated the numbers and her resulting calculation of the utilization rate of visible minorities is overstated.

Danielle Auclair, a representative of PIPSC, presented comprehensive data on the eight additional groups that Ms. Furrie extracted from the EX/Equivalent group. Her evidence

demonstrated that four of these occupational levels are not excluded from collective bargaining and thus should not be included in the totals for

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management. She agreed, however, with Ms. Furrie that the other four occupational levels should be included.

Having agreed to include these groups, the Complainants through Micheline Nehme, put into evidence, revised calculations showing the total population, visible minority representation, the estimated availability of visible minorities, the utilization rate and the future estimated vacancies which were calculated by tracking HC's recruitment trends over a period of five years.

The Tribunal accepts the evidence of both Danielle Auclair and Micheline Nehme. The resulting data for the utilization rate for visible minorities for the years noted are as follows: 1991 UR = 33% (5/15); 1992 UR = 27% (4/15); March 31 1993 UR = 42% (7/17); September 30 1993 UR = 20% (3/15); 1994 UR = 36% (6/16); 1995 UR = 25% (4/16). The average utilization rate for these 5 years is 33%, (excluding September 30, 1993).

Ms. Furrie's conclusion is that, given her cutoff point of 30%, the data does not support the allegation of the extremely low number of visible minority employees in senior management. Ms. Bosch concluded that visible minorities are severely under-represented in the EX group. Of course, the validity of either of these two conclusions depends upon how under-representation is defined. In any case, we do not understand Ms. Furrie's position to be that visible minorities are not under-represented in management, but only that their numbers are not extremely low.

There was some evidence presented to the Tribunal from Ms. Bosch and Dr. Nan Weiner, that 100% representation is the "ideal", but the "four-fifths rule" or 80% representation is generally accepted.

Applying this test, it is clear that, according to the data of Ms. Bosch or Ms. Furrie, there is a significant under-representation of visible minorities in HC senior management.

(b) Indicator Two

Dealing now with the second indicator in the Complaint that "discrimination is indicated by the extremely low number of visible minorities in the A&FS category". Ms. Furrie limited her analysis to non-management occupational groups and levels, namely, the EX Equivalent non-management and EX minus one and Ex minus two. The data indicates a utilization (representation) rate for visible minorities in these groups to be: March 31, 1991, UR = 53% (9/17); March 31, 1992, UR = 53% (9/17); March 31, 1993, UR = 42% (8/19); March 31, 1994, UR = 40% (8/20); March 31, 1995, UR = 40% (8/20). By comparison, Ms. Bosch

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determined a utilization rate in the A&FS group of 33% in 1992. Ms. Furrie did not consider the visible minority representation to be extremely low, again using a cut off point of 30%.

If the four-fifths rule is applied, there is a significant under-representation of visible minorities in the A&FS category.

(c) Indicator Three

In the third indicator that, "discrimination is especially supported by the concentration of visible minorities at lower levels in the S&P category", Ms. Furrie defined lower level positions as those below the feeder group, i.e. below EX Equivalent/non senior management and EX minus one and EX minus two.

According to the data that she analyzed over the five year period, visible minorities consistently maintained a smaller share of the lower levels in the S&P category and again she concluded that the allegation was not supported by the data.

But it is the corollary of her finding that is much more telling. The data that Ms. Furrie presented shows that for each year, for the years 1991 to 1995, the percentage of visible minorities in the EX Equivalent/non-senior management, EX minus one and EX minus two, the feeder group, consistently exceeded the percentage of the total population of this group. For example, as at March 31, 1991, visible minorities constituted 36% of the EX Equivalent/non senior management, EX minus one and Ex minus two, (or 36% of the feeder group) compared to 27% for non visible minorities. As of March 31, 1995, visible minorities were 35% of the S&P feeder group compared to 27% for non-visible minorities. This pattern is consistent for the other 3 years and is consistent with Ms. Bosch's conclusion that there is a high concentration of visible minorities in the feeder group, but low numbers in the management group, the next progression. In other words, visible minorities in the S&P category are bottlenecked at the feeder group level.

(d) Indicator Four

With respect to the fourth indicator that "visible minorities in the S&P category are not promoted equitably which negatively affects their opportunity for appointment to senior management", Ms. Furrie analyzed three types of HC staffing actions, acting appointments, competitions and reclassifications. She did so because promotions to a higher level are usually achieved through competitions or reclassifications and acting

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appointments provide experience that is very useful when applying for a promotion. The data she analyzed related to acting appointments, competitions and reclassifications in the S&P category for the fiscal years, 1991 - 92 to 1994 - 95.

Acting appointments constituted the majority of the total of these staffing actions during this period, being about 65% of the total. There is no consistent pattern in the data with respect to the success of visible minorities obtaining acting appointments whether it be for less than or more than 4 months. For example, visible minorities were given a greater proportion of acting appointments of less than 4 months than non visible minorities in 2 of these years, but a lesser proportion in the other 2 years. For acting appointments of more than 4 months, visible minorities succeeded in a greater proportion than non visible minorities in one of the years, and in the remaining three years, the majority of acting appointments were given to non visible minorities.

With respect to competitions and reclassification, visible minority employees were slightly more successful in competitions and significantly more successful in reclassification.

The question the Tribunal must now address is, what is the reason for this under-representation. Is it because of certain staffing practices at HC, which, as alleged, bear adversely on the promotion opportunities of visible minority employees? That is, can the under-representation be linked to discrimination in staffing practises of HC? The remainder of the Complainants' evidence was directed to answering these questions.

3. Evidence of Jeffrey Reitz - The Mail Back Survey

Dr. Reitz has a Ph.D. in sociology from Columbia University and is a professor of sociology at the University of Toronto. He teaches graduate courses in ethnicity and social inequality and in survey research methods and data analysis. Dr. Reitz has been involved in a number of studies with respect to race relations, the immigrant labour market and he has also published various books and journal articles relating to ethnic and racial issues.

Dr. Reitz was retained by PIPSC to conduct a survey, the purpose of which was to determine whether, at HC, racial minorities in the S&P category have equal access with whites to career development opportunities. The survey was a "mail back questionnaire" sent out in late October and early November, 1995. Questionnaires were mailed to 1563 persons out of a

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total population of 2033 employees in the S&P category. Those who were not mailed the survey were "Rand Formula" members of PIPSC. That is, these employees are required to pay PIPSC union dues, but are not members of PIPSC and have not signed PIPSC membership cards. Because they are not PIPSC members, PIPSC does not have permanent address records for them and could not send them the questionnaire. There were 533 responses to the survey for a response rate of about 34%. Dr. Reitz considered this to be adequate although it is slightly below the norm for a mail back survey.

Dr. Reitz identified five areas of career development opportunities and the survey questions were designed for responses in these five areas, career development training, special assignments, access to acting positions, supervisory responsibility and service on selection boards.

Dr. Reitz' analysis of the responses indicated that the survey sample was representative of PIPSC members in terms of occupational groups in the S&P category. For example, Biology was 15% compared to 16% PIPSC membership; 13% in Chemistry/12% membership; 18% Scientific Regulation/17% membership; 7% Scientific Research/6% membership; 32% Nursing/36% membership and so on. The survey closely reflected the membership in terms of gender, 44.6% males/45.5% membership.

On the question of race, Dr. Reitz testified that the survey questions were designed to compare the position of whites with that of racial minority groups, i.e., to evaluate the actual experiences of different racial groups. The objective was not to find out what the membership of PIPSC thought about the impact of race in HC. Racial status was measured using questions adapted from the 1996 Canadian Census and respondents were

asked to self identify. Whites in the sample numbered 82% of the responses. Racial minorities were 13.4% of the responses and aboriginal persons were 4.6% as compared to HC data as of October, 1994, which showed that 8.3% of the employees in the S&P category were visible minorities and 4.7% were aboriginals. About 60% of those responding worked in the Health Protection Branch and 36% in the Medical Services Branch.

The questionnaire asked respondents whether they ever had career development training and listed a number of training courses. The survey data indicated that racial minorities are less often to have had career development training experiences than whites (39% v. 46%). This racial difference for management-related training was larger for males and larger for those more senior in terms of age, length of service, educational level and supervisory responsibility.

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The sample data also identified a racial difference as to how respondents became aware of a training opportunity. Whites were more often informed of these training opportunities by managers, whereas minorities were much more proactive and found out about these opportunities by using their own initiative.

The survey contained a number of questions relating to acting positions. This was considered an important area because an employee in a higher acting position gains valuable management experience and may obtain an advantage in a later competition if the position is filled on a permanent basis.

The sample results indicated that whites more often hold acting positions than racial minorities (45% v. 34%). The minority disadvantage is even more pronounced among males and among those more senior in age, experience, supervisory responsibilities and graduate education. For white males, 47% obtained acting positions compared to 27% for non-white males.

There were also racial differences regarding how employees found out about acting positions. Whites were more often asked by their managers to apply, whereas racial minorities were more self reliant in finding out about opportunities for acting positions.

The survey also measured supervisory responsibility, as this can be a qualification for career development. The survey data indicated that among whites, 42% supervise other employees compared to 32% for racial minorities. This difference was not explained by difference in age, experience or education. Further, management training and holding an acting position increased the likelihood of supervising for both whites and racial minorities. However, the advantage was much greater for whites. For whites with management training or who held acting positions, the likelihood of being supervisors increased significantly compared to racial minorities.

Respondents were also asked if they had served on a selection board. This is relevant not for assessing a career development opportunity, but rather to assess the participation of minority groups in hiring and promotion decisions. The survey data again showed a minority disadvantage. In fact, whites were almost twice as likely to serve on selection boards as non-whites. Interestingly, this racial difference is not explained by other factors such as age or experience or eduction. In fact, the racial

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gap is much greater for those who are more senior and with more qualifications. Dr. Reitz considered this was particulary significant because service on selection boards is primarily a management decision. In his view, this suggests that this management decision favours whites over non-whites for reasons that have little to do with the level of education, experience or responsibility.

Dr. Reitz agreed that the total population in the S&P category was not surveyed, but did not agree that this would affect the validity of the survey in terms of its representation. In his view, there is nothing to indicate that those persons not surveyed were different in some way or less representative of the population that was surveyed.

Dr. Reitz was also challenged with respect to the fact that there was an over-representation of visible minorities responding to the questionnaire, (13.4% v. 8.3%). It was also pointed out to him that 60% of the respondents to the survey came from the Health Protection Branch, and that 83% of non-whites who responded came from this Branch. This, plus the fact that, respondents can, with a mail back survey, consider all of the questions before answering any, raised questions about a possible bias in the responses.

While agreeing to these facts, Dr. Reitz pointed out that because the number of visible minority responses were only 13% of the total, these facts were not particularly significant. Further, the purpose of the survey was to compare whites and non-whites, and a higher response rate from one group compared to another, is not in itself a source of bias.

4. Evidence of Visible Minority Employees in HC

The Tribunal heard from a number of other witnesses, many of whom testified as to their experiences and perceptions as visible minorities seeking advancement opportunities in HC.

(a) Dr. Dennis Awang

Dr. Awang was employed at Health Canada from 1969 to 1993. Dr. Awang, a visible minority, was born in Trinidad and received his undergraduate and doctoral degrees in organic chemistry from Queen's University, Kingston, Ontario. He spent two post-doctoral years as a lecturer and research associate in the Department of Chemistry at both the University of Illinois and at the University of Michigan. He is fluent in English and in French.

Dr. Awang has published more than 70 papers in national and international scientific journals and has given numerous presentations at universities and at learned conferences. In 1990, he was the sole Canadian

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representative in a group from eight countries who participated in the World Health Organization (WHO) meeting on traditional medicine and AIDS.

He was chosen for this meeting because of his expertise in medicinal chemistry and herbal botanical science. Because of his expertise, experience and frequency of invitations to national and international conferences, Dr. Awang, with all modesty, considered that he could make a reasonable claim to be the leading authority in his field in Canada.

Dr. Awang began his employment with HC in 1969 as an entry level Research Scientist (RS1) in the Pharmaceutical Chemistry Section of HC. When he was hired, Dr. Awang was told that he was the best candidate interviewed by HC. Yet a (white) colleague, Dr. Keith Bailey, a non visible minority from Great Britain, with similar qualifications, was hired at the same time, at a higher classification and salary. Dr. Awang discussed this differential with his superior, Dr. Cook. As a result, he received a modest increase in salary, but his classification level, which was much more important for him, was not changed.

Dr. Awang was appointed, Head, National Products Chemistry Section in 1979. At that time, he was a Research Scientist 2 having been promoted in 1974. He was the Head of this section until it was merged with another section in 1991. This was the highest level and classification that he achieved except for a brief stint in 1984, as acting Chief, Chemical Standards Division in 1984. Dr. Awang retired from HC in 1993.

During his tenure at HC, Dr. Awang had a number of unpleasant experiences with his colleague, Dr. Lodge, who was the Head of the Steroids Section. In the spring of 1984, they attended a university lecture given by a professor from the United States, who during his lecture, noted that most of the background research for his work had been done by a graduate student, a doctoral candidate of Middle Eastern origin.

On hearing that comment, Dr. Lodge said to Dr. Awang, "That guy worked like a nigger." Dr. Awang was surprised and bothered by this comment and reported it to Dr. Hughes, the then Acting Director of the Bureau of Drug Research. Dr. Hughes' response was that he did not find the term particularly bothersome and in fact, his family once had a dog named "Nigger".

Dr. Awang testified that Dr. Lodge often greeted him by "Hello darkness my old friend", and on occasion, referred to him as "Blackie".

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For a period of about one year, Dr. Lodge would place stickers from South African fruits on Dr. Awang's telephone, his desk, his desk lamp and on the door of his office. This was prior to the abolition of apartheid and Dr. Awang believed that the only reasonable explanation for this behaviour was an indication of support for apartheid or white superiority.

Dr. Awang took up this matter with Dr. Hughes and Dr. Lodge. At the meeting, Dr. Lodge admitted responsibility for his conduct, but offered no explanation or apology. The meeting was effective and Dr. Lodge stopped this type of insulting conduct.

Dr. Awang testified that he had recorded the incidents in a report and forwarded it to PIPSC, but decided not to follow up and that his best course of action was to continue to perform his duties and press on.

Dr. Awang did not leave the FPS willingly, but rather because, the Natural Products Section was merged with another section and all the employees of that section, including Dr. Awang, were declared surplus effective June 1st, 1991. This happened in spite of an external evaluation which considered the Natural Products Section as dealing with a very important field and the work being conducted by Dr. Awang was highly valued.

When Dr. Awang learned that he was designated surplus, he wrote to the Deputy Minister requesting a meeting to discuss this matter. In his letter, he indicated that, as one of the announced goals of the Public Service Commission was to increase the number of visible minorities in the FPS, he did not understand the rationale of the lay-off of an internationally recognized black scientist. He met with the Deputy Minister and subsequently with the Director General of the Personnel Administration Branch of HC, but he was unsuccessful in having the decision changed.

Between 1991 and 1993, Dr. Awang made persistent efforts to obtain another position within HC, but his efforts were unsuccessful. During that period a permanent position for a Research Scientist became available. But according to Dr. Awang, someone else was appointed to the position without a competition and even though the person appointed did not meet the educational qualifications required by the job description. Dr. Awang brought this matter to the attention of PIPSC, who intervened on his behalf, but was not able to achieve any positive result. On another occasion, another position became available for which Dr. Awang believed he was qualified. He did not get the position and subsequently found out that

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the position had been downgraded and given to someone who was working as a technologist with an undergraduate degree in another section in HC.

After he received his surplus notice, Dr. Awang made repeated requests for extensions to his termination date to give him time to seek another position within his area of experience in HC. At no time did he want to retire. Dr. Awang testified that he was prepared to do laboratory work if necessary and he suggested that he would return to University to be trained in another area. However, when he made that suggestion, he was told it would take more than two years to train and was not feasible.

After exhausting all the possibilities for another permanent position, and receiving no more extensions, he left HC in August, 1993.

(b) Ivy Williams

Ivy Williams holds a double masters degree in education and psychology from Columbia University. Her main work experience has been in education, child development and child mental health. She was senior lecturer at Mico Teachers College in Jamaica and, subsequently, a lecturer in the Faculty of Education at the University of the West Indies ("UWI"). She had also served as the director of a regional pre-school child development centre at UWI, with supervisory responsibility throughout the islands of Barbados, Jamaica and St. Vincent. Currently, Ms. Williams is the acting chief of the Mental Health Promotion Plans Unit in HC. She has held that position since April, 1995. Her classification is a PM-04, which classification she has held since 1987 when she first became a permanent employee in HC.

The relevant portions of Ms. Williams' evidence centered around two matters, first her failure to obtain the position of Chief of the Children's Mental Health Unit, the Mental Health Division of HC; and second, her position as the first chair of the Visible Minorities Advisory Committee (VMAC) in HC.

Ms. Williams testified that the Children's Mental Health Unit was established in approximately 1992, as a result of her initiative and the proposal which she drafted to set up this unit. Her proposal was accepted and the unit was established with initial funding of about $6.5 M. She also drafted the job description for Chief of the unit, which job description described very closely the work that she had done in the preceding five years and she expected that she would be appointed into this position on a permanent basis. She was not appointed and it was her understanding that a person with less educational qualifications and

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experience for the position was appointed Acting Chief, without competition. She later found out that the person appointed had worked at the PM-04 level as a Chief of Operations overseeing a budget of about $18 M.

Ms. Williams testified that she did not feel personally discriminated against as a visible minority when she was not appointed as Chief, nor did she file a grievance. She felt that it was "terribly unfair treatment", but she was not disposed to pursue any appeal because it was too painful for her to do so. She did make a point of discussing this matter with her immediate supervisor, and pointedly recalled that her supervisor told her "that she did not see her as a manager". Ms. Williams requested that she be sent on language training immediately which was done, and following language training she was seconded to the Public Service Commission for approximately two years and returned to the Mental Health Unit in December, 1994.

It was pointed out to Ms. Williams during her cross-examination that there was a competition for the permanent position of Chief of the Children's Mental Health Unit dated July 25, 1994. Ms. Williams responded that this was the first she had heard about a competition because she had been away on a secondment. No one had informed her about this competition, even though she had regular contact with her supervisor in the Mental Health Division. Had she known, Ms. Williams said she certainly would have applied. She also noted that the acting Chief would have had a two year advantage in experience and knowledge of the position.

It was also pointed out to Ms. Williams in cross-examination that in her 1992 Performance Appraisal indicated that financial accountability and administrative tasks were not a priority for her and the Chief of the Children's Mental Health Unit was responsible for a substantial budget. Ms. Williams' response was that she regarded these comments as a justification for not appointing her or considering her for the acting position. In her view, the requirement for financial accountability and administrative tasks were considerably less important than the program planning and development responsibilities in the job.

Ms. Williams also spoke about the Visible Minority Advisory Committee (VMAC) which was established by HC in 1991. VMAC consisted of twelve persons and Ms. Williams was elected the first chair of the Committee. VMAC's mandate was to recommend implementation of methods that advocate and promote the recruitment, retention and promotion of visible minorities in HC, and to advise HC on work related programs and policies that are responsive to a certainly diverse population. VMAC issued its report in September 1992 entitled "Health and Welfare: Excellence through Diversity". The VMAC noted a perception among visible minorities that discriminatory behaviour exists within HC. While there was no quantitative

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data for the perception of the discrimination, the Committee concluded that whatever their origins and accuracy, these perceptions are detrimental to the individuals involved and to those they work with. VMAC made a number of recommendations including, establishing a mechanism to actively recruit visible minorities; that steps be taken to increase the representation of visible minorities on selection boards; that mechanisms be established to ensure that visible minorities are represented fairly at all levels and in all categories within HC, and that HC recognize, use and develop the skills of visible minorities and actively promote their career development.

According to Ms. Williams, VMAC's Report was given to the Deputy Minister, but there has never been any official acknowledgment of receipt of the Report and no discussion with VMAC as to its findings or recommendations.

(c) Tina Walter

Tina Walter holds an M.A. from the University of Western Ontario and is a management trainee in the Management Training Program offered by the Public Service Commission. Ms. Walter is a visible minority and was the Chair of the VMAC in 1993. Perhaps her experience as the Chair of VMAC can best be summed up by reference to her January 12th, 1994 memorandum to Kent Foster, the Assistant Deputy Minister of the Health Protection Branch and who was the liaison between VMAC and HC. Ms. Walter wrote this memorandum at that time she was leaving the Department to join the Treasury Board.

In her memorandum, she pointed out that being a member of the VMAC had been a test in perseverance. She pointed out that with exception, senior management had not shown any commitment to the issues of employment equity for visible minorities and visible minorities themselves recognized this lack of commitment. Over the past three years of the life of VMAC there has been no real movement towards change within HC at any level. She also pointed out that VMAC was asked by the Deputy Minister to prepare a Report, the Report was produced and distributed in 1992. By 1994 nothing had been done about the Report and the manner in which the Report was managed and addressed by HC was less than adequate. She concluded that the Department can not afford to allow employment equity for visible minorities to continue to be a low priority.

(d) Dr. Daljit Dhillon

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Dr. Daljit Dhillon is a Scientific Evaluator in the Bureau of Medical Services, Environmental Health Directorate of HC. Dr. Dhillon holds a M.Sc. in Chemistry from Harcourt Technological Collegiate Institute, India and a Ph.D. (1970) in Microbiology from the University of Manitoba.

Dr. Dhillon's testimony was focused primarily on his failure to be promoted or obtain an acting position at HC.

It is his belief that it is because of racial discrimination that he was not selected for acting positions that would help advance his career. He testified that on a number of occasions, he had appealed the selection

of the person chosen for the acting position for which he had applied, but he conceded that he had never alleged discrimination on any of his appeals nor had he ever made any complaints to the CHRC. His explanation for this was that he thought that such course of action would cause bad feeling and cause unnecessary antagonism in the work place. It was his position that he had to work within HC and therefore, had to live with the situation.

It is not our purpose here to determine whether or not Dr. Dhillon personally suffered racial discrimination. Rather our focus is on the process of appointment to acting positions that Dr. Dhillon described in his evidence.

Dr. Dhillon's concern related to the appointment of Dr. Mary Jane Bell as acting Head of the Pre-Market Review Section. Dr. Dhillon worked as an Evaluator in this section. According to Dr. Dhillon, Dr. Bell was appointed to this position in January, 1993, but no notice of the appointment or notice of a right of appeal was posted. As a result of Dr. Dhillon's and PIPSC's intervention, a notice of appeal was posted in November, 1993 and Dr. Dhillon and five other persons, four of whom were not visible minorities, filed an appeal on the basis that there had been no competition for this acting appointment. This appeal was allowed and the appeal board ordered that a competition be held for this acting position.

This was subsequently changed to a comparative paper assessment of the candidates who applied, rather than a competition. Dr. Dhillon testified that there was no written exam, that he was not interviewed and he had no idea of how he was assessed, other than the fact that he was assessed. He was advised in March, 1994 that his qualifications had been assessed and he was found not to be qualified for the position. The assessment was done by Dr. Freeland, the chief of the Device Evaluation Division to whom the head of the Pre-Market Review Section reported. Dr. Dhillon testified that

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Dr. Freeland did not supervise him and he had virtually no direct contact with him.

Dr. Dhillon subsequently learned that Dr. Freeland assessed him on the basis of his performance appraisals and on the basis of consultations with his immediate supervisor, who, in this case was Dr. Bell, the acting head of the section and the person whose acting appointment had been appealed by Dr. Dhillon. Dr. Freeland had initially appointed Dr. Bell and Dr. Bell was confirmed in the acting position, having been assessed as the best candidate by Dr. Freeland.

A competition was held for the permanent appointment of Head of Pre-Market in September, 1994. The qualifications for the position included experience in the supervision of professional or support staff and now required a degree in natural, physical or applied sciences. Previously the statement of qualifications had required a post-graduate degree in biology. Dr. Bell does not have a degree in biology, but does have a post-graduate degree in chemistry. Dr. Dhillon applied for the position and was screened out because he did not have the management experience for the position.

Dr. Dhillon appealed the permanent appointment, but he withdrew the appeal because, in his view as a union steward with PIPSC, he did not have any faith in the appeal process. His experience has been that, even when

an appeal is successful and corrective action is required, the same person who was in the acting position seems to get appointed to the permanent position. Dr. Bell was the successful candidate.

It should be pointed out that prior to Dr. Bell obtaining the acting position, Dr. N. Chopra, a visible minority, was the Head of the Pre-Market Review Section from 1988 to 1991. She was succeeded by Dr. Boulay who was the acting head between 1991 and 1992. Dr. Chander replaced him and was then the acting head from about September, 1992 to January, 1993. Dr. Chander and Dr. Wadera are visible minorities. Dr. Dhillon did not appeal their acting appointments.

(e) Dr. Ajit Das Gupta

Dr. Das Gupta had an interesting tale to tell. He was born in India and came to Canada in 1952 as a student. He holds a Ph.D. in Physics and did post-graduate research at Oxford University. In 1959, he became a lecturer in nuclear and radiation technology at McMaster University, and in

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1960 he joined HC as a Physical Scientist in the Radiation Protection Bureau. Dr. Das Gupta was promoted rather rapidly, first to Section Head, then to Assistant Chief, then to Chief, then finally Director, of the Bureau of Medical Devices. He was appointed to this position in about 1974.

When he first joined HC, Dr. Das Gupta worked in the newly formed Radiation Protection Program which was established to deal with Canada's concerns about the potential of radioactive emissions and nuclear fallout. He was very involved in the development of the legislation dealing with this subject matter, the Radioactive and Emitting Devices Act. Because of his expertise and work in the field, he was known across Canada in his words, as "Mr. Radiation", and travelled across the country to help provinces develop radiation protection programs.

By 1982, the Bureau of Medical Devices had grown to 35 employees of various scientific backgrounds and expertise. Dr. Das Gupta believed the Bureau should become more proactive and should adopt a preventative approach by carrying out a pre-market review of products, particulary those being used for human implant. In order to accomplish this, Dr. Das Gupta requested additional resources which was approved by the Deputy Minister and the Treasury Board. However, he had to obtain approval from the Director General of the Environmental Health Directorate to actually staff these positions. This Directorate was headed by Dr. Somers who did not agree that these resources should be allocated to the Bureau of Medical Devices. As a result, Dr. Das Gupta did not get these additional staff positions and a large backlog developed in the Bureau of Medical Devices in the processing of the many applications for approval received by the Bureau.

Dr. Das Gupta testified that from about 1982 until his eventual retirement in 1993, he was engaged in a constant battle with Dr. Somers to get the necessary resources to staff positions in the Bureau. In many instances he was given staff positions that were classified much lower than was required to perform the tasks. Dr. Das Gupta offered voluntary overtime and to divert resources from other areas within the Bureau to deal

with the backlog, but Dr. Somers would not approve any of these actions. Eventually Dr. Das Gupta became convinced that Dr. Somers was creating these obstacles because he wanted him out of the Bureau and was attempting to show that he was an ineffectual director.

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In 1985, Dr. Das Gupta attended a conference in Madrid and was invited by the Spanish Government subsequently to spend time in Spain to advise on the development of their medical device program, his program in Canada having developed an international reputation. He advised Dr. Somers of this, but Dr. Somers did not approve this and told him that he was on a program of saving resources and intended to merge the Bureau of Radiation Protection and the Medical Devices Bureau into one. Two Directors would no longer be required and Dr. Das Gupta was to lose his position as Director. Instead, he would be appointed as a Special Advisor.

Dr. Das Gupta felt that since he had been responsible for the development of the Radiation Protection Unit that he should be the Director of the combined Bureaux. Dr. Somers, however, informed him that he lacked a suitable personality for the political and other aspects that were required for this new position. In particular, he did not have the personality and was not suitable to interact with the medical profession, scientists and politicians. Dr. Das Gupta testified that this was not the first time that Dr. Somers had spoken to him about his personal unsuitability. He and Dr. Somers had had many conversations over the years and when they talked about interacting with other people, Dr. Somers told Dr. Das Gupta that individuals of his background were not quite suitable because they were "colonials". Dr. Somers told him that "good brainy guys had to come from the U.K.". Dr. Somers also told Dr. Das Gupta that there were too many Indians in the Bureau and expressed the view that Indians were technically competent, but wondered if they were good for regulatory programs.

As Director of the Bureau of Medical Devices, Dr. Das Gupta sat on selection boards, particularly for competitions where the position to be filled would be reporting directly to him. Dr. Das Gupta testified that on some of these occasions, Dr. Somers would approach him and tell him whom he, Dr. Somers, would like to see selected as well as those who should not be selected. Dr. Das Gupta recalled on one occasion, there had been a competition for a Research Scientist and one of the candidates was a scientist from India. Prior to the formation of the selection board, Dr. Somers told him that he did not want him to sit on the board, as he may very well select this candidate because he was Indian.

On another occasion, Dr. Somers upon returning from a conference from India, told Dr. Das Gupta that visiting India had been a very unpleasant experience because the people of India were so corrupt. He also stated that "I hope you don't get some of that corruption here".

The two Bureaux were amalgamated as the Radiation Protection and Medical Devices Bureau and Dr. Das Gupta was not appointed as the Director. After these events had taken place, he reviewed the options available to

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him which were to accept the position of a Special Advisor, take medical leave, retire, or fight. He elected to retire from HC and did so in 1993.

(f) Dr. Shiv Chopra

Dr. Chopra is currently chair of the Employment Equity Committee of NCARR, immediate past president of NCARR. He played a key role in bringing NCARR's complaint to the CHRC. Dr. Chopra had previously filed a complaint against HC under section 7 of the CHRA, which was heard by another Tribunal. The major portion of his evidence before this Tribunal related to his personal experiences and, in particular, his obvious frustration with his inability to rise within the management structure in HC. Dr. Chopra's individual complaint is not before this Tribunal and we have considered his evidence to the extent only for its relevance to the staffing practices at HC that have been alleged by NCARR to create barriers to the progression of visible minority employees into management.

Dr. Chopra has a B.VSc. (1957) from Punjab Veterinary College, India and a Ph.D. (1964) in Microbiology from McGill University.
Prior to coming to Canada and after obtaining his B.VSc., he worked as a veterinary surgeon in charge of the State Veterinary Hospital in India, supervising a staff of six assistants. His duties in this position involved management of technical, fiscal matters and personnel. From 1958 to 1960, he was a research officer with the Biologics Production and Quality Control at the Punjab Veterinary College, and managed a staff of 30 scientific and technical personnel.

In 1965, Dr. Chopra moved to England to work for Miles Laboratories. He headed a section of a multi-disciplinary team of 13 researchers and the functions of this position involved the supervision and management of the pharmacology and toxicology program for the regulatory approvals of new drug submissions.

Dr. Chopra returned to Canada in 1969 and joined HC as a Scientific Advisor (SA-1), in the Bureau of Human Prescription Drugs (BHPD) of the Health Protection Branch and was reclassified in 1971 to a Biologist 4 (BI-04).

Dr. Chopra worked in the BHPD from 1969 to 1987. In 1987, Dr. Chopra applied for and was selected for a position in the Human Safety Division of the Bureau of Veterinary Drug, with the classification of Veterinary Medicine 4 (VM4). He has remained in this Division and at this classification since 1987 (with the exception of some special assignments).

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During his tenure with HC, Dr. Chopra has received fairly extensive management training, either through formal training courses or through his involvement on management related committees and on task forces. He has frequently acted as Chief of his Division for short periods of time and performed the regular duties of the Chief on a day to day basis.

Dr. Chopra was keenly interested in moving into management at HC and it is clear from his evidence that over the years, he experienced an increasing level of frustration due to what he characterized as senior management's insensitivity and inaction with respect to his requests, given his experience, qualifications and positive performance appraisals.

Dr. Chopra gave evidence relating to a particular staffing action at HC which he put forward as raising issues of fair treatment in the staffing

process. These are the events of 1990 to 1992 which involved the acting appointment of Dr. Claire Franklin to the position of Director, Human Prescription Drugs and the saga of all that happened following that appointment.

