COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER:	1703-0283AC
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REGISTRY OFFICE:	EDMONTON
APPELLANTS:	UALBERTA PRO-LIFE, AMBERLEE NICOL and CAMERON WILSON
STATUS ON APPEAL:	APPELLANTS
RESPONDENT	THE GOVERNORS OF THE UNIVERSITY OF ALBERTA
STATUS ON APPEAL:	APPELLANTS
DOCUMENT:	**BOOK OF AUTHORITIES TO THE REPLY FACTUM OF THE APPELLANTS**

Appeal of the Judgement of
The Honourable Madam Justice Bonnie L. Bokenfohr
Dated the 11th day of October, 2017
Filed the 11th day of October, 2017

Book of Authorities to the Reply Factum of the Appellants, UALBERTA PRO-LIFE, AMBERLEE NICOL and CAMERON WILSON, Volume 1 of 1, Tabs 1-8

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Cases Cited

TAB 1

2016 BCCA 162
British Columbia Court of Appeal

BC Civil Liberties Assn. v. University of Victoria

2016 CarswellBC 1008, 2016 BCCA 162, [2016] 8 W.W.R. 678, [2016] B.C.W.L.D. 3154, [2016] B.C.W.L.D. 3295, [2016] B.C.W.L.D. 3308, 264 A.C.W.S. (3d) 642, 353 C.R.R. (2d) 357, 385 B.C.A.C. 306, 404 D.L.R. (4th) 750, 665 W.A.C. 306, 85 B.C.L.R. (5th) 310

The BC Civil Liberties Association and Cameron Côté, Appellants (Petitioners) and University of Victoria and University of Victoria Students' Society, Respondents (Respondents)

Saunders, Willcock, Dickson JJ.A.

Heard: February 4-5, 2016
Judgment: April 18, 2016
Docket: Vancouver CA42551

Proceedings: affirming *BC Civil Liberties Assn. v. University of Victoria* (2015), 74 B.C.L.R. (5th) 170, 2015 CarswellBC 60, 2015 BCSC 39, [2015] 9 W.W.R. 549, *(*sub nom. *British Columbia Civil Liberties Assn. v. University of Victoria)* 326 C.R.R. (2d) 310, Hinkson C.J.S.C. (B.C. S.C.)

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Subject: Civil Practice and Procedure; Constitutional; Public; Human Rights

Headnote

Constitutional law --- Charter of Rights and Freedoms — Scope of application — Bodies subject to Charter — Miscellaneous

Pro-life student club was granted permit by respondent university to hold demonstration on campus — University learned that respondent students' society had prohibited club from using campus space due to conduct that society considered to be harassment — University revoked permit, relying on policy providing that bookings by groups sanctioned for violating student society policy might be cancelled — Club held demonstration, to which university responded with threats of sanction — Petition by student executive of club and provincial civil liberties' association for declarative relief on basis that university's decisions infringed rights of freedom of expression under s. 2 of Canadian Charter of Rights and Freedoms was dismissed — Petitioners appealed — Appeal dismissed — Chambers judge did not err in concluding that actions of university in creating and applying policy did not infringe rights of Charter — Binding precedent rejected view that Charter could be used to challenge all measures undertaken pursuant to statutory provisions that created or enabled university — Simple fact that policy could be said to have been adopted on basis of university's authority to regulate use of property under s. 27 of University Act did not permit student to invoke Charter in attempt to quash policy — There was no specific statutory direction or regular government control as to how university could use its discretion to regulate, prohibit or impose requirements in relation to activities and events on its property — View that universities were charged with delivery of public good so as to act as agents of state had been rejected — Specific impugned acts of university were not governmental in nature — Petitioners' argument that, because university concluded fulfillment of its statutory mandate required allocation of space to students for free expression of ideas, that forum was provided pursuant to government policy would apply to all of university's core activities — Precedent establishing that university did not perform its core function as part of apparatus government was full answer to such argument —

Chambers judge was correct to find that neither entity whose activity was impugned nor activity itself were amenable to Charter scrutiny.

Administrative law --- Prerequisites to judicial review — Jurisdiction of court to review — Where issue becoming academic

Pro-life student club was granted permit by respondent university to hold demonstration on campus — University learned that respondent students' society had prohibited club from using campus space due to conduct that society considered to be harassment — University revoked permit, relying on policy providing that bookings by groups sanctioned for violating student society policy might be cancelled — Club held demonstration, to which university responded with threats of sanction — Petition by student executive of club and provincial civil liberties' association for declarative relief on basis that university's decisions infringed rights of freedom of expression under s. 2 of Canadian Charter of Rights and Freedoms was dismissed — Petitioners appealed — Appeal dismissed — Chambers judge did not err in declining to address claim that impugned decisions were unreasonable, as question was moot — Relief would have no practical effect or significance — Suspension of club's outdoor space booking privileges and threat of further sanctions for non-academic misconduct were withdrawn — Student had graduated — Policy was amended, apparently as result of this litigation — Petitioners were essentially seeking in function, if not form, declaration that consideration should have been given to Charter values when university made its decisions but there was no live issue in relation to reasonableness of impugned decisions — There were still adversaries who fully argued appeal on both sides to appropriate address question — Concern for judicial economy and appropriate recognition for court's limited appellate role weighed heavily against addressing moot issue — Extensive record of university's decision-making was not developed in court below — Club's failure to exhaust remedies, having failed to either appeal student society's resolution to sanction it or challenge revocation of its permit, might have been obstacle to argument that decisions were unreasonable for failure to consider Charter values — Chambers judge clearly considered petition to turn upon Charter issue as this was thrust of parties' arguments — Distinct judicial review raised by petitioners was moot and of no broader legal significance.

APPEAL by petitioners from judgment reported at *BC Civil Liberties Assn. v. University of Victoria* (2015), 2015 BCSC 39, 2015 CarswellBC 60, [2015] 9 W.W.R. 549, 326 C.R.R. (2d) 310, 74 B.C.L.R. (5th) 170 (B.C. S.C.), dismissing their petition for declarative relief relating to university's revocation of permit for pro-life student club to hold campus demonstration and threat of sanctions for holding demonstration without permit.

***Willcock J.A.*:**

Introduction

1 On January 29, 2013, Jim Dunsdon, the Associate Vice-President of Student Affairs at the University of Victoria, approved the use of campus space by a pro-life student club, Youth Protecting Youth ("YPY"), on February 1, 2013. Shortly thereafter, when he was advised by the University of Victoria Students' Society ("UVSS") that it had prohibited YPY from the use of campus space because the Society considered the club to have engaged in harassment of students, Mr. Dunsdon withdrew that approval and instructed the president of YPY not to proceed. In doing so, he relied upon the University's *Booking of Outdoor Space by Students Policy* (the "*Policy*"), which provided bookings by student groups that had been sanctioned for a violation of a student society policy might be cancelled. The YPY activity in question, a demonstration described as a "Choice Chain", proceeded despite the cancellation of approval. On March 7, 2013, in response to the unauthorized demonstration, the University suspended YPY's outdoor space booking privileges for one year and warned YPY members that any future disregard of the University's directions could result in the imposition of non-academic discipline.

2 Cameron Côté, in his capacity as president of YPY, and the BC Civil Liberties Association petitioned the BC Supreme Court for relief including:

> 1. A declaration under section 52 of the *Constitution Act*, *1982* that Section 15.00 of the *Booking of Outdoor Space by Students Policy* is *ultra vires*, void and of no force or effect as it violates section 2(b)(c) and (d) of the *Canadian Charter of Rights and Freedoms* and is not saved by section 1;

2. A declaration that policies and decisions of the University of Victoria restricting or regulating the use of its common areas for expressive purposes must be consistent with the *Charter of Rights and Freedoms*;

3. A declaration that the decisions of Jim Dunsdon, Associate Vice-President Student Affairs, University of Victoria, dated January 29, 2013, January 31, 2013 and March 7, 2013 failed to appropriately weigh the infringement of section 2(b), (c) and (d) of the *Canadian Charter of Rights and Freedoms* against the justifications for such infringement and were therefore unreasonable;

4. An order that the decisions of Jim Dunsdon dated January 29, 2013, January 31, 2013 and March 7, 2013, are quashed and set aside; ...

3 The petition came on for hearing before the Chief Justice in chambers. For reasons indexed at 2015 BCSC 39 (B.C. S.C.), he held that neither the impugned decisions nor the policy could be challenged on the grounds they violated students' *Charter* rights. The petitioners appeal that decision.

Grounds of Appeal

4 The appellants say the acts of the University are governmental action inconsistent with the rights and freedoms guaranteed by the *Charter*, and that the judgment below is in error insofar as it finds the *Charter* inapplicable to the University's decisions. Specifically, they submit:

a) The chambers judge erred in law in failing to find that Section 15.00 of the *Booking of Outdoor Space by Students Policy* is *ultra vires*, void and of no force or effect as it violates s. 2(b)(c) and (d) of the *Canadian Charter of Rights and Freedoms* and in dismissing the application for a declaration that the policies and decisions of the University of Victoria restricting or regulating the use of its common areas for expressive purposes must be consistent with the *Charter of Rights and Freedoms*; and

b) The chambers judge erred in law in dismissing the application for a declaration that that the decisions of the Associate Vice-President of Student Affairs, University of Victoria, dated January 29, 2013, January 31, 2013 and March 7, 2013 failed to appropriately weigh the infringement of s. 2(b), (c) and (d) of the *Canadian Charter of Rights and Freedoms* against the justifications for such infringement, and were therefore unreasonable.

5 Further, the appellants ask us to consider a question identified in their petition but not addressed in the judgment below: whether one or all of the impugned decisions of the University should be quashed, even if those decisions cannot be characterized as governmental action, because they were made without adequate consideration of *Charter* values.

The Appellants' Argument

Failure to Recognize Charter Rights

6 The appellants acknowledge the University of Victoria is not "an organ of the state", but say, relying upon *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (S.C.C.), certain of the University's decisions can be subject to *Charter* challenges. They argue the University's regulation of its property pursuant to the provisions of the *University Act*, R.S.B.C. 1996, c. 486, amounts to "government activity" that attracts scrutiny under the *Charter*. The *Policy* involved an exercise of statutorily-conferred regulatory power inseparable from the University's core role: delivering publicly-funded post-secondary education. They submit the chambers judge placed undue reliance upon the Supreme Court of Canada's decision in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 (S.C.C.), and cases that followed that decision, including *Maughan v. University of British Columbia*, 2009 BCCA 447 (B.C. C.A.); *University of British Columbia Faculty Assn. v. University of British Columbia*, 2010 BCCA 189 (B.C. C.A.); and *Lobo v. Carleton University*, 2012 ONCA 498 (Ont. C.A.). The appellants say all of the justices of the Court in *McKinney* acknowledged that certain functions of a university could be governmental for the purposes of s. 32 of the *Charter*, which confines its application to government action. The cases that follow *McKinney*, in the appellants' submission, address essentially private law disputes rather than

universities' role in delivering post-secondary education. *Lobo*, they submit, turned on particular statutory provisions not applicable in this province and, in any event, is wrongly decided and should not be followed.

7 The appellants say the case at bar is more closely analogous, on its facts, to cases where university students have been held to be entitled to assert *Charter* rights in their disputes with governing bodies: *R. v. Whatcott*, 2002 SKQB 399 (Sask. Q.B.); *R. v. Whatcott*, 2011 ABPC 336 (Alta. Prov. Ct.); *Pridgen v. University of Calgary*, 2012 ABCA 139 (Alta. C.A.); *R. v. Whatcott*, 2012 ABQB 231 (Alta. Q.B.); and *R. v. Whatcott*, 2014 SKPC 215 (Sask. Q.B.).

8 The University derives its powers and mandate from the *University Act.* Under the provisions of the *Act*, its control over property more closely resembles the regulatory powers of a municipality than those of a natural person. Here, as in *Horse Lake First Nation v. Horseman*, 2003 ABQB 152 (Alta. Q.B.), the appellants argue, the *Charter* should apply to the impugned decisions because a decision-maker charged with the regulation of the affairs of a public body has used its statutory authority to regulate the lives of its members.

9 They say there is a public interest in so extending the scope of *Charter* protection. The ability of students to associate in order to express complex political ideas on the University's campus is not separable from other aspects of a university education and the University should be obliged to protect that freedom of speech and association as part of the role it discharges on behalf of government. The University plays a central role in the democratic, economic and social life of the province; the appellants say it must use its statutory powers in the public interest.

10 No support is needed for the proposition that universities are established in the public interest to serve a public purpose, or the importance, in some cases, of the physical facilities used to that end, but the appellants nonetheless recommend to this Court statements to that effect in *Pridgen*; *R. v. Whatcott*, 2011 ABPC 336 (Alta. Prov. Ct.) at para. 67 (affirmed on appeal, 2012 ABQB 231 (Alta. Q.B.)); and *University of Waterloo v. Ontario (Minister of Finance)*, [2002] O.J. No. 4416 (Ont. C.A.).

Failure to Weigh Charter Values

11 As a separate ground, the appellants argue whether or not they can assert an infringement of their *Charter* rights, the University is required to take into account the underlying values of the *Charter* when applying the *Policy*, and it failed to do so. They say the chambers judge erred by implicitly concluding the University and its administrative agents were not required to consider fundamental values (including *Charter* values) when deciding whether to permit student clubs to use common campus space for expressive purposes. They submit all statutory decision-makers, including public universities, must exercise their statutorily-conferred powers in conformity with fundamental values, including *Charter* values. On that point, counsel refer us, in particular, to *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) at para. 56; *R. v. Conway*, 2010 SCC 22 (S.C.C.) at para. 103; and *Doré c. Québec (Tribunal des professions)*, 2012 SCC 12 (S.C.C.).

12 The appellants say the impugned decisions are subject to judicial review because they have a "public element". That review, they say, is a "flexible instrument for doing justice" to protect the individual from administrative decisions that are not fair or reasonable: *R. v. Panel on Takeovers and Mergers*, *Ex parte Datafin Plc.*, [1987] Q.B. 815 (Eng. C.A.) at 845-46 and 849. See also *Air Canada v. Toronto Port Authority*, 2011 FCA 347 (F.C.A.); *West Toronto United Football Club v. Ontario Soccer Assn.*, 2014 ONSC 5881 (Ont. Div. Ct.).

Discussion

13 The first relief sought by the appellants is a declaration under s. 52 of the *Constitution Act*, *1982*, "that Section 15.00 of the *Booking of Outdoor Space by Students Policy* is *ultra vires*, void and of no force or effect as it violates section 2(b)(c) and (d) of the *Canadian Charter of Rights and Freedoms* and is not saved by section 1". That relief is only available where the impugned law (here, presumably, the *Policy*) has been found to be inconsistent with the provisions of the *Constitution*.

14 The appellants also seek declaratory relief under s. 24 of the *Charter*, which they describe as an appropriate and just remedy to prevent continued infringement or denial of *Charter* rights: a declaration that policies and decisions of the University of Victoria restricting or regulating the use of its common areas for expressive purposes must be consistent with the *Charter*, and a declaration that the impugned decisions failed to appropriately weigh the infringement of s. 2(b), (c) and (d) of the *Charter* against the justifications for such infringement and were therefore unreasonable.

15 The only remedy sought that is not contingent upon a finding that *Charter* rights have been infringed is the request for an order that the decisions of Mr. Dunsdon of January 29, 2013, January 31, 2013 and March 7, 2013, applying the *Policy* and addressing its apparent breach, be quashed.

16 For reasons set out below, I am of the view that the chambers judge did not err in concluding that the actions of the University in creating the *Policy* and applying it cannot be said to have infringed the appellants' *Charter* rights. Further, I am of the view that it was not an error to decline to address the claim that the impugned decisions were unreasonable. That question was moot when the matter came on for hearing before the chambers judge. The decisions the appellants seek to quash have been revoked. I am of the view we should not exercise our discretion to address the moot question whether the revoked decisions were founded upon inadequate consideration of *Charter* values.

The Appellants' Charter Rights Were Not Infringed

17 Section 2 of the *Charter* guarantees fundamental freedoms, including freedom of thought, belief, opinion and expression, freedom of peaceful assembly and freedom of association. Those guarantees must be read in light of the fact the *Charter* is an instrument for checking the powers of government over the individual. Its central concern is direct impingement by government upon the rights and freedoms it protects and enshrines. It is a bulwark against the intrusion of the state upon our liberty: *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, [1984] 2 S.C.R. 145 (S.C.C.) at 156; *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.) at 490; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (S.C.C.) at 347; *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, [1986] 2 S.C.R. 573 (S.C.C.) at 593-98; *Tremblay c. Daigle*, [1989] 2 S.C.R. 530 (S.C.C.); *McKinney*; *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451 (S.C.C.); and *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483 (S.C.C.).

18 Section 32 describes the scope of the *Charter*'s application:

> 32. (1) This *Charter* applies
>
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament...; and
>
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

19 In *Dolphin Delivery*, McIntyre J, for the Court, concluded that s. 32 does not refer to government in its "generic sense - meaning the whole of the governmental apparatus of the state" but rather to a branch of government, narrowly defined. In *McKinney*, La Forest J. said the provisions of s. 32 "give a strong message that the *Charter* is confined to government action." In the companion judgment *Stoffman*, citing the views of McIntyre J. in *Dolphin Delivery*, La Forest J. noted that references to government in s. 32 "could not be interpreted as bringing within the ambit of the *Charter* the whole of that amorphous entity which in contemporary political theory might be thought of as 'the state'".

20 On the other hand, the jurisprudence makes it clear that s. 32 should not so narrowly define the application of the *Charter* as to permit government to act with impunity through the agency of subordinate bodies. As McIntyre J. noted in *Dolphin Delivery*, the *Charter* should apply to "many forms of delegated legislation, regulations, orders in council, possibly municipal by-laws, and by-laws and regulations of other creatures of Parliament and the Legislatures". The edges of the apparatus of government have been described in the case law so as to exclude, among other entities, universities

in Ontario and British Columbia (*McKinney*; *Harrison*) as well as the Vancouver General Hospital (*Stoffman*); and so as to include, among others, community colleges in British Columbia (expressly determined to be agents of the Crown in *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570 (S.C.C.)), and the transportation authority of the Greater Vancouver Regional District (described as an entity placed in the hands of local governments by administrative restructuring, in *Canadian Federation of Students v. Greater Vancouver Transportation Authority*, 2009 SCC 31, [2009] 2 S.C.R. 295 (S.C.C.)).

21 The question whether the University of Victoria should be regarded as an agent of government or equivalent to government for all purposes, insofar as the application of the *Charter* is concerned, is settled by the decisions of the Supreme Court of Canada in *McKinney*, *Stoffman* and in particular *Harrison*. All that is said in *Harrison* about the relationship between the University of British Columbia and the Government of British Columbia is equally applicable to the relationship between the University of Victoria and the government. There are subtle distinctions in the composition of the boards of the universities but the appellants cannot point to any material distinctions that would place the present case beyond the scope of the *Harrison* decision.

22 The appellants do not press the argument that the University is in all respects government and subject to the *Charter* generally but, emphasize, rather, that in some respects, particularly in affording students a forum for free expression, the University is effecting government policy and in doing so must be governed by the provisions of the *Charter.* In order to address that argument it is necessary to look at the discussion of the role of universities in previous *Charter* litigation. The appellants say the cases carve out an exception from the general rule into which this case fits. The University of Victoria says the jurisprudence clearly establishes that, insofar as its core functions are concerned, the University is autonomous; that being the case, and in the absence of a directive from government that a specific service or facility be provided, no aspect of its decision-making is subject to *Charter* scrutiny.

23 The appellants say the University of Victoria is given the statutory authority to regulate the use of its property. That is clearly the case. Section 27 of the *University Act* authorizes the University of Victoria Board to maintain and keep in proper order and condition the property of the University; to make rules respecting the management, government and control of the property; to regulate, prohibit and impose requirements in relation to the use of the property; to make rules consistent with the powers conferred on the Board by the *Act*; and to provide for the hearing and determination of disputes arising in relation to the contravention of a rule.

24 However, the argument that the *Charter* may be used to challenge all measures undertaken pursuant to the statutory provisions that create or enable a university was rejected in *McKinney*. In that case the Court said:

> ... [T]he mere fact that an entity is a creature of statute and has been given the legal attributes of a natural person is in no way sufficient to make its actions subject to the *Charter*. Such an entity may be established to facilitate the performance of tasks that those seeking incorporation wish to undertake and to control, not to facilitate the performance of tasks assigned to government. It would significantly undermine the obvious purpose of s. 32 to confine the application of the *Charter* to legislative and government action to apply it to private corporations, and it would fly in the face of the justifications for so confining the *Charter* to which I have already referred.

25 Can it be said that when the University of Victoria exercises its particular statutory power, pursuant to s. 27 of the *University Act*, to regulate, prohibit or impose requirements in relation to activities and events on its property, it is acting in furtherance of a specific government policy or program? That argument must be considered in light of the decision in *Harrison*. There, the impugned decision was the enactment of a mandatory retirement policy respecting the members of the University of British Columbia faculty and administrative staff. As Wilson J. pointed out, in dissent, the mandatory retirement policy was enacted by the university's Board pursuant to s. 27(f) of the *University Act*. That fact alone, the fact that the university was specifically empowered to undertake the impugned decision by statute, was considered by the majority to be insufficient to bring the *Charter* to bear on the decision. The simple fact, in the case at bar, that the *Policy* can be said to have been adopted pursuant to s. 27 of the *University Act*, does not permit students to invoke the *Charter* in an attempt to quash the policy.

26 The Court in *Harrison*, as in *Stoffman*, distinguished between "ultimate or extraordinary control and routine or regular control" of the entity in question. It agreed with the finding of this Court in *Harrison v. University of British Columbia* (1988), 21 B.C.L.R. (2d) 145 (S.C.C.) at 152, that "the fact that the university is fiscally accountable under these statutes does not establish government control or influence upon the core functions of the university and, in particular, upon the policy and contracts in issue in this case". There is no specific statutory direction with respect to the manner in which the University is to use its discretion to regulate, prohibit or impose requirements in relation to activities and events on its property. There is no routine or regular control of that power by government.

27 What of the argument that the specific activity affected by the decisions of the University in this case, public expression, is one the University is established to encourage in the public interest? In the particular context of this appeal, is the regulation of speech fundamentally different from the staffing and tenure issues considered in *McKinney* and *Stoffman* ? The view that the core function of universities is a public good, and universities which are charged with delivery of that good thereby act as agents of the state, was rejected in *McKinney*. In *Stoffman*, La Forest J. wrote of the question whether the Vancouver General Hospital was part of the apparatus of government because of its role in delivering mandated public health care (at 511):

> If that was by itself sufficient to bring the hospital and all other bodies and individuals concerned with the provision of health care or hospital services within the reach of the *Charter*, a wide range of institutions and organizations commonly regarded as part of the private sector, from airlines, railways, and banks, to trade unions, symphonies and other cultural organizations, would also come under the *Charter*. For each of these entities, along with many others, are concerned with the provision of a service which is an important part of the legislative mandate of one or the other level of government.

28 *McKinney* says the delivery of a public service by an agency does not automatically incorporate it into government. Doing so may, however, subject an agency, acting as a proxy for government in relation to a specific activity, to *Charter* scrutiny. The circumstances in which that should occur were elaborated upon in *Eldridge*. The argument that the University of Victoria, in providing a forum for free speech (or restricting that forum), is a private body advancing a specific objective of the state must be founded, largely, upon the judgment of the Supreme Court of Canada in *Eldridge*.

29 In *Eldridge*, the Court was required to look at the Vancouver General Hospital, together with other respondents, as parties charged with the delivery of medical services rather than as an autonomous institution. When the Court, in *Stoffman*, found the Vancouver General Hospital was not part of the "administrative branch" of government, it left open the argument that the hospital might for certain purposes be a private entity acting in a capacity that requires it to respect *Charter* rights. *Stoffman* was not such a case. The Court in that case expressly noted, at 516:

> [T]his is not a case for the application of the *Charter* to a specific act of an entity which is not generally bound by the *Charter*. The only specific connection between the actions of the Vancouver General in adopting and applying [the mandatory retirement policy] and the actions of the Government of British Columbia was the requirement that [the policy] receive ministerial approval. In light of what I have said above in regard to this requirement, a "more direct and a more precisely-defined connection", to borrow McIntyre J.'s phrase used in *Dolphin Delivery*, would have to be shown before I would conclude that the *Charter* applied on this ground.

30 In *Eldridge*, the Court defined that "more direct and a more precisely-defined connection". Although *Stoffman* had determined that the Vancouver General Hospital was not part of the apparatus of government, it was found in *Eldridge* to be putting into place a government program or acting in a governmental capacity in adopting policies with respect to the delivery of medical care specifically mandated by statute. The decision in that case established that a private entity may be subject to the *Charter* in respect of what were referred to as "certain inherently governmental actions". The factors that define such actions did not admit "of any *a priori* elucidation". The Court considered whether the government retained responsibility for the program, despite the use of a private agency to deliver it; whether there could be said to be

a specific government program or policy directing the Hospital to act; and whether it could be said that the government had delegated the implementation of its policies and programs to the private entity.

31 The Court noted two important points with respect to the scope of the applicability of the *Charter* to private entities in such circumstances:

> 43 ... [T]he mere fact that an entity performs what may loosely be termed a "public function", or the fact that a particular activity may be described as "public" in nature, will not be sufficient to bring it within the purview of "government" for the purposes of s. 32 of the *Charter.*

And:

> 44 ... [A]n entity may be found to attract *Charter* scrutiny with respect to a particular activity that can be ascribed to government. This demands an investigation not into the nature of the entity whose activity is impugned but rather into the nature of the activity itself. In such cases, in other words, one must scrutinize the quality of the act at issue, rather than the quality of the actor. If the act is truly "governmental" in nature — for example, the implementation of a specific statutory scheme or a government program — the entity performing it will be subject to review under the *Charter* only in respect of that act, and not its other, private activities.

32 Applying the criteria *Eldridge* suggests we must use, I cannot find the specific impugned acts of the University of Victoria to be governmental in nature. The government neither assumed nor retained any express responsibility for the provision of a public forum for free expression on university campuses. The Legislature has not enacted a provision of the sort adopted in the United Kingdom, s. 43(1) of the *Education (No. 2) Act 1986* (UK), c. 61, which imposes an obligation on universities and colleges to:

> ... take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment, and for visiting speakers.

33 The *University Act*, by contrast, does not describe a *specific* governmental program or policy which might have been affected by the impugned decisions and there was no evidence before the judge of any legislation or policy that does so. There is no basis upon which it can be said on the evidence that when the University regulated the use of space on the campus it was implementing a government policy or program.

34 The Court in *McKinney* recognized the significance of the relationships between universities and provincial governments in Canada, including governments' role in determining universities' powers, objects and governmental structures, and the role of governments in their funding, but noted that they manage their own affairs and allocate government funds, tuition revenues and endowment funds to meet their needs as they see fit. The Court adopted the view expressed by Beetz J. in *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 (S.C.C.), speaking of comparable Saskatchewan legislation: "The Act incorporates a university and does not alter the traditional nature of such an institution as a community of scholars and students enjoying substantial internal autonomy."

35 Part 10 of the *University Act* describes the powers and duties of universities. The following provisions are significant:

> 46.1 A university has the power and capacity of a natural person of full capacity.
>
> 47 ... (2) A university must, so far as and to the full extent that its resources from time to time permit, do all of the following:
>
> (a) establish and maintain colleges, schools, institutes, faculties, departments, chairs and courses of instruction;
>
> (b) provide instruction in all branches of knowledge;
>
> (c) establish facilities for the pursuit of original research in all branches of knowledge;

. . .

> (f) generally, promote and carry on the work of a university in all its branches, through the cooperative effort of the board, senate and other constituent parts of the university.

[Emphasis added.]

36 The only statutory obligation upon which the appellants rely in support of the argument that the University of Victoria is obliged to afford students a forum for free speech as part of a government policy or program is s. 47(2)(f) of the *Act*. The appellants submit that because the University has concluded fulfillment of its statutory mandate requires it to allocate space to students for free expression of ideas, that forum is provided pursuant to government policy and its provision and allocation must be subject to *Charter* scrutiny. That argument, however, would result in all of the core activities of the University being considered to be measures taken to effect government policy. The University, as we have seen above, does not perform its core function as part of the apparatus of government. The Court's ruling in *Harrison* is, in my view, full answer to this argument.

37 The cases relied upon by the appellants do not convince me otherwise. *Pridgen* arose on judicial review of a disciplinary measure taken by the University of Calgary. There was no doubt judicial review was available to the respondent students in that case pursuant to the appeal provisions of the *Post-Secondary Learning Act*, S.A. 2003, c. P-19.5. The disciplinary decision was found to be unreasonable and overturned by the Court of Queen's Bench. On appeal, all three judges of the Alberta Court of Appeal concluded, on administrative law grounds, the university's disciplinary decision could not stand and the appeal should be dismissed. Paperny J.A., alone among the judges, went further in finding the disciplinary decision could be impeached as a breach of students' *Charter* rights. The analysis of the *Charter* issues by Paperny J.A. was *dicta*, and expressly not adopted by her colleagues. It addresses a specific statutory framework that has no applicability in this province. To the extent that her conclusion is founded upon the specific statutory task delegated to universities in Alberta, by the *Post-Secondary Learning Act*, it is not of assistance to us.

38 Further, the Court in *Pridgen* clearly emphasized the fact that the appellants were not challenging the University in its day-to-day operations. As Paperny J.A. noted:

> [105] Applying the *Eldridge* analysis to the facts of this case is one possible approach. However, I find that the nature of the activity being undertaken by the University here, imposing disciplinary sanctions, fits more comfortably within the analytical framework of statutory compulsion. The issue is whether in disciplining students pursuant to authority granted under the *PSL Act*, the University must be *Charter* compliant. The statutory authority includes the power to impose serious sanctions that go beyond the authority held by private individuals or organizations. Those sanctions include the power to fine, the power to suspend a student's right to attend the university, and the power to expel students from the university: *PSL Act*, section 31. Accordingly, *Charter* protection for students' fundamental freedoms, including freedom of expression, applies in these circumstances. This goes to the fundamental purpose of the *Charter* as noted by Wilson J. at 222 of her dissent in *McKinney*, where she stated that those who enacted the *Charter* "were concerned to provide some protection for individual freedom and personal autonomy in the face of government's expanding role".

39 In the case at bar, the decisions challenged involve no exercise of statutory authority going beyond the authority held by private individuals or organizations.

