

Notes of Cases

*Commentaires d'arrêt*

MARITIME LAW—FEDERAL COURT JURISDICTION—CANADIAN MARITIME LAW  
—RELATIONSHIP TO CIVIL AND COMMON LAW: *ITO—International Terminal  
Operators Ltd. v. Miida Electronics Inc.*

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In 1973 the Buenos Aires Maru sailed from Kobe, Japan, with a cargo including 250 cartons of electronic desk calculators which were to be delivered to their owner and consignee in Montreal. On arrival in Montreal 84.5 cartons were not delivered and the owner and consignee, Miida Electronics Inc., instituted proceedings in the Federal Court against the carrier and against ITO-International Terminal Operators Ltd. as stevedore and provider of terminal services in the port of Montreal. At trial it was found that the loss occurred after the goods had been unloaded from the ship in Montreal. In ultimately rejecting the action against both the carrier and the terminal operator the Supreme Court of Canada held that both were entitled to the benefit of an exemption from liability clause in the bill of lading.<sup>1</sup> With respect to the terminal operator this conclusion was reached only after the court had concluded that the so-called Himalaya clause<sup>2</sup>—extending to stevedores and terminal operators not party to the initial contract of carriage the benefit of exemptions from liability in the bill of lading—was valid in Canadian maritime law. The decision aligns Canadian law with that of other sea-trading nations such as the United States, the United Kingdom and France, and provides a clear

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<sup>1</sup> *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752, (1986), 28 D.L.R. (4th) 641. For further comment see A. Braën, *L'arrêt ITO-International Terminal Operators Ltd. c. Miida Electronics Inc., ou comment écarter l'application du droit civil dans un litige maritime au Québec* (1987), 32 McGill L.J. 386.

<sup>2</sup> As to which see S. Waddams, *Contracts - Carriage of Goods - Exemptions for the Benefit of Third Parties* (1977), 55 Can. Bar Rev. 327; J. Pineau, *La Clause 'Himalaya': la difficile conquête des stevedores* (1979), 39 R. du B. 113.

rule permitting commercial partners to assess and insure against maritime cargo risks. The decision was reached, however, only after the court by a vote of 4 to 3 had made important and controversial determinations as to the extent of the jurisdiction of the Federal Court and as to the nature of Canadian maritime law which is to be applied by it.

### *Federal Court Jurisdiction*

Section 101 of the Constitution Act, 1867, authorizes the Parliament of Canada to constitute courts for "the better administration of the laws of Canada". As is well known, the Supreme Court of Canada decided in *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*,<sup>3</sup> that these words require that there be applicable and existing federal law upon which the jurisdiction of the Federal Court can be exercised. Absent such existing federal law, no statutory grant of jurisdiction to the Federal Court is valid, and the mere existence of federal legislative authority in a given field is not indicative of existing federal law. In a nutshell, there is no federal common law and the task of the Federal Court is the administration of the "laws of Canada" defined in a more limited fashion. The decision in *Quebec North Shore* has been criticized for its divisive effect on multi-party litigation but is important for its re-affirmation of the fundamentally unitary character of the Canadian court system (in which the Federal government plays an important role), for its rejection of the idea that a common law can be described as somehow belonging to a particular level of legislative authority,<sup>4</sup> and for its refusal to admit that the law of the provinces has been referentially adopted as part of a federal common law so as to nourish Federal Court jurisdiction.<sup>5</sup>

As to maritime matters, however, the Supreme Court subsequently held in *Tropwood A.G. v. Sivaco Wire & Nail Co.*<sup>6</sup> that there had been legislative definition in section 2 of the Federal Court Act<sup>7</sup> of a body of "Canadian maritime law" upon which Federal Court jurisdiction can be

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<sup>3</sup> [1977] 2 S.C.R. 1054, (1976), 71 D.L.R. (3rd) 111.

<sup>4</sup> This view of the common law has been subsequently adhered to by the Federal Court itself, most notably in *Alda Enterprises Ltd. v. The Queen*, [1978] 2 F.C. 106 (T.D.), in which it was held that there is no federal common law even in the Yukon, with respect to which the Federal Parliament exercises exclusive legislative jurisdiction. It follows that there is also no provincial common law (whether of a common law province or of Quebec), in the sense of law belonging to a particular province by virtue of its legislative authority in a given field. This latter statement conforms more obviously to long-held concepts of the nature of the common law and of the civil law.

<sup>5</sup> In the United States similar conclusions were reached by the Supreme Court in 1938 in *Eric Railroad v. Tompkins*, 304 U.S. 64, after nearly a century of efforts to construct a federal common law.

<sup>6</sup> [1979] 2 S.C.R. 157, (1977), 99 D.L.R. (3rd) 235.

<sup>7</sup> R.S.C. 1970, c. 10 (2nd supp.).

based. This body of "Canadian maritime law" includes "all that body of law which was administered in England by the High Court on its admiralty side in 1934".<sup>8</sup> The Federal Court was thus enabled to exercise a jurisdiction in Admiralty of some importance, concurrently with that exercised by the superior courts of the provinces, but which was limited by restrictions inherent in English admiralty jurisdiction in 1934.

In the *ITO* decision the Supreme Court has now eliminated these restrictions. In doing so it relied on language, hitherto unconstrued by itself, in section 2 of the Federal Court Act<sup>9</sup> to the effect that Canadian maritime law also includes law that would have been administered by the Exchequer Court of Canada "if that court had had, on its Admiralty side, unlimited jurisdiction in relation to maritime and admiralty matters". Federal Court jurisdiction is thus now co-extensive with that which is maritime, a definition which would make it as broad as that exercised by the English Admiralty Court in its most expansive period in the fifteenth century reign of Edward III. Yet even this extensive English jurisdiction would not have included a claim for a tort or delict committed on land, as the claim in the *ITO* was conceded to be, since the jurisdiction of the English Court of Admiralty extended only to torts on the high seas, the British seas, and in ports within the ebb and flow of the tide. McIntyre J., however, speaking for the majority of the court, refused to restrict the definition of maritime and admiralty matters to claims fitting within such historical limits. The concept of maritime and admiralty matters should rather be interpreted in the modern context of commerce and shipping. In his view the liability of a stevedore-terminal operator in the short-term storing of goods within a port area pending delivery to a consignee was an integral part of the activity of shipping and a matter of maritime concern.

One may always quarrel with where lines are drawn in space, but it does not appear inherently unreasonable to conclude that certain port activities are maritime in character. Shippers, moreover, will thus have a single forum in which to pursue all those potentially responsible for loss of cargo (individual Himalaya clauses being subject to interpretation). The decision is of greater importance for its broad and flexible concept of maritime matters and for the regeneration of admiralty jurisdiction this will permit, to the benefit of the Federal Court. This does not in itself appear to be a bad thing, given the condition of civil court caseloads and a more general movement, notably in England, to restore to admiralty jurisdictions much of the work they lost to common law courts from the time of Coke. Admiralty matters also usually escape the competence of civil law courts in France, to the benefit of commercial or

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<sup>8</sup> *Supra*, footnote 1, at pp. 771 (S.C.R.), 654 (D.L.R.)

<sup>9</sup> *Supra*, footnote 7.

arbitral tribunals. What is more controversial, particularly in Quebec, is the content of "Canadian maritime law" upon which Federal Court jurisdiction may be based.

### *Canadian Maritime Law*

Having adopted such a broad concept of maritime jurisdiction the court, in accordance with *Quebec North Shore*, had to identify the corpus of Canadian maritime law which could be said to nourish the jurisdiction of the Federal Court. Speaking for the majority, McIntyre J. stated that Canadian maritime law "encompassed both specialized rules and principles of admiralty and the rules and principles adopted from the common law and applied in admiralty cases".<sup>10</sup> It was therefore inappropriate, even in a case arising in Montreal, to resort to the Civil Code of Quebec as provincial law applicable in the Federal Court, as had been done by Pratte J. in the Court of Appeal,<sup>11</sup> and whose reasons were approved by the three dissenting members of the Supreme Court.<sup>12</sup> With respect, the conclusion of the majority of the court is a justifiable one, since the admission of provincial law to nourish Federal Court jurisdiction in matters of admiralty would be incompatible with *Quebec North Shore* and invite further use of provincial law in the construction of federal common law. To the extent that "laws of Canada" exist, they exist as such, and not through referential incorporation of provincial law.

There remains, however, the large question of the nature of English admiralty law and the extent to which common law principles have been adopted and applied in English admiralty practice. In this regard it is difficult to escape contemporary concepts of the dominance of the common law and of the particular and fragmented character of law in fields such as admiralty. Contemporary concepts cannot, however, alter historical evidence, and the historical evidence is to the effect that the English law of admiralty existed not as a fragmentary body of law which necessarily borrowed from the common law, but as an autonomous body of law the concepts of which did much to shape the common law as we know it today. Administered by the English civilians, who in their monopoly of admiralty practice made exclusive use of maritime custom, the law merchant and the civil law (the persuasive *ius commune* of the continent), the law of admiralty thus presented the advantages of *in rem* proceedings, hypothecation of vessels and negotiable bills of exchange, to say nothing of broad civil law principles of contractual and delictual

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<sup>10</sup> *Supra*, footnote 1, at pp. 776 (S.C.R.), 658 (D.L.R.). See also at pp. 782 (S.C.R.), and 662 (D.L.R.): "Canadian maritime law . . . includes common law principles as they are applied in Admiralty matters."

<sup>11</sup> [1982] 1 F.C. 406, (1981), 124 D.L.R. (3rd) 33.

<sup>12</sup> Chouinard, Lamer and Beetz JJ.

liability. The common law was notoriously deficient with respect to all of these matters and the Trinity petitioners complained in 1641 that "the common law doth not provide in all causes concerning maritime affairs. . .".<sup>13</sup> Even in the nineteenth century, when common law absorption of merchant and civil law had largely run its course,<sup>14</sup> the expansion of admiralty jurisdiction which then occurred was justified by the Judicature Commission of 1869 in terms of "the imperfection of the Common Law system, and the consequent necessity of seeking for a more complete remedy elsewhere".<sup>15</sup> While Doctors' Commons disappeared in 1858, and with it much of the English civilian literary tradition, the first common lawyer to sit in Admiralty was Sir Gorell Barnes in 1892,<sup>16</sup> and it was only progressively during the nineteenth century that admiralty lawyers came to recognize a common law capable of application by them and to acknowledge that they functioned in a domestic, as opposed to international, court. The 1873 Courts of Judicature Act explicitly preserved existing rules in force in Admiralty,<sup>17</sup> and the principal conclusion of the most extensive study of the matter is that "only in relatively few respects has the procedure and substance of the common law intruded into Admiralty", and that this occurred because "the common lawyers, once the Court of Admiralty had passed into their hands, [have] shown an unexpected concern for the preservation and extension of the legal system bequeathed by the civilians".<sup>18</sup>

Incorporation by reference of English admiralty law and common law principles adopted and applied in English admiralty cases therefore accomplishes two useful purposes in Canadian maritime practice. It provides a corpus of learning readily available in common law provinces for use in the extended maritime practice now possible in the Federal Court. It also ensures the reception of those civilian principles administered by English civilians as part of the European *ius commune*, and thus ensures the continuing relevance of Quebec civil law and the Quebec Civil Code, not as provincial law, but as evidence of received civil law

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<sup>13</sup> Cited in G.F. Steckley, *Merchants and the Admiralty Court During the English Revolution* (1978), 22 *Am. J. Leg. Hist.* 137, at p. 151. For the early and full reception of the law merchant in Admiralty, contrasted with the attitude of the courts of common law, see *Select Pleas in the Court of Admiralty*, *The Publications of the Selden Society*, vol. VI, 1894, p. lxxvii.

<sup>14</sup> See, for example, in the law of bailment, (which may be relevant to the liability of terminal operators), the adoption of civil law principles by Holt J. in the leading decision of *Coggs v. Bernard (Barnard)* (1703), 2 *Ld. Raym.* 909.

<sup>15</sup> F.L. Wiswall, *The Development of Admiralty Jurisdiction and Practice since 1800* (1970), p. 101.

<sup>16</sup> *Ibid.*, p. 136.

<sup>17</sup> *Ibid.*, p. 102.

<sup>18</sup> *Ibid.*, p. 210.

principle. Quebec civilians may thus continue the civilian tradition in maritime matters. This will provoke no more uncertainty than exists in English law and is a useful reminder, as Gilmore and Black have stated in the United States, that maritime law may be regarded "as a system not depending for its validation on any inferred national legislation".<sup>19</sup>

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CONSTITUTIONAL LAW—A NEW BASIS FOR SCREENING CONSTITUTIONAL QUESTIONS UNDER THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS—PREJUDGING THE EVIDENCE?: *Operation Dismantle Inc. et al. v. The Queen et al.*

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The Supreme Court's judgment in the Cruise Missile case<sup>1</sup> was widely publicized in the media. The media focused their attention upon the court's conclusion that the Cabinet could be subject to scrutiny by the judiciary under the Charter of Rights and Freedoms.<sup>2</sup> However, it is our contention that this conclusion was by no means startling and that the importance of this case lies primarily in the new test it propounds for the screening of Charter cases.