In 1990, the position of the Director of the BPD, where Dr. Chopra worked for eighteen years, became vacant. Dr. Chopra wrote in September, 1990, to Dr. Somers, the Director General, proposing himself as a candidate for the position and he also wrote to Dr. Liston, the Assistant Deputy Minister. Dr. Liston replied that Dr. Somers thought that this position should be filled by someone with a medical background. The position was described as bilingual and required the director to be a medical doctor. The previous incumbent did not have a medical degree and the duties were split between the director and assistant director who was a medical doctor.

No competition was held to fill the vacancy, and Dr. Franklin was given the acting appointment in October, 1990.

Dr. Franklin had been chief of a division in the Environmental Health Directorate for about nine years and had substantial experience as a manager. She was not a medical doctor, nor was she bilingual at the time of the appointment.

The statement of qualifications for the position was not prepared until March 25th, 1991, but was made retroactive to October, 1990. It did not require that the director be a medical doctor. Dr. Chopra objected to and appealed the acting appointment in December, 1990 to the PSC. Early in 1991, HC created an EX-02 Director position with some job qualifications

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as Director, except for the requirement to be a medical doctor. The medical duties were assigned to another position. Dr. Franklin was appointed to this position on an acting basis for four months when her previous acting appointment expired and was reappointed two more times to the end of November, 1991.

The appeal heard on July 19th, 1991, was allowed, the appeal board finding that Dr. Franklin was not fully qualified for the position of Director. Notwithstanding this decision, Dr. Franklin continued to act in the position for two more months until, through intervention of Dr. Chopra and PIPSC, the PSC ordered that Dr. Franklin's acting appointment be terminated on September 20th, 1991, and that there be two competitions, one for a four month acting appointment and the other for the permanent position as director. Dr. Franklin continued in the position and continued to exercise the responsibilities of Director, but she was classified and paid at her previous classification and salary level not at an EX-02 level.

In October, 1991, a competition for the position of Director was posted, but Dr. Chopra could not apply because his classification was one level below the eligibility level set for the position. Dr. Chopra responded by an application to the Federal Court requesting that Dr. Franklin's appointment be revoked. This litigation was resolved on the basis that Dr. Franklin would be assigned to other duties, that there would be a new competition to staff the permanent position of the Director and Dr. Somers was excluded from any involvement in the selection process. On March 20th, 1992, a competition was posted for the position of Director and Dr. Chopra was eligible to apply, which he did. Dr. Chopra was screened

out by the screening committee for the reason that he did not possess the necessary management experience. Dr. Franklin was found to be qualified and her appointment as a permanent Director was confirmed on April 21st. At the same time, the position of Assistant Director was abolished. Both Dr. Chopra and Dr. Michele Edwards, the former assistant director, appealed the appointment of Dr. Franklin, but their appeal was dismissed on July 27th, 1992. The appeal board found that HC had not acted improperly by reclassifying the position of director to an EX-02 and dropping the requirement of a medical doctor. The board also upheld the selection of Dr. Franklin and concluded that Dr. Chopra did not possess the necessary management experience for the position.

On October 12th, 1992, a final level grievance meeting was held with the Deputy Minister of HC. Dr. Chopra presented a written statement

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outlining the grounds for his grievance, but nothing was resolved in favour of Dr. Chopra except that the Deputy Minister directed Shirley Cuddihy of Staff Relations to speak to Dr. Liston and Dr. Somers with respect to the reasons why Dr. Chopra was not being promoted into management.

(B) Systemic Barriers in Staffing and Staffing Development Systems in HC

1. Dr. Nan Weiner

Dr. Nan Weiner, a consultant in human resources, including staffing and organizational behaviour, gave expert evidence for the Complainants. Dr. Weiner has a Ph.D. (1977) in human resources from the University of Minnesota and over 20 years of human resources experience gained through practical experience, consulting and teaching. Dr. Weiner was qualified as an expert in staffing development and systemic discrimination.

Essentially, Dr. Weiner's evidence consisted of identifying in general terms, systemic barriers in staffing and staffing development which adversely affect the hiring and promotion of visible minorities. She then examined two specific staffing practices at HC to determine whether barriers, which are found in other employment systems, were operating in HC. Having concluded that certain barriers were present, Dr. Weiner then suggested remedies to overcome the barriers found at HC.

Dr. Weiner defined staffing as initial hires and promotion and staffing development as dealing with employees' needs to develop the skills necessary to do their current jobs and obtain the additional skills necessary for promotion.

Barriers are staffing practices which directly or indirectly disadvantage members of a particular group, and for which there is no job related rationale.

To identify the relevant barriers, Dr. Weiner relied primarily on three sources. The 1995 Glass Ceiling Report of the U.S. Federal Glass Ceiling Commission (which was concerned with the opportunities for women and minorities to advance to management and decision making positions in private sector organizations in the United States) and two reports prepared by the FPS, Breaking Through the Visibility Ceiling: Interim Report of the Visible Minority Consultation Group on Employment Equity (March 27, 1992);

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and Distortions in the Mirror: Reflections of Visible Minorities in the Public Service of Canada (January 22, 1993), (both reports prepared for the Secretary of the Treasury Board and Council of Deputy Ministers).

The two specific staffing and staffing development practices at HC that Dr. Weiner examined were:

(1) promotion of visible minorities into senior management; and

(2) initial hire and promotion of visible minorities in the A&FS category.

With respect to (1) above, Dr. Weiner extracted the following barriers that she considered relevant to HC and then sought to determine whether these barriers are operating in HC:

(a) ghettoization of or the clustering of visible minorities into technical and professional jobs that do not lead to management positions;

(b) staffing decisions which are ultimately based on an informal process;

(c) less encouragement for visible minorities; and

(d) perceiving visible minorities as different and "unfit for managerial positions".

(a) Ghettoization

Ghettoization, is the clustering or concentration of visible minorities in staff jobs or in highly technical or professional jobs from which they do not proceed into management positions, in other words, a "visibility trap".

Dr. Weiner considered that the possible explanations for the under-utilization of visible minorities in senior management could be lack of interest of visible minorities in management, or lack of skills of visible minorities for management. She concluded that there is no evidence that visible minorities as a group, are any less interested than non visible minorities in advancing into management. Certainly at least, the evidence of Ms. Williams, Dr. Dhillon, Dr. Chopra and Dr. Das Gupta is to the contrary. With respect to skills, Dr. Weiner stated that there is nothing to suggest visible minorities in the S&P category are any less skilled professionally or technically than other employees.

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Dr. Weiner noted, however, that lack of management experience seemed to be holding back visible minorities from management positions. This was the reason given for the failure of Dr. Chopra, Dr. Dhillon and Ms. Williams to be promoted to management.

For Dr. Weiner, the requirement for managerial experience is a legitimate one and not necessarily discriminatory. However, for this requirement to operate in a non-discriminatory way, there must be an opportunity for all employees to obtain the necessary training and experience, and the assessment of this qualification must be consistently assessed for all employees.

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Dr. Weiner referred to Dr. Reitz' survey data, which indicated a minority disadvantage in access in management training, and a minority disadvantage in obtaining supervisory responsibility and acting positions, all three of which are important methods of obtaining the requisite experience. The evidence of Ms. Furrie also confirmed the minority disadvantage of visible minorities in obtaining acting appointments. This data also showed a minority disadvantage with respect to how employees were apprised of acting appointments.

Dr. Weiner also considered the promotional patterns of visible minorities in the S&P category into the EX positions. These patterns (described in Ms. Bosch's evidence) showed that the majority of EX positions are filled from occupations in the feeder group in which there are few or no visible minorities.

Dr. Weiner also noted by reference to Dr. Chopra and Ms. Williams that managerial qualifications are not consistently assessed; their management and supervisory experience, although admittedly obtained prior to joining HC, seemed to be discounted.

Dr. Weiner concluded that the under-representation of visible minorities could not be explained by lack of interest or lack of skills on the part of visible minorities. This under-utilization and the promotional patterns are consistent with a finding that the barrier of ghettoization is operating in HC.

(b) Less Encouragement of Visible Minorities

Dr. Weiner referred to the survey response which indicated that, in the employment context, visible minorities receive less encouragement than whites. Dr. Weiner explained this is important because people tend to

apply for promotions because they feel they are competent and are eager to move up the ladder. But there is always some uncertainty about one's ability to succeed at the next level and in her view, people watch for signals from their manager or from their organization that if they bid for a higher level job, that they will be given fair consideration. These signals can be encouragement to take management training programs, serving on committees or task forces or other activities that provide experience and exposure to others in the organization.

The survey data was that whites are more likely to be told about training opportunities than visible minority employees; whites are more often asked to apply for acting positions, whereas visible minorities had to be more proactive and self-sufficient in seeking management training opportunities and acting positions; and whites are very much more likely to be asked to serve on selection boards. This is important because whites are asked to take part in who gets chosen for promotion and racial minorities are not included in that decision making process.

The result is that whites are getting more of the experience and training necessary for promotion into the EX jobs.

(c) Informal Staffing Decisions

Staffing decisions based on an informal process can present a barrier for promotion, because, according to Dr. Weiner, the less formal the process, the less likely job qualifications will be set out in advance, will be assessed in a standard manner for all candidates and will allow for their recognition in candidates who are different from those who typically perform the job.

In reviewing this as a potential barrier, Dr. Weiner focused on acting appointments. The evidence indicated that acting appointments had become a significant part of the staffing actions of HC in recent years and many of the acting positions were filled without competition. In her opinion, the more acting positions, the more the likelihood that the selection will be more informal. The more informal, the more the unintended bias can affect the selection process.

The acting appointments of Dr. Bell and Dr. Franklin provide examples of how bias or perceived unfair treatment can enter the selection process. Dr. Bell was appointed without a competition and when on appeal it was found that Dr. Bell's appointment was made on a too informal basis, it was then made a second time by the same manager who originally appointed her,

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on the basis of a paper assessment of all the candidates. In this situation, it is very likely that the second decision has been influenced by the fact that the same person made the first decision.

Dr. Bell's appointment and Dr. Franklin's appointment (which was also made without a competition), were also coloured by the fact that the job qualifications were tailored to fit the pre-selected candidate or were changed after the staffing action had begun.

In Dr. Franklin's case, she remained in the position, even after she was found not to be qualified.

This informality can create barriers in that not all potentially qualified staff can seek the acting position. Further, the acting assignment provides valuable managerial experience and gives the person who is acting the appearance of being "right" for the jobs.

Dr. Reitz' survey results showed that visible minorities proportionately get less acting appointments than whites and the effect may well be that they are less likely to apply because they do not believe they have a chance to be appointed.

(d) Perceiving Visible Minorities as Unfit for Management

For Dr. Weiner, the evidence of this barrier in Health Canada is found in the September 1, 1992, memorandum from Shirley Cuddihy, then, Chief, Staff Relations, Operations to Rod Ballantyne, Director-General, Personnel Administration Branch.

This memorandum came out of the direction of the Deputy Minister following Dr. Chopra's grievance hearing. The Deputy Minister wanted information concerning the impediments to the promotion of Dr. Chopra into a management position. Ms. Cuddihy was asked to meet with senior management who knew Dr. Chopra and she met with both Dr. Liston, the

Assistant Deputy Minister for the HPB and Dr. Somers, the Director General of the Drugs Directorate.

Ms. Cuddihy prepared the memorandum based on her hand written notes taken during her interviews with these two persons. Her notes were in point form and she prepared the memorandum from these notes immediately after the meeting.

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Ms. Cuddihy was very definite in her evidence that the memorandum accurately represented the ideas and thoughts which Dr. Liston and Dr. Somers expressed to her during the meeting. The Tribunal accepts her evidence that the memorandum is an accurate representation of their position.

Almost all of the memorandum deals with Dr. Liston's comments. It is his general comments that are of importance here. His comments are as follows:

General:

> Employees who are being considered solely for "technical" positions seem to fare better than when being considered for "management" positions. The cultural differences are minimized when we are only looking for the scientific approach. However, when we start looking for the "soft skills" such as communicating, influencing, negotiating... quite often their cultural heritage has not emphasized these areas and they are at a disadvantage. (Exhibit HR-4)

For Dr. Weiner, the reference to "technical" positions rather than "management" and "cultural differences being minimized for the scientific approach", suggests an attitude that individuals of the same racial group as Dr. Chopra, are good at jobs involving technical matters, but are not good in management jobs. Racial differences are irrelevant to staffing for scientific jobs, but not for management positions.

The memorandum goes on:

> Abilities to interact with a number of stakeholders, such as industry as well as internally with peers, subordinates and superiors are important. As well we do business in the North American way - "consensus reaching model" which to some cultures is very foreign. (Exhibit HR-4)

Dr. Weiner's comment is that this sets up a stereotype, namely, that there is only one style of management that can be successful and only one set of people can manage that way and that does not include those such as Dr. Chopra. This attitude respecting cultural differences and abilities was also reflected in the comments of Dr. Somers, who expressed the view to Dr. Das Gupta that "good brainy guys had to come from the U.K".

Dr. Weiner also highlighted Dr. Liston's comment that:

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There is however a bit of a paradox in highlighting what we consider needs to be changed because we run the risk of having to defend ourselves against charges of assimilation. He suggests that we need to provide minority groups with training - we need to point them in a direction in a mirror and say: because of your cultural background, you need to communicate better to adopt a less authoritarian style. (Exhibit HR-4)

Dr. Weiner's translation of this is that there is an assumption that there is only one way to perform a job successfully. What this does is to set up a "us/them" kind of dichotomy, seeing visible minorities as different and thus the need to change their ways, so that they can acquire the ability to manage.

Dr. Weiner agreed that the ideas and attitudes expressed may not be representative of management in HC. But she pointed out that Dr. Liston was the Assistant Deputy Minister and the more senior the managers, the more they contribute and set the tone for the whole department.

Other comments such as those expressed to Dr. Das Gupta by Dr. Somers that Indians are corrupt and the suggestion that he, Dr. Das Gupta, should not sit on a selection board because as a visible minority, he would be biased in favour of a visible minority candidate; and the comments of Dr. Lodge to Dr. Awang, calling him "Blackie" and "Hello darkness my old friend", are consistent, in Dr. Weiner's view, with an organizational attitude of "we/they", (even bordering on individual discrimination).

(e) Under-Representation in the A&FS Category

Finally, Dr. Weiner dealt with under-representation of visible minorities in the A&FS category. Both Ms. Bosch's and Ms. Furrie's evidence showed this to be the case. This in itself, of course, does not establish that there is discrimination in the recruitment practises for the A&FS category. During the hearing, Respondent counsel objected to the Tribunal making any finding of discrimination in HC's recruitment practices for the A&FS category arguing that this had not been identified as an issue. Counsel did agree, however, that if the Tribunal finds that one of the reasons for the under-representation of visible minorities in management is because of the under-representation of visible minorities in the A&FS category, then the Tribunal can make an order to correct this under-representation, without deciding whether HC has or has not

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discriminated in its recruiting practices.

IV THE FINDINGS

The Tribunal makes the following findings on the evidence:

(1) There is a significant under-representation of visible minorities in senior management in HC.

(2) There is a significant under-representation of visible minorities in the A&FS category in HC. This

is a contributing factor to the very low numbers of visible minorities in senior management.

(3) There is a high concentration of visible minorities in the feeder group in the S&P category and visible minorities are bottlenecked in the feeder group and are not progressing into senior management.

(4) The majority of members in the EX group from the S&P category were recruited from occupational groups with a fairly high representation of visible minorities, but no visible minorities were recruited from this group; or were recruited from occupational groups with no visible minorities; and there was a very low recruitment of members into the EX group from feeder occupational groups with a very high representation of visible minorities.

(5) The failure of visible minorities to progress into management cannot be explained by a lack of interest or lack of technical or professional skills on the part of these visible minorities.

(6) A common theme in the evidence is that visible minorities in HC lack the necessary managerial experience to move into senior management positions.

(7) The necessary managerial experience can be obtained through acting positions, and through exercising supervisory responsibilities and through management training programs.

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(8) Acting positions constituted a very large part of the total staffing actions in HC during the period 1991 to 1995.

(9) Acting appointments were often made without a competition and on an informal basis. As a result, potentially qualified persons are not considered for appointment or when an acting appointment is challenged, the subsequent selection process is affected by an unintended bias so that the person initially appointed is usually confirmed in the position.

(10) Visible minorities proportionately were given less acting positions than non-visible minorities.

(11) Visible minorities were at a disadvantage with respect to how they found out about acting positions. Non-visible minorities were more often asked by their managers to apply whereas visible

minorities were required to be more proactive in finding out about opportunities for acting positions.

(12) Visible minorities received less management related training than non-visible minorities.

(13) Non-visible minorities were more often informed of management training opportunities by their managers whereas visible minorities had to be much more self-reliant in finding out about these opportunities.

(14) There is a minority disadvantage in terms of supervising other employees. Management training and having held an acting appointment increased the likelihood of supervisory responsibility for both non-visible minorities and visible minorities. But in the case of non-visible minorities with management training or non-visible minorities who held acting positions, there was a significant increase in the likelihood of being supervisors as compared to visible minorities.

(15) Visible minorities are viewed by senior management as culturally different within HC and are not considered suitable for managerial positions.

(16) There is a significant difference in the participation of visible minorities in hiring and promotion decisions. Non-visible

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minorities are almost twice as likely to serve on selection boards as non-visible minorities. The difference is even greater for those visible minorities who are more senior and have more qualifications. This suggests that management, whose responsibility it is to appoint members of the selection board, chooses members for reasons that have little to do with the level of education, experience or responsibility.

V CONCLUSION

The Complainants have taken the position from the beginning that this complaint is one of "systemic discrimination". In the case of Action Travail des Femmes v. Canadian National Railway, et al. [1987] 1 S.C.R. 1114, the Supreme Court of Canada in considering the meaning of systemic discrimination, referred to in the Abella Report on Equality in Employment which did not define systemic discrimination but set out the essentials as follows:

> Discrimination...means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics...
>
> It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or

> systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.
>
> This is why it is important to look at the results of a system... (pp. 1138-1139)

The Court went on to say that:

> ...In other words, systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of

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recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of natural forces...(p. 1139)

The essential element then of systemic discrimination is that it results from the unintended consequences of established employment systems and practices. Its effect is to block employment opportunities and benefits for members of certain groups. Since the discrimination is not motivated by a conscious act, it is more subtle to detect and it is necessary to look at the consequences or the results of the particular employment system.

It is clear from the evidence in this case that visible minority groups in HC are being affected in a disproportionately negative way. There is a significant under-representation of visible minorities in senior management in HC and in the A&FS category in HC. Visible minorities are bottlenecked or concentrated in the feeder group in the S&P category and are not progressing into senior management.

To paraphrase Judge Abella, this is a signal that certain employment practices that lead to this adverse impact may be discriminatory.

In the case of Basi v. Canadian National Railway Company, 9 C.H.R.R. D/5029 (a decision of the HRT), the Tribunal pointed out and we accept as well-established law, that the Complainants must first establish a prima facie case of discrimination and once that is done, the burden shifts to the Respondent to provide a reasonable explanation for the otherwise discriminatory behaviour. Further, there is virtual unanimity in the cases that the usual standard of proof in this type of case is the civil standard of a preponderance of the evidence.

The Respondent, using a rather bold strategy, chose not to call any evidence to explain the reasons for the significant under-representation of visible minorities in senior management or the reasons for the high concentration of visible minorities in the feeder group. Rather the

Respondent tended to rely mainly on the cross-examination of the Complainants' witnesses and make the Complainants satisfy their onus.

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The Tribunal has concluded that the Complainants have made out a prima facie case of discrimination which the Respondent has not rebutted. There are a number of staffing practices of HC that have a disproportionately negative effect on visible minorities in HC which the Tribunal finds to be discriminatory.

These practises have been identified in the Tribunal's Findings, specifically Finding numbers 4, 9, 10, 11, 12, 13, 14, 15 and 16. Thus, it is the Tribunal's decision that HC has established or pursued staffing practises that are discriminatory in contravention of section 10 of the CHRA.

VI JURISDICTION ON REMEDY

The Respondent challenged this Tribunal's jurisdiction to make an order in the nature of an "employment equity remedy", which we intend to do. The Respondent argued that the Tribunal's jurisdiction is limited to making an order that HC cease the discriminatory practice. This is because the authority to impose an employment equity program is vested in the PSC and the Treasury Board under the provisions of the FAA and PSEA. As we indicated earlier in our reasons, we do not agree with this argument. Section 53(2)(a) of the CHRA gives this Tribunal the jurisdiction to make a cease and desist order. In addition if the Tribunal considers it appropriate to prevent the same or a similar practice from occurring in the future, it may order certain measures including the adoption of a special program, plan or arrangement referred to in subsection 16(1) of the CHRA.

The scope of this jurisdiction was considered by the Supreme Court of Canada in the Action Travail des Femmes case. In adopting the dissenting opinion of MacGuigan, J. in the Federal Court of Appeal, the Court stated that:

> ...s. 41(2)(a), [now 53(2)(a)], was designed to allow human rights tribunals to prevent future discrimination against identifiable protected groups, but he held that "prevention" is a broad term and that it is often necessary to refer to historical patterns of discrimination, in order to design appropriate strategies for the future..... (at page 1141)

The Supreme Court also said in reference to the Order made by the Tribunal in that case:

> ...When confronted with such a case of "systemic discrimination", [as was the case with Canadian

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National Railway], it may be that the type of order issued by the Tribunal is the only means by which the purpose of the Canadian Human Rights Act can be met.

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In any program of employment equity, there simply cannot be a radical dissociation of "remedy" and "prevention". Indeed, there is no prevention without some form of remedy... (at pages 1141 to 1142)

The Court pointed out that:

Unlike the remedies in s. 41(2)(b)-(d), [now Section 53], the remedy under s. 41(2)(a), is directed towards a group and is therefore not merely compensatory but is itself prospective. The benefit is always designed to improve the situation for the group in the future, so that a successful employment equity program will render itself otiose. (at page 1142)

And at pages 1143 to 1144:

An employment equity program thus is designed to work in three ways. First, by countering the cumulative effects of systemic discrimination, such a program renders further discrimination pointless....

Secondly, by placing members of the group that had previously been excluded into the heart of the work place and by allowing them to prove ability on the job, the employment equity scheme addresses the attitudinal problem of stereotyping.....

Thirdly, an employment equity program helps to create what has been termed a "critical mass" of the previously excluded group in the work place. This "critical mass" has important effects. The presence of a significant number of individuals from a targeted group eliminates the problems of "tokenism".

In the Tribunal's opinion, an employment equity remedy is required in this case to prevent future systemic discrimination and to eliminate past barriers arising out of the discriminatory practices identified.

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The Respondent has argued that there is no conflict between the CHRA and the FAA and the PSEA. Rather the two regimes complement each other and therefore the paramountcy principle does not apply. In this respect, the Respondent's argument is similar to the argument made by the Respondent in the case of The Attorney General of Canada v. Uzoaba [1995] 2 F.C. 569.

In the Uzoaba case, as part of its order, the Tribunal required Correctional Service Canada to reinstate Dr. Uzoaba in a position which amounted to a promotion from his previous position. Counsel for the Attorney General argued that this would be contrary to the merit provisions of the PSEA and the scheme in the PSEA for promotions and that this cannot be overridden by a Human Rights Tribunal. Counsel also argued that in the

case of a direct conflict, the CHRA would apply, however, the conflict here was not direct. In response to this argument, the Court said:

> On its face, the Tribunal's order appears to fall squarely within the jurisdiction of a Tribunal under paragraph 53(2)(b) of the Act.
>
> The law is clear... It is not clear to me how this argument assists counsel. Indeed, counsel for Dr. Uzoaba submits there is no real conflict between the Act and the Public Service Employment Act. He says that the promotion on merit provisions of the Public Service Employment Act apply in the normal, day-to-day administration of the Public Service and the Act does not purport to displace the Public Service Employment Act in that respect. In practical terms I agree with this submission.
>
> However, even if the power of a Human Rights Tribunal to order promotion in the Public Service conflicts with the Public Service Employment Act, I am satisfied that the provisions of the Act must prevail. (at pp. 576-577)

The unanimity that the CHRA is paramount was first enunciated in the Insurance Corporation of British Columbia v. Heerspink [1982] 2 S.C.R. 145, 158, and further articulated by the Supreme Court of Canada in Winnipeg School Division No. 1 v. Craton [1985] 2 S.C.R. 150, at p. 156 where the court stated:

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> Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such a nature that it may not be altered, amended or appealed, nor may exceptions be created to its provisions save by clear legislative pronouncement. (at p. 577)

Following on this principle, the Court in the Uzoaba case held that:

> I think this principle of paramountcy must apply in this case to enable a Human Rights Tribunal to order a promotion which it has found has been denied for reasons of discrimination, contrary to the Act. In other words, the jurisdiction of the Public Service Commission and the process respecting promotions within the Public Service must give way in those rare exceptions where promotions have been denied based on discriminatory reasons and where a Tribunal, acting within its jurisdiction under the Act, orders a promotion in order to remedy the results of discriminatory action taken by the employer. (at p. 577)

33

Although there may not be a direct or real conflict between the CHRA and the FAA and the PSEA, the effect of the Respondent's argument would be to prevent this Tribunal from exercising the whole of the jurisdiction conferred upon it under the CHRA where the Tribunal has concluded that HC has engaged in discriminatory employment practices.

To accede to the Respondent's argument therefore would be to deny the paramountcy of the CHRA over the FAA and PSEA. The law is unequivocal that the jurisdiction conferred upon this Tribunal under section 52 can only be altered or an exception created by a clear legislative pronouncement. There is no such legislative pronouncement in the FAA or the PSEA that in any way affects the jurisdiction of this Tribunal under section 52 of the CHRA. Accordingly, we dismiss the Respondent's motion objecting to this Tribunal's jurisdiction to make an order in the nature of an employment equity remedy.

VII ORDER

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The Respondents entered as an exhibit, a document entitled "Detailed Measures - Employment Equity for Visible Minorities at Health Canada". In the introduction to the Detailed Measures, it is stated that HC is committed to ensuring that no person will be denied employment opportunities or benefits for reasons unrelated to ability and that HC is committed to equitable representation and participation of visible minorities at all levels of the organization, corresponding to their availability. HC is also committed to implementing a series of measures for visible minorities intended to achieve improved representation, access to training, development, promotion and overall career advancement. This document sets out detailed measures relating to numerical targets, appointments, recruitment strategies, acting appointments, supervisory/management training and development, career counselling services, and a procedure for monitoring an enforcement.

By letter dated November 15th, 1995, to the Chief Commissioner of the CHRC, the Acting Secretary of the Treasury Board, the President of the Public Service Commission and the Deputy Minister of HC committed these agencies to the implementation of these measures.

The CHRC also presented to the Tribunal, an Outline of the Remedy that the CHRC and the Complainants were seeking. This Remedy was expanded upon in the evidence of Dr. Weiner.

There are many areas of agreement between the Detailed Measures and the Outline of Remedy. But there are two major areas of disagreement namely, the numerical targets and the number of years it will take for visible minorities to reach proportional representation in the EX group; and the enforcement and monitoring of the remedy.

Even though there is considerable overlap between the Detailed Measures and the Outline of Remedy, the parties could not finally agree on the measures to be taken to achieve equitable representation of visible minorities at HC.

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The Tribunal, having concluded that HC engaged in certain staffing practices, contrary to section 10 of the CHRA, orders HC to adopt and implement the following special corrective measures program.

SPECIAL CORRECTIVE MEASURES PROGRAM

The objectives of the special corrective program are to:

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(i) eliminate discriminatory employment barriers for visible minorities in HC;

(ii) remove discriminatory barriers to the full participation of visible minorities in the EX/Senior Management and in the A&FS categories;

(iii) ensure the maximum utilization of the knowledge, skills, and expertise of visible minorities;

(iv) redress the effects of past discrimination and ensure that HC's organizational structure more accurately reflects its diverse workforce and demographics.

PERMANENT CORRECTIVE MEASURES

(1) HC shall immediately set standards to ensure that visible minority employees are evaluated not only on experience, but also on desirable skills in determining personal suitability for positions.

(2) HC shall train all individuals selected, or who may be selected to sit on selection boards on the proper interviewing techniques needed to facilitate bias-free selection. In addition, HC will develop a list of trained employees from the visible minority group who would be made available to participate on selection boards. Where possible HC should use selection boards that are diverse in its composition.

(3) HC shall provide training to all managers and human resource specialists on strategies to recruit, promote and retain visible minorities by providing guidelines and training on bias-free selection and recruitment practices. This will also include sensitizing them to diversity and employment equity issues, including systemic barriers.

(4) HC shall conduct workshops throughout the department on the benefits of a diverse workforce and human rights legislation, with attendance of management being mandatory.

(5) HC shall set clearly defined qualifications for all EX/Senior managerial positions as well as for all A&FS positions and ensure that these criteria are known to everyone interested in moving into senior management and into the A&FS categories and to all those involved in the staffing process.

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(6) HC shall develop in advance parts of the selection process to assess skill needed for EX/Senior Management and A&FS positions which will be used when filling acting appointments.

(7) HC shall develop a computerized inventory (Human Resource Information System) of visible minority and white employees in feeder positions who are interested in advancement into EX/Senior Management categories so that this information is available to staffing managers when acting and/or indeterminate jobs become available.

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TEMPORARY CORRECTIVE MEASURES

(1) Within a period of six months from the date of this order HC shall commence the appointment of visible minorities into the permanent EX/Senior Management category at the rate of 18% per year (twice the rate of availability) for five years in order to reach 80% proportional representation of this designated group into this category within this time frame.

(2) Within a period of six months from the date of this order HC shall commence the appointment of visible minorities into the permanent feeder level positions of the A&FS category at the rate of 16% per year (twice the rate of availability) for five years in order to reach 80% proportional representation of this designated group into that category.

(3) Within a period of six months from the date of this order HC shall commence the appointment of visible minorities from the S&P category to acting positions for four months or longer, in the EX/Senior Management category at a rate of 18% per year (twice the rate of availability) for four years to enable visible minorities to develop the requisite job qualifications needed to be screened into permanent competitions when they become available.

(4) Within a period of six months from the date of this order HC shall commence the appointment of visible minorities from the A&FS category to acting positions, for four months or longer, in the EX/Senior Management category at a rate of 16% per year (twice the rate of availability) for four years, to enable visible minorities to acquire the requisite job qualifications

needed to be screened into permanent competitions when they become available.

(5) Within a period of six months from the date of this order HC shall commence the appointment of visible minorities in the S&P category at the rate of 18% per year (twice the rate of availability) for four years, to acting positions, for four months or longer, in the EX minus three and EX minus four positions with supervisory /managerial responsibilities in the S&P category.

(6) Within a period of six months from the date of this order HC shall commence the appointment of visible minorities from the A&FS category, at the rate of 16% per year (twice the rate of

availability) for five years, to acting positions of four months or longer, in the Ex minus three and EX minus four positions with supervisory/managerial responsibilities.

(7) To ensure the successful attainment of the goal of the special corrective measures within the specified time-frame, hiring managers of EX/Senior Management staff at HC shall undertake a special reporting measure. Before a final decision is made in any competition where visible minority candidates have been considered but a visible minority candidate has not been selected, the hiring manager(s) or selection board will explain to either the Deputy Minister or the Assistant Deputy Minister why the visible minority candidates were not found to be qualified.

(8) In order to ensure that the numerical goals are attained and within the specified time-frame, HC shall state specifically in all Staffing Notices (Internal and External Recruiting Advertisements, Job Postings, Electronic Job Postings, MRIS job search, and all other Staffing communication media), for EX/Senior Management and Administrative and Foreign Service positions that HC is an "Equal Opportunity Employer" and that this particular advertisement is aimed at visible minorities.

(9) HC shall identify visible minorities (and whites) in feeder group positions who are interested in advancement into EX/Senior Management and Administrative and Foreign Service jobs so individual career plans can be developed for these groups which

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highlight what employees are required to do to be viable candidates for such jobs.

(10) HC shall develop outreach recruitment sources for visible minorities and use them when hiring into Administrative and Foreign Service jobs. Doing so, requires HC to use different media to target visible minorities who have not traditionally learned about job openings e.g., advertising in visible minority - based newspapers, and using informal networks of visible minorities in HC and other federal departments.