40 In my opinion, the chambers judge correctly concluded that the appellants' *Charter* argument stands on the same footing as that rejected by the Ontario Court of Appeal in *Lobo v. Carleton University*, 2012 ONCA 498 (Ont. C.A.). There, the motion judge had held the appellants failed to plead the material facts necessary to establish that the respondent university was implementing a specific government program or policy by failing to allocate space for the appellants to advance their extra-curricular objectives (which included a "Choice Chain") as a means to express their

social, moral, religious or political views. The Court of Appeal dismissed the appeal by endorsement in the following terms:

> [4] ... As explained by the motion judge, when the University books space for non-academic extra-curricular use, it is not implementing a specific government policy or program as contemplated in *Eldridge*. In carrying out this particular activity there is, therefore, no triable issue as to whether *Charter* scrutiny applies to the respondent's actions.

41 In my view, the chambers judge in this case was correct to find that neither the entity whose activity is impugned, nor the activity itself, were amenable to *Charter* scrutiny.

The Other Question is Moot

42 The *Policy* itself was only challenged by way of an application under s. 52 of the *Constitution*, on the grounds it was *ultra vires* as it infringed the appellants' *Charter* rights.

43 The further relief the appellants seek, under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, is limited. The appellants do not ask for a new hearing or an opportunity to make a case before the University's Associate Vice-President of Student Affairs in relation to any of the impugned decisions. The only relief sought by the appellants pursuant to the *Judicial Review Procedure Act* is an order quashing three decisions of Mr. Dunsdon: the January 29, 2013 decision to permit the demonstration; the January 31, 2013 decision to revoke the permit; and the March 7, 2013 decision to sanction YPY and to warn its members of the consequences of future infractions. As the chambers judge pointed out, the question whether there are grounds to challenge the first decision, granting the permit, did not give rise to a justiciable issue:

> [109] While Mr. Dunsdon's letter of January 29, 2013, has not been withdrawn, it granted permission to YPY and its members to engage in the Choice Chain on February 1, 2013, albeit on terms. Those terms were agreed to and accepted by Mr. Côté. In the result, I am not persuaded that the decision referred to in that letter entitles the petitioners to any relief, and I would not entertain the relief they seek with respect to the decision reflected in that letter.

44 The appellants say, irrespective of whether the *Charter* is engaged, the second and third decisions are unreasonable and must be set aside. They say it is clear from Mr. Dunsdon's January 31, 2013 letter that the University revoked the permit to hold the Choice Chain solely because the UVSS had imposed sanctions upon YPY and there was no rational exercise of the University's discretion to regulate speech in its public space. The University's reliance upon the *Policy* had the effect of unreasonably delegating decision-making power to the UVSS without regard for countervailing interests such as freedom of expression.

45 Because they do not seek reconsideration of the decisions, the appellants do not intend to revisit the substantive issue: whether Mr. Dunsdon could properly have withdrawn the permit or sanctioned the YPY after having considered *Charter* values. The relief they seek will have no practical effect or significance. The University's letter of March 7, 2013, suspending YPY's outdoor space booking privileges, was withdrawn in March 2014. The threat of further sanctions for non-academic misconduct was withdrawn at the same time. There is no longer a threat of sanctions to YPY members as a result of the 2013 decisions (Mr. Côté himself has since graduated). The *Policy* was amended in July 2014, apparently as a consequence of the dispute giving rise to this appeal.

46 There is no need to quash the decisions that have been revoked, nor is there any apparent benefit to doing so. What is sought by the appellants, if they cannot assert *Charter* rights, is essentially - in function, if not form - a declaration that consideration ought to have been given to *Charter* values when the University made two decisions the appellants no longer have any real interest in challenging.

47 Whether the plea for relief under the *Judicial Review Procedure Act* is moot, and if so, whether that should end our enquiry, should be considered in light of the principles set out in *Borowski v. Canada (Attorney General)*, [1989] 1

S.C.R. 342 (S.C.C.), and canvassed in Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback, 2008) (loose-leaf updated December 2014) at §3.3300.

48 Where no live controversy exists which affects the rights of the parties, the issue is moot. In my view, there was no live issue in relation to the reasonableness of the impugned decisions, as opposed to the question whether the decisions infringed upon *Charter* rights, before the chambers judge.

49 The prayer for relief in the petition was founded, in part, upon the argument that the decisions failed to appropriately weigh an *infringement* of s. 2(b), (c) and (d) of the *Charter.* The appellants submit, however, that they have also consistently sought an order quashing the decisions on the distinct ground they were unreasonably made without regard to *Charter values.* The appellants direct us to the chambers judge's description of the issues at paras. 85-87 of his reasons. The cited passages clearly describe the appellants' assertions that the impugned decisions were unreasonable because they failed to proportionately weigh *Charter* values, and in particular students' rights of expression and peaceful assembly. The chambers judge also noted the argument that the University had impermissibly and unreasonably delegated decisions on use of University property to the UVSS. The appellants say their attack upon the reasonableness of the impugned decisions was described but not explicitly addressed by the chambers judge.

50 The University's mootness argument with respect to the allegation of a *Charter* breach, was addressed in the following terms:

> [113] If Mr. Côté was deprived of any of his *Charter* rights by the second and third impugned decisions, he may, in my opinion, be entitled to seek relief as a result of such deprivations, notwithstanding that the deprivations are no longer operative.
>
> [Emphasis added.]

51 In my view, it is correct to say the mootness of the balance of the judicial review application was not expressly dealt with by the chambers judge, who considered the answer to the *Charter* arguments to be determinative of the live issues before him. He clearly declined to engage in a full judicial review analysis. At para. 153 he held:

> [153] As I have concluded that the *Charter* does not apply to the activities relating to the booking of space by students it follows that I decline to make the declarations sought in paras. 1 and 3 of the Petition. Therefore, I also decline to grant the relief requested in para. 4 of the Petition.

52 The question before this Court is whether the chambers judge's failure to further address the relief sought in para. 4 of the petition (an order quashing the impugned decisions) might be available to the appellants, despite the finding that the *Charter* did not apply to the decisions in question, was such an error in the exercise of his discretion as to warrant our intervention. In my view, it was not. The issue of the reasonableness of the impugned decisions is still moot; addressing that issue can produce no practical remedy. Answering this moot question would be particularly difficult because the evidence was not fully developed in the Supreme Court.

53 As a general policy or practice, abstract, hypothetical or contingent questions will not be heard unless the court exercises its discretion to depart from that policy or practice: *Borowski* at 353. The relevant factors relating to the exercise of the court's discretion to do so include:

> a) whether there are still adversaries who can suitably put the question to the court;
>
> b) whether it is in the interests of judicial economy to consider the question; and
>
> c) whether the question should be considered in light of the court's appropriate adjudicative role.

54 With regard to the first criterion, this appeal was fully argued on both sides and it cannot be suggested that the question was not appropriately addressed. However, with regard to the remaining criteria, concern for judicial economy and appropriate recognition of this Court's limited appellate role weigh heavily against addressing the moot issue.

55 There will be little value in an order quashing the decisions in question. The manner and extent to which *Charter* values should be weighed by universities in the course of administrative decision-making is fact-specific and does not lend itself to general pronouncements. Here, as in *Borowski*, "[i]t is far from clear that a decision on the merits will obviate the necessity for future repetitious litigation". There is considerable jurisprudence upon which the appellants have relied in support of the rule that *Charter* values must be weighed where a discretionary administrative decision engages the protections enumerated in the *Charter*, including *Doré* and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 (S.C.C.). A decision on the moot question posed in the case at bar will not address a lacuna in the law.

56 Furthermore, I agree with the University's submission that the appellants only fully developed and advanced their *Charter* claims in the court below. Review of the impugned decisions for reasonableness was evidently a secondary concern of the appellants, who concentrated their submissions almost exclusively upon their claim to a *Charter* remedy. As a result, an extensive record of the University's decision-making was not developed.

57 There was no consideration of whether the impugned decisions were appropriately the subject of judicial review and, if so, whether they were ripe for review. The University is manifestly a public body exercising some public functions amenable to judicial review and public universities enjoy no special insulation from judicial review, but not *all* decisions made by the administration of a public university are amenable to judicial review (*Harelkin*, and in particular the observations of La Forest J. in *McKinney*).

58 The chambers judge gave no consideration to whether, as the appellants claim, a "penalty" was imposed in the wake of the Choice Chain event, and if so, whether that penalty was imposed "on YPY students". The chambers judge only briefly considered whether the appellants were obliged to exhaust internal avenues of appeal before seeking judicial review. It was open to YPY to appeal the UVSS resolution to sanction YPY, and the club was in fact encouraged to do so by Mr. Dunsdon in January 2013. YPY could have challenged Mr. Dunsdon's revocation of its permit, but chose to hold the Choice Chain event. In the wake of that event, it was open to the group to appeal the suspension of its booking privileges. It did not do so. The failure to exhaust these remedies is not *prima facie* fatal to the appellants' petition, as the chambers judge noted at paras. 114-115, but it may have posed an obstacle to the argument that *Charter* values ought to have been considered by Mr. Dunsdon before making the impugned decisions.

59 It is clear from his reasons that the chambers judge considered the petition to turn upon the *Charter* issue (not surprisingly, considering this was the thrust of the parties' arguments). Whether students may be deprived of *Charter* rights by the University's decisions with respect to the use of its facilities and space is, as the chambers judge concluded, a question of general significance. On the other hand, the distinct judicial review issue raised by the appellants was moot by the time of the hearing and is still moot. It is of no broader legal significance. For that reason I would not accede to either the argument that the chambers judge erred in failing to address the issue or the submission that we should address it on appeal.

Conclusion

60 I would dismiss the appeal.

***Saunders J.A.*:**

I agree:

***Dickson J.A.*:**

I agree:

Appeal dismissed.

End of Document

TAB 2

2006 SCC 3
Supreme Court of Canada

Bella v. Young

2006 CarswellNfld 19, 2006 CarswellNfld 20, 2006 SCC 3, [2006] 1 S.C.R. 108, [2006] R.R.A. 1, [2006] W.D.F.L. 489, [2006] S.C.J. No. 2, 145 A.C.W.S. (3d) 343, 21 C.P.C. (6th) 1, 254 Nfld. & P.E.I.R. 26, 261 D.L.R. (4th) 516, 343 N.R. 360, 37 C.C.L.T. (3d) 161, 764 A.P.R. 26, J.E. 2006-290

Wanda Young (Appellant) v. Leslie Bella, William S. Rowe and Memorial University of Newfoundland (Respondents) and Child Welfare League of Canada (Intervener)

McLachlin C.J.C., Bastarache, Binnie, LeBel, Fish, Abella, Charron JJ.

Heard: October 20, 2005
Judgment: January 27, 2006 *
Docket: 30670

Proceedings: reversing *Bella v. Young* (2004), *(*sub nom. *Young v. Bella)* 241 Nfld. & P.E.I.R. 35, *(*sub nom. *Young v. Bella)* 716 A.P.R. 35, 8 C.P.C. (6th) 131, 2004 NLCA 60, 2004 CarswellNfld 300 (N.L. C.A.)

Counsel: Gilian D. Butler, Q.C., Kimberley M. McLennan for Appellant
R. Wayne Bruce, Susan E. Norman for Respondents
Michael Barrack, Christoper A. Wayland for Intervener

Subject: Torts; Public; Family; Civil Practice and Procedure

Headnote

Negligence --- General principles — Duty and standard of care — Miscellaneous issues

Plaintiff university student submitted, as appendix attached to term paper, case study of woman sexually abusing children — Professor speculated it was personal confession — Without further inquiry, director of School of Social Work reported plaintiff to Child Protection Services (CPS) — Plaintiff was "red-flagged" as potential child abuser but was cleared by CPS investigation two years later — Plaintiff brought claim for damages in negligence against professor, director, and university — Jury found that university's negligence had destroyed plaintiff's chosen career prospects and awarded her $839,400 in damages — Court of Appeal held that action was barred by s. 38(6) of Child Welfare Act and overturned jury award — Appeal by plaintiff allowed — Defendants acted on conjecture and speculation which fell far short of required "reasonable cause" under s. 38(6) to make report — Plaintiff's claim in negligence encompassed university's dealings with her generally, which gave rise to duty of care — Standard of care to be exercised by professors towards their students requires them to take necessary care to get their facts straight before taking potential career-ending action — There was evidence that university breached these duties through negligence of its employees — It was open to jury to conclude that behaviour of professor and director fell markedly short of standard of care professors should exercise.

Education law --- Educational malpractice

Plaintiff university student submitted, as appendix attached to term paper, case study of woman sexually abusing children — Professor speculated it was personal confession — Without further inquiry, director of School of Social Work reported plaintiff to Child Protection Services (CPS) — Plaintiff was "red-flagged" as potential child abuser but was cleared by CPS investigation two years later — Plaintiff brought claim for damages in negligence against professor, director, and university — Jury found that university's negligence had destroyed plaintiff's chosen career prospects and awarded her $839,400 in damages — Court of Appeal held that action was barred by s. 38(6) of Child Welfare Act and overturned jury award — Appeal by plaintiff allowed — Defendants acted on conjecture and speculation which fell far short of required "reasonable cause" under s. 38(6) to make report — Plaintiff's claim in negligence encompassed university's dealings with

her generally, which gave rise to duty of care — Standard of care to be exercised by professors towards their students requires them to take necessary care to get their facts straight before taking potential career-ending action — There was evidence that university breached these duties through negligence of its employees — It was open to jury to conclude that behaviour of professor and director fell markedly short of standard of care professors should exercise.

Family law --- Children in need of protection — Offences under child welfare legislation — General principles

Duty to report — Plaintiff university student submitted, as appendix attached to term paper, case study of woman sexually abusing children — Professor speculated it was personal confession — Without further inquiry, director of School of Social Work reported plaintiff to Child Protection Services (CPS) — Plaintiff was "red-flagged" as potential child abuser but was cleared by CPS investigation two years later — Plaintiff brought claim for damages in negligence against professor, director, and university — Jury found that university's negligence had destroyed plaintiff's chosen career prospects and awarded her $839,400 in damages — Court of Appeal held that action was barred by s. 38(6) of Child Welfare Act, which protects informants who report child abuse from legal action unless report is done "maliciously or without reasonable cause," and overturned jury award — Appeal by plaintiff allowed — Section 38(6) did not bar cause of action on facts of this case — Defendants acted on conjecture and speculation which fell far short of required "reasonable cause" under s. 38(6) to make report — Duty to report "information" imposed by s. 38(1) and protection against suits accorded by s. 38(6) are co-extensive — Words "information" in s. 38(1) and "reasonable cause" in s. 38(6) must together be given purposive interpretation — Section 38(6) offered no protection to defendants here because case study in appendix to plaintiff's paper was not information that child was in danger or in need of protection from plaintiff.

Negligence --- Practice and procedure — Trials — Grounds for appeal — Miscellaneous issues

Damages — Plaintiff university student submitted, as appendix attached to term paper, case study of woman sexually abusing children — Professor speculated it was personal confession — Without further inquiry, director of School of Social Work reported plaintiff to Child Protection Services (CPS) — Plaintiff was "red-flagged" as potential child abuser but was cleared by CPS investigation two years later — Plaintiff brought claim for damages in negligence against professor, director, and university — Jury found that university's negligence had destroyed plaintiff's chosen career prospects and awarded her $839,400 in damages — Court of Appeal held that action was barred by s. 38(6) of Child Welfare Act and overturned jury award — Appeal by plaintiff allowed — Defendants acted on conjecture and speculation which fell far short of required "reasonable cause" under s. 38(6) to make report — Possibility of suing in defamation does not negate availability of cause of action in negligence where necessary elements are made out — Evidence at trial supported jury's finding of negligence and factual underpinnings of plaintiff's claim to damages — There was sufficient evidence to permit jury to find causal connection between university's breach of duty and damages suffered by plaintiff — It was open to jury on evidence to conclude that professors' collective negligence destroyed plaintiff's career prospects as social worker and to assess damages accordingly.

Damages --- Valuation of damages — Measure of damages — Miscellaneous issues

Non-pecuniary damages — Plaintiff university student submitted, as appendix attached to term paper, case study of woman sexually abusing children — Professor speculated it was personal confession — Without further inquiry, director of School of Social Work reported plaintiff to Child Protection Services (CPS) — Plaintiff was "red-flagged" as potential child abuser but was cleared by CPS investigation two years later — Plaintiff brought claim for damages in negligence against professor, director, and university — Jury found that university's negligence had destroyed plaintiff's chosen career prospects and awarded her $839,400 in damages, including $430,000 in non-pecuniary damages — Court of Appeal held that action was barred by s. 38(6) of Child Welfare Act and overturned jury award — Appeal by plaintiff allowed — Defendants acted on conjecture and speculation which fell far short of required "reasonable cause" under s. 38(6) to make report — Evidence at trial supported jury's finding of negligence and factual underpinnings of plaintiff's claim to damages — It was open to jury on evidence to conclude that professors' collective negligence destroyed plaintiff's career prospects as social worker and to assess damages accordingly — In light of evidence, jury's award was not wholly disproportionate or shockingly unreasonable — Defendants had not established why cap on non-pecuniary damages imposed in catastrophic personal injury cases should be imposed in cases such as this.

Damages --- Practice — Appeals — Grounds for appeal — Quantum unreasonable — Excessive award

Plaintiff university student submitted, as appendix attached to term paper, case study of woman sexually abusing children — Professor speculated it was personal confession — Without further inquiry, director of School of Social Work reported

plaintiff to Child Protection Services (CPS) — Plaintiff was "red-flagged" as potential child abuser but was cleared by CPS investigation two years later — Plaintiff brought claim for damages in negligence against professor, director, and university — Jury found that university's negligence had destroyed plaintiff's chosen career prospects and awarded her $839,400 in damages, including $430,000 in non-pecuniary damages — Court of Appeal held that action was barred by s. 38(6) of Child Welfare Act and overturned jury award — Appeal by plaintiff allowed — Defendants acted on conjecture and speculation which fell far short of required "reasonable cause" under s. 38(6) to make report — Evidence at trial supported jury's finding of negligence and factual underpinnings of plaintiff's claim to damages — It was open to jury on evidence to conclude that professors' collective negligence destroyed plaintiff's career prospects as social worker and to assess damages accordingly — In light of evidence, jury's award was not wholly disproportionate or shockingly unreasonable — Defendants had not established why cap on non-pecuniary damages imposed in catastrophic personal injury cases should be imposed in cases such as this.

Négligence --- Principes généraux — Devoir et norme de diligence — Questions diverses

Demanderesse, une étudiante à l'université, a remis, en annexe à son travail de session, une étude de cas d'une femme qui agressait sexuellement des enfants — Professeure a supposé qu'il s'agissait d'une confession personnelle — Sans poser plus de questions, le directeur de l'École de service social a signalé la demanderesse au Service de protection de l'enfance (SPE) — Demanderesse a été étiquetée comme étant un agresseur d'enfants potentiel, mais a été exonérée deux ans plus tard par l'enquête du SPE — Demanderesse a intenté une action pour négligence et dommages contre la professeure, le directeur et l'université — Jury a conclu que la négligence de l'université avait détruit les perspectives de carrière de la demanderesse et a octroyé à celle-ci des dommages-intérêts de 839 400 $ — Cour d'appel a statué que l'action était interdite par l'art. 38(6) de la Child Welfare Act et a annulé la condamnation du jury — Pourvoi de la demanderesse accueilli — Défendeurs ont agi sur la base de conjectures et de suppositions qui étaient bien loin de correspondre à une « raison valable » telle qu'exigée par l'art. 38(6) pour faire un signalement — Action de la demanderesse comprenait les agissements en général de l'université envers la demanderesse, lesquels donnaient lieu à une obligation de diligence — Norme de diligence que les professeurs sont tenus de respecter à l'égard de leurs étudiants exige qu'ils prennent les moyens nécessaires pour vérifier les faits avant de faire quelque chose pouvant mettre fin à la carrière des étudiants — Preuve avait été faite que l'université avait manqué à ses obligations en raison de la négligence de ses employés — Il était loisible au jury de conclure que le comportement de la professeure et du directeur dérogeait sensiblement à la norme de diligence qu'ils étaient tenus de respecter.

Droit de l'éducation --- Faute professionnelle en matière d'éducation

Demanderesse, une étudiante à l'université, a remis, en annexe à son travail de session, une étude de cas d'une femme qui agressait sexuellement des enfants — Professeure a supposé qu'il s'agissait d'une confession personnelle — Sans poser plus de questions, le directeur de l'École de service social a signalé la demanderesse au Service de protection de l'enfance (SPE) — Demanderesse a été étiquetée comme étant un agresseur d'enfants potentiel, mais a été exonérée deux ans plus tard par l'enquête du SPE — Demanderesse a intenté une action pour négligence et dommages contre la professeure, le directeur et l'université — Jury a conclu que la négligence de l'université avait détruit les perspectives de carrière de la demanderesse et a octroyé à celle-ci des dommages-intérêts de 839 400 $ — Cour d'appel a statué que l'action était interdite par l'art. 38(6) de la Child Welfare Act et a annulé la condamnation du jury — Pourvoi de la demanderesse accueilli — Défendeurs ont agi sur la base de conjectures et de suppositions qui étaient bien loin de correspondre à une « raison valable » telle qu'exigée par l'art. 38(6) pour faire un signalement — Action de la demanderesse comprenait les agissements en général de l'université envers la demanderesse, lesquels donnaient lieu à une obligation de diligence — Norme de diligence que les professeurs sont tenus de respecter à l'égard de leurs étudiants exige qu'ils prennent les moyens nécessaires pour vérifier les faits avant de faire quelque chose pouvant mettre fin à la carrière des étudiants — Preuve avait été faite que l'université avait manqué à ses obligations en raison de la négligence de ses employés — Il était loisible au jury de conclure que le comportement de la professeure et du directeur dérogeait sensiblement à la norme de diligence qu'ils étaient tenus de respecter.

Droit de la famille --- Enfants ayant besoin de protection — Infractions en vertu des lois sur la protection de l'enfance — Principes généraux

Obligation de signaler — Demanderesse, une étudiante à l'université, a remis, en annexe à son travail de session, une étude de cas d'une femme qui agressait sexuellement des enfants — Professeure a supposé qu'il s'agissait d'une confession

personnelle — Sans poser plus de questions, le directeur de l'École de service social a signalé la demanderesse au Service de protection de l'enfance (SPE) — Demanderesse a été étiquetée comme étant un agresseur d'enfants potentiel, mais a été exonérée deux ans plus tard par l'enquête du SPE — Demanderesse a intenté une action pour négligence et dommages contre la professeure, le directeur et l'université — Jury a conclu que la négligence de l'université avait détruit les perspectives de carrière de la demanderesse et a octroyé à celle-ci des dommages-intérêts de 839 400 $ — Court d'appel a statué que l'action était interdite par l'art. 38(6) de la Child Welfare Act, laquelle protège contre les poursuites judiciaires les dénonciateurs qui signalent des mauvais traitements infligés aux enfants, à moins que le signalement n'ait été fait « de façon malveillante ou sans raison valable »; elle a annulé la condamnation du jury — Pourvoi de la demanderesse accueilli — Vu les faits de cette affaire, la cause d'action n'était pas interdite par l'art. 38(6) — Défendeurs ont agi sur la base de conjectures et de suppositions qui étaient bien loin de correspondre à une « raison valable » telle qu'exigée par l'art. 38(6) pour faire un signalement — Obligation de communiquer des « renseignements » qu'imposait l'art. 38(1) et la protection contre les poursuites judiciaires accordée par l'art. 38(6) avaient la même portée — Termes « renseignements » de l'art. 38(1) et « raison valable » de l'art. 38(6) devaient recevoir une interprétation téléologique — Article 38(6) ne protégeait pas les défendeurs en l'espèce, puisque l'étude de cas annexée au travail de la demanderesse ne constituait pas des renseignements à propos d'un enfant en danger ou ayant besoin d'être protégé contre la demanderesse.

Négligence --- Procédure — Procès — Motifs d'appel — Questions diverses

Dommages-intérêts — Demanderesse, une étudiante à l'université, a remis, en annexe à son travail de session, une étude de cas d'une femme qui agressait sexuellement des enfants — Professeure a supposé qu'il s'agissait d'une confession personnelle — Sans poser plus de questions, le directeur de l'École de service social a signalé la demanderesse au Service de protection de l'enfance (SPE) — Demanderesse a été étiquetée comme étant un agresseur d'enfants potentiel, mais a été exonérée deux ans plus tard par l'enquête du SPE — Demanderesse a intenté une action pour négligence et dommages contre la professeure, le directeur et l'université — Jury a conclu que la négligence de l'université avait détruit les perspectives de carrière de la demanderesse et a octroyé à celle-ci des dommages-intérêts de 839 400 $ — Cour d'appel a statué que l'action était interdite par l'art. 38(6) de la Child Welfare Act et a annulé la condamnation du jury — Pourvoi de la demanderesse accueilli — Défendeurs ont agi sur la base de conjectures et de suppositions qui étaient bien loin de correspondre à une « raison valable » telle qu'exigée par l'art. 38(6) pour faire un signalement — Possibilité de poursuivre en diffamation ne fait pas disparaître la possibilité d'une cause d'action fondée sur la négligence lorsque les éléments nécessaires ont été prouvés — Preuve faite au procès étayait la conclusion de négligence tirée par le jury et le fondement factuel de l'action en dommages-intérêts intentée par la demanderesse — Il y avait suffisamment de preuve permettant au jury de conclure à l'existence d'un lien de causalité entre le manquement de l'université à son obligation et les dommages subis par la demanderesse — Il était loisible au jury de conclure que la négligence collective des professeurs avait détruit les perspectives de carrière de la demanderesse comme travailleuse sociale et d'évaluer les dommages en conséquence.

Dommages-intérêts --- Évaluation des dommages — Calcul des dommages-intérêts — Questions diverses

Dommages non pécuniaires — Demanderesse, une étudiante à l'université, a remis, en annexe à son travail de session, une étude de cas d'une femme qui agressait sexuellement des enfants — Professeure a supposé qu'il s'agissait d'une confession personnelle — Sans poser plus de questions, le directeur de l'École de service social a signalé la demanderesse au Service de protection de l'enfance (SPE) — Demanderesse a été étiquetée comme étant un agresseur d'enfants potentiel, mais a été exonérée deux ans plus tard par l'enquête du SPE — Demanderesse a intenté une action pour négligence et dommages contre la professeure, le directeur et l'université — Jury a conclu que la négligence de l'université avait détruit les perspectives de carrière de la demanderesse et a octroyé à celle-ci des dommages-intérêts de 839 400 $, dont 430 000 $ à titre de dommages non pécuniaires — Cour d'appel a statué que l'action était interdite par l'art. 38(6) de la Child Welfare Act et a infirmé la condamnation du jury — Pourvoi de la demanderesse accueilli — Défendeurs ont agi sur la base de conjectures et de suppositions qui étaient bien loin de correspondre à une « raison valable » telle qu'exigée par l'art. 38(6) pour faire un signalement — Preuve faite au procès étayait la conclusion de négligence tirée par le jury et le fondement factuel de l'action en dommages-intérêts intentée par la demanderesse — Il était loisible au jury de conclure que la négligence collective des professeurs avait détruit les perspectives de carrière de la demanderesse comme travailleuse sociale et d'évaluer les dommages en conséquence — Vu la preuve, la somme octroyée par le jury n'était pas tout à fait disproportionnée ou terriblement déraisonnable — Défendeurs n'avaient pas établi pourquoi le plafond

auquel sont assujettis les dommages non pécuniaires dans les cas de blessures corporelles catastrophiques devrait être appliqué dans des affaires comme celle-ci.

Dommages-intérêts --- Procédure — Appels — Motifs d'appel — Quantum déraisonnable — Montant excessif

Demanderesse, une étudiante à l'université, a remis, en annexe à son travail de session, une étude de cas d'une femme qui agressait sexuellement des enfants — Professeure a supposé qu'il s'agissait d'une confession personnelle — Sans poser plus de questions, le directeur de l'École de service social a signalé la demanderesse au Service de protection de l'enfance (SPE) — Demanderesse a été étiquetée comme étant un agresseur d'enfants potentiel, mais a été exonérée deux ans plus tard par l'enquête du SPE — Demanderesse a intenté une action pour négligence et dommages contre la professeure, le directeur et l'université — Jury a conclu que la négligence de l'université avait détruit les perspectives de carrière de la demanderesse et a octroyé à celle-ci des dommages-intérêts de 839 400 $, dont 430 000 $ à titre de dommages non pécuniaires — Cour d'appel a statué que l'action était interdite par l'art. 38(6) de la Child Welfare Act et a annulé la condamnation du jury — Pourvoi de la demanderesse accueilli — Défendeurs ont agi sur la base de conjectures et de suppositions qui étaient bien loin de correspondre à une « raison valable » telle qu'exigée par l'art. 38(6) pour faire un signalement — Preuve faite au procès étayait la conclusion de négligence tirée par le jury et le fondement factuel de l'action en dommages-intérêts intentée par la demanderesse — Il était loisible au jury de conclure que la négligence collective des professeurs avait détruit les perspectives de carrière de la demanderesse comme travailleuse sociale et d'évaluer les dommages en conséquence — Vu la preuve, la somme octroyée par le jury n'était pas tout à fait disproportionnée ou terriblement déraisonnable — Défendeurs n'avaient pas établi pourquoi le plafond auquel sont assujettis les dommages non pécuniaires dans les cas de blessures corporelles catastrophiques devrait être appliqué dans des affaires comme celle-ci.

The plaintiff was a university student taking "distance education" courses towards her goal of becoming a social worker. She submitted a term paper which contained an appendix that was a woman's "first person" confession to being a child sexual abuser. There was no indication that the case study was taken from a textbook listed in the paper's bibliography. The plaintiff's professor speculated that the case study was a personal confession by the plaintiff to having abused children, and also suspected that the term paper was plagiarized. She raised the issue of plagiarism with the plaintiff, but did not mention her concerns about child abuse or ask the plaintiff about the appendix. Instead the professor took her concerns to the director of the School of Social Work who, without seeking an explanation from the plaintiff, reported her to Child Protection Services (CPS). As a result, and unbeknownst to her, the plaintiff was "red-flagged" as a potential child abuser in the communities where she might have hoped to find work as a social worker. The university later rejected her application to pursue a degree in social work. When the matter was investigated by CPS two years later, the plaintiff produced the book and the misunderstanding was cleared up within 24 hours, the suspicion of child abuse having been found to be "without a shred of reality."

The plaintiff brought an action against the professor, the director, and the university for damages for negligence and defamation. The trial judge ruled that as a matter of law, the words in the director's letter to CPS were not capable of being defamatory. However, a jury found that the university's treatment of the plaintiff was negligent and that as a result of this negligence, her chosen career prospects had been destroyed. The jury awarded the plaintiff $839,400 in damages, including $430,000 in non-pecuniary damages. The defendants appealed and the plaintiff cross-appealed the trial judge's ruling that the action in defamation was precluded. A majority of the Court of Appeal held that the action was barred by s. 38(6) of the Child Welfare Act, which protects informants who report child abuse from legal action unless the report is done "maliciously or without reasonable cause," and set aside the finding of negligence and the jury award. The cross-appeal was dismissed. The plaintiff appealed.