That the Cabinet was subject to judicial review had already been decided by the court in the *Inuit Tapirisat* case,<sup>3</sup> in which Estey J., writing for a unanimous court, stated:

Let it be said at the outset that the mere fact that the statutory power is vested in the Governor in Council does not mean that it is beyond review. If that body has

<sup>19</sup> G. Gilmore and C. Black, *The Law of Admiralty* (2nd ed., 1975), p. 45. For the utility of the Civil Code as a statement of maritime law see *Fairway Life & Marine Insurance Ltd. & The Fishing Vessel "Susan Darline"*, F.C.T.D., Toronto, June 17, 1986, No. 196-86, Giles J., cited by Braën, *loc. cit.*, footnote 1, at note 24.

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<sup>1</sup> *Operation Dismantle Inc. et al. v. The Queen et al.*, [1985] 1 S.C.R. 441, (1985), 18 D.L.R. (4th) 481; hereinafter "Dismantle". The appeal was heard on February 14 and 15, 1984, judgment was not delivered until May 9, 1985.

<sup>2</sup> Constitution Act, 1982, Part 1, s. 52. (Hereafter referred to as the Charter).

<sup>3</sup> *Attorney General of Canada v. Inuit Tapirisat of Canada et al.*, [1980] 2 S.C.R. 735, at p. 748, (1981), 115 D.L.R. (3d) 1, at p. 11. See also *Gloucester Properties Ltd. et al. v. R. in right of British Columbia* (1981), 27 B.C.L.R. 10, at p. 16, where the B.C. Court of Appeal endorsed this position.

failed to observe a condition precedent to the exercise of that power, the Court can declare that such purported exercise is a nullity.

As the Cabinet is subject to judicial review under ordinary principles of administrative law, *a fortiori* it must be so under the Charter, which is "the supreme law of Canada".<sup>4</sup> While it is true that the judgments of both Dickson J. and Wilson J. (writing a concurring judgment for herself) agreed that this principle extended even to the exercise of royal prerogative powers, which may go somewhat beyond previous Canadian case law,<sup>5</sup> it is noteworthy that a recent English case, which obviously cannot rely on any comparable Charter jurisprudence, indicated that the House of Lords has a similar view.<sup>6</sup>

### *Background*

#### (1) *The Complaint*

The appellants complained under section 7 of the Charter that the decision of the federal Cabinet to permit the testing of the cruise missile by the United States of America in Canadian territory was unlawful. Section 7 provides:

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.

The plaintiffs alleged that the testing of the cruise missile in Canada is a violation of these rights in that it would make Canada a more likely target of a nuclear attack, thus endangering the security and lives of all people.

The remedies sought by the appellants were as follows: (i) a declaration that the decision to permit testing was unconstitutional; (ii) injunctive relief to prohibit the testing; and (iii) damages. The respondents brought a motion to strike out the case as disclosing no reasonable cause of action. Cattanach J. dismissed the motion to strike on the ground that the Charter applied to the Government of Canada and that the statement of claim raised a justiciable issue.<sup>7</sup>

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<sup>4</sup> *Supra*, footnote 2, s. 52.

<sup>5</sup> See, e.g., the judgment of Marceau J. in *The Queen v. Operation Dismantle*, [1983] 1 F.C. 745, at p. 783, (1983), 3 D.L.R. (4th) 193, at pp. 225-226 (C.A.), holding that royal prerogative powers could not be the subject of judicial review. But see *Reference re Resolution to Amend the Constitution of Canada*, [1981] 1 S.C.R. 753, at pp. 876-877, (1981), 125 D.L.R. (3d) 1, at p. 82.

<sup>6</sup> *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] A.C. 374, [1984] 3 All E.R. 935 (H.L.).

<sup>7</sup> *Operation Dismantle v. The Queen*, [1983] 1 F.C. 429 (T.D.).

## (2) *The Federal Court of Appeal*

The Federal Court of Appeal unanimously allowed the defendants' appeal, but each of the five judges delivered separate reasons.<sup>8</sup> Four of the five (Pratte, Le Dain, Marceau and Hugessen JJ.) held that a breach of section 7 of the Charter must involve a failure to comply with the principles of fundamental justice and the appellants had not alleged the factual basis for any such failure.

This view seems to treat section 7 as being essentially procedural in nature, contemplating that it would be possible to deprive someone of the right to life, liberty and security of the person if it is done in accordance with the principles of fundamental justice. The Supreme Court of Canada did not find it necessary to deal with this issue.<sup>9</sup> Two of the Federal Court of Appeal judges (Ryan and Le Dain JJ.) would have allowed the appeal on the ground that the issue was inherently non-justiciable and therefore incapable of adjudication by a court; the other three did not directly address this point. Interestingly, none of the five judges was prepared to say that the Cabinet's decision to test the cruise missile was unreviewable because it involved a "political question".

## (3) *The Supreme Court of Canada*

The Supreme Court of Canada upheld the Federal Court of Appeal in two separate judgments. The first judgment was rendered by Dickson J., writing for himself and Estey, McIntyre, Chouinard and Lamer JJ., and the second by Wilson J. writing for herself. Wilson J. summarized the issues as follows:<sup>10</sup>

1. Is a decision made by the government of Canada in relation to a matter of national defence and foreign affairs unreviewable on any of the following grounds:
  - (a) it is an exercise of the royal prerogative;
  - (b) it is, because of the nature of the factual questions involved, inherently non-justiciable; and
  - (c) it involves a "political question" of a kind a court should not decide?
2. Under what circumstances can a Statement of Claim seeking declaratory relief concerning the constitutionality of a law or governmental decision be struck out as disclosing no cause of action?
3. Do the facts as alleged in the Statement of Claim, which must be taken as proven, constitute a violation of Section 7 of the *Canadian Charter of Rights and Freedoms*? and
4. Do the plaintiffs have a right to amend the Statement of Claim before the filing of a Statement of Defence?

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<sup>8</sup> *The Queen v. Operation Dismantle*, *supra*, footnote 5.

<sup>9</sup> In the Supreme Court's subsequent judgment in *Reference re Section 94(2) of the Motor Vehicle Act*, [1985] 2 S.C.R. 486, (1985), 23 C.C.C. (3d) 289, 48 C.R. (3d) 289, it was held that s. 7 of the Charter was not to be limited to procedural guarantees.

<sup>10</sup> *Supra*, footnote 1, at pp. 463 (S.C.R.), 497 (D.L.R.).



We do not intend to deal with the procedural question found in the fourth issue, nor the question relating to the scope of section 7 of the Charter found in the third. These issues need not be considered given the court's conclusions on the first two issues. Rather, we believe that all of the important issues in the two judgments can be conveniently collapsed into one question: what are the appropriate mechanisms and criteria for screening cases in order to determine those which will be adjudicated under the Charter?

### *Reviewing the Cabinet*

There was nothing too startling about the court's unanimous conclusion that Cabinet decisions are reviewable under the Charter. The Government of Canada had relied upon the text of section 32(1)(a) to argue that the Charter could apply only to the exercise of powers which derive directly from statute. Since the Cabinet's jurisdiction over foreign affairs primarily involved an exercise of the royal prerogative, it was argued that the phrase "within the authority of Parliament" found in section 32(1)(a) must limit the Charter's application to those sources of power existing independently of Parliament.

Dickson J. devoted only two or three sentences to this issue, noting that since Cabinet decisions ultimately fall under the terms of section 32(1)(a) of the Charter, they are therefore "subject to judicial scrutiny for compatibility with the Constitution".<sup>11</sup> Likewise, Wilson J. dismissed the government's argument that the Charter should be applied only to the exercise of governmental powers deriving directly from statute. This argument would have meant that since the Cabinet relied on the Crown's prerogative power in national defence matters, its decision to allow cruise missile testing in Canada could not be judicially reviewed. She agreed that there was no reason in principle for distinguishing between Cabinet decisions made pursuant to statute and those made in the exercise of the royal prerogative: both types of decisions could be scrutinized in light of the Charter.<sup>12</sup>

The court's position on this issue parallels the conclusion arrived at shortly beforehand by the House of Lords. In the "*G.C.H.Q.*" case, *Council of Civil Service Unions v. Minister for Civil Service*,<sup>13</sup> the House of Lords was asked to consider whether the Prime Minister had been under a duty to act fairly before she issued an instruction that staff at a top secret facility could no longer be permitted to belong to trade unions. The House of Lords held unanimously that merely because exec-

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<sup>11</sup> *Ibid.*, at pp. 455 (S.C.R.), 491 (D.L.R.).

<sup>12</sup> *Ibid.*, at pp. 463-464 (S.C.R.), 497-498 (D.L.R.).

<sup>13</sup> *Supra*, footnote 6.

utive action was carried out in pursuance of a power derived from common law or the royal prerogative did not mean that a minister, in appropriate circumstances, would not be under a duty to act fairly. Apart from considerations of national security, the applicants would have had a legitimate expectation that they be consulted before the instruction was issued. Ordinarily the decision-making at issue would have been held unfair; however, the court held that the Prime Minister had adequately demonstrated that her decision was based on national security considerations, which outweighed her duty to act fairly in the circumstances. Interestingly, the Supreme Court of India has recently reached a similar conclusion.<sup>14</sup>

Nevertheless, the conclusion of both the House of Lords and the Supreme Court of Canada with respect to the reviewability of powers derived from the royal prerogative is not without difficulty. Historically, the Crown has enjoyed certain powers and immunities which were not available to private citizens. These incidents of the royal prerogative exist as a matter of common law, not statute. Since the seventeenth century constitutional settlement, there are no powers of the Crown which cannot be limited by statute; accordingly, as Wilson J. notes, section 52 of the Constitution Act acknowledges that such powers are "within the authority of Parliament".<sup>15</sup> For generations there has been no doubt that Parliament can address prerogative powers in legislation. It can also provide explicitly for judicial review by legislating with respect to a matter formally subject to a prerogative power and providing explicitly for scrutiny of a particular discretion by the courts.

Prior to the *G.C.H.Q.* case, courts generally had restricted themselves to determining whether a particular Cabinet decision constituted an exercise of the prerogative. The House of Lords has now held that the exercise of *all* Crown powers, whether derived from statute or common law, are subject to judicial review. The majority of the law Lords (Lords Scarman, Roskill and Diplock) were in principle prepared to review a direct exercise of the prerogative. The only limitation to this apparent expansion of the court's authority was to be found in the open-ended concept of justiciability that they adopted. Lord Scarman stated as follows:<sup>16</sup>

... I believe that the law relating to judicial review has now reached the state where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter upon which the court can adjudicate, the exercise of the power is subject to review in

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<sup>14</sup> See *A.K. Roy v. Union of India*, [1982] A.I.R., Sup. Ct. 710, holding that an ordinance made by the President for national security purposes is not an executive act, but rather is as much "law" as an act passed by Parliament. Accordingly, the court held that "fortunately and unquestionably", it was subject to judicial scrutiny.

<sup>15</sup> *Supra*, footnote 1, at pp. 464 (S.C.R.), 498 (D.L.R.).

<sup>16</sup> *Supra*, footnote 6, at pp. 407 (A.C.), 948 (All E.R.).

accordance with the principles developed in respect of the review of the exercise of statutory power.

Despite the breadth of this assertion, however, some of the law Lords expressed strong reservations. Lord Roskill, for example, set out examples of royal prerogative powers which were not considered amenable to the judicial process. He instanced such prerogative powers as those relating to the making of treaties, the defence of the realm, the prerogative of mercy and the grant of honours.<sup>17</sup> In light of the celebrated *Gouriet* decision,<sup>18</sup> the Crown's prerogative power in relation to criminal justice, as exercised by the Attorney General, might also figure in this list. Professor Wade has concluded that this long list of prerogative powers that are to be excluded from judicial scrutiny means that despite bold judicial pronouncements, little is likely to change in Great Britain.<sup>19</sup>

What is the situation in Canada? If the principle established in the *G.C.H.Q.* case were applied, the exercise of prerogative powers by Cabinet is now squarely within the realm of judicial review. The status of the law Lords' self-imposed limitations on this principle is less certain. In *Dismantle* both the majority and Wilson J. noted that the doctrine of justiciability is based on the "appropriateness" of the courts being a forum for the resolution of certain types of disputes. All agreed that "disputes of a political or foreign policy nature may be properly cognizable by the courts".<sup>20</sup> Interestingly, the prerogative powers "relating to the making of treaties and the defence of the realm" were specific examples cited by Lord Roskill in the *G.C.H.Q.* case of matters that were not justiciable. Of course, the *G.C.H.Q.* case did not arise under the Charter. Wilson J. took pains to deny that judicial review in respect of such matters entailed the substitution of the court's opinion "on the merits" for the opinion of the Cabinet. This was said not to be appropriate.<sup>21</sup> In the context of the Charter, however, she said that if the court was called upon to decide whether a particular act of the executive violated a citizen's right, then "it is not only appropriate that we answer the question; it is our obligation under the *Charter* to do so".<sup>22</sup> Where Charter rights are *not* involved, will the Supreme Court review the Cabinet's exercise of such prerogative powers as those relating to national defence? The

<sup>17</sup> *Ibid.*, at pp. 418 (A.C.), 956 (All E.R.).

<sup>18</sup> *Gouriet v. Union of Post Office Workers*, [1978] A.C. 435, [1977] 3 All E.R. 70 (H.L.).

<sup>19</sup> H.R.W. Wade, *Procedure and Prerogative in Public Law* (1985), 101 Law Q. Rev. 180, at pp. 197-198.