(11) HC shall establish mentoring programs and shall train current Senior Management on methods of mentoring its cross-culturally diverse workforce and shall reward good mentoring.

(12) HC shall invite visible minorities to attend the departmental "Learning for Leadership" programs and set aside 25% of the seats for visible minorities, to be assigned on a first come basis.

(13) HC shall invite visible minorities to participate in departmental and other training courses including the Health Protection Management Development Program with 25% of program seats set aside and allocated to visible minorities on a first come basis.

(14) HC shall invite visible minorities in the feeder group levels to participate in Canadian Centre for Management Development (CCMD)

Executive Development Programs and PSC Management Training Programs (MTP).

(15) HC shall appoint a person who shall be responsible with full powers to ensure the implementation of the special temporary corrective measures and to carry out any other duties so assigned by HC to implement this order.

(16) There shall be an annual performance assessment of HC's executive/senior managers including Assistant Deputy Ministers, Director Generals, Directors and Division Chiefs regarding full compliance with this order.

(17) HC shall establish an Internal Review Committee, co-chaired by the Director General, Human Resources and Chair of the Visible Minorities Advisory Committee. Membership of the Committee shall

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include an equal number of departmental managerial representatives and delegates from the Advisory Committee on Visible Minorities with additional expertise to be made available on an as required basis. The Internal Review Committee shall monitor the implementation of this plan. The Committee shall meet on a quarterly basis and the Co-chairs shall meet with the Deputy Minister following these meetings to report the results directly. A report shall be made to the Departmental Executive Committee semi-annually.

(18) HC shall submit to the Canadian Human Rights Commission:

(a) Within 60 days of the introduction of the special corrective measures program the current numbers of employees in the EX, EX Equivalent, EX minus 1, EX minus 2, EX minus 3 and EX minus 4 groups; percentage representation of employees in the EX, EX Equivalent, EX minus 1, EX minus 2, EX minus 3 and EX minus 4 groups;

(b) Within 60 days of the end of each quarterly period after the implementation of the aforementioned special temporary corrective measures, and for the entire duration of the said measures, after forwarding a copy to NCARR and PIPSC for their information, a report outlining:

i) The number and percentages of visible minorities appointments to the EX/Senior Management and the Administrative and Foreign Service categories;

ii) The number and percentage of visible minorities appointments to acting positions to the EX/Senior Management and the Administrative and Foreign Service categories;

iii) The number and percentage of visible minorities chosen to sit on selection boards; training sessions

offered/delivered; feedback of participants; and, validation of training program content; and efforts made to recruit visible minorities for the EX/Senior Management and Administrative and Foreign Service

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categories for indeterminate and term positions during the previous quarter;

iv) A comparison of the participation rate of visible minorities in training and development activities to that of the Department's general employee population; and the specific steps being taken to ensure that the Department's policies and practices are free of employment barriers.

Dated at Toronto, Ontario, this 31st day of January, 1997.

J. GRANT SINCLAIR, Q.C., Chairperson

CAROL H.Y. BOXILL, Member

ALVIN TURNER, Member

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TAB 8

Canada (Minister of Human Resources Development) v. Rafuse, 2002 FCA 31 (CanLII)

Date:	2002-01-22
Docket:	A-818-00
Other citations:	286 NR 385; [2002] FCJ No 91 (QL); 222 FTR 160
Citation:	Canada (Minister of Human Resources Development) v. Rafuse, 2002 FCA 31 (CanLII), <http://canlii.ca/t/4jg7>, retrieved on 2017-02-28

- Cited by 47 documents
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Date: 20020122

Docket: A-818-00

Neutral citation: 2002 FCA 31

CORAM: STONE J.A.

EVANS J.A.

MALONE J.A.

BETWEEN:

MINISTER OF HUMAN RESOURCES DEVELOPMENT

Appellant

and

NORMAN RAFUSE

Respondent

Heard at Montreal, Quebec, January 22, 2002.

Judgment delivered from the Bench at Montreal, Quebec, on January 22, 2002.

REASONS FOR JUDGMENT OF THE COURT: EVANS J.A.

Date: 20020122

Docket: A-818-00

Neutral citation: 2002 FCA 31

CORAM: STONE J.A.

EVANS J.A.

MALONE J.A.

BETWEEN:

MINISTER OF HUMAN RESOURCES DEVELOPMENT

Appellant

and

NORMAN RAFUSE

Respondent

REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Montreal, Quebec,

on January 22, 2002.)

EVANS J.A.

A. INTRODUCTION

[1] This is an appeal by the Minister of Human Resources Development from an order of a Judge of the Trial Division, dated December 5, 2000, in which she allowed an application for judicial review of a decision by a single member of the Pension Appeals Board refusing to grant leave to Norman Rafuse to appeal a decision of the Review Tribunal.

[2] The issue to be decided on this appeal is whether the Judge erred in law when she not only set aside the Tribunal's decision, but also granted Mr. Rafuse leave to appeal to the Board. While not disputing that the member erred in granting leave to appeal, the Minister submits that, in granting leave, the Judge purported to exercise a power not conferred on the Federal Court on an application for judicial review and thereby, in effect, usurped the fact-finding function that Parliament has entrusted to the Tribunal.

B. THE BACKGROUND

[3] In a decision dated April 16, 1997 the Tribunal had upheld Mr. Rafuse's claim that he was disabled within the meaning of subsection 42(2) of the *Canada Pension Plan,* R.S.C. 1985, c. C-8, and was thus entitled to a disability pension. However, while Mr. Rafuse maintained that his disability had started in 1991, the Tribunal held that it had not commenced until October 31, 1994, the day when Mr. Rafuse's expert medical witness first examined him.

[4] In seeking leave to appeal the Tribunal's determination of the date of the onset of his disability, Mr. Rafuse pointed to evidence in the record indicating that

1991 was the appropriate date. This is when he had stopped working because of illness.

[5] In its decision to refuse leave to appeal, dated July 15, 1998, the Board member said:

There is no basis for granting leave to Appeal. There is evidence to support the Tribunal's conclusion in respect of the date of onset. It is neither here nor there to contend that the Tribunal might have chosen another date also supportable by evidence. In concluding as it did, it acted lawfully and did not commit a reversible error.

No new evidence capable of challenging the finding was presented on this leave notwithstanding contrary indication.

[6] On the application for judicial review of this decision, the Judge held that the correct test to be applied by the Board on a leave application is whether there is an arguable case which might succeed on appeal. She relied on *Martin v. Canada (Minister of Human Resources Development)* (1999), 252 N.R. 141 (F.C.A.) for this proposition.

[7] Following the decision in *Davies v. Canada (Minister of Human Resources Development)* (1999), 1999 CanLII 8969 (FC), 177 F.T.R. 88, the Judge also held that the Court should apply a deferential standard when reviewing decisions of the Board on leave applications. Looking at the record before the Board, the Judge concluded that the refusal of leave was unreasonable and that, since the evidence was sufficient to enable Mr. Rafuse to succeed on appeal, she granted him leave to appeal.

C. ANALYSIS

[8] It is common ground between counsel that the Board did not apply the correct test in deciding the leave application and that the decision cannot stand. It was also agreed that, since this matter came before the Judge as an application for judicial review, and not as an appeal, she had no power to substitute her view for that of the Board on the proper disposition of the leave application. This is simply not a remedial power that subsection 18.1(3) of the *Federal Court Act*, R.S.C. 1985, c. F-7, affords to the Court.

[9] In our opinion, this is a correct view of the law: see, for example, the particularly clear statement to this effect in *Xie v. Canada (Minister of Employment and Immigration)* (1994), 75 F.T.R. 125, at paragraph 17.

[10] However, counsel for the respondent argues that the Judge's order is justifiable as an exercise of the Court's power under paragraph 18.1(3)(*b*) of the*Federal Court Act* to "set aside a decision and refer it back for determination in accordance with such directions as it considers to be appropriate". The argument is that it would have been appropriate for the Judge to have exercised this power in the instant case by directing a verdict, since she had decided that the only decision reasonably open to the Board on the evidence before it was that Mr. Rafuse had satisfied the legal test for the grant of leave to appeal. Hence, since there is no substantive distinction between the Judge's granting leave to appeal, and setting aside the refusal and referring it back with instructions to the Board to grant leave, the Court should dismiss this appeal.

[11] Regrettably, we are not able to accept this argument. On our analysis, the Board erred in law when it asked itself whether there was evidence to support the Tribunal's conclusion and, finding that there was no new evidence capable of challenging it, it refused leave. In so ruling, the Board to our mind applied a more stringent test than that mandated in law and trespasses on matters that should be decided by the Board when it hears the appeal on its merits.

[12] The application to the facts of the correct legal test, namely whether Mr. Rafuse has established that on the evidence before the Board there is an arguable case which might succeed on appeal, is largely a question of fact. The determination of factual questions is within the exclusive jurisdiction of the Board and at the core of its expertise. In this case, because it misdirected itself in law on the test for deciding leave applications, the Board is yet to make the essentially factual determination required of it.

[13] On an application for judicial review, the role of the Court with respect to a tribunal's findings of fact is strictly circumscribed. In the absence of an error of law in a tribunal's fact-finding process, or a breach of the duty of fairness, the Court may only quash a decision of a federal tribunal for factual error if the finding was perverse or capricious or made without regard to the material before the tribunal: *Federal Court Act*, paragraph 18.1(4)(*d*). Hence, if, as a result of an error of law, a tribunal has omitted to make a relevant finding of fact, including a factual inference, the matter should normally be returned to the tribunal to enable it to complete its work. Accordingly, in our opinion, the Judge would have erred in law if, having set aside the

decision of the Board, she had remitted the matter with a direction that the Board grant Mr. Rafuse leave to appeal.

[14] While the directions that the Court may issue when setting aside a tribunal's decision include directions in the nature of a directed verdict, this is an exceptional power that should be exercised only in the clearest of circumstances: *Xie, supra*, at paragraph 18. Such will rarely be the case when the issue in dispute is essentially factual in nature (*Ali v. Canada (Minister of Employment and Immigration)*, 1994 CanLII 3480 (FC), [1994] 3 F.C. 73 (T.D.)), particularly when, as here, the tribunal has not made the relevant finding.

[15] In the course of oral argument counsel for Mr. Rafuse drew our attention to some more recent cases concerning the judicial review of dispositions by the Pension Appeals Board of leave applications. However, in none of these did the Court issue directions of the kind that counsel urged upon us in this case.

[16] We noted earlier in these reasons that we had reached our decision with regret. This is because ten years have elapsed since Mr. Rafuse first made his claim for a disability pension. To the extent that the decision-making process in this administrative scheme has been designed to produce expeditious and final determinations of pension entitlements, the system seems seriously to have malfunctioned in this case.

[17] Nonetheless, in our view it is important to respect the large degree of autonomy that Parliament has granted to the Board on questions of fact, even though the effect of our decision may be to cause further delay by giving the party disappointed with the Board's disposition of the leave application an opportunity to challenge it. In order to minimise delay, we would hope that, when the leave application is returned to the Board for redetermination, it will be dealt with at the earliest opportunity.

D. CONCLUSIONS

[18] For these reasons, the appeal will be allowed, without costs. The Judge's order will be varied so as to remove the grant of leave for Mr. Rafuse to appeal to the Pension Appeals Board. The matter will be remitted to another member of the Pension Appeals Board duly designated under subsection 83(2.1) of the *Plan* to determine in

accordance with these reasons whether Mr. Rafuse should be granted leave to appeal the decision of the Review Tribunal that his disability did not commence until 1994.

"John M. Evans"

J.A.

FEDERAL COURT OF CANADA

APPEAL DIVISION

Names of Counsel and Solicitors of Record

DOCKET: A-818-00

STYLE OF CAUSE: Minister of Human Resources Development

Appellant

and

Norman Rafuse

Respondent

DATE OF HEARING: JANUARY 22, 2002.

PLACE OF HEARING: MONTREAL, QUEBEC

REASONS FOR JUDGMENT OF THE COURT BY: EVANS J.A.

DATED: JANUARY 22, 2002

DELIVERED FROM THE BENCH AT MONTREAL, QUEBEC ON JANUARY 22, 2002.

APPEARANCES BY:

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Mr. Alexander Paradissis For the Respondent

SOLICITORS OF RECORD:

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FEDERAL COURT OF CANADA

APPEAL DIVISION

Date: 20020122

Docket: A-818-00

BETWEEN:

MINISTER OF HUMAN RESOURCES DEVELOPMENT

Appellant

and

NORMAN RAFUSE

Respondent

REASONS FOR JUDGMENT OF THE COURT

By

for the law societies members of the

Federation of Law Societies of Canada

TAB 9

Federal Court Cour fédérale

Date: 20160720

Docket: T-1612-15

Citation: 2016 FC 837

2016 FC 837 (CanLII)

Ottawa, Ontario, July 20, 2016

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

SOUTHERN CHIEFS ORGANIZATION INC.

Applicant

and

JESSICA DUMAS

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 of a decision [the Decision] by the Canadian Human Rights Commission [the Commission], pursuant to paragraph 44(3)(a) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [the Act], to request that the Chairperson of the Canadian Human Rights Tribunal commence an inquiry into a complaint [the Complaint] filed by the Respondent. The Decision is

dated August 25, 2015. For the reasons provided below, the matter will be returned to the Investigator for reconsideration.

II. Background

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[2] The Applicant, Southern Chiefs Organization Inc., is a not-for-profit corporation that acts as a political organization on behalf of its First Nation members.

[3] The Respondent, Jessica Dumas, was hired in December 2008 by the Applicant to work as a Community Justice Development Coordinator. In that role she reported directly to Michael Bear, Chief of Staff at the time, and ultimately to Morris Swan Shannacappo, the Applicant's then Grand Chief. She resigned from her position on July 16, 2012.

[4] On July 18, 2013, the Respondent filed the Complaint against the Applicant with the Commission. She alleges that she was harassed and discriminated against in the workplace by Mr. Bear on the basis of her age, sex, and marital status. As a result, she suffered anxiety, had to take a medical leave of absence, and was eventually forced to resign. Though the Complaint lists both the Applicant and Mr. Bear as respondents, the Commission processed the Complaint as if only the Applicant had been named.

[5] On June 25, 2015, the Commission designated an Investigator to conduct an investigation [the Investigation] into the Complaint. From June 2014 to May 2015, the Investigator assessed the question of whether the Complaint ought to proceed to be heard by the Tribunal.

[6] On May 28, 2015, the Commission released the Investigation Report [the Report], which recommended that the Tribunal commence an inquiry into the Complaint. The Applicant submitted a response to the Report on July 3, 2015 outlining a number of concerns that it had with the Report's contents.

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[7] The Commission issued the Decision on August 25, 2015. Since it stated only that, "having regard to all the circumstances of the complaint, further inquiry is warranted", the reasons given by the Investigator in the Report serve as the reasons for the Decision itself (*Cerescorp Company v Marshall*, 2011 FC 468 at para 49 [*Cerescorp*]).

III. **The Complaint**

[8] The Respondent makes four separate allegations of misconduct in the Complaint:

A. *The South Beach Casino incident*: On May 2, 2012, at a breakfast buffet at the South Beach Casino in Scanterbury, Manitoba, Mr. Bear demanded that the Respondent get him food. When she refused, he allegedly responded: "don't you think she should go and get my breakfast? That's how you take care of a man. It's practice so then maybe you can keep a man".

B. *The Inappropriate questions about her relationship status*: On several separate occasions Mr. Bear would ask blunt questions as to whether the Respondent was dating various male work associates.

C. *The inappropriate staring incident*: On June 13, 2012, the Respondent attended a meeting with Mr. Bear to discuss the performance and attendance of an employee in her department. At a certain point in the meeting, Mr. Bear moved from his seat across the table to sit next to her. He then, in her words, "looked at my head and clearly moved his eyes down my body to my shoes, and then clearly moved his eyes back up to my head, he would raise his eye brows [sic] as he was doing this".

D. *Reprimand without cause*: The Respondent states that she was humiliated, demeaned, and insulted as a result of Mr. Bear's "inappropriate gazing and gawking" at the June 13, 2012 meeting. As a result, she began a medical leave of absence for stress and anxiety. Shortly after she returned to work on July 16, 2012, she received a letter of reprimand from Mr. Bear for, in her words, "taking a

medical leave at a time when the justice program was in disarray". She resigned the same day.

IV. The Decision

[9] In the Report which forms the basis of the Decision, the Investigator first stated that there were two issues to be assessed:

A. Whether the Applicant failed to provide a harassment-free workplace to the Respondent; and

B. Whether the Applicant terminated the Respondent's employment on the basis of her age, sex, or marital status.

[10] The Investigator then outlined the investigation process, asking whether there is support for the Respondent's allegation of harassment and then whether the Applicant was or should have been aware of the harassment and, if so, what steps were taken.

[11] After providing some background and discussing preliminary objections raised by the Respondent, the Investigator then described her methodology. The Investigator noted that she spoke with the Respondent and four witnesses who all had at one time been employed by SCO, but none of whom were employed at the time of the investigation. These individuals were Shirli Ewanchuk (former Director of Health); Ellen Contois, (former Administrative Support); Crystel McLean-Grisdale (former Assistant Justice Coordinator); and former Grand Chief Morris Swan Shannacappo.

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[12] The Investigator stated that she made repeated unsuccessful attempts to locate Mr. Bear for an interview. She also attempted to interview Denice Perswain, employed by the Applicant as Finance Administrator, as Ms. Perswain was the sole witness present for the South Beach Casino incident. Ms. Perswain declined to participate, however, as she was still an employee of the Applicant.

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A. Is there support for the Respondent's allegation of harassment?

[13] The Investigator addressed the Respondent's allegations as follows:

A. *The South Beach Casino incident*: the Investigator concluded that "[t]he evidence suggests that Mr. Bear asked the [Respondent] to bring him food and made comments about the [Respondent] 'taking care of' and 'keeping' a man". The Investigator based this conclusion on the evidence of Ms. Ewanchuk, who joined the Respondent and Ms. Perswain shortly after the incident and was immediately told about it.

B. *Inappropriate questions about her relationship status*: the Investigator found that the "evidence suggests that Mr. Bear inquired about the complainant's personal life". Again, the Investigator reached this conclusion on the basis of Ms. Ewanchuk's evidence – that Mr. Bear had asked Ms. Ewanchuk on several occasions about the Respondent's marital or relationship status and that, when Ms. Ewanchuk informed Mr. Bear that these were inappropriate questions, he would laugh.

C. *The inappropriate staring incident:* the Investigator concluded that "[t]he evidence indicates that Mr. Bear stood close to the complainant as she worked and made comments about her physical appearance". This conclusion was based on the evidence of Ms. Ewanchuk, who stated that she often saw Mr. Bear stand close to the Respondent as she worked, that Mr. Bear often did the same to Ms. Ewanchuk, that he seemed to lack "physical boundaries", and that Mr. Bear often commented to Ms. Ewanchuk on the Respondent's physical appearance and "appeared to be romantically interested" in her. The conclusion about Mr. Bear's inappropriate comments was also based on the evidence of Ms. Contois, who recalled the Respondent stating that she felt "creeped out" by how Mr. Bear looked at her and who also recalled one instance, sometime shortly before the Respondent went on leave, where the Respondent approached Ms. Contois after a meeting with Mr. Bear, began to cry, and told her that Mr. Bear's gaze "creeped her out" and that she "[couldn't] take it anymore".

D. *Reprimand without cause*: based on documentary evidence submitted by the Applicant, the Investigator determined that the Respondent was not reprimanded for taking medical leave but rather for failing to return work-related materials to the Applicant, a request to which she had not adhered.

[14] Finally, the Investigator noted that Ms. McLean-Grisdale provided evidence of "other associated behaviour" on the part of Mr. Bear – that he was aggressive, that the Respondent was uncomfortable in his presence, and that on one occasion Mr. Bear pretended to run Ms. McLean-Grisdale and the Respondent down with his car in the parking lot adjacent to the Applicant's offices. This evidence, according to the Investigator, "provides further context to Mr. Bear's demeanour and interactions with the [Respondent]".

[15] In light of all the above, the Investigator concluded that, other than the reprimand without cause, the alleged misconduct of harassment had occurred. The Investigator found that the evidence indicated that Mr. Bear's inappropriate behaviour was: persistent and repetitious; unwelcomed; linked to her sex and marital status; may have been linked to her age; and detrimentally affected the work environment and led to adverse job-related consequences for the Respondent. However, the Investigator also concluded that the Respondent's letter of resignation did not make explicit mention of the alleged misconduct, nor did she state to the Applicant when she took her medical leave that she felt the alleged misconduct was the source of her anxiety and distress.

B. Was the Applicant aware or should the Applicant have been aware of the harassment and, if so, what steps were taken?

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[16] The Investigator first observed that the Respondent's original position was that she had not told the Applicant about the harassment or why she had resigned because there was no way to do so, given the Applicant's reporting structure, which advises employees to report harassment either to their immediate supervisor or, where the immediate supervisor is the source of the alleged harassment, to the Applicant's Chief of Staff. The Investigator noted that Mr. Bear was both one of the Respondent's immediate supervisors and the Applicant's Chief of Staff at the time of the alleged misconduct. The Investigator further noted that the Respondent had provided conflicting information about whether she had advised Grand Chief Shannacappo of Mr. Bear's alleged misconduct.

[17] The Investigator concluded that it was not necessary to resolve this issue and the contradiction in the Respondent's testimony because of the fact that the Respondent had informed Ms. Ewanchuk, who the Investigator believed to be the Director of Health at the material time (i.e. when the incidents took place, between May and July of 2012). As such, the Investigator concluded that the Applicant should have known about the harassment since "one of its directors was aware of it and spoke to Mr. Bear about it, noting to him that it was inappropriate".

[18] Finally, the Investigator determined that the Applicant had not taken appropriate action to deal with the harassment and found that the Applicant's personnel policy does not outline management's responsibilities when harassment is witnessed or reported. Furthermore, Ms. Ewanchuk was aware of the alleged misconduct but did not raise it "with management", and while the Applicant insisted that it had exercised due diligence throughout, "it did not provide

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evidence during the investigation to support this statement". The Investigator also noted that the Ms. Ewanchuk had spoken to the Respondent about Mr. Bear's conduct and suggested that she not be alone in her office with him.

[19] As a result, the Investigator found that the Respondent's complaint warranted further inquiry and recommended that, per paragraph 44(3)(a) of the Act, the Commission request that the Chairperson of the Canadian Human Rights Tribunal institute an inquiry into the complaint.

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V. Issues

[20] The Applicant raises the following issues:

A. Did the Investigator and the Commission breach the Applicant's right to procedural fairness by:

1. failing to conduct a sufficiently thorough investigation?
2. failing to be neutral?
3. failing to assess the Respondent's credibility?
4. failing to provide the Applicant with an adequate response to its concerns about the Investigation and the Report?

B. Was the Commission's decision to request further inquiry unreasonable?

VI. Standard of Review

[21] The standard of review applicable to questions of the Commission and the Investigator's thoroughness and neutrality is correctness (*Joshi v Canadian Imperial Bank of Commerce*, 2015 FCA 92; *Big River First Nation v Dodwell*, 2012 FC 766 at para 33).

[22] The Applicant cites *Canada (Attorney General) v Tran*, 2011 FC 1519 at para 19 [*Tran*], for the principle that a failure to assess credibility is reviewable on a correctness standard. *Tran*, however, suggests that the obligation to assess a complainant's credibility is a reviewable on a correctness standard because it is a matter of jurisdiction (para 18). That conclusion arose from the specific facts of that case – there, the investigator stated that it could not interview a particular witness even though that witness was available. Justice Simpson interpreted that as an incorrect statement that the investigator felt he had no jurisdiction to do so. In this case, however, the Investigator made no such statement. As such, and as will be more fully explained below, I think that it is more appropriate to consider a failure to assess credibility as part of the question of whether the investigation was sufficiently thorough – which, as noted above, involves procedural fairness and thus attracts a correctness review.

[23] Similarly, the question of whether the Investigator provided the Applicant with an adequate response to its concerns about the Investigation and the Report is a matter of thoroughness and thus reviewed on a correctness standard. As noted in *Brosnan v Bank of Montreal*, 2015 FC 925 at para 22, "[t]horoughness also entails that the Commission must, as a matter of fairness, respond to any submissions which go to the heart of the investigator's findings" (see also *Carroll v Canada (Attorney General)*, 2015 FC 287 at paras 68-69).

[24] Finally, the Commission's decision to request further inquiry is reviewable on a reasonableness standard (*Cerescorp* at para 14). As such, so long as the decision demonstrates justification, transparency and intelligibility and falls within a range of acceptable, defensible outcomes, it should not be disturbed (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

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VII. Analysis

[25] Before turning to the specific issues raised by the Applicant, a brief discussion of the Commission's role in the complaints process under the Act may be of assistance. As recently explained by Justice Gleeson in *Phipps v Canada Post Corporation*, 2015 FC 1080:

> [35] The Commission is established under section 26 of [the Act] and consists of a Chief Commissioner, a Deputy Chief Commissioner and three to six members. Section 32 provides for the appointment of such officers and employees as necessary for the proper conduct of the work of the Commission in accordance with the *Public Service Employment Act*, SC 2003, c. 22, ss 12, 13.
>
> [36] Complaints alleging discriminatory practice are received by the Commission and, with exceptions, where the Commission has reasonable grounds to believe a person has engaged or is engaging in a discriminatory practice, as defined in [the Act], the Commission may initiate a complaint (section 40). Where a complaint is initiated, the Commission may designate a person to investigate the complaint (section 43(1)). The Investigator shall investigate and submit a report to the Commission (section 44(1)).
>
> [37] Upon receipt of the report the Commission will dispose of the complaint in one of three manners: (1) refer the complaint to an appropriate external authority where the Commission is of the opinion that the complainant ought to exhaust grievance or review procedures otherwise reasonably available or the complaint could be more appropriately dealt with by means of a procedure provided for under an Act of Parliament other than [the Act]; (2) where the Commission believes an inquiry is warranted, refer the complaint to the Canadian Human Rights Tribunal requesting the Chairperson to institute an inquiry under section 49 of [the Act]; or (3) where the Commission is satisfied that an inquiry into the complaint is not warranted, having had regard to all of the circumstances, dismiss the complaint.

[26] The Commission is "not an adjudicative body… [r]ather, the role of the Commission is to carry out an administrative and screening function" (*Canadian Union of Public Employees*

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(Airline Division) v Air Canada, 2013 FC 184 at paras 60-61 [*Air Canada*]). In the words of the Supreme Court in *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 at para 53 [*Cooper*]:

> …the Commission fulfills a screening analysis somewhat analogous to that of a judge at a preliminary inquiry. It is not the job of the Commission to determine if the complaint is made out. Rather its duty is to decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts.

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[27] This is a low threshold, requiring only that the Commission determine whether there is a reasonable basis in the evidence for proceeding to the next stage (*Cerescorp* at para 51). Importantly, in suggesting that further inquiry into the complaint is warranted, the Commission is "not making any final determination about the complaint's ultimate success or failure" (*Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at para 24).

[28] The Commission is also entitled to a significant degree of latitude in the performance of its functions: "it may be safely said as a general rule that Parliament did not want the courts at this stage to intervene lightly in the decisions of the Commission" (*Bell Canada v Communications, Energy and Paperworks Union of Canada*, [1999] 1 FCR 113 at 137 (FCA)).

[29] Nonetheless, the Commission must abide by certain principles of procedural fairness. One is that the investigation be sufficiently thorough (*Slattery v Canada (Human Rights Commission)*, [1994] 2 FC 574 at 600 (FC) [*Slattery*]). An investigation is thorough so long as it is not "clearly deficient" or fails to assess any "obviously crucial evidence" (*Slattery* at 600, 605). This is a deferential standard: there is no obligation on the Investigator to interview every

individual suggested by the parties (*Bateman v Canada (Attorney General)*, 2008 FC 393 at para 29 [*Bateman*]), nor is it "the Court's role either to dissect the Investigator's report on a microscopic level or second-guess the Investigator's approach to his task" (*Abi-Mansour v Canada (Revenue Agency)*, 2015 FC 883 at para 21 [*Abi-Mansour*]), nor must be the investigation be perfect (*Air Canada* at para 68). The obviously crucial test "requires that it should have been obvious to a reasonable person that the evidence an applicant argues should have been investigated was crucial given the allegations in the complaint" (*Gosal v Canada (Attorney General)*, 2011 FC 570 at para 54 [*Gosal*]).

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[30] Thoroughness includes an obligation to thoroughly review the parties' submissions, and "where a party's submissions to the Commission pertaining to an investigator's report allege substantial and material omissions in the investigation and provide support for that assertion the Commission must refer to those discrepancies and indicate, even briefly, why it is of the view that they are either immaterial or insufficient to challenge the investigator's recommendation" (*Gosal* at para 49; *Herbert v Canada (Attorney General)*, 2008 FC 969 at para 26). That duty, however, applies more strictly "in cases in which the investigator has recommended that the complaint be dismissed" since while "a dismissal brings an end to the matter… [a] referral to the Tribunal is in no way determinative of the truth of the allegation of discrimination" (*Canada (Attorney General) v Davis*, 2009 FC 1104 at para 56).

[31] A second applicable principle of procedural fairness is that of neutrality (*Slattery* at 600). According to Justice Gauthier (then of this Court), the test for neutrality is whether the investigator approached the case with a 'closed mind' (*Gosal* at para 51). The burden of proof

for demonstrating a lack of neutrality is high and requires more than a mere suspicion (*Abi-Mansour* at para 51).

A. Did the Investigator fail to conduct a sufficiently thorough investigation?

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[32] I find that there are several respects in which the Investigator, while otherwise undeniably diligent, failed to conduct a sufficiently thorough investigation, rendering it clearly deficient.

[33] The first flaw in the investigation was the conclusion that, through Ms, Ewanchuk, the Applicant's one-time Director of Health, the Applicant knew of Mr. Bear's alleged misconduct. This is because the evidence now before me shows that Ms. Ewanchuk was not actually an employee of the Applicant during any of the period relevant to the Respondent's complaint; while Ms. Ewanchuk was terminated "in or about March of 2012" (Applicant's Record at 16 [AR]), the incidents in question took place between May 2 and June 13, 2012, ending with the Respondent's resignation on July 16, 2012.

[34] While this information appears only to have surfaced in the principal Affidavit in support of this judicial review (that of the Applicant's current Chief of Staff, Donald Courchene), the Respondent took no issue with its accuracy, nor with the Applicant's observation that any attribution of knowledge from Ms. Ewanchuk to the Applicant is problematic given Ms. Ewanchuk's departure in 2012. It is clear that the Investigator, at a minimum, could and should have asked Ms. Ewanchuk about the exact period of her employment, and presumably would have received the information had she done so. She did not.

[35] Even if one puts aside the dates of employment, given that they were not before the Investigator, it remains unclear whether Ms. Ewanchuk was sufficiently senior in the Applicant's organizational structure to have imputed knowledge to the Applicant through her own awareness of Mr. Bear's conduct. She advised the Investigator that she was at the same level as the Respondent, and not the Respondent's superior.

[36] The question of whether the Applicant was aware or should have been aware of Mr. Bear's alleged misconduct is central to the complaint, and Ms. Ewanchuk's status and knowledge are foundational aspects of that question, particularly in light of the Investigator's decision to forego any inquiry into the inconsistencies in the Respondent's evidence, or into whether there may have been witnesses to the incident at the June 13 meeting.

[37] While it is not the job of the Commission to determine if the complaint is made out, but rather to determine if an inquiry is warranted having regard to all the facts (*Cooper* at para 53), the foundational evidence by which knowledge was attributed to the Applicant was flawed. Ms. Ewanchuk may have been aware of the alleged conduct at some point, but if she was, she was not employed at the time and therefore could not be said to be in a position to impute knowledge to the Applicant. The Investigator's conclusion therefore cannot be upheld.

[38] Furthermore, four other clear weaknesses must be revisited by the Commission in deciding anew whether to send this matter to inquiry.