Held: The appeal was allowed and the trial judgment restored.

Section 38(1) of the Child Welfare Act requires the reporting of "information that a child has been, is or may be in danger of abandonment, desertion, neglect, physical, sexual or emotional ill-treatment or has been, is or may be otherwise in need of protection." Those who are subject to a duty to report information must be protected from any adverse legal consequences flowing from compliance with that duty. Section 38(6) of the Act requires there to be "reasonable cause" to make a report to CPS, striking an appropriate balance between the protection of children, the protection of third parties against unfounded allegations, and the protection of informants. Here the defendants acted on conjecture and speculation which fell far short of the required "reasonable cause" to make a report to CPS. They did not even have

misinformation, for which protection will be available unless reported maliciously or without reasonable cause. They acted in a way the jury found to be without any reasonable cause even to make a report.

There was evidence before the jury capable of establishing all the elements of the tort of negligence. The defendants' assertion that the duty of care was negated for policy reasons overlooked the fact that the plaintiff's claim in negligence encompassed the university's dealings with her generally. Proximity was not simply grounded in a misguided report to CPS, but was rooted in the broader relationship between the professors and their students, creating mutual rights and liabilities and giving rise to a duty of care. The standard of care that should be exercised by professors towards their students required them to take the necessary care to get their facts straight before taking a potential career-ending action. It was the absence of reasonable cause even to make a report that lay at the heart of the plaintiff's allegation of negligence. There was evidence that the university had breached these duties through the negligence of its employees. Neither the professor nor the director sought an explanation from the plaintiff for the missing footnote. In light of the evidence, it was open to the jury to conclude that their behaviour fell markedly short of the standard of care professors should exercise towards their students. There was no basis for an appellate court to intervene with the jury's findings in that respect.

Section 38(6) did not bar relief to the plaintiff in these circumstances. The director acted on nothing more than speculation and conjecture in making his report, which he must have known would have serious consequences within the small community of social workers in the province, including the likely posting of the plaintiff's name on the Child Abuse Registry. The legislation specifies both a subjective element ("maliciously") and an objective element ("reasonable cause") to determine whether a report of "information" is to be protected from all legal consequences. To construe s. 38(6) so broadly that anything potentially relevant to child abuse that comes from an external source should be reported reads the words "reasonable cause" out of the section and fundamentally changes the legislative scheme. The duty to report "information" imposed by s. 38(1) and the protection against suits accorded by s. 38(6) are co-extensive and must be read together. Further, the duty to report should not be narrowly construed. Information that a child "may be" in danger or in need of protection suffices to trigger the obligation to report "immediately." A broad duty to report possible abuse is consistent with the Act's goal of protecting children.

While the primary objective of the Act is to protect children, it seeks to do so in a way that also takes into account the interests of the persons under suspicion and the interests of informants. The interest of the person suspected of abuse is protected by the inclusion of an objective standard in s. 38(6). These two components must be read together, and the words "information" and "reasonable cause" must together be given a purposive interpretation. "Reasonable cause" does not mean reasonable grounds to believe that abuse has occurred, or is occurring, or will occur. The informant need only have "reasonable cause" to ask CPS to consider looking into the matter. Here, s. 38(6) offered no protection to the defendants because the case study contained in the appendix to the plaintiff's paper was not information that a child was in danger or in need of protection from the plaintiff. There was nothing that tied the experiences it related to her.

There was no basis on which to interfere with the jury's award of damages. There were many contingencies built into the damage calculations, and the jury chose to resolve those contingencies in favour of the plaintiff. It was within their province to do so. The defendants' assertion that the plaintiff's claim was really an action for defamation was rejected. The possibility of suing in defamation does not negate the availability of a cause of action in negligence where the necessary elements are made out. The evidence at trial supported the jury's finding of negligence and the factual underpinnings of the plaintiff's claim to damages. There was sufficient evidence to permit the jury to find a causal connection between the university's breach of duty and the damages suffered by the plaintiff. There was also evidence before the jury of the profound risk of damage posed by the fanciful speculations of the professors, which gave rise to their actions against the plaintiff internally as well as to their report to CPS. It was open to the jury on the evidence to conclude that the professors' collective negligence destroyed the plaintiff's career prospects as a social worker, and to assess damages accordingly. Their decision was not so aberrant that it could be said that no reasonable jury, properly instructed, could have made it. The jury must also have found that contributory negligence on the part of the plaintiff because of her footnoting mistake had not been proven. That conclusion was open to it on the evidence.

The defendants sought to set aside the award of $430,000 for non-pecuniary damages because the loss suffered by the plaintiff was not of such magnitude to justify "one of the largest non-pecuniary general damage awards . . . ever awarded in this country . . . ." That is not the test for appellate intervention with a jury award. The plaintiff called uncontradicted expert evidence laying out a number of scenarios based on different potential findings of fact for the jury's consideration.

Jury awards of damages may only be set aside for palpable and overriding error. In light of the evidence, the award for non-pecuniary damages could not be said to be wholly disproportionate or shockingly unreasonable. Further, the defendants had not established why the cap on non-pecuniary damages imposed in catastrophic personal injury cases should be imposed in cases such as this. The case for imposing a cap in cases of negligence causing economic loss was not made out here either. The issue of whether and in what circumstances the cap applies to non-pecuniary damage awards outside the catastrophic personal injury context was left open for consideration in another case.

La demanderesse était une étudiante à l'université qui suivait des cours à distance dans le but de devenir une travailleuse sociale. Elle a remis un travail de session avec, en annexe, la confession d'une femme écrite à la première personne qui disait agresser sexuellement des enfants. Rien n'indiquait que cette étude de cas avait été tirée d'un manuel indiqué dans la bibliographie de la demanderesse. La professeure de la demanderesse a supposé que l'étude de cas constituait une confession personnelle de celle-ci d'agressions sexuelles d'enfants et a aussi soupçonné que le travail était plagié. Elle a soulevé la question du plagiat auprès de la demanderesse, mais n'a pas mentionné ses craintes relatives aux agressions sexuelles ni ne lui a posé de questions à propos de son annexe. La professeure a plutôt fait part de ses craintes au directeur de l'École de service social qui, sans même demander d'explications à la demanderesse, a signalé celle-ci auprès du Service de protection à l'enfance (SPE). Par conséquent, et sans le savoir, la demanderesse a été étiquetée d'agresseur d'enfants potentiel au sein des communautés mêmes où elle aurait pu espérer trouver du travail comme travailleuse sociale. L'université a par la suite refusé sa demande de continuer son diplôme en travail social. Lorsque le SPE a enquêté deux ans plus tard, la demanderesse a montré le livre et le quiproquo s'est dissipé dans les 24 heures, les soupçons d'agression d'enfants ayant été considérés comme n'ayant « aucun fondement ».

La demanderesse a intenté une action en négligence, en dommages et en diffamation contre la professeure, le directeur et l'université. Le premier juge a jugé que les termes utilisés dans la lettre du directeur envoyée au SPE ne pouvaient être diffamatoires en droit. Cependant, le jury a conclu que l'université avait fait preuve de négligence à l'égard de la demanderesse et que cette négligence avait eu pour effet de détruire les perspectives de carrière de la demanderesse. Le jury a accordé à celle-ci des dommages-intérêts de l'ordre de 839 000 $, dont 430 000 $ à titre de dommages non pécuniaires. Les défendeurs ont interjeté appel et la demanderesse a formé un pourvoi incident quant à la conclusion du juge que l'action en diffamation était forclose. Les juges majoritaires de la Cour d'appel ont statué que l'action était interdite par l'art. 38(6) de la Child Welfare Act, qui protège contre les poursuites judiciaires les dénonciateurs qui signalent des cas d'agression d'enfants, à moins que le signalement n'ait été fait « de façon malveillante ou sans raison valable »; les juges majoritaires ont annulé la conclusion de négligence et le montant octroyé. Le pourvoi incident a été rejeté. La demanderesse a interjeté appel.

Arrêt: Le pourvoi a été accueilli et le jugement de première instance a été rétabli.

L'article 38(1) de la Child Welfare Act exige le signalement de « renseignements indiquant qu'un enfant a été, est ou risque d'être victime d'abandon, de délaissement, de négligence, de mauvais traitements physiques, sexuels ou affectifs, ou qu'il a ou peut avoir par ailleurs besoin de protection ». Ceux qui ont l'obligation de signaler doivent être protégés contre toute conséquence judiciaire négative pouvant découler de leur respect de cette obligation. L'article 38(6) de la Loi exige la présence d'une « raison valable » pour faire un signalement auprès du SPE, et ce, afin d'établir un équilibre approprié entre la protection des enfants, la protection des tiers contre des allégations non fondées et la protection des dénonciateurs. En l'espèce, les défendeurs ont agi sur la base de conjectures et de suppositions qui étaient bien loin de constituer une « raison valable » exigée pour faire un signalement auprès du SPE. Ils n'étaient même pas mal informés, ce qui donne droit à la protection à moins que le signalement ne soit fait de façon malveillante ou sans raison valable. Le jury a conclu que leur façon d'agir ne pouvait constituer une raison valable de faire un signalement.

Il y avait suffisamment de preuve devant le jury pour établir tous les éléments du délit civil de négligence. L'affirmation des défendeurs que la norme de diligence était annulée pour des raisons de politiques générales ne tenait pas compte du fait que l'action en négligence de la demanderesse comprenait les agissements de l'université envers celle-ci en général. La proximité ne découlait pas simplement d'un signalement malavisé au SPE, mais principalement du lien général entre les professeurs et leurs étudiants, lequel crée des droits et responsabilités mutuels et donne lieu à une obligation de diligence. La norme de diligence dont devaient faire preuve les professeurs à l'égard de leurs étudiants exigeait qu'ils prennent les moyens nécessaires pour vérifier les faits avant de commettre un geste pouvant potentiellement mettre fin à une carrière. C'était l'absence même de raison valable de faire un signalement qui se situait au coeur même de la négligence alléguée

par la demanderesse. Il avait été prouvé que l'université avait manqué à ses obligations par le biais de la négligence de ses employés. Ni la professeure ni le directeur n'ont demandé à la demanderesse d'explications à propos de la note en bas de page manquante. Vu la preuve, il était loisible au jury de conclure que le comportement de ces derniers dérogeait sensiblement à la norme de diligence qu'ils étaient tenus de respecter à l'égard de leurs étudiants. Rien ne justifiait d'intervention en appel relativement aux conclusions du jury à cet égard.

L'article 38(6) n'empêchait pas la demanderesse d'obtenir réparation dans ces circonstances. Le directeur n'a fait son signalement que sur la base de suppositions et conjectures et il aurait dû savoir que ce signalement aurait des conséquences graves dans le milieu restreint des travailleurs sociaux de la province, dont l'inscription probable du nom de la demanderesse dans le registre de l'enfance maltraitée. La loi établit un élément subjectif (« de façon malveillante ») et un élément objectif (« raison valable ») pour déterminer si la communication de « renseignements » doit être protégée contre toutes les conséquences juridiques. Interpréter l'art. 38(6) de façon si large que tout ce qui pourrait se rapporter à la violence envers un enfant et qui émane d'une source extérieure devrait être signalé fait abstraction de l'expression « raison valable » et modifie fondamentalement le régime législatif. L'obligation de communiquer des « renseignements » imposée par l'art. 38(1) et la protection contre les poursuites accordée par l'art. 38(6) ont la même portée et doivent être interprétées ensemble. De plus, l'obligation de signaler ne devrait pas être interprétée restrictivement. Des renseignements indiquant qu'un enfant « risque » d'être en danger ou d'avoir besoin de protection suffisent pour déclencher l'obligation de signaler « sans délai ». Une obligation générale de signaler une possibilité de mauvais traitements est compatible avec l'objectif de la Loi de protéger les enfants.

Même si la Loi a comme objectif principal de protéger les enfants, elle cherche à le faire d'une manière qui tienne compte des intérêts des personnes soupçonnées et des dénonciateurs. L'intérêt des personnes soupçonnées de se livrer à des mauvais traitements est protégé par l'inclusion d'une norme objective dans l'art. 38(6). Ces deux composantes doivent être lues ensemble, et les termes « renseignements » et « raison valable » doivent recevoir ensemble une interprétation téléologique. L'expression « raison valable » ne signifie pas des motifs raisonnables de croire que des mauvais traitements ont été infligés, sont infligés ou le seront. Le dénonciateur doit seulement avoir une « raison valable » de demander au SPE d'envisager d'enquêter. En l'espèce, l'art. 38(6) ne protégeait pas les défendeurs parce que l'étude de cas annexée au travail de la demanderesse ne constituait pas des renseignements indiquant qu'un enfant risquait d'être en danger ou d'avoir besoin d'être protégé contre la demanderesse. Cette étude ne contenait rien reliant ces expériences à la demanderesse.

Rien ne justifiait d'intervenir à l'égard des dommages-intérêts octroyés par le jury. Le calcul des dommages comportait plusieurs événements incertains, et le jury a choisi de trancher en faveur de la demanderesse à leur égard. Il lui était loisible de le faire. L'affirmation des défendeurs que l'action de la demanderesse en était réellement une de diffamation a été rejetée. La possibilité de poursuivre en diffamation ne nie pas la possibilité d'une cause d'action en négligence lorsque les différents éléments en sont prouvés. La preuve présentée au procès étayait la conclusion de négligence tirée par le jury et le fondement factuel de l'action en dommages-intérêts intentée par la demanderesse. Il y avait suffisamment de preuve pour permettre au jury de conclure à l'existence d'un lien de causalité entre le manquement de l'université à son obligation et les dommages subis par la demanderesse. La preuve avait été faite devant le jury du grave risque de préjudice posé par les suppositions fantaisistes des professeurs, lesquelles étaient à l'origine des mesures internes qu'ils avaient prises contre la demanderesse et du signalement qu'ils avaient effectué auprès du SPE. Vu la preuve, il était loisible au jury de conclure que la négligence collective des professeurs avait détruit les perspectives de carrière de la demanderesse à titre de travailleuse sociale et d'évaluer les dommages en conséquence. La décision du jury n'était pas aberrante au point d'affirmer qu'elle n'aurait pu être prise par aucun jury raisonnable ayant reçu des directives appropriées. Le jury a dû conclure qu'une négligence contributive de la part de la demanderesse n'avait pas été établie. Il pouvait le faire compte tenu de la preuve.

Les défendeurs voulaient faire annuler les dommages de 430 000 $ octroyés, invoquant que la perte subie par la demanderesse n'était pas assez importante pour justifier « un montant de dommages-intérêts généraux non pécuniaires qui compte parmi les plus élevés . . . qui ont été consentis dans notre pays . . . ». Il ne s'agit pas là du critère applicable pour justifier la modification, par une cour d'appel, d'une indemnité accordée par un jury. La demanderesse a présenté de la preuve d'expert non contredite exposant un certain nombre de scénarios fondés sur diverses conclusions de fait possibles qui seraient soumises à l'appréciation du jury. Les dommages-intérêts accordés par les jurys ne peuvent être annulés qu'en cas d'erreur manifeste et dominante. Vu la preuve, on ne pouvait dire que les dommages non pécuniaires octroyés

étaient tout à fait disproportionnés ou terriblement déraisonnables. De plus, les défendeurs n'ont pas établi pourquoi le plafond applicable dans les affaires de préjudice physique catastrophique devrait être appliqué dans les affaires comme celle-ci. La nécessité de fixer un plafond dans les cas de négligence causant une perte économique n'a pas été établie en l'espèce non plus. L'examen de la question de savoir si et dans quelles circonstances le plafond devrait s'appliquer à l'attribution de dommages non pécuniaires en dehors du contexte des préjudices physiques catastrophiques a été réservé pour une autre affaire.

APPEAL by plaintiff student from judgment reported at *Bella v. Young* (2004), *(*sub nom. *Young v. Bella)* 241 Nfld. & P.E.I.R. 35, *(*sub nom. *Young v. Bella)* 716 A.P.R. 35, 8 C.P.C. (6th) 131, 2004 NLCA 60, 2004 CarswellNfld 300 (N.L. C.A.), allowing appeal by university defendants from award of damages in negligence and dismissing plaintiff's cross-appeal from dismissal of her claim for damages for defamation.

POURVOI de l'étudiante demanderesse à l'encontre de l'arrêt publié à *Bella v. Young* (2004), *(*sub nom. *Young v. Bella)* 241 Nfld. & P.E.I.R. 35, *(*sub nom. *Young v. Bella)* 716 A.P.R. 35, 8 C.P.C. (6th) 131, 2004 NLCA 60, 2004 CarswellNfld 300 (N.L. C.A.), qui a accueilli le pourvoi des défendeurs de l'université à l'encontre des dommages-intérêts octroyés pour négligence et qui a rejeté le pourvoi incident de la demanderesse à l'encontre du rejet de son action en diffamation.

***McLachlin C.J.C., Binnie J.*:**

I. Introduction

1 The appellant, Wanda Young, was a student at Memorial University of Newfoundland in 1994, taking courses toward her goal of being admitted to the School of Social Work and becoming a social worker. Because of a bizarre misunderstanding between her and one of her professors over a missing footnote to a term paper, a misunderstanding that was not brought to the appellant's attention until more than two years after her paper was submitted, she was reported in May 1994 by the respondent William Rowe, the then Director of the School of Social Work, to the provincial Child Protection Services ("CPS") as a potential child abuser. When the report was belatedly "investigated" by CPS in 1996, the misunderstanding was cleared up within 24 hours. The suspicion of child abuse was found by CPS to be without a shred of reality. As a result of the Director's report, however, the appellant (unbeknownst to her) had been placed on the provincial Child Abuse Registry and her name was "red flagged" in the police and social work communities in Newfoundland and Labrador where, as an aspiring social worker, she might have hoped to obtain employment. A Newfoundland jury found the University's treatment of her to be negligent, and further found (more controversially) that as a result of this negligence, her chosen career prospects had been destroyed. The jury awarded her damages of $839,400.

2 It is important that suspected child abuse be promptly reported. But, as this case illustrates, it is also important that persons in positions of authority (such as university professors in relation to their students) act responsibly and avoid unfounded and damaging reports of suspicion. Section 38(6) of the *Child Welfare Act*, R.S.N. 1990, c. C-12, requires there to be "reasonable cause" to make the report, thus striking an appropriate balance between the protection of children, the protection of third parties against unfounded allegations, and the protection of informants.

3 A majority of the Newfoundland Court of Appeal overturned the jury award because it considered the appellant's action to be barred by s. 38(6), which protects individuals from legal action who report "information that a child has been, is or may be in danger" of abuse. We agree, of course, that those who are subject to a duty to report information must be protected from any adverse legal consequences flowing from compliance with that duty, but here the university professors acted on conjecture and speculation which fell far short of the required "reasonable cause" to make a report to CPS required by s. 38(6). They did not even have misinformation (for which protection will be available unless reported maliciously or without reasonable cause). They acted in a way the jury found to be without any reasonable cause to make a report. In our view, s. 38(6) does not bar relief to the appellant in these circumstances. The cause of the action of negligence was properly put to the jury. The defence's evidence, as well as the plaintiff's evidence, was clearly laid out by the trial judge. It was open to the jury, as the finder of facts, to reach the conclusions it did on the evidence put before it. We would allow the appeal, set aside the decision of the Court of Appeal, and restore the jury's verdict.

27 The jury was asked whether Leslie Bella or William Rowe, by their acts or omissions, had breached the duty of care they owed to the appellant. This is the classic formulation of the cause of action in negligence. It is premised on a relationship between the plaintiff and the defendant, which in turn gives rise to a duty of care on the defendant toward the plaintiff. Breach of the standard of care imposed by that duty creates legal liability for damages caused by the breach. There was evidence before the jury capable of establishing all the elements of the tort of negligence.

(1) Existence of a Duty of Care

28 The Court recently affirmed in *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79 (S.C.C.), at para. 24, and *Martel Building Ltd. v. R.*, [2000] 2 S.C.R. 860, 2000 SCC 60 (S.C.C.), at para. 46, that the "duty" analysis proceeds in two stages:

> (a) Is there a sufficiently close relationship of proximity between the parties such that, in the reasonable contemplation of the defendant, carelessness on its part might cause damage to the plaintiff?
>
> (b) If so, are there any considerations which ought to negative or limit: (a) the scope of the duty; (b) the class of persons to whom it is owed; or (c) the damages to which a breach of it may give rise?

29 The respondents assert that the duty of care in this case is negated for policy reasons under the second branch of the test. They argue that s. 38 of the *Child Welfare Act* establishes the policy that in the interests of protecting children, people should be encouraged to report suspicions of child abuse, free from fear of reprisal. The duty imposed by s. 38(1), they argue, should as a matter of policy negate any duty of care which might otherwise arise at common law.

30 We discuss the Act in greater detail below. At this point, however, it suffices to note that the respondents' argument overlooks the fact that the appellant's claim in negligence was a broad one, encompassing not only the report made to CPS, but the University's dealings with the appellant generally. Paragraph 15(a) of her Amended Statement of Claim reads:

> The Plaintiff states that the actions of Dr. Bella, Dr. Rowe and other officials at Memorial University of Newfoundland combined to put in motion a series of events that would forever shape the course of the Plaintiff's future by affecting her reputation in the community, her ability to complete her education and by reducing her income-earning capacity.

In support of this broader claim the appellant led evidence of failure to mentor, failure to properly advise her on her future and negligent publication within the faculty, through means other than the report to CPS, of the suggestion that the appellant may have abused children.

31 In short, in the present case, proximity was not simply grounded in a misguided report to CPS, but was rooted in the broader relationship between the professors at Memorial University and their students. The appellant, even as a "distant" student, was a fee-paying member of the university community, and this fact created mutual rights and responsibilities. The relationship between the appellant and the University had a contractual foundation, giving rise to duties that sound in both contract and tort: *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 (S.C.C.).

32 Whether or not a duty of care will be negatived where the parties are strangers linked only by the events surrounding a "report" is a question that should only be decided when it arises. Assuming that the policy expressed in the Act could countermand potential liability for a negligent report in such circumstances, as discussed below, it does not provide any policy reason to negative liability that would otherwise arise on the facts of this case. The scope of the s. 38(6) defence is restricted to the making of the CPS report and would not excuse the University and its employees from failure to live up to their broader responsibilities to the appellant as a member of the university community. The facts in this case do not trigger the protection of the Act because, quite simply, the respondent Dr. Rowe acted on nothing more than speculation and conjecture in making his report which, as Director of the School of Social Work, he must have known would have

TAB 3

2009 SCC 62
Supreme Court of Canada

Cusson v. Quan

2009 CarswellOnt 7958, 2009 CarswellOnt 7959, 2009 SCC 62, [2009] 3 S.C.R. 712, [2009] S.C.J. No. 62, 102 O.R. (3d) 480 (note), 183 A.C.W.S. (3d) 1174, 258 O.A.C. 378, 314 D.L.R. (4th) 55, 397 N.R. 94, 70 C.C.L.T. (3d) 1

Douglas Quan, Kelly Egan, Don Campbell, Ottawa Citizen, Ottawa Citizen Group Inc. and Southam Publications (A CanWest Company) (Appellants) v. Danno Cusson (Respondent) and Globe and Mail, Toronto Star Newspapers Limited, Canadian Broadcasting Corporation, Canadian Civil Liberties Association, Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers' Association, RTNDA Canada/Association of Electronic Journalists, Canadian Publishers' Council, Magazines Canada, Canadian Association of Journalists, Canadian Journalists for Free Expression, Writers' Union of Canada, Professional Writers Association of Canada, Book and Periodical Council, PEN Canada, Peter Grant and Grant Forest Products Inc. (Interveners)

McLachlin C.J.C., Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: February 17, 2009
Judgment: December 22, 2009
Docket: 32420

Proceedings: reversing *Cusson v. Quan* (2007), 87 O.R. (3d) 241, 286 D.L.R. (4th) 196, 2007 CarswellOnt 7310, 2007 CarswellOnt 7311, 2007 ONCA 771, 164 C.R.R. (2d) 284, 53 C.C.L.T. (3d) 122, 231 O.A.C. 277 (Ont. C.A.)

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Subject: Torts; Civil Practice and Procedure

Headnote

Torts --- Defamation — Privilege — Qualified privilege — When qualified privilege arises — Matters of general interest — Miscellaneous

Defence of responsible communication — Plaintiff police officer went to New York City to assist in search and rescue operations following attack on World Trade Center — Media corporations published three newspaper articles casting plaintiff and his rescue activities in negative light — Plaintiff brought defamation action against media corporations and authors of articles ("media defendants"), and his superior officer, B — Trial judge ruled that all three articles were of public interest, but that two of them did not attract qualified privilege as there was no compelling, moral or social duty to

publish them — Jury awarded general damages of $100,000 against media defendants and $25,000 against B — Court of Appeal upheld decision, holding that while defence of "responsible journalism" should be recognized as part of Ontario law, it was not available to media defendants because issue of whether they followed standard of responsible journalism was not litigated — Appeal by media defendants allowed — Time had come to recognize new defence of responsible communication on matters of public interest — Public interest test was clearly met in this case — Articles touched on matters close to core of public's legitimate concern with integrity of its public service — Issue on appeal did not raise entirely new factual matters without any basis in evidence — Interests of justice favoured allowing media defendants opportunity to avail themselves of change of law on new trial — Media defendants would be seriously disadvantaged by being deprived of opportunity to avail themselves of responsible communication defence which their appeal was responsible for developing — Their conduct did not exhibit absence of due diligence — New trial ordered.

Délits civils --- Diffamation — Immunité — Immunité relative — Lorsque l'immunité relative trouve application — Questions d'intérêt général — Divers

Défense de communication responsable — Demandeur était un agent de la police qui s'est rendu à New-York pour participer aux opérations de recherche et de sauvetage suivant les attaques sur le World Trade Center — Sociétés média ont publié trois articles présentant le demandeur et ses activités de sauvetage sous un jour défavorable — Demandeur a déposé une action en diffamation contre les sociétés média et les auteurs des articles (les « défendeurs média »), ainsi que sa supérieure, B — Juge de première instance a statué que les trois articles étaient d'intérêt public, mais que deux d'entre eux n'étaient pas couverts d'une immunité relative puisqu'il n'y avait aucune obligation impérieuse, morale ou sociale de les publier — Jury a condamné les défendeurs média et B à des dommages-intérêts généraux de 100 000 $ et 25 000 $, respectivement — Cour d'appel a confirmé la décision, statuant que la défense de « journalisme responsable », bien qu'elle devrait être reconnue comme faisant partie du droit de l'Ontario, n'était pas une défense dont les défendeurs média pouvaient se prévaloir étant donné que la question de savoir s'ils satisfaisaient à la norme du journalisme responsable n'avait pas fait l'objet du débat — Pourvoi formé par les défendeurs média accueilli — Temps était venu de reconnaître à titre de nouveau moyen de défense la défense de communication responsable concernant des questions d'intérêt public — Critère relatif à l'intérêt public a manifestement été rempli en l'espèce — Articles touchaient des questions au coeur des préoccupations légitimes de la population en ce qui concerne l'intégrité de ses services publics — Point en litige en appel ne soulevait pas des questions factuelles entièrement nouvelles non étayées par la preuve — Intérêt de la justice commandait qu'on offre aux défendeurs média la possibilité d'invoquer, dans le cadre d'un nouveau procès, la modification du droit engendrée par le litige — Défendeurs média seraient considérablement désavantagés s'ils étaient privés de la possibilité d'invoquer la défense de communication responsable élaborée grâce à leur pourvoi — On ne pouvait pas dire que les défendeurs média n'avaient pas fait preuve de diligence raisonnable — Tenue d'un nouveau procès a été ordonnée.

The plaintiff was an Ontario police officer who, on his own initiative and without his employer's permission, went to New York City to assist with search and rescue operations immediately following the September 11, 2001 attacks on the World Trade Center. An Ontario newspaper published three articles casting the plaintiff and his rescue activities in a negative light, suggesting that he had misrepresented himself to the New York police and might have compromised rescue operations. The plaintiff brought an action in defamation against the newspaper, the publishing media corporations, and the authors of the articles (collectively, the "media defendants"), as well as his superior officer, B, who was a quoted source of information for the articles.

At trial, the defendants attempted to prove the truth of the defamatory statements and relied on the defence of fair comment. They disclaimed any separate reliance on the defence known in England as "responsible journalism" which, at the time, had not yet been recognized as a distinct defence by any Canadian court. The trial judge ruled that all three articles were of public interest but that two of the articles did not attract qualified privilege as there was no "compelling, moral or social duty" to publish them. The jury rendered a special verdict, ruling on each of the impugned statements in the articles. It found that the defendants had established the truth of some, but not all, of the statements, but found no malice on the part of any of the defendants. It awarded the plaintiff $100,000 in general damages against the media defendants and $25,000 against B. The third article was found to be protected by qualified privilege and the claim based on it was dismissed.

The Court of Appeal upheld the decision, holding that while the responsible journalism defence should be recognized as part of Ontario law, it was not available to the media defendants because the issue of whether they followed the standard of responsible journalism was not litigated at trial. The media defendants appealed to the Supreme Court of Canada.

Held: The appeal was allowed and a new trial was ordered.

Per McLachlin C.J.C. (Binnie, LeBel, Deschamps, Fish, Charron, Rothstein, Cromwell JJ. concurring): The time had come to recognize a new defence of responsible communication on matters of public interest. In the companion case of Grant v. Torstar Corp., it was held that the defence of responsible communication on matters of public interest applies where the publication is on a matter of public interest, and the publisher was diligent in trying to verify the allegation having regard to the relevant factors. If the judge decides that the publication was on a matter of public interest, the jury then decides whether the standard of responsibility has been met.

In this case, the public interest test was clearly met. The Canadian public has a vital interest in knowing about the professional misdeeds of those who are entrusted by the state with protecting public safety. The newspaper articles touched on matters close to the core of the public's legitimate concern with the integrity of its public service. Therefore, liability hinged on whether the media defendants were diligent in trying to verify the allegations prior to publication.

The Court of Appeal applied the general rule that a new issue may not be raised on appeal. However, appellate courts may depart from the general rule where the interests of justice require it and where the court has a sufficient evidentiary record and findings of fact to do so. It was not clear that the issue argued on appeal was genuinely "new" in the sense of being legally and factually distinct from the issues litigated at trial. Much of the evidence adduced to demonstrate qualified privilege and malice would also be relevant to responsible communication. The issue on appeal did not raise entirely new factual matters without any basis in the evidence. The arguments on qualified privilege and responsible journalism were both directed toward the same fundamental question: whether the newspaper enjoyed a privilege to publish the impugned material on grounds of public interest and due diligence. The deficiencies in the evidentiary foundation were largely immaterial because the ultimate determination of responsibility was a matter for the jury.