<sup>20</sup> *Supra*, footnote 1, at pp. 459 (S.C.R.), 494 (D.L.R.) (Dickson J.); at pp. 474 (S.C.R.), 505 (D.L.R.) (Wilson J.).

<sup>21</sup> *Ibid.*, at pp. 472 (S.C.R.), 504 (D.L.R.).

<sup>22</sup> *Ibid.*

issue will be noteworthy not only for the doctrinal reasons suggested above, but also in light of concerns as to the legitimacy or "appropriateness" of the court's involvement in such matters.

The reviewability of Cabinet decisions on the basis of procedural deficiencies has been generally acknowledged. In *Attorney-General of Canada v. Inuit Tapirisat of Canada*,<sup>23</sup> Estey J. was considering the power of the Governor in Council under section 64(1) of the National Transportation Act<sup>24</sup> which conferred a wide discretion upon the Cabinet to "vary or rescind" an order of the Canadian Radio-television and Telecommunications Commission in connection with its telecommunications jurisdiction. Although Estey J. claimed that "it is not helpful in my view to attempt to classify the action or function. . . into one of the traditional categories established in the development of administrative law",<sup>25</sup> nonetheless he later appeared to resurrect the much-maligned classification approach.<sup>26</sup> The learned judge termed the Cabinet's powers "legislative action in its purest form",<sup>27</sup> in order to hold that the duty to act fairly did not apply to such "legislative functions".

Although no procedural entitlements were in fact found in this case, just as in the *G.C.H.Q.* case, some jurisdictions have applied the duty to act fairly to cabinet decision-making. For example, the High Court of Australia has held that the Governor in Council, in granting or refusing an application by an individual for the renewal of approval to act as an insurer, was required to base its decision on the circumstances of each case, not simply upon issues of general policy. A duty to act fairly was imposed.<sup>28</sup> The court held that although the Cabinet was indeed different in nature and character from ordinary administrative decision-makers, such difference was to be reflected in the content of the duty, not in its existence. Presumably where statutes explicitly contemplate "appeals" to Cabinet, rather than such broad discretionary powers as are exemplified in the power to "vary or rescind" on its own motion which was considered in *Inuit Tapirisat*, a stronger case can be made for the application to Cabinet of procedural guarantees.<sup>29</sup> If the Cabinet may be subject to judicial review at common law, it is not at all surprising that the

<sup>23</sup> *Supra*, footnote 3.

<sup>24</sup> R.S.C. 1970, c. N-17, as amended.

<sup>25</sup> *Supra*, footnote 3, at pp. 752 (S.C.R.), 14 (D.L.R.).

<sup>26</sup> R. Reid and H. David refer to this area of classification of administrative functions and assert that "nowhere is the law more confused and ill'ogical": *Administrative Law and Practice* (2nd ed., 1978), p. 117.

<sup>27</sup> *Supra*, footnote 3, at pp. 754 (S.C.R.), 15 (D.L.R.).

<sup>28</sup> *FAI Insurances Ltd. v. Winneke* (1982), 41 Aust. L.R. 1 (H.C. Aust.).

<sup>29</sup> See M. Rankin, *The Cabinet and the Agencies: Toward Accountability in British Columbia* (1985), 19 U.B.C. L. Rev. 25, at p. 39.

Supreme Court in *Dismantle* affirmed that Cabinet decision-making could be judicially reviewed under the Charter.

*The Mechanism for Reviewing Statements of Claim on Motions to Strike*

An interesting debate arose between the majority and Wilson J. as to the appropriate test for screening statements of claim. Dickson J. stated:<sup>30</sup>

In short, then, for the appellants to succeed on this appeal, they must show that they have some chance of proving that the action of the Canadian Government has caused a violation or a threat of violation of their rights under the Charter.

With respect, there is no authority for this proposition nor has it been, at least until this case, part of the law of Canada. One's chance of proving something is dependent upon the evidence one will call, which has heretofore not been the appropriate concern of the courts on a motion to strike.

The majority purported to screen the statement of claim by employing the relevant rule, Federal Court Rule 419(1), which provides as follows:

The court may at any stage of an action order any pleading or any thing in a pleading to be struck out, with or without leave to amend, on the ground that

(a) it discloses no reasonable cause of action or defence, as the case may be. . .

This test has consistently been applied.<sup>31</sup> As Estey J. indicates in the *Inuit Tapirisat* case:<sup>32</sup>

. . . all the facts pleaded in the statement of claim must be deemed to have been proven. On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt".

In other words, the legal test for striking a statement of claim is whether or not the statement of claim discloses a reasonable cause of action. The courts have steadfastly refused to strike out pleadings merely because they might raise a novel point of law, recognizing the capacity of the common law to evolve.<sup>33</sup>

<sup>30</sup> *Supra*, footnote 1, at pp. 450 (S.C.R.), 487 (D.L.R.).

<sup>31</sup> Most Anglo-Canadian jurisdictions have similar rules which are almost identical in their wording: see, for example, R.S.C. 1982, Ord. 18, r. 19 (U.K.); Rule 21.01(1)(b), Ont. Rules of Civil Procedure, O. Reg. 560/84 as am. (Ont.); Rule 19(24), Supreme Court Rules, B.C. Reg. 310/76 (British Columbia).

<sup>32</sup> *Supra*, footnote 3, at pp. 740 (S.C.R.), 5 (D.L.R.).

<sup>33</sup> Of course, the most celebrated case in the law of torts, *Donoghue (or M'Alister) v. Stevenson*, [1932] A.C. 562 (H.L.), raised a novel issue arising out of the "averments made by the pursuer in her pleading". See also *Krouse v. Chrysler Canada Ltd.* (1970), 12 D.L.R. (3d) 463 (Ont. H.C.); *Pilkington Glass Ltd. v. Burnaby School District No. 41* (1961), 36 W.W.R. 34 (B.C.S.C.).

However, the ordinary test was not applied in the judgment of the majority in the *Dismantle* case. What was the reason for altering the usual principle? Dickson J. stated:<sup>34</sup>

We are not, in my opinion, required by the principle enunciated in *Inuit Tapirisat*, *supra*, to take as true the appellants' allegations concerning the possible consequences of the testing of the cruise missile. The rule that the material facts in a statement of claim must be taken as true for the purpose of determining whether it discloses a reasonable cause of action does not require that allegations based on assumptions and speculations be taken as true. The very nature of such an allegation is that it cannot be proven to be true by the adduction of evidence. It would, therefore, be improper to accept that such an allegation is true. No violence is done to the rule where allegations, incapable of proof, are not taken as proven.

Wilson J., apparently, did not agree. She cited<sup>35</sup> with approval the judgment of Grant J. in *Shawn v. Robertson et al.*,<sup>36</sup> citing Magee J.A. in *Ross v. Scottish Union and National Insurance Company*,<sup>37</sup> to the following effect:

To justify the use of Rule 124. . . it is not sufficient that the plaintiff is not likely to succeed at the trial.<sup>38</sup>

Wilson J. also cited<sup>39</sup> with approval a case found to be analogous to the present case because of the novelty of the alleged cause of action and the absence of precedent, *McKay v. Essex Area Health Authority*.<sup>40</sup> In this case, Stephenson L.J. said:<sup>41</sup>

Here the court is considering not "ancient law" but a novel cause of action, for or against which there is no authority in any reported case in the courts of the United Kingdom or the Commonwealth. It is tempting to say that the question whether it exists is so difficult and so important that it should be argued out at trial and on appeal up to the House of Lords. But it may become just as plain and obvious, after argument on the defendant's application to strike it out, that the novel cause of action is unarguable or unsustainable or has no chance of succeeding.

It is clear, from the foregoing quotations, that the phrase, "has no chance of succeeding" is being used in two different ways. Hitherto, it was used to describe cases which were being struck out because of the plaintiff's failure to raise a reasonable cause of action or to put a legal question to the court. But where the nature of the claim involves a cognizable constitutional issue, there is always a cause of action. The question "Is X in violation of my constitutional rights?" is always

<sup>34</sup> *Supra*, footnote 1, at pp. 455 (S.C.R.), 490-491 (D.L.R.).

<sup>35</sup> *Ibid.*, at pp. 476 (S.C.R.), 507 (D.L.R.).

<sup>36</sup> (1965), 46 D.L.R. (2d) 363, at p. 365 (Ont. H.C.).

<sup>37</sup> (1920), 53 D.L.R. 415, at p. 423 (Ont. C.A.).

<sup>38</sup> The then Ontario Rule 124 is equivalent to Federal Rule 419, which was in issue in *Dismantle*.

<sup>39</sup> *Supra*, footnote 1, at pp. 477 (S.C.R.), 508 (D.L.R.).

<sup>40</sup> [1982] Q.B. 1166, [1982] 2 All E.R. 771 (C.A.).

<sup>41</sup> *Ibid.*, at pp. 1177 (Q.B.), 778 (All E.R.). (Emphasis added by Wilson J.)

“justiciable”—that is, capable of judicial determination. Thus it would never be possible to strike out a constitutional question as disclosing no cause of action. The majority uses the term “no chance of success” in an entirely different way, as meaning “Do we think they can win?” In this way, the majority seems to have pulled a semantic sleight of hand. They have used Rule 419 to apply a new test, namely whether the judges happen to think that the plaintiff will succeed on the merits because of what he or she can or cannot prove. To the best of our knowledge, this is unprecedented in Canadian jurisprudence.<sup>42</sup>

We recognize the need for some screening device—in constitutional cases just as in other litigation. However, the court cites no authority for the proposition that the long-standing principle restated in *Inuit Tapirisat* has a special exception for allegations based on “assumptions and speculations”. A statement of claim is normally full of assertions, the provability of which remains to be determined at trial. Whether some of these are merely assumptions or speculations may be matters on which the defendant, or eventually the court may form its own opinions. However, until now, this has never been of any legal significance. No authority is offered for the assertion that it would be “improper” to accept such allegations as true, nor are we aware of any such authority.

What is most striking about this case is the fact that, with the exception of Cattanach J. in the Trial Division, all of the judges who heard the motion to strike seemed to have arrived intuitively at the conclusion that, in some way, it must be struck out. Each found some technical basis for doing so. Apparently none was prepared to hold that whatever his or her initial views concerning the merits of the case, plaintiffs are entitled to their day in court if they are prepared to pay the cost.

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<sup>42</sup> The majority’s approach can be usefully contrasted with that of the English Court of Appeal in *Dyson v. Attorney-General*, [1911] 1 K.B. 410 (C.A.). There, an action was brought to determine the validity of new tax notices, and the interlocutory issue concerned whether an action of this sort could be brought against the Attorney-General. The Court of Appeal allowed the novel action to proceed to trial. Fletcher Moulton L.J. stated as follows (at pp. 418-419):

Now it is unquestionable that. . . the Court has a right to stop an action at this stage if it is wantonly brought without the shadow of an excuse, so that to permit the action to go through its ordinary stages up to trial would be to allow the defendant to be vexed under the form of legal process when there could not at any stage be any doubt that the action was baseless. But from this to the summary dismissal of actions because the judge in chambers does not think they will be successful in the end lies a wide region, and the Courts have properly considered that this power of arresting an action and deciding it without trial is one to be very sparingly used, and rarely if ever, excepting in cases where the action is an abuse of legal procedure. . . . To my mind it is evident that our judicial system would never permit a plaintiff to be “driven from the judgment seat” in this way without any Court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad.

This is not to underestimate the difficulty of applying appropriate screening mechanisms to constitutional cases. The imagination of lawyers in inventing questions which may be advanced in court as constitutional questions has, at least in the United States, become legendary. The United States Supreme Court has felt it necessary to develop a number of tests to determine whether or not a case should be adjudicated, perhaps in response to the fear of "opening the floodgates of litigation". Now that Canada is embarking upon a similar experiment with its new Charter, a similar fear arises. The United States Supreme Court developed the "political questions" doctrine,<sup>43</sup> and has also imposed somewhat rigid standing requirements employing the "case or controversy" test<sup>44</sup> as a secondary screening device. Perhaps the majority in *Dismantle* was concerned that the test in *Inuit Tapirisat* would be ineffective in a post-Charter era, where a cause of action would automatically arise in every case raising a legitimate constitutional issue. Therefore, in the important paragraph set out above, the learned judge created an exception to the *Inuit Tapirisat* mechanism, holding that it would be "improper" to apply it when the allegations are based on "assumptions and speculations". This has been framed as a new test: the appellants "must show that they have some chance of proving" what they allege in the statement of claim. What are the consequences of this new test?

### *The New Test*

#### (1) "Unprovable" Facts

What the appellants in *Dismantle* were required to show under this new test was stated in a variety of ways in Dickson J.'s reasons. For example, he stated that in order to succeed at trial the plaintiffs would have to prove ". . . that testing of the cruise missile *would* cause an increase in the risk of nuclear war".<sup>45</sup> Dickson J. then held that it was precisely this link between the Cabinet decision to permit the testing of the cruise missile and the increased risk of nuclear war which, in his opinion, "they cannot establish". With respect to the alleged duty of the government to refrain from allowing testing, the majority opinion indicates the following:<sup>46</sup>

Such a duty only arises. . . where it can be said that a deprivation of life and

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<sup>43</sup> See e.g., *Baker v. Carr*, 369 U.S. 186 (1962), discussed by Wilson J., *supra*, footnote 1, at pp. 467 (S.C.R.), 500 (D.L.R.).