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[39] First, the Investigator exclusively interviewed former employees of the Applicant: none of them were still employed by the Applicant when she conducted her interviews. The only current employee that the Investigator attempted to contact was Ms. Perswain, who did not accede to the interview request (although the Court acknowledges that such an interview request from an Investigator is voluntary, and there was nothing compelling Ms. Perswain to attend).

[40] Second, the Investigator did not interview any witnesses to the June 13, 2012 meeting. As the Applicant explained before this Court, Mr. Bear had written a memo to the Respondent, dated June 11, 2012, making it clear that the June 13 meeting was to include, among others, the Community Justice Committee and the RCMP. The Applicant highlighted this memo and fact that there may have been witnesses to the alleged June 13, 2012 incident in the July 3, 2015 letter in response to the Report, and strongly urged the Investigator to speak to someone who actually attended the meeting. The Investigator is, of course, not obliged to contact every individual suggested by the parties (*Bateman* at 29), and simply because the Applicant noted that others may have been present at the June 13, 2012 meeting does not oblige the Investigator to interview those individuals. In this case, however, given that there was no corroborating evidence regarding the claims of harassment at the June 13 meeting, it appears particularly important for the Commission to have at least attempted to elicit both sides of the story regarding that meeting.

[41] The third area which requires further consideration was whether the Applicant knew of the conduct, particularly in light of the observations about Ms. Ewanchuk above. As the Investigator noted, the evidence is on this point from the Respondent was contradictory. First, the Respondent stated in her complaint that she never advised the Grand Chief, but later changed

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her testimony in her interview. The Grand Chief, on the other hand, was categorical in his interview that the Respondent did not advise him of any alleged inappropriate conduct of Mr. Bear, and that he knew nothing of it when the complaint was filed – in spite of what he reported as "monthly contact" during the Respondent's employment.

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[42] The Applicant's personnel policy is clear that "the Complainant/Employee shall report the harassment to the Immediate Supervisor at once… If the Immediate Supervisor is the source of the alleged harassment, the employee shall report the problem to the Chief of Staff" (AR at 107). The Respondent's reporting relationships were set out in her Job Description, stating that she "reports directly to and is fully accountable to the Chief of Staff and to the Grand Chief" (AR at 98). The Investigator will therefore need to turn her mind to whether or not the organization knew of the alleged harassment.

[43] Fourth, the Investigator will also have to take into account, in reconsidering the matter, the question of whether the Respondent's anxiety and emotional distress resulted from the alleged harassment, or whether they were the adverse consequences of unrelated issues, such as the difficult work conditions that she herself alluded to in the complaint letter when she stated that "the position is very demanding and there is no 'appropriate' time to take time away"; or that she "could no longer stand to be a part of an organization that was falling apart and had no support for its staff"; or that "[t]he structure of [the Applicant] has fallen apart significantly since Mike Bear has been hired as Chief of Staff" (AR at 156).

[44] In conclusion, while appreciating that under normal circumstances deference is owed to decisions of the Commission, both in terms of the investigation process selected and the conclusions drawn from the interviews, where there are fundamental issues with the thoroughness of the investigation, it cannot stand. This is not to say that the Commission need determine if the complaint is made out; clearly, that is not the role of an investigation (*Cooper*). Rather, it will need to reconsider whether, in light of the observations above, an inquiry is still warranted. This will include whether the evidence suggests that the Applicant actually had, or should have had, knowledge of the allegations.

B. Did the Investigator fail to remain neutral?

[45] The Applicant submits that the Investigator failed to remain neutral in conducting the investigation. The Applicant points to two facts to support its case on this point. First, the Applicant notes that the Investigator made no attempt to contact any of the parties mentioned in the June 11, 2012 memo from Mr. Bear about the June 13, 2012 meeting. Second, the Applicant notes that the Investigator made no attempt to interview Ms. Sanderson, Mr. Bear's executive assistant, who the Respondent allegedly informed of Mr. Bear's behaviour. Since the Respondent stated that she did not believe Ms. Sanderson "would back [her] up", the Applicant contends that the decision not to interview Ms. Sanderson, focusing instead on interviewing a series of individuals that were sympathetic to the Respondent's Complaint, demonstrates a lack of neutrality.

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[46] The burden of demonstrating the existence of a lack of neutrality – in other words, a reasonable apprehension of bias – is high and it rests on the Applicant. I do not find that the Applicant has met this high bar.

[47] First, the Investigator was not obliged to interview every individual suggested by the parties or to explicitly address every piece of evidence they made available; failing to have done so alone does not support a finding of bias.

[48] Second, the Investigator ultimately found that one of the four grounds of misconduct raised by the Respondent had no merit, a strange finding if the Investigator were truly biased in her favour.

[49] Third, the Investigator provided the Applicant with an extension of time to raise its concerns, which would also reflect and approach inconsistent with a biased investigation.

[50] In my view, these indicia demonstrate that the Investigator displayed neutrality, including interacting with Applicant's counsel and being responsive to communications (see, for instance, a memo from the Investigator detailing her interactions with counsel, which displayed impartiality and a willingness to listen to work with the Applicant and consider its position (Respondent's Record at 2-3)).

C. Was the Decision unreasonable?

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[51] The Applicant alleges that there were numerous errors in the Commission's decision. Given my findings on the issue of thoroughness, however, there is no need to examine the reasonableness of the decision. That assessment can only be made with the proper evidentiary foundation that a thorough investigation can provide.

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VIII. Remedy

[52] The Applicant has requested that this Court dismiss the complaint through the issuance of a writ of *mandamus*. The Federal Court of Appeal summarized the necessary criteria to issue a *mandamus* order in *Canada (Attorney General) v Arsenault*, 2009 FCA 300 at para 32:

> 1. There must be a public legal duty to act;
> 2. The duty must be owed to the applicant;
> 3. There is a clear right to the performance of that duty, in particular:
>
> (a) the applicant has satisfied all conditions precedent giving rise to the duty;
>
> (b) here was a prior demand for performance of the duty, a reasonable time to comply with the demand, and a subsequent refusal which can be either expressed or implied;
>
> 4. Where the duty sought to be enforced is discretionary, the following rules apply:
>
> (a) in exercising a discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";
>
> (b) mandamus is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";
>
> (c) in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", considerations;

(d) mandamus is unavailable to compel the exercise of a "fettered discretion" in a particular way; and

(e) mandamus is only available when the decision-maker's discretion is "spent"; i.e., the applicant has a vested right to the performance of the duty;

5. No other adequate remedy is available to the applicant;

6. The order sought will be of some practical value or effect;

7. The court in the exercise of its discretion finds no equitable bar to the relief sought;

8. On a "balance of convenience" an order in the nature of mandamus favours the applicant.

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[53] I do not find that the Applicant has met the requirements of the third part of this analysis since it is certainly possible that, once additional evidence is obtained when the matter is returned for further investigation, the Respondent's complaint may nonetheless require further inquiry.

IX. Conclusion

[54] This Court will not dismiss the complaint through the issuance of a *mandamus* order. Rather, it will, in light of the above, grant the Applicant its application for judicial review and return the matter to the same Investigator, given the significant work already done on the file, assuming her availability.

X. Costs

[55] The parties requested reviewing this judgment before providing their submissions on costs. If the parties are unable to agree to costs between themselves, they may make brief written submissions on costs (a maximum of three pages each), within 20 days from the date of this judgment.

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JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.

2. The complaint will be returned to the Investigator, subject to her availability, for redetermination in light of these reasons.

"Alan S. Diner"

Judge

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FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1612-15
STYLE OF CAUSE:	SOUTHERN CHIEFS ORGANIZATION INC. v JESSICA DUMAS
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	JUNE 14, 2016
JUDGMENT AND REASONS:	DINER J.
DATED:	JULY 20, 2016

APPEARANCES:

Ryan Savage Peter Mueller	FOR THE APPLICANT
Anthony Lafontaine Guerra Michael Gerstein	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Ryan Savage Peter Mueller Barristers and Solicitors Winnipeg, Manitoba	FOR THE APPLICANT
Anthony Lafontaine Guerra Michael Gerstein Barristers and Solicitors Winnipeg, Manitoba	FOR THE RESPONDENT

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Her Majesty The Queen in Right of the Province of British Columbia, as represented by the Minister of Forests *Appellant*

v.

Chief Dan Wilson, in his personal capacity and as representative of the Okanagan Indian Band, and all other persons engaged in the cutting, damaging or destroying of Crown Timber at Timber Sale Licence A57614 *Respondents*

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of British Columbia, Attorney General of Alberta, the Songhees Indian Band, the T'Sou-ke First Nation, the Nanoose First Nation and the Beecher Bay Indian Band (collectively the "Te'mexw Nations"), and Chief Roger William, on his own behalf and on behalf of all other members of the Xeni Gwet'in First Nations government and on behalf of all other members of the Tsilhqot'in Nation *Interveners*

and between

Her Majesty The Queen in Right of the Province of British Columbia, as represented by the Minister of Forests *Appellant*

v.

Chief Ronnie Jules, in his personal capacity and as representative of the Adams Lake Indian Band, Chief Stuart Lee, in his

Sa Majesté la Reine du chef de la province de la Colombie-Britannique, représentée par le ministre des Forêts *Appelante*

c.

Chef Dan Wilson, à titre personnel et en qualité de représentant de la Bande indienne Okanagan, et toutes les autres personnes qui coupent, endommagent ou détruisent du bois de la Couronne sur la terre publique visée par le permis de vente de bois A57614 *Intimés*

et

Procureur général du Canada, procureur général de l'Ontario, procureur général du Québec, procureur général du Nouveau-Brunswick, procureur général de la Colombie-Britannique, procureur général de l'Alberta, Bande indienne des Songhees, Première nation des T'Sou-ke, Première nation de Nanoose et Bande indienne de Beecher Bay (collectivement appelées « Nations des Te'mexw »), et chef Roger William, en son nom, en celui de tous les autres membres du gouvernement des Premières nations Xeni Gwet'in et en celui de tous les autres membres de la Nation des Tsilhqot'in *Intervenants*

et entre

Sa Majesté la Reine du chef de la province de la Colombie-Britannique, représentée par le ministre des Forêts *Appelante*

c.

Chef Ronnie Jules, à titre personnel et en qualité de représentant de la Bande indienne d'Adams Lake, chef Stuart Lee, à titre

personal capacity and as representative of the Spallumcheen Indian Band, Chief Arthur Manuel, in his personal capacity and as representative of the Neskonlith Indian Band, and David Anthony Nordquist, in his personal capacity and as representative of the Adams Lake Indian Band, the Spallumcheen Indian Band and the Neskonlith Indian Band, and all other persons engaged in the cutting, damaging or destroying of Crown Timber at Timber Sale Licence A38029, Block 2 *Respondents*

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of British Columbia, Attorney General of Alberta, the Songhees Indian Band, the T'Sou-ke First Nation, the Nanoose First Nation and the Beecher Bay Indian Band (collectively the "Te'mexw Nations"), and Chief Roger William, on his own behalf and on behalf of all other members of the Xeni Gwet'in First Nations government and on behalf of all other members of the Tsilhqot'in Nation *Interveners*

personnel et en qualité de représentant de la Bande indienne de Spallumcheen, chef Arthur Manuel, à titre personnel et en qualité de représentant de la Bande indienne de Neskonlith, et David Anthony Nordquist, à titre personnel et en qualité de représentant de la Bande indienne d'Adams Lake, de la Bande indienne de Spallumcheen et de la Bande indienne de Neskonlith, et toutes les autres personnes qui coupent, endommagent ou détruisent du bois de la Couronne sur la terre publique visée par le permis de vente de bois A38029 (bloc 2) *Intimés*

et

Procureur général du Canada, procureur général de l'Ontario, procureur général du Québec, procureur général du Nouveau-Brunswick, procureur général de la Colombie-Britannique, procureur général de l'Alberta, Bande indienne des Songhees, Première nation des T'Sou-ke, Première nation de Nanoose et Bande indienne de Beecher Bay (collectivement appelées « Nations des Te'mexw »), et chef Roger William, en son nom, en celui de tous les autres membres du gouvernement des Premières nations Xeni Gwet'in et en celui de tous les autres membres de la Nation des Tsilhqot'in *Intervenants*

Indexed as: British Columbia (Minister of Forests) *v.* Okanagan Indian Band

Neutral citation: 2003 SCC 71.

File Nos.: 28988, 28981.

2003: June 9; 2003: December 12.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

Répertorié : Colombie-Britannique (Ministre des Forêts) *c.* Bande indienne Okanagan

Référence neutre : 2003 CSC 71.

N^os^ du greffe : 28988, 28981.

2003 : 9 juin; 2003 : 12 décembre.

Présents : La juge en chef McLachlin et les juges Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel et Deschamps.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Costs — Interim costs — Principles governing exercise of court's discretionary power to grant interim costs — Minister of Forests serving Indian Bands with stop-work orders for logging on Crown land without authorization — Bands claiming aboriginal title to lands — Minister applying to have proceedings remitted to trial list — Bands arguing that matter of aboriginal title should not go to trial as they lack financial resources to fund action or in alternative, requesting order that Crown pay interim costs to fund action in advance and in any event of cause — Whether Court of Appeal's decision to grant interim costs should be upheld — Whether Court of Appeal had sufficient grounds to review exercise of chambers judge's discretion — Rules of Court, B.C. Reg. 221/90, ss. 52(11)(d), 57(9).

In 1999, members of the four respondent Bands began logging on Crown land in B.C. without authorization under the *Forest Practices Code of British Columbia Act*. The Minister of Forests served the Bands with stop-work orders under the Code, and commenced proceedings to enforce the orders. The Bands claimed that they had aboriginal title to the lands in question and were entitled to log them. They filed a notice of constitutional question challenging the Code as conflicting with their constitutionally protected aboriginal rights. The Minister then applied to have the proceedings remitted to the trial list instead of being dealt with in a summary manner. The Bands argued that the matter should not go to trial, because they lacked the financial resources to fund a protracted and expensive trial. In the alternative, they argued that the court, in the exercise of its powers to attach conditions to a discretionary order and to make orders as to costs, should order a trial only if it also ordered the Crown to pay their legal fees and disbursements in advance and in any event of the cause. The B.C. Supreme Court held that the case should be remitted to the trial list and declined to order the Minister to pay the Bands' costs in advance of the trial. The Court of Appeal allowed the Bands' appeal. The decision to remit the matter of the Bands' aboriginal rights or title to trial was upheld. The court concluded, however, that although the Bands did not have a constitutional right to legal fees funded by the provincial Crown the court did have a discretionary

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Dépens — Provisions pour frais — Principes régissant l'exercice du pouvoir discrétionnaire du tribunal de statuer sur les dépens — Signification par le ministre des Forêts aux bandes indiennes d'ordonnances de cessation des travaux pour avoir mené des activités d'exploitation forestière sur des terres publiques sans autorisation — Bandes soutenant qu'elles détiennent un titre aborigène sur les terres en question — Demande du ministre que l'instance soit inscrite pour instruction — Bandes plaidant que la question du titre aborigène ne doit pas faire l'objet d'une instruction parce qu'elles n'ont pas les ressources financières voulues pour financer un procès ou que la Couronne leur verse une provision pour frais pour le financement du procès quelle que soit l'issue de la cause — Faut-il confirmer la décision de la Cour d'appel d'attribuer une provision pour frais? — La Cour d'appel avait-elle des motifs suffisants pour réviser l'exercice du pouvoir discrétionnaire du juge en chambre? — Rules of Court, B.C. Reg. 221/90, art. 52(11)d), 57(9).

En 1999, des membres des quatre bandes indiennes intimées ont commencé l'exploitation forestière sur des terres publiques en C.-B. sans l'autorisation requise par la *Forest Practices Code of British Columbia Act.* Le ministre des Forêts a signifié aux Bandes des ordonnances de cessation des travaux en vertu du Code et a introduit une instance afin de les faire respecter. Les Bandes ont soutenu qu'elles détenaient un titre aborigène sur les terres en question et qu'elles avaient le droit d'y mener des activités d'exploitation forestière. Elles ont déposé un avis de question constitutionnelle contestant le Code au motif qu'il contrevient à leurs droits ancestraux garantis par la Constitution. Le ministre a alors demandé que l'instance soit inscrite pour instruction au lieu d'être tranchée par procédure sommaire. Les Bandes ont prétendu que l'affaire ne devait pas faire l'objet d'une instruction parce qu'elles n'avaient pas les ressources financières voulues pour financer un procès long et coûteux. Subsidiairement, elles ont prétendu que, dans l'exercice de ses pouvoirs d'assortir de conditions l'ordonnance discrétionnaire et de statuer sur les dépens, la cour ne devait ordonner la tenue d'une instruction que si elle donnait également à la Couronne l'ordre de payer à l'avance leurs honoraires et débours d'avocats, quelle que soit l'issue de la cause. La Cour suprême de la C.-B. confirme que l'affaire doit être inscrite pour instruction et refuse d'ordonner au ministre de payer à l'avance les dépenses des Bandes. La Cour d'appel accueille l'appel des Bandes. La

power to order interim costs. It ordered the Crown to pay such legal costs of the Bands as ordered by the chambers judge from time to time, subject to detailed terms that it imposed so as to encourage the parties to minimize unnecessary steps in the dispute and to resolve as many issues as possible by negotiation.

décision d'inscrire pour instruction la question du titre aborigène ou d'autres droits ancestraux des Bandes est confirmée. La cour conclut toutefois que, même si la Constitution ne garantit pas aux Bandes le paiement par la Couronne provinciale des honoraires d'avocats, la cour a le pouvoir discrétionnaire d'ordonner le paiement d'une provision pour frais. Elle ordonne à la Couronne de payer les honoraires et débours d'avocats des Bandes, selon ce que pourrait ordonner le juge en chambre, sous réserve de conditions détaillées qu'elle impose de manière à encourager les parties à un litige à éviter les démarches inutiles et à régler par la négociation le plus grand nombre possible de questions.

Held (Iacobucci, Major and Bastarache JJ. dissenting): The appeal should be dismissed.

Arrêt (les juges Iacobucci, Major et Bastarache sont dissidents) : Le pourvoi est rejeté.

Per McLachlin C.J. and Gonthier, Binnie, Arbour, LeBel and Deschamps JJ.: The Court of Appeal's decision to grant interim costs to the Bands should be upheld. The discretionary power to award interim costs in appropriate cases has been recognized in Canada. Concerns about access to justice and the desirability of mitigating severe inequality between litigants feature prominently in the rare cases where such costs are awarded. The power to order interim costs is inherent in the nature of the equitable jurisdiction as to costs, in the exercise of which the court may determine at its discretion when and by whom costs are to be paid. Several conditions must be present for an interim costs order to be granted. The party seeking the order must be impecunious to the extent that, without such an order, that party would be deprived of the opportunity to proceed with the case; the claimant must establish a *prima facie* case of sufficient merit to warrant pursuit; and there must be special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate.

La juge en chef McLachlin et les juges Gonthier, Binnie, Arbour, LeBel et Deschamps : La décision de la Cour d'appel d'accorder une provision pour frais aux Bandes est confirmée. Le pouvoir discrétionnaire d'attribution de provisions pour frais dans certains cas a été reconnu au Canada. Les préoccupations concernant l'accès à la justice et l'opportunité d'atténuer les grandes inégalités entre les parties au litige occupent le premier plan dans les rares cas où de telles provisions pour frais sont accordées. Le pouvoir d'ordonner le paiement de frais provisoires est inhérent à la nature de la compétence en equity de statuer sur les dépens, et le tribunal peut, lorsqu'il l'exerce, décider à son gré à quel moment et par qui les dépens seront payés. Plusieurs conditions doivent être présentes pour qu'une provision pour frais soit accordée. La partie qui sollicite l'ordonnance doit être si dépourvue de ressources qu'elle serait incapable, sans cette ordonnance de faire entendre sa cause; elle doit prouver *prima facie* que sa cause possède un fondement suffisant pour justifier son instruction devant le tribunal et il doit exister des circonstances suffisamment spéciales pour que le tribunal soit convaincu que la cause appartient à cette catégorie restreinte de causes justifiant l'exercice exceptionnel de ses pouvoirs.

In public interest litigation special considerations also come into play. Public law cases, as a class, can be distinguished from ordinary civil disputes. They may be viewed as a subcategory where the special circumstances that must be present to justify an award of interim costs are related to the public importance of the questions at issue in the case. It is for the trial court to determine in each instance whether a particular case, which might be classified as special by its very nature as a public interest case, is special enough to rise to the level where the unusual measure of ordering costs

Dans les causes d'intérêt public, des considérations particulières entrent également en jeu. Les causes de droit public en tant que catégorie se distinguent des litiges civils ordinaires. Elles peuvent être considérées comme une sous-catégorie dans laquelle les « circonstances particulières » qui sont nécessaires pour que l'on puisse justifier l'octroi de provisions pour frais tiennent à l'importance des questions en jeu pour le public. Il incombe au tribunal de première instance de décider dans chaque cas si une affaire qui peut être qualifiée de « particulière » de par son caractère d'intérêt public est

would be appropriate. The criteria that must be present to justify an award of interim costs in this kind of case are as follows: the party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial; the claim to be adjudicated is *prima facie* meritorious; and the issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

suffisamment particulière pour s'élever au niveau des causes où l'allocation inhabituelle de dépens constituerait une mesure appropriée. Les conditions qui doivent être réunies pour que l'octroi de provisions pour frais dans ce genre de cause soit justifié sont les suivantes : la partie qui demande une provision pour frais n'a véritablement pas les moyens de payer les frais occasionnés par le litige et ne dispose réalistement d'aucune autre source de financement lui permettant de soumettre les questions en cause au tribunal; la demande vaut *prima facie* d'être instruite et les questions soulevées dépassent le cadre des intérêts du plaideur, elles revêtent une importance pour le public et elles n'ont pas encore été tranchées.

Each of these criteria is met in this case. The Bands are impecunious and cannot proceed to trial without an order for interim costs. The case is of sufficient merit that it should go forward; the issues sought to be raised at trial are of profound importance to the people of B.C., both aboriginal and non-aboriginal, and their determination would be a major step towards settling the many unresolved problems in the Crown-aboriginal relationship in that province. In short, the circumstances of this case are indeed special, even extreme. The conditions attached to the costs order by the Court of Appeal ensure that the parties will be encouraged to resolve the matter through negotiation, which remains the ultimate route to achieving reconciliation between aboriginal societies and the Crown, and also that there will be no temptation for the Bands to drag out the process unnecessarily and to throw away costs paid by the Crown.

Il doit être satisfait à chacune de ces conditions. Les Bandes ne disposent pas de ressources suffisantes et ne peuvent faire entendre leur cause sans ordonnance de paiement d'une provision pour frais. L'affaire vaut d'être instruite. Les questions que l'on cherche à soulever au procès sont d'une importance cruciale pour la population de la C.-B., tant autochtone que non autochtone, et une décision à leur égard constituerait un pas majeur vers le règlement des nombreux problèmes en suspens entre la Couronne et les Autochtones dans cette province. Bref, les circonstances de l'espèce sont effectivement particulières, voire exceptionnelles. Les conditions dont la Cour d'appel a assorti l'ordonnance de paiement des dépens garantissent que les parties seront encouragées à régler le litige par la négociation, qui demeure ultimement la meilleure manière de réconcilier les sociétés autochtones et la Couronne. Elles garantissent également que les Bandes ne seront pas tentées d'étirer le processus inutilement et de dilapider la provision pour frais versée par la Couronne.

The Court of Appeal had sufficient grounds to review the exercise of discretion by the trial court. Discretionary decisions are not completely insulated from review. An appellate court may and should intervene where it finds that the trial judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts. Two errors in particular vitiate the chambers judge's decision and call for appellate intervention. First, he overemphasized the importance of avoiding any order that involved prejudging the issues and erred when he concluded that his discretion did not extend so far as to empower him to make the order requested. Second, his finding that a contingent fee arrangement might be a viable alternative for funding the litigation does not appear to be supported by any evidence, and the prospect of the Bands' hiring counsel on a contingency basis seems

La Cour d'appel avait des motifs suffisants pour réviser l'exercice du pouvoir discrétionnaire du tribunal de première instance. Les décisions discrétionnaires ne sont pas entièrement à l'abri de tout contrôle. Une cour d'appel peut et doit intervenir lorsqu'elle estime que le juge de première instance s'est fondé sur des considérations erronées en ce qui concerne le droit applicable ou a commis une erreur manifeste dans son appréciation des faits. Deux erreurs en particulier vicient la décision du juge en chambre et appellent l'intervention en appel. Premièrement, le juge en chambre a trop insisté sur l'importance d'éviter de rendre une ordonnance par laquelle on se trouverait à préjuger des questions en litige et il a commis une erreur lorsqu'il a conclu que son pouvoir discrétionnaire n'allait pas jusqu'à lui permettre de rendre l'ordonnance demandée. Deuxièmement, sa conclusion qu'une entente d'honoraires conditionnels serait peut-être une solution de rechange viable quant

unrealistic in the particular circumstances of this case.

Per Iacobucci, Major and Bastarache JJ. (dissenting): The chambers judge interpreted the applicable principles correctly and there is no basis for reversing his discretion. Traditionally, costs are awarded after the ultimate trial or appellate decision and almost always to the successful party. However, the common law on interim costs has been more confined and interim costs have been awarded in two circumstances: in marital cases where some liability is presumed and the indemnificatory purpose of the costs power is fulfilled; and in corporate and trust cases where the court grants advanced costs to be paid by the corporation or trust for whose benefit the action is brought. Courts may also award interim costs in child custody cases. The reason for such restrictive use is apparent since awarding costs in advance could be seen as prejudging the merits and the objectivity of the court making such an order will almost automatically be questioned. The awarding of interim costs in the circumstances of this appeal appears as a form of judicially imposed legal aid. Interim costs should not be expanded to engage the court in essentially funding litigation for impecunious parties and ensuring their access to court. The new criteria endorsed by the majority broaden the scope of interim costs to an undesirable extent and are not supported in the case law. Such developments should be initiated by trial courts properly exercising their discretionary power, not the appellate reversal of that discretion. A case must be exceptional in order to attract interim costs; however, the majority accept that most public interest cases would satisfy this criterion and leave to the discretion of the trial judge the decision as to whether the case is "special enough" to warrant an order. The difficulty for the trial judge is that this does not provide any ascertainable standard or direction. Even if such special circumstances were to be considered, there is nothing to distinguish the present aboriginal land claims from any other. Further, one may not presume that the Bands will establish even partial aboriginal title in the cases under appeal. The *ratio* of the common law dictates the following three guidelines for the discretionary, extraordinary award of interim costs: the party seeking the interim costs cannot afford to fund the litigation, and has no other realistic manner of proceeding with the case; there is a special relationship between the parties such that an award of interim costs or support would be particularly appropriate; and it is presumed that the party seeking

au financement du litige ne paraît étayée par aucun élément de preuve, et la perspective que les Bandes puissent retenir les services d'un avocat sur une base d'honoraires conditionnels semble irréaliste dans les circonstances particulières de l'espèce.

Les juges Iacobucci, Major et Bastarache (dissidents) : Le juge en chambre a correctement interprété les principes applicables et il n'y a aucune raison d'infirmer sa décision discrétionnaire. Traditionnellement, les dépens sont attribués après que la décision finale a été rendue en première instance ou en appel et ils le sont presque toujours en faveur de la partie gagnante. Toutefois, les règles de common law en matière de provisions pour frais ont vu leur application restreinte et des provisions pour frais ont été accordées dans deux sortes d'affaires : dans des affaires de droit matrimonial où l'on présume une certaine responsabilité et où l'octroi des dépens répond à l'objectif d'indemnisation; dans des affaires en matière de sociétés ou de fiducie où le tribunal ordonne à la société ou à la fiducie pour laquelle l'action est intentée de payer la provision pour frais. Les tribunaux peuvent également accorder des provisions pour frais dans les affaires de garde d'enfants. La raison de cette application restreinte est apparente vu le risque que l'octroi de dépens avant l'instruction soit perçu comme laissant préjuger de l'issue de la cause et vu que l'objectivité du tribunal qui rend une telle ordonnance sera presque automatiquement remise en question. L'adjudication d'une provision pour frais dans les circonstances de l'espèce apparaît comme une forme d'aide juridique imposée par le tribunal. Il ne faut pas étendre les provisions pour frais pour amener, essentiellement, le tribunal à financer le litige pour les parties sans ressources suffisantes et à garantir leur accès aux tribunaux. Les nouveaux critères approuvés par la majorité élargissent le champ d'application des provisions pour frais dans une mesure qui n'est pas souhaitable et ils ne sont pas étayés par la jurisprudence. Une telle évolution devrait être amorcée par les tribunaux de première instance dans l'exercice judicieux de leur pouvoir discrétionnaire et non par l'annulation en appel de leurs décisions à cet égard. L'affaire doit être exceptionnelle pour ouvrir droit à une provision pour frais; toutefois, la majorité convient que la plupart des causes d'intérêt public répondraient à ce critère et laisse au juge de première instance le soin de décider si l'affaire est « suffisamment spéciale » pour justifier une ordonnance. La difficulté pour le juge de première instance est que cela ne constitue pas une norme ou une directive identifiable. Même s'il fallait prendre en compte de telles circonstances particulières, rien ne distingue les présentes revendications territoriales autochtones de toute autre revendication. De plus, on

interim costs will win some award from the other party. The chambers judge committed no error of law nor a palpable error in his assessment of the facts. Deference should be given to his decision not to exercise his discretion to grant interim costs.

ne peut présumer que les Bandes prouveront l'existence d'un titre aborigène, même partiel, dans les affaires faisant l'objet du pourvoi. Il faut satisfaire aux trois conditions suivantes pour que l'exception en common law soit justifiée quant à l'octroi discrétionnaire et extraordinaire de provisions pour frais : la partie qui demande une provision pour frais n'a pas les moyens d'agir en justice et ne dispose en réalité d'aucune autre source de financement; il existe entre les parties une relation spéciale telle que l'octroi d'une provision pour frais ou d'un soutien est particulièrement approprié; on présume que la partie qui demande une provision pour frais obtiendra une certaine compensation de la part de l'autre partie. Le juge en chambre n'a pas commis d'erreur en droit ni d'erreur manifeste dans son appréciation des faits. Il faut faire preuve de déférence à l'égard de sa décision de ne pas exercer son pouvoir discrétionnaire pour accorder des provisions pour frais.

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By LeBel J.