The interests of justice favoured allowing the media defendants the opportunity to avail themselves of the change of the law brought about by this litigation on a new trial. Under the Courts of Justice Act, an Ontario court hearing an appeal of a civil matter may order a new trial only if "some substantial wrong or miscarriage of justice has occurred." That test was met in this case. The plaintiff would suffer no undue prejudice from a new trial other than costs. The media defendants, however, would be seriously disadvantaged by being deprived of the opportunity to avail themselves of the responsible communication defence which their appeal was responsible for developing. If the defence were found to apply to the articles in question, such a deprivation would amount to an injustice. The conduct of the media defendants did not exhibit the absence of due diligence that the "no new issues on appeal" rule is meant to discourage. At the time of trial, it was by no means clear that the new defence of responsible communication would emerge as a "different jurisprudential creature" in English or Canadian law. It was therefore not unreasonable for the media defendants to argue qualified privilege at trial, and later, on appeal, to contend for a broader elaboration of a responsible communication defence. Further, had the Court of Appeal and this Court endorsed a broadened defence of qualified privilege as pleaded by the media defendants, a new trial would have been required in any event, because the trial judge applied an extremely narrow conception of public interest. His restrictive approach to the pleaded defence of qualified privilege occasioned an injustice by effectively removing any realistic prospect that statements on matters of public interest to the world at large could be protected. The media defendants deserved an opportunity to make their case to a jury properly instructed on the law as it now stands.

Per Abella J. (concurring): As in the companion case of Grant v. Torstar Corp., both steps in the responsible communication defence should be determined by the judge, with the jury determining factual disputes. Subject to those views, the Chief Justice's reasons and her decision to order a new trial were agreed with.

Le demandeur était un agent de la police de l'Ontario qui, de sa propre initiative et sans l'autorisation de son employeur, s'est rendu à New-York pour participer aux opérations de recherche et de sauvetage peu après les attaques du 11 septembre 2001 sur le World Trade Center. Un quotidien en Ontario a publié trois articles présentant le demandeur et ses activités de sauvetage sous un jour défavorable, laissant croire qu'il avait donné des renseignements erronés sur son identité aux autorités new-yorkaises et avait nui aux opérations de sauvetage. Le demandeur a déposé une action en

diffamation contre le quotidien, les sociétés d'édition et les auteurs des articles (les « défendeurs média »), ainsi que sa supérieure, B, laquelle était citée comme source dans les articles.

Au procès, les défendeurs ont tenté de démontrer la véracité des propos diffamatoires et ont invoqué la défense de commentaire loyal. Ils ont renoncé à s'appuyer de façon spécifique sur la défense reconnue en Angleterre comme la défense de « journalisme responsable », laquelle, à l'époque, n'avait pas encore été reconnue comme moyen de défense distinct par les tribunaux canadiens. Le juge de première instance a statué que les trois articles étaient d'intérêt public mais que deux des articles n'étaient pas couverts d'une immunité relative puisqu'il n'y avait « aucune obligation impérieuse, morale ou sociale » de les publier. Le jury a rendu un verdict particulier et s'est prononcé sur chacune des déclarations relevées dans les articles. Il a conclu que les défendeurs avaient établi la véracité de certaines des déclarations seulement mais a conclu à l'absence de malveillance de la part des défendeurs. Il a condamné les défendeurs média et B à verser au demandeur 100 000 $ et 25 000 $, respectivement, en dommages-intérêts généraux. Il a été statué que le troisième article était couvert d'une immunité relative et la réclamation s'y rapportant a été rejetée.

La Cour d'appel a confirmé la décision, statuant que la défense de journalisme responsable, bien qu'elle devrait être reconnue comme faisant partie du droit de l'Ontario, n'était pas une défense dont les défendeurs média pouvaient se prévaloir étant donné que la question de savoir s'ils satisfaisaient à la norme du journalisme responsable n'avait pas été débattue lors du procès. Les défendeurs média ont formé un pourvoi devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été accueilli et la tenue d'un nouveau procès a été ordonnée.

McLachlin, J.C.C. (Binnie, LeBel, Deschamps, Fish, Charron, Rothstein, Cromwell, JJ., souscrivant à son opinion) : Le temps était venu de reconnaître à titre de nouveau moyen de défense la défense de communication responsable concernant des questions d'intérêt public. Dans le pourvoi connexe Grant c. Torstar Corp., il a été décidé que la défense de communication responsable concernant des questions d'intérêt public s'applique lorsque la publication porte sur une question d'intérêt public et le diffuseur s'est efforcé avec diligence de vérifier les allégations en lien avec les éléments pertinents. Si le juge décide que la publication portait sur une question d'intérêt public, il appartient ensuite au jury de déterminer si la norme de responsabilité a été satisfaite.

Dans le cas présent, le critère relatif à l'intérêt public a manifestement été rempli. La population canadienne a un intérêt fondamental à connaître les fautes professionnelles commises par les personnes auxquelles l'État confie la tâche de protéger le public. Les articles du quotidien touchaient des questions au coeur des préoccupations légitimes de la population en ce qui concerne l'intégrité de ses services publics. Par conséquent, la responsabilité dépendait de la question de savoir si les défendeurs média avaient fait preuve de diligence en tentant de vérifier les allégations avant qu'elles ne soient diffusées.

La Cour d'appel a appliqué la règle générale à l'effet qu'une nouvelle question ne peut pas être soulevée en appel. Toutefois, les cours d'appel peuvent s'éloigner de la règle générale lorsque l'intérêt de la justice l'exige et lorsque la cour dispose de conclusions de fait et d'un dossier factuel suffisant. Il n'était pas évident que la question débattue en appel était véritablement une « nouvelle » question, c'est-à-dire une question différente sur les plans juridique et factuel de celles soulevées pendant le procès. Une large part de la preuve portée à l'attention du tribunal en ce qui concerne l'immunité relative et la malveillance serait également pertinente pour décider s'il y a lieu d'accepter la défense de communication responsable. Le point en litige en appel ne soulevait pas des questions factuelles entièrement nouvelles non étayées par la preuve. Les arguments concernant l'immunité relative et le journalisme responsable se rapportaient tous deux à la même question fondamentale : le quotidien jouissait-il du droit de publier les articles contestés pour des motifs d'intérêt public et en raison de la diligence raisonnable dont il a fait preuve? Les lacunes du dossier factuel n'avaient pour ainsi dire aucune importance étant donné qu'il appartenait ultimement au jury de trancher la question de la responsabilité.

L'intérêt de la justice commandait qu'on offre aux défendeurs média la possibilité d'invoquer, dans le cadre d'un nouveau procès, la modification du droit engendrée par le litige. En vertu de la Loi sur les Tribunaux judiciaires de l'Ontario, le tribunal saisi d'un appel dans un dossier civil ne peut ordonner un nouveau procès que s'il y a « préjudice grave ou [...] erreur judiciaire ». Ce critère a été rempli en l'espèce. Le demandeur ne subirait pas de préjudice indu advenant la tenue d'un nouveau procès, si ce n'était des coûts qu'il générerait. Les défendeurs média, par contre, seraient considérablement désavantagés s'ils étaient privés de la possibilité d'invoquer la défense de communication responsable élaborée grâce à leur pourvoi. S'il s'avérait que le moyen de défense s'applique aux articles en question, on créerait une injustice en empêchant que les défendeurs média y recourent. En outre, on ne pouvait pas dire que les défendeurs média n'avaient

pas fait preuve de diligence raisonnable, comportement que la règle « empêchant qu'une nouvelle question soit soulevée en appel » vise à décourager. Au moment du procès, il était loin d'être évident que la nouvelle défense de communication responsable verrait le jour en droit britannique ou en droit canadien en tant que « créature jurisprudentielle différente ». Il n'était donc pas déraisonnable que les défendeurs média invoquent l'immunité relative au procès, et par la suite, en appel, qu'ils préconisent l'adoption d'une défense de communication responsable plus large. De plus, si la Cour d'appel et la présente Cour avaient reconnu l'existence d'une défense d'immunité relative plus large, comme le proposaient les défendeurs média, il aurait quand même été nécessaire d'ordonner la tenue d'un nouveau procès, parce que le juge de première instance s'est appuyé sur une notion d'intérêt public extrêmement étroite. En interprétant de façon trop restrictive la défense d'immunité relative invoquée devant lui, il a engendré une injustice étant donné que, ce faisant, il écartait toute possibilité réaliste que des déclarations sans destinataire précis concernant des questions d'intérêt public soient protégées. Les défendeurs média devraient pouvoir présenter leur cause devant un jury ayant reçu des directives appropriées quant à l'état du droit actuel.
Abella, J. (souscrivant à l'opinion des juges majoritaires) : Comme dans le pourvoi connexe Grant c. Torstar Corp., il revenait au juge de trancher les deux volets du test applicable à la défense de communication responsable et au jury de décider des questions de fait. Sous réserve de ce point de vue, on convenait avec les motifs de la Juge en chef et sa décision d'ordonner la tenue d'un nouveau procès.

APPEAL by media defendants from judgment reported at *Cusson v. Quan* (2007), 87 O.R. (3d) 241, 286 D.L.R. (4th) 196, 2007 CarswellOnt 7310, 2007 CarswellOnt 7311, 2007 ONCA 771, 164 C.R.R. (2d) 284, 53 C.C.L.T. (3d) 122, 231 O.A.C. 277 (Ont. C.A.), dismissing their appeal from judgment awarding plaintiff damages for defamation.

POURVOI des défendeurs média à l'encontre d'un jugement publié à *Cusson v. Quan* (2007), 87 O.R. (3d) 241, 286 D.L.R. (4th) 196, 2007 CarswellOnt 7310, 2007 CarswellOnt 7311, 2007 ONCA 771, 164 C.R.R. (2d) 284, 53 C.C.L.T. (3d) 122, 231 O.A.C. 277 (Ont. C.A.), ayant rejeté l'appel qu'ils ont interjeté à l'encontre d'un jugement ayant accordé des dommages-intérêts au demandeur au motif de diffamation.

***McLachlin C.J.C.*:**

I. Overview

1 This appeal, along with its companion case *Grant v. Torstar Corp.*, 2009 SCC 61 (S.C.C.) (released concurrently), requires the Court to consider whether the common law of defamation should be modified to accord stronger protection to defamatory statements of fact published responsibly.

2 As explained in *Grant*, the time has come to recognize a new defence — the defence of responsible communication on matters of public interest. The question on this appeal is whether the defendants should be able to avail themselves of it.

3 The respondent in this Court, Danno Cusson, was a constable with the Ontario Provincial Police ("OPP") who, shortly after the events of September 11, 2001, and without permission from his employer, traveled to New York City to assist with the search and rescue effort at Ground Zero. Initially, he was portrayed in the press as a hero, while the OPP was pilloried for demanding that he return to his duties in Ottawa. The *Ottawa Citizen* subsequently published three articles alleging that Cst. Cusson had misrepresented himself to the authorities in New York and possibly interfered with the rescue operation. Cst. Cusson brought this libel action against the newspaper, the reporters (the "Citizen defendants"), and OPP Staff Sgt. Penny Barager, who was a quoted source of information for the articles.

4 At trial, the defendants pleaded qualified privilege. They disclaimed any separate reliance on the defence known in England as "responsible journalism" or "*Reynolds* privilege" — which, at the time, had not yet been recognized as a distinct defence by any Canadian court. With respect to two of the articles, the trial judge rejected the claim of privilege and put the case to the jury to decide whether the defence of truth had been made out. Answering a long list of factual questions which parsed the allegedly defamatory statements in considerable detail, the jury found that many, but not all, of the factual imputations in the articles had been proven true. It awarded Cst. Cusson $100,000 in general damages

this issue. And, as will be explained, it is open to question how "new" this issue really was, considering the defences pleaded at trial.

35 Second, from a substantive perspective, the new defence was properly before the Court of Appeal and, in principle, available to the defendants.

36 The general rule, applied by the Court of Appeal, is that a new issue may not be raised on appeal. However, the authorities shed light on the circumstances in which appellate courts should make an exception to the rule. In *Lamb v. Kincaid* (1907), 38 S.C.R. 516 (S.C.C.), at p. 539, Duff J. (as he then was) observed:

> A court of appeal, I think, should not give effect to such a point taken for the first time in appeal, unless it be clear that, had the question been raised at the proper time, no further light could have been thrown upon it.

See also: *R. v. Warsing*, [1998] 3 S.C.R. 579 (S.C.C.), at para. 16, *per* L'Heureux-Dubé J. (dissenting in part); *Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678 (S.C.C.), at paras. 32-33, *per* Binnie J.

37 Further guidance as to the appropriate test is provided by *Wasauksing First Nation v. Wasausink Lands Inc.* (2004), 184 O.A.C. 84 (Ont. C.A.), relied on by Sharpe J.A. below. There, the Ontario Court of Appeal explained the circumstances in which an exception will be made to the rule:

> An appellate court may depart from this ordinary rule and entertain a new issue where the interests of justice require it and where the court has a sufficient evidentiary record and findings of fact to do so. [para. 102]

38 Applying this test, the preliminary question is whether the Citizen defendants in fact raised a "new issue" in arguing responsible journalism on appeal. If so, then the question becomes whether the evidentiary record and the interests of justice support granting an exception to the general rule.

39 In this case it was much less clear than in *Wasauksing First Nation* that the issue argued on appeal was genuinely "new" in the sense of being legally and factually distinct from the issues litigated at trial. Though Sharpe J.A. is right that the focus of the inquiry under the new defence is different from the focus under qualified privilege, there is considerable overlap. Much of the evidence adduced to demonstrate qualified privilege and malice would also be relevant to responsible communication. For example, in attempting to refute any suggestion of malice, the defendants led evidence from Douglas Quan which showed some of the steps he took to verify the allegations. Importantly, he talked to Cst. Cusson and gave him the opportunity to tell his side of the story. Cusson's denials were included in the article.

40 All this is to say that the issue on appeal — responsible journalism — did not raise entirely new factual matters without any basis in the evidence. The arguments on qualified privilege and responsible journalism were both directed toward the same fundamental question: whether the Citizen enjoyed a privilege to publish the impugned material on grounds of public interest and due diligence.

41 In any event, the deficiencies in the evidentiary foundation are largely immaterial because, as held in *Grant*, the ultimate determination of responsibility is a matter for the jury. Since Sharpe J.A. took the view (following *Reynolds* and *Jameel*) that the new defence would be a matter for the judge, he did not consider ordering a new trial so that a jury could entertain the new defence. However, the gaps in the evidentiary record with respect to responsible communication are of less concern if the relevant option is a new trial rather than appellate application of the defence. A proper evidentiary record can be established at a new trial.

42 The remaining question is whether the interests of justice favour allowing the defendants the opportunity to avail themselves of the change of the law brought about by this litigation on a new trial.

43 In my opinion, they do. In Ontario, a court hearing an appeal of a civil matter may only order a new trial if "some substantial wrong or miscarriage of justice has occurred": *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 134(6). This is

TAB 4

2012 SCC 12
Supreme Court of Canada

Doré c. Québec (Tribunal des professions)

2012 CarswellQue 2048, 2012 CarswellQue 2049, 2012 SCC 12, [2012] 1 S.C.R. 395, [2012] A.C.S. No. 12, [2012] S.C.J. No. 12, 211 A.C.W.S. (3d) 852, 255 C.R.R. (2d) 289, 343 D.L.R. (4th) 193, 34 Admin. L.R. (5th) 1, 428 N.R. 146, J.E. 2012-672

Gilles Doré, Appellant and Pierre Bernard, in his capacity as Assistant Syndic of the Barreau du Québec, Tribunal des professions and Attorney General of Quebec, Respondents and Federation of Law Societies of Canada, Canadian Civil Liberties Association and Young Bar Association of Montreal, Interveners

McLachlin C.J.C., Binnie, LeBel, Fish, Abella, Rothstein, Cromwell JJ.

Heard: January 26, 2011
Judgment: March 22, 2012
Docket: 33594

Proceedings: affirmed *Doré c. Québec (Tribunal des professions)* (2010), 2010 CarswellQue 77, 2010 QCCA 24, 2010 CarswellQue 13368, [2010] R.J.Q. 77, (sub nom. *Doré v. Barreau du Québec)* 326 D.L.R. (4th) 749, Dufresne, J.C.A., Léger, J.C.A., Rochon, J.C.A. (C.A. Que.); affirmed *Doré c. Québec (Tribunal des professions)* (2008), 2008 CarswellQue 5285, 2008 QCCS 2450, Déziel J.C.S (C.S. Que.)

Counsel: Sophie Dormeau, Sophie Préfontaine, for Appellant
Claude G. Leduc, Luce Bastien, for Respondent, Pierre Bernard, in his capacity as Assistant Syndic of the Barreau du Québec.
Dominique A. Jobin, Noémi Potvin, for Respondents, Tribunal des professions, Attorney General of Québec
Babak Barin, Frédéric Côté, for Intervener, Federation of Law Societies of Canada
David Grossman, Sylvain Lussier, Julien Morissette, Annie Gallant, for Intervener, Canadian Civil Liberties Association
Mathieu Bouchard, Audrey Boctor, for Intervener, Young Bar Association of Montreal

Subject: Public; Torts; Civil Practice and Procedure; Constitutional; Human Rights

Headnote

Administrative law --- Standard of review — Miscellaneous

Revised standard of review - reasonableness — Counsel was representing his client before Superior Court when judge criticized counsel — Counsel then wrote letter to judge, in which he poured insults on him, and complaint was filed against counsel — Disciplinary council of Quebec Bar reprimanded counsel and suspended his ability to practice law for 21 days — Tribunal des professions found that decision to sanction counsel was minimal restriction on his freedom of expression — Superior Court upheld decision of tribunal — Court of Appeal applied full Oakes analysis and found that counsel's letter had limited importance compared to values underlying freedom of expression — Counsel appealed before Supreme Court of Canada, claiming that council's decision violated his freedom of expression under Canadian Charter of Rights and Freedoms — Appeal dismissed — Normally, discretionary administrative decision made by adjudicator within his or her mandate is judicially reviewed for its reasonableness — Presence of Charter issue does not necessarily call for replacement of this administrative law framework with Oakes test — When Charter values are applied to individual administrative decision, they are being applied in relation to particular set of facts — Thus, more flexible administrative approach to balancing Charter values is more consistent with nature of discretionary decision-making — It must then be determined whether decision-maker disproportionately, and therefore unreasonably, limited Charter right.

Professions and occupations --- Barristers and solicitors — Organization and regulation of profession — Disciplinary proceedings — Judicial review

Counsel was representing his client before Superior Court when judge criticized counsel — Counsel then wrote letter to judge, in which he poured insults on him, and complaint was filed against counsel — Disciplinary council of Quebec Bar reprimanded counsel and suspended his ability to practice law for 21 days — Tribunal des professions found that decision to sanction counsel was minimal restriction on his freedom of expression — Superior Court upheld decision of tribunal — Court of Appeal applied full Oakes analysis and found that counsel's letter had limited importance compared to values underlying freedom of expression — Counsel appealed before Supreme Court of Canada, claiming that council's decision violated his freedom of expression under Canadian Charter of Rights and Freedoms — Appeal dismissed — Normally, discretionary administrative decision made by adjudicator within his or her mandate is judicially reviewed for its reasonableness — Presence of Charter issue does not necessarily call for replacement of this administrative law framework with Oakes test — When Charter values are applied to individual administrative decision, they are being applied in relation to particular set of facts — Thus, more flexible administrative approach to balancing Charter values is more consistent with nature of discretionary decision-making — It must then be determined whether decision-maker disproportionately, and therefore unreasonably, limited Charter right.

Constitutional law --- Charter of Rights and Freedoms — Nature of rights and freedoms — Freedom of expression — Nature and scope of expression

Counsel was representing his client before Superior Court when judge criticized counsel — Counsel then wrote letter to judge, in which he poured insults on him, and complaint was filed against counsel — Disciplinary council of Quebec Bar reprimanded counsel and suspended his ability to practice law for 21 days — Tribunal des professions found that decision to sanction counsel was minimal restriction on his freedom of expression — Superior Court upheld decision of tribunal — Court of Appeal applied full Oakes analysis and found that counsel's letter had limited importance compared to values underlying freedom of expression — Counsel appealed before Supreme Court of Canada, claiming that council's decision violated his freedom of expression under Canadian Charter of Rights and Freedoms — Appeal dismissed — Only issue here was whether council's decision to reprimand counsel reflected proportionate balancing of counsel's expressive rights under Charter with necessity to ensure civility in profession — Fact that lawyer criticized judge may raise, not lower, threshold for limiting lawyer's expressive rights — Lawyers are expected by public, on whose behalf they serve, to endure criticisms and pressures with civility and dignity — Criticism expressed by lawyer will be measured against public's reasonable expectations of lawyer's professionalism — As council found, counsel's letter was outside those expectations — His displeasure with judge was justifiable, but extent of response was not — Therefore, council's decision to reprimand counsel reflected proportionate balancing of its public mandate to ensure that lawyers behave with objectivity, moderation and dignity with lawyer's expressive rights, and decision was reasonable one.

Professions and occupations --- Barristers and solicitors — Organization and regulation of profession — Disciplinary proceedings — Penalties — Reprimand

Counsel was representing his client before Superior Court when judge criticized counsel — Counsel then wrote letter to judge, in which he poured insults on him, and complaint was filed against counsel — Disciplinary council of Quebec Bar reprimanded counsel and suspended his ability to practice law for 21 days — Tribunal des professions found that decision to sanction counsel was minimal restriction on his freedom of expression — Superior Court upheld decision of tribunal — Court of Appeal applied full Oakes analysis and found that counsel's letter had limited importance compared to values underlying freedom of expression — Counsel appealed before Supreme Court of Canada, claiming that council's decision violated his freedom of expression under Canadian Charter of Rights and Freedoms — Appeal dismissed — Only issue here was whether council's decision to reprimand counsel reflected proportionate balancing of counsel's expressive rights under Charter with necessity to ensure civility in profession — Fact that lawyer criticized judge may raise, not lower, threshold for limiting lawyer's expressive rights — Lawyers are expected by public, on whose behalf they serve, to endure criticisms and pressures with civility and dignity — Criticism expressed by lawyer will be measured against public's reasonable expectations of lawyer's professionalism — As council found, counsel's letter was outside those expectations — His displeasure with judge was justifiable, but extent of response was not — Therefore, council's decision to reprimand counsel reflected proportionate balancing of its public mandate to ensure that lawyers behave with objectivity, moderation and dignity with lawyer's expressive rights, and decision was reasonable one.

Professions and occupations --- Barristers and solicitors — Organization and regulation of profession — Disciplinary proceedings — Penalties — Suspension

Counsel was representing his client before Superior Court when judge criticized counsel — Counsel then wrote letter to judge, in which he poured insults on him, and complaint was filed against counsel — Disciplinary council of Quebec Bar reprimanded counsel and suspended his ability to practice law for 21 days — Tribunal des professions found that decision to sanction counsel was minimal restriction on his freedom of expression — Superior Court upheld decision of tribunal — Court of Appeal applied full Oakes analysis and found that counsel's letter had limited importance compared to values underlying freedom of expression — Counsel appealed before Supreme Court of Canada, claiming that council's decision violated his freedom of expression under Canadian Charter of Rights and Freedoms — Appeal dismissed — Only issue here was whether council's decision to reprimand counsel reflected proportionate balancing of counsel's expressive rights under Charter with necessity to ensure civility in profession — Fact that lawyer criticized judge may raise, not lower, threshold for limiting lawyer's expressive rights — Lawyers are expected by public, on whose behalf they serve, to endure criticisms and pressures with civility and dignity — Criticism expressed by lawyer will be measured against public's reasonable expectations of lawyer's professionalism — As council found, counsel's letter was outside those expectations — His displeasure with judge was justifiable, but extent of response was not — Therefore, council's decision to reprimand counsel reflected proportionate balancing of its public mandate to ensure that lawyers behave with objectivity, moderation and dignity with lawyer's expressive rights, and decision was reasonable one.

Professions and occupations --- Barristers and solicitors — Organization and regulation of profession — Disciplinary proceedings — Grounds for suspension

Counsel was representing his client before Superior Court when judge criticized counsel — Counsel then wrote letter to judge, in which he poured insults on him, and complaint was filed against counsel — Disciplinary council of Quebec Bar reprimanded counsel and suspended his ability to practice law for 21 days — Tribunal des professions found that decision to sanction counsel was minimal restriction on his freedom of expression — Superior Court upheld decision of tribunal — Court of Appeal applied full Oakes analysis and found that counsel's letter had limited importance compared to values underlying freedom of expression — Counsel appealed before Supreme Court of Canada, claiming that council's decision violated his freedom of expression under Canadian Charter of Rights and Freedoms — Appeal dismissed — Only issue here was whether council's decision to reprimand counsel reflected proportionate balancing of counsel's expressive rights under Charter with necessity to ensure civility in profession — Fact that lawyer criticized judge may raise, not lower, threshold for limiting lawyer's expressive rights — Lawyers are expected by public, on whose behalf they serve, to endure criticisms and pressures with civility and dignity — Criticism expressed by lawyer will be measured against public's reasonable expectations of lawyer's professionalism — As council found, counsel's letter was outside those expectations — His displeasure with judge was justifiable, but extent of response was not — Therefore, council's decision to reprimand counsel reflected proportionate balancing of its public mandate to ensure that lawyers behave with objectivity, moderation and dignity with lawyer's expressive rights, and decision was reasonable one.

Droit administratif --- Norme de contrôle — Divers

Norme de contrôle révisée - décision raisonnable — Procureur représentait son client devant la Cour supérieure lorsque le juge a émis une critique à son endroit — Ce dernier a alors écrit une lettre au juge dans laquelle il l'insultait copieusement, et une plainte a été déposée à l'encontre du procureur — Comité de discipline du Barreau du Québec a réprimandé le procureur et a suspendu son droit de pratique durant 21 jours — Tribunal des professions a conclu que la décision d'infliger une sanction au procureur constituait une restriction minimale à sa liberté d'expression — Cour supérieure a maintenu la décision du tribunal — Cour d'appel a procédé à une analyse complète fondée sur l'arrêt Oakes et a conclu que la lettre du procureur revêtait une importance limitée par rapport aux valeurs sous-jacentes à la liberté d'expression — Procureur a formé un pourvoi auprès de la Cour suprême du Canada, faisant valoir que la décision du comité enfreignait la liberté d'expression que lui garantit la Charte canadienne des droits et libertés — Pourvoi rejeté — Normalement, si un décideur a rendu une décision administrative conforme à son mandat en exerçant un pouvoir discrétionnaire, le contrôle judiciaire qui la concerne vise à juger de son caractère raisonnable — Présence d'une question relative à la Charte n'entraîne pas le remplacement de ce cadre d'analyse de droit administratif par le test énoncé dans l'arrêt Oakes — Lorsque les valeurs consacrées par la Charte sont appliquées à une décision administrative particulière, elles sont appliquées relativement à un ensemble précis de faits — Ainsi, l'approche plus souple du droit administratif pour mettre

en balance les valeurs consacrées par la Charte est également plus compatible avec la nature de la prise de décision qui découle de l'exercice d'un pouvoir discrétionnaire — Il s'agit alors de déterminer si le décideur a restreint le droit protégé par la Charte de manière disproportionnée et donc déraisonnable.

Professions et métiers --- Avocats — Organisation et règlement de la profession — Procédures disciplinaires — Contrôle judiciaire

Procureur représentait son client devant la Cour supérieure lorsque le juge a émis une critique à son endroit — Ce dernier a alors écrit une lettre au juge dans laquelle il l'insultait copieusement, et une plainte a été déposée à l'encontre du procureur — Comité de discipline du Barreau du Québec a réprimandé le procureur et a suspendu son droit de pratique durant 21 jours — Tribunal des professions a conclu que la décision d'infliger une sanction au procureur constituait une restriction minimale à sa liberté d'expression — Cour supérieure a maintenu la décision du tribunal — Cour d'appel a procédé à une analyse complète fondée sur l'arrêt Oakes et a conclu que la lettre du procureur revêtait une importance limitée par rapport aux valeurs sous-jacentes à la liberté d'expression — Procureur a formé un pourvoi auprès de la Cour suprême du Canada, faisant valoir que la décision du comité enfreignait la liberté d'expression que lui garantit la Charte canadienne des droits et libertés — Pourvoi rejeté — Normalement, si un décideur a rendu une décision administrative conforme à son mandat en exerçant un pouvoir discrétionnaire, le contrôle judiciaire qui la concerne vise à juger de son caractère raisonnable — Présence d'une question relative à la Charte n'entraîne pas le remplacement de ce cadre d'analyse de droit administratif par le test énoncé dans l'arrêt Oakes — Lorsque les valeurs consacrées par la Charte sont appliquées à une décision administrative particulière, elles sont appliquées relativement à un ensemble précis de faits — Ainsi, l'approche plus souple du droit administratif pour mettre en balance les valeurs consacrées par la Charte est également plus compatible avec la nature de la prise de décision qui découle de l'exercice d'un pouvoir discrétionnaire — Il s'agit alors de déterminer si le décideur a restreint le droit protégé par la Charte de manière disproportionnée et donc déraisonnable.

Droit constitutionnel --- Charte des droits et libertés — Nature des droits et libertés — Liberté d'expression — Nature et portée de l'expression

Procureur représentait son client devant la Cour supérieure lorsque le juge a émis une critique à son endroit — Ce dernier a alors écrit une lettre au juge dans laquelle il l'insultait copieusement, et une plainte a été déposée à l'encontre du procureur — Comité de discipline du Barreau du Québec a réprimandé le procureur et a suspendu son droit de pratique durant 21 jours — Tribunal des professions a conclu que la décision d'infliger une sanction au procureur constituait une restriction minimale à sa liberté d'expression — Cour supérieure a maintenu la décision du tribunal — Cour d'appel a procédé à une analyse complète fondée sur l'arrêt Oakes et a conclu que la lettre du procureur revêtait une importance limitée par rapport aux valeurs sous-jacentes à la liberté d'expression — Procureur a formé un pourvoi auprès de la Cour suprême du Canada, faisant valoir que la décision du comité enfreignait la liberté d'expression que lui garantit la Charte canadienne des droits et libertés — Pourvoi rejeté — Seule question à trancher en l'espèce était celle de savoir si la décision du comité de réprimander le procureur a établi un juste équilibre entre le droit du procureur à la liberté d'expression garanti par la Charte et la nécessité d'assurer la civilité dans l'exercice de la profession juridique — Fait qu'un avocat ait critiqué un juge pourrait hausser, et non abaisser, le seuil au-delà duquel il convient de limiter l'exercice par un avocat du droit à la liberté d'expression — Public, au nom de qui les avocats exercent, s'attend à ce qu'ils encaissent les critiques et la pression avec civilité et dignité — Critique émise par un avocat sera évaluée à la lumière des attentes raisonnables du public quant au professionnalisme dont ce dernier doit faire preuve — Comme l'a conclu le comité, la lettre du procureur ne satisfaisait pas à ces attentes — Son mécontentement à l'égard du juge était légitime, mais la teneur de sa réponse ne l'était pas — Par conséquent, la décision du comité de réprimander le procureur a établi un équilibre proportionné entre son mandat consistant à garantir que les avocats agissent avec objectivité, modération et dignité et le droit du procureur à la libre expression, et elle était une décision raisonnable.