<sup>44</sup> Professor L. Tribe identifies the core of standing in United States federal courts as the requirement of "injury in fact" to the claimant, which generally is conceived as an application of the "case or controversy" requirement of Article III of the United States Constitution; see L. Tribe, *Constitutional Choices* (1985), p. 99.

<sup>45</sup> *Supra*, footnote 1, at pp. 451 (S.C.R.), 488 (D.L.R.). (Emphasis added).

<sup>46</sup> *Ibid.*, at pp. 456 (S.C.R.), 491 (D.L.R.). (Emphasis added).



security of the person could be *proven* to result from the impugned government act.

Later in his judgment, Dickson J. said:<sup>47</sup>

. . . there must be a cognizable threat to a legal interest before the courts will entertain the use of its process as a preventative measure.

As we have said, this test is new. For lack of a better term, we have decided to call it the “unprovable facts” doctrine, in that it seems to suggest that there is a category of facts which one can allege but which are, inherently, merely speculative and never provable.

Unquestionably, at trial the plaintiffs would have had a remoteness problem. It would have been difficult to establish a causal link between the testing and the alleged injury without the proof of facts which, of their very nature, would be difficult to establish. Also, admittedly, the action had all of the elements of a “media stunt”, in that much of the case was tried in the newspapers, leading the late Chief Justice Laskin (who presided over the hearing of the case but was unable to participate in the decision) to rebuke the lawyer for the peace groups from the bench. *Dismantle* is undoubtedly an extraordinary piece of litigation. But by no means does it mark the first time that widespread publicity has resulted from an attempt to use the courts in a novel way. That the case is the stuff of which judicial nightmares are made was not in and of itself sufficient reason to assume that inevitably it must be struck out without hearing. Thus, the ultimate question that remains is whether, upon our analysis of the case, Canadian constitutional jurisprudence has been enriched or impoverished by the court’s refusal to hear it on the sole ground that judicial speculation as to the evidence likely to be called suggested that the plaintiffs could not succeed.

Dickson J. held that no sufficient causal link between cruise missile testing and the violation of section 7 rights could be established. Predicting what the evidence might be, he asserted:<sup>48</sup>

. . . it can only be a matter of hypothesis whether an increased American presence would make Canada more vulnerable to nuclear attack. It would not be possible to prove it one way or the other.

Later in his reasons, he added:<sup>49</sup>

A duty of the federal Cabinet cannot arise on the basis of speculation and hypothesis about possible effects of government action. Such a duty only arises, in my view, where it can be said that a deprivation of life and security of the person *could be proven to result* from the impugned government act.

<sup>47</sup> *Ibid.*, at pp. 457 (S.C.R.), 492 (D.L.R.).

<sup>48</sup> *Ibid.*, at pp. 453 (S.C.R.), 489 (D.L.R.).

<sup>49</sup> *Ibid.*, at pp. 456 (S.C.R.), 491 (D.L.R.). (Emphasis added).

As Professor Andrew Petter has pointed out, the purported distinction between allegations which are and those which are not capable of being proved, "enables the court to avoid the appearance of engaging in substantive balancing of competing political interests".<sup>50</sup> By dwelling upon issues of causation, the court has neatly sidestepped a central dilemma in the post-Charter era: the legitimacy of judicial involvement in matters that are more overtly "political" in nature than the court has addressed in the past.

## (2) "Political Questions" and Justiciability

The majority rejected the "political questions" doctrine developed in the United States jurisprudence in one sentence:<sup>51</sup>

I have no doubt that disputes of a political or foreign policy nature may be properly cognizable by the courts.

Wilson J. examined the political questions doctrine in depth, considering both judicial and academic commentary. She then defined the issue in the following way:<sup>52</sup>

The question before us is not whether the government's defence policy is sound but whether or not it violates the appellants' rights under section 7 of the *Canadian Charter of Rights and Freedoms*. This is a totally different question. I do not think there can be any doubt that this is a question for the courts. Indeed, section 24(1) of the Charter, also part of the Constitution, makes it clear that the adjudication of that question is the responsibility of "a court of competent jurisdiction". While the court is entitled to grant such remedy as it "considers appropriate and just in the circumstances", I do not think it is open to it to relinquish its jurisdiction either on the basis that the issue is inherently non-justiciable or that it raises a so-called "political question". . . .

I would conclude, therefore, that if we are to look at the Constitution for the answer to the question whether it is appropriate for the courts to "second guess" the executive on matters of defence, we would conclude that it is not appropriate. However, if what we are being asked to do is decide whether any particular act of the executive violates the rights of the citizens, then it is not only appropriate that we answer the question; it is our obligation under the *Charter* to do so.

None of the members of the court was willing to accept the "political questions" test, nor was it possible in the wake of the Supreme Court's trilogy of standing cases, *Thorson*,<sup>53</sup> *McNeil*,<sup>54</sup> and *Borowski*,<sup>55</sup>

<sup>50</sup> A. Petter, *The Politics of the Charter* (1986), 8 *Supreme Court L. Rev.* 473, at p. 499.

<sup>51</sup> *Supra*, footnote 1, at pp. 459 (S.C.R.), 494 (D.L.R.).

<sup>52</sup> *Ibid.*, at pp. 472 (S.C.R.), 504 (D.L.R.).

<sup>53</sup> *Thorson v. Attorney-General of Canada (No.2)*, [1975] S.C.R. 138, (1974), 43 D.L.R. (3d) 1.

<sup>54</sup> *Nova Scotia Board of Censors v. McNeil*, [1976]-2 S.C.R. 265, (1975), 55 D.L.R. (3d) 632.

<sup>55</sup> *Minister of Justice of Canada et al. v. Borowski*, [1981] 2 S.C.R. 575, (1981), 130 D.L.R. (3d) 588.

to adopt restrictive standing requirements similar to those in the United States. As a consequence, it was perhaps considered necessary to create a new test, presumably one more precise and less arbitrary than the test formulated in the United States.<sup>56</sup> Unfortunately, such a test was not articulated in either judgment, and has yet to be propounded. We would even question whether any such test exists or is possible. If that is correct, there may be no principled way of pre-screening constitutional cases. We contend, however, that this conclusion need not be cause for great concern.

The effect of clear reasons for decision and *stare decisis* in constitutional cases may be sufficient to obviate the necessity for screening on any basis other than that found in *Inuit Tapirisat*. The Charter does not contain an unlimited number of categories of constitutional questions, and once it has had a chance to operate for a few years, the initial fear of "opening the floodgates" should subside.<sup>57</sup> In the meantime, the deterrent of costs, the difficulty of obtaining leave to appeal in the Supreme Court of Canada or in a provincial Court of Appeal, and the lengthy judicial backlog in all courts may well suffice to disincline those interested in quick publicity from going to the courts. In any event, in most cases such actions could be summarily dismissed on the merits at trial, with costs assessed in appropriate circumstances. In addition, the courts have ample deterrent power through awards of only nominal damages or the denial of remedies which are discretionary in certain jurisdictions. In some jurisdictions, particularly irksome litigants can be statutorily barred from judicial proceedings.<sup>58</sup> Costs could even be awarded against counsel in extreme cases of frivolous and vexatious actions.<sup>59</sup> Leave to appeal would probably be denied by the Court of Appeal at that stage, which would preclude the necessity of the Supreme Court of Canada ever being burdened with the matter.

### (3) *The Operation of the "Unprovable" Facts Test*

The new test may be a dangerous one. It is very difficult to determine before the plaintiff has had a chance to utilize the various mecha-

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<sup>56</sup> See, e.g., A. Chayes, Foreword: Public Law Litigation and the Burger Court (1982), 96 Harv. L. Rev. 4, at p. 10 *et seq.*

<sup>57</sup> The "floodgates" concern is a familiar one, of course. For example, the same concern was voiced after the House of Lords decided *Donoghue (or M'Alister) v. Stevenson*, *supra*, footnote 33. However, subsequent courts have been able to clarify the scope of the far-reaching "neighbour" principle in negligence law by articulating a number of principles and categories.

<sup>58</sup> See, e.g., Supreme Court Act, R.S.B.C. 1979, c. 397, s. 67.

<sup>59</sup> *Myers v. Elman*, [1940] A.C. 282 (H.L.). See also, e.g., Rule 57.07, Ont. Rules of Civil Procedure. See, generally, N. Gold, *The Court's Authority to Award Costs against Lawyers*, in E. Gertner (ed.), *Studies in Civil Procedure* (1979).

nisms for discovery what evidence he or she will or will not be able to bring forward. While the court may feel safe, on the facts of this case, in prejudging the evidence and speculating that it is likely to be found wanting, in our view, the old adage applies: hard cases make bad law. The application of this kind of judicial speculation to other cases may be fraught with difficulty. A court can easily underestimate the resourcefulness of plaintiffs and wrongfully deny them their day in court. Indeed, one might question whether the risk of such an error is not so high as to outweigh the risk to the judicial system of allowing a case with a slim chance of success to proceed to trial.

Let us consider the hypothetical example of a plaintiff who brings an action against a tobacco company alleging that his lung cancer is due to cigarettes sold to him by that company. Clearly, he would have evidentiary problems centring around causality. Yet should we not hesitate to prejudge the evidence and strike out the statement of claim on the basis that we do not believe that the plaintiff could ever win? Should he not at least be allowed to try? If one's conclusion on this question would be "yes", is there not an even stronger case to be made where constitutional issues arise? One might also ask, if it is unacceptable for a plaintiff to invoke the processes of a court by alleging facts which are merely speculative, is it not equally inappropriate for the court itself to engage in speculation as to what the plaintiff's evidence may yield?

Wilson J. provides an illuminating discussion of this point when she states:<sup>60</sup>

It has been suggested, however, that the plaintiffs' claim should be struck out because some of the allegations contained in it are not matters of fact but matters of opinion and that matters of opinion, being to some extent speculative, do not fall within the principle that the allegations of fact in the statement of claim must be taken as proved. I cannot accept this proposition since it appears to me to imply that a matter of opinion is not subject to proof. What we are concerned with for purposes of the application of the principles is, it seems to me, "evidentiary" facts. These may be either real or intangible. Real facts are susceptible of proof by direct evidence. Intangible facts, on the other hand, may be proved by inference from real facts or through the testimony of experts. Intangible facts are frequently the subject of opinion. The question of the probable cause of a certain result is a good illustration and germane to the issues at hand. An allegation that the lack of shower facilities at a defendant's brickworks probably resulted in a plaintiff employee's skin disease may in lay language appear to be merely an expression of medical opinion, but it is also in law a determination which the courts can properly infer from the surrounding facts and expert opinion evidence. . . . Indeed, even a finding that an event "would cause" a certain result in the future is a finding of intangible fact. . . .

In my view, several of the allegations contained in the statement of claim are statements of intangible fact. Some of them invite inferences; others anticipate probable consequences. They may be susceptible to proof by inference from real facts or by expert testimony or "through the application of common sense princi-

<sup>60</sup> *Supra*, footnote 1, at p. 478-479 (S.C.R.), 508-509 (D.L.R.). (Emphasis added).

ples". . . We may entertain serious doubts that the plaintiffs will be able to prove them by any of these means. *It is not, however, the function of the court at this stage to prejudge that question.* I agree with Cattanach J. that the statement of claim contains sufficient allegations to raise a justiciable issue.

It is quite commonly necessary for courts to draw inferences from real facts or expert testimony, or to apply common sense principles. For example, in a fatal accident case, courts are called upon to assess damages by computing how much the deceased would have earned had she lived. This can only be done by forecasting how much her income would have increased over her lifetime, and also how long she would have lived. In one sense this is "speculation", since the cause of action only arose because the person died. Although an actuary can provide the court with an expert estimate as to what would have been the probable life expectancy of an "average" person, obviously there can be no proof that the particular deceased would have lived to the average age. On the contrary, the statistical probability is far greater that the particular deceased would have lived either longer or shorter than the average. Yet such assumptions are commonplace and vital if justice is to be done in particular circumstances. How, then, can we draw any principled distinction between legitimate speculation as to such facts and the apparently illegitimate speculation which Dickson J.'s judgment implies would have been necessary for the court to make in this case?

An important element of "speculation" is the need to look into the future. Yet most applications for an injunction will involve the court in a forecasting exercise—or "speculation"—as to what will happen in the future. Although injunction applications are usually supplemented by affidavit or other "evidence", inherently the key facts are unprovable because there can be no facts *in futuro*. That is because the future is not amenable to "proof" in the conventional sense of that term. Accordingly, the question remains: under what circumstances should a court be willing or unwilling to speculate as to the future?

Let us hypothesize that the plaintiffs in *Dismantle* were successful in calling as a witness the Soviet Ambassador to Canada who testified that if Canada were to become involved in the cruise programme, the Soviet Union would regard it as a more threatening and risky neighbour than otherwise and, as a result, it would be more likely to make Canada a military target in the event of nuclear war. Alternatively, suppose that the plaintiffs tendered as evidence a resolution of the Supreme Soviet to the effect that Soviet missiles would only be aimed at countries where cruise missiles were housed or had been tested. Though the probative value of such evidence might be discounted by the court, such evidence would presumably remove the "impossibility" of determining how an independent sovereign nation would react. Yet the majority commented:<sup>61</sup>

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<sup>61</sup> *Ibid.*, at pp. 452 (S.C.R.), 488 (D.L.R.).