Referred to: *Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc.* (1985), 51 O.R. (2d) 23; *Ryan v. McGregor* (1925), 58 O.L.R. 213; *Fellowes, McNeil v. Kansa General International Insurance Co.* (1997), 37 O.R. (3d) 464; *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201; *Kendall v. Hunt (No. 2)* (1979), 16 B.C.L.R. 295; *Canadian Newspapers Co. v. Attorney-General of Canada* (1986), 32 D.L.R. (4th) 292; *Re Lavigne and Ontario Public Service Employees Union (No. 2)* (1987), 60 O.R. (2d) 486, rev'd (1989), 67 O.R. (2d) 536, aff'd [1991] 2 S.C.R. 211; *Rogers v. Sudbury (Administrator of Ontario Works)* (2001), 57 O.R. (3d) 467; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, aff'g (1992), 10 O.R. (3d) 321, aff'g [1989] O.J. No. 205 (QL); *Jones v. Coxeter* (1742), 2 Atk. 400, 26 E.R. 642; *Organ v. Barnett* (1992), 11 O.R. (3d) 210; *McDonald v. McDonald* (1998), 163 D.L.R. (4th) 527; *Woloschuk v. Von Amerongen*, [1999] A.J. No. 463 (QL), 1999 ABQB 306; *Roberts v. Aasen*, [1999] O.J. No. 1969 (QL); *Amcan Industries Corp. v. Toronto-Dominion Bank*, [1998] O.J. No. 3014 (QL); *Turner v. Telecommunication Workers Pension Plan* (2001), 197 D.L.R. (4th) 533, 2001 BCCA 76; *New Brunswick (Minister of Health and Community Services) v. G. (J.)* (1995), 131 D.L.R. (4th) 273, rev'd [1999] 3 S.C.R. 46; *Earl v. Wilhelm* (2000), 199 Sask. R. 21, 2000 SKCA 68; *Benson v. Benson* (1994), 120 Sask. R. 17; *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12; *Pelech v. Pelech*, [1987] 1 S.C.R. 801; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

Jurisprudence

Citée par le juge LeBel

Arrêts mentionnés : *Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc.* (1985), 51 O.R. (2d) 23; *Ryan c. McGregor* (1925), 58 O.L.R. 213; *Fellowes, McNeil c. Kansa General International Insurance Co.* (1997), 37 O.R. (3d) 464; *Skidmore c. Blackmore* (1995), 2 B.C.L.R. (3d) 201; *Kendall c. Hunt (No. 2)* (1979), 16 B.C.L.R. 295; *Canadian Newspapers Co. c. Attorney-General of Canada* (1986), 32 D.L.R. (4th) 292; *Re Lavigne and Ontario Public Service Employees Union (No. 2)* (1987), 60 O.R. (2d) 486, inf. par (1989), 67 O.R. (2d) 536, conf. par [1991] 2 R.C.S. 211; *Rogers c. Sudbury (Administrator of Ontario Works)* (2001), 57 O.R. (3d) 467; *B. (R.) c. Children's Aid Society of Metropolitan Toronto*, [1995] 1 R.C.S. 315, conf. (1992), 10 O.R. (3d) 321, conf. [1989] O.J. No. 205 (QL); *Jones c. Coxeter* (1742), 2 Atk. 400, 26 E.R. 642; *Organ c. Barnett* (1992), 11 O.R. (3d) 210; *McDonald c. McDonald* (1998), 163 D.L.R. (4th) 527; *Woloschuk c. Von Amerongen*, [1999] A.J. No. 463 (QL), 1999 ABQB 306; *Roberts c. Aasen*, [1999] O.J. No. 1969 (QL); *Amcan Industries Corp. c. Toronto-Dominion Bank*, [1998] O.J. No. 3014 (QL); *Turner c. Telecommunication Workers Pension Plan* (2001), 197 D.L.R. (4th) 533, 2001 BCCA 76; *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G. (J.)* (1995), 131 D.L.R. (4th) 273, inf. par [1999] 3 R.C.S. 46; *Earl c. Wilhelm* (2000), 199 Sask. R. 21, 2000 SKCA 68; *Benson c. Benson* (1994), 120 Sask. R. 17; *R. c. Regan*, [2002] 1 R.C.S. 297, 2002 CSC 12; *Pelech c. Pelech*, [1987] 1 R.C.S. 801; *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010.

By Major J. (dissenting)

Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *McDonald v. McDonald* (1998), 163 D.L.R. (4th) 527; *Randle v. Randle* (1999), 254 A.R. 323, 1999 ABQB 954; *Roberts v. Aasen*, [1999] O.J. No. 1969 (QL); *Watkins v. Olafson*, [1989] 2 S.C.R. 750; *R. v. Salituro*, [1991] 3 S.C.R. 654; *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925.

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Patrick G. Foy, *Q.C.*, and *Robert J. C. Deane*, for the appellant.

Citée par le juge Major (dissident)

Delgamuukw c. Colombie-Britannique, [1997] 3 R.C.S. 1010; *R. c. Van der Peet*, [1996] 2 R.C.S. 507; *McDonald c. McDonald* (1998), 163 D.L.R. (4th) 527; *Randle c. Randle* (1999), 254 A.R. 323, 1999 ABQB 954; *Roberts c. Aasen*, [1999] O.J. No. 1969 (QL); *Watkins c. Olafson*, [1989] 2 R.C.S. 750; *R. c. Salituro*, [1991] 3 R.C.S. 654; *Office des services à l'enfant et à la famille de Winnipeg (région du Nord-Ouest) c. G. (D.F.)*, [1997] 3 R.C.S. 925.

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POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (2001), 95 B.C.L.R. (3d) 273, 208 D.L.R. (4th) 301, 161 B.C.A.C. 13, 263 W.A.C. 13, 92 C.R.R. (2d) 319 (*sub nom. British Columbia (Ministry of Forests) c. Jules*), [2002] 1 C.N.L.R. 57, [2001] B.C.J. No. 2279 (QL), 2001 BCCA 647, qui a accueilli en partie un appel interjeté contre une décision de la Cour suprême de la Colombie-Britannique, [2000] B.C.J. No. 1536 (QL), 2000 BCSC 1135. Pourvoi rejeté, les juges Iacobucci, Major et Bastarache sont dissidents.

Patrick G. Foy, *c.r.*, et *Robert J. C. Deane*, pour l'appelante.

Louise Mandell, *Q.C.*, *Michael Jackson*, *Q.C.*, *Clarine Ostrove* and *Reidar Mogerman*, for the respondents.

Cheryl J. Tobias and *Brian McLaughlin*, for the intervener the Attorney General of Canada.

Lori R. Sterling and *Mark Crow*, for the intervener the Attorney General of Ontario.

René Morin, *Gilles Laporte* and *Brigitte Bussières*, for the intervener the Attorney General of Quebec.

Written submissions only by *Gabriel Bourgeois*, *Q.C.*, for the intervener the Attorney General of New Brunswick.

Written submissions only by *George H. Copley*, *Q.C.*, for the intervener the Attorney General of British Columbia.

Written submissions only by *Margaret Unsworth*, for the intervener the Attorney General of Alberta.

Robert J. M. Janes and *Dominique Nouvet*, for the interveners the Songhees Indian Band et al.

Joseph J. Arvay, *Q.C.*, and *David M. Robbins*, for the intervener Chief Roger William.

The judgment of McLachlin C.J. and Gonthier, Binnie, Arbour, LeBel and Deschamps JJ. was delivered by

LeBel J. —

I. Introduction

These two appeals concern the inherent jurisdiction of the courts to grant costs to a litigant, in rare and exceptional circumstances, prior to the final disposition of a case and in any event of the cause (I will refer to a cost award of this nature as "interim costs"). Such a jurisdiction exists in British Columbia. This discretionary power is subject to stringent conditions and to the observance of

Louise Mandell, *c.r.*, *Michael Jackson*, *c.r.*, *Clarine Ostrove* et *Reidar Mogerman*, pour les intimés.

Cheryl J. Tobias et *Brian McLaughlin*, pour l'intervenant le procureur général du Canada.

Lori R. Sterling et *Mark Crow*, pour l'intervenant le procureur général de l'Ontario.

René Morin, *Gilles Laporte* et *Brigitte Bussières*, pour l'intervenant le procureur général du Québec.

Argumentation écrite seulement par *Gabriel Bourgeois*, *c.r.*, pour l'intervenant le procureur général du Nouveau-Brunswick.

Argumentation écrite seulement par *George H. Copley*, *c.r.*, pour l'intervenant le procureur général de la Colombie-Britannique.

Argumentation écrite seulement par *Margaret Unsworth*, pour l'intervenant le procureur général de l'Alberta.

Robert J. M. Janes et *Dominique Nouvet*, pour les intervenantes la bande indienne des Songhees et autres.

Joseph J. Arvay, *c.r.*, et *David M. Robbins*, pour l'intervenant le chef Roger William.

Version française du jugement de la juge en chef McLachlin et des juges Gonthier, Binnie, Arbour, LeBel et Deschamps rendu par

Le juge LeBel —

I. Introduction

1 Les deux présents pourvois ont trait à la compétence inhérente des tribunaux d'accorder des dépens à une partie au litige, dans des circonstances rares et exceptionnelles, avant le règlement définitif de l'affaire et quelle qu'en soit l'issue (j'appellerai « provision pour frais » l'avance provisoire d'honoraires et de débours de cette nature). Une telle compétence existe en Colombie-Britannique. Ce

appropriate procedural controls. In this case, for the reasons which follow, I would uphold the granting of interim costs to the respondents by the British Columbia Court of Appeal, and I would hold that the Court of Appeal had sufficient grounds to review the exercise of discretion by the trial court.

pouvoir discrétionnaire est assujetti à des conditions rigoureuses et au respect de contrôles procéduraux applicables. En l'espèce, pour les motifs qui suivent, je suis d'avis de confirmer la décision de la Cour d'appel de la Colombie-Britannique d'attribuer une provision pour frais aux intimés et je conclus que la Cour d'appel avait des motifs suffisants pour réviser l'exercice du pouvoir discrétionnaire du tribunal de première instance.

II. Background

2 In the fall of 1999, members of the four respondent Indian bands (the "Bands") began logging on Crown land in British Columbia without authorization under the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159 (the "Code"). The Bands' respective tribal councils had purportedly authorized the harvesting of the timber, which was to be used to construct housing on the Bands' reserves. The appellant Minister of Forests served the Bands with stop-work orders under the Code, and commenced proceedings to enforce the orders. The Bands claimed that they had aboriginal title to the lands in question and were entitled to log them. They filed a notice of constitutional question challenging ss. 96 and 123 of the Code as conflicting with their constitutionally protected aboriginal rights.

3 The Minister then applied under Rule 52(11)(d) of the *Rules of Court* of the Supreme Court of British Columbia, B.C. Reg. 221/90, to have the proceedings remitted to the trial list instead of being dealt with in a summary manner. The respondents argued that the matter should not go to trial, because they lacked the financial resources to fund a protracted and expensive trial — which, given the evidentiary challenges of proving a claim of aboriginal title, this would almost undoubtedly be. In the alternative, they argued that the court, in the exercise of its powers to attach conditions to a discretionary order under Rule 52(11)(d) and to make orders as to costs pursuant to Rule 57(9), should order a trial only if

II. Le contexte

Au cours de l'automne 1999, des membres des quatre bandes indiennes intimées (les « Bandes ») ont commencé l'exploitation forestière sur des terres publiques en Colombie-Britannique sans l'autorisation requise par la *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, ch. 159 (le « Code »). Les conseils tribaux respectifs des Bandes avaient prétendument autorisé la coupe du bois qui devait servir à construire des maisons sur les réserves des Bandes. L'appelant, le ministre des Forêts, a signifié aux Bandes des ordonnances de cessation des travaux en vertu du Code et a introduit une instance afin de les faire respecter. Les Bandes ont soutenu qu'elles détenaient un titre aborigène sur les terres en question et qu'elles avaient le droit d'y mener des activités d'exploitation forestière. Elles ont déposé un avis de question constitutionnelle contestant les art. 96 et 123 du Code au motif qu'ils contreviennent à leurs droits ancestraux garantis par la Constitution.

Le ministre a alors demandé, en vertu de l'al. 52(11)d) des *Rules of Court* de la Cour suprême de la Colombie-Britannique, B.C. Reg. 221/90, que l'instance soit inscrite pour instruction au lieu d'être tranchée par procédure sommaire. Les intimés ont prétendu que l'affaire ne devait pas faire l'objet d'une instruction parce qu'ils n'avaient pas les ressources financières voulues pour financer un procès qui, vu la difficulté de faire la preuve d'un titre aborigène, serait certainement long et coûteux. Subsidiairement, ils ont prétendu que, dans l'exercice de ses pouvoirs d'assortir de conditions l'ordonnance discrétionnaire prévue à l'al. 52(11)d) et de statuer sur les dépens en vertu du

it also ordered the Crown to pay their legal fees and disbursements in advance and in any event of the cause. In support of this position, they raised constitutional arguments on three grounds: a general right of access to justice that is implicit in the *Canadian Charter of Rights and Freedoms* and flows from the primacy of the rule of law; the protection of aboriginal rights, as affirmed by s. 35 of the *Constitution Act, 1982*; and equality rights under s. 15 of the *Charter*.

par. 57(9), la cour ne devait ordonner la tenue d'une instruction que si elle donnait également à la Couronne l'ordre de leur verser une provision pour frais, quelle que soit l'issue de la cause. À l'appui de cette position, ils ont présenté des arguments constitutionnels de trois ordres : un droit général d'accès à la justice, qui est implicite dans la *Charte canadienne des droits et libertés* et qui découle de la primauté du droit, la protection des droits ancestraux confirmés par l'art. 35 de la *Loi constitutionnelle de 1982* et les droits à l'égalité garantis par l'art. 15 de la *Charte*.

The respondents filed affidavit and documentary evidence in support of their claims of aboriginal title and rights. They also submitted evidence demonstrating that it was impossible for them to fund the litigation themselves. The evidence indicated that the Bands were all in extremely difficult financial situations. The chiefs deposed that their communities face grave social problems, including high unemployment rates, lack of housing, inadequate infrastructure, and lack of access to education. Many members of the respondent Bands who live off-reserve would like to return to their communities, but are unable to do so because there are not enough jobs and homes even for those who live on the reserves now. The Bands have been forced to run deficits to finance their day-to-day operations. The chiefs of the Spallumcheen and Neskonlith Bands deposed that they are close to having outside management of their finances imposed by the Department of Indian and Northern Affairs because their working capital deficits are so high.

4 Les intimés ont déposé une preuve par affidavit et une preuve documentaire à l'appui de leur revendication du titre aborigène et d'autres droits ancestraux. Ils ont également déposé une preuve démontrant qu'il leur était impossible de financer le litige à eux seuls. Selon la preuve, les Bandes se trouvaient dans une situation financière extrêmement difficile. Les chefs ont attesté que leurs collectivités étaient aux prises avec de graves problèmes sociaux, notamment des taux de chômage élevés, une pénurie de logements, des infrastructures inadéquates et le manque d'accès à l'éducation. De nombreux membres des Bandes intimées qui vivent à l'extérieur des réserves aimeraient retourner vivre dans leurs collectivités, mais ne peuvent le faire parce qu'il n'y a déjà pas assez d'emplois et de logements pour ceux qui vivent actuellement dans les réserves. Les Bandes ont été obligées d'accumuler des déficits pour financer leurs activités de tous les jours. Les chefs des bandes de Spallumcheen et de Neskonlith ont attesté que le ministère des Affaires indiennes et du Nord était sur le point de leur imposer une gestion externe de leurs finances en raison de l'importance des déficits de leurs fonds de roulement.

The Bands' counsel estimated that the cost of a full trial would be $814,010. The Bands say that they had no way to raise this much money; and that even if they did, there are many more pressing needs which would have to take priority over funding litigation. One of the most urgent needs is new housing — the very purpose for which, they say, they

5 Les avocats des Bandes ont estimé à 814 010 $ le coût d'un procès complet. Les Bandes affirment qu'elles ne peuvent réunir une telle somme et que, même si elles en étaient capables, elles doivent répondre à des besoins plus urgents que le financement d'un litige. L'un des besoins les plus urgents est celui de nouveaux logements — pour

want to harvest timber from the land to which they claim title.

III. Relevant Legislative Provisions

6 Supreme Court of British Columbia *Rules of Court*, B.C. Reg. 221/90

1(12) When making an order under these rules the court may impose terms and conditions and give directions as it thinks just.

52(11) On an application the court may

(d) order a trial of the proceeding, either generally or on an issue, and order pleadings to be filed, and may give directions for the conduct of the trial and of pre-trial proceedings, and for the disposition of the application.

57(9) . . . costs of and incidental to a proceeding shall follow the event unless the court otherwise orders.

IV. Judicial History

A. *British Columbia Supreme Court*, [2000] B.C.J. No. 1536 (QL), 2000 BCSC 1135

7 Sigurdson J. held that the case could not be decided on the basis of documentary and affidavit evidence alone, and should therefore be remitted to the trial list. The evidence submitted by the Bands of their historical connection to the land was not sufficient in itself to dispose of the issue. Proving the Bands' aboriginal rights claims, which were contested by the Crown, would require historical, anthropological and archaeological evidence to be given by live witnesses and subjected to the detailed and rigorous testing of the trial process. The just resolution of the dispute required a trial and pleadings.

8 Sigurdson J. went on to consider whether he should impose a condition that the Minister pay the Bands' legal fees and disbursements. He began with the question of whether the court retained a general

la construction même desquels, disent-elles, elles veulent couper du bois sur les terres qu'elles revendiquent.

III. Les dispositions législatives pertinentes

Rules of Court de la Cour suprême de la Colombie-Britannique, B.C. Reg. 221/90

[TRADUCTION]

1(12) La cour peut assortir toute ordonnance qu'elle rend en vertu des présentes règles des conditions et directives qu'elle juge équitables.

52(11) Sur demande la cour peut :

d) ordonner l'instruction de l'instance, d'une façon générale ou sur un point particulier et ordonner le dépôt d'actes de procédure; elle peut aussi donner des directives relatives au déroulement du procès et des instances préparatoires à l'instruction, ainsi qu'au règlement de la demande.

57(9) . . . les dépens de l'instance ou d'une mesure prise dans le cadre de celle-ci suivent, sauf ordonnance contraire de la cour, le sort de l'affaire.

IV. L'historique des procédures judiciaires

A. *Cour suprême de la Colombie-Britannique*, [2000] B.C.J. No. 1536 (QL), 2000 BCSC 1135

Le juge Sigurdson conclut que l'affaire ne peut être tranchée sur la seule base de la preuve documentaire et de la preuve par affidavit, et qu'elle doit donc être inscrite pour instruction. La preuve qu'ont soumise les Bandes pour démontrer leur lien historique avec la terre en question ne suffit pas en soi pour régler le litige. La preuve du bien-fondé des revendications des Bandes en matière de droits ancestraux, que conteste la Couronne, exigerait des témoignages d'experts en histoire, en anthropologie et en archéologie et leur vérification détaillée et rigoureuse au cours de l'instruction. Le règlement équitable du litige requiert la tenue d'un procès et des plaidoiries.

Le juge Sigurdson s'interroge ensuite sur l'opportunité d'imposer comme condition que le ministre paye les honoraires et débours d'avocats des Bandes. Il se demande d'abord si la cour possède la

jurisdiction to award interim costs in a proceeding. He noted that costs usually follow the event and are awarded at the conclusion of the proceedings. Referring to a line of Ontario cases where a narrow jurisdiction to award interim costs has been recognized, Sigurdson J. held that such a discretion also existed in British Columbia in exceptional circumstances. He noted that he was unaware of any cases where substantial amounts had been awarded prior to trial where a liability or right was seriously in issue.

compétence générale d'accorder une provision pour frais en cours d'instance. Il souligne que les dépens suivent habituellement le sort de l'affaire et qu'ils sont attribués au terme de l'instance. Citant des décisions ontariennes dans lesquelles on a reconnu l'existence d'une compétence limitée quant à l'attribution de provisions pour frais, le juge Sigurdson conclut qu'un pouvoir discrétionnaire semblable existe aussi en Colombie-Britannique dans des cas exceptionnels. Il rappelle qu'il ne connaît aucune affaire dans laquelle on a accordé une somme importante avant le procès et où une obligation ou un droit était sérieusement en litige.

9 Turning to the Bands' argument that constitutional norms applied to the exercise of his discretion over costs, Sigurdson J. held that those norms did not require an order of interim costs to be made in the Bands' favour. He acknowledged that the Bands would need to retain experienced counsel and experts, and that a trial would be complex and expensive. He also recognized that the Bands' poverty would make it difficult for them to put their case forward. In his view, however, these obstacles resulted from the nature of the case and from the Bands' financial circumstances, not from any interference with their constitutional rights. The Bands' s. 35 argument failed, he held, because there were no specific circumstances giving rise to a fiduciary obligation on the part of the Crown to negotiate with the Bands or to fund the litigation of their land claim.

Pour ce qui est de la prétention des Bandes que l'exercice du pouvoir discrétionnaire d'adjudication des dépens est soumis à des normes constitutionnelles, le juge Sigurdson conclut que ces normes n'exigent pas une ordonnance de paiement d'une provision pour frais en faveur des Bandes. Il reconnaît que les Bandes devraient retenir les services d'experts et d'avocats chevronnés et qu'un procès serait complexe et onéreux. Il admet également qu'en raison de leur état d'indigence, les Bandes auraient de la difficulté à faire valoir leur cause. À son avis, toutefois, ces obstacles découlent de la nature de l'affaire et de la situation financière des Bandes, non d'une atteinte à leurs droits constitutionnels. Il conclut alors que la prétention des Bandes fondée sur l'art. 35 ne peut être retenue en l'absence de circonstances spécifiques imposant à la Couronne une obligation fiduciaire de négociation avec les Bandes ou de financement de la défense de leurs revendications territoriales.

10 Sigurdson J. declined to order the Minister to pay the Bands' costs in advance of the trial. He found that his jurisdiction to make such an order was very narrow and was limited by the principle that he could not prejudge the outcome of the case. In this case, liability was still in issue, and Sigurdson J. held that ordering the payment of costs in advance would involve prejudging the case on the merits. For this reason, he was of the view that he was precluded from making such an order. Sigurdson J. added a recommendation that the federal and provincial Crown consider providing funding to ensure that the cases, which had elements of test cases, would

Le juge Sigurdson refuse d'ordonner au ministre de payer à l'avance les honoraires et débours d'avocats des Bandes. Il estime que sa compétence pour rendre une telle ordonnance demeure très restreinte et qu'elle se trouve limitée par le principe qu'il ne peut préjuger de l'issue de la cause. En l'espèce, la question de la responsabilité n'est pas réglée et le juge Sigurdson conclut que, s'il ordonnait le versement d'une provision pour frais, il se trouverait à préjuger de l'affaire quant au fond. C'est pourquoi il estime qu'il ne peut rendre une telle ordonnance. Cependant, il recommande aussi que la Couronne, aussi bien fédérale que provinciale, envisage de

be properly resolved at trial. He also suggested that the litigation might be able to proceed if the Bands could work out a contingent fee arrangement with counsel.

fournir un appui financier de sorte que ces affaires, qui s'apparentent à des causes types, soient tranchées comme il se doit dans le cadre d'un procès. Il semble également indiquer que le litige pourrait être entendu si les Bandes pouvaient conclure une entente d'honoraires conditionnels avec leurs avocats.

B. *British Columbia Court of Appeal* (2001), 95 B.C.L.R. (3d) 273, 2001 BCCA 647

B. *Cour d'appel de la Colombie-Britannique* (2001), 95 B.C.L.R. (3d) 273, 2001 BCCA 647

11 Newbury J.A., writing for a unanimous panel, allowed the Bands' appeal of Sigurdson J.'s decision.

La juge Newbury, au nom d'une formation unanime, accueille l'appel des Bandes contre la décision du juge Sigurdson.

12 At the outset, Newbury J.A. noted that the Bands' claims, if they went to trial, would be the first to try aboriginal claims to title and other rights in respect of logging in British Columbia. She also summarized some of the affidavit evidence setting out the dire financial circumstances of the Bands.

Dès le départ, la juge Newbury souligne que, si les revendications des Bandes faisaient l'objet d'un procès, il s'agirait du premier procès sur la revendication d'un titre aborigène et d'autres droits ancestraux à l'égard de l'exploitation forestière en Colombie-Britannique. Elle résume aussi certains affidavits exposant la situation financière précaire des Bandes.

13 Newbury J.A. upheld the chambers judge's decision to remit the matter of the Bands' aboriginal rights or title to trial. She agreed with him that the just determination of these issues required a trial. This holding was not raised on appeal to this Court.

La juge Newbury confirme la décision du juge en chambre d'inscrire pour instruction la question du titre aborigène ou d'autres droits ancestraux. Elle convient avec lui qu'un règlement équitable de ces questions nécessite la tenue d'un procès. Cette décision n'a pas été remise en cause lors du pourvoi devant notre Cour.

14 On the question of funding the litigation, Newbury J.A. distinguished between a constitutional right to full funding of legal fees and disbursements, on the one hand, and on the other, the court's discretion to make orders as to "costs" as that term is used in the rules of court and in general legal parlance — meaning a payment to offset legal expenses, usually in an amount set by statutory guidelines, rather than payment of the actual amount owed by the client to his or her solicitor.

À propos de la question du financement du litige, la juge Newbury établit une distinction entre, d'une part, un droit constitutionnel au paiement intégral des honoraires et débours et, d'autre part, le pouvoir discrétionnaire du tribunal de statuer sur les « dépens » au sens où ce terme est employé dans les règles de procédure et dans la langue juridique en général — c'est-à-dire le versement d'une somme destinée à couvrir les frais du recours à la justice, habituellement selon des lignes directrices prévues par la loi, et non le paiement de la somme réelle que le client doit à son avocat.

15 As far as a constitutional right to funding of the Bands' legal expenditures was concerned, Newbury J.A. substantially agreed with the reasons of the

Au sujet de la question d'un droit constitutionnel des Bandes au paiement des honoraires et débours d'avocats, la juge Newbury souscrit pour l'essentiel

chambers judge. She held that the principle of access to justice did not extend so far as to oblige the government to fund litigants who could not afford to pay for legal representation in a civil suit. She also agreed with Sigurdson J. that s. 35 of the *Constitution Act, 1982* did not place an affirmative obligation on the government to provide funding for legal fees of an aboriginal band attempting to prove asserted aboriginal rights. Nothing in the specific circumstances of this case gave rise to a fiduciary expectation on the Bands' part that their legal fees would be funded. (She did not address the Bands' s. 15 arguments, which were not raised on appeal.) Newbury J.A. concluded that the Bands did not have a constitutional right to legal fees funded by the provincial Crown.

aux motifs du juge en chambre. Elle conclut que le principe de l'accès à la justice ne va pas jusqu'à obliger le gouvernement à soutenir financièrement les parties qui n'ont pas les moyens de payer leur représentation par avocat dans une poursuite civile. Elle convient également avec le juge Sigurdson que l'art. 35 de la *Loi constitutionnelle de 1982* n'impose pas au gouvernement l'obligation positive de payer les honoraires d'avocats d'une bande autochtone qui tente de prouver l'existence de droits ancestraux. Rien dans les circonstances particulières de l'espèce ne permet aux Bandes d'invoquer l'existence d'une obligation fiduciaire relativement au paiement des honoraires d'avocats (la juge n'a pas examiné les prétentions fondées sur l'art. 15, lesquelles n'ont pas été soulevées en appel). La juge Newbury décide ainsi que la Constitution ne garantit pas aux Bandes le paiement par la Couronne provinciale de tels honoraires.

Newbury J.A. came to a different conclusion, however, on the matter of the court's discretion to order interim costs in favour of the Bands. She agreed with Sigurdson J. that this discretion existed, and that it was narrow in scope and restricted to narrow and exceptional circumstances. In her view, however, the circumstances of this case were indeed exceptional. Newbury J.A. held that the chambers judge had placed too much emphasis on concerns about prejudging the outcome, which in her view were diminished in light of the special circumstances of the case and the public interest in a proper resolution of the issues. She held that constitutional principles and the unique nature of the relationship between the Crown and aboriginal peoples were background factors that should inform the exercise of the court's discretion to order costs. Newbury J.A. held that the chambers judge had erred in failing to recognize that the case involved exceptional and unique circumstances which outweighed concerns about prejudging the outcome of the case.

16

Cela dit, la juge Newbury arrive à une conclusion différente sur la question du pouvoir discrétionnaire de la cour d'ordonner le versement d'une provision pour frais aux Bandes. Elle convient avec le juge Sigurdson que ce pouvoir discrétionnaire existe, qu'il a une portée limitée et qu'on ne peut y recourir que dans des circonstances exceptionnelles bien précises. À son avis, toutefois, les circonstances de l'espèce sont effectivement exceptionnelles. La juge Newbury estime que le juge en chambre a trop insisté sur les préoccupations concernant le danger de préjuger de l'issue de la cause; selon elle, ces préoccupations se trouvent atténuées en raison des circonstances spéciales de l'espèce et de l'intérêt du public à ce que les questions en litige soient réglées comme il se doit. Elle conclut que les principes constitutionnels et le caractère unique de la relation entre la Couronne et les peuples autochtones sont des facteurs fondamentaux qui doivent guider la cour dans l'exercice de son pouvoir discrétionnaire de statuer sur les dépens. Selon son opinion, le juge en chambre a commis une erreur en ne reconnaissant pas que l'affaire présente des circonstances uniques et exceptionnelles qui doivent prévaloir sur toute préoccupation relative au danger de préjuger de l'issue de la cause.

17 Newbury J.A. held that, although the court had no discretion to order full funding of the Bands' case by the Crown, the chambers judge did have a discretionary power to order interim costs. She held that such an order should be made with conditions designed to provide concrete assistance to the Bands without exposing the Minister to unreasonable or excessive costs. She ordered the Crown to pay such legal costs of the Bands as ordered by the chambers judge from time to time, subject to detailed terms that she imposed so as to encourage the parties to minimize unnecessary steps in the dispute and to resolve as many issues as possible by negotiation. These terms, as found in the Court of Appeal Order dated November 5, 2001, are best stated in full:

AND THIS COURT FURTHER ORDERS that the Crown, in any event of the cause, pay such legal costs of the Bands, as that term is used and as the Chambers judge orders from time to time in accordance with the following:

(a) Costs, as is referenced in paragraph [10] of the *Reasons for Judgment*;

(b) Unless the Chambers judge concludes that special costs are warranted in this case, costs are to be calculated on the appropriate scale in light of the complexity and difficulty of the litigation;

(c) Counsel are to consider whether costs could be saved by trying one of the four cases rather than all four at the same time. If counsel are unable to agree on that issue, they should seek directions from the Chambers judge. Counsel are also to use all other reasonable measures to minimize costs, and the Chambers judge may impose restrictions for this purpose;

(d) The Province and the Bands are to attempt to agree on a procedure whereby the Bands upon incurring taxable costs and disbursements from time to time up to the end of the trial, will so advise the respondent, and provide such other 'backup' material as the Chambers judge may order. Such costs would be paid by the respondent within a given time-frame, unless the

La juge Newbury estime que, même si la cour ne possède pas le pouvoir discrétionnaire d'ordonner à la Couronne de financer au complet la cause des Bandes, le juge en chambre a le pouvoir discrétionnaire d'ordonner le paiement d'une provision pour frais. Elle conclut qu'une telle ordonnance ne devrait être rendue que si elle est assortie de conditions visant à fournir une aide concrète aux Bandes sans pour autant exposer le ministre à des dépenses excessives ou déraisonnables. Elle ordonne alors à la Couronne de payer les honoraires et débours d'avocats des Bandes, selon ce que pourrait ordonner le juge en chambre, sous réserve de conditions détaillées qu'elle impose de manière à encourager les parties à un litige à éviter les démarches inutiles et à régler par la négociation le plus grand nombre possible de questions. Il est utile de reproduire intégralement ces conditions, qui figurent dans l'ordonnance du 5 novembre 2001 de la Cour d'appel :

[TRADUCTION] LA COUR ORDONNE EN OUTRE que la Couronne, quelle que soit l'issue de la cause, paye les honoraires et débours d'avocats des Bandes, au sens où ce terme est employé et selon ce que pourrait ordonner le juge en chambre, en conformité avec ce qui suit :

a) Les dépens, au sens du par. [10] des *Motifs du jugement*.

b) Sauf si le juge en chambre conclut que l'octroi d'honoraires et de débours spéciaux est justifié en l'espèce, ces derniers seront calculés selon le barème applicable compte tenu de la complexité et de la difficulté du litige.

c) Les avocats devront examiner la possibilité de diminuer les coûts en ne faisant instruire qu'une seule des causes au lieu des quatre à la fois. S'ils n'arrivent pas à s'entendre sur cette question, ils devront demander des directives au juge en chambre. Ils prendront également toutes les autres mesures raisonnables pour réduire au minimum les dépenses et le juge en chambre pourra imposer des restrictions à cette fin.

d) La Province et les Bandes devront tenter de s'entendre sur une procédure valide pour toute la durée de l'instruction en vertu de laquelle les Bandes, au fur et à mesure qu'elles engageront des frais et des débours taxables, aviseront l'intimée et fourniront toute pièce justificative que le juge en chambre pourra exiger. Ces honoraires et débours seront payés par l'intimée dans un délai

Province objects, in which case it shall refer the matter to the Chambers judge, who may order the taxation of the bill in the ordinary way;

(e) If counsel are unable to agree on such procedures, the matter shall be taken back to the Chambers judge, who shall make directions in accordance with the spirit of these *Reasons*.

prescrit, sauf si la Province s'y oppose, auquel cas elle devra renvoyer l'affaire au juge en chambre, qui pourra ordonner la taxation du mémoire de frais de la manière habituelle.

e) Si les avocats n'arrivent pas à s'entendre sur une telle procédure, l'affaire devra être renvoyée au juge en chambre, qui donnera des directives en conformité avec l'esprit des présents *Motifs*.