Professions et métiers --- Avocats — Organisation et règlement de la profession — Procédures disciplinaires — Sanctions — Réprimande

Procureur représentait son client devant la Cour supérieure lorsque le juge a émis une critique à son endroit — Ce dernier a alors écrit une lettre au juge dans laquelle il l'insultait copieusement, et une plainte a été déposée à l'encontre du procureur — Comité de discipline du Barreau du Québec a réprimandé le procureur et a suspendu son droit de pratique durant 21 jours — Tribunal des professions a conclu que la décision d'infliger une sanction au procureur constituait une

restriction minimale à sa liberté d'expression — Cour supérieure a maintenu la décision du tribunal — Cour d'appel a procédé à une analyse complète fondée sur l'arrêt Oakes et a conclu que la lettre du procureur revêtait une importance limitée par rapport aux valeurs sous-jacentes à la liberté d'expression — Procureur a formé un pourvoi auprès de la Cour suprême du Canada, faisant valoir que la décision du comité enfreignait la liberté d'expression que lui garantit la Charte canadienne des droits et libertés — Pourvoi rejeté — Seule question à trancher en l'espèce était celle de savoir si la décision du comité de réprimander le procureur a établi un juste équilibre entre le droit du procureur à la liberté d'expression garanti par la Charte et la nécessité d'assurer la civilité dans l'exercice de la profession juridique — Fait qu'un avocat ait critiqué un juge pourrait hausser, et non abaisser, le seuil au-delà duquel il convient de limiter l'exercice par un avocat du droit à la liberté d'expression — Public, au nom de qui les avocats exercent, s'attend à ce qu'ils encaissent les critiques et la pression avec civilité et dignité — Critique émise par un avocat sera évaluée à la lumière des attentes raisonnables du public quant au professionnalisme dont ce dernier doit faire preuve — Comme l'a conclu le comité, la lettre du procureur ne satisfaisait pas à ces attentes — Son mécontentement à l'égard du juge était légitime, mais la teneur de sa réponse ne l'était pas — Par conséquent, la décision du comité de réprimander le procureur a établi un équilibre proportionné entre son mandat consistant à garantir que les avocats agissent avec objectivité, modération et dignité et le droit du procureur à la libre expression, et elle était une décision raisonnable.

Professions et métiers --- Avocats — Organisation et règlement de la profession — Procédures disciplinaires — Sanctions — Suspension

Procureur représentait son client devant la Cour supérieure lorsque le juge a émis une critique à son endroit — Ce dernier a alors écrit une lettre au juge dans laquelle il l'insultait copieusement, et une plainte a été déposée à l'encontre du procureur — Comité de discipline du Barreau du Québec a réprimandé le procureur et a suspendu son droit de pratique durant 21 jours — Tribunal des professions a conclu que la décision d'infliger une sanction au procureur constituait une restriction minimale à sa liberté d'expression — Cour supérieure a maintenu la décision du tribunal — Cour d'appel a procédé à une analyse complète fondée sur l'arrêt Oakes et a conclu que la lettre du procureur revêtait une importance limitée par rapport aux valeurs sous-jacentes à la liberté d'expression — Procureur a formé un pourvoi auprès de la Cour suprême du Canada, faisant valoir que la décision du comité enfreignait la liberté d'expression que lui garantit la Charte canadienne des droits et libertés — Pourvoi rejeté — Seule question à trancher en l'espèce était celle de savoir si la décision du comité de réprimander le procureur a établi un juste équilibre entre le droit du procureur à la liberté d'expression garanti par la Charte et la nécessité d'assurer la civilité dans l'exercice de la profession juridique — Fait qu'un avocat ait critiqué un juge pourrait hausser, et non abaisser, le seuil au-delà duquel il convient de limiter l'exercice par un avocat du droit à la liberté d'expression — Public, au nom de qui les avocats exercent, s'attend à ce qu'ils encaissent les critiques et la pression avec civilité et dignité — Critique émise par un avocat sera évaluée à la lumière des attentes raisonnables du public quant au professionnalisme dont ce dernier doit faire preuve — Comme l'a conclu le comité, la lettre du procureur ne satisfaisait pas à ces attentes — Son mécontentement à l'égard du juge était légitime, mais la teneur de sa réponse ne l'était pas — Par conséquent, la décision du comité de réprimander le procureur a établi un équilibre proportionné entre son mandat consistant à garantir que les avocats agissent avec objectivité, modération et dignité et le droit du procureur à la libre expression, et elle était une décision raisonnable.

Professions et métiers --- Avocats — Organisation et règlement de la profession — Procédures disciplinaires — Motifs de suspension

Procureur représentait son client devant la Cour supérieure lorsque le juge a émis une critique à son endroit — Ce dernier a alors écrit une lettre au juge dans laquelle il l'insultait copieusement, et une plainte a été déposée à l'encontre du procureur — Comité de discipline du Barreau du Québec a réprimandé le procureur et a suspendu son droit de pratique durant 21 jours — Tribunal des professions a conclu que la décision d'infliger une sanction au procureur constituait une restriction minimale à sa liberté d'expression — Cour supérieure a maintenu la décision du tribunal — Cour d'appel a procédé à une analyse complète fondée sur l'arrêt Oakes et a conclu que la lettre du procureur revêtait une importance limitée par rapport aux valeurs sous-jacentes à la liberté d'expression — Procureur a formé un pourvoi auprès de la Cour suprême du Canada, faisant valoir que la décision du comité enfreignait la liberté d'expression que lui garantit la Charte canadienne des droits et libertés — Pourvoi rejeté — Seule question à trancher en l'espèce était celle de savoir si la décision du comité de réprimander le procureur a établi un juste équilibre entre le droit du procureur à la liberté d'expression garanti par la Charte et la nécessité d'assurer la civilité dans l'exercice de la profession juridique — Fait qu'un avocat ait

critiqué un juge pourrait hausser, et non abaisser, le seuil au-delà duquel il convient de limiter l'exercice par un avocat du droit à la liberté d'expression — Public, au nom de qui les avocats exercent, s'attend à ce qu'ils encaissent les critiques et la pression avec civilité et dignité — Critique émise par un avocat sera évaluée à la lumière des attentes raisonnables du public quant au professionnalisme dont ce dernier doit faire preuve — Comme l'a conclu le comité, la lettre du procureur ne satisfaisait pas à ces attentes — Son mécontentement à l'égard du juge était légitime, mais la teneur de sa réponse ne l'était pas — Par conséquent, la décision du comité de réprimander le procureur a établi un équilibre proportionné entre son mandat consistant à garantir que les avocats agissent avec objectivité, modération et dignité et le droit du procureur à la libre expression, et elle était une décision raisonnable.

The counsel was representing his client before the Superior Court. In the course of the proceedings, the judge criticized the counsel. The counsel then wrote a private letter to the judge calling him loathsome, arrogant and fundamentally unjust, and accusing him of hiding behind his status like a coward, of having a chronic inability to master any social skills, of being pedantic, aggressive and petty, and of having a propensity to use his court to launch ugly, vulgar and mean personal attacks. A complaint was filed against the counsel by the assistant syndic of the Quebec Bar.

The disciplinary council of the Quebec Bar found that the letter was likely to offend, rude and insulting and that the statements had little expressive value. It reprimanded the counsel and suspended his ability to practice law for 21 days. The counsel appealed before the Tribunal des professions, which found that the decision to sanction the counsel was a minimal restriction on his freedom of expression. On judicial review, the Superior Court upheld the decision of the tribunal. The counsel appealed to the Court of Appeal.

The Court of Appeal applied a full Oakes analysis and found that the counsel's letter had limited importance compared to the values underlying freedom of expression. It also found that the council's decision had a rational connection to the important objective of protecting the public and that the effects of the decision were proportionate to its objectives. The counsel appealed before the Supreme Court of Canada, claiming that the council's decision violated his freedom of expression under the Canadian Charter of Rights and Freedoms.

Held: The appeal was dismissed.

Per Abella J. (McLachlin C.J.C., Binnie, LeBel, Fish, Rothstein, Cromwell JJ. concurring): Normally, a discretionary administrative decision made by an adjudicator within his or her mandate is judicially reviewed for its reasonableness. The presence of a Charter issue does not necessarily call for the replacement of this administrative law framework with the Oakes test. When Charter values are applied to an individual administrative decision, they are being applied in relation to a particular set of facts. Thus, the more flexible administrative approach to balancing Charter values is more consistent with the nature of discretionary decision-making. It must then be determined whether the decision-maker disproportionately, and therefore unreasonably, limited a Charter right.

Hence, the only issue here was whether the council's decision to reprimand the counsel reflected a proportionate balancing of the counsel's expressive rights under the Charter with the necessity to ensure civility in the profession. The fact that a lawyer criticized a judge may raise, not lower, the threshold for limiting a lawyer's expressive rights. Lawyers are expected by the public, on whose behalf they serve, to endure criticisms and pressures with civility and dignity. Criticism expressed by a lawyer will be measured against the public's reasonable expectations of a lawyer's professionalism. As the council found, the counsel's letter was outside those expectations. His displeasure with the judge was justifiable, but the extent of the response was not. Therefore, the council's decision to reprimand the counsel reflected a proportionate balancing of its public mandate to ensure that lawyers behave with objectivity, moderation and dignity with the lawyer's expressive rights, and the decision was a reasonable one.

Le procureur représentait son client devant la Cour supérieure. Au cours des procédures, le juge a émis une critique à l'endroit du procureur. Ce dernier a alors écrit une lettre au juge dans laquelle il l'a décrit comme un être exécrable, arrogant et foncièrement injuste et l'a accusé de se cacher lâchement derrière son statut, d'être chroniquement incapable de maîtriser quelque aptitude sociale, d'adopter un comportement pédant, hargneux et mesquin et de démontrer une propension à se servir de sa tribune pour s'adonner à des attaques personnelles mesquines, repoussantes et vulgaires. Une plainte a été déposée à l'encontre du procureur par le syndic adjoint du Barreau du Québec.

Le comité de discipline du Barreau du Québec a conclu que la lettre du procureur était de nature à choquer et constituait des propos grossiers et injurieux et que les propos du procureur n'avaient que peu de valeur sur le plan expressif. Le comité a réprimandé le procureur et a suspendu son droit de pratique durant 21 jours. Le procureur a interjeté appel

devant le Tribunal des professions, lequel a conclu que la décision de lui infliger une sanction constituait une restriction minimale à sa liberté d'expression. Lors du contrôle judiciaire, la Cour supérieure a maintenu la décision du tribunal. Le procureur a interjeté appel à la Cour d'appel.

La Cour d'appel a procédé à une analyse complète fondée sur l'arrêt Oakes et a conclu que la lettre du procureur revêtait une importance limitée par rapport aux valeurs sous-jacentes à la liberté d'expression. Elle a aussi conclu que la décision du comité avait un lien rationnel avec l'important objectif que constitue la protection du public et que la décision avait des effets proportionnels aux objectifs qu'elle visait. Le procureur a formé un pourvoi auprès de la Cour suprême du Canada, faisant valoir que la décision du comité enfreignait la liberté d'expression que lui garantit la Charte canadienne des droits et libertés.

Arrêt: Le pourvoi a été rejeté.

Abella, J. (McLachlin, J.C.C., Binnie, LeBel, Fish, Rothstein, Cromwell, JJ., souscrivant à son opinion) : Normalement, si un décideur a rendu une décision administrative conforme à son mandat en exerçant un pouvoir discrétionnaire, le contrôle judiciaire qui la concerne vise à juger de son caractère raisonnable. La présence d'une question relative à la Charte n'entraîne pas le remplacement de ce cadre d'analyse de droit administratif par le test énoncé dans l'arrêt Oakes. Lorsque les valeurs consacrées par la Charte sont appliquées à une décision administrative particulière, elles sont appliquées relativement à un ensemble précis de faits. Ainsi, l'approche plus souple du droit administratif pour mettre en balance les valeurs consacrées par la Charte est également plus compatible avec la nature de la prise de décision qui découle de l'exercice d'un pouvoir discrétionnaire. Il s'agit alors de déterminer si le décideur a restreint le droit protégé par la Charte de manière disproportionnée et donc déraisonnable.

Ainsi, la seule question à trancher en l'espèce était celle de savoir si la décision du comité de réprimander le procureur a établi un juste équilibre entre le droit du procureur à la liberté d'expression garanti par la Charte et la nécessité d'assurer la civilité dans l'exercice de la profession juridique. Le fait qu'un avocat ait critiqué un juge pourrait hausser, et non abaisser, le seuil au-delà duquel il convient de limiter l'exercice par un avocat du droit à la liberté d'expression. Le public, au nom de qui les avocats exercent, s'attend à ce qu'ils encaissent les critiques et la pression avec civilité et dignité. Une critique émise par un avocat sera évaluée à la lumière des attentes raisonnables du public quant au professionnalisme dont ce dernier doit faire preuve. Comme l'a conclu le comité, la lettre du procureur ne satisfaisait pas à ces attentes. Son mécontentement à l'égard du juge était légitime, mais la teneur de sa réponse ne l'était pas. Par conséquent, la décision du comité de réprimander le procureur a établi un équilibre proportionné entre son mandat consistant à garantir que les avocats agissent avec objectivité, modération et dignité et le droit du procureur à la libre expression, et elle était une décision raisonnable.

APPEAL by counsel from decision reported at *Doré c. Québec (Tribunal des professions)* (2010), 2010 CarswellQue 77, 2010 QCCA 24, 2010 CarswellQue 13368, [2010] R.J.Q. 77, *(*sub nom. *Doré v. Barreau du Québec)* 326 D.L.R. (4th) 749 (C.A. Que.), dismissing counsel's appeal from decision of disciplinary council reprimanding him for words used in letter he sent to judge.

POURVOI formé par un procureur à l'encontre d'une décision publiée à *Doré c. Québec (Tribunal des professions)* (2010), 2010 CarswellQue 77, 2010 QCCA 24, 2010 CarswellQue 13368, [2010] R.J.Q. 77, *(*sub nom. *Doré v. Barreau du Québec)* 326 D.L.R. (4th) 749 (C.A. Que.), ayant rejeté l'appel qu'il a interjeté à l'encontre d'une décision du comité de discipline de le réprimander pour les mots utilisés dans une lettre qu'il a fait parvenir à un juge.

***Abella J.*:**

1 The focus of this appeal is on the decision of a disciplinary body to reprimand a lawyer for the content of a letter he wrote to a judge after a court proceeding.

2 The lawyer does not challenge the constitutionality of the provision in the *Code of ethics* under which he was reprimanded. Nor, before us, does he challenge the length of the suspension he received. What he *does* challenge, is the constitutionality of the decision itself, claiming that it violates his freedom of expression under the *Canadian Charter of Rights and Freedoms*.

his or her potential reintegration into society" (paras. 19 and 23). In *Pinet*, the test was laid out in the statute, but Binnie J. made it clear that the emphasis on the least infringing decision was a constitutional requirement.

50 In *Lake*, where the court was reviewing the Minister's decision to surrender a Canadian citizen for extradition, implicating ss. 6(1) and 7 of the *Charter*, the Court again applied a reasonableness standard. LeBel J. held that deference is owed to the Minister's decision, as the Minister is closer to the relevant facts required to balance competing considerations and benefits from expertise:

> This Court has repeatedly affirmed that deference is owed to the Minister's decision whether to order surrender once a fugitive has been committed for extradition. The issue in the case at bar concerns the standard to be applied in reviewing the Minister's assessment of a fugitive's *Charter* rights. Reasonableness is the appropriate standard of review for the Minister's decision, regardless of whether the fugitive argues that extradition would infringe his or her rights under the *Charter*. As is evident from this Court's jurisprudence, to ensure compliance with the *Charter* in the extradition context, the Minister must balance competing considerations, and where many such considerations are concerned, the Minister has superior expertise. The assertion that interference with the Minister's decision will be limited to exceptional cases of "real substance" reflects the breadth of the Minister's discretion; the decision should not be interfered with unless it is unreasonable (*Schmidt* [*Canada v. Schmidt*, [1987] 1 S.C.R. 500]) (for comments on the standards of correctness and reasonableness, see *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9). [Emphasis added; para. 34]

51 The alternative — adopting a correctness review in every case that implicates *Charter* values — will, as Prof. Mullan noted, essentially lead to courts "retrying" a range of administrative decisions that would otherwise be subjected to a reasonableness standard:

> If correctness review becomes the order of the day in all *Charter* contexts, including the determination of factual issues and the application of the law to those facts, then what in effect can occur is that the courts will perforce assume the role of a *de novo* appellate body from all tribunals the task of which is to make decisions that of necessity have an impact on *Charter* rights and freedoms: Review Boards, Parole Boards, prison disciplinary tribunals, child welfare authorities, and the like. Whether that kind of judicial micro-managing of aspects of the administrative process should take place is a highly problematic question.
>
> [Emphasis added; p. 145.]

52 So our choice is between saying that every time a party argues that *Charter* values are implicated on judicial review, a reasonableness review is transformed into a correctness one, or saying that while both tribunals and courts can interpret the *Charter*, the administrative decision-maker has the necessary specialized expertise and discretionary power in the area where the *Charter* values are being balanced.

53 The decisions of legal disciplinary bodies offer a good example of the problem of applying a correctness review whenever *Charter* values are implicated. Most breaches of art. 2.03 of the *Code of ethics* calling for "objectivity, moderation and dignity", necessarily engage the expressive rights of lawyers. That would mean that most exercises of disciplinary discretion under this provision would be transformed from the usual reasonableness review to one for correctness.

54 Nevertheless, as McLachlin C.J. noted in *Catalyst*, "reasonableness must be assessed in the context of the particular type of decision making involved and all relevant factors. It is an essentially contextual inquiry" (para. 18). Deference is still justified on the basis of the decision-maker's expertise and its proximity to the facts of the case. Even where *Charter* values are involved, the administrative decisionmaker will generally be in the best position to consider the impact of the relevant *Charter* values *on the specific facts of the case*. But both decision-makers and reviewing courts must remain conscious of the fundamental importance of *Charter* values in the analysis.

TAB 5

1907 CarswellYukon 51
The Supreme Court of Canada

Lamb v. Kincaid

1907 CarswellYukon 51, [1907] S.C.J. No. 19, 27 C.L.T. 489, 38 S.C.R. 516

Charles Lamb and H.L. Miller (Defendants), Appellants and Samuel T. Kincaid and Anthony Krober (Plaintiffs), Respondents

Fitzpatrick C.J. and Girouard, Davies, Idington and Duff JJ.

Judgment: March 11, 1907
Judgment: May 7, 1907

Proceedings: On Appeal from the Territorial Court of Yukon Territory.

Counsel: *Ewart K.C.* for the appellants.
Holman K.C. and Gwillim, for the respondents.

Subject: Evidence; Natural Resources; Torts

Headnote

Evidence --- Legal proof — Presumptions — Non-production of evidence — Destruction of evidence

Computation of damages — Presumption where wrongful act renders accuracy impossible.

Per Duff J.: "The court is not called upon to speculate in such a case for the benefit of deliberate wrong-doers; they come within the wholesome rule, that if a man by his deliberately tortious act destroys the evidence necessary to ascertain the extent of the injury he has inflicted, he must suffer all the inconvenience which is the result of his own wrong." Defendants, by deliberate trespass, took ore from plaintiffs' placer mining claim, and mixed it with their own ore. When sued, they claimed to be entitled to deduct the cost of washing this ore from the amount which they were required to pay to plaintiffs as representing its value. Held, this contention could be answered by saying that defendants had themselves, by their own wrongful acts, made it impossible to ascertain the amount of these expenses. Per Duff J.: "The case calls for a further observation. The learned trial Judge seems to have proceeded on the assumption that the burden was upon the plaintiffs to prove the value of the mineral taken from their claim. The burden which by this course was placed upon the defendants was much lighter than, in the circumstances of this case, they had a right to expect. In the view I have taken of their conduct, they were, under the long settled doctrine of the English law, accountable for as much of the mixed products of the two claims as they did not strictly prove to have come from their own.".

Mines and Minerals --- Remedies — Damages — Assessment and quantum

Wilful and non-wilful trespass — Mixing of mined ore.

It has for some years been the settled law applicable to coal mining trespass, where the trespass is not wilful, that in estimating the value of the coal abstracted the coal is to be treated as in situ and from its value at the mouth of the pit is to be deducted the cost of severing it from its natural bed and of bringing it to bank. Where the trespass is wilful, the cost of severance is not allowed although as a general rule the cost of bringing it to bank is. A trespasser upon a placer mining claim is not in more favourable position than a coal trespasser under this rule. Where defendants mixed the ore taken from their own property and that taken by trespass, held, they were accountable for as much of the mixed products of the two claims as they did not strictly prove to have come from their own.

Torts --- Conversion — Elements of right of action — Wrongful act

Dispute as to boundary line — Wrongful removal and admixture of ore.

Plaintiff and defendant were owners of adjoining mining claims. A dispute as to their common boundary was decided by the commissioner in favour of defendant. Pending plaintiff's appeal, defendant removed the mineral-bearing soil from the disputed ground, keeping no record of the amount. The soil was inextricably mixed with defendant's own soil. Plaintiff

succeeded on the appeal, and brought an action for conversion. Held, the action should succeed. Defendant proceeded from sinister motives and not from an honest though mistaken belief in his rights, and was liable for conversion of the mineral-bearing soil.

Torts --- Conversion — Damages — Valuation

Wrongful removal and admixture of goods.

A person who wilfully and dishonestly removes minerals from another's mine will be liable for the conversion to the full value of the final product without reduction for the cost of removal and production of the final product. Where he has intermixed such minerals with his own, the onus will lie upon him to prove strictly what portion of the whole is his.

***The Chief Justice*:**

1 I agree with the reasoning of Mr. Justice Duff.

***Girouard J.*:**

2 I agree in the opinion of Mr. Justice Duff.

***Davies J.* (dissenting):**

3 The question we have to decide is as to the measure of damages to be applied to the trespasses committed by the appellants on the plaintiffs' mining area, and for which they were sued.

4 Are these damages to be assessed according to the severe rule, the rule *in poenam*, whereby the trespasser is to be held liable for the full value of the gold taken by him out of the property trespassed upon without making any allowance whatever for the cost either of taking out the pay dirt or afterwards of washing and mining the gold from this pay dirt, or are they to be assessed according to the milder rule by which the necessary expense which it would have cost plaintiff to obtain the gold had he mined and obtained it himself, would be allowed to the trespasser?

5 The trial judge declined to make any allowance to defendants for these necessary expenses and upon appeal the court was equally divided, Craig J. holding with the trial judge, and Macauley J. deciding in favour of the application of the milder rule and allowing these necessary expenses.

6 The grounds upon which Craig J. supports his judgment are that the trespass was a wilful and deliberate invasion of the plaintiff's property. He proceeds upon the assumption that plaintiff was a wilful trespasser and incorporates, from Armstrong on the Law of Gold Mining, a definition of wilful trespasser as one

> not in possession under any colour of title and not under any mistake as to facts though misapprehending the law.

In another place he says that

> after reading Lamb's (defendant's) evidence carefully he had reached the conclusion that * * * he deliberately made up his mind to have this ground in spite of any body and that with wilful intent to obtain an unfair advantage, he entered upon this ground, took out the pay dirt, and deliberately confused it with his own.

7 Having reached such a conclusion that the trespass was simply a deliberate fraud, of course there could not be any doubt as to the proper rule to apply in measuring the damages. I have, bearing in mind the very strong language of Craig J., read carefully over Lamb's evidence, but I have not been able to reach any such conclusions from it as the judge seems to have done. On the contrary, I think his evidence, read with all the other evidence in the case, shews that so far from being a wilful trespasser without any colour of title, the defendants entered upon the disputed claim only after it had been judicially determined by the Gold Commissioner, after a trial, to have been their property and within the bonds of their mining lease; that they carried on their operations of taking out the pay dirt from the disputed territory during the winter and spring after judgment had been given in their favour, tunnelling into the territory across a tunnel of plaintiffs, and that these operations must have been known to the plaintiffs who stood by and saw the property being

worked by defendants and contented themselves simply with appealing from the judgment of the Gold Commissioner, without applying for an injunction restraining the defendants from working the disputed territory.

8 It is true the judgment of the Gold Commissioner was more than a year afterwards reversed by the court of appeal, Craig J. stating on that appeal that it was "merely a question of boundaries and consideration of the weight of evidence." Before this appeal was determined all that is complained of by the plaintiffs was done. It does not, therefore, seem to me proper to speak of the plaintiff as a wilful trespasser, or deal with him as one in possession "not under any colour of right."

9 He was in possession under the judgment of a court of competent jurisdiction which declared the disputed territory to form part of his mining claim, and I cannot see that he ought to be treated as acting fraudulently or dishonestly, simply because he went on exercising rights declared to be his without any attempt to restrain him from doing so by his opponent who had appealed from the judgment simply. In the absence of any positive evidence to the contrary, and drawing reasonable inferences from the facts proved, I would conclude that what defendants did was done openly under a claim of right and *bonâ fide*, though in the ultimate result proved to be wrongful.

10 In his judgment in the case of *Trotter v. MacLean* [1] , Fry J., at p. 587, after reviewing the different classes of cases in which the milder rule or the punitive rule was applied, cited with approval from the observations of Lord Hatherley in *Jegon v. Vivian* [2] the following:

> I think that the milder rule of law is certainly that which ought to guide this court subject to any case made of a special character which would induce the court to swerve from it; otherwise on the one hand a trespass might be committed with impunity if the rule *in poenam* were not insisted upon; so on the other hand persons might stand by and see their coal worked, being spared the expense of mining and getting it.

Fry J then goes on to say:

> These observations are material in two ways. In the first place they express the view of the Lord Chancellor that the milder rule is to be assumed when the propriety of applying the contrary rule is not shewn, and *they throw the burden on him who asserts that the severer rule ought to be applied;* and so his language has been interpreted by V.-C. Bacon, in, I think, more than one case. In the next place, Lord Hatherley points out that the milder rule should be applied where persons *stand by and see their coal worked.*

I think the plaintiffs here have failed to discharge the burden cast on them and that they should, under the circumstances, be classed with those who stand by and see their property worked.

11 In the case of *Livingstone v. Rawyards Coal Co.* [3] , in the House of Lords, Lord Blackburn stated the general rule where an injury is to be compensated by damages to be that

> you should as nearly as possible get at that sum of money which will put the party who has been injured or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation. That must be qualified by a great many things which may arise, such for instance as by the consideration whether the damage has been maliciously done or whether it has been done with full knowledge that the person doing it was doing wrong.

12 I can see no evidence whatever of malicious action on defendants' part and cannot, as before stated, reach the conclusion that the defendants, with the judgment of the court of first instance in their favour, and with the plaintiffs in the position of persons looking on at defendants' operations and contenting themselves with a simple appeal, must necessarily be held to have had "full knowledge" that they were doing wrong at the time the only court that had passed upon the question had determined they could legally do what they were doing. Until evidence is given forcing the court to that conclusion of wilful wrongdoing the plaintiffs have not discharged the onus which Lord Hatherley thought lay upon them.

13 My attention has been called by my brother Duff to the case of *Peruvian Guano Co. v. Dreyfus Brothers & Co.* [4] , at p. 167, decided in the House of Lords. In that case it was held by Lords Watson and MacNaghten, after an elaborate and instructive review by Lord MacNaghten of many of the cases alike at common law and equity bearing upon the question now under discussion, that on general principles the defendants, though they had illegally detained the plaintiffs' property, were entitled to repayment of the expenses properly incurred by them on account of freight and landing charges.

14 Whatever strength there might have been in the argument denying the right of the defendants to have any expenses allowed them for taking the pay dirt out of the disputed territory into the dump heap, I can see no just rule or reason which should preclude them from the reasonable expense of washing the gold out of the dump heap. In any event that would have had to be incurred by plaintiffs, if they themselves had taken out the pay dirt, and the cost can easily be estimated. To confirm the judgment appealed from would deny even that to the defendants.

15 I do not think the explanation of the reasons why they did not keep a separate account of the working of the portion of the mining area under dispute, or why they mixed the pay dirt from that area with that from their undisputed area, unreasonable as was contended. It would no doubt have been better, and proper, had it been possible, to keep these accounts and not to have mixed the pay dirt with other. But on the statement, uncontradicted so far as I can see of the extremely limited extent of dumping ground which defendants had, and the great expense of separating the pay dirt from the disputed area with that from the undisputed area, I am unable to draw the conclusion that this mixing of the two was necessarily a wilful mixing which ought to be punished by the application of the punitive rule of damages. There might have been some difficulty in reaching a proper estimate of the whole expenses to be properly allowed defendants from the evidence already in, and without a further reference. But, as counsel for the plaintiffs, respondents, pressed us, if we reached the opinion that the defendants were entitled to be allowed such expenditure as it would undoubtedly have cost the plaintiffs if they had mined and won the gold from the disputed area, not to refer the case back for further evidence but to make such estimate from the evidence already in, I think we may under that consent adopt the conclusion of Macauley J. and allow them 40 per cent. of the gross proceeds, as and for such necessary expenditure, and as being under the evidence a fair, just and reasonable allowance.

16 I would, therefore, allow the appeal with costs to that extent.

***Idington J.*:**

17 I agree in the opinion of Mr. Justice Duff.

***Duff J.*:**

18 The appellants and one Randall were, in 1901 and 1902, the owners of a placer claim known as the "Miller" on Bonanza Creek in the Yukon Territory adjoining a claim known as the "Krober" owned by the respondents.

19 A dispute as to the boundary between the claims was determined in February, 1903, by a judgment given in favour of the respondent by the Territorial Court of the Yukon Territory reversing the judgment of the Gold Commissioner which had been delivered 11th January, 1902. Between the last mentioned date and the date of the delivery of the judgment of the Territorial Court, the appellants entered upon the area in dispute and abstracted large quantities of auriferous material, from which, after intermixing it with similar material taken from the "Miller," they extracted the gold which it contained. The respondents brought this action to recover damages for the invasion of their claim by the appellants and the trial judge awarded them $7,306.56, which the learned judge found to be the value of the gold recovered by the appellants from the respondents' claim.

20 On appeal, Craig J. agreed with the trial judge, while Macauley J. took the view that this sum should be reduced by a deduction equivalent to the expenses incurred by them as well in separating the gold bearing material from its natural bed as in removing it from the mine and in recovering the mineral it contained.