Since the foreign policy decisions of independent and sovereign nations are not capable of prediction, on the basis of evidence, *to any degree of certainty approaching probability*, the nature of such reactions can only be a matter of speculation. . .

With respect, the majority is clearly right that all predictions involve a degree of probability. But this analysis is incapable of any meaningful mathematical precision, despite the use of such terms as "probability". We might agree in principle that if something is perceived to be highly speculative, the court ought not to go along with it, whereas if it is merely slightly speculative, it should do so. Yet how is that distinction to be drawn? Can it be anything more than "crystal ball gazing" to attempt to determine whether the evidence that a plaintiff might call will be of probative value approaching probability? Given the well-established principle that a plaintiff should be denied his or her day in court only in extreme cases where there are unquestionably sound reasons for doing so, this kind of judicial speculation as to probability is, with respect, itself so uncertain and conjectural as to cause serious difficulty for future courts.

### *Wilson J.'s Concept of Rights*

As noted earlier, in her judgment Wilson J. rejects the test accepted by the majority, suggesting that it is not the function of the court to pre-judge the evidence. Taking the facts pleaded as proven, she then asks whether they disclose a reasonable cause of action in that they allegedly violate section 7 of the Charter. Like Cattanach J. in the Trial Division of the Federal Court, she concludes that this was a justiciable question. However, she goes on to develop a sophisticated, if somewhat narrow, concept of "rights" in the context of the Charter, distinguishing between rights in the sense of that term as intended by the drafters, and rights in some other sense.<sup>62</sup>

Wilson J.'s reasoning begins with the premise that rights, even a substantive right to life, liberty and security of the person, cannot be absolute.<sup>63</sup> This is explained on the basis of the "political reality of the modern State".<sup>64</sup> One example given is that the failure of government to limit the speed of traffic on highways may threaten our right to life and

<sup>62</sup> Her approach is reminiscent of the early cases determining the jurisdiction of the Federal Court of Appeal, in which it was held that although section 28 of the Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), uses the term "decision or order", this meant only final decisions and does not include certain other decisions which do not constitute "decisions" within the meaning of that term in section 28. See, e.g., *Attorney-General of Canada v. Cylien*, [1973] F.C. 1, 43 D.L.R. (3d) 590 (C.A.).

<sup>63</sup> In *Singh et al. v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, (1985), 17 D.L.R. (4th) 422, Wilson J. held that even if the right conferred in s. 7 is a single right, each element thereof must be given meaning. Accordingly, there would be a deprivation of the right if one were denied any one of the constitutive elements.

<sup>64</sup> *Supra*, footnote 1, at pp. 448 (S.C.R.), 517 (D.L.R.).

security in that it increases the risk of highway accidents, but such conduct would not, in her view, fall within the scope of the rights protected by section 7 of the Charter. But why not? No answer is given as to why it would not be "political reality" to make such an assumption, perhaps resorting later in the analysis to section 1 of the Charter in order to justify restrictions on one's section 7 rights.

A generalization about rights not being absolute is not at all startling in the context of such rights as freedom of speech: most of us accept the cliché that freedom of speech does not extend to the right to shout "fire!" in a crowded theatre. Everyone's rights are limited by those of others, to the extent that one person's rights may intrude upon those of another. But one might question the relevance of this type of reasoning to the right to life. With the possible exception of capital punishment for murder (where there has been a conviction for taking away the life of another) and self-defence, the right to life—subsequent to birth, at the very least—is traditionally treated as an absolute value.

One can conceive of circumstances, such as during war time, in which even the right to life might be limited. Conscription of soldiers to save the lives of the members of the political community constituting the State who are threatened by war might well be covered by section 7 of the Charter. However, the practice may be justified by subsequent reference to section 1 as being indispensable in a "free and democratic society", in an effort to ensure that the community remains free. Section 7 of the Charter need not be considered in isolation. It can, and probably should, be read together with section 1. This would obviate the need to come up with a special and technical meaning of "right" exclusively for section 7 cases or, perhaps, for Charter cases in general. Thus, to stay with Wilson J.'s example of the highway laws, it is quite possible that the risks engendered by travelling at 100 kilometres per hour on the highway are just "in a free and democratic society" because of the benefits of the mobility conferred upon members of that society.

In other words, while we can agree with Wilson J. that the Charter does not require us to treat the right to life, liberty and security of the person as being absolute, such limitations on these rights as may be necessary are imposed not by the judiciary, through sophisticated redefinitions of the word "life", but by the Constitution itself, in the moderating and balancing influence of section 1.<sup>65</sup> The court's apparent refusal to resort to section 1 in these circumstances is consistent with its judgment in the *Quebec Association of Protestant School Boards* case,<sup>66</sup>

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<sup>65</sup> In addition, of course, under s. 33 Parliament or a provincial legislature may also deny s. 7 guarantees by legislation explicitly declared to operate notwithstanding s. 7 of the Charter.

<sup>66</sup> *Attorney-General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, (1984), 10 D.L.R. (4th) 321.

which held that the denial at issue was so clear that it could not constitute a "reasonable limit" within the meaning of section 1. Professor Peter Hogg has criticized this position, stating that it is based upon "an amorphous distinction" which "introduces an unnecessary and inappropriate complexity into the application of section 1".<sup>67</sup>

The application of section 1 we suggest is perfectly compatible with Wilson J.'s position that the real or apprehended external threats to the State must be considered in interpreting the concept of "right" as used in the Charter. She says:<sup>68</sup>

In order to protect the community against such threats it may well be necessary for the State to take risks which incidentally increase the risk to the lives or personal security of some or all of the State's citizens.

We would agree that this may well be necessary, and that such necessity may be justifiable under section 1. We would also suggest, with respect, that this might be a better way to interpret the Charter, as it involves looking at the Charter as a whole rather than focusing on section 7 in isolation. This necessitates weighing these individual rights against the necessity of their infringement or denial by the State on the basis of some reasonably justifiable higher collective imperative.

However, the difference between the result that would be obtained by that method and by Wilson J.'s reasoning is that the necessity for such infringement presumably would have to be determined by the court. Thus, the court would have to hear the case and decide whether such steps were justified as being necessary in a free and democratic society. In this regard, we must, with respect, disagree with Wilson J.'s contention that:<sup>69</sup>

The rights under the Charter not being absolute, their content or scope must be discerned quite apart from any limitation sought to be imposed upon them by the government under section 1.

Nor can we agree with her view that such steps as the State may have to take to increase the risk to the lives of citizens "cannot have been contemplated by the draftsman of the Charter as giving rise to violations of section 7".<sup>70</sup>

The only arguments she gives in support of her view are three quotations. The first, from John Rawls' work, *A Theory of Justice*,<sup>71</sup> is as follows:

The government's right to maintain public order and security is. . . a right which the government must have if it is to carry out its duty of impartially supporting the

<sup>67</sup> P.W. Hogg, *Constitutional Law of Canada* (2nd ed., 1985), p. 683.

<sup>68</sup> *Supra*, footnote 1, at pp. 489 (S.C.R.), 517 (D.L.R.).

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

<sup>71</sup> J. Rawls, *A Theory of Justice* (1971), p. 213, cited *supra*, footnote 1, at pp. 489 (S.C.R.), 517 (D.L.R.).



conditions necessary for everyone's pursuit of his interests and living up to his obligations as he understands them.

As a generalization this is unquestionably correct, but Rawls was not discussing section 7 of the Charter. He was referring to the power of government in general terms. We can share this conclusion, if section 1 is applied as a limitation on the apparently absolute working found in section 7. The other quotations she offers, one from the Ontario Court of Appeal in the *Rauca* case<sup>72</sup> and the other from Ronald Dworkin, *Taking Rights Seriously*,<sup>73</sup> are equally general and apply equally well to section 1. Thus, while we might be able to agree with her if she said that such steps as the community takes against external threats do not give rise to violations of the Charter, we must, respectfully, disagree with her conclusions that it cannot give rise to violations of section 7.

In concluding her examination of section 7, Wilson J. states:<sup>74</sup>

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 section 7 even though such action may have the incidental effect of increasing the risk of death or injury that individuals generally have to face.

But why? Despite her use of the passive mood ("there must be a presumption"), whose presumption is it but Wilson J.'s, and what authority is there for it? None is offered. If we can agree that every rational person is justifiably less secure in the face of increasing risk of death, what possible difference would it make if such an increasing risk is the result of an act which is domestic, as opposed to one which is international in scope, having regard to the meaning of section 7?

It seems that Wilson J., in substance, is engaging in an unarticulated application of the kind of weighing mandated by section 1. If that is so, would it not be a more satisfactory rationale, on a motion to strike, for the court to look at the cause of action by examining the Charter as a whole, not merely those sections pleaded by the plaintiff? If the increase in the risk of death through nuclear war is arguably justified in a free and democratic society, then it is already clear that the case must fail on the law and, as held by Marceau J. in the passage in the *Inuit Tapirisat* case approved by the Supreme Court of Canada,<sup>75</sup> a court on a motion to strike is in as good a position as the trial judge to come to this conclusion.

<sup>72</sup> *Re Federal Republic of Germany and Rauca* (1983), 145 D.L.R. (3d) 638, 41 O.R. (2d) 225 (C.A.).

<sup>73</sup> R. Dworkin, *Taking Rights Seriously* (1977).

<sup>74</sup> *Supra*, footnote 1, at pp. 490 (S.C.R.), 518 (D.L.R.).

<sup>75</sup> *In Inuit Tapirisat of Canada v. Leger*, [1979] 1 F.C. 213, at p. 217, (1978), 87 D.L.R. (3d) 26, at p. 29. Marceau J. stated:

... The order sought was to be granted only if I come to the conclusion that there

In a startling qualification to her earlier conclusion, Wilson J. adds the following:<sup>76</sup>

This is not to say that every governmental action that is purportedly taken in furtherance of national defence would be beyond the reach of section 7. If, for example, testing the cruise missile posed a direct threat to some specific segment of the populace—as, for example, if it were being tested with live warheads—I think that might raise different considerations. A court might find that that constituted a violation of section 7 and it might then be up to the government to try to establish that testing the cruise with live warheads was justified under section 1 of the Charter. Section 1, in my opinion, is the uniquely Canadian mechanism through which the courts are to determine the justiciability of particular issues that come before it. It embodies through its reference to a free and democratic society the essential features of our constitution including the separation of powers, responsible government and the rule of law. It obviates the need for a “political questions” doctrine and permits the court to deal with what might be termed “prudential” considerations in a principled way without renouncing its constitutional and mandated responsibility for judicial review.

This comment raises more questions than it answers. If some governmental actions purportedly taken in furtherance of national defence are beyond the reach of section 7, while others are not, what is the test for determining which is which? The answer to that is not found in Wilson J.'s judgment. Furthermore, if Wilson J. is suggesting that sections 1 and 7 be read together to screen justiciable cases “in a principled way” then, again, she has failed to articulate the relevant principle. In its absence we are left with the uncomfortable feeling that she, too, is merely prejudging the evidence.

Her example of live warheads may be more confusing than helpful. When can the court look behind the motives or actions of the government in defence matters? These questions are not answered by the live warheads illustration, and all we can deduce from it is that she intended to imply a different degree of risk to the citizenry. Yet, in any event, this involves her prejudging the evidence by predicting both the benefit to our defence resulting from the use of live warheads and the risk to Canadians occasioned by straying missiles. Thus, Wilson J. also expressly rejects the application of section 1, arriving at her conclusion by her own speculations as to the evidence which, though different from those of the majority, unfortunately remain speculations. If she relied on section 1, she would not have needed to prejudge the evidence and would have provided us with a “made in Canada” surrogate of the political questions doctrine—in our view, a more “principled” and “prudential” approach to Charter interpretation. It would, of course, still have neces-

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was no issue which could be better explored at trial, the action as it stood being clearly unsustainable.

See Estey J. in *Attorney-General of Canada v. Inuit Tapirisat of Canada*, *supra*, footnote 3, at pp. 740-741 (S.C.R.), 5 (D.L.R.).

<sup>76</sup> *Supra*, footnote 1, at pp. 490-491 (S.C.R.), 518-519 (D.L.R.).

sitated some weighing of the question on the merits. But whether or not a certain degree of military action taken to preserve a free society is justifiable in a free and democratic society constitutes a value judgment which an appellate court is in as good a position to make as is a trial judge.

Some clue to the difficulty she may have faced is found in her phrase, "such action may have the *incidental effect* of increasing the risk. . .".<sup>77</sup> This raises the difficulty that speculation is necessary as to the government's motives. Words like "directed at any member of the immediate political community" require judicial guessing as to what the government's motive was in permitting cruise missile testing. Is this any less arbitrary and unsatisfying than the alleged speculation found in the plaintiff's evidence? If one must take as proven the allegation in the statement of claim that nuclear war *will* result (as Wilson J. does), then it seems rather odd to refer to its effect as "incidental" in increasing the risk of death: surely nuclear war can only result in massive and widespread death. There can be nothing "incidental" about it. Moreover, such words force us into yet another classification exercise based on speculation as to motives: was the impugned action directed at any member of the political community, or is the risk caused thereby merely an incidental effect? In the context of nuclear war, surely a distinction between what is intended to be directed at members of the immediate political community and what is an incidental effect is a distinction without a practical difference.