V. Issues

This case raises two issues: first, the nature of the court's jurisdiction in British Columbia to grant costs on an interim basis and the principles that govern its exercise; and second, appellate review of the trial court's discretion as to costs. The issue of a constitutional right to funding does not arise, as it was not relied on by the respondents in this appeal.

V. Les questions en litige

18 La présente affaire soulève deux questions : premièrement, la nature de la compétence des cours de la Colombie-Britannique d'accorder des provisions pour frais et les principes qui régissent l'exercice de cette compétence; deuxièmement, l'examen en appel du pouvoir discrétionnaire du tribunal de première instance de statuer sur les dépens. La question d'un droit constitutionnel au financement ne se pose pas, car elle n'a pas été soulevée par les intimés en l'espèce.

VI. Analysis

A. *The Court's Discretionary Power to Grant Interim Costs*

(1) Traditional Costs Principles — Indemnifying the Successful Party

The jurisdiction of courts to order costs of a proceeding is a venerable one. The English common law courts did not have inherent jurisdiction over costs, but beginning in the late 13th century they were given the power by statute to order costs in favour of a successful party. Courts of equity had an entirely discretionary jurisdiction to order costs according to the dictates of conscience (see M. M. Orkin, *The Law of Costs* (2nd ed. (loose-leaf)), at p. 1-1). In the modern Canadian legal system, this equitable and discretionary power survives, and is recognized by the various provincial statutes and rules of civil procedure which make costs a matter for the court's discretion.

In the usual case, costs are awarded to the prevailing party after judgment has been given. The

VI. Analyse

A. *Le pouvoir discrétionnaire du tribunal d'accorder des provisions pour frais*

(1) Les principes traditionnels relatifs à l'attribution de dépens — L'indemnisation de la partie ayant obtenu gain de cause

19 La compétence des tribunaux d'ordonner le paiement des dépens afférents à une procédure judiciaire existe depuis fort longtemps. Les cours anglaises de common law n'avaient pas de compétence inhérente pour statuer sur les dépens mais, dès la fin du 13e siècle, la loi leur a conféré le pouvoir d'adjuger les dépens à la partie gagnante. De plus, les cours d'equity détenaient une compétence entièrement discrétionnaire pour accorder les dépens au gré de leur conscience (voir M. M. Orkin, *The Law of Costs* (2e éd. (feuilles mobiles)), p. 1-1). Dans le système juridique canadien moderne, ce pouvoir discrétionnaire fondé sur l'equity existe toujours et est reconnu par les diverses lois et règles de procédure civile provinciales, qui laissent la question des dépens à la discrétion de la cour.

20 Normalement, les dépens sont accordés à la partie gagnante après le prononcé du jugement. Dans

standard characteristics of costs awards were summarized by the Divisional Court of the Ontario High Court of Justice in *Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc.* (1985), 51 O.R. (2d) 23, at p. 32, as follows:

(1) They are an award to be made in favour of a successful or deserving litigant, payable by the loser.

(2) Of necessity, the award must await the conclusion of the proceeding, as success or entitlement cannot be determined before that time.

(3) They are payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceeding.

(4) They are *not* payable for the purpose of assuring participation in the proceedings. [Emphasis in original.]

21 The characteristics listed by the court reflect the traditional purpose of an award of costs: to indemnify the successful party in respect of the expenses sustained either defending a claim that in the end proved unfounded (if the successful party was the defendant), or in pursuing a valid legal right (if the plaintiff prevailed). Costs awards were described in *Ryan v. McGregor* (1925), 58 O.L.R. 213 (App. Div.), at p. 216, as being "in the nature of damages awarded to the successful litigant against the unsuccessful, and by way of compensation for the expense to which he has been put by the suit improperly brought".

(2) Costs as an Instrument of Policy

22 These background principles continue to govern the law of costs in cases where there are no special factors that would warrant a departure from them. The power to order costs is discretionary, but it is a discretion that must be exercised judicially, and accordingly the ordinary rules of costs should be followed unless the circumstances justify a different approach. For some time, however, courts have recognized that indemnity to the successful party is

Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc. (1985), 51 O.R. (2d) 23, p. 32, la Cour divisionnaire de la Haute Cour de justice de l'Ontario résume ainsi les caractéristiques habituelles de l'octroi des dépens :

[TRADUCTION]

(1) Les dépens sont alloués à la partie victorieuse ou méritoire et sont payables par la partie qui succombe.

(2) Par la force des choses, les dépens ne sont accordés qu'à la fin de l'instance étant donné qu'on ne peut savoir d'avance qui aura gain de cause.

(3) Ils sont payables à titre d'indemnité pour les dépenses et les services admissibles afférents à l'instance.

(4) Ils *ne* sont *pas* versés dans le but de garantir la participation à l'instance. [En italique dans l'original.]

Les caractéristiques énumérées par la cour traduisent le but traditionnel de l'octroi des dépens : indemniser la partie gagnante des dépenses qu'elle a engagées soit pour se défendre contre une action qui, en fin de compte, s'est révélée sans fondement (si le défendeur a obtenu gain de cause), soit pour faire reconnaître un droit valide (si le demandeur a obtenu gain de cause). L'attribution des dépens est décrite dans *Ryan c. McGregor* (1925), 58 O.L.R. 213 (Div. app.), p. 216, comme [TRADUCTION] « participant de la nature des dommages-intérêts accordés au gagnant contre le perdant, à titre de compensation des dépenses qu'il a dû engager en raison de la poursuite non fondée ».

(2) L'attribution de dépens comme instrument de politique juridique

Ces principes fondamentaux continuent à régir les règles de droit relatives à l'attribution de dépens dans les affaires où aucun facteur particulier ne justifierait qu'on y déroge. Le pouvoir d'adjudication de dépens demeure discrétionnaire, mais c'est un pouvoir discrétionnaire qui doit être exercé de façon judicieuse et il faut donc suivre les règles ordinaires relatives à cette question à moins que les circonstances ne justifient une approche différente. Depuis

not the sole purpose, and in some cases not even the primary purpose, of a costs award. Orkin, *supra*, at p. 2-24.2, has remarked that:

> The principle of indemnification, while paramount, is not the only consideration when the court is called on to make an order of costs; indeed, the principle has been called "outdated" since other functions may be served by a costs order, for example to encourage settlement, to prevent frivolous or vexations [*sic*] litigation and to discourage unnecessary steps.

The indemnification principle was referred to as "outdated" in *Fellowes, McNeil v. Kansa General International Insurance Co.* (1997), 37 O.R. (3d) 464 (Gen. Div.), at p. 475. In this case the successful party was a law firm, one of whose partners had acted on its behalf. Traditionally, courts applying the principle of indemnification would allow an unrepresented litigant to tax disbursements only and not counsel fees, because the litigant could not be indemnified for counsel fees it had not paid. Macdonald J. held that the principle of indemnity remained a paramount consideration in costs matters generally, but was "outdated" in its application to a case of this nature. The court should also use costs awards so as to encourage settlement, to deter frivolous actions and defences, and to discourage unnecessary steps in the litigation. These purposes could be served by ordering costs in favour of a litigant who might not be entitled to them on the view that costs should be awarded purely for indemnification of the successful party.

Similarly, in *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201, the British Columbia Court of Appeal stated at para. 28 that "the view that costs are awarded solely to indemnify the successful litigant for legal fees and disbursements incurred is now outdated". The court held that self-represented lay litigants should be allowed to tax

un certain temps, toutefois, les tribunaux reconnaissent que l'indemnisation de la partie victorieuse ne constitue pas le seul objectif et, dans certains cas, pas même l'objectif principal de l'attribution de dépens. Voici ce qui est écrit dans Orkin, *op. cit.*, p. 2-24.2 :

> [TRADUCTION] Le principe de l'indemnisation, bien que primordial, n'est pas la seule considération retenue par le tribunal appelé à rendre une ordonnance de paiement des dépens; ce principe a même été qualifié de « désuet » puisqu'une telle ordonnance peut servir d'autres fins, par exemple encourager les règlements, prévenir les litiges futiles ou vexatoires et décourager les démarches inutiles.

23 Le principe de l'indemnisation a été qualifié de « désuet » dans la décision *Fellowes, McNeil c. Kansa General International Insurance Co.* (1997), 37 O.R. (3d) 464 (Div. gén.), p. 475. Dans cette affaire, la partie victorieuse était un cabinet d'avocats. L'un de ses associés avait agi pour le compte de ce dernier. Traditionnellement, les tribunaux qui appliquent le principe de l'indemnisation permettent à une partie non représentée de taxer uniquement les débours et non les honoraires d'avocats, la partie ne pouvant être indemnisée des honoraires d'avocats qu'elle n'a pas payés. La juge Macdonald a estimé que, d'une manière générale, le principe de l'indemnisation demeurait toujours une considération primordiale en matière de dépens, mais que son application était « désuète » dans une affaire de cette nature. La cour devrait également recourir à l'attribution des dépens afin d'encourager les règlements, de prévenir les actions et les défenses frivoles et de décourager les démarches futiles dans le cadre du litige. Ces objectifs pourraient être atteints au moyen d'une ordonnance de paiement de dépens en faveur d'une partie qui n'y aurait peut-être pas droit selon le seul principe de l'indemnisation de la partie victorieuse.

24 De même, dans *Skidmore c. Blackmore* (1995), 2 B.C.L.R. (3d) 201, la Cour d'appel de la Colombie-Britannique a affirmé au par. 28 que [TRADUCTION] « le principe selon lequel les dépens sont accordés dans le seul but d'indemniser la partie gagnante des honoraires et débours d'avocats est maintenant périmé ». La cour a conclu que

legal fees, overruling its earlier decision in *Kendall v. Hunt* (*No. 2)* (1979), 16 B.C.L.R. 295. This change in the common law was described by the court as an incremental one "when viewed in the larger context of the trend towards awarding costs to encourage or deter certain types of conduct, and not merely to indemnify the successful litigant" (para. 44).

le profane non représenté par avocat devrait avoir le droit de taxer les frais du recours à la justice, écartant ainsi sa décision dans *Kendall c. Hunt* (*No. 2)* (1979), 16 B.C.L.R. 295. Selon la cour, il s'agissait là d'un changement progressif en common law [TRADUCTION] « lorsqu'on l'examine dans le contexte global de la tendance à accorder des dépens pour encourager ou décourager certains types de comportement et non simplement pour indemniser la partie gagnante » (par. 44).

25 As the *Fellowes* and *Skidmore* cases illustrate, modern costs rules accomplish various purposes in addition to the traditional objective of indemnification. An order as to costs may be designed to penalize a party who has refused a reasonable settlement offer; this policy has been codified in the rules of court of many provinces (see, e.g., Supreme Court of British Columbia *Rules of Court*, Rules 37(23) to 37(26); Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 49.10; Manitoba *Queen's Bench Rules*, Man. Reg. 553/88, Rule 49.10). Costs can also be used to sanction behaviour that increases the duration and expense of litigation, or is otherwise unreasonable or vexatious. In short, it has become a routine matter for courts to employ the power to order costs as a tool in the furtherance of the efficient and orderly administration of justice.

Comme l'illustrent les décisions *Fellowes* et *Skidmore*, les règles modernes d'attribution des dépens visent des objectifs divers outre le traditionnel objectif de l'indemnisation. Une ordonnance d'adjudication des dépens peut viser à pénaliser la partie qui a refusé une offre de règlement raisonnable; cette politique a été codifiée dans les règles de pratique des tribunaux de plusieurs provinces (voir, p. ex., les *Rules of Court* de la Cour suprême de la Colombie-Britannique, par. 37(23) à 37(26); les *Règles de procédure civile* de l'Ontario, R.R.O. 1990, Règl. 194, par. 49.10; les *Règles de la Cour du Banc de la Reine*, Règl. du Man. 553/88, règle 49.10). L'attribution des dépens peut également servir à sanctionner des conduites qui ont prolongé la durée du litige, ou en ont augmenté le coût ou qui sont par ailleurs déraisonnables ou vexatoires. Bref, les tribunaux utilisent maintenant couramment le pouvoir d'adjudication des dépens comme un instrument destiné à favoriser l'administration efficace et ordonnée de la justice.

26 Indeed, the traditional approach to costs can also be viewed as being animated by the broad concern to ensure that the justice system works fairly and efficiently. Because costs awards transfer some of the winner's litigation expenses to the loser rather than leaving each party's expenses where they fall (as is done in jurisdictions without costs rules), they act as a disincentive to those who might be tempted to harass others with meritless claims. And because they offset to some extent the outlays incurred by the winner, they make the legal system more accessible to litigants who seek to vindicate a legally sound position. These effects of the traditional rules can be connected to the court's concern with overseeing its own process and ensuring

À vrai dire, on peut aussi considérer que la règle traditionnelle d'adjudication des dépens est dictée par le souci général d'assurer le fonctionnement équitable et efficace du système judiciaire. Comme l'attribution des dépens transfère au perdant une partie des dépenses assumées par le gagnant au lieu de laisser à chaque partie le soin de supporter ses frais (comme c'est la pratique dans les ressorts où il n'existe pas de règles à cet égard), elle agit comme moyen dissuasif sur ceux qui pourraient être tentés d'en harceler d'autres par des demandes non fondées. Comme elle réduit dans une certaine mesure les dépenses du gagnant, elle rend le système juridique plus accessible aux parties qui cherchent à défendre une position valable en droit.

that litigation is conducted in an efficient and just manner. In this sense it is a natural evolution in the law to recognize the related policy objectives that are served by the modern approach to costs.

Ces effets des règles traditionnelles peuvent être rattachés au souci de la cour d'exercer un contrôle sur sa propre procédure et de voir au déroulement efficace et juste de l'instance. En ce sens, ce souci se situe dans la ligne de l'évolution naturelle du droit de reconnaître les objectifs connexes d'intérêt public que favorise l'approche moderne de l'attribution des dépens.

(3) Public Interest Litigation and Access to Justice

(3) Poursuites d'intérêt public et accès à la justice

27 Another consideration relevant to the application of costs rules is access to justice. This factor has increased in importance as litigation over matters of public interest has become more common, especially since the advent of the *Charter*. In special cases where individual litigants of limited means seek to enforce their constitutional rights, courts often exercise their discretion on costs so as to avoid the harshness that might result from adherence to the traditional principles. This helps to ensure that ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole.

Autre considération pertinente pour l'application des règles d'attribution des dépens : l'accès à la justice. Ce facteur a pris de l'importance avec l'augmentation du nombre de poursuites d'intérêt public, surtout depuis l'avènement de la *Charte*. Dans des cas spéciaux où des parties aux ressources limitées cherchent à faire respecter leurs droits constitutionnels, les tribunaux exercent souvent leur pouvoir discrétionnaire d'adjudication des dépens de façon à ne pas les mettre dans une situation difficile que pourrait causer l'application des règles traditionnelles. Ils contribuent ainsi à aider les citoyens ordinaires à avoir accès au système juridique lorsqu'ils cherchent à régler des questions qui revêtent de l'importance pour l'ensemble de la collectivité.

28 Courts have referred to the importance of this objective on numerous occasions. In *Canadian Newspapers Co. v. Attorney-General of Canada* (1986), 32 D.L.R. (4th) 292 (Ont. H.C.J.), Osler J. opined that "it is desirable that *bona fide* challenge is not to be discouraged by the necessity for the applicant to bear the entire burden" (pp. 305-6), while at the same time cautioning that "the Crown should not be treated as an unlimited source of funds with the result that marginal applications would be encouraged" (p. 306). In *Re Lavigne and Ontario Public Service Employees Union (No. 2)* (1987), 60 O.R. (2d) 486 (H.C.J.), White J. held that "it is desirable that Charter litigation not be beyond the reach of the citizen of ordinary means" (p. 526). He awarded costs to the successful *Charter* applicant in spite of the fact that his representation had been paid for by a third-party organization (so that he would not, on the

Les tribunaux ont souligné à maintes reprises l'importance de cet objectif. Dans *Canadian Newspapers Co. c. Attorney-General of Canada* (1986), 32 D.L.R. (4th) 292 (H.C.J. Ont.), le juge Osler a déclaré qu'il est [TRADUCTION] « souhaitable qu'une contestation de bonne foi ne soit pas découragée par le fait que le requérant doit assumer tout le fardeau » (p. 305-306), tout en précisant qu'[TRADUCTION] « il ne faut pas traiter le ministère public comme une source de fonds intarissable de manière à encourager les demandes marginales » (p. 306). Dans *Re Lavigne and Ontario Public Service Employees Union (No. 2)* (1987), 60 O.R. (2d) 486 (H.C.J.), le juge White a conclu que [TRADUCTION] « les personnes aux ressources ordinaires devraient pouvoir participer à un litige intéressant la Charte » (p. 526). Il a adjugé les dépens à la partie qui revendiquait avec succès un droit fondé sur la *Charte*, et ce, malgré le fait

traditional approach, have been entitled to any indemnity). This case was overturned on the merits on appeal (*Lavigne v. O.P.S.E.U.* (1989), 67 O.R. (2d) 536 (C.A.), aff'd [1991] 2 S.C.R. 211), but neither the Ontario Court of Appeal nor this Court expressed any disapproval of White J.'s remarks on costs. Referring to both *Canadian Newspapers* and *Lavigne* in *Rogers v. Sudbury (Administrator of Ontario Works)* (2001), 57 O.R. (3d) 467 (S.C.J.), Epstein J. concluded at para. 19 that "costs can be used as an instrument of policy and . . . making *Charter* litigation accessible to ordinary citizens is recognized as a legitimate and important policy objective".

que les frais de sa représentation juridique avaient été payés par une organisation tierce (selon la règle traditionnelle, il n'aurait eu droit à aucune indemnité). Cette décision a été infirmée sur le fond en appel (*Lavigne c. O.P.S.E.U.* (1989), 67 O.R. (2d) 536 (C.A.), conf. par [1991] 2 R.C.S. 211), mais ni la Cour d'appel de l'Ontario ni notre Cour n'ont exprimé leur désaccord avec les remarques du juge White sur la question des frais. Citant les décisions *Canadian Newspapers* et *Lavigne* dans *Rogers c. Sudbury (Administrator of Ontario Works)* (2001), 57 O.R. (3d) 467 (C.S.J.), le juge Epstein a conclu au par. 19 que [TRADUCTION] « l'octroi des dépens peut être utilisé comme instrument de politique juridique et [. . .] donner aux citoyens ordinaires la possibilité d'intenter des poursuites fondées sur la *Charte* est reconnu comme un objectif d'intérêt public légitime et important ».

29 In *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, the applicants, who were Jehovah's Witnesses, unsuccessfully argued that their *Charter* rights had been violated when a blood transfusion was administered to their baby daughter over their objections. Instead of granting costs in the cause, the District Court judge directed the intervening Attorney General to pay the applicants' costs. Whealy Dist. Ct. J. cited Osler J.'s statement in *Canadian Newspapers*, *supra*, that *bona fide* challenges should not be deterred, and observed that the case before him was an unusual one involving a matter of province-wide importance (see [1989] O.J. No. 205 (QL) (Dist. Ct.)). His costs order, although unconventional, was upheld on appeal by the Ontario Court of Appeal, and subsequently by this Court. At the Court of Appeal, Tarnopolsky J.A. noted that this case, in which "the parents rose up against state power because of their religious beliefs", was one of national, even international significance ((1992), 10 O.R. (3d) 321, at pp. 354-55). La Forest J. stated at para. 122 of this Court's judgment that the costs award against the Attorney General was "highly unusual" and something that should be permitted "only in very rare cases", but that the case "raised special and peculiar

Dans *B. (R.) c. Children's Aid Society of Metropolitan Toronto*, [1995] 1 R.C.S. 315, les demandeurs, des témoins de Jéhovah, avaient plaidé sans succès qu'on avait porté atteinte aux droits que leur reconnaît la *Charte* en pratiquant contre leur gré une transfusion sanguine sur leur fillette. Au lieu d'accorder les dépens suivant le sort de l'affaire, le juge de la Cour de district avait ordonné à l'intervenant, le procureur général, de payer les frais des demandeurs. Le juge Whealy de la Cour de district a cité la déclaration du juge Osler dans *Canadian Newspapers*, précité, qu'il ne faut pas décourager les contestations de bonne foi, et il a fait remarquer que l'affaire dont il était saisi était une affaire inhabituelle soulevant une question importante pour l'ensemble de la province (voir [1989] O.J. No. 205 (QL) (C. dist.)). Son ordonnance de paiement des frais a été confirmée en appel par la Cour d'appel de l'Ontario et ultérieurement par notre Cour, malgré son caractère novateur. À la Cour d'appel, le juge Tarnopolsky a fait remarquer que cette cause, dans laquelle [TRADUCTION] « les parents se sont élevés contre le pouvoir de l'État en raison de leurs convictions religieuses », était d'importance nationale, voire internationale ((1992), 10 O.R. (3d) 321, p. 354-355). Le juge La Forest a écrit, au par. 122 du jugement de la Cour, que la condamnation du procureur général aux dépens était « fort

problems". He allowed Whealy Dist. Ct. J.'s order to stand.

inhabituelle » et ne devrait être permise que « dans des cas très rares », mais que la cause a « soulevé des problèmes spéciaux et particuliers ». Il a confirmé l'ordonnance du juge Whealy.

30 The *B. (R.)* case illustrates that in highly exceptional cases involving matters of public importance the individual litigant who loses on the merits may not only be relieved of the harsh consequence of paying the other side's costs, but may actually have its own costs ordered to be paid by a successful intervenor or party. It should be noted that Whealy Dist. Ct. J. applied Rule 57.01(2), a provision of Ontario's *Rules of Civil Procedure* that expressly authorized the court to award costs against a successful litigant and specified that the importance of the issues was a factor to be considered (see Rule 57.01(1)(d)). Although these principles are not spelled out in the Supreme Court of British Columbia *Rules of Court*, in my view they are generally relevant in guiding the exercise of a court's discretion as to costs. They form part of the background against which a British Columbia court exercises its inherent equitable jurisdiction, confirmed by Rule 57(9), to depart from the usual rule that costs follow the event.

L'arrêt *B. (R.)* illustre le fait que, dans des affaires vraiment exceptionnelles mettant en cause des questions d'intérêt public, la partie qui perd sur le fond peut non seulement être dispensée du paiement des frais de la partie adverse, mais aussi voir ses propres frais payés par l'intervenant ou la partie victorieuse. Il convient de signaler que le juge Whealy a appliqué le par. 57.01(2) des *Règles de procédure civile* de l'Ontario, qui autorise expressément le tribunal à condamner aux dépens la partie gagnante et qui précise qu'il faut prendre en considération l'importance des questions en litige (voir al. 57.01(1)d)). Bien que ces principes ne soient pas énoncés expressément dans les *Rules of Court* de la Cour suprême de la Colombie-Britannique, ils sont, à mon avis, généralement pertinents pour guider les tribunaux dans l'exercice de leur pouvoir discrétionnaire d'adjudication des dépens. Ils font partie du contexte dans lequel les tribunaux de la Colombie-Britannique exercent leur compétence inhérente en equity, confirmée par le par. 57(9), pour déroger à la règle habituelle voulant que les dépens suivent l'issue de la cause.

(4) Interim Costs

(4) La provision pour frais

31 Concerns about access to justice and the desirability of mitigating severe inequality between litigants also feature prominently in the rare cases where interim costs are awarded. An award of costs of this nature forestalls the danger that a meritorious legal argument will be prevented from going forward merely because a party lacks the financial resources to proceed. That costs orders can be used in this way in a narrow class of exceptional cases was recognized early on by the English courts. In *Jones v. Coxeter* (1742), 2 Atk. 400, 26 E.R. 642 (Ch.), the Lord Chancellor found that "the poverty of the person will not allow her to carry on the cause, unless the court will direct the defendant to pay something to the plaintiff in the mean time". Invoking the "intirely discretionary" equitable jurisdiction to order costs, he ordered costs to be paid

Les préoccupations concernant l'accès à la justice et l'opportunité d'atténuer les grandes inégalités entre les parties au litige occupent également le premier plan dans les rares cas où des provisions pour frais sont accordées. L'octroi d'une telle provision permet d'éviter qu'une argumentation juridique fondée ne soit pas entendue parce qu'une des parties ne dispose pas des ressources financières nécessaires. Les cours de justice anglaises ont reconnu très tôt cette possibilité de statuer sur les dépens de cette façon dans une catégorie restreinte de cas exceptionnels. Dans *Jones c. Coxeter* (1742), 2 Atk. 400, 26 E.R. 642 (Ch.), le lord chancelier a conclu que, [TRADUCTION] « en raison de sa pauvreté, la personne ne pourra pas faire entendre sa cause à moins que la cour n'ordonne au défendeur de payer entre-temps une certaine somme à la

to the plaintiff "to empower her to go on with the cause" (p. 642).

demanderesse ». Invoquant la [TRADUCTION] « nature purement discrétionnaire » de la compétence en equity d'ordonner le paiement des dépens, il les a adjugés à la demanderesse [TRADUCTION] « afin qu'elle puisse poursuivre l'instance » (p. 642).

32 The discretionary power to award interim costs in appropriate cases has also been recognized in Canada. An extensive discussion of this power is found in *Organ v. Barnett* (1992), 11 O.R. (3d) 210 (Gen. Div.). Macdonald J. reviewed the authorities, including *Jones*, *supra*, and concluded that "the court *does* have a general jurisdiction to award interim costs in a proceeding" (p. 215 (emphasis in original)). She also found that that jurisdiction was "limited to very exceptional cases and ought to be narrowly applied, especially when the court is being asked to essentially pre-determine an issue" (p. 215).

Le pouvoir discrétionnaire d'attribution de provisions pour frais dans certains cas a également été reconnu au Canada. On retrouve un examen approfondi de ce pouvoir dans *Organ c. Barnett* (1992), 11 O.R. (3d) 210 (Div. gén.). La juge Macdonald a passé en revue la jurisprudence, dont l'arrêt *Jones*, précité, et a conclu que [TRADUCTION] « la cour possède *bel et bien* une compétence générale lui permettant d'accorder des provisions pour frais en cours d'instance » (p. 215 (en italique dans l'original)). Elle a également conclu que cette compétence [TRADUCTION] « se limitait à des cas vraiment exceptionnels et qu'elle devait être appliquée avec restriction, en particulier lorsque le tribunal est appelé essentiellement à préjuger d'une question » (p. 215).

33 As Macdonald J. recognized in *Organ*, *supra*, at p. 215, the power to order interim costs is perhaps most typically exercised in, but is not limited to, matrimonial or family cases. In *McDonald v. McDonald* (1998), 163 D.L.R. (4th) 527 (Alta. C.A.), Russell J.A. observed that the wife in divorce proceedings could traditionally obtain "anticipatory costs" to enable her to present her position (para. 18). This was because husbands usually controlled all the matrimonial property. Since the wife had "no means to pay lawyers, her side of the litigation would not be advanced, and this position was patently unfair" (para. 20). Interim costs will still be granted in family cases where one party is at a severe financial disadvantage that may prevent his or her case from being put forward. See, e.g., *Woloschuk v. Von Amerongen*, [1999] A.J. No. 463 (QL), 1999 ABQB 306, where the Alberta Court of Queen's Bench ordered a lump sum payment of $10,000 to the mother in a custody action by way of interim costs, finding that the father's financial position was "significantly better than that of the [mother] in terms of funding this protracted lawsuit" (para. 16); and *Roberts v. Aasen*, [1999] O.J. No. 1969 (QL) (S.C.J.), also a custody case, where

Comme l'a reconnu la juge Macdonald dans *Organ*, précité, p. 215, c'est peut-être surtout dans les affaires relevant du droit matrimonial ou du droit de la famille que s'exerce le pouvoir d'adjudication de provisions pour frais, mais il ne se limite pas à ces domaines. Dans *McDonald c. McDonald* (1998), 163 D.L.R. (4th) 527 (C.A. Alb.), le juge Russell a fait remarquer que, dans une action en divorce, l'épouse pouvait normalement obtenir des « frais estimatifs » qui lui permettent de faire valoir sa position (par. 18). Cette situation s'expliquait par le fait que les maris étaient habituellement maître de l'ensemble du patrimoine familial. Comme l'épouse n'avait [TRADUCTION] « pas les moyens de payer les avocats, elle ne pouvait pas présenter sa version de l'affaire, ce qui était manifestement injuste » (par. 20). Des provisions pour frais continueront d'être accordées dans les affaires touchant le droit de la famille où une partie est fortement désavantagée sur le plan financier au point qu'elle risque de ne pouvoir faire valoir sa cause. Voir, p. ex., *Woloschuk c. Von Amerongen*, [1999] A.J. No. 463 (QL), 1999 ABQB 306, où la Cour du Banc de la Reine de l'Alberta a ordonné le versement à la mère d'une somme forfaitaire de 10 000 $ à titre de

the court held that the father was unlikely to succeed at trial and that the mother lacked the resources to pay her legal fees and disbursements, and ordered the father to pay $15,000 as interim costs. Orkin, *supra*, at p. 2-23, observes that in the modern context "the *raison d'tre* [*sic*] of such awards is to assist the financially needy party pending the trial; they are made where the spouse is without resources and would otherwise be unable to obtain relief in court" (citations omitted).

provision pour frais dans le cadre d'une demande de garde d'enfant, ayant conclu que le père se trouvait dans [TRADUCTION] « une situation financière bien meilleure que la mère pour financer ce long litige » (par. 16); et *Roberts c. Aasen*, [1999] O.J. No. 1969 (QL) (C.S.J.), une autre affaire concernant la garde d'enfant où la cour, ayant conclu que le père n'aurait probablement pas gain de cause au procès et que la mère n'avait pas les moyens de payer les frais et débours d'avocats, a ordonné au père de payer 15 000 $ à titre de provision pour frais. Orkin, *op. cit.*, p. 2-23, fait remarquer que dans le contexte moderne [TRADUCTION] « la raison d'être de l'octroi de ces frais est de soutenir financièrement la partie indigente pendant le procès; ils sont adjugés dans les cas où le conjoint est sans ressources et serait autrement incapable d'obtenir réparation en cour » (citations omises).