21 Before us, the appellants' principal contention was that, not having entered upon the disputed area until they had first obtained the decision of the Gold Commissioner in their favour, they are entitled to the benefit of an allowance in accordance with the view of Macauley J.

22 It has for some years been the settled law applicable to cases of coal mining trespass, where the trespass is not wilful, that in estimating — when that forms an element in the damages to which the plaintiffs is entitled — the value of the coal abstracted, the coal is to be treated as *in situ* and from its value at the mouth of the pit is to be deducted the cost of severing it from its natural bed and of bringing it to bank; where the trespass is wilful, the cost of severance is not allowed although as a general rule the cost of bringing it to bank is.

23 It was not argued and, I think, cannot be maintained, that a trespasser upon a placer mining claim held under the mining regulations of the Yukon Territory is in a position more favourable than a coal trespasser under this rule. Whether he is in a less favourable position, it is, in the view I take of the facts, unnecessary to consider. I have come to the conclusion that, assuming the rule to apply in its entirety, the appellants are within that branch of it which governs cases of wilful trespass and are, consequently, not entitled to the benefit of the allowance claimed.

24 No attempt, so far as I can find, has yet been made to define with precision the circumstances in which the court will treat a trespass as wilful within the meaning of the rule; but this much is sufficiently clear upon any examination of the cases — that, upon that point, the existence or non-existence in the mind of a trespasser of a belief in his title to the locus is not necessarily conclusive.

25 In the leading case *Wood v. Morewood*[5] , for example, the test which Baron Parke instructed the jury to apply was: Did the defendant act

> fairly and honestly (not honestly only) in the *bonâ fide* belief that he had a right to do what he did?

(not merely that he owned the coal taken). If the title is in dispute and the dispute is in course of active litigation an abstraction of mineral may be innocent or non-innocent, according to the circumstances; according, for example, to its effect upon the trespasser's adversary in respect of his position in the dispute, or upon the adversary's rights, in the event of his success in litigation. If, in that event — the adversary's success — the trespasser can compensate him fully in money and if the trespass places him at no disadvantage either in the dispute itself or in the ascertainment of compensation or otherwise, then the trespass may be perfectly innocent in all but a legal sense. Apparently such a case, in the opinion of Lord Hatherly, was disclosed by the circumstances of *Jegon v. Vivian*[6] , although I venture to think there will be few cases in which the appropriation by one party to a litigated dispute of the subject matter of the litigation, will not place upon that party a heavy burden of explanation.

26 If on the other hand the act is an adverse act, designed to put the adversary at a disadvantage in the dispute, the mere fact that the trespasser believes he is acting within his legal rights will not, I think, bring him within the category of the innocent. *Peruvian Guano Co. v. Dreyfus Bros. & Co.*[7] , *Per* Lord Watson at page 171. At least as effectively, would it appear to me, is he excluded from that category, if his act of trespass is designed, in the event of his own defeat, to deprive his adversary of, or to embarrass him in obtaining the whole or part of that to which he shall prove to have been entitled. In such a case he cannot be said to act "fairly and honestly," to use the language already quoted from the charge of Parke B. in *Wood v. Morewood*[8] ; or "wholly ignorantly and innocently," in the language of Lord Blackburn in *Livingstone v. Rawyards Coal Co.*[9] at page 40; or without any "sinister intention" in the language of Lord Cairns, in the same case at page 31. He is in a word, a wrong-doer *in foro conscientioe* — not in the eye of the law merely.

27 That the design of the defendants in committing the trespass complained of was to frustrate the plaintiffs' appeal by depriving them, in the event of their success, of the fruits of success, is in my opinion the only view fairly consistent with the whole of the facts in evidence.

28 A glance at the salient facts in the history of the controversy respecting the boundaries of the "Miller" and the "Krober" is necessary to enable us fully to appreciate the bearing of the evidence on this question.

29 The controversy began in the year 1900. The "Miller" had been located by one J.A. Miller on the 11th June, 1898, and the "Krober" on the 21st of the same month.

30 The "Miller" being the senior location, and the whole of the disputed territory being admittedly with in the lines of the "Krober," the question of title to that territory necessarily rested upon the determination of the boundaries of the "Miller" as originally located.

31 In October, 1899, the owners of the "Miller" (of whom the defendant H.I. Miller was then one) had a survey and plan of it made by one T.D. Green. The plan, which so placed the boundaries of the claim as to embrace only a part of the area in question, was signed by J.A. Miller, the locator, and filed in the office of the Gold Commissioner. In May, 1900, J.A. Miller, the locator, the present defendant H.I. Miller, and one Bowhay, who were then the owners of the "Miller," commenced in the Gold Commissioner's Court a proceeding against the present plaintiff Krober, as owner of the "Krober," claiming to have the boundaries of the "Miller" established in accordance with the survey. A date was fixed for the hearing, which, however, never took place, and the proceeding was afterwards discontinued. In the same year — the precise date is not disclosed by the evidence — the same persons made an attempt to establish the same boundaries through the procedure provided by a regulation promulgated in March of that year; under this regulation, if, after public notice of a survey of a placer claim for the period and in the manner prescribed by the regulation, there should be no protest against it lodged with the Gold Commissioner, the boundaries of the claim became defined for all purposes in accordance with the survey. Green's plan and survey were advertised, but a protest being lodged the plan and survey were withdrawn.

32 A fact of cardinal importance in connection with this survey is that it was based upon the theory that the initial post of the "Miller" as located by J.A. Miller, was a post (described in the subsequent proceedings before the Gold Commissioner as post B.) which had already been placed, in locating the "Newman," an adjoining claim; on the same theory another survey of the "Miller," made by one Barwell, apparently in 1900, at the instance of the same persons, seems to have proceeded.

33 On the 15th June, 1901, a third survey was made at the instance of the present defendants — then the owners of the claim — by Barwell. This survey proceeded on a new theory. Barwell took as his starting point a place pointed out to him on the ground by J.A. Miller, the locator of the claim, as the situation of the initial post; and the claim as surveyed from that starting point embraced an area within the limits of the "Krober" (the area in dispute, that is to say) very much larger than that falling within the lines of Green's survey.

34 On the day following the completion of this survey the action was commenced in the Gold Commissioner's Court by the present defendants against the present plaintiffs which resulted in the judgment of the Gold Commissioner of the 11th January, 1902, already referred to.

35 The plaintiffs on the same day gave notice of appeal to the Territorial Court. The defendants having in the preceding November begun mining on the "Miller" — which had up to that time remained unworked — extended their operations after the Gold Commissioner's decision into the disputed territory, and before the hearing of the plaintiffs' appeal (on the 17th September, 1902) had removed from it the mineral bearing material it contained. The defendants kept no account of this material (as to either its quantity or its value), or of the cost of mining, removing or washing it. On the contrary, they — as I have already mentioned — intermixed it with similar material taken from parts of the "Miller" not in dispute and appropriated the gold recovered from the whole mass. On the 28th September, 1902, the day after the hearing of the appeal, the defendants having completed the washing of this material, discontinued operations and afterwards sold the unworked part of their claim for $10,000.00.

36 *Quo animo* then did the defendants commit these trespasses? We have here no question of inadvertence or negligence. That the defendants deliberately invaded the territory in litigation is now conceded. One of two things must therefore be clear. The defendants either rested on the decision of the Gold Commissioner as conferring on them a title of absolutely assured validity and proceeded with no misgiving as to the result of the appeal; or they disposed of the product of the property with a clear perception that, if the plaintiffs should succeed, that would happen which has happened, namely, that the plaintiffs in spite of their success would find that the subject matter of the litigation had disappeared and with it all reliable evidence of its extent and value.

37 The first of these alternative propositions, Mr. Ewart, if I understood him, asked us to adopt. The facts, I think, make it clear that it should be rejected.

38 This view of the state of mind of the defendants seems hard to reconcile with the nature of the case presented before the Gold Commissioner. The case turned in substance upon the point whether J.A. Miller in locating the "Miller" had taken as his initial post the post "B." to which I have referred, or had placed an initial post in the situation pointed out by him to Barwell for the purposes of the third survey, in June, 1901. The plaintiffs' success depended upon their ability to maintain the latter proposition. The Gold Commissioner had accepted that view; but considering the evidence as disclosed by the materials before us in the light of the previous history of the dispute, one finds little pointing to *bona fides* on the part of the defendants; on the contrary, I regret to say there is much to suggest a case inherently unworthy of credit. The record of the trial is not in evidence; but we have the reasons given by Craig J. for his judgment on appeal, in which Macauley J. concurred; and from some observations made in the course of the judgment of Craig J. in this action, I assume that the view expressed by him had also the concurrence of Dugas J., although it appears that the last mentioned judge proceeded also on the ground that the defendants, by their course of action respecting the Green survey, were estopped from disputing the plaintiffs' contention respecting the position of the initial post. The learned judges in appeal did not of course see the witnesses; but subject to that, we may, I think, assume — otherwise doubtless the record would have been put in evidence — that, so far as it could be got from the record, the effect of the evidence is fairly stated by Craig J. The learned judge says:

> I have read the evidence in this case most carefully, and I have come to the conclusion that I cannot follow the learned Gold Commissioner on his finding on the facts. Miller, the first witness, is a most unsatisfactory witness, hesitating and uncertain and contradictory; he was on the ground once for a short time after he was sick, and the staking was done, and he paid very little attention to what he did. Christie, the important witness against him, was on the ground for a long time prior, knew it intimately, and had gone over it, and marked out the features of the ground. Warren, who confirms to a certain extent, is forced to admit upon examination that an affidavit made by him is untrue, and that he will not now support it, proving either that he was willing to sign anything laid before him without reading it, or that, having read it, he was willing to swear to it anyhow, in either case being a most unscrupulous witness. Then, again, Warren, in his evidence, swears that he can recognize a stake after it has been cut off by seeing the stem five inches from the ground. Any man who will swear to that state of things is not worthy of belief. Bowhay, who confirms Miller as to the stakes, was willing to have the plan of Green and Barwell adopted, which is not the contention which he now sets up, and it is singular that he should have done that if he knew better at the time. Miller himself signs the Green plan and approved of the Barwell plan. Against this we have the direct evidence of Hawkins, who made the first survey and found post B. with Miller's name upon it, being the only post which had the name. We have Sinclair's evidence of conversation where Miller draws a plan and shews the claims exactly as Korber now contends they are, with the "Newman" claim jutting up into the "Miller" claim. We have the evidence of Green who found the post B. We have the evidence of Jephson, who found that post. We have the evidence of Krober who saw the post. We have also the evidence of Kincaid, Ware and Rost, who either saw the post or had conversation with Miller and admitted the evidence is preponderatingly in favour of Kroeber's contention as to what the "Miller" survey was.

39 With the transactions of 1899 and 1900 in their minds — the Green plan signed by J.A. Miller, the Barwell plan approved by him, the proceedings (in the Gold Commissioner's office and by public notice) to establish Green's survey

— can we assume that Miller and Lamb regarded as inexpugnable the case described by the learned trial judge in the passage I have quoted?

40 At least it would seem that their conduct in disposing of the product of the encroachment as they did calls for some explanation in addition to the suggestion that they acted on a blind faith in an unimpeachable title. Two explanations are offered by counsel. It was impracticable, it is said, first, to distinguish the material removed from the disputed area; and secondly either to deposit it as a separate mass on the dump or separately to sluice it. It is not necessary I think to consider the exculpatory validity of these explanations; they fail because they have no basis of fact. As to the first, the evidence shews clearly that the defendants' workings crossed at three places only the boundary between the territory admittedly within the "Miller" and that in dispute. It is obvious that every carload of material excavated from the last mentioned territory must have passed one of these three points. That the points could have been ascertained with exactitude and marked on the ground by any competent surveyor is also obvious. Lamb, having in his examination in chief sworn that in order to distinguish the cars proceeding from the disputed area the constant attendance of a surveyor under ground would be necessary, in cross examination admits — what must be very plain — that the marking of the underground boundary would have involved very little expense or trouble. As to the other explanation offerred, there is some evidence given by Frank Miller in support of it; but we are relieved from considering in detail the evidence of this witness by the admissions made on cross-examination on this point also by the defendant Lamb himself, who says that the sole obstacle in the way of the suggested precaution was a little additional expense.

41 It is to be observed that while these explanations are put forward by counsel to account for the action of the defendants in blending the material, we have no such explanation from the lips of the persons who were directly concerned in it.

42 There are three persons whose *bona fides* in com mitting the trespasses under consideration is in question. No one of these offers any explanation of his conduct. The defendant Miller and Randall (who owned a one-fourth interest and acted as foreman in charge of the operations down to 22nd July, 1902), were not called as witnesses; they were both, it seems, absent from the territory during the trial; but why was their evidence not taken in the way usually followed in such cases? Lamb, the only one of these persons who gave evidence at the trial, not only attempts no justification of the trespass, but professes ignorance of the fact of the trespass.

43 The proceedings in the present action indeed seem to me to afford some light upon this question of intention. A scrupulously honest man, having in full belief that he was exercising his rights, taken that which has proved to belong to another, would, speaking generally, evince some desire to make restitution. The defendants — being as they say in that case — first, by their pleadings denied their act of trespass; then, to shew that this was no formality of pleading, by their counsel at the trial, in answer to the court, said that the fact of the trespass was seriously put in issue; and the defendant Lamb in the witness box thus fences with the question:

Q. What was done with the gravel and other pay material taken from the ground in question?

A. *If we had anything to do with it*, it was sluiced with the rest.

Q. The first ground taken out would be the ground nearest the encroachment or the encroachment *if you took it?*

A. Yes, it would be the first to come out.

Q. What was done with the first ground that was taken out?

A. Sluiced.

Q. When?

A. I think somewhere about June.

Q. 1902?

A. Yes.

Q. Had you then finished your operations in the vicinity of the ground in dispute or did you continue them on after June?

A. They worked continuously right along.

Q. Was the ground included in the disputed ground worked out up to June?

A. *I don't know anything about it*.

44 This conduct lends no support to the theory that the defendants acted without any sinister intention. Indeed the course of the defendants throughout the whole controversy, the proceedings in 1900 — the volte face of 1901 — the nature of the case before the Gold Commissioner — the intermixture of the products — the failure to keep separate accounts — the conduct of the present litigation — would appear not to be reconcilable with the hypothesis that they acted with the intention of taking the benefit of that only which should prove to be rightfully theirs.

45 But it is contended that the plaintiffs are within the principle stated by Lord Hatherly in *Jegon v. Vivian* [10] and by Fry J. in *Trotter v. McLean* [11] , which, it is said, precludes the owner from disputing the defendants' right to deduction for the expenses of severance, where he, having a knowledge of the trespass, has taken no steps or has been dilatory in taking steps to stop it. It is said that the failure of the plaintiffs to apply for an injunction brings them within these cases.

46 It is plain that the conduct of the owner in standing by inactive while the trespass proceeds may bear upon the trespasser's right to claim the deduction in one or both of two ways. The owner's inactivity or dilatoriness may, in the circumstances of particular cases, be an element of some importance to be considered in deciding upon the character of the trespasser's intention. On the other hand, independently of any question of the trespasser's intention, the owner may by his laches disentitle himself to the full measure of relief which the court might otherwise award. In *Trotter v. McLean* [12] Fry J. found that the conduct of the owners during a certain period amounted to acquiescence in the trespass, but he held that this period of acquiescence came to an end upon a simple notice to the trespasser unaccompanied by legal proceedings.

47 In *Jegon v. Vivian* [13] , the trespass was held in the circumstances not to be a wilful trespass; and the actual decision turned upon that, although no doubt the dilatoriness of the owner's proceedings was an element which influenced Lord Hatherly's mind in the consideration of the question of *bona fides*.

48 On the other hand, Lord Hatherly does lay down or suggest what seems to be a clear principle — viz.: that where the owner has stood by inactive and allowed a trespass to proceed, especially if it is proceeding under a *bonâ fide* belief in title, it would be wrong to refuse the trespasser the benefit of the allowance.

49 My difficulty is to apply to the circumstances of this case anything decided or any principle enunciated by Lord Hatherly or by Lord Fry.

50 The plaintiffs did not stand by inactive; on the contrary they promptly launched their appeal and it cannot be suggested, nor is it, that the prosecution of the appeal was dilatory. Such a case is, I think, very remote from anything within the scope of Lord Hatherly's language. Still less can it be maintained that there is any evidence that anything done by the defendants misled the plaintiffs into the belief that the defendants were acquiescing in the course taken by the plaintiffs. The evidence upon which the fact of the defendants' knowledge of the trespass rests is meagre, and not without ambiguity. But if that evidence proves anything, it proves this, that Randall, a co-owner with the defendants and the foreman in charge of the operations, informed the plaintiff Kincaid that the defendants did not intend to work the

disputed territory until after the determination of the appeal. Had it been suggested at the trial that the plaintiffs ought to have proceeded in the manner now suggested, it is impossible to say what might have proved to be the explanation of the fact that the plaintiffs did not so proceed. Many explanations occur to one, but such speculation is profitless; and I do not think the plaintiffs can be called upon properly at this stage to justify their course from the evidence upon the record. A court of appeal, I think, should not give effect to such a point taken for the first time in appeal, unless it be clear that, had the question been raised at the proper time, no further light could have been thrown upon it. *Browne v. Dunn*[14] at p. 76; *Connecticut Fire Ins. Co. v. Kavanagh*[15] at page 480; *The Tasmania*[16] at page 225; *Ex parte Firth*[17] at page 429; *Karunaratne v. Ferdinandus*[18] at page 409; *Loosemore v. Tiverton and North Devon Ry. Co.*[19] at page 46; *Page v. Bowdler*[20] ; *Borrowman Phillips & Co. v. Free and Hollis*[21] at page 68.

51 But it is contended that the defendants are, at least, entitled to the expenses incurred in removing and washing the product of their trespasses. It is, I think, for the purposes of this appeal, a sufficient answer to this contention to say — in accordance with the view of Macauley J. — that the defendants have, by their own wrongful acts, made it impossible to ascertain these expenses. The court is not called upon to speculate in such a case for the benefit of deliberate wrong-doers; they come within the wholesome rule, that if a man by his deliberately tortious act destroys the evidence necessary to ascertain the extent of the injury he has inflicted, he must suffer all the inconvenience which is the result of his own wrong. *Armory v. Delamirie*[22] . In such a case, to quote the language of Sir Lancelot Shadwell, V.C., in *Duke of Leeds v. Amherst*[23] at page 596:

> In my opinion this case is to be judged not merely by the simple circumstances of evidence which are found in it, but the reference to those great principles of justice, which, as I apprehend, have always governed mankind, and have been acknowledged from the earliest times. It appears to me that it is a very right thing to hold in one's contemplation, on deciding such a case as this, what has been the uniform opinion of mankind upon such a general case as the one now presented in this cause. I take it, that the general wisdom of mankind has acquiesced in this; that the author of a mischief is not the party who is to complain of the result of it, but that he who has done it must submit to have the effects of it recoil upon himself. *** "All those who take the sword shall perish by the sword." "The mischief-maker shall suffer for the mischief he has created."

52 I do not overlook the method followed by Macauley J. but, having regard to the views I have expressed, it is obviously inapplicable. The allowance of 40 per cent. made by that learned judge must be taken to include the cost not only of removing and treating the deposits but of drifting and digging as well; and further indeed — if the analogy of the terms upon which the laymen worked was consistently pursued — of all the excavations required to work the ground. There is absolutely nothing before us by which, assuming that in the view taken by the learned judge his method of ascertaining the whole cost of working the deposits is a valid method, one can distinguish the cost of removing or washing from the other expenses.

53 The case calls for a further observation.

54 The learned trial judge seems to have proceeded on the assumption that the burden was upon the plaintiffs to prove the value of the mineral taken from their claim. The burden which by this course was placed upon the defendants was much lighter than, in the circumstances of this case, they had a right to expect. In the view I have taken of their conduct, they were, under the long settled doctrine of the English law, accountable for as much of the mixed products of the two claims as they did not strictly prove to have come from their own.

55 *Warde v. Eyre*[24] ; *White v. Lady Lincoln*[25] ; *Lupton v. White*[26] ; *Re Oatway*[27] ; *Cook v. Addison*[28] ; Story on Bailments, 41; *Spence v. Union Insurance Co.*[29] ; *Hart v. Ten Eyck*[30] ; *Attorney-General v. Lansell*[31] ; *Last Chance Mining Co. v. American Boy Mining Co.*[32]

56 The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors of record:
Solicitors for the appellants: *Wilson & Stackpoole.*
Solicitors for the respondents: *Pattullo & Tobin*.

Footnotes

1 13 Ch. D. 574.

2 6 Ch. App. 742 at p. 763.

3 5 App. Cas. 25.

4 (1892) A.C. 166.

5 3 Q.B. 440n.

6 6 Ch. App. 742.

7 (1892) A.C. 166.

8 3 Q.B. 440.

9 5 App. Cas. 25.

10 6 Ch. App. 742.

11 13 Ch. D. 574.

12 13 Ch. D. 574.

13 6 Ch. App. 742.

14 6 R. 67.

15 [1892] A.C. 473.

16 15 App. Cas. 223.

17 19 Ch. D. 419.

18 (1902) A.C. 405.

19 22 Ch. D. 25.

20 10 Times L.R. 423.

21 48 L.J.Q.B. 65.

22 1 Strange 505.

23 52 Eng. Rep. 595; 20 Beav. 239 at p. 242.

24 2 Bulst. 323.

25 8 Ves. 363.

26 15 Ves. 432; 2 Kent 365.

27 (1903) 2 Ch. 356.

28 L.R. 7 Eq. 466 at p. 470.

29 L.R. 3 C.P. 427.

30 2 Johns. (N.Y.) 62 at p. 108.

31 10 Vict. L.R. 84.

32 2 Martin's M.C. 150.

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TAB 6

2012 ONCA 498
Ontario Court of Appeal

Lobo v. Carleton University

2012 CarswellOnt 8626, 2012 ONCA 498, [2012] O.J. No. 3161, 220 A.C.W.S. (3d) 46, 265 C.R.R. (2d) 1

Ruth Lobo and John McLeod, Plaintiff/Appellants and Carleton University, Dr. Roseann O'Reilly Runte, David Sterritt, Ryan Flannagan and Allan Burns, Defendants/Respondents

David Watt J.A., Paul Rouleau J.A., S.E. Pepall J.A.

Heard: June 29, 2012
Judgment: June 29, 2012
Docket: CA C55068

Proceedings: affirming *Lobo v. Carleton University* (2012), 2012 CarswellOnt 101, 2012 ONSC 254 (Ont. S.C.J.)

Counsel: Albertos Polizogopoulos, for Plaintiffs / Appellants
Richard Dearden, for Defendants / Respondents

Subject: Public; Civil Practice and Procedure; Constitutional; Torts; Human Rights

Headnote

Education law --- Colleges and universities — Nature and status of corporation — Application of Charter of Rights and Freedoms

Plaintiffs were students at defendant University — Plaintiffs wished to place political material at location on University campus, and were ordered to place material at allegedly less-frequented on-campus location — Plaintiffs then proceeded to place material at plaintiffs' desired location and conducted demonstration there, and plaintiffs were subsequently charged with trespassing and then barred from placing material at any campus location — Plaintiffs brought action for damages against University for violation of certain rights as guaranteed by Canadian Charter of Rights and Freedoms and negligence — University brought motion for order striking out pleadings as disclosing no cause of action known to law — University's motion was granted with respect to plaintiffs' Charter claims on basis that Charter did not apply to University in present case — Plaintiffs appealed — Appeal dismissed — Plaintiffs conceded that University was not itself government entity — Liability for Charter violations could only attach to University if University was executing government program — Applications judge correctly held that provision of higher education generally did not constitute execution of government program where allocation of University facilities for extra-curricular activities was concerned — Accordingly, no triable issue existed with respect to Charter claims against University and appeal was properly dismissed.

Civil practice and procedure --- Pleadings — Statement of claim — Striking out for absence of reasonable cause of action — Miscellaneous

Plaintiffs were students at defendant University — Plaintiffs wished to place political material at location on University campus — Allegedly by order of defendant individuals, employees of University, plaintiffs were ordered to place material at allegedly less-frequented on-campus location — Plaintiffs then proceeded to place material at plaintiffs' desired location and conducted demonstration there, and plaintiffs were subsequently charged with trespassing and then barred from placing material at any campus location — Plaintiffs brought action for damages against defendant individuals and University for violation of certain rights as guaranteed by Canadian Charter of Rights and Freedoms and negligence — Defendant individuals brought motion for order striking out pleadings as disclosing no cause of action known to law — Motion was granted in part and plaintiffs appealed — Appeal dismissed — Actions against employees for acts undertaken in alleged execution of their employment only lie where those acts constitute independent torts or where, following judgment of Court of Appeal in Montreal Trust Co. of Canada v. Scotia McLeod Inc., employees' conduct

exhibited "separate identity or interest from that of the . . . employer" — Plaintiffs did not allege independent torts of fraud, deceit, dishonesty or want of authority on part of defendant individuals — Bare allegation that defendant individuals did not share plaintiffs' political views was not sufficient to constitute material fact in support of claim that defendant individuals had "separate identity or interest from that of [University]" — Accordingly, claim in tort as against defendant individuals did not disclose triable issue and no reason existed to interfere with findings of applications judge.
Constitutional law --- Charter of Rights and Freedoms — Scope of application — Bodies subject to Charter — Miscellaneous
University — Plaintiffs were students at defendant University — Plaintiffs wished to place political material at location on University campus, and were ordered to place material at allegedly less-frequented on-campus location — Plaintiffs then proceeded to place material at plaintiffs' desired location and conducted demonstration there, and plaintiffs were subsequently charged with trespassing and then barred from placing material at any campus location — Plaintiffs brought action for damages against University for violation of certain rights as guaranteed by Canadian Charter of Rights and Freedoms and negligence — University brought motion for order striking out pleadings as disclosing no cause of action known to law — University's motion was granted with respect to plaintiffs' Charter claims on basis that Charter did not apply to University in present case — Plaintiffs appealed — Appeal dismissed — Plaintiffs conceded that University was not itself government entity — Liability for Charter violations could only attach to University if University was executing government program — Applications judge correctly held that provision of higher education generally did not constitute execution of government program where allocation of University facilities for extra-curricular activities was concerned — Accordingly, no triable issue existed with respect to Charter claims against University and appeal was properly dismissed.
Civil practice and procedure --- Costs — Costs of appeals — General principles
Appeal from order striking pleadings — Defendants, University and certain employees of University, brought motion for order striking plaintiffs' amended Statement of Claim in action for, inter alia, violations of Canadian Charter of Rights and Freedoms and negligence — Motion was granted in part, certain pleadings were struck without leave to amend and plaintiffs appealed — Appeal dismissed — Defendants' costs of appeal were fixed at $15,000 inclusive.

APPEAL by plaintiffs from judgment reported at *Lobo v. Carleton University* (2012), 2012 CarswellOnt 101, 2012 ONSC 254 (Ont. S.C.J.), granting in part defendants' motion to strike out plaintiffs' amended pleadings as disclosing no cause of action known to law.

***Per curiam*:**

1 This is an appeal from the order of Toscano Roccamo J. striking those portions of the appellants' claim pertaining to *Charter* breaches on the basis that those portions of the claim disclose no reasonable cause of action. She held that the appellants failed to plead the material facts necessary to establish that the respondent University was implementing a specific government program or policy by failing to allocate the desired space for the appellants to advance their extra-curricular objectives. She also struck the claims made against the individual respondents as disclosing no reasonable cause of action.

2 The appellants have appealed both the striking of the *Charter* claims and the claims against the individual respondents. On the *Charter* issue, the appellants argue that the motion judge should have concluded that the fresh as amended statement of claim pleaded facts capable of satisfying the test set out in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (S.C.C.) for applying the *Charter* to an entity such as the respondent University.

3 In *Eldridge*, the Supreme Court of Canada explained that the *Charter* may be found to apply to a private entity on one of two bases. First, it may be determined that the entity is itself "government" for purposes of s. 32 of the *Charter*. Second, an entity may be found to attract the *Charter's* scrutiny with respect to a particular activity that can be ascribed to government. As to the first basis, the appellants concede that the respondent is not "government" for purposes of s. 32 of the *Charter*. Rather, as noted earlier, they argue that the respondent is implementing a specific government program. That program is the delivery of post-secondary education. The actions of the respondent such as the limiting of the appellants' right to freedom of expression were, according to the appellants, actions taken by the University in the course

of delivering a government program. In the appellants' submissions, therefore, the motion judge erred in concluding that the University was not acting as government in the circumstances of this case. At a minimum, the appellants argue that the *Eldridge* issue and whether the respondent was subject to *Charter* review ought to have been left to be decided at trial with the benefit of a full evidentiary record.

4 We disagree. As explained by the motion judge, when the University books space for non-academic extra-curricular use, it is not implementing a specific government policy or program as contemplated in *Eldridge*. In carrying out this particular activity there is, therefore, no triable issue as to whether *Charter* scrutiny applies to the respondent's actions.

5 With respect to the striking of the claim against the individual respondents, the appellants argue that the fresh as amended statement of claim pleaded that each of the individual respondents was acting outside of his or her capacity as employees of the university. The appellants explain that this is because the individual respondents did not agree with the appellants' political view. Putting their own personal beliefs ahead of their professional obligations, they did not respect the university policies in the way they dealt with the appellants' requests. In making these allegations, the appellants submit that the facts necessary to demonstrate that the individual respondents had a separate identity from the University were pleaded and that it was not plain and obvious that the negligence claims against them could not succeed.

6 We would not give effect to this submission. This court's decision in *Montreal Trust Co. of Canada v. ScotiaMcLeod Inc.* (1995), 26 O.R. (3d) 481 (Ont. C.A.) set out the criteria that need to be met to establish personal liability. These are:

> (1) the actions of the employees are themselves tortious; or
>
> (2) the actions of the employees exhibit a separate identity or interest from that of the corporation or employer so as to make the act or conduct complained of their own.

As to the first basis, it is conceded that there is no plea in the fresh as amended statement of claim for fraud, deceit, dishonesty or want of authority on the part of the individual respondents.

7 With respect to the second branch of the *Scotia McLeod* case, we agree with the motion judge, at para. 35, that "the amended pleading [...] does little more than "window dress" the suggestion of a separate identity or interest of the named Defendants from that of [Carleton University]" and, at para. 32, that "the allegations made against each in pith and substance relate to decisions made within their ostensible authority as [Carleton University] employees". The fact that the individual respondents did not exhibit a separate identity or interest is confirmed by para. 145 of the fresh as amended statement of claim in which the appellants pleaded that, "As the employer of the individual Defendants, Carleton University, permitted or acquiesced the individual Defendants to act in the manner that they did and as such, is vicariously liable for their actions."