Similarly, Wilson J.'s purported distinction between the risk created by actions of the government of Canada and the risk created by the reactions of other states is a difficult distinction to preserve in a "principled way". If the action of the government of Canada causes a reaction by other states, it seems to follow that the reaction may well not have occurred had the action not been taken. While there is nothing any Canadian court can do about the reaction of other states, of what relevance is that to a court being asked to make a finding as to an action of the Canadian government? This was not a case involving any issue concerning the extraterritorial application of Canadian law. Admittedly, the possible reactions of other states to Canadian actions would have to be anticipated and would therefore involve practical problems of proof, but for her part, Wilson J. had already rejected this as ground for striking out the statement of claim.

Wilson J.'s reasoning in this case is to be contrasted with her dissenting judgment in *R. v. Big M Drug Mart*,<sup>78</sup> which was released at almost the same time. In that case, she held that in testing the constitu-

<sup>77</sup> *Ibid.*, at pp. 490 (S.C.R.), 518 (D.L.R.). (Emphasis added).

<sup>78</sup> [1985] 1 S.C.R. 295, (1985), 18 D.L.R. (4th) 321.

tionality of legislation, both its purpose and its *effects* must be considered.<sup>79</sup> There was no notion that intention was determinative, while effect was incidental. In this sense, her two judgments may be somewhat at odds. Of the two, we would respectfully prefer the proposition that both the purpose and the effect of governmental conduct, whether manifested through legislation or through executive action, are potentially relevant and should be considered. There ought to be no difference in a parliamentary system where the legislative and executive branches of government are combined. Regardless of the government's professed intention, if the facts as asserted by the plaintiff must be taken to be true, and if the plaintiff asserts that cruise missile testing will increase the likelihood of nuclear war, it seems somewhat arbitrary to ignore the effect in *Dismantle*, but to consider the effect in the *Big M Drug Mart* case.

In concluding this point, we would observe that the consensus apparently reached by all the judges at the appellate level, as well as by some learned commentators such as Professor Hudson Janisch,<sup>80</sup> is that the statement of claim should have been struck out. Despite this, there has been no articulation of a principled basis for doing so. Perhaps this tells us more about the pitfalls of screening in constitutional cases than it does about the statement of claim in the *Dismantle* case itself. At bottom, there may not be very much practical difference between the United States test, overtly and candidly termed a "political questions" test, and our own test, the "unprovable facts" doctrine. If the reason why the facts are assumed to be unprovable is because they are essentially political facts, then all that has been accomplished by the two judgments of the Supreme Court of Canada in this case has been to relabel the political questions test for Canadian consumption, all the while professing no need to rely upon it. If that is the situation, then the American test is to be preferred. Although each test appears arbitrary and unamenable to prediction, at least the United States test does not appear to prejudge the evidence, and has the virtue of being clearly and candidly a political test.

### Costs

In all judgments rendered by the Supreme Court and the Federal Court of Appeal, the plaintiffs were ordered to pay costs at all three levels. Neither Supreme Court judgment examined the issue of costs, merely following the usual practice that appeals which are dismissed are dismissed with costs against the appellant. The "costs in the cause" rule is the standard rule in Anglo-Canadian jurisprudence.<sup>81</sup> However,

<sup>79</sup> *Ibid.*, at pp. 360-362 (S.C.R.), 372-374 (D.L.R.).

<sup>80</sup> Annotation (1985), 12 Admin. L.R. 18, at p. 20.

<sup>81</sup> See, e.g., M. Orkin, *The Law of Costs* (1968).

the Charter of Rights is not an Anglo-Canadian institution. The constitutional doctrine that neither level of government may legislate in certain areas of protected rights is new to Canadian jurisprudence and substantially "americanizes" our received notions of constitutionality.

A primary purpose of the usual costs rule in Anglo-Canadian law is to provide a screening or deterrent device.<sup>82</sup> It is derived from private law litigation, and is intended to encourage settlement. As such, it may not be appropriate to apply the normal rule of costs to the evolving constitutional field, particularly when the Supreme Court of Canada's application for leave to appeal procedures themselves represent an arduous screening process. If the Supreme Court of Canada did not wish to hear the *Dismantle* case, it need not have granted leave to appeal. Having screened the case and concluded that it was worthy of the court's time, it seems gratuitous to double-screen it by means of the costs principle. It may be unfair to the plaintiff to hold that a case is worthy of the attention of the highest court in the land, but then, through an award of costs, in effect to hold that it should never have been brought.

If the appellant's counsel had in some fashion misled the court and induced it through trickery or error to grant leave to appeal, the situation certainly would be different;<sup>83</sup> however, absent such improbable circumstances, there is little rationale for not adopting the principle normally applied by the United States Supreme Court and letting each side bear its own costs.<sup>84</sup> This is particularly important to recognize in a constitutional case. By their very nature, such cases cannot be settled out of court as readily. Damages are usually not an issue, and there is no question of penalizing a defendant or plaintiff whose greed may have thwarted settlement efforts.<sup>85</sup>

The peace groups would have had to pay as much as \$15,000 in legal costs to the government.<sup>86</sup> This issue was raised as a question in the House of Commons and obtained responses from the Prime Minister

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<sup>82</sup> A.L. Goodhart, *Costs* (1929), 38 *Yale L.J.* 849.

<sup>83</sup> See I. Jacob, *The Inherent Jurisdiction of the Court* (1970), 23 *Curr. L. Probs.* 23, at pp. 46-48; see also *supra*, footnote 59.

<sup>84</sup> In the American practice, courts have no general authority to order the unsuccessful litigant to pay the successful litigant's lawyers' fees and general disbursements, although they enjoy a limited authority with respect to the relatively minor issue of court filing fees. See Rule 54(d), *Fed. Rules of Civ. Pro.* In certain recent statutes, Congress has explicitly reversed this position and allowed for the award of attorney's fees. See, especially, *The Civil Rights Attorney's Fees Award Act*, 42 U.S.C., s. 1988 (1972), as amended.

<sup>85</sup> See such costs provisions as Rule 57(18) in the B.C. Supreme Court Rules permitting the court to award "up to double costs" if an offer to settle is made and the plaintiff recovers as much as or more than the amount of the offer.

<sup>86</sup> *Petter, loc. cit.*, footnote 50, at p. 484.

and the Minister of Justice. Eventually the government decided not to collect these costs, presumably due to political considerations.<sup>87</sup> The net effect has been to politicize the question rather than leaving it to be considered fully at the judicial level. Since such major bills of costs are likely to represent very powerful deterrents to the launching of constitutional cases, both meritorious and otherwise, it is most unsatisfactory if the financial feasibility of access to the courts is to be protected not by the courts themselves but through the discretion of the executive branch, which is usually the defendant in such cases. It is sincerely to be hoped that the Supreme Court of Canada will review its costs policies in constitutional cases and adopt the American rule in the absence of compelling reasons to do otherwise.

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EVIDENCE—TESTS FOR SUFFICIENCY OF EVIDENCE: *Mezzo v. The Queen*

R.J. Delisle\*

### *Introduction*

In *Mezzo v. The Queen*<sup>1</sup> the accused was charged with rape and the only issue at trial was identification. The trial judge weighed and considered the quality of the evidence of identification and granted a motion for a directed verdict of acquittal. The Manitoba Court of Appeal ordered a new trial. The Supreme Court of Canada dismissed the accused's appeal. The majority believed the trial judge had erred in assessing the sufficiency of the identification evidence, as questions of credibility and the weight to be given to evidence are matters peculiarly within the province of the jury.

Judges are frequently called on to assess the sufficiency of evidence for purposes other than determining guilt or innocence. Section 475 of the Canadian Criminal Code<sup>2</sup> advises the justice on a preliminary inquiry to commit an accused for trial if he concludes that "in his opinion the evidence is sufficient to put the accused on trial". An extraditing judge is instructed by the Extradition Act<sup>3</sup> to employ that very same test

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<sup>87</sup> *Ibid.*, at p. 484, note 39, citing an estimate given by the then Minister of Justice, Hon. John Crosbie: House of Commons, Debates, May 4, 1985, at p. 4721.

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<sup>1</sup> [1986] 1 S.C.R. 802, (1986), 30 D.L.R. (4th) 161.

<sup>2</sup> R.S.C. 1970, c.C-34.

<sup>3</sup> R.S.C. 1970, c.E-21, s. 18(1)(b).

in evaluating the foreign state's case prior to ordering departure. A judge at trial is asked to evaluate the sufficiency of the prosecutor's case whenever the defence applies for a directed verdict of acquittal and the yardstick again is the same.<sup>4</sup> On an appeal from conviction the appellate court has power, pursuant to section 613 of the Criminal Code, to evaluate sufficiency and to set aside the verdict if "it is unreasonable or cannot be supported by the evidence". Again, the test should be the same. Glanville Williams, describing the role of the trial judge on an application for a directed verdict, wrote:<sup>5</sup>

The test is whether there is sufficient evidence for a conviction to be upheld. The trial judge, in ruling on the submission, must put himself in the position of an appellate court hearing an appeal against conviction.

This comment explores the nature of this common test. To determine its nature we must first ask why the judge, at preliminary, at trial or on appeal, is called on to perform his reviewing function.

### *Rational Decision-making*

In the beginning we resolved disputes by appealing directly to the supernatural. We conducted our trials by ordeal and by battle and asked God to support the just. As the Church withdrew its support for such processes the system of trial by jury evolved. Initially the jury investigated the matter, gathered data, listened to the judge's advice on the law and decided the dispute. Gradually, through the fifteenth century the process changed and the jury began to decide on facts, not from their own investigation, but on the basis of information presented by the parties in open court through witnesses. With these developments the common lawyers begin to point with pride to their adversary system of fact-finding as a relatively rational process. While the jury remains the ultimate arbiter of fact the system seeks to control its decision-making, eliminating emotion and promoting rationality.

To promote rational decision-making a variety of techniques are employed. We caution juries at the outset to put aside their biases and prejudices and exhort them to try to decide the case solely on the basis of the evidence led. We employ a jury selection process designed to assemble and choose an impartial jury prepared to act rationally. We invoke the hallowed phrase "presumption of innocence" to counter any emotional reaction that the jury might have on seeing the prisoner in custody. We allow our judges to comment on the evidence, hoping that their advice, from a position of greater experience, will assist in arriving

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<sup>4</sup> See *U.S.A. v. Shephard*, [1977] 2 S.C.R. 1067, (1976), 30 C.C.C. (2d) 424 (*sub nom. U.S.A. v. Sheppard*).

<sup>5</sup> G. Williams, *Application for a Directed Verdict*, [1965] Crim. L.Rev. 343, at p. 346.

at a proper verdict. We insist that the evidence led be relevant to a material issue. By relevance we mean logical probity. We demand a rational connection between the evidence led and the proposition thereby sought to be established. Rules of evidence are fashioned to promote greater trustworthiness of verdict. We equip the trial judge with a discretion to exclude relevant evidence when it is forecast that the evidence may be improperly used or given inordinate weight and its prejudicial impact is seen then as too great in relation to its probative worth. We warn the jury that in their assessment of credibility they are to be cautious in their acceptance of testimony about past facts. We alert them to the dangers of faulty memory, defective perception and insincerity. All these things we do, to confine the jury, insofar as we are able, within the parameters of rationality.

We recognize, however, that despite our admonitions, our exhortations, our evidentiary rules, a jury, made up of human beings with all their frailties and wants, may act unreasonably through weakness of emotion and judgment. When a judge observes irrational decision-making, either as having occurred in the past, or as possibly occurring in the future, he is obliged to deal with the same and needs to be equipped with additional techniques of control. Accordingly the appellate court judge is equipped with power to overturn a conviction, a trial judge equipped to direct a verdict of acquittal, a judge at preliminary equipped to refuse a committal, when he is persuaded that the evidence is insufficient to support a conviction rationally. Given that this is the rationale how should the judiciary go about its task? What is the nature of the test? While the processes we are examining were fashioned for jury trials they are regarded as equally applicable to trials by judge alone. In such cases the judge theorizes what he would do if sitting with a jury, notwithstanding that he is the trier of fact.

### *The Test for Sufficiency*

The test in each case is simply to ask whether, in the opinion of the judge, a jury acting reasonably could conclude guilt. The judge, in assessing sufficiency, must, by definition, weigh the evidence, but we need to recognize the limited way in which that weighing occurs. The judge does not ask himself whether he personally is satisfied or dissatisfied with the evidence, but rather asks whether a jury, twelve persons acting reasonably, could be satisfied. Also, the judge, at preliminary, at trial or on appeal, is not permitted to assess the credibility of the witnesses as that is always left as a matter for the jury as the ultimate trier of fact. This highlights a very important point. The judiciary's task in evaluating sufficiency is difficult only when the prosecution's case is based on circumstantial evidence. If the evidence is all direct, and there is evidence of each material ingredient, then, since credibility belongs in the sole province of the jury, there is no further role for the judge to play. If



the evidence is circumstantial, however, in order to find guilt a trier of fact must first find certain facts proved by the evidence, and then infer from those basic facts that other facts essential to conviction also existed. It is in evaluating the rationality of the necessary derivative inference, in testing its legitimacy, that the judge, either at preliminary, at trial or on appeal, performs the necessary weighing function. The judge is well equipped to make such an evaluation and in doing so does not interfere with the jury's function. Willes J. wrote:<sup>6</sup>

We quite agree that the judges are not to determine facts, and therefore where evidence is given as to any facts the jury must determine whether they believe it or not. But the judges do know, as much as juries, what is the usual and normal state of things. . .