Interim costs are also potentially available in certain trust, bankruptcy and corporate cases, where they are awarded for essentially the same reason — to avoid unfairness by enabling impecunious litigants to pursue meritorious claims with which they would not otherwise be able to proceed. *Organ* was a corporate case involving, among other causes of action, an action under the oppression remedy set out in s. 248 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16. The statute also provided in s. 249(4) that interim costs could be awarded in an oppression case. Macdonald J. held that, in addition to this express statutory power, the court also had an inherent jurisdiction to award interim costs. In the particular circumstances of this case, however, she held that the order should not be granted, because by their own admission the plaintiffs were not impecunious and would be able to proceed to trial without it. In *Amcan Industries Corp. v. Toronto-Dominion Bank*, [1998] O.J. No. 3014 (QL) (Gen. Div.), a bankruptcy case, Macdonald J. acknowledged "the inherent unfairness that arises in choking a plaintiff's action if access to funds is not permitted" (para. 39); in this case, again, interim costs were not awarded because impecuniosity was not established. In *Turner v. Telecommunication Workers Pension Plan* (2001), 197 D.L.R. (4th) 533, 2001 BCCA 76, an action for breach of fiduciary duty in respect of a pension fund, the British Columbia

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Des provisions pour frais peuvent également être accordées dans certaines affaires en matière de fiducie, de faillite et de sociétés, et ce, essentiellement pour la même raison — éviter les injustices en permettant aux parties sans ressources suffisantes de faire entendre des demandes fondées, ce qu'elles ne pourraient autrement pas faire. Dans *Organ*, il s'agissait d'une affaire relevant du droit des sociétés où il est question, entre autres causes d'action, du recours en cas d'abus prévu à l'art. 248 de la *Loi sur les sociétés par actions* de l'Ontario, L.R.O. 1990, ch. B.16. La loi prévoyait également au par. 249(4) que des frais provisoires pouvaient être adjugés en matière d'abus. La juge Macdonald a conclu alors qu'outre ce pouvoir exprès conféré par la loi, la cour avait également une compétence inhérente pour accorder des frais provisoires. Dans les circonstances particulières de l'espèce, toutefois, elle a décidé qu'il n'y avait pas lieu de rendre l'ordonnance parce que les demandeurs avaient eux-mêmes reconnu qu'ils n'étaient pas indigents et qu'ils pouvaient faire instruire leur cause sans l'ordonnance. Dans *Amcan Industries Corp. c. Toronto-Dominion Bank*, [1998] O.J. No. 3014 (QL) (Div. gén.), une affaire de faillite, la juge Macdonald a reconnu [TRADUCTION] « l'injustice intrinsèque qui est créée lorsque le demandeur ne peut faire instruire sa cause faute de fonds » (par. 39); dans cette affaire, encore là, la cour n'a pas accordé de frais provisoires parce

Court of Appeal recognized that the court had the power to award interim costs, but held that the interests of justice did not require it to do so on the facts of the case. Newbury J.A. noted that the financial position or impecuniosity of a party is not in itself reason enough to depart from the usual rules as to costs (para. 18).

que le manque de ressources nécessaires n'a pas été établi. Dans *Turner c. Telecommunication Workers Pension Plan* (2001), 197 D.L.R. (4th) 533, 2001 BCCA 76, une action pour manquement à une obligation fiduciaire relativement à un régime de retraite, la Cour d'appel de la Colombie-Britannique a admis que le tribunal avait le pouvoir d'accorder des frais provisoires, mais a conclu que les intérêts de la justice ne nécessitaient pas qu'il le fasse eu égard aux faits de l'espèce. La juge Newbury a souligné que la situation financière ou le manque de ressources nécessaires d'une partie ne constitue pas en soi un motif suffisant pour s'écarter des règles habituelles d'attribution des dépens (par. 18).

35 Based on the foregoing overview of the case law, the following general observations can be made. The power to order interim costs is inherent in the nature of the equitable jurisdiction as to costs, in the exercise of which the court may determine at its discretion when and by whom costs are to be paid. This broad discretion may be expressly referred to in a statute, as in s. 131(1) of the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43, which provides that costs "are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid". Indeed, the power to order interim costs may be specifically stipulated, as in the Ontario *Business Corporations Act* or similar legislation in other jurisdictions. Even absent explicit statutory authorization, however, the power to award interim costs is implicit in courts' jurisdiction over costs as it is set out in statutes such as the Supreme Court of British Columbia *Rules of Court*, which provides that the court may make orders varying from the usual rule that costs follow the event.

Compte tenu de l'analyse de la jurisprudence qui précède, on peut dégager les observations générales suivantes. Le pouvoir d'ordonner le paiement de frais provisoires est inhérent à la nature de la compétence en equity de statuer sur les dépens, et le tribunal peut, lorsqu'il l'exerce, décider à son gré à quel moment et par qui les dépens seront payés. Ce large pouvoir discrétionnaire peut être expressément mentionné dans une loi, comme au par. 131(1) de la *Loi sur les tribunaux judiciaires* de l'Ontario, L.R.O. 1990, ch. C.43, qui prévoit, s'agissant des dépens, que « ceux qui les paient et la part qui incombe à chacun relèvent du pouvoir discrétionnaire du tribunal ». Le pouvoir d'ordonner le paiement de frais provisoires peut donc être expressément prévu, comme dans la *Loi sur les sociétés par actions* de l'Ontario, ou une loi semblable dans les autres ressorts. Toutefois, même en l'absence d'habilitation législative explicite, le pouvoir d'attribution de frais provisoires découle implicitement de la compétence des tribunaux de statuer sur les dépens comme c'est le cas dans les *Rules of Court* de la Cour suprême de la Colombie-Britannique, qui prévoient que la cour peut rendre des ordonnances qui dérogent à la règle habituelle voulant que les dépens suivent le sort de l'affaire.

36 There are several conditions that the case law identifies as relevant to the exercise of this power, all of which must be present for an interim costs order to be granted. The party seeking the order must be impecunious to the extent that, without such an order, that party would be deprived of the

La jurisprudence pose plusieurs conditions à l'exercice de ce pouvoir, toutes devant être présentes pour qu'une provision pour frais soit accordée. La partie qui sollicite l'ordonnance doit être si dépourvue de ressources qu'elle serait incapable, sans cette ordonnance, de faire entendre sa cause. Elle doit

opportunity to proceed with the case. The claimant must establish a *prima facie* case of sufficient merit to warrant pursuit. And there must be special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate. These requirements might be modified if the legislature were to set out the conditions on which interim costs are to be granted, or where courts develop criteria applicable to a particular situation where interim costs are authorized by statute (as is the case in relation to s. 249(4) of the Ontario *Business Corporations Act*; see *Organ*, *supra*, at p. 213). But in the usual case, where the court exercises its equitable jurisdiction to make such costs orders as it concludes are in the interests of justice, the three criteria of impecuniosity, a meritorious case and special circumstances must be established on the evidence before the court.

prouver *prima facie* que sa cause possède un fondement suffisant pour justifier son instruction devant le tribunal. De plus, il doit exister des circonstances suffisamment spéciales pour que le tribunal soit convaincu que la cause appartient à cette catégorie restreinte de causes justifiant l'exercice exceptionnel de ses pouvoirs. Ces exigences pourraient être modifiées si le législateur définissait les conditions d'octroi des provisions pour frais ou si les tribunaux établissaient des critères applicables à une situation particulière où l'attribution de provisions pour frais est autorisée par la loi (comme c'est le cas avec le par. 249(4) de la *Loi sur les sociétés par actions* de l'Ontario; voir *Organ*, précité, p. 213). Mais normalement, lorsque le tribunal exerce sa compétence en equity pour ordonner de telles provisions pour frais parce qu'il conclut qu'il y va de l'intérêt de la justice, il doit ressortir de la preuve que les trois conditions sont réunies : le manque de ressources nécessaires, une cause qui vaut d'être instruite et des circonstances spéciales.

37 Although a litigant who requests interim costs must establish a case that is strong enough to get over the preliminary threshold of being worthy of pursuit, the order will not be refused merely because key issues remain live and contested between the parties. If the court does decide to award interim costs in such circumstances, it will in a sense be predetermining triable issues, since it will have to decide that one side will receive its costs before it is known who will win on the merits (and since the winner is usually entitled to costs). As a result, concerns may arise about fettering the discretion of the trial judge who will eventually be called upon to adjudicate the merits of the case. This in itself should not, however, preclude the granting of interim costs if the relevant criteria are met. As Macdonald J. noted in *Organ*, *supra*, the court's discretion must be exercised with particular caution where it is being asked to predetermine an issue in this sense, but it does not follow that the court would be going beyond the limits of its discretion if it were to grant the order. I therefore disagree with the conclusion of the New Brunswick Court of Queen's Bench in *New Brunswick (Minister of Health and Community Services) v. G. (J.)* (1995), 131 D.L.R. (4th) 273,

Bien que la partie qui demande une provision pour frais doive établir une preuve suffisamment solide pour répondre à la condition préliminaire de l'existence d'une cause méritant d'être instruite, le tribunal ne refusera pas de rendre l'ordonnance simplement parce que les parties n'ont pas fini de débattre des questions en litige importantes. Si le tribunal décide d'accorder une provision pour frais dans de telles circonstances, il se trouvera en un sens à préjuger des questions qui peuvent faire l'objet d'un procès puisqu'il devra décider quelle partie obtiendra paiement de ses dépens avant que l'on sache qui gagnera la cause sur le fond (et puisque le gagnant a habituellement droit aux dépens). On peut donc se demander si cette situation n'affecte pas le pouvoir discrétionnaire du juge qui devra éventuellement se prononcer sur le bien-fondé de la cause. Un tel état de chose ne devrait toutefois pas empêcher l'octroi de provisions pour frais si les conditions pertinentes sont respectées. Comme l'a souligné la juge Macdonald dans *Organ*, précité, le tribunal doit exercer son pouvoir discrétionnaire avec une prudence particulière lorsqu'on lui demande de préjuger d'une question litigieuse en ce sens, mais il ne s'ensuit pas qu'il excéderait les limites de son

that costs cannot be ordered at the commencement of a proceeding in the absence of express statutory authority to award costs regardless of the outcome of the proceeding (p. 283) (this case was eventually overturned by this Court in [1999] 3 S.C.R. 46, but the interim costs issue was a secondary one that was not dealt with on appeal). As I stated above, the power to order costs contrary to the cause is always implicit in the court's discretionary jurisdiction as to costs, as is the power to order interim costs.

pouvoir discrétionnaire s'il rendait l'ordonnance. Je ne souscris donc pas à la conclusion de la Cour du Banc de la Reine du Nouveau-Brunswick dans *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G. (J.)* (1995), 131 D.L.R. (4th) 273, selon laquelle on ne peut ordonner le paiement de dépens au début d'une instance en l'absence d'un pouvoir expressément prévu par la loi d'accorder des frais sans égard à l'issue de l'instance (p. 283) (cette décision a été finalement infirmée par la Cour dans [1999] 3 R.C.S. 46, mais la question des provisions pour frais était secondaire et n'a pas été examinée en appel). Je le répète, le pouvoir d'ordonner le paiement des dépens contrairement au résultat de la cause découle toujours implicitement du pouvoir discrétionnaire d'adjudication des dépens du tribunal, comme d'ailleurs le pouvoir d'accorder des provisions pour frais.

(5) Interim Costs in Public Interest Litigation

38 The present appeal raises the question of how the principles governing interim costs operate in combination with the special considerations that come into play in cases of public importance. In cases of this nature, as I have indicated above, the more usual purposes of costs awards are often superseded by other policy objectives, notably that of ensuring that ordinary citizens will have access to the courts to determine their constitutional rights and other issues of broad social significance. Furthermore, it is often inherent in the nature of cases of this kind that the issues to be determined are of significance not only to the parties but to the broader community, and as a result the public interest is served by a proper resolution of those issues. In both these respects, public law cases as a class can be distinguished from ordinary civil disputes. They may be viewed as a subcategory where the "special circumstances" that must be present to justify an award of interim costs are related to the public importance of the questions at issue in the case. It is for the trial court to determine in each instance whether a particular case, which might be classified as "special" by its very nature as a public interest case, is special enough

(5) Les provisions pour frais dans le cadre de poursuites d'intérêt public

Le présent pourvoi soulève la question de l'interaction entre les principes régissant l'octroi des provisions pour frais et les considérations particulières qui entrent en jeu dans les causes d'intérêt public. Dans les causes de ce genre, comme je l'ai mentionné précédemment, des objectifs de politique juridique différents, notamment celui de garantir que les citoyens ordinaires auront accès aux tribunaux afin de faire préciser leurs droits constitutionnels et faire trancher d'autres questions sociales de portée générale, l'emportent souvent sur les objectifs traditionnel de l'attribution des dépens. De plus, de par leur nature, les causes de ce type soulèvent des questions importantes non seulement pour les parties au litige mais aussi pour la collectivité en général, de sorte que leur règlement adéquat sert l'intérêt public. Sous ces deux aspects, les causes de droit public en tant que catégorie se distinguent des litiges civils ordinaires. Elles peuvent être considérées comme une sous-catégorie dans laquelle les « circonstances particulières » qui sont nécessaires pour que l'on puisse justifier l'octroi de provisions pour frais tiennent à l'importance des questions en jeu pour le public. Il incombe au tribunal de première

to rise to the level where the unusual measure of ordering costs would be appropriate.

instance de décider dans chaque cas si une affaire qui peut être qualifiée de « particulière » de par son caractère d'intérêt public est suffisamment particulière pour s'élever au niveau des causes où l'allocation inhabituelle de dépens constituerait une mesure appropriée.

39 One factor to be borne in mind by the court in making this determination is that in a public law case costs will not always be awarded to the successful party if, for example, that party is the government and the opposing party is an individual *Charter* claimant of limited means. Indeed, as the *B. (R.)* case demonstrates, it is possible (although still unusual) for costs to be awarded in favour of the unsuccessful party if the court considers that this is necessary to ensure that ordinary citizens will not be deterred from bringing important constitutional arguments before the courts. Concerns about prejudging the issues are therefore attenuated in this context since costs, even if awarded at the end of the proceedings, will not necessarily reflect the outcome on the merits. Another factor to be considered is the extent to which the issues raised are of public importance, and the public interest in bringing those issues before a court.

Lorsqu'il tranche cette question, le tribunal ne doit pas perdre de vue que, dans une affaire relevant du droit public, les dépens ne sont pas toujours accordés à la partie gagnante si, par exemple, cette partie est le gouvernement et que la partie adverse est une personne aux ressources limitées qui invoque un droit en vertu de la *Charte*. Comme l'illustre l'affaire *B. (R.)*, il est possible (bien qu'encore inhabituel) que les dépens soient accordés à la partie perdante si le tribunal estime que cela est nécessaire pour ne pas dissuader les citoyens ordinaires de soumettre d'importants arguments constitutionnels à l'examen des tribunaux. Les préoccupations concernant le danger de préjuger des questions en litige sont par conséquent atténuées dans ce contexte, car, même s'ils sont adjugés à la fin de l'instance, les dépens ne refléteront pas nécessairement le résultat quant au fond. Un autre facteur dont on doit tenir compte est la mesure dans laquelle les questions soulevées revêtent une importance pour le public, et l'intérêt qu'a celui-ci à ce que ces questions soient tranchées en justice.

40 With these considerations in mind, I would identify the criteria that must be present to justify an award of interim costs in this kind of case as follows:

1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial — in short, the litigation would be unable to proceed if the order were not made.

2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.

Compte tenu de ces considérations, je résumerais ainsi les conditions qui doivent être réunies pour que l'octroi de provisions pour frais dans ce genre de cause soit justifié :

1. La partie qui demande une provision pour frais n'a véritablement pas les moyens de payer les frais occasionnés par le litige et ne dispose réalistement d'aucune autre source de financement lui permettant de soumettre les questions en cause au tribunal — bref, elle serait incapable d'agir en justice sans l'ordonnance.

2. La demande vaut *prima facie* d'être instruite, c'est-à-dire qu'elle paraît au moins suffisamment valable et, de ce fait, il serait contraire aux intérêts de la justice que le plaideur renonce à agir en justice parce qu'il n'en a pas les moyens financiers.

3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

41 These are necessary conditions that must be met for an award of interim costs to be available in cases of this type. The fact that they are met in a particular case is not necessarily sufficient to establish that such an award should be made; that determination is in the discretion of the court. If all three conditions are established, courts have a narrow jurisdiction to order that the impecunious party's costs be paid prospectively. Such orders should be carefully fashioned and reviewed over the course of the proceedings to ensure that concerns about access to justice are balanced against the need to encourage the reasonable and efficient conduct of litigation, which is also one of the purposes of costs awards. When making these decisions courts must also be mindful of the position of defendants. The award of interim costs must not impose an unfair burden on them. In the context of public interest litigation judges must be particularly sensitive to the position of private litigants who may, in some ways, be caught in the crossfire of disputes which, essentially, involve the relationship between the claimants and certain public authorities, or the effect of laws of general application. Within these parameters, it is a matter of the trial court's discretion to determine whether the case is such that the interests of justice would be best served by making the order.

B. *Appellate Review of Discretionary Decisions*

42 The discretion of a trial court to decide whether or not to award costs has been described as unfettered and untrammelled, subject only to any applicable rules of court and to the need to act judicially on the facts of the case (*Earl v. Wilhelm* (2000), 199 Sask. R. 21, 2000 SKCA 68, at para. 7, citing *Benson v. Benson* (1994), 120 Sask. R. 17 (C.A.)). Sigurdson J.'s decision in the present case was based on his judicial experience, his view of what justice

3. Les questions soulevées dépassent le cadre des intérêts du plaideur, revêtent une importance pour le public et n'ont pas encore été tranchées.

Ce sont là les conditions à remplir pour avoir recours aux provisions pour frais dans ce type de causes. Le fait qu'elles soient remplies dans une espèce donnée n'établit pas automatiquement la nécessité d'une telle ordonnance; cette décision relève du pouvoir discrétionnaire du tribunal. Si les trois conditions sont remplies, les tribunaux disposent d'une compétence limitée pour ordonner que les dépenses de la partie sans ressources suffisantes soient payées préalablement. De telles ordonnances doivent être formulées avec soin et révisées en cours d'instance de façon à assurer l'équilibre entre les préoccupations concernant l'accès à la justice et la nécessité de favoriser le déroulement raisonnable et efficace de la poursuite, qui est également l'un des objectifs de l'attribution de dépens. Lorsqu'ils rendent ces décisions, les tribunaux doivent également tenir compte de la position des défendeurs. Il ne faut pas que l'octroi de provisions pour frais leur impose un fardeau inéquitable. Dans le contexte des poursuites d'intérêt public, les juges doivent prêter une attention toute particulière à la position des justiciables privés qui, d'une certaine manière, peuvent faire les frais de litiges qui mettent essentiellement en cause la relation entre les demandeurs et certaines autorités publiques ou l'effet de lois d'application générale. À l'intérieur de ces paramètres, il appartient au tribunal de première instance de décider si l'affaire est telle qu'il est dans l'intérêt de la justice que l'ordonnance soit rendue.

B. *Examen en appel des décisions discrétionnaires*

On a qualifié d'absolu et d'illimité le pouvoir discrétionnaire du tribunal de première instance de décider s'il y a lieu d'adjuger des dépens, sous la seule réserve des règles de pratique applicables et de la nécessité d'agir de façon judiciaire selon les faits de l'espèce (*Earl c. Wilhelm* (2000), 199 Sask. R. 21, 2000 SKCA 68, par. 7, citant *Benson c. Benson* (1994), 120 Sask. R. 17 (C.A.)). En l'espèce, le juge Sigurdson a rendu sa décision en se fondant

required, and his assessment of the evidence; it is not to be interfered with lightly.

sur son expérience judiciaire, sa perception des exigences de la justice et son appréciation de la preuve; cette décision ne doit pas être modifiée à la légère.

As I observed in *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12, however, discretionary decisions are not completely insulated from review (para. 118). An appellate court may and should intervene where it finds that the trial judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts. As this Court held in *Pelech v. Pelech*, [1987] 1 S.C.R. 801, at p. 814-15, the criteria for the exercise of a judicial discretion are legal criteria, and their definition as well as a failure to apply them or a misapplication of them raise questions of law which are subject to appellate review.

43 Comme je l'ai fait remarquer dans *R. c. Regan*, [2002] 1 R.C.S. 297, 2002 CSC 12, toutefois, les décisions discrétionnaires ne sont pas entièrement à l'abri de tout contrôle (par. 118). Une cour d'appel peut et doit intervenir lorsqu'elle estime que le juge de première instance s'est fondé sur des considérations erronées en ce qui concerne le droit applicable ou a commis une erreur manifeste dans son appréciation des faits. Comme la Cour l'a dit dans *Pelech c. Pelech*, [1987] 1 R.C.S. 801, p. 814-815, les conditions d'exercice du pouvoir discrétionnaire du juge constituent des critères juridiques et leur définition, tout comme leur non-application ou leur mauvaise application, pose des questions de droit susceptibles de révision en appel.

Two errors in particular vitiate the chambers judge's decision and call for appellate intervention. First, he overemphasized the importance of avoiding any order that involved prejudging the issues. In a case of this kind, as I have indicated, this consideration is of less weight than in the ordinary case; in fact, the allocation of the costs burden may, in certain cases, be determined independently of the outcome on the merits. Sigurdson J. erred when he concluded that his discretion did not extend so far as to empower him to make the order requested. Secondly, Sigurdson J.'s finding that a contingent fee arrangement might be a viable alternative for funding the litigation does not appear to be supported by any evidence, and I agree with Newbury J.A. that the prospect of the Bands' hiring counsel on a contingency basis seems unrealistic in the particular circumstances of this case.

44 Deux erreurs en particulier vicient la décision du juge en chambre et appellent l'intervention en appel. Premièrement, le juge en chambre a trop insisté sur l'importance d'éviter de rendre une ordonnance par laquelle on se trouverait à préjuger des questions en litige. Dans une affaire de ce type, comme je l'ai mentionné, cette considération revêt moins d'importance que dans une affaire ordinaire; en fait, la répartition du fardeau des frais peut, dans certains cas, être établie indépendamment de l'issue quant au fond. Le juge Sigurdson a commis une erreur lorsqu'il a conclu que son pouvoir discrétionnaire n'allait pas jusqu'à lui permettre de rendre l'ordonnance demandée. Deuxièmement, sa conclusion qu'une entente d'honoraires conditionnels serait peut-être une solution de rechange viable quant au financement du litige ne paraît étayée par aucun élément de preuve, et je conviens avec la juge Newbury que la perspective que les Bandes puissent retenir les services d'un avocat sur une base d'honoraires conditionnels semble irréaliste dans les circonstances particulières de l'espèce.

C. *Application to the Facts of this Case*

C. *Application aux faits de l'espèce*

It is unnecessary to send this case back to the chambers judge to apply the criteria set out here,

45 Il n'est pas nécessaire de renvoyer la présente affaire au juge en chambre pour qu'il applique les

because it is apparent from his reasons that, had he done so, he would have ordered interim costs in favour of the respondents. Sigurdson J. found as a fact that the Bands were in extremely difficult financial circumstances and could not afford to pay for legal representation. The only alternative which he suggested might be available for funding the litigation was a contingent fee arrangement, which, as I have stated, was not feasible. He found the Bands' claims of aboriginal title and rights to be *prima facie* plausible and supported by extensive documentary evidence; although the claim was not so clearly valid that there was no need for it to be tested through the trial process, it was certainly strong enough to warrant pursuit. Finally, Sigurdson J. found the case to be one of great public importance, raising novel and significant issues resolution of which through the trial process was very much in the interests of justice. He even went so far as to urge the executive branches of the federal and provincial governments to provide funding so that the respondents' claims could be addressed.

conditions énoncées en l'espèce, parce qu'il ressort de ses motifs que, s'il l'avait fait, il aurait ordonné le paiement d'une provision pour frais aux intimés. Le juge Sigurdson a conclu que, de fait, les Bandes éprouvaient de très grandes difficultés financières et n'avaient pas les moyens d'être représentées par avocat. Selon lui, la seule solution de rechange qui leur était offerte pour le financement de la poursuite se résumerait à une entente d'honoraires conditionnels, qui, comme je l'ai dit, n'était pas réaliste. Il a estimé que les revendications des Bandes au sujet de leur titre aborigène et d'autres droits ancestraux étaient plausibles *prima facie* et étayées par une preuve documentaire abondante; même si la revendication n'était pas clairement valide au point de rendre inutile son examen dans le cadre d'un procès, elle était certainement assez solide pour justifier l'institution d'une poursuite. Enfin, le juge Sigurdson a admis que l'affaire revêtait une très grande importance pour le public et qu'elle soulevait des questions nouvelles et importantes dont le règlement judiciaire était tout à fait dans l'intérêt de la justice. Il est même allé jusqu'à suggérer aux pouvoirs exécutifs des gouvernements fédéral et provincial de fournir un appui financier afin que les revendications des intimés puissent être tranchées.

46 Applying the criteria I have set out to the evidence in this case as assessed by the chambers judge, it is my view that each of them is met. The respondents are impecunious and cannot proceed to trial without an order for interim costs. The case is of sufficient merit that it should go forward. The issues sought to be raised at trial are of profound importance to the people of British Columbia, both aboriginal and non-aboriginal, and their determination would be a major step towards settling the many unresolved problems in the Crown-aboriginal relationship in that province. In short, the circumstances of this case are indeed special, even extreme.

Si j'applique les conditions que j'ai énoncées à la preuve en l'espèce telle que le juge en chambre l'a appréciée, je suis d'avis qu'il est satisfait à chacune d'elles. Les intimés ne disposent pas de ressources suffisantes et ne peuvent faire entendre leur cause sans ordonnance de paiement d'une provision pour frais. L'affaire vaut d'être instruite. Les questions que l'on cherche à soulever au procès sont d'une importance cruciale pour la population de la Colombie-Britannique, tant autochtone que non autochtone, et une décision à leur égard constituerait un pas majeur vers le règlement des nombreux problèmes en suspens entre la Couronne et les Autochtones dans cette province. Bref, les circonstances de l'espèce sont effectivement particulières, voire exceptionnelles.

47 The conditions attached to the costs order by Newbury J.A. ensure that the parties will be encouraged to resolve the matter through

Les conditions dont la juge Newbury a assorti l'ordonnance de paiement des dépens garantissent que les parties seront encouragées à régler le

negotiation, which remains the ultimate route to achieving reconciliation between aboriginal societies and the Crown (see *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 186), and also that there will be no temptation for the Bands to drag out the process unnecessarily and to throw away costs paid by the appellant. I would uphold her disposition of the case.

litige par la négociation, qui demeure ultimement la meilleure manière de réconcilier les sociétés autochtones et la Couronne (voir *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010, par. 186). Ces conditions garantissent également que les Bandes ne seront pas tentées d'étirer le processus inutilement et de dilapider la provision pour frais versée par l'appelante. Je suis d'avis de confirmer la décision de la juge Newbury.

VII. Disposition

VII. Dispositif

48 The appeal is dismissed with costs to the respondents.

Le pourvoi est rejeté, avec dépens en faveur des intimés.

The reasons of Iacobucci, Major and Bastarache JJ. were delivered by

Version française des motifs des juges Iacobucci, Major et Bastarache rendus par

49 Major J. (dissenting) — At issue in this appeal is how trial courts should be guided in their award of interim costs. When are these advance costs appropriate? How much deference should appellate courts give to the trial judge's discretion in the matter?

Le juge Major (dissident) — Il s'agit en l'espèce de déterminer sur quels paramètres les tribunaux de première instance peuvent se fonder pour octroyer des provisions pour frais. Dans quels cas l'adjudication de provisions pour frais est-elle opportune? Jusqu'à quel point les tribunaux d'appel doivent-ils faire preuve de retenue à l'égard du pouvoir discrétionnaire du juge de première instance en la matière?

50 Four Indian bands are suing the Crown in right of British Columbia, to establish aboriginal title over land they wish to log. Because this litigation will be expensive, they seek interim costs — that is, advance costs awarded whether or not they are successful at trial. By any standard, this is an extraordinary remedy.

Quatre bandes indiennes poursuivent la Couronne du chef de la province de la Colombie-Britannique pour établir l'existence d'un titre aborigène sur des terres sur lesquelles elles veulent mener des activités d'exploitation forestière. Comme ce litige sera coûteux, elles demandent que leur soit allouée une provision pour frais — c'est-à-dire des frais qui leur seraient accordés à l'avance peu importe l'issue du litige. Il s'agit incontestablement d'une mesure extraordinaire.

51 The chambers judge could not find a supporting precedent and in the exercise of his discretion he chose not to grant interim costs. The British Columbia Court of Appeal, and now my colleague LeBel J., reversed the chambers judge on what appears to be a new rule for interim costs. With respect for the contrary view, I conclude that Sigurdson J. interpreted the applicable principles correctly and can find no basis for

Le juge en chambre ne trouve aucune jurisprudence à l'appui et, usant de son pouvoir discrétionnaire, choisit de ne pas attribuer de provision pour frais. La Cour d'appel de la Colombie-Britannique d'abord, puis mon collègue le juge LeBel ont infirmé la décision du juge en chambre en se fondant sur ce qui semble être une nouvelle règle d'adjudication des provisions pour frais. Avec égards pour l'opinion contraire, je conclus que le juge Sigurdson

reversing his discretion. I would therefore allow the appeal.

a correctement interprété les principes applicables et je ne vois aucune raison d'infirmer sa décision discrétionnaire. Par conséquent, je suis d'avis d'accueillir le pourvoi.

52 The appeal raises difficult questions. In particular, how may impoverished parties sue to establish what is submitted to be constitutionally supported rights? Constitutional issues, however, were not pursued in this appeal. The respondents rely solely on the common law rules on costs.

Le pourvoi soulève des questions difficiles. En particulier, comment des parties démunies peuvent-elles intenter une poursuite pour faire valoir ce qu'elles allèguent être des droits fondés du point de vue constitutionnel? Aucune question constitutionnelle n'a cependant été invoquée en l'espèce. Les intimés se fondent uniquement sur les règles de common law régissant l'octroi des dépens.

53 Traditionally, costs — usually party and party costs — are awarded after the ultimate trial or appellate decision and almost always to the successful party. Party and party costs in all Canadian jurisdictions are only partial indemnification of the litigants' legal costs. In certain cases, interim costs may be awarded to a spouse suing for the division of property as a consequence of separation or divorce. The *ratio* of the matrimonial cases is clear: a spouse usually owns or is entitled to part of the matrimonial property; some success on the merits is practically assured. Thus, the traditional purpose of costs — indemnification of the prevailing party — is preserved.

Traditionnellement, les dépens — habituellement les dépens entre parties — sont attribués après que la décision finale a été rendue en première instance ou en appel et ils le sont presque toujours en faveur de la partie gagnante. Dans l'ensemble des ressorts canadiens, les dépens entre parties ne représentent qu'une indemnisation partielle des frais de justice des plaideurs. Dans certains cas, une provision pour frais peut être accordée à un conjoint qui intente un procès au sujet du partage des biens, par suite d'une séparation ou d'un divorce. En droit matrimonial, la justification de telles provisions pour frais est claire : habituellement un conjoint a droit en tout ou en partie au patrimoine familial; il est presque assuré d'obtenir en partie gain de cause sur le fond. Ainsi, le but traditionnel de l'adjudication des dépens — l'indemnisation de la partie gagnante — est préservé.

54 But to award interim costs when liability remains undecided would be a dramatic extension of the precedent. Furthermore, to do so in a case with serious constitutional considerations where the Crown is the defending party would be an unusual extension of highly exceptional private law precedent into an area fraught with other implications.

Cependant, ce serait étendre considérablement la portée de la jurisprudence que d'accorder des provisions pour frais alors que la question de la responsabilité n'a pas encore été tranchée. De plus, agir de la sorte dans une affaire qui présente des considérations constitutionnelles importantes et dans laquelle la Couronne est la partie défenderesse constituerait une transposition inhabituelle d'une jurisprudence de droit privé très exceptionnelle dans un domaine lourd d'implications.

55 The common law is said to evolve to adapt prevailing principles to modern circumstances. But the common law of costs should develop through the discretion of trial judges. This equitable trial-level discretion, developed over centuries, is essential

La common law est censée évoluer de façon à adapter les principes applicables à la réalité moderne. Cependant, en matière d'adjudication des dépens, l'évolution de la common law devrait se faire par l'exercice du pouvoir discrétionnaire

to the primary traditional use of the discretionary costs power by courts: to manage litigation and case loads. It may be that there are public law questions where access to justice can be provided through the discretionary award of interim costs. Even so, such cases must lie closer to the heart of the interim costs case law. Such developments should be initiated by trial courts properly exercising their discretionary power, not the appellate reversal of that discretion.

du juge de première instance. Ce pouvoir discrétionnaire, qui est fondé sur l'equity et qui résulte de siècles d'évolution, est un aspect essentiel de la principale fonction traditionnelle du pouvoir discrétionnaire d'adjudication des dépens des tribunaux : la gestion des instances et du rôle. Il se peut que des questions de droit public justifient l'octroi discrétionnaire de provisions pour frais afin de permettre l'accès à la justice. Mais de tels cas doivent être largement comparables à ceux que reconnaît la jurisprudence en matière d'attribution de provisions pour frais. Une telle évolution devrait être amorcée par les tribunaux de première instance dans l'exercice judicieux de leur pouvoir discrétionnaire et non par l'annulation en appel de leurs décisions à cet égard.

I. Background

I. Historique

56 My colleague has fairly characterized the facts of this litigation. However, some highlighting of those facts may be useful.

Mon collègue a caractérisé avec justesse les faits du présent litige. Il serait toutefois utile d'en dégager quelques points saillants.

57 In 1999, the four respondent Indian bands (the "Bands") began logging Crown land. Funds from that activity were to be used for housing and other desperately needed social services. The British Columbia Minister of Forests served the Bands with stop-work orders and commenced proceedings to prevent further logging. The Bands challenged the orders and claimed aboriginal title to the lands.