8 In the result, the appeal is dismissed with costs to the respondents fixed at $15,000 inclusive of disbursements and applicable taxes.

Appeal dismissed.

TAB 7

2014 SCC 54, 2014 CSC 54
Supreme Court of Canada

R. v. Mian

2014 CarswellAlta 1561, 2014 CarswellAlta 1562, 2014 SCC 54, 2014 CSC 54, [2014] 2 S.C.R. 689, [2014] A.W.L.D. 3845, [2014] A.W.L.D. 3846, [2014] A.W.L.D. 3849, [2014] A.W.L.D. 3876, [2014] A.W.L.D. 3889, [2014] A.W.L.D. 3908, [2014] S.C.J. No. 54, 116 W.C.B. (2d) 334, 13 C.R. (7th) 1, 2 Alta. L.R. (6th) 217, 315 C.C.C. (3d) 453, 319 C.R.R. (2d) 4, 377 D.L.R. (4th) 385, 462 N.R. 1, 580 A.R. 1, 620 W.A.C. 1

Mohammad Hassan Mian, Appellant and Her Majesty The Queen, Respondent and Attorney General of Alberta, Intervener

McLachlin C.J.C., LeBel, Abella, Rothstein, Moldaver, Karakatsanis, Wagner JJ.

Heard: April 15, 2014
Judgment: September 12, 2014
Docket: 35132

Proceedings: reversing *R. v. Mian* (2012), 78 Alta. L.R. (5th) 249, 98 C.R. (6th) 311, [2012] A.J. No. 1044, 2012 ABCA 302, 2012 CarswellAlta 1744, 559 W.A.C. 308, 536 A.R. 308, 292 C.C.C. (3d) 346, Clifton O'Brien J.A., Jean Côté J.A., R. Paul Belzil J. (ad hoc) (Alta. C.A.); reversing *R. v. Mian* (2011), [2011] A.J. No. 475, 2011 ABQB 290, 2011 CarswellAlta 726, 516 A.R. 368, 234 C.R.R. (2d) 122, Eric F. Macklin J. (Alta. Q.B.)

Counsel: Daniel J. Song, Darin D. Sprake, Anna M. Konye, for Appellant
David Schermbrucker, Ronald C. Reimer, for Respondent
Jolaine Antonio, for Intervener

Subject: Civil Practice and Procedure; Constitutional; Criminal; Evidence; Human Rights

Headnote

Evidence --- Examination of witnesses — Cross-examination — Improper questions

Accused was charged with possession of cocaine and possession of currency obtained by commission of offence — Trial judge found that accused's rights under s. 10(a) and 10(b) of Canadian Charter of Rights and Freedoms had been breached by roadside detention — Evidence seized from accused's vehicle was excluded pursuant to s. 24(2) of Charter and he was acquitted — Crown appealed exclusion of evidence — Appeal was allowed; new trial was ordered — Court of Appeal found that trial judge erred in law by relying on impermissible cross-examination of lead investigator W as to veracity of testimony of D, member of surveillance team — Trial judge found that W's evidence was not credible and his credibility as lead investigator was critically important — Trial judge's conclusion that W was intentionally misleading court led him to conclude that society's interest in adjudication on merits favoured exclusion of evidence — It was possible to conclude that police had legitimate concern which could have affected seriousness of 22-minute delay in informing accused of his s. 10 rights — Trial judge's conclusion that there was no evidence as to how providing accused with his rights could compromise ongoing investigation was influenced by his assessment of W's credibility, which was itself influenced by impugned cross-examination — Trial judge did not give due consideration to all evidence relevant to s. 24(2) issue — Trial judge erred in law by admitting and considering irrelevant and inadmissible evidence — Mistake was material, and Crown had demonstrated that verdict would not necessarily have been same had trial judge not allowed impugned cross-examination and admitted evidence — Accused appealed — Appeal allowed; acquittal restored — Trial judge did not err in ruling accused's s. 10 rights had been violated and that evidence should be excluded as there was deliberate and egregious state conduct which favours exclusion — Court of Appeal erred by raising issue of cross-examination as appellate court's right to raise new issues is subject to limits and there was no risk of injustice which is required — Trial judge did not rely on impugned testimony to rule on W's credibility.

Criminal law --- Charter of Rights and Freedoms — Charter remedies [s. 24] — Exclusion of evidence
Accused was charged with possession of cocaine and possession of currency obtained by commission of offence — Trial judge found that accused's rights under s. 10(a) and 10(b) of Canadian Charter of Rights and Freedoms had been breached by roadside detention — Evidence seized from accused's vehicle was excluded pursuant to s. 24(2) of Charter and he was acquitted — Crown appealed exclusion of evidence — Appeal was allowed; new trial was ordered — Court of Appeal raised new issue of impermissible cross-examination — Court of Appeal found that trial judge erred in law by relying on impermissible cross-examination of lead investigator W as to veracity of testimony of D, member of surveillance team — Trial judge had found that W's evidence was not credible and his credibility as lead investigator was critically important — It was possible to conclude that police had legitimate concern which could have affected seriousness of 22-minute delay in informing accused of his s. 10 rights — Trial judge's conclusion that there was no evidence as to how providing accused with his rights could compromise ongoing investigation was influenced by his assessment of W's credibility, which was itself influenced by impugned cross-examination — Mistake was material, and Crown had demonstrated that verdict would not necessarily have been same had trial judge not allowed impugned cross-examination and admitted evidence — Accused appealed — Appeal allowed; acquittal restored — Trial judge did not err in ruling accused's s. 10 rights had been violated and that evidence should be excluded as there was deliberate and egregious state conduct which favours exclusion — Court of Appeal erred by raising issue of cross-examination as appellate court's right to raise new issues is subject to limits and there was no risk of injustice which is required — Trial judge did not rely on impugned testimony to rule on W's credibility.
Criminal law --- Charter of Rights and Freedoms — Right to be informed of offence [s. 11(a)]
Accused was charged with possession of cocaine and possession of currency obtained by commission of offence — Trial judge found that accused's rights under s. 10(a) and 10(b) of Canadian Charter of Rights and Freedoms had been breached by roadside detention — Evidence seized from accused's vehicle was excluded pursuant to s. 24(2) of Charter and he was acquitted — Crown appealed exclusion of evidence — Appeal was allowed; new trial was ordered — Court of Appeal raised new issue of impermissible cross-examination — Court of Appeal found that trial judge erred in law by relying on impermissible cross-examination of lead investigator W as to veracity of testimony of D, member of surveillance team — Trial judge had found that W's evidence was not credible and his credibility as lead investigator was critically important — It was possible to conclude that police had legitimate concern which could have affected seriousness of 22-minute delay in informing accused of his s. 10 rights — Trial judge's conclusion that there was no evidence as to how providing accused with his rights could compromise ongoing investigation was influenced by his assessment of W's credibility, which was itself influenced by impugned cross-examination — Mistake was material, and Crown had demonstrated that verdict would not necessarily have been same had trial judge not allowed impugned cross-examination and admitted evidence — Accused appealed — Appeal allowed; acquittal restored — Trial judge did not err in ruling accused's s. 10 rights had been violated and that evidence should be excluded as there was deliberate and egregious state conduct which favours exclusion — Court of Appeal erred by raising issue of cross-examination as appellate court's right to raise new issues is subject to limits and there was no risk of injustice which is required — Trial judge did not rely on impugned testimony to rule on W's credibility.
Criminal law --- Charter of Rights and Freedoms — Arrest or detention [s. 10] — Right to counsel [s. 10(b)] — Right to be informed — General principles
Accused was charged with possession of cocaine and possession of currency obtained by commission of offence — Trial judge found that accused's rights under s. 10(a) and 10(b) of Canadian Charter of Rights and Freedoms had been breached by roadside detention — Evidence seized from accused's vehicle was excluded pursuant to s. 24(2) of Charter and he was acquitted — Crown appealed exclusion of evidence — Appeal was allowed; new trial was ordered — Court of Appeal raised new issue of impermissible cross-examination — Court of Appeal found that trial judge erred in law by relying on impermissible cross-examination of lead investigator W as to veracity of testimony of D, member of surveillance team — Trial judge had found that W's evidence was not credible and his credibility as lead investigator was critically important — It was possible to conclude that police had legitimate concern which could have affected seriousness of 22-minute delay in informing accused of his s. 10 rights — Trial judge's conclusion that there was no evidence as to how providing accused with his rights could compromise ongoing investigation was influenced by his assessment of W's credibility, which was itself influenced by impugned cross-examination — Mistake was material,

and Crown had demonstrated that verdict would not necessarily have been same had trial judge not allowed impugned cross-examination and admitted evidence — Accused appealed — Appeal allowed; acquittal restored — Trial judge did not err in ruling accused's s. 10 rights had been violated and that evidence should be excluded as there was deliberate and egregious state conduct which favours exclusion — Court of Appeal erred by raising issue of cross-examination as appellate court's right to raise new issues is subject to limits and there was no risk of injustice which is required — Trial judge did not rely on impugned testimony to rule on W's credibility.

Judges and courts --- Provincial courts of appeal

Accused was charged with possession of cocaine and possession of currency obtained by commission of offence — Trial judge found that accused's rights under s. 10(a) and 10(b) of Canadian Charter of Rights and Freedoms had been breached by roadside detention — Evidence seized from accused's vehicle was excluded pursuant to s. 24(2) of Charter and he was acquitted — Crown appealed exclusion of evidence — Appeal was allowed; new trial was ordered — Court of Appeal raised new issue of impermissible cross-examination — Court of Appeal found that trial judge erred in law by relying on impermissible cross-examination of lead investigator W as to veracity of testimony of D, member of surveillance team — Trial judge had found that W's evidence was not credible and his credibility as lead investigator was critically important — It was possible to conclude that police had legitimate concern which could have affected seriousness of 22-minute delay in informing accused of his s. 10 rights — Trial judge's conclusion that there was no evidence as to how providing accused with his rights could compromise ongoing investigation was influenced by his assessment of W's credibility, which was itself influenced by impugned cross-examination — Mistake was material, and Crown had demonstrated that verdict would not necessarily have been same had trial judge not allowed impugned cross-examination and admitted evidence — Accused appealed — Appeal allowed; acquittal restored — Trial judge did not err in ruling accused's s. 10 rights had been violated and that evidence should be excluded as there was deliberate and egregious state conduct which favours exclusion — Court of Appeal erred by raising issue of cross-examination as appellate court's right to raise new issues is subject to limits and there was no risk of injustice which is required — Trial judge did not rely on impugned testimony to rule on W's credibility.

Criminal law --- Post-trial procedure — Appeal from conviction or acquittal — Procedure on appeal — Miscellaneous

Accused was charged with possession of cocaine and possession of currency obtained by commission of offence — Trial judge found that accused's rights under s. 10(a) and 10(b) of Canadian Charter of Rights and Freedoms had been breached by roadside detention — Evidence seized from accused's vehicle was excluded pursuant to s. 24(2) of Charter and he was acquitted — Crown appealed exclusion of evidence — Appeal was allowed; new trial was ordered — Court of Appeal raised new issue of impermissible cross-examination — Court of Appeal found that trial judge erred in law by relying on impermissible cross-examination of lead investigator W as to veracity of testimony of D, member of surveillance team — Trial judge had found that W's evidence was not credible and his credibility as lead investigator was critically important — It was possible to conclude that police had legitimate concern which could have affected seriousness of 22-minute delay in informing accused of his s. 10 rights — Trial judge's conclusion that there was no evidence as to how providing accused with his rights could compromise ongoing investigation was influenced by his assessment of W's credibility, which was itself influenced by impugned cross-examination — Mistake was material, and Crown had demonstrated that verdict would not necessarily have been same had trial judge not allowed impugned cross-examination and admitted evidence — Accused appealed — Appeal allowed; acquittal restored — Trial judge did not err in ruling accused's s. 10 rights had been violated and that evidence should be excluded as there was deliberate and egregious state conduct which favours exclusion — Court of Appeal erred by raising issue of cross-examination as appellate court's right to raise new issues is subject to limits and there was no risk of injustice which is required — Trial judge did not rely on impugned testimony to rule on W's credibility.

Preuve --- Interrogatoire des témoins — Contre-interrogatoire — Questions inappropriées

Accusé a été inculpé de possession de cocaïne et de possession d'une somme d'argent obtenue à la suite d'une infraction — Juge du procès a conclu que les droits garantis à l'accusé par l'art. 10a) et 10b) de la Charte canadienne des droits et libertés avaient été violés lors d'une détention survenue sur la route — Preuve saisie dans le véhicule de l'accusé a été exclue en vertu de l'art. 24(2) de la Charte et l'accusé a été acquitté — Ministère public a interjeté appel à l'encontre de l'exclusion de la preuve — Appel a été accueilli; nouveau procès ordonné — Cour d'appel a conclu que le juge du procès avait commis une erreur de droit en se fondant sur le contre-interrogatoire inapproprié de l'enquêteur principal

W au sujet de la véracité du témoignage de D, un membre de l'équipe de surveillance — Juge du procès a conclu que le témoignage de W n'était pas crédible et que sa crédibilité en tant qu'enquêteur principal était d'une importance capitale — Conclusion du juge du procès selon laquelle W avait intentionnellement induit le tribunal en erreur l'a persuadé que l'intérêt de la société à ce qu'une décision au fond soit rendue permettait l'exclusion de la preuve — Il était possible de conclure que les agents de police avaient des craintes raisonnables, ce qui aurait pu avoir causé la gravité du retard de 22 minutes avant d'informer l'accusé de ses droits en vertu de l'art. 10 — Conclusion du juge du procès selon laquelle il n'y avait aucune preuve indiquant que le fait d'informer l'accusé de ses droits aurait pu compromettre l'enquête en cours était influencée par son appréciation de la crédibilité de W, elle-même influencée par le contre-interrogatoire contesté — Juge du procès n'a pas pris en compte tous les éléments de preuve pertinents pour l'application de l'art. 24(2) — Juge du procès a commis une erreur de droit en admettant et en prenant en considération des éléments de preuve sans pertinence et inadmissibles — Erreur était importante, et le ministère public a démontré que le verdict n'aurait pas été nécessairement le même si le juge du procès n'avait pas permis le contre-interrogatoire contesté et admis la preuve — Accusé a formé un pourvoi — Pourvoi accueilli; acquittement rétabli — Juge du procès n'a pas commis d'erreur en concluant que les droits de l'accusé garantis par l'art. 10 avaient été violés, considérant la gravité de l'atteinte et le caractère délibéré et inacceptable de la conduite de l'État, ce qui favorisait l'exclusion de la preuve — Cour d'appel a commis une erreur en soulevant la question du contre-interrogatoire puisque le droit d'une cour d'appel de soulever de nouvelles questions est assujetti à des limites et qu'il n'y avait aucun risque d'injustice, ce qui était une condition préalable — Juge du procès ne s'est pas fondé sur le témoignage contesté pour juger de la crédibilité de W.

Droit criminel --- Charte des droits et libertés — Réparations en vertu de la Charte [art. 24] — Exclusion de la preuve

Accusé a été inculpé de possession de cocaïne et de possession d'une somme d'argent obtenue à la suite d'une infraction — Juge du procès a conclu que les droits garantis à l'accusé par l'art. 10a) et 10b) de la Charte canadienne des droits et libertés avaient été violés lors d'une détention survenue sur la route — Preuve saisie dans le véhicule de l'accusé a été exclue en vertu de l'art. 24(2) de la Charte et l'accusé a été acquitté — Ministère public a interjeté appel à l'encontre de l'exclusion de la preuve — Appel a été accueilli; nouveau procès ordonné — Cour d'appel a soulevé une nouvelle question concernant le caractère inapproprié du contre-interrogatoire — Cour d'appel a conclu que le juge du procès avait commis une erreur de droit en se fondant sur le contre-interrogatoire inapproprié de l'enquêteur principal W au sujet de la véracité du témoignage de D, un membre de l'équipe de surveillance — Juge du procès a conclu que le témoignage de W n'était pas crédible et que sa crédibilité en tant qu'enquêteur principal était d'une importance capitale — Il était possible de conclure que les agents de police avaient des craintes raisonnables, ce qui aurait pu avoir causé la gravité du retard de 22 minutes avant d'informer l'accusé de ses droits en vertu de l'art. 10 — Conclusion du juge du procès selon laquelle il n'y avait aucune preuve indiquant que le fait d'informer l'accusé de ses droits aurait pu compromettre l'enquête en cours était influencée par son appréciation de la crédibilité de W, elle-même influencée par le contre-interrogatoire contesté — Erreur était importante, et le ministère public a démontré que le verdict n'aurait pas été nécessairement le même si le juge du procès n'avait pas permis le contre-interrogatoire en question et admis la preuve — Accusé a formé un pourvoi — Pourvoi accueilli; acquittement rétabli — Juge du procès n'a pas commis d'erreur en concluant que les droits de l'accusé garantis par l'art. 10 avaient été violés, considérant la gravité de l'atteinte et le caractère délibéré et inacceptable de la conduite de l'État, ce qui favorisait l'exclusion de la preuve — Cour d'appel a commis une erreur en soulevant la question du contre-interrogatoire puisque le droit d'une cour d'appel de soulever de nouvelles questions est assujetti à des limites et qu'il n'y avait aucun risque d'injustice, ce qui était une condition préalable — Juge du procès ne s'est pas fondé sur le témoignage contesté pour juger de la crédibilité de W.

Droit criminel --- Charte des droits et libertés — Droit d'être informé de l'infraction [art. 11a)]

Accusé a été inculpé de possession de cocaïne et de possession d'une somme d'argent obtenue à la suite d'une infraction — Juge du procès a conclu que les droits garantis à l'accusé par l'art. 10a) et 10b) de la Charte canadienne des droits et libertés avaient été violés lors d'une détention survenue sur la route — Preuve saisie dans le véhicule de l'accusé a été exclue en vertu de l'art. 24(2) de la Charte et l'accusé a été acquitté — Ministère public a interjeté appel à l'encontre de l'exclusion de la preuve — Appel a été accueilli; nouveau procès ordonné — Cour d'appel a soulevé une nouvelle question concernant le caractère inapproprié du contre-interrogatoire — Cour d'appel a conclu que le juge du procès avait commis une erreur de droit en se fondant sur le contre-interrogatoire inapproprié de l'enquêteur principal W au sujet de la véracité du témoignage de D, un membre de l'équipe de surveillance — Juge du procès a conclu que le témoignage de W n'était

pas crédible et que sa crédibilité en tant qu'enquêteur principal était d'une importance capitale — Il était possible de conclure que les agents de police avaient des craintes raisonnables, ce qui aurait pu avoir causé la gravité du retard de 22 minutes avant d'informer l'accusé de ses droits en vertu de l'art. 10 — Conclusion du juge du procès selon laquelle il n'y avait aucune preuve indiquant que le fait d'informer l'accusé de ses droits aurait pu compromettre l'enquête en cours était influencée par son appréciation de la crédibilité de W, elle-même influencée par le contre-interrogatoire contesté — Erreur était importante, et le ministère public a démontré que le verdict n'aurait pas été nécessairement le même si le juge du procès n'avait pas permis le contre-interrogatoire en question et admis la preuve — Accusé a formé un pourvoi — Pourvoi accueilli; acquittement rétabli — Juge du procès n'a pas commis d'erreur en concluant que les droits de l'accusé garantis par l'art. 10 avaient été violés, considérant la gravité de l'atteinte et le caractère délibéré et inacceptable de la conduite de l'État, ce qui favorisait l'exclusion de la preuve — Cour d'appel a commis une erreur en soulevant la question du contre-interrogatoire puisque le droit d'une cour d'appel de soulever de nouvelles questions est assujetti à des limites et qu'il n'y avait aucun risque d'injustice, ce qui était une condition préalable — Juge du procès ne s'est pas fondé sur le témoignage contesté pour juger de la crédibilité de W.

Droit criminel --- Charte des droits et libertés — Arrestation ou détention [art. 10] — Droit à l'assistance d'un avocat [art. 10b)] — Droit d'être informé — Principes généraux

Accusé a été inculpé de possession de cocaïne et de possession d'une somme d'argent obtenue à la suite d'une infraction — Juge du procès a conclu que les droits garantis à l'accusé par l'art. 10a) et 10b) de la Charte canadienne des droits et libertés avaient été violés lors d'une détention survenue sur la route — Preuve saisie dans le véhicule de l'accusé a été exclue en vertu de l'art. 24(2) de la Charte et l'accusé a été acquitté — Ministère public a interjeté appel à l'encontre de l'exclusion de la preuve — Appel a été accueilli; nouveau procès ordonné — Cour d'appel a soulevé une nouvelle question concernant le caractère inapproprié du contre-interrogatoire — Cour d'appel a conclu que le juge du procès avait commis une erreur de droit en se fondant sur le contre-interrogatoire inapproprié de l'enquêteur principal W au sujet de la véracité du témoignage de D, un membre de l'équipe de surveillance — Juge du procès a conclu que le témoignage de W n'était pas crédible et que sa crédibilité en tant qu'enquêteur principal était d'une importance capitale — Il était possible de conclure que les agents de police avaient des craintes raisonnables, ce qui aurait pu avoir causé la gravité du retard de 22 minutes avant d'informer l'accusé de ses droits en vertu de l'art. 10 — Conclusion du juge du procès selon laquelle il n'y avait aucune preuve indiquant que le fait d'informer l'accusé de ses droits aurait pu compromettre l'enquête en cours était influencée par son appréciation de la crédibilité de W, elle-même influencée par le contre-interrogatoire contesté — Erreur était importante, et le ministère public a démontré que le verdict n'aurait pas été nécessairement le même si le juge du procès n'avait pas permis le contre-interrogatoire en question et admis la preuve — Accusé a formé un pourvoi — Pourvoi accueilli; acquittement rétabli — Juge du procès n'a pas commis d'erreur en concluant que les droits de l'accusé garantis par l'art. 10 avaient été violés, considérant la gravité de l'atteinte et le caractère délibéré et inacceptable de la conduite de l'État, ce qui favorisait l'exclusion de la preuve — Cour d'appel a commis une erreur en soulevant la question du contre-interrogatoire puisque le droit d'une cour d'appel de soulever de nouvelles questions est assujetti à des limites et qu'il n'y avait aucun risque d'injustice, ce qui était une condition préalable — Juge du procès ne s'est pas fondé sur le témoignage contesté pour juger de la crédibilité de W.

Juges et tribunaux --- Cours d'appel provinciales

Accusé a été inculpé de possession de cocaïne et de possession d'une somme d'argent obtenue à la suite d'une infraction — Juge du procès a conclu que les droits garantis à l'accusé par l'art. 10a) et 10b) de la Charte canadienne des droits et libertés avaient été violés lors d'une détention survenue sur la route — Preuve saisie dans le véhicule de l'accusé a été exclue en vertu de l'art. 24(2) de la Charte et l'accusé a été acquitté — Ministère public a interjeté appel à l'encontre de l'exclusion de la preuve — Appel a été accueilli; nouveau procès ordonné — Cour d'appel a soulevé une nouvelle question concernant le caractère inapproprié du contre-interrogatoire — Cour d'appel a conclu que le juge du procès avait commis une erreur de droit en se fondant sur le contre-interrogatoire inapproprié de l'enquêteur principal W au sujet de la véracité du témoignage de D, un membre de l'équipe de surveillance — Juge du procès a conclu que le témoignage de W n'était pas crédible et que sa crédibilité en tant qu'enquêteur principal était d'une importance capitale — Il était possible de conclure que les agents de police avaient des craintes raisonnables, ce qui aurait pu avoir causé la gravité du retard de 22 minutes avant d'informer l'accusé de ses droits en vertu de l'art. 10 — Conclusion du juge du procès selon laquelle il n'y avait aucune preuve indiquant que le fait d'informer l'accusé de ses droits aurait pu compromettre l'enquête en cours

était influencée par son appréciation de la crédibilité de W, elle-même influencée par le contre-interrogatoire contesté — Erreur était importante, et le ministère public a démontré que le verdict n'aurait pas été nécessairement le même si le juge du procès n'avait pas permis le contre-interrogatoire en question et admis la preuve — Accusé a formé un pourvoi — Pourvoi accueilli; acquittement rétabli — Juge du procès n'a pas commis d'erreur en concluant que les droits de l'accusé garantis par l'art. 10 avaient été violés, considérant la gravité de l'atteinte et le caractère délibéré et inacceptable de la conduite de l'État, ce qui favorisait l'exclusion de la preuve — Cour d'appel a commis une erreur en soulevant la question du contre-interrogatoire puisque le droit d'une cour d'appel de soulever de nouvelles questions est assujetti à des limites et qu'il n'y avait aucun risque d'injustice, ce qui était une condition préalable — Juge du procès ne s'est pas fondé sur le témoignage contesté pour juger de la crédibilité de W.

Droit criminel --- Procédure après le procès — Appel à l'encontre d'une déclaration de culpabilité ou d'un acquittement — Procédure en appel — Divers

Accusé a été inculpé de possession de cocaïne et de possession d'une somme d'argent obtenue à la suite d'une infraction — Juge du procès a conclu que les droits garantis à l'accusé par l'art. 10a) et 10b) de la Charte canadienne des droits et libertés avaient été violés lors d'une détention survenue sur la route — Preuve saisie dans le véhicule de l'accusé a été exclue en vertu de l'art. 24(2) de la Charte et l'accusé a été acquitté — Ministère public a interjeté appel à l'encontre de l'exclusion de la preuve — Appel a été accueilli; nouveau procès ordonné — Cour d'appel a soulevé une nouvelle question concernant le caractère inapproprié du contre-interrogatoire — Cour d'appel a conclu que le juge du procès avait commis une erreur de droit en se fondant sur le contre-interrogatoire inapproprié de l'enquêteur principal W au sujet de la véracité du témoignage de D, un membre de l'équipe de surveillance — Juge du procès a conclu que le témoignage de W n'était pas crédible et que sa crédibilité en tant qu'enquêteur principal était d'une importance capitale — Il était possible de conclure que les agents de police avaient des craintes raisonnables, ce qui aurait pu avoir causé la gravité du retard de 22 minutes avant d'informer l'accusé de ses droits en vertu de l'art. 10 — Conclusion du juge du procès selon laquelle il n'y avait aucune preuve indiquant que le fait d'informer l'accusé de ses droits aurait pu compromettre l'enquête en cours était influencée par son appréciation de la crédibilité de W, elle-même influencée par le contre-interrogatoire contesté — Erreur était importante, et le ministère public a démontré que le verdict n'aurait pas été nécessairement le même si le juge du procès n'avait pas permis le contre-interrogatoire en question et admis la preuve — Accusé a formé un pourvoi — Pourvoi accueilli; acquittement rétabli — Juge du procès n'a pas commis d'erreur en concluant que les droits de l'accusé garantis par l'art. 10 avaient été violés, considérant la gravité de l'atteinte et le caractère délibéré et inacceptable de la conduite de l'État, ce qui favorisait l'exclusion de la preuve — Cour d'appel a commis une erreur en soulevant la question du contre-interrogatoire puisque le droit d'une cour d'appel de soulever de nouvelles questions est assujetti à des limites et qu'il n'y avait aucun risque d'injustice, ce qui était une condition préalable — Juge du procès ne s'est pas fondé sur le témoignage contesté pour juger de la crédibilité de W.

During a police stop as part of an ongoing investigation into C's involvement in a series of homicides the police stopped the accused. Constable D saw the accused reach under the seat of the car and Officer W, who was the lead on the surveillance, gave instructions that the accused was to be arrested without compromising the ongoing investigation. The accused was searched and handcuffed. A large quantity of cocaine and cash was found. The trial judge ruled there was no breach of the accused's rights under ss. 8 or 9 of the Canadian Charter of Rights and Freedoms but found that the accused's rights under s. 10(a) and 10(b) had been breached when the officers waited 22 minutes before advising him of the reasons for his arrest and of his right to counsel and that no circumstances justified that delay. He also found that W intentionally mislead the court when he maintained that D's comments about the accused's hand movements were meant to convey a concern for officer safety. D in his testimony denied that his words were meant to express this concern. The trial judge found that the Charter breaches were serious and that the impact on the accused was lessened by the fact that there was no causal connection between the breaches and the obtaining of the evidence. The offences were serious and the evidence was real evidence. However, the continued reliance by the officer on safety concerns undermined the truth-seeking function of the trial. The trial judge excluded the evidence under s. 24(2) and acquitted the accused. The Crown appealed.

On appeal the Crown advanced two grounds of appeal alleging the trial judge erred by failing to find that exceptional circumstances justified the suspension of the accused's rights under s. 10 and that the exclusion of the evidence was an error in law as the breach was not egregious and had no significant impact on the accused's Charter-protected interests.

In response to the written submissions the Court of Appeal called the parties' attention to two issues for comment during oral argument including what the limits of cross-examination are and the consequences of exceeding the limits. During the oral hearing counsel both made submissions on whether defence counsel had conducted an improper cross-examination of W by asking him to comment on the truth of D's testimony. Both parties were permitted to file written submissions on improper cross-examination. The Court of Appeal ruled that the appeal should be allowed as the trial judge had erred in law by admitting and relying on impermissible cross-examination, that the mistake was material and the verdict would not necessarily have been the same if the trial judge had not allowed the admission of the evidence. The Court of Appeal allowed the Crown's appeal and ordered a new trial. The accused appealed.

Held: The appeal was allowed and the acquittal restored.

Per Rothstein J. (McLachlin C.J.C., LeBel, Abella, Moldaver, Karakatsanis and Wagner JJ. concurring): An appellate court has the jurisdiction to invite submissions on an issue neither party has raised, but that jurisdiction has limits. The issue must be a genuinely new issue which happens when it raises a new basis for finding potential error in the decision under appeal that was not raised by the parties in the framing of the grounds of appeal. A genuinely new issue must be legally and factually distinct from the grounds of appeal raised by the parties. Not all questions asked will be new issues and an appellate court's right to ask questions will not be limited by anything other than the existing requirement that the manner in which they are raised cannot suggest bias or partiality. Courts are permitted to raise a broad range of questions during oral submissions and may go outside the grounds in order to understand the context, statutory background or other implications. New issues are not those rooted in or part of existing issues or those that go to inherent or fundamental parts of appellate litigation.