The jury's function is to decide, on the basis of a case filtered for worth by a judge, whether the propositions alleged actually exist. The judge's function is to ensure that such a decision is rational. Lord Blackburn described the two non-competing functions:<sup>7</sup>

. . . if the facts, as to which evidence is given, are such that from them a farther inference of fact may legitimately be drawn, it is for the jury to say whether that inference is to be drawn or not. But it is for the judge to determine, subject to review, as a matter of law whether from those facts that farther inference may legitimately be drawn.<sup>6</sup>

More recently, in Canada, in *U.S.A. v. Sheppard*,<sup>8</sup> the majority agreed that:

. . . to justify him in withdrawing the case from the jury. . . is to be determined according to whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty.

In the *Sheppard* case the examining judge had refused extradition as he regarded the evidence as "manifestly unreliable". If the evidence was manifestly unreliable no reasonable jury, properly instructed, could return a verdict of guilty. The Supreme Court of Canada held this to be error. But note exactly what the error was. The evidence tendered in that case was that of an accomplice who was thereby purchasing immunity from prosecution. The extraditing judge was not satisfied with his credibility. The Supreme Court noted that the cases the judge had relied on were all distinguishable as cases involving circumstantial evidence. In distinguishing such cases the Supreme Court evidently recognized the necessary role of the judge in weighing circumstantial evidence and determining whether the inferences necessary to guilt were rational.

It is not enough for the judge to ask whether there is "some evidence"; the sufficiency of the evidence must be related to the task ahead.

<sup>6</sup> *Ryder v. Wombwell* (1863), L.R. 4 Ex. 32, at p. 40.

<sup>7</sup> *Metropolitan Ry. Co. v. Jackson* (1877), 3 App. Cas. 193, at p. 207.

<sup>8</sup> *Supra*, footnote 4, at pp. 1080 (S.C.R.), 427 (C.C.C.).

Though we continue to see some judgments referring to a distinction between "no evidence" and "some evidence" and allowing that the latter is sufficient to get past the judge and into the hands of the jury such terms are, alone, without meaning. Over a century ago a great English judge wrote:<sup>9</sup>

It was formerly considered necessary in all cases to leave the question to the jury if there was any evidence, even a scintilla, in support of the case; but it is now settled that the question for the judge. . . is not. . . whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established.

Brett J., in *Bridges v. North London Ry. Co.*,<sup>10</sup> similarly explained:

[The proposition] cannot merely be, is there evidence? That has no meaning. The proposition seems to me to be this: are there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the Plaintiff is bound to maintain?

In *Mezzo v. The Queen*<sup>11</sup> the Supreme Court of Canada unfortunately resurrected the useless phrase "no evidence". The majority opinion recites that a judge may direct a verdict only if there is "no evidence", but then defines the phrase as meaning something quite different from "no evidence". The majority opinion, by McIntyre J., says that "circumstantial evidence, which did not comply with the rule in *Hodge's Case*, [is] no evidence at all going to show guilt".<sup>12</sup> For Wilson J., "in this context 'no evidence' is not to be taken literally as meaning a total absence of any evidence but as meaning rather no evidence capable of supporting a conviction".<sup>13</sup> For both "no evidence" really means "insufficient evidence". Despite their reluctance to say it, both opinions in fact clearly approve of the trial judge weighing the sufficiency of the evidence in circumstantial evidence cases.

### *Incorporating the Standard of Proof*

When the judge examines a case for sufficiency, when he asks whether a jury could rationally conclude guilt, he must incorporate into that weighing process the requisite standard of proof.<sup>14</sup> The judge in a criminal case must ask whether a jury could rationally be persuaded of the accused's

<sup>9</sup> *Supra*, footnote 6, at p. 39 (Willes J.).

<sup>10</sup> (1874), L.R. 7 H.L. 213, at pp. 232-233. Professor Wigmore described this passage as the best statement of the test: J.H. Wigmore, *Evidence* (Chadbourne Rev.), s. 2494.

<sup>11</sup> *Supra*, footnote 1.

<sup>12</sup> *Ibid.*, at pp. 843 (S.C.R.), 171 (D.L.R.).

<sup>13</sup> *Ibid.*, at pp. 813 (S.C.R.), 190 (D.L.R.).

<sup>14</sup> See for example *R. v. Sawrenko* (1971), 4 C.C.C. (2d) 338 (Y.T.C.A.), and *R. v. Nelles* (1985), 16 C.C.C. (2d) 97 (Ont. Prov. Ct.). But see *R. v. Heywood* (1971), 6 C.C.C. (2d) 141 (B.C.C.A.), and *R. v. Syms* (1979), 47 C.C.C. (2d) 114 (Ont. C.A.).

guilt beyond a reasonable doubt. Incorporating the requisite standard, though admittedly said to be inappropriate in some judgments, is clearly logically necessary. *Some* standard must be incorporated. It is impossible to weigh anything without employing a standard. If you ask me as your grocer to weigh the apples you've just selected for purchase, and I say "they weigh eight", you have much reason to complain if I refuse to tell you against which standard I have weighed them, metric or British. Eight has no meaning; you want to know if it is eight pounds or eight kilograms. If you ask me how I am feeling it would be natural to say that on a scale of one to ten I presently rate a seven. Since a standard is necessary, does it not make sense to use the standard against which the trier of fact must ultimately be satisfied? A verdict in a criminal case is only proper, is only rational, if the trier of fact is satisfied beyond a reasonable doubt. A judge who fails to incorporate the standard into his measurement runs the risk of an irrational verdict. Consider the anomaly if the judge were obliged to leave the case to the jury when he believed that a jury could reasonably conclude that the evidence preponderated in favour of the prosecutor, but believed that no jury could reasonably be satisfied beyond a reasonable doubt. That judge would then be required to admonish the jury that they could convict only if satisfied beyond a reasonable doubt but still leave with them a case about which he is convinced that no reasonable jury could be satisfied with that standard! The great American jurist, Jerome Frank, wrote:<sup>15</sup>

If the judges abandon responsibility for determining whether reasonable juries could find that derivative inferences ("circumstantial evidence") meet that higher standard, I think they cut the heart out of our oft-repeated boast that, in this land, no man can be jailed or put to death by the government unless proof of his guilt has been established beyond a reasonable doubt.

The prosecution in a criminal case generally entertains two burdens: an evidential burden and a persuasive burden. The evidential burden, the duty of going forward, is the burden of passing the judge. The persuasive burden is the burden of satisfying the jury. While these burdens are different they are by necessity related. Professor McNaughton put it this way:<sup>16</sup>

. . . the duty of bringing forward evidence, or burden of production of evidence, is a derivative function of the burden of persuasion of a jury, albeit the relevant jury is a hypothetical reasonable jury rather than a real one.

Professor Cross wrote:<sup>17</sup>

The test to be applied by the judge in order to determine whether there is sufficient evidence in favour of the proponent of an issue, is for him to inquire whether

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<sup>15</sup> *U.S. v. Masiello*, 235 F. (2d) 279, at p. 294 (2d Circ., 1956).

<sup>16</sup> J.T. McNaughton, *Burden of Production of Evidence: A Function of a Burden of Persuasion* (1955), 68 Harv. L. Rev. 1382, at p. 1382.

<sup>17</sup> R. Cross and C. Tapper, *Cross on Evidence* (6th ed., 1985), p. 165 (Emphasis added).

there is evidence which, if uncontradicted, would justify men of ordinary reason and fairness in affirming the proposition which the proponent is bound to maintain, *having regard to the degree of proof demanded by the law with regard to the particular issue.*

The degree of proof demanded by the law in criminal cases is, of course, proof beyond a reasonable doubt. In cases of circumstantial evidence that degree of proof *may* be expressed as Baron Alderson chose to word it in *Hodge's* case.<sup>18</sup> That is to say, a jury should only convict if satisfied that the circumstances are consistent with guilt and inconsistent with any other rational conclusion.

The majority in *Mezzo v. The Queen*<sup>19</sup> appears to hold, in dicta, that in a case of circumstantial evidence the trial judge is not to assess the quality of the evidence against some standard such as that the jury be satisfied in accordance with the rule in *Hodge's* case. The majority writes that "even in circumstantial cases the law now is that determination as to compliance with the rule in *Hodge's* case would be left to the jury".<sup>20</sup> The majority denies the worth of earlier decisions which cast a duty on the trial judge to decide whether the evidence could satisfy the rule in *Hodge's* case. They are seen as "effectively overruled".<sup>21</sup> According to the majority, the trial judge does not screen the evidence to see whether the evidence *could* reasonably be construed by the jury as satisfying the rule in *Hodge's* case. The majority, however, in a lengthy treatment of the Supreme Court earlier classic decision in *R. v. Comba*,<sup>22</sup> attempts to reconcile the same by saying the court in *Comba* found that the trial judge should have directed a verdict of acquittal as "[t]he evidence was dubious only because in the application of the test in *Hodge's* case it cast the balance neither way".<sup>23</sup> It would seem that the majority contradicts itself in successive paragraphs and this issue is, accordingly, still left unresolved.

Why should an accused be forced to lead a defence before the prosecution has presented a case at least capable of rationally satisfying the requisite standard of proof? Surely the judiciary has the obligation of ensuring that the prosecution comes up to scratch. By erecting this hurdle the judge reinforces in a special way the accused's right to silence. If an accused elects to exercise his right to remain silent and chooses not to testify he runs the risk that the jury will take an adverse inference from his silence. He also runs the risk that an appellate court will take

<sup>18</sup> See *R. v. Cooper*, [1978] 1 S.C.R. 860.

<sup>19</sup> *Supra*, footnote 1.

<sup>20</sup> *Ibid.*, at pp. 843 (S.C.R.), 171 (D.L.R.).

<sup>21</sup> *Ibid.*, citing *R. v. Paul*, [1977] 1 S.C.R. 181, (1975), 64 D.L.R. (3d) 491, and *Lavoie v. R.*, [1977] 1 S.C.R. 193, (1977), 39 C.C.C. (2d) 480 n.

<sup>22</sup> [1938] S.C.R. 396, [1938] 3 D.L.R. 719.

<sup>23</sup> *Supra*, footnote 1, at pp. 842 (S.C.R.), 170 (D.L.R.).

into account his failure to testify when determining whether there was a "substantial miscarriage of justice" in the court below. Speaking for the majority in the Supreme Court of Canada in *Corbett v. The Queen*<sup>24</sup> Pigeon J. wrote:

No one can reasonably think that a jury will fail, in reaching a verdict, to take into account the failure of the accused to testify, specially in a case like this. This being so, it is a fact properly to be considered by the Court of Appeal when dealing with the question: "Is this a reasonable verdict?"

The accused's ability to move for a directed verdict allows the accused to test the Crown's case without being exposed to either peril and so makes truly meaningful his right to silence.

The proposed Canada Evidence Act, 1986, which may yet be introduced, provides:

s.10(1) Where the evidential burden in a criminal proceeding is on the prosecution, it is discharged if the court, without assessing the credibility of the witnesses, concludes that the trier of fact, properly instructed, reasonably could find that the fact in issue has been established beyond a reasonable doubt.

It is to be hoped that legislation along these lines is soon enacted to bring much needed clarity to this area.

#### *Eye-witness Identification*

In *U.S.A. v. Shephard*,<sup>25</sup> the extradition judge found the evidence insufficient as he regarded the affidavit of the accomplice as manifestly unreliable. The judge relied on *R. v. Comba*,<sup>26</sup> where Duff C.J.C. had stated that the trial judge, where the case rested on circumstantial circumstantial evidence, ought to have directed a verdict of acquittal "in view of the dubious nature of the evidence". In the Federal Court of Appeal, in *Shephard*, Jackett C.J. endorsed the opinion of the extradition judge and drew support for his reasoning from *Commonwealth of Puerto Rico v. Hernandez*.<sup>27</sup> In *Hernandez*, extradition had been refused because, according to Thurlow J.:<sup>28</sup>

. . . I find it inconceivable that a person should be put on trial on such flimsy evidence as a purported identification made a year after the event by a person who did not previously know the accused and whose only opportunity to observe him was a fleeting one from a distance of some sixty feet. . .

The majority in the Supreme Court of Canada in *Shephard* distinguished *Comba* as a case of circumstantial evidence and also distinguished, and

<sup>24</sup> [1975] 2 S.C.R. 275, at pp. 280-281, (1973), 14 C.C.C. (2d) 385, at p. 388.

<sup>25</sup> *Supra*, footnote 4.

<sup>26</sup> *Supra*, footnote 22.

<sup>27</sup> [1973] F.C. 1206, (1973), 15 C.C.C. (2d) 56 ( *sub nom. Re Puerto Rico (Curth.) and Hernandez (No. 2)* ) (C.A.).

<sup>28</sup> *Ibid.*, at pp. 1214 (F.C.), 63 (C.C.C.).

evidently approved, *Hernandez* as an identification case. In *R. v. Mezzo*<sup>29</sup> the Manitoba Court of Appeal recognized the right of a trial judge to direct a verdict of acquittal if, on his view of the identification evidence, he saw it as of such a dubious nature that it would be unsafe to find the accused guilty. An exception was made, then, to the general proposition that on an application for a directed verdict of acquittal the trial judge should not assess credibility. A witness's evidence may lack credibility as the result of defects in perception, memory or sincerity. Defects in perception and memory affecting an identification evidently can be judged but, apparently, defects in sincerity cannot. It may be wise, however, to make an exception for identification as judges and lawyers are more familiar than jurors with the inherent dangers of such evidence and it may be necessary to take such a case from the jury rather than risk an irrational verdict.

This apparent exception was denied on the appeal to the Supreme Court of Canada.<sup>30</sup> The majority ruled that if there was direct evidence of identification, the evidence should be left with the jury with a proper caution.<sup>31</sup> The majority evidently believed it was unnecessary to deal with *Hernandez* and that case is not even cited by them. The opinion of Wilson J., concurring in the result, and the dissenting opinion of Lamer J., both find *Hernandez*, and its apparent confirmation in *Shephard*, controlling and indicative of an assessment or weighing function for the trial judge in identification cases. It is most curious that the majority does not explicitly recognize its apparent rejection of its own earlier doctrine and deals with the *Hernandez* case by saying nothing.

### Appellate Review

A recent decision of the British Columbia Court of Appeal provides a good vehicle for discussing the role of the judge on appeal. In *R. v. Gale*<sup>32</sup> the accused was convicted of robbery and appealed on the ground that the verdict was, on the basis of the evidence submitted, unreasonable. The Court of Appeal concluded that the question for an appellate court to ask in such a case was whether a jury could possibly rationally conclude that the prosecution's case had been established beyond a reasonable doubt. Applying that standard to the facts of their case they set aside the conviction. The court felt obliged to accept a distinction fashioned by Pigeon J. in *Corbett v. The Queen*.<sup>33</sup> Pigeon J. there noted that

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<sup>29</sup> (1983), 35 C.R. (3d) 272 (Man. C.A.).

<sup>30</sup> *Supra*, footnote 1.

<sup>31</sup> Compare the English approach in *R. v. Turnbull*, [1977] Q.B. 224, [1976] 3 All E.R. 549 (C.A.), which instructs a trial judge to withdraw the case from the jury and direct an acquittal when the evidence of identification is insufficient.

<sup>32</sup> (1984), 42 C.R. (3d) 94 (B.C.C.A.).

<sup>33</sup> *Supra*, footnote 24.

the statutory provision under review, section 613(1)(a)(i) of the Criminal Code<sup>34</sup>, provided that the appeal could be allowed:<sup>35</sup>

. . . not only when the verdict cannot be supported by the evidence but also when it is unreasonable. In other words, the Court of Appeal must satisfy itself not only that there was evidence requiring the case to be submitted to the jury, but also that the weight of such evidence is not so weak that a verdict of guilty is unreasonable. This cannot be taken to mean that the Court of Appeal is to substitute its opinion for that of the jury. The word of the enactment is "unreasonable", not "unjustified". The jurors are the triers of the facts and their finding is not to be set aside because the judges in appeal do not think that they would have made the same finding if sitting as jurors. This is only to be done if they come to the conclusion that the verdict is such that no twelve reasonable men could possibly have reached it acting judicially.

This latter phrase, "acting judicially", led the British Columbia Court of Appeal in *R. v. Gale* to the view that the standard of proof must be incorporated into their measurement, as they must hypothesize a jury "acting judicially". For them, however, the standard need not be incorporated by a trial judge on an application for a directed verdict. One is moved to ask why.

It is true that Pigeon J. in *Corbett* did make a distinction between two reviews possible under section 613(1)(a)(i), but it was not necessary to his decision and can be regarded as obiter dicta. The principal argument in *Corbett* concerned whether the British Columbia Court of Appeal had only considered whether there was evidence and not considered whether there was evidence making the verdict reasonable. The majority in the Supreme Court of Canada believed the Court of Appeal had fully considered the necessary question of reasonableness.

There appear to be two answers to rebut the suggestion of a distinction between two possible reviews. The first answer is logic. Section 613(1)(a)(i) empowers an appellate court to set aside a conviction if "it is unreasonable or cannot be supported by the evidence". I suggest that the two phrases cover identical ground. Given the other powers of the appellate court to allow an appeal, section 613(1)(a)(ii) on the basis of a wrong decision on a question of law, and section 613(1)(a)(iii), on the basis of a miscarriage of justice, how could a verdict be unreasonable if it was, at the same time, supported by the evidence? I suggest that the words, "cannot be supported by the evidence", were inserted to remind the appellate court that in judging reasonableness it is not to substitute its own view of how it would have decided the case but rather simply to judge reasonableness in the sense of whether the jury's verdict was supported by the evidence; that is, *could* a rational jury conclude guilt on the basis of this evidence. The second answer lies in history. Section 613(1)(a)(i) was introduced into the Criminal Code, in substantially the

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<sup>34</sup> *Supra*, footnote 2.

<sup>35</sup> *Supra*, footnote 24, at pp. 278-279 (S.C.R.), 386-387 (C.C.C.).

same wording, in 1923.<sup>36</sup> The legislation was copied from the English Criminal Appeal Act, 1907,<sup>37</sup> which constituted the Court of Criminal Appeal. The following year, 1908, that legislation was characterized as incorporating principles equivalent to those announced by the House of Lords for reversing a jury verdict in a civil case.<sup>38</sup> The House of Lords had earlier announced those principles in *Metropolitan Ry. Co. v. Wright*.<sup>39</sup> The House there said an appellate court's role was limited to reversing only when the the verdict was viewed as "unreasonable or unjust". Again these are here synonyms, as Lord Herschell summarized:<sup>40</sup>

The case was one unquestionably within the province of the jury; and in my opinion the verdict ought not to be disturbed unless it was one which a jury viewing the whole of the evidence reasonably, could not properly find.

The test in each case, reviewing on appeal or on a directed verdict application, must be the same and in each the appropriate standard of proof must be used to evaluate sufficiency.

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#### FAMILY LAW—PROPERTY—CONSTRUCTIVE TRUSTS: *Sorochan v. Sorochan*

##### A. Bissett-Johnson\*

Ever since the Supreme Court of Canada decisions in *Murdoch*<sup>1</sup> and *Rathwell*<sup>2</sup> it has been clear that the constructive trust has become a prime remedy to prevent unjust enrichment. The elements have become well defined in *Pettkus v. Becker*<sup>3</sup> as (i) an enrichment, (ii) a corresponding

<sup>36</sup> S.C. 1923, c. 41, s. 9.

<sup>37</sup> 7 Edw. 7, c. 23, s. 4(1).

<sup>38</sup> *R. v. Ashford* (1908), 1 Cr. App. Rep. 185; see also *R. v. Cooke* (1924), 57 N.S.R. 362 (C.A.).

<sup>39</sup> (1886), 11 App. Cas. 152.

<sup>40</sup> *Ibid.*, at p. 154.

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<sup>1</sup> *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423, (1973), 41 D.L.R. (3d) 367. See especially Laskin J.'s dissent, which became the springboard for later developments.

<sup>2</sup> *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, 83 D.L.R. (3d) 289.

<sup>3</sup> [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257. The mere awarding of assets by a court does not ensure that the plaintiff will be able to enforce the order, and it is a sad fact that Rosa Becker committed suicide without getting a cent (see *Globe and Mail*, Nov. 12th, 1986). Apparently when two of the pieces of land in dispute were sold for



deprivation, (iii) the absence of any juristic reason for the enrichment, and (iv) a causal connection between the contribution and the disputed assets. The rule was applied in *Pettkus v. Becker* to common law relationships which have been more than transitory, apparently in order to give effect to reasonable expectations of the parties.<sup>4</sup>

Applying these principles to the facts of *Sorochan v. Sorochan*<sup>5</sup> it was not difficult to permit a common law wife, in failing health, in a relationship of forty-two years' duration out of which six children had been born, a one third share in the farming operation that the parties had jointly worked. The farm had been owned by the "husband" jointly with his brother at the time when the "spouses" started to live together. The fact that the "wife's" efforts over many years had merely maintained the value of the farming operation without increasing its value was not regarded as decisive by the Supreme Court of Canada although it had been by the Alberta Court of Appeal.<sup>6</sup> The wife's child care, work in the home and farming duties<sup>7</sup> were regarded as having maintained and preserved a valuable benefit which, since these were unpaid services, constituted a clear detriment to the wife for which no juristic explanation was forthcoming.

Despite the greater fairness in the law arising from the concept of the constructive trust as enunciated by the Supreme Court some tantalising problems still remain.

1. The constructive trust in its institutional form, as revealed in its historic roots in cases like *Keech v. Sanford*,<sup>8</sup> is a proprietary remedy, which is potentially binding on third parties unless they are *bona fide* purchasers for value without notice. Is this what the Supreme Court of Canada has in mind? It may be, however, that the remedial constructive

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\$68,000 a year earlier, Ms. Becker's lawyer seized the money for legal fees incurred during the eleven years that he had worked on the case. It may be that in future cases involving a potentially intransigent defendant an order should be sought attaching to specific property and requiring its transfer.

<sup>4</sup> Although questions of implied or imputed intention in this area seem to raise more problems than they solve, and the constructive trust is better regarded as independent of intention. Note that Dickson C.J.'s statement in *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38, at p. 56, (1986), 29 D.L.R. (4th) 1, at p. 7, about the plaintiff having a reasonable expectation of receiving some benefit simply serves to revive the quest for the "chimera" of intention. See *Pettkus v. Becker*, *supra*, footnote 3, at pp. 843 (S.C.R.), 270 (D.L.R.).

<sup>5</sup> *Ibid.*

<sup>6</sup> (1984), 36 Alta. L.R. (2d) 119, 44 R.F.L. (2d) 144 (Alta. C.A.).

<sup>7</sup> *Supra*, footnote 4, at pp. 44 (S.C.R.), 5 (D.L.R.); looking after the vegetable garden, milking cows, raising chickens, working in the fields, haying, baling and harvesting. The work was hardly distinguishable from that of Mrs. Murdoch, *supra*, footnote 1, at pp. 443-444 (S.C.R.), 380 (D.L.R.).

<sup>8</sup> (1726), 2 Eq. Ca. Abr. 741, 22 E.R. 629.

trust is only binding on the defendant, but the constructive trust determines the appropriateness of the remedy in the same way that detinue will allow a plaintiff to seek the return of an item rather than being satisfied with damages.

2. Closely related to the first question is the time at which the interest under a constructive trust arises. Can it back date to the time at which the "detriment" was incurred, by analogy with the institutional constructive trust, or does it only date from the time of the court hearing? This may obviously affect third parties such as creditors of the defendant who may be vulnerable to a proprietary remedy. Professor McLeod has noted that although the trite answer is that it arises when awarded, questions of *Mareva* injunctions and prejudgment interest cloud the simplicity of this answer.<sup>9</sup>

3. The question also arises about the interaction of the equitable constructive trust and the Matrimonial Property Acts. In Alberta a wife would not have any claim to a share in a shareable asset owned by the husband at the time of the marriage, unless its value increased (even if only by inflation) during the marriage.<sup>10</sup> This raises the possibility either that common law spouses are better off in Alberta than married spouses (on the assumption that the matrimonial property legislation is an exclusive code that impliedly repeals the equitable remedies), or that a spouse may still in an appropriate case plead the equitable remedies over and above those conferred by the new matrimonial property legislation. This latter argument has been recently used with success before Walsh J. in *Rawluk v. Rawluk*,<sup>11</sup> who noted that it was difficult to accept that the legislature intended to deny spouses a right and remedy that they would have had if they were unmarried.

4. Although it may well be possible to establish a causal relationship between the contribution and assets in question on facts like those in *Sorochan*, it is much more difficult to do this where the wife does not contribute business activities such as driving tractors or milking cows but rather contributes domestic duties such as child care. In *Rawluk* the wife was unable to acquire any equitable interest in properties other than the home farm and an adjoining lot since she had no involvement with them.

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<sup>9</sup> Annotation to *Sorochan* (1986), 2 R.F.L. (3d) 226, at p. 229.

<sup>10</sup> See Matrimonial Property Act, R.S.A. 1980, c. M-9, s. 7(2). For more detail see P.J. Lown, chapter on Alberta, in A. Bissett-Johnson, W.M. Holland (eds.), *Matrimonial Property Law in Canada* (1980).

<sup>11</sup> (1986), 55 O.R. (2d) 704, 29 D.L.R. (4th) 754 (Ont. H.C.). The downside of this approach is that it may undermine the legislative scheme by increasing judicial discretion at the expense of legislative certainty. *Rawluk* was not followed in *Benke v. Benke* (1986), 4 R.F.L. (3d) 58 (Ont. Dist. Ct.).

The previous case law was unclear about the interrelationship between the equitable remedies and the matrimonial property legislation but where, as under the old Ontario Family Law Reform Act, a spouse had no right to invoke the legislation on the death of his or her spouse, it was clear that the gap could be filled by the equitable remedy of the constructive trust. It seems unlikely that a spouse could "double dip" by a constructive trust claim on top of an entitlement in property already confirmed by the matrimonial property legislation.