En 1999, les quatre bandes indiennes intimées (les « Bandes ») ont commencé l'exploitation forestière sur des terres publiques. Les fonds générés par cette activité devaient servir à la construction de logements et à la prestation d'autres services sociaux dont les Bandes ont désespérément besoin. Le ministre des Forêts de la Colombie-Britannique a signifié aux Bandes des ordonnances de cessation des travaux et a introduit une instance visant à faire arrêter l'exploitation forestière. Les Bandes ont contesté les ordonnances et ont prétendu qu'elles détenaient un titre aborigène sur les terres en question.

58 At the British Columbia Supreme Court, Sigurdson J. ruled that the question of aboriginal title was sufficiently complex that a trial was necessary. The Bands stated that they could not afford to litigate and even if they could, they would have preferred to use such funds to provide social services. The Bands claimed that they had been unable to find any governmental or *pro bono* sources of aid. They therefore petitioned for interim costs — costs in advance of trial. The Bands' motions were originally grounded in the constitutional question of title. They now seek interim costs on the

À la Cour suprême de la Colombie-Britannique, le juge Sigurdson conclut que la question du titre aborigène est suffisamment complexe pour que l'on tienne une instruction. Les Bandes déclarent qu'elles n'ont pas les moyens d'agir en justice et que, même si elles les avaient, elles préféreraient utiliser ces fonds pour dispenser des services sociaux. Elles prétendent n'avoir pas pu trouver de l'aide de source gouvernementale ou bénévole. Elles sollicitent donc une provision pour frais — frais accordés avant l'instruction. Leurs requêtes se fondaient initialement sur la question constitutionnelle du titre.

basis of the trial court's inherent and statutory cost power.

59 The chambers judge conducted a thorough examination of the case law on interim costs and, in the exercise of his discretion, concluded:

> I find that the respondents' argument that its trial costs be paid in advance must fail. The issue of liability is very much in dispute and the trial costs are substantial. To order the payment of trial costs would require prejudging the case on the merits which, of course, I cannot do. Although I have a limited discretion in appropriate circumstances to award interim costs this case falls far outside that area. I recognize that these respondents are in a difficult position. However, counsel may be prepared to represent them on a contingency basis and, if successful, the respondents will undoubtedly receive significant indemnity for their costs. I recommend, however, that the Federal and Provincial Crown consider providing some funding so that these disputes, which have some elements of test cases, if they cannot be settled, can be properly resolved at trial.

([2000] B.C.J. No. 1536 (QL), 2000 BCSC 1135, at para. 129)

II. Analysis

A. *The Law of Costs*

60 The standard rule on party and party costs is that they are generally awarded to the successful litigant at the end of litigation. These costs are a contribution to the successful party's actual expense. Full indemnification by way of solicitor-client costs is infrequently ordered in Canada. Such costs require unusual and egregious conduct by the losing party. On rare occasions the court may award solicitor-client costs where equity is met by doing so.

61 My colleague points to what he describes as a modern trend in the law on costs — its use as an instrument to encourage litigation in the public interest. With respect, I think this proposition

Elles demandent maintenant une provision pour frais en invoquant le pouvoir inhérent et attribué du tribunal de première instance à cet égard.

Après avoir fait une étude approfondie de la jurisprudence relative à l'attribution de provisions pour frais, le juge en chambre, usant de son pouvoir discrétionnaire, conclut :

> [TRADUCTION] À mon avis, l'argument des intimés que leurs frais d'instruction devraient leur être payés à l'avance doit être rejeté. La question de la responsabilité est très contestée et les frais de l'instruction sont élevés. Si j'ordonnais leur paiement, je préjugerais de l'affaire quant au fond, ce que je ne peux évidemment pas faire. Bien que je possède un pouvoir discrétionnaire limité dans les circonstances appropriées d'accorder des provisions pour frais, la présente affaire relève d'un tout autre domaine. Je reconnais que les intimés se trouvent dans une situation difficile. Toutefois, leurs avocats sont peut-être disposés à les représenter sur une base d'honoraires conditionnels et, si elles ont gain de cause, elles recevraient sans aucun doute une indemnité importante pour leurs frais. Toutefois, je recommande que la Couronne, aussi bien fédérale que provinciale, envisage la possibilité de fournir un appui financier de sorte que ces affaires, qui s'apparentent à des causes types, soient tranchées comme il se doit dans le cadre d'un procès si elles ne peuvent faire l'objet d'un règlement.

([2000] B.C.J. No. 1536 (QL), 2000 BCSC 1135, par. 129)

II. Analyse

A. *Les règles de droit en matière de dépens*

Selon la règle habituelle d'adjudication des dépens entre parties, ceux-ci sont généralement accordés à la partie gagnante à la fin du litige. Ils représentent une contribution aux dépenses réelles de la partie gagnante. Au Canada, il est rare que l'on ordonne une pleine indemnisation par l'octroi de dépens sur la base avocat-client. De tels dépens ne sont attribués que lorsque la partie perdante s'est comportée d'une manière singulière et inacceptable. Dans de rares cas, eu égard à l'equity, la cour peut allouer des dépens sur la base avocat-client.

Mon collègue souligne ce qu'il décrit comme étant une tendance moderne en ce qui concerne les règles d'adjudication des dépens — soit à titre d'appui aux litiges d'intérêt public. En toute déférence, je

mistakes public funding to pursue *Charter* claims as an exercise in awarding costs. It is a separate function. Although the trial judge retains a discretion on the question of costs in such cases, they have always been awarded at the conclusion of the litigation.

crois que cet argument confond la notion de financement public des revendications fondées sur la *Charte* avec celle de l'adjudication des dépens. Il s'agit de deux fonctions distinctes. Même si le juge de première instance conserve un pouvoir discrétionnaire pour l'attribution des dépens dans de telles affaires, ceux-ci ont toujours été accordés à l'issue du litige.

B. *The Law of Interim Costs*

B. *Les règles de droit en matière de provisions pour frais*

As a matter of public policy as reflected in federal and provincial rules of court, costs are usually awarded at the conclusion of trial as a contribution to the successful party's legal expenses. However, the common law on interim costs — costs in advance of trial — has been more confined and almost exclusively restricted to family law litigation to allow the impecunious spouse and children access to the court. The reason for such restrictive use is apparent since awarding costs in advance could be seen as prejudging the merits. While there is limited jurisdiction to award interim costs, it is logical that the party who must pay them and informed members of society might, in the absence of compelling reasons, have a reasonable apprehension of bias in favour of the recipient. The objectivity of the court making such an order will almost automatically be questioned.

62 Pour des raisons d'intérêt public, comme le confirment les règles de pratique fédérales et provinciales, les dépens sont habituellement alloués à l'issue de l'instruction comme contribution aux honoraires et débours d'avocats de la partie gagnante. Toutefois, les règles de common law en matière de provisions pour frais — frais accordés avant l'instruction — ont vu leur application restreinte presque exclusivement aux affaires de droit de la famille pour permettre à l'époux sans ressources suffisantes et aux enfants d'avoir accès au tribunal. La raison de cette application restreinte est apparente vu le risque que l'octroi de dépens avant l'instruction soit perçu comme laissant préjuger de l'issue de la cause. Bien que les tribunaux disposent d'un pouvoir d'adjudication de provisions pour frais, quoique limité, il est logique que la partie condamnée à les payer et les membres bien renseignés de la société puissent, en l'absence de raisons sérieuses, craindre raisonnablement qu'il y ait partialité en faveur du bénéficiaire. L'objectivité du tribunal qui rend une telle ordonnance sera presque automatiquement remise en question.

The award of costs before trial is a more potent incentive to litigation than the possibility of costs after the trial. The awarding of interim costs in the circumstances of this appeal appears as a form of judicially imposed legal aid. Interim costs are useful in family law, but should not be expanded to engage the court in essentially funding litigation for impecunious parties and ensuring their access to court. As laudable as that objective may be, the remedy lies with the legislature and law societies, not the judiciary.

63 L'octroi de dépens avant l'instruction est plus susceptible d'encourager les procès que leur éventuelle attribution après l'instruction. L'adjudication d'une provision pour frais dans les circonstances particulières de l'espèce apparaît comme une forme d'aide juridique imposée par le tribunal. Les provisions pour frais sont utiles en droit de la famille mais on ne doit pas étendre leur utilisation pour amener, essentiellement, le tribunal à financer le litige pour les parties sans ressources suffisantes et à garantir leur accès aux tribunaux. Si louable que puisse être cet objectif, la solution relève du législateur et des ordres professionnels des avocats et non de la magistrature.

64 LeBel J. concludes from his review of the case law on interim costs that they may be granted when (i) the party seeking the costs would be unable to pursue the litigation otherwise; (ii) there is a *prima facie* case of sufficient merit; and (iii) there are present "special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate" (para. 36). He finds that such special circumstances may exist if the case is in the public interest and is a test case. With respect, I come to a different result.

Le juge LeBel conclut de son examen de la jurisprudence relative à l'octroi de provisions pour frais qu'elles peuvent être accordées dans les cas suivants : (i) la partie demanderesse ne serait autrement pas en mesure de poursuivre l'instance; (ii) la cause vaut *prima facie* d'être instruite; (iii) il existe « des circonstances suffisamment spéciales pour que le tribunal soit convaincu que la cause appartient à cette catégorie restreinte de causes justifiant l'exercice exceptionnel de ses pouvoirs » (par. 36). Il conclut que ces circonstances spéciales peuvent exister si la cause est d'intérêt public et s'il s'agit d'une cause type. J'arrive à une conclusion différente.

65 I agree that the case must be exceptional in order to attract interim costs. Of necessity, the proposition that extraordinary circumstances practically always exist where the public interest is invoked is too broad to meet the exceptional requirement. LeBel J. accepts that most public interest cases would satisfy this criterion (para. 38). This is why he leaves to the discretion of the trial judge the decision as to whether the case is "special enough" to warrant an order. The difficulty for the trial judge is that this does not provide any ascertainable standard or direction. To say simply that the issues transcend the individual interests in the case and have not yet been resolved (para. 40) does not assist the trial judge in deciding what is "special enough". An examination of past *Charter* cases will demonstrate that dilemma.

Je reconnais que l'affaire doit être exceptionnelle pour ouvrir droit à une provision pour frais. Mais la proposition que les causes où l'on invoque l'intérêt public font presque toujours intervenir des circonstances extraordinaires est forcément trop large pour satisfaire à l'exigence du caractère exceptionnel. Le juge LeBel convient que la plupart des causes d'intérêt public répondraient à ce critère (par. 38). C'est pourquoi il laisse au juge de première instance le soin de décider si l'affaire est « suffisamment spéciale » pour justifier une ordonnance. La difficulté pour le juge de première instance est que cela ne constitue pas une norme ou une directive vérifiable. Dire simplement que les questions soulevées dépassent le cadre des intérêts individuels en cause et qu'elles n'ont pas encore été tranchées (par. 40) n'aide pas le juge de première instance à décider de ce qui est « suffisamment spécial ». Un examen de la jurisprudence où les dispositions de la *Charte* ont été invoquées illustrera ce dilemme.

66 Test cases are referred to by LeBel J. and involve situations where important precedents are sought. In my view, the proposition that "it [would be] contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means" (para. 40), without more, is not sufficient. A trial judge can draw no direction from this proposal.

Le juge LeBel renvoie à des causes types où l'on cherchait à créer d'importants précédents. À mon avis, la proposition selon laquelle « il serait contraire aux intérêts de la justice que le plaideur renonce à agir en justice parce qu'il n'en a pas les moyens financiers » (par. 40) est, à elle seule, insuffisante. Un juge de première instance ne peut en tirer aucune indication susceptible de l'éclairer.

67 But even if such special circumstances were to be considered, there is nothing to distinguish the present aboriginal land claims from any other. On the contrary, the litigation here is likely to involve

Même s'il fallait prendre en compte de telles circonstances particulières, rien ne distingue les présentes revendications territoriales autochtones de toute autre revendication. Au contraire,

the application of principles enunciated by this Court in cases such as *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, and *R. v. Van der Peet*, [1996] 2 S.C.R. 507. There is no evidence to establish that these land claims should be considered exceptional. Nor is there anything to establish how the new criteria would apply in a different way between one impecunious aboriginal party and another.

il est vraisemblable que le litige en l'espèce nécessite l'application de principes énoncés par la Cour dans des arrêts comme *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010, et *R. c. Van der Peet*, [1996] 2 R.C.S. 507. Rien dans la preuve ne démontre le caractère exceptionnel des présentes revendications territoriales. Rien non plus ne permet d'établir comment l'application des nouveaux critères varierait selon la partie autochtone sans ressources suffisantes dont il est question.

68 It is worth noting that the honour of the Crown is not at stake in this appeal and that there is no reason to distinguish the aboriginal claimants from any other impecunious persons claiming rights under the Constitution with regard to the availability of costs. The new definition of extraordinary circumstances must therefore apply generally and its impact measured accordingly. There is no doubt that the conclusions of LeBel J. will result in an increase of interim costs applications while offering little in the way of guidance to trial judges.

Il convient de signaler que le présent pourvoi ne met pas en cause l'honneur de la Couronne et qu'il n'y a aucune raison, pour ce qui est du paiement des dépens, d'établir une distinction entre les revendicateurs autochtones et toutes autres personnes sans ressources suffisantes revendiquant des droits en vertu de la Constitution. La nouvelle définition de circonstances extraordinaires doit être d'application générale et son incidence mesurée en conséquence. Il ne fait aucun doute que les conclusions du juge LeBel entraîneront une augmentation de demandes de provisions pour frais en donnant aux juges de première instance peu d'indications susceptibles de les guider.

69 The interim costs case law suggests narrow guidelines. Interim costs have been awarded in two circumstances: (i) in marital cases where some liability is presumed and the indemnificatory purpose of the costs power is fulfilled; and (ii) in corporate and trust cases where the court grants advanced costs to be paid by the corporation or trust for whose benefit the action is brought. In those cases it is still necessary that the party seeking advanced costs show that they would otherwise be unable to proceed with litigation.

La jurisprudence relative à l'adjudication des provisions pour frais propose des lignes directrices étroites. Des provisions pour frais ont été accordées dans deux sortes d'affaires : (i) dans des affaires de droit matrimonial où l'on présume une certaine responsabilité et où l'octroi des dépens répond à l'objectif d'indemnisation; (ii) dans des affaires en matière de sociétés ou de fiducie où le tribunal ordonne à la société ou à la fiducie pour laquelle l'action est intentée de payer la provision pour frais. Dans ces affaires, il demeure néanmoins nécessaire que la partie demanderesse démontre qu'elle serait autrement incapable de poursuivre l'instance.

70 The matrimonial cases involving the division of assets upon divorce comprise the oldest line of interim costs jurisprudence. At common law, a wife could be awarded interim costs to help her maintain her divorce action. This rule has been generally recognized in statute and Canadian case law. See *McDonald v. McDonald* (1998), 163 D.L.R. (4th)

La jurisprudence la plus ancienne concernant l'octroi de provision pour frais est issue des affaires de droit matrimonial où il est question de partage de biens lors d'un divorce. En common law, une épouse pouvait se voir attribuer une provision pour frais afin de poursuivre son action en divorce. Cette règle a été généralement reconnue dans les lois et la

527 (Alta. C.A.). See also *Randle v. Randle* (1999), 254 A.R. 323, 1999 ABQB 954, where interim costs were granted in an action concerning the division of property between common law spouses.

jurisprudence canadienne. Voir *McDonald c. McDonald* (1998), 163 D.L.R. (4th) 527 (C.A. Alb.). Voir également *Randle c. Randle* (1999), 254 A.R. 323, 1999 ABQB 954, dans laquelle une provision pour frais a été adjugée dans le cadre d'une action concernant le partage de biens entre conjoints de fait.

71 There are three legal characteristics that explain why the post-marital contest serves as the exception to the standard rule that costs "follow the event". These three characteristics are guidelines for the exercise of discretion in the award of interim costs.

Trois caractéristiques juridiques expliquent pourquoi les affaires de droit matrimonial constituent une exception à la règle habituelle voulant que les dépens « suivent l'issue de la cause ». Ces trois caractéristiques constituent des lignes directrices pour l'exercice du pouvoir discrétionnaire d'adjudication des provisions pour frais.

72 First, at common law, husbands usually had control and legal ownership of the marital purse and property, ensuring in most cases that wives did not have the financial resources to pursue litigation. See *McDonald*, *supra*, at para. 20. Therefore, the first required element of an interim cost award is that the party seeking the award is impoverished, and would not be able to pursue the litigation without such an award. It is acknowledged in this appeal that each of the bands are without funds.

Premièrement, en common law, du fait que l'argent et les autres biens de la famille étaient légalement la propriété du mari, qui en assurait également la maîtrise, l'épouse n'avait souvent pas les ressources financières nécessaires pour faire valoir ses droits devant les tribunaux. Voir l'affaire *McDonald*, précitée, par. 20. Par conséquent, le premier élément exigé pour que l'on accorde des provisions pour frais est que la partie demanderesse soit sans ressources suffisantes et qu'elle serait autrement incapable de poursuivre l'instance. Il est reconnu en l'espèce que chacune des Bandes n'a pas de moyens financiers.

73 Second, the marital relationship is perhaps unique in the mutual support owed between spouses. Thus, generalizing beyond the marital context, there must be a special relationship between the parties such that the cost award would be particularly appropriate. Where, as in this appeal, no right under s. 35 of the *Constitution Act, 1982* is implicated and the matter involves the provincial Crown rather than the federal Crown, this special relationship cannot automatically be presumed.

Deuxièmement, le lien conjugal est peut-être un élément spécifique du soutien mutuel que se doivent les époux. Par conséquent, si on généralise au-delà du contexte matrimonial, la relation entre les parties doit être telle que l'adjudication de dépens serait particulièrement appropriée. Dans les cas, comme en l'espèce, où aucun droit fondé sur l'art. 35 de la *Loi constitutionnelle de 1982* n'est en cause et où l'affaire concerne la Couronne provinciale plutôt que la Couronne fédérale, cette relation spéciale ne peut être automatiquement présumée.

74 But third, and dispositive to this appeal, in the marital cases there is a presumption that the property that is the subject of the dispute is to be shared in some way. See *Randle*, *supra*, at para. 22. Generally, it is the distribution of assets and extent of support that are at issue in a divorce action, not

Troisièmement, mais élément déterminant en l'espèce, dans les affaires de droit matrimonial il existe la présomption que le bien faisant l'objet du litige sera partagé d'une façon ou d'une autre. Voir *Randle*, précité, par. 22. Généralement, c'est le partage des biens et le degré de soutien qui sont

whether such a division and such support are owed. In a sense, some liability is assumed; all that is to be litigated is the extent of the liability. LeBel J. blunts the bite of this element, reducing it to the modest requirement that "[t]he claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means" (para. 40). The traditional roots of the costs power require more than *prima facie* merit. The costs power originally provided indemnification — the prevailing party won costs. In a divorce action, however, it was assumed that the spouse, usually the wife, would be awarded something; the question was how much.

en litige dans une action en divorce et non pas la question de savoir si un tel partage et un tel soutien sont dus. En un sens, le tribunal présume une certaine responsabilité; la seule chose à débattre, c'est l'étendue de cette responsabilité. Le juge LeBel atténue la portée de cet élément, la réduisant à la simple exigence que « [l]a demande vaut *prima facie* d'être instruite, c'est-à-dire qu'elle paraît au moins suffisamment valable et, de ce fait, il serait contraire aux intérêts de la justice que le plaideur renonce à agir en justice parce qu'il n'en a pas les moyens financiers » (par. 40). La justification traditionnelle du pouvoir d'adjudication des dépens exige davantage que le bien-fondé *prima facie* de l'affaire. Ce pouvoir visait à l'origine à procurer une indemnité — la partie gagnante se voyait accorder les dépens. Toutefois, dans une action en divorce, on présumait que le conjoint, habituellement l'épouse, se verrait accorder une certaine somme, la question était de savoir combien.

The matrimonial cases can therefore be seen as exceptional not because they dispensed with the rule that the prevailing party won costs (and the related principle that judges not predetermine the merits of the case), but because they dispensed with the need to wait for the end of trial to decide which party prevailed, for some liability was presumed.

75 Les affaires de droit matrimonial peuvent donc être considérées comme exceptionnelles, non pas parce qu'elles écartent la règle voulant que ce soit la partie gagnante qui se voit accorder les dépens (et le principe connexe que les juges ne doivent pas préjuger de l'affaire quant au fond), mais parce qu'elles éliminent la nécessité d'attendre la fin de l'instruction pour décider quelle partie a gagné, car on présume une certaine responsabilité.

In this appeal, Sigurdson J.'s reluctance to "prejudg[e] the case on the merits" was appropriate. Unlike the divorce cases, one may not presume that the Bands will establish even partial aboriginal title in the cases under appeal.

76 En l'espèce, les réticences du juge Sigurdson à [TRADUCTION] « préjuge[r] de l'affaire quant au fond » sont justifiées. À la différence des affaires de divorce, on ne peut présumer que les Bandes prouveront l'existence d'un titre aborigène, même partiel, dans les affaires faisant l'objet du pourvoi.

In summary, in my opinion the *ratio* of the common law dictates the following three guidelines for the discretionary, extraordinary award of interim costs:

1. The party seeking the interim costs cannot afford to fund the litigation, and has no other realistic manner of proceeding with the case.

77 En résumé, selon moi, il faut satisfaire aux trois conditions suivantes pour que l'exception en common law soit justifiée quant à l'octroi discrétionnaire et extraordinaire de provisions pour frais :

1. La partie qui demande une provision pour frais n'a pas les moyens d'agir en justice et ne dispose en réalité d'aucune autre source de financement.

2. There is a special relationship between the parties such that an award of interim costs or support would be particularly appropriate.

3. It is presumed that the party seeking interim costs will win some award from the other party.

2. Il existe entre les parties une relation spéciale telle que l'octroi d'une provision pour frais ou d'un soutien est particulièrement approprié.

3. On présume que la partie qui demande une provision pour frais obtiendra une certaine compensation de la part de l'autre partie.

78 In my view, a court should be particularly careful in the exercise of its inherent powers on costs in cases involving the resolution of controversial public questions. Not only was such precedent not required at common law, but by incorporating such an amorphous concept without clearly defining what constitutes "special circumstances", the distinction between the traditional purpose of awarding costs and concerns over access to justice has been blurred.

Selon moi, un tribunal doit se montrer particulièrement prudent dans l'exercice de son pouvoir inhérent d'adjudication des dépens dans les affaires où l'on doit résoudre des questions d'intérêt public controversées. Non seulement un tel précédent n'était pas exigé par la common law, mais l'adoption d'une notion aussi nébuleuse sans définition claire de ce que l'on entend par « circonstances spéciales » estompe la distinction entre l'objectif traditionnel de l'adjudication des dépens et les préoccupations quant à l'accès à la justice.

79 As noted earlier, certain corporate and trust actions form another line of interim costs cases with a different *ratio*. In those cases, a litigant sues on behalf of a corporation or trust, and seeks interim costs. Such cases are an exception to the general rule on costs because the court makes the costs order on behalf of the corporation or trust. For example, where a shareholder sues directors on behalf of the corporation, it is presumed that the corporation, which in many ways is owned by the shareholders, although under the control of the directors, consents to the paying of the interim costs. It is important to note that in the corporate context, interim costs are specifically addressed by legislation. See British Columbia *Company Act*, R.S.B.C. 1996, c. 62, s. 201; Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 249.

Comme je l'ai mentionné précédemment, certaines actions en matière de droit des sociétés ou de droit de fiducie constituent un autre courant jurisprudentiel où il est question de frais provisoires mais où la justification est différente. Dans ces affaires, le justiciable poursuit au nom d'une société ou d'une fiducie et demande des frais provisoires. De telles affaires constituent une exception à la règle générale d'adjudication des dépens parce que le tribunal ordonne le paiement des dépens à la société ou à la fiducie. Par exemple, lorsqu'un actionnaire poursuit des administrateurs au nom d'une société, on présume que la société, qui, à bien des égards, appartient aux actionnaires, bien qu'elle soit contrôlée par les administrateurs, consente à payer les frais provisoires. Il importe de noter que, dans le contexte du droit des sociétés, la loi traite expressément de la question des frais provisoires. Voir la *Company Act* de la Colombie-Britannique, R.S.B.C. 1996, ch. 62, art. 201; la *Loi sur les sociétés par actions* de l'Ontario, L.R.O. 1990, ch. B.16, art. 249.

80 Courts may also award interim costs in child custody cases. See *Roberts v. Aasen*, [1999] O.J. No. 1969 (QL) (S.C.J.). Child custody litigation focuses on the best interests of the child for whose welfare both parents are responsible. The purpose of the interim costs award is not merely to aid one side or the other in funding their litigation but,

Les tribunaux peuvent également accorder des provisions pour frais dans les affaires de garde d'enfants. Voir *Roberts c. Aasen*, [1999] O.J. No. 1969 (QL) (C.S.J.). Les litiges en matière de garde d'enfants sont axés sur l'intérêt de l'enfant dont le bien-être relève de la responsabilité des deux parents. L'octroi de provision pour frais ne vise

commensurate with the parents' duty, to help the court find the result most beneficial to the child.

pas uniquement à aider une partie ou une autre à financer son litige mais, dans le respect de l'obligation des parents, également à aider le tribunal à trouver la solution qui soit la meilleure pour l'enfant.

81 The value in considering the derivative and related child custody cases is simply to concede that there are circumstances beyond the matrimonial cases in which interim costs may be appropriate. The cases on appeal do not fit these exceptions.

L'intérêt d'examiner les affaires invoquant un droit dérivé et celles concernant la garde d'enfants est simplement de nous rendre compte qu'il existe des affaires autres que les affaires de droit matrimonial où l'adjudication de provisions pour frais est appropriée. Les affaires faisant l'objet du pourvoi ne cadrent pas avec ces exceptions.

C. *The Trial Judge's Discretion*

C. *Le pouvoir discrétionnaire du juge de première instance*

82 I agree with LeBel J. that a trial judge's discretionary decision on interim costs is owed great deference, and should be disturbed only if "the trial judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts" (para. 43). I also agree that a misapplication of the criteria relevant to an exercise of discretion constitutes an error of law.

Je conviens avec le juge LeBel qu'il faut faire preuve de grande déférence à l'égard du pouvoir discrétionnaire du juge de première instance d'accorder des provisions pour frais et n'intervenir que si « le juge de première instance s'est fondé sur des considérations erronées en ce qui concerne le droit applicable ou a commis une erreur manifeste dans son appréciation des faits » (par. 43). Je reconnais également qu'une mauvaise application des critères relatifs à l'exercice du pouvoir discrétionnaire constitue une erreur de droit.

83 LeBel J. concludes that because Sigurdson J. failed to apply the newly enunciated criteria of impecuniosity, *prima facie* merit, and public importance, an error of law was (understandably) committed. LeBel J. saw no need to return the case to the chambers judge, and held that Sigurdson J. would have exercised his discretion to grant the award had he had the benefit of what is described as new criteria.

Le juge LeBel conclut que, parce que le juge Sigurdson n'a pas appliqué les critères récemment énoncés de ressources insuffisantes, de bien-fondé *prima facie* et d'importance pour le public, une erreur de droit (et cela est compréhensible) a été commise. Le juge LeBel n'a pas jugé nécessaire de renvoyer l'affaire au juge en chambre et a conclu que le juge Sigurdson aurait usé de son pouvoir discrétionnaire pour attribuer les dépens s'il avait eu l'avantage de connaître ce qu'il décrit comme étant de nouveaux critères.

84 If this Court enlarges the scope for interim costs it should be seen as a new rule and not an adaptation of existing law. On the basis of the law on costs at the time of this application the chambers judge properly exercised his discretion.

Si la Cour élargit le champ d'application des provisions pour frais, il faudra interpréter cela comme une nouvelle règle et non pas comme une adaptation des règles de droit existantes. Le juge en chambre a correctement exercé son pouvoir discrétionnaire en fonction des règles de droit qui existaient en matière de dépens à l'époque où la demande a été présentée.

85 Sigurdson J. was correct in his assessment that liability remains an open question in this appeal and that ordering interim costs would inappropriately require prejudging the case. Accordingly, he was justified in concluding that "[a]lthough [he had] a limited discretion in appropriate circumstances to award interim costs this case falls far outside that area" (para. 129).

Le juge Sigurdson a eu raison de conclure que la question de la responsabilité demeure entière en l'espèce et que, s'il ordonnait le paiement de provisions pour frais, il se trouverait à préjuger de façon inopportune de l'issue de l'affaire. Il a donc eu raison de conclure que [TRADUCTION] « [b]ien qu['il] possède un pouvoir discrétionnaire limité dans les circonstances appropriées d'accorder des provisions pour frais, la présente affaire relève d'un tout autre domaine » (par. 129).

III. Conclusion

III. Conclusion

86 The common law is to advance by increments while generally staying true to the purposes behind its rules. The new criteria endorsed by my colleague broaden the scope of interim costs to an undesirable extent and are not supported in the case law. In my view, the common law rules on interim costs should not be advanced through an appellate court ignoring and overturning the trial judge's correctly guided discretion. This is more appropriately a question for the legislature. See *Watkins v. Olafson*, [1989] 2 S.C.R. 750; *R. v. Salituro*, [1991] 3 S.C.R. 654; and *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925.

La common law doit évoluer graduellement tout en respectant d'une manière générale les objets sous-jacents à ses règles. Les nouveaux critères approuvés par mon collègue élargissent le champ d'application des provisions pour frais dans une mesure qui n'est pas souhaitable et ils ne sont pas étayés par la jurisprudence. Selon moi, les règles de common law en matière de provisions pour frais ne devraient pas être modifiées par l'intervention d'une cour d'appel infirmant la décision que le juge de première instance a rendue en usant judicieusement de son pouvoir discrétionnaire. Une telle modification relève davantage du législateur. Voir *Watkins c. Olafson*, [1989] 2 R.C.S. 750; *R. c. Salituro*, [1991] 3 R.C.S. 654; *Office des services à l'enfant et à la famille de Winnipeg (région du Nord-Ouest) c. G. (D.F.)*, [1997] 3 R.C.S. 925.

87 Since Sigurdson J. committed no error of law and did not commit a "palpable error" in his assessment of the facts, I would defer to his decision not to exercise his discretion to make the extraordinary grant of interim costs.

Comme le juge Sigurdson n'a pas commis d'erreur de droit ni d'« erreur manifeste » dans son appréciation des faits, je suis d'avis de m'en remettre à la décision qu'il a prise de ne pas exercer son pouvoir discrétionnaire pour accorder exceptionnellement des provisions pour frais.

88 I would allow the appeal, with each side to bear its own costs.

Je suis d'avis d'accueillir le pourvoi, chacune des parties devant assumer ses propres dépens.

Appeal dismissed with costs, IACOBUCCI, MAJOR *and* BASTARACHE JJ. *dissenting.*

Pourvoi rejeté avec dépens, les juges IACOBUCCI, MAJOR *et* BASTARACHE *sont dissidents.*

Solicitors for the appellant: Borden Ladner Gervais, Vancouver.

Procureurs de l'appelante : Borden Ladner Gervais, Vancouver.

Solicitors for the respondents: Mandell Pinder, Vancouver.

Procureurs des intimés : Mandell Pinder, Vancouver.

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Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Department of Justice, Sainte-Foy.

Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of British Columbia: Ministry of Attorney General, Victoria.

Solicitor for the intervener the Attorney General of Alberta: Alberta Justice, Edmonton.

Solicitors for the interveners the Songhees Indian Band et al.: Cook, Roberts, Victoria.

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Procureurs de l'intervenant le chef Roger William : Woodward & Company, Victoria.

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA

Complainants

-and-

ATTORNEY GENERAL OF CANADA

Respondent

Docket: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

IMMEDIATE RELIEF BOOK OF AUTHORITIES OF THE INTERESTED PARTY NISHNAWBE ASKI NATION ("NAN")

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