While judicial decision-makers are required to remain independent and impartial and to be seen as such in order to avoid any apprehension of bias, they also have to ensure that justice is done. Accordingly the discretion to raise a new issue on appeal should be used in rare circumstances, only when failure to do so would risk an injustice. Whether an injustice would arise should be assessed on a standard of whether there is a good reason to believe a failure to act would risk an injustice. There should be sufficient evidence in the record to decide the issue and there should be no resulting procedural prejudice to either party. An appellate court can only raise an issue where they have jurisdiction to consider it, there is sufficient evidence on the record to be able to resolve the issue, and no procedural prejudice to either party arises from raising the issue that cannot be addressed by adjustments to the process. The procedures to be followed in the case of an appellate court raising a new issue are that the parties must be given adequate notice and opportunity to respond. The particular procedure must vary to fit the varied context and circumstances of each particular case. Imposing strict procedural standards were inappropriate as it would fail to recognize the different circumstances in which issues may arise in different cases. Notification may occur before the oral hearing or during it. An adjournment may be necessary. The parties need adequate notification that gives enough information to allow for sufficient response without giving too much detail or indicating that the court had already formed an opinion. The court's concern must be with ensuring they receive full submissions on the issue. Recusal by the panel that raised the issue is not necessarily required and must be decided on a case-by-case basis with the concern to not have any reasonable apprehension of bias.

The Court of Appeal erred in raising the issue of improper cross-examination. The Court of Appeal erred as it raised the issue in the absence of a threat of an injustice. The court was incorrect in finding that the impugned cross-examination affected the trial judge's decision and the result would have been different had he not allowed the cross-examination. Nothing indicated that the improper cross-examination factored into the trial judge's decision-making process. The question was not objected to at the time or raised on appeal. Most importantly it was not evident that the result would have been different without the impugned testimony.

The trial judge did not err in ruling that the accused's rights under s. 10 were infringed. The police delay in complying with the information duties under s. 10 was not justified by any exceptional circumstances. While compliance with the informational duty may be suspended in certain situations the accused's situation was not included in the exception. The trial judge ruled that there was insufficient evidence to support the assertion that the police could not immediately comply with s. 10 of the Charter in order to not compromise the broader investigation. It was not clear why telling the accused why he was being arrested or informing him of his right to counsel would compromise the other investigation. There was no legal basis to challenge the trial judge's findings as there was no evidence of any shortcoming in his assessment of the evidence.

The trial judge did not err in his analysis of the factors relevant to determining the exclusion of evidence. His findings under each branch of the test were reasonable. The trial judge did not err in finding that the seriousness of the breach favoured exclusion of the evidence. The seriousness of the breach was not lessened by the situation. The 22-minute delay was not minor in the circumstances as the accused was questioned by the police before his s. 10 rights were complied with and the significance of the passage of time was heightened by the fact the trial judge found there was no valid reason for the delay. There were no extenuating circumstances. The lack of a causal connection between the breach and the discovery of the evidence was not determinative and is not required to engage s. 24(2). When assessing the seriousness of the breach, deliberate and egregious state conduct favours exclusion and the trial judge found that the police had a number of opportunities to advise the accused of the reason for his detention, there was no evidence as to how advising the accused of his rights would compromise the other investigation and there was no risk of destruction of any evidence once the accused left the vehicle. The trial judge did not err by overstating the impact of the breach on the accused's Charter-protected interests. The trial judge did not err by concluding that the importance and reliability of the evidence were offset by W's attempt to mislead the court. The officer's misleading testimony was not restricted to consideration under the first factor. The trial judge made no error in law and his findings were owed considerable deference and the Crown failed to raise any arguments on an error of law.

Lors d'un contrôle routier s'inscrivant dans le cadre d'une enquête en cours concernant la participation de C à une série d'homicides, des agents de police ont intercepté l'accusé. Le constable D a aperçu l'accusé chercher quelque chose sous le siège du véhicule, et l'agent W, qui était l'enquêteur principal au sein de l'équipe de surveillance, a donné instruction de procéder à l'arrestation de l'accusé de manière à ne pas compromettre l'enquête en cours. L'accusé a été fouillé et menotté. Une grande quantité de cocaïne et d'argent a été retrouvée. Le juge du procès a estimé qu'il n'y avait pas eu atteinte aux droits de l'accusé garantis en vertu de l'art. 8 et 9 de la Charte canadienne des droits et libertés, mais a conclu que les droits garantis à l'accusé en vertu de l'art. 10a) et 10b) avaient été violés, puisque les agents de police avaient attendu 22 minutes avant d'informer l'accusé des raisons de son arrestation et de son droit à l'assistance d'un avocat et que rien ne justifiait ce délai. Il a également conclu que W avait intentionnellement induit le tribunal en erreur en soutenant que les commentaires émis par D au sujet des gestes que l'accusé avait posés avec les mains exprimaient une préoccupation liée à la sécurité des agents. Au cours de son témoignage, D a nié que ses propos avaient pour but d'exprimer cette préoccupation. Le juge du procès a conclu que les atteintes aux droits garantis par la Charte étaient graves et que leur impact sur l'accusé était amoindri par le fait qu'il n'y avait aucun lien de causalité entre les atteintes et l'obtention des éléments de preuve. Les infractions étaient graves et la preuve était une preuve matérielle. Toutefois, en continuant d'invoquer préoccupations liées à la sécurité des agents, l'agent de police tentait de compromettre la fonction de recherche de la vérité du tribunal. Le juge du procès a exclu la preuve en vertu de l'art. 24(2) et a prononcé l'acquittement de l'accusé. Le ministère public a interjeté appel.

Lors de l'appel, le ministère public a fait valoir deux motifs d'appel alléguant que le juge du procès avait commis une erreur en omettant de conclure à l'existence de circonstances exceptionnelles justifiant la suspension des droits garantis à l'accusé en vertu de l'art. 10 et que l'exclusion de la preuve constituait une erreur de droit puisque l'atteinte n'était pas flagrante et n'avait eu aucun impact sérieux sur les droits de l'accusé en vertu de la Charte. Une fois que les observations écrites eurent été déposées, la Cour d'appel a soumis deux questions aux parties en vue d'obtenir leurs commentaires à l'audience, y compris celles de savoir quelles sont les limites du contre-interrogatoire et quelles sont les conséquences lorsque ces limites sont outrepassées. À l'audience, les deux avocats ont présenté des observations sur la question de savoir si la défense avait soumis W à un contre-interrogatoire inapproprié en lui demandant de se prononcer sur la véracité du témoignage de D. Les deux parties ont pu déposer des observations écrites sur la question du caractère inapproprié d'un contre-interrogatoire. La Cour d'appel a conclu que l'appel devait être accueilli puisque le juge du procès avait commis une erreur de droit en admettant et en se fondant sur un contre-interrogatoire inacceptable, que l'erreur était sérieuse et que le verdict n'aurait pas été nécessairement le même si le juge du procès n'avait pas admis la preuve. La Cour d'appel a accueilli l'appel interjeté par le ministère public et a ordonné la tenue d'un nouveau procès. L'accusé a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli et l'acquittement rétabli.

Rothstein, J. (McLachlin, J.C.C., LeBel, Abella, Moldaver, Karakatsanis, Wagner, JJ., souscrivant à son opinion) : Une cour d'appel a compétence pour inviter les parties à présenter des observations sur une question que ni l'une ni l'autre n'a soulevée, mais cette compétence a des limites. La question doit être véritablement nouvelle, c'est-à-dire qu'elle doit

constituer un nouveau fondement sur lequel on pourrait s'appuyer, autre que les moyens d'appel formulés par les parties, pour conclure que la décision frappée d'appel est erronée. Une question véritablement nouvelle doit être différente, sur les plans juridique et factuel, des moyens d'appel soulevés par les parties. Ce ne sont pas toutes les questions qui sont de nouvelles questions, et le droit d'une cour d'appel de poser des questions n'est limité que par l'exigence selon laquelle les questions ne doivent pas être soulevées d'une manière qui donne à penser que la cour d'appel n'est pas impartiale. Les questions soulevées par les cours à l'audience peuvent valablement porter sur une gamme étendue de sujets, qui peuvent aller au-delà des moyens d'appel dans le but de comprendre le contexte factuel ou législatif ou les implications plus larges du débat. Les questions qui reposent sur une question existante ou qui en sont des éléments et celles qui forment la toile de fond de l'instance d'appel ne sont pas non plus de nouvelles questions.

Bien que les décideurs judiciaires doivent demeurer indépendants et impartiaux et doivent être perçus comme tels afin d'éviter toute crainte de partialité, ils doivent également s'assurer que justice soit rendue. Aussi, le pouvoir discrétionnaire de soulever une nouvelle question en appel ne devrait être exercé que dans de rares situations, seulement si son omission de le faire risquerait d'entraîner une injustice. La question de savoir si une injustice serait susceptible de survenir devrait être abordée en fonction de la norme visant à déterminer s'il existe une bonne raison de croire que l'omission de soulever une nouvelle question risquerait d'entraîner une injustice. Il doit y avoir suffisamment de preuve au dossier pour procéder à cette détermination et aucune des parties ne devrait subir de préjudice d'ordre procédural en conséquence. Une cour d'appel ne peut soulever une question que lorsqu'elle a compétence pour s'y pencher, que s'il y a suffisamment de preuve au dossier pour lui permettre de trouver une réponse et si aucune des parties ne subit de préjudice d'ordre procédural ne pouvant pas être écarté en modulant le processus. La procédure à suivre lorsqu'une cour d'appel soulève une nouvelle question exige que les parties soient notifiées et aient l'occasion d'y répondre. Cette procédure particulière variera en fonction du contexte et des circonstances de chaque dossier. Il serait inapproprié d'imposer des normes procédurales strictes, puisque cela ferait abstraction du fait que la question peut se présenter dans diverses situations selon les dossiers. La notification de la nouvelle question peut se faire avant l'audience ou à l'audience. Un ajournement peut s'avérer nécessaire. La notification doit renfermer assez d'information pour permettre aux parties de répondre, mais ne doit pas renfermer trop de détails ou indiquer que la cour d'appel s'est déjà formé une opinion. La cour doit s'assurer de recevoir des observations complètes sur la question. Il n'est pas nécessaire que la formation qui a soulevé la question se récuse, et le besoin d'une formation reconstituée doit être déterminé au cas par cas afin de s'assurer qu'il n'existe aucune crainte raisonnable de partialité.

La Cour d'appel a commis une erreur en soulevant la question de savoir si le contre-interrogatoire avait été approprié. La Cour d'appel a commis une erreur en soulevant cette question en l'absence d'une menace d'injustice. La Cour a commis une erreur en concluant que le contre-interrogatoire en question avait influencé la décision du juge du procès et que l'issue aurait été différente s'il n'avait pas permis le contre-interrogatoire. Rien n'indiquait que le caractère inapproprié du contre-interrogatoire avait été pris en compte dans le processus décisionnel du juge du procès. La question n'a pas été contestée au procès ni soulevée lors de l'appel. Plus important encore, il n'était pas évident que l'issue aurait été différente sans la tenue du contre-interrogatoire en question.

Le juge du procès n'a pas commis d'erreur en concluant que les droits de l'accusé garantis par l'art. 10 avaient été violés. Il n'y avait aucunes circonstances exceptionnelles justifiant le retard des agents de police à respecter leurs obligations d'informer l'accusé comme le requiert l'art. 10. L'accusé ne se trouvait pas dans l'une des situations permettant de suspendre l'obligation d'informer un accusé. Le juge du procès a estimé qu'il n'y avait pas suffisamment de preuve pour étayer la prétention selon laquelle les agents de police ne pouvaient, dans l'immédiat, respecter l'art. 10 de la Charte sans compromettre l'enquête plus large. Il n'était pas clair pourquoi le fait d'informer l'accusé des raisons de son arrestation ou de son droit à un avocat risquait de compromettre l'autre enquête. Il n'y avait aucun fondement juridique permettant de contester les conclusions du juge du procès, puisque la preuve ne révélait la présence d'aucune lacune dans son appréciation de la preuve.

Le juge du procès n'a pas commis d'erreur dans son analyse des éléments servant à déterminer si la preuve devait être exclue. Ses conclusions à chaque étape du test étaient raisonnables. Le juge du procès n'a pas commis d'erreur en concluant que la gravité de l'atteinte permettait d'exclure la preuve. La situation n'atténuait pas la gravité de l'atteinte. Le retard de 22 minutes n'était pas un élément négligeable dans les circonstances, puisque l'accusé a été interrogé par les agents de police alors que les droits qui lui sont garantis par l'art. 10 n'étaient pas encore respectés et l'importance

de l'écoulement du temps était amplifiée par le fait que le juge du procès a conclu qu'aucun motif valable ne justifiait le délai. Il n'y avait aucunes circonstances atténuantes. L'absence d'un lien de causalité entre l'atteinte et la découverte des éléments de preuve n'était pas déterminante et n'était pas requis pour déclencher l'application de l'art. 24(2). À l'étape de l'évaluation de la gravité de l'atteinte, le caractère délibéré et inacceptable de la conduite de l'État favorise l'exclusion de la preuve, et le juge du procès a conclu que les agents de police avaient eu plusieurs occasions d'informer l'accusé des raisons de sa détention, qu'il n'y avait aucune preuve indiquant pourquoi le fait d'informer l'accusé de ses droits risquait de compromettre l'autre enquête et qu'il n'y avait aucun risque que les éléments de preuve ne soient détruits une fois l'accusé hors du véhicule. Le juge du procès n'a pas commis d'erreur en insistant sur l'incidence de l'atteinte sur les droits que la Charte garantit à l'accusé. Le juge du procès n'a pas commis d'erreur en concluant que l'importance et la fiabilité de la preuve avaient été neutralisées par la tentative de W d'induire le tribunal en erreur. Le témoignage trompeur de l'agent de police ne se limitait pas à l'analyse du premier facteur. Le juge du procès n'a commis aucune erreur de droit et il fallait faire preuve d'une grande déférence à l'égard de ses conclusions, et le ministère public a échoué dans sa tentative de faire valoir une erreur de droit.

APPEAL by accused from judgment reported at *R. v. Mian* (2012), 2012 ABCA 302, 2012 CarswellAlta 1744, [2012] A.J. No. 1044, 98 C.R. (6th) 311, 292 C.C.C. (3d) 346, 536 A.R. 308, 559 W.A.C. 308, 78 Alta. L.R. (5th) 249 (Alta. C.A.), allowing Crown's appeal of his acquittal.

POURVOI formé par l'accusé à l'encontre d'une décision publiée à *R. v. Mian* (2012), 2012 ABCA 302, 2012 CarswellAlta 1744, [2012] A.J. No. 1044, 98 C.R. (6th) 311, 292 C.C.C. (3d) 346, 536 A.R. 308, 559 W.A.C. 308, 78 Alta. L.R. (5th) 249 (Alta. C.A.), ayant accueilli l'appel interjeté par le ministère public à l'encontre de son acquittement.

Rothstein J. **(McLachlin C.J.C. and LeBel, Abella, Moldaver, Karakatsanis and Wagner JJ. concurring):**

I. Overview

1 The primary question on this appeal centres on the issue of an appellate court's ability to raise new grounds of appeal and the considerations which should guide the court in doing so. At the heart of this appeal are two potentially competing tensions: (1) the adversarial system, which relies on the parties to frame the issues on appeal, and reserves the role of neutral arbiter for the courts; and (2) the need for an appellate court to intervene in order to prevent an injustice. The question on this appeal is at what point can an appellate court disrupt the adversarial system and raise a ground of appeal of its own?

2 This appeal arose in the context of a *voir dire* to exclude evidence. The secondary issue therefore concerns the trial judge's findings with respect to infringements under s. 10(*a*) and (*b*) of the *Canadian Charter of Rights and Freedoms* and the exclusion of evidence under *s. 24(2)*.

II. Facts

A. The Chelmick Investigation

3 This case began with an investigation by the Edmonton Police Service into a number of homicides and attempted homicides in the city of Edmonton. Under the leadership of Detective Werth (then Constable Werth), the investigation team obtained a wiretap authorization allowing them to intercept the private communications of one of their principal targets, Robin Flynn Chelmick.

4 Between the night of January 5, 2009 and the afternoon of January 6, 2009, the police intercepted calls from Chelmick's line related to a drug transaction for the purchase of a half a kilogram of cocaine. Chelmick was acting as the middle man for an unidentified supplier for a transaction scheduled to occur at 4:30 p.m. at Duke's Bar and Grill.

trial judge had not allowed the impugned cross-examination and admitted the evidence. The Court of Appeal ordered a new trial on this basis. The Court of Appeal did not analyze the grounds of appeal advanced by the Crown.

IV. Issues

27 This appeal raises the following issues:

(1) Did the Alberta Court of Appeal err in raising a new ground of appeal?

(2) Did the Alberta Court of Appeal err in ordering a new trial on the basis of the improper cross-examination issue?

(3) Did the trial judge err in law in concluding that the police infringed the rights of the accused under s. 10(*a*) and (*b*) of the *Charter*?

(4) Did the trial judge err in law in excluding the evidence under s. 24(2) of the *Charter*?

V. Analysis

A. When Can an Appellate Court Raise a New Issue?

28 It is not disputed that an appellate court has the jurisdiction to invite submissions on an issue neither party has raised. This appeal raises the questions of how broad this jurisdiction is, when it should be exercised, and what procedures should be followed when it is invoked.

(1) What Is a "New Issue"?

29 This case turns on whether and how an appellate court can raise a new issue on appeal. It is therefore important to first define what a "new issue" is.

30 An issue is new when it raises a new basis for potentially finding error in the decision under appeal beyond the grounds of appeal as framed by the parties. Genuinely new issues are legally and factually distinct from the grounds of appeal raised by the parties (see *Cusson v. Quan*, 2009 SCC 62, [2009] 3 S.C.R. 712 (S.C.C.), at para. 39) and cannot reasonably be said to stem from the issues as framed by the parties. It follows from this definition that a new issue will require notifying the parties in advance so that they are able to address it adequately.

31 In defining what a new issue is, it is important to recognize what will not constitute a new issue raised on appeal. First, not all questions asked by an appeal court will constitute a new issue. The jurisdiction of appellate courts to ask questions during the oral hearing is well established. This jurisdiction is broad and is limited only by the requirement that questions not be "raised in a manner which suggests bias or partiality on the part of the appeal court" (*R. v. W. (G.)*, [1999] 3 S.C.R. 597 (S.C.C.), at para. 17, *per* Lamer C.J.). Nothing in these reasons should be construed as limiting the ability of appellate judges to ask any question in the course of the oral hearing.

32 Questions raised during the oral hearing may properly touch on a broad range of issues, which may be components of the grounds of appeal put forward by the parties, or may go outside of those grounds in an aim to understand the context, statutory background or larger implications. For example, an appellate court may pose questions as to the practical workings of a statutory regime. Absent any concerns about bias, questions raised during the oral hearing, whether linked directly or by extension to the grounds of appeal or not, are not improper (see *W. (G.)*, at para. 17). Such questions may be necessary for the court to gain a more complete understanding of the issues at hand.

33 Second, issues that are rooted in or are components of an existing issue are also not "new issues". Appellate courts may draw counsel's attention to issues that must be addressed in order to properly analyze the issues raised by the parties. For example, in a case involving a claim of self-defence, the parties may argue exclusively over whether the accused's belief that his life was in danger was reasonable, but it may be necessary for the court to first analyze the issue of whether

the accused subjectively believed that he was at risk of death. This is not a "new issue", but a component of the overall analysis of the grounds as raised by the parties. However, where appropriate, the court may have to be prepared to grant even a brief adjournment to allow the parties to consider and canvass the issue.

34 Finally, issues that form the backdrop of appellate litigation, such as jurisdiction, whether a given error requires a remedy and what the appropriate remedy is, or as discussed below, the standard of review, are not new issues and parties should not require notice to address them.

35 In summary, an appellate court will be found to have raised a new issue when the issue was not raised by the parties, cannot reasonably be said to stem from the issues as framed by the parties, and therefore would require that the parties be given notice of the issue in order to make informed submissions. Issues that form the backdrop of appellate litigation will typically not be "new issues" under this definition. Exercising the jurisdiction to ask questions during the oral hearing will not constitute raising a new issue, unless, in doing so, the appellate court provides a new basis for reviewing the decision under appeal for error.

(2) What Considerations Should Guide an Appellate Court in Determining Whether to Raise a New Issue on Appeal?

36 The parties do not dispute that appellate courts have the jurisdiction to raise new issues. Indeed, this jurisdiction is an extension of the power of appellate courts to ask questions of the parties (see *W. (G.)*, at para. 17). The issue on this appeal is not whether appellate courts can raise new issues, but when and in what circumstances will it be appropriate for an appellate court to do so.

37 There are two potentially competing considerations at the heart of the issue in this case. First, the adversarial system, which is a fundamental tenet of our legal system. Second, the role of the courts to ensure that justice is done.

38 Our adversarial system of determining legal disputes is a procedural system "involving active and unhindered parties contesting with each other to put forth a case before an independent decision-maker" (*Black's Law Dictionary* (9th ed. 2009), *sub verbo* "adversary system"). An important component of this system is the principle of party presentation, under which courts "rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present" (*Greenlaw v. United States*, 554 U.S. 237 (U.S. Sup. Ct. 2008) at p. 243, *per* Ginsburg J.).

39 A fundamental reason for maintaining this system is to ensure that judicial decision-makers remain independent and impartial and are seen to remain independent and impartial. When a judge or appellate panel of judges intervenes in a case and departs from the principle of party presentation, the risk is that the intervention could create an apprehension of bias. This kind of departure from the usual conduct of an appeal could lead the court to be seen to be intervening on behalf of one of the parties, thus impugning the impartiality of the court. As this Court has said, "[it] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." (*R. v. Brouillard*, [1985] 1 S.C.R. 39 (S.C.C.), at p. 43, citing *R. v. Justices of Sussex* (1923), [1924] 1 K.B. 256 (Eng. K.B.), at p. 259). It is for this reason that an important tenet of our appellate system is for the court to respect the strategic choices made by parties in framing the issues (see *W. (G.)*, at paras. 17-18).

40 On the other hand, courts also have the role of ensuring that justice is done. As Lord Denning explained in the context of trial judges in the United Kingdom: "... a judge is not a mere umpire to answer the question 'How's that?' His object above all is to find out the truth, *and to do justice according to law*..." (*Jones v. National Coal Board*, [1957] 2 All E.R. 155 (Eng. C.A.), at p. 159 (emphasis added)). This proposition is no less true of appellate judges. Meaningful appellate review assesses the correctness of a lower court decision, both on errors of law and palpable overriding errors of fact (see *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869 (S.C.C.), at paras. 25 and 28; and *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), at paras. 1 and 4). I accept the submission of the intervener the Attorney General of Alberta that "for 'justice in fact to be done,' judges must sometimes 'intervene in the adversarial debate'" (I.F., at para. 16, citing *Brouillard*, at p. 44).

TAB 8

2004 CarswellOnt 936
Ontario Court of Appeal

Wasauksing First Nation v. Wasausink Lands Inc.

2004 CarswellOnt 936, [2004] 2 C.N.L.R. 355, [2004] O.J. No. 810, 129 A.C.W.S. (3d) 2, 184 O.A.C. 84, 43 B.L.R. (3d) 244

Council of the Wasauksing First Nation a.k.a. Council of Ojibways of Parry Island Band, and John Beaucage and Terry Pegahmagabow, on their own behalf and on behalf of the registered members of the Wasauksing First Nation a.k.a. Ojibways of Parry Island Band, Applicants (Appellants) and Wasausink Lands Inc., Joyce Tabobondung, Wilfred King, Dora Tabobondung, Leslie Tabobondung, and Florence Tabobondung, Respondents (Respondents)

Laskin, Cronk, Armstrong JJ.A.

Heard: April 2-3, 2003
Judgment: March 4, 2004
Docket: CA C37772

Proceedings: affirming *Wasauksing First Nation v. Wasausink Lands Inc.* (2002), 2002 CarswellOnt 107, [2002] 3 C.N.L.R. 287 (Ont. S.C.J.)

Counsel: Yehuda Levinson, Eugene Meehan, David Stone for Applicants / Appellants
Charles Campbell, Renée Lang for Respondents / Respondents

Subject: Corporate and Commercial; Public; Contracts; Constitutional

Headnote

Business associations --- Creation and organization of business associations — Corporations — Incorporation — Miscellaneous issues

Wasauksing First Nation ("WFN") was native community on island in Lake Huron — Back in 1960s, to gain revenues for its members, WFN decided to lease part of its land as cottage lots — Because Indian Act prohibited Indian bands from alienating land except to Crown, in 1971 W Inc. was incorporated to lease lots and collect and manage rents — Between 1971 and 1993, chief and council in office from time to time acted as de facto directors of W Inc. and were accepted as such by members of WFN and by federal government and all concerned parties dealing with W Inc. — In 1994 and 1995, chief and council at time reorganized W Inc., formally separating its governance from that of WFN by virtue of operating agreement — In 1997, WFN elected new chief and band council ("applicants") who objected to management of W Inc. by previous chief and band council — Applicant and individual members of WFN applied for declaration that all members of WFN were members of W Inc. — Application was dismissed — Applicants appealed — Appeal dismissed — Open to trial judge to find that there was no general understanding or belief amongst all, or even majority, of members of WFN that all members of WFN were "members" of W Inc., in corporate law terms, simply by virtue of fact that they were members of WFN — Trial judge did not err by applying "black letter" corporate law principles to assessment of issues concerning membership and board of directors of W Inc. — Applicants failed to establish requirements for rectification of W Inc.'s records under s. 309(1) of Corporations Act — Section 309(1) was not intended as tool to resolve complex corporate disputes by facilitating, through exercise of judicial discretion, fundamental changes that intruded on established internal corporate affairs — Applicants failed to establish that management of W Inc. was based on aboriginal rights and practices.

Aboriginal law --- Bands and band government — Band councils — Powers and jurisdiction — General principles

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Business associations --- Specific corporate organization matters — Directors and officers — Miscellaneous issues

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Business associations --- Creation and organization of business associations — Corporations — Corporate constitution — Miscellaneous issues

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of issues concerning membership and board of directors of W Inc. — Applicants failed to establish requirements for rectification of W Inc.'s records under s. 309(1) of Corporations Act — Section 309(1) was not intended as tool to resolve complex corporate disputes by facilitating, through exercise of judicial discretion, fundamental changes that intruded on established internal corporate affairs — Applicants failed to establish that management of W Inc. was based on aboriginal rights and practices.

Aboriginal law --- Constitutional issues — Miscellaneous issues

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APPEAL by Indian chief and band council from judgment reported at *Wasauksing First Nation v. Wasausink Lands Inc.* (2002), 2002 CarswellOnt 107, [2002] 3 C.N.L.R. 287 (Ont. S.C.J.) dismissing application for control of land management company.

***Per curiam*:**

I. Overview

1 Wasauksing First Nation (the "WFN") is a native community on an island in Lake Huron. Back in the 1960s, to gain revenues for its members, the WFN decided to lease part of its land as cottage lots. Because the *Indian Act*, R.S.C. 1985, c. I-5 prohibits Indian Bands from alienating land (except to the Crown), in 1971 the respondent, Wasausink Lands Inc. ("WLI") was incorporated to lease the lots, and collect and manage the rents.

2 Between 1971 and 1994 the chief and band council of the WFN controlled WLI. In 1994 and 1995 the chief and council at the time - now individual respondents - reorganized WLI, formally separating its governance from that of the WFN. The individual respondents remain the directors of WLI. Since 1997, however, the WFN has elected a new chief and band council - the appellants - who object to the respondents' management of WLI.

3 At its core, this litigation is about who controls WLI. The appellants contend that the members of the WFN are members of WLI and that the chief and council of the WFN are the rightful directors of WLI. They rely on the practice that existed between 1971 and 1994. The respondents, on the other hand, contend that control of WLI, its members and directors, must be determined by the corporation's letters patent and by-laws, and by the provisions of the *Corporations Act*, R.S.O. 1990, c. 38 (the Act).

4 The appellants sought relief from the requirements of the Act and put forward a number of arguments in support of that relief. After a long trial, Blair R.S.J., in lengthy and thorough reasons, dismissed their application. The appellants now appeal to this court on three grounds:

treaties or the *Indian Act*, they are subject to all of the responsibilities, including payment of taxes, of other Canadian citizens."

95 The appellants also argue that an expansive interpretation of a statutory provision is warranted in the aboriginal context if it is demonstrated that an established aboriginal practice conflicts with the applicable statutory provision. Support for this proposition may be found in *K's Adoption Petition, Re* (1961), 32 D.L.R. (2d) 686 (N.W.T. Terr. Ct.) and *Casimel v. Insurance Corp. of British Columbia* (1993), 82 B.C.L.R. (2d) 387 (B.C. C.A.). See also, in the context of membership in an unincorporated association, *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165 (S.C.C.).

96 This argument rests on proof of an established aboriginal practice or custom that is at odds with the requirements of the enactment in question. It is unsustainable on the facts here.

97 The trial judge held, in connection with the appellants' argument that the WFN's custom and practice of governing and managing its affairs through band council is constitutionally exempt from the application of the Act, that there is no established aboriginal practice to operate or manage a corporation. We discuss the appellants' constitutional exemption argument later in these reasons. For the purpose of the interpretation of s. 309(1) of the Act, however, we agree with the respondents' submission that the alleged WFN Understanding, even if it had been established at trial, does not itself constitute an aboriginal practice or custom merely because the community at issue is aboriginal. Stated somewhat differently, aboriginal peoples engage in many activities, and may hold many beliefs, that do not attract the status of aboriginal practices and customs.

98 We also agree with the trial judge's conclusion that the *K's Adoption Petition, Re* and *Casimel* decisions do not assist the appellants. In those cases, unlike the case at bar, the asserted aboriginal practice or custom was established to the satisfaction of the court and the relevant provincial legislation was interpreted and applied in light of the proven aboriginal practice or custom. In this case, the asserted practice or custom, which involves the membership and governance of a not-for-profit corporation, was not established at trial. There is no suggestion that the WFN community had a settled practice or custom concerning the corporate records of WLI, or regarding the application of the Act to WLI.

99 For all of these reasons, we conclude that the trial judge did not err in rejecting the appellants' claim for rectification under s. 309(1) of the Act.

(2) Trust Claim

100 As an alternative to the relief sought under s. 309(1) of the Act, the appellants submit that this court should impose a constructive trust on the directors and officers of WLI. In oral argument they framed their trust submission in one of two ways: either that WLI, its officers and directors, hold legal title to the corporation for the benefit of the WFN and its members, or that the directors and officers of WLI must vote at meetings of the corporation as directed by the band council. In advancing this submission the appellants rely on the four conditions for imposing a constructive trust set out by the Supreme Court of Canada in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.).

101 The appellants did not ask for a declaration of a constructive trust at trial. They sought this relief for the first time on appeal. On that ground alone we decline to give effect to their submission.

102 The ordinary rule is that a party cannot raise a new issue on appeal. An appellate court may depart from this ordinary rule and entertain a new issue where the interests of justice require it and where the court has a sufficient evidentiary record and findings of fact to do so.

103 The appellants do not meet these requirements for departing from the court's ordinary practice. *Soulos* was decided in 1997. Thus, its four conditions for imposing a constructive trust were known more than three years before this trial began. These four conditions are as follows:

