

CANADIAN COURT OF JUSTICE

BETWEEN:

HER MAJESTY THE QUEEN  
COMMITTEE FOR EXCELLENCE IN ELECTORAL JOURNALISM  
COMMISSIONER FOR EXCELLENCE IN ELECTORAL JOURNALISM

Appellants / Respondents on Cross-Appeal

and

Sophie BEAULAC

Respondent / Appellant on Cross-Appeal

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RESPONDENT / APPELLANT ON CROSS-APPEAL'S FACTUM

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## RESPONDENT / APPELLANT ON CROSS-APPEAL'S FACTUM

### PART I: STATEMENT OF FACTS

#### **A. MS. SOPHIE BEAULAC**

1. Ms. Sophie Beaulac, founder and primary contributor to the popular French blog *Pourquoi on en parle?*, has covered provincial and federal politics across Canada since 2005.<sup>1</sup> Ms. Beaulac's reporting has drawn praises from other journalists and from politicians across the political spectrum.<sup>2</sup> Her humoristic and slightly satirical assessment of party leaders' styles and policies is considered tough but fair.<sup>3</sup>

#### **B. THE COMMITTEE FOR EXCELLENCE IN ELECTORAL JOURNALISM**

2. In response to considerable lobbying efforts and complaints from media organizations claiming that journalistic access to party leaders during electoral campaigns was limited, uneven or unproductive,<sup>4</sup> Parliament established the Committee for Excellence in Electoral Journalism (Committee).<sup>5</sup>
3. The Committee controls access to party leaders during federal elections through the allocation of a limited number of All-Access Press Passes (Press Passes).<sup>6</sup> Journalists who wish to gain close access to party leaders during electoral campaigns must submit an application to the Committee.<sup>7</sup>
4. The Committee has the discretion to establish and modify the criteria for granting or denying a Press Pass.<sup>8</sup> Up to March 2015, the Committee's non-determinative criteria included the applicant's mode of communication, readership, average weekly content output, geographic location, organizational size and magnitude of funding.<sup>9</sup>
5. All Press Passes are allocated within the first week of an electoral campaign.<sup>10</sup> The Committee's decisions are final and without appeal.<sup>11</sup>

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<sup>1</sup> *Beaulac v R*, 2015 FC 87 at para 13[*Beaulac v R*, FC].

<sup>2</sup> *Ibid* at para 14.

<sup>3</sup> *Ibid*.

<sup>4</sup> *Ibid* at para 6.

<sup>5</sup> *Canada Elections Act*, SC 2000, c 9, as amended in *Beaulac v R*, FC, *ibid* at para 7.

<sup>6</sup> *Beaulac v R*, FC, *supra* note 1 at paras 7-8.

<sup>7</sup> *Ibid* at para 9.

<sup>8</sup> *Ibid* at para 8.

<sup>9</sup> *Ibid* at paras 16-18.

<sup>10</sup> *Ibid* at para 9.

### C. MS. BEULAC'S PRESS PASS APPLICATION

6. Before the 2015 federal election, Ms. Beulac had always been granted a Press Pass; she reported on Conservative Party leader Stephen Harper in 2008 and Liberal Party leader Michael Ignatieff in 2011. On both occasions, her online coverage received significant praises and following throughout Canadian francophone communities.<sup>12</sup>
7. In January 2015, Ms. Beulac applied for a Press Pass in anticipation of the 2015 federal election.<sup>13</sup>
8. In March 2015, the Committee adopted a new “guiding principle”: it would strive to award Press Passes to anglophone and francophone applicants proportionally, based on the percentage of journalists operating in each language throughout Canada.<sup>14</sup>
9. At the same time, the Committee added to the list of criteria “the extent to which the analytical depth and scope of the applicant’s publication or programme contributes to Canadians’ understanding of the political process”.<sup>15</sup>
10. Despite the Committee’s knowledge of Ms. Beulac’s application, it never informed her of these changes. It simply modified its website.<sup>16</sup> Ms. Beulac was never made aware that she should update her application.<sup>17</sup>
11. One week into the 2015 campaign, the Committee rejected Ms. Beulac’s application, but did not provide reasons for its decision.<sup>18</sup> Ms. Beulac immediately requested a re-consideration of her application and explanations regarding the original refusal.<sup>19</sup>
12. The Committee refused to re-consider Ms. Beulac’s application. In a terse statement, it affirmed that all Press Passes reserved for francophone applicants had al-

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<sup>11</sup> *Beulac v R*, FC, *supra* note 1 at para 9.

<sup>12</sup> *Ibid* at para 14.

<sup>13</sup> *Ibid* at para 15.

<sup>14</sup> *Ibid* at para 18.

<sup>15</sup> *Ibid* at para 19.

<sup>16</sup> *Ibid* at paras 18-19.

<sup>17</sup> *Ibid* at para 20.

<sup>18</sup> *Ibid* at para 21.

<sup>19</sup> *Ibid* at para 22.

ready been allocated and that, in any event, Ms. Beaulac was ineligible for a Press Pass since her blog is “purely satirical”.<sup>20</sup>

13. Being denied close access to party leaders, Ms. Beaulac was prevented from writing a book and articles presenting an up-close and unique viewpoint on the 2015 federal election. She lost a publishing contract and her blog readership dropped well below average, causing several advertisers to refuse to renew their contracts with her website.<sup>21</sup>

#### **D. FEDERAL COURT JUDGMENT**

14. Ms. Beaulac sued the Committee, its Commissioner and Her Majesty the Queen for damages. She alleges that the Committee (1) committed two faults by refusing her application based on unlawful considerations and by failing to inform her of the changes to the selection criteria, and (2) unduly interfered with her freedom of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms*.<sup>22</sup>
15. The Federal Court dismissed Ms. Beaulac’s claim for civil damages, but granted her \$5,000 for the breach of her freedom of expression.<sup>23</sup> The Court found that the Committee owed a duty of care to Ms. Beaulac, but that the decision to deny her a Press Pass was a true policy decision subject to Crown immunity.<sup>24</sup> Applying *Doré v Barreau du Québec*,<sup>25</sup> the Court concluded that the Committee’s rejection of Ms. Beaulac’s application on the sole basis that her blog is satirical is an unreasonable limitation of her freedom of expression.<sup>26</sup>

#### **E. FEDERAL COURT OF APPEAL JUDGMENT**

16. The Federal Court of Appeal quashed the Federal Court’s judgment in part and allowed the appeal on the Committee’s civil liability.<sup>27</sup>

— Du Plessis J.A., relying on *Montambault v Hôpital Maisonneuve-Rosemont*<sup>28</sup> and *Paradis Honey Ltd v Canada*,<sup>29</sup> found that the Committee’s decision is illegal and constitutes a fault;

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<sup>20</sup> *Beaulac, v R*, FC, *supra* note 1 at para 22.

<sup>21</sup> *Ibid* at para 23.

<sup>22</sup> *Ibid* at paras 24-25; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c 11 [Charter]*.

<sup>23</sup> *Ibid* at para 55.

<sup>24</sup> *Ibid* at paras 32, 38.

<sup>25</sup> 2012 SCC 12, [2012] 1 SRC 395 [*Doré*].

<sup>26</sup> *Beaulac v R*, FC, *supra* note 1 at para 52.

<sup>27</sup> *R v Beaulac*, 2015 FCA 271 at para 31 [*R v Beaulac*, FCA].

- Knight J.A., concurring, applying the traditional rules of civil liability, found that the Committee’s decision was not immune from liability and that the Committee was liable for damages;
  - Nicholson J.A., dissenting, applying *Paradis Honey*, concluded that the Committee had not committed a fault and was not liable for damages.
17. The Court dismissed the appeal on the *Charter* claim:
- Du Plessis J.A. concluded that a claim under section 24(1) of the *Charter* can never be allowed under the *Doré* analysis, as this approach cannot lead to a finding of an infringement of *Charter* rights;<sup>30</sup>
  - Knight J.A., concurring, would have denied the appeal on *Charter* damages on the basis that Ms. Beaulac is claiming a positive right;<sup>31</sup>
  - Nicholson J.A. did not deal with this issue.

**PART II: RESPONDENT / APPELLANT ON CROSS-APPEAL’S POSITION  
CONCERNING THE POINTS IN ISSUE**

18. This appeal raises the following issues:
- Is the Crown liable for damages under article 1457 of the *Civil Code of Quebec* for denying Ms. Beaulac a Press Pass?
  - Did the denial of the Press Pass violate Ms. Beaulac’s freedom of expression guaranteed under section 2(b) of the *Charter*, and is Ms. Beaulac entitled to damages under section 24(1)?

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<sup>28</sup> [2001] RJQ 893, JE 2001-833 (QC CA) [*Montambault*].

<sup>29</sup> 2015 FCA 89, 382 DLR (4th) 720 [*Paradis Honey*].

<sup>30</sup> *R v Beaulac*, FCA, *supra* note 27 at para 30.

<sup>31</sup> *Ibid* at para 40.

### **PART III: ARGUMENT**

19. Ms. Beaulac’s highly-praised humoristic and “at times” satirical blog contributes to Canadians’ understanding of the political process. It effectively provides franco-phone communities across Canada and young voters in particular with vital information for the meaningful exercise of their political rights.
20. A prudent, reasonable and diligent decision-maker would not have denied Ms. Beaulac a Press Pass (1) based on a non-existent criterion banning satire, and (2) without prior notice to applicants regarding the changes made to the policies and criteria for deciding Press Pass applications already filed. This illegal and unfair decision caused a decrease in Ms. Beaulac’s publicity revenues and prevented her from writing articles and a book, for which she should be compensated.
21. Freedom of expression includes the right to gather news and information. The Committee’s decision limited the exercise of this right by Ms. Beaulac. This limitation is not saved under section 1 of the *Charter* and warrants an award of compensatory and punitive damages to Ms. Beaulac.

#### **A. STANDARD OF REVIEW ON APPEAL**

22. On appeal, questions of law are reviewed upon a standard of correctness.<sup>32</sup> Questions of fact and questions of mixed fact and law where the factual component pre-

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<sup>32</sup> *Housen v Nikolaisen*, 2002 SCC 33 at paras 8-9, [2002] 2 SCR 235 [*Housen*]; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at para 31, [2011] 3 SCR 471.



dominates are reviewed only if the Court committed an overriding and palpable error.<sup>33</sup>

**B. THE COMMITTEE WRONGFULLY DENIED MS. BEAULAC A PRESS PASS AND IS LIABLE FOR THE INJURY SHE SUFFERED**

**I. *The liability of the federal Crown in civil law***

**a) *The Quebec law provides the appropriate framework***

23. The law of the province where the impugned acts were committed governs proceedings against the federal Crown for damages.<sup>34</sup>

24. In this case, all the events leading to Ms. Beaulac's claim took place in the Province of Quebec<sup>35</sup>. The claim against the Committee is to be examined according to the rules of civil liability set out in the *Civil Code of Quebec (CCQ)*,<sup>36</sup> subject to

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<sup>33</sup> *Housen*, *supra* note 32 at paras 10-37; *Fletcher v Manitoba Public Insurance Co*, [1990] 3 SCR 191 at 205-06, 74 DLR (4th) 636.

<sup>34</sup> *Crown Liability and Proceedings Act*, RSC 1985, c C-50, s 3(a) [*Crown Liability Act*]; *Hinse v Canada (Attorney General)*, 2015 SCC 35 at para 21, [2015] 2 SCR 621 [*Hinse*]; *Canadian Food Inspection Agency v Professional Institute of the Public Service of Canada*, 2010 SCC 66 at para 25, [2010] 3 SRC 657 [*CFLA*]; *Entreprises Sibeca Inc v Frelighsburg (Municipality)*, 2004 SCC 61, at paras 15-16, [2004] 3 SCR 304 [*Sibeca*]; *The King v Dubeau / The King v Laperrière*, [1946] SCR 415 at 443, 3 DLR 1; Peter W Hogg, Patrick J Monahan et Wade K Wright, *Liability of the Crown*, 4th ed, (Toronto: Carswell, 2011) at 436 [Hogg].

<sup>35</sup> *R v Beaulac*, FCA, *supra* note 27 at para 7; see Laskin Clarification No 2.

<sup>36</sup> *Code civil du Québec*, RLRQ c C-1991 [CCQ].

public law and any other legislation applicable to it.<sup>37</sup> Public law rules include the general principles of Crown immunity.<sup>38</sup>

**b) *Crown immunity applies only to true policy decisions that are not irrational or taken in bad faith***

25. The proper approach to qualified Crown immunity was confirmed in *R v Imperial Tobacco Canada Ltd*<sup>39</sup> and recently applied in *Hinse v Canada (Attorney General)*.<sup>40</sup> Despite its unique role as a regulator and the need to avoid undue judicial interference with governmental decision-making, the Crown should enjoy immunity only when making true policy decisions.<sup>41</sup>
26. True policy decisions are limited to general rules or principles of action adopted by a government.<sup>42</sup> They must be grounded in social, economic and political consider-

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<sup>37</sup> Art 1376 CCQ; *Hinse*, *supra* note 34 at para 22; *CFIA*, *supra* note 34 at para 26; *Finney v Barreau du Québec*, 2004 SCC 36 at para 26-27, [2004] 2 SCR 17 [*Finney*]; *Prud'homme v Prud'homme*, 2002 SCC 85 at para 31, [2002] 4 SCR 663 [*Prud'homme*]; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Communauté urbaine de Montréal*, 2004 SCC 30 at para 20, [2004] 1 SCR 789 [*Commission des droits de la personne et des droits de la jeunesse*]; *Doré v Verdun (Municipalité)*, [1997] SCR 862 at paras 15-17, 20-21, 150 DLR (4th) 385.

<sup>38</sup> *Hinse*, *supra* note 34 at paras 22-23; *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 76, [2011] 3 SCR 45 [*Imperial Tobacco*]; *CFIA*, *supra* note 34 at para 27; *Commission des droits de la personne et des droits de la jeunesse*, *ibid* at para 20.

<sup>39</sup> *Imperial Tobacco*, *ibid* at paras 74, 90.

<sup>40</sup> *Hinse*, *supra* note 34 at paras 23-24.

<sup>41</sup> *Imperial Tobacco*, *supra* note 38 at paras 72, 87; *Holland v Saskatchewan (Minister of Agriculture, Food & Rural Revitalization)*, 2008 SCC 42 at para 14, [2008] 2 SCR 551 [*Holland*]; *Cooper v Hobart*, 2001 SCC 79 at para 38, [2001] 3 SCR 537 [*Cooper*]; *Lewis (Guardian ad litem of) v British Columbia*, [1997] 3 SCR 1145 at para 12, 153 DLR (4th) 594 [*Lewis*]; *Brown v British Columbia (Ministry of transportation & Highways)*, [1994] 1 SCR 420 at para 21, 112 DLR (4th) 1 [*Brown*]; *Swinamer v Nova Scotia (Attorney General)*, [1994] 1 SCR 445 at para 12, 112 DLR (4th) 18 [*Swinamer*]; *Just v British Columbia*, [1989] 2 SCR 1228 at 1239, 1244-45, 64 DLR (4th) 689 [*Just*]; *Laurentide Motels Ltd v Beauport (City)*, [1989] 1 SCR 705 at 718-19, 15 ACWS (3d) 95 [*Laurentide Motels*]; *Kamloops v Nielsen*, [1984] 2 SCR 2 at 55, 10 DLR (4th) 641 [*Kamloops*]; *Canada (Procureur général) c Imperial Tobacco Ltd*, 2012 QCCA 2034 at para 101, [2012] RJQ 2046 [*Imperial Tobacco (QC CA)*]; *Blessing v US*, 447 F Supp 1160 at 1170 (1978).

<sup>42</sup> *Imperial Tobacco*, *ibid* at para 87; *Just*, *ibid*; *Laurentide Motels*, *ibid* at 707, 722; *Imperial Tobacco (QC CA)* at paras 24, 101.

ations<sup>43</sup> and suffused by facts, policies, discretions, subjective appreciations and expertise.<sup>44</sup> They are distinguishable from operational decisions, which seek to implement government policy and are based on administrative direction and technical standards.<sup>45</sup>

27. A true policy decision will still engage the Crown's civil liability<sup>46</sup> if it constitutes a gross fault<sup>47</sup> or if it is irrational or taken in bad faith.<sup>48</sup>
28. This approach should be preferred over the one proposed in *Montambault c Hôpital Maisonneuve-Rosemont*. The Quebec Court of Appeal suggested that the test for Crown immunity should consider the legality of an administrative decision.<sup>49</sup> This consideration is already taken into account when determining whether a fault was committed under the civil liability framework.

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<sup>43</sup> *Imperial Tobacco*, *supra* note 38 at paras 84, 88, 90; *Montambault*, *supra* note 28 at paras 76-77.

<sup>44</sup> *Paradis Honey*, *supra* note 29 at para 137.

<sup>45</sup> *Imperial Tobacco*, *supra* note 38 at para 74; *Brown*, *supra* note 41 at 434; *Just*, *supra* note 41 at 1244-45; *Laurentide Motels*, *supra* note 41 at 722.

<sup>46</sup> *Imperial Tobacco*, *ibid* at para 72; *Holland*, *supra* note 41 at para 14; *Sibeca*, *supra* note 34 at para 19; *Cooper*, *supra* note 41 at para 38; *Lewis*, *supra* note 41 at para 12; *Brown*, *ibid* at 436-37; *Swinamer*, *supra* note 41 at 454-55; *Laurentide Motels*, *supra* note 41 at 722; *Just*, *supra* note 41 at 1244-45; *Kamloops*, *supra* note 41 at 55; *Baratt c Corporation of North Vancouver*, [1980] 2 RCS 418 at 428-29, 114 DLR (3d) 557; *Imperial Tobacco* (QC CA), *supra* note 41 at para 101; *Québec (Procureur général) c Deniso Lebel inc*, [1996] RJQ 1821 at 36-37, [1996] RRA 978 (QC CA) [*Deniso*]; *Hogg*, *supra* note 34 at 226, 228.

<sup>47</sup> **For a definition see** Art 1474 CCQ; *R v Canada Steamship Lines Ltd*, [1950] SCR 532 at 537, [1950] 4 DLR 703; *Audet c Transamerica Life Canada*, 2012 QCCA 1746 at para 90, JE 2012-1924; *Empire Cold Storage Co c Cie de volailles Maxi ltée*, [1995] RRA 846 at para 65, JE 95-1986 (QC CA); Jean-Louis Baudouin, Patrice Deslauriers et Benoît Moore, *La responsabilité civile, Volume 1 - Principes généraux*, 8th ed, (Cowansville, Que: Yvon Blais, 2014) at para 190 [Baudouin].

<sup>48</sup> *Hinse*, *supra* note 34 at para 53; *Imperial Tobacco*, *supra* note 38 at para 90; *Sibeca*, *supra* note 34 at paras 22-23; *Imperial Tobacco* (QC CA), *supra* note 41 at para 101; *Gosselin c Canada (Procureur général)*, 2008 QCCS 3559 at para 174, (CanLII) [*Gosselin*]; *Bernèche c Canada (Procureur général)*, 2007 QCCS 2945 at paras 83-84, 100, [2007] RJQ 1602 [*Bernèche*]; *Cilinger c Centre hospitalier de Chicoutimi*, [2004] RJQ 3083 at para 97, JE 2004-697 (QC CS) [*Cilinger*]; *Association pour le Lac Heney c Gestion Serge Lafrenière inc*, 1998 CarswellQue 2571 at para 31 (WL Can), JE 98-1676 (QC CS).

<sup>49</sup> *Montambault*, *supra* note 28 at para 74.

c) *Absent a qualified immunity, the Crown will be liable for any simple fault committed by its servants*

29. One who does not “abide by the rules of conduct incumbent on him, according to the circumstances, usage or law”, commits a fault.<sup>50</sup> A conduct is a fault if it displays a departure from the standard of care expected of a reasonable, prudent and diligent person in the same circumstances.<sup>51</sup>
30. To establish that the conduct of a decision-maker constitutes a fault, one must compare his conduct to the one of a similar reasonable, prudent and diligent decision-maker, placed in the same circumstances, using the same type of discretionary power and having the same degree of expertise.<sup>52</sup> Administrative decision-makers’ obligations include the duty to exercise discretionary powers lawfully and according to the duty of fairness.<sup>53</sup>

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<sup>50</sup> Art 1457 CCQ.

<sup>51</sup> Art 1457 CCQ; *R v Roy*, 2012 SCC 26 at para 13, [2012] 2 SCR 60; *Bou Malhab v Diffusion Métromédia CMR inc*, 2011 SCC 9 at para 24, [2011] 1 SCR 214; *St. Lawrence Cement Inc v Barrette*, 2008 SCC 64 at para 71, [2008] 3 SCR 392 [*St. Lawrence Cement*]; *Prud’homme*, *supra* note 37 at para 62; *Gill c Chélin*, 2015 QCCA 1280 at para 42, JE 2015-1342 [*Gil*]; *Montambault*, *supra* note 28 at para 85; Baudouin, *supra* note 47 at paras 161, 193; Louise Langevin, “Mythes et réalités de la personne raisonnable dans le livre des Obligations du CcQ” (2005) 46: 1-2 *C de D* 357; **in the case of doctors see** *Eady v Tenderenda*, [1975] 2 RCS 599 at 600-02, 51 DLR (3d) 79; *Thibault c Morneau*, 2004 CanLII 12384 (QC CQ) at para 13; *McGorka c Larocque*, 2014 QCCQ 8054 at para 68 (CanLII); *Lavoie c Khoury*, 2013 QCCQ 1585 at paras 29-30 (CanLII); *Boness c Jewish General Hospital*, 2013 QCCQ 13928 at para 20 (CanLII); **in the case of lawyers/notaries see** *Paré c Maille*, 2014 QCCQ 1251 at paras 22-26 (CanLII); *6385567 Canada Inc c Gagnon, Brunet, Avocats*, 2010 QCCA 1625 at paras 72-73 (CanLII); *Bélanger c Gestion André Houle Inc*, JE 2001-1538 at para 34, [2001] RRA 596 (QC CS); *Plante c Lafleur*, [1990] RRA 290 at paras 15-16, JE 90-571 (QC CA).

<sup>52</sup> Baudouin, *supra* note 47 at para 135; **see** *Montambault*, *supra* note 28 at para 98.

<sup>53</sup> *Mission Institution v Khela*, 2014 SCC 24 at para 82, [2014] 1 SCR 502 [*Khela*].

31. A decision-maker has the duty to exercise its statutory discretion in accordance with the purposes and policies underlying its grant.<sup>54</sup> Discretion should aim to promote the policies and object of the enabling statute.<sup>55</sup> When based on irrelevant grounds, a discretionary decision is illegal<sup>56</sup> and will constitute a fault if it departs from the conduct of a reasonable, prudent and diligent decision-maker.<sup>57</sup>
32. An administrative decision affecting the rights or interests of an individual triggers the application of the duty of fairness.<sup>58</sup> The content of the duty of fairness varies according to circumstances,<sup>59</sup> including whether or not the decision can be appealed from or re-examined,<sup>60</sup> its impact on an individual,<sup>61</sup> and the legitimate expectations regarding procedures.<sup>62</sup> Although the decision-maker has some discre-

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<sup>54</sup> See *Khela*, *ibid* at para 67; *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23 at para 46, [2010] 1 SCR 815 [*Criminal Lawyers*]; *Montréal (City) v Montreal Port Authority*, 2010 SCC 14 at para 33, [2010] 1 SCR 427; *Baker v Canada (Minister of Citizenship & Immigration)*, [1999] 2 SCR 817 at para 56, 174 DLR (4th) 193 [*Baker*]; *Roncarelli v Duplessis*, [1959] SCR 121 at 140, 16 DLR (2d) 689; *R v Secretary of State for the Home Department, ex parte Cheblak*, [1991] 2 All ER 319 at 322-23; Guy Régimbald, *Canadian Administrative Law*, 2nd ed, (Markam, Ont: LexisNexis, 2015) at 222-23 [Régimbald].

<sup>55</sup> *Oakwood Development Ltd v St. François Xavier (Rural Municipality)*, [1985] 2 SCR 164 at 74, 20 DLR (4th) 641; *Padfield v Minister of Agriculture, Fisheries and Food*, [1968] 1 All ER 694 at 1030-34 (HL Eng); Régimbald, *ibid* at 229.

<sup>56</sup> *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at 653, 24 DLR (4th) 44 [*Cardinal*]; *Prince George (City) v Payne* [1978] 1 SCR 458 at 463, 75 DLR (3d) 1; Régimbald, *ibid*.

<sup>57</sup> *Finney*, *supra* note 37 at para 31; *Montambault*, *supra* note 28 at para 82; *Deniso*, *supra* note 46 at 32; *Nkuzimana v Canada*, 2014 FC 736 at paras 38-39, 44, 247 ACWS (3d) 430.

<sup>58</sup> *Baker*, *supra* note 54 at para 20; *Cardinal*, *supra* note 56 at 653.

<sup>59</sup> *Moreau-Bérubé v New Brunswick*, 2002 SCC 11 at paras 74-75, [2002] 1 SCR 249; *Baker*, *ibid* at paras 21, 23-27; *Knight v Indian Head School Division No 19*, [1990] 1 SCR 653 at 682, 69 DLR (4th) 489; *Irvine v Canada (Restrictive Trade Practices Commission)*, [1987] 1 SCR 181 at 231, 41 DLR (4th) 429; *Cardinal*, *ibid* at 654.

<sup>60</sup> *Baker*, *ibid* at para 24.

<sup>61</sup> *Ibid* at para 25; *Kane v Board of Governors of the University of British Columbia*, [1980] 1 SCR 1105 at 1113, 110 DLR (3d) 311; *R v Higher Education Funding Council, ex parte Institute of Dental Surgery*, [1994] 1 All ER 651 (QB) at 667.

<sup>62</sup> *Baker*, *ibid* note 54 at para 26; *Qi v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 615 at para 8, 59 ACWS (3d) 1162; *Mercier-Néron v Canada (Minister of National Health and Welfare)* (1995), 98 FTR 36 at paras 15, 17, 57 ACWS (3d) 400; *Bendahmane v Canada (Minister of Employment and Immigration)*, [1989] 3 FC 16 at para 17, 15 ACWS (3d) 243 (FCA).

tion regarding its procedural choices,<sup>63</sup> an unfair decision-making process will constitute a fault if it departs from the conduct of a reasonable, prudent and diligent decision-maker.<sup>64</sup>

33. The Quebec Court of Appeal demonstrated in *Montambault* that such a framework is workable and coherent.<sup>65</sup> There are many similarities between the approach to judicial review and the one set out under article 1457 CCQ. Both require the court to take into account the context of each case and the specificities of the defendants and both recognize that reasonableness is, in most cases, a redeeming factor.<sup>66</sup>
34. Unlike what is suggested in *Paradis Honey*, private law rules must be used to resolve questions regarding the liability of public authorities.<sup>67</sup> While public law principles may be relevant and sometimes essential at civil law, particularly when

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<sup>63</sup> *Council of Canadians with Disabilities v VIA Rail Canada Inc*, 2007 SCC 15 at para 231, [2007] 1 SCR 650; *Baker*, *ibid* at para 27; *IWA v Consolidated-Bathurst Packaging Ltd*, [1990] 1 SCR 282 at 327, 68 DLR (4th) 524; *Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 245 at para 72, 246 ACWS (3d) 191; *Re:Sound v Fitness Industry Council of Canada*, 2014 FCA 48 at para 37, [2015] 2 FCR 170; *H Coyne & Sons Ltd v Yukon*, 2014 YKSC 13 at para 4, 239 ACWS (3d) 274; *UBCJA, Local 1985 v Saskatchewan (Labour Relations Board)*, 2011 SKQB 380 at par 150, 213 ACWS (3d) 1020.

<sup>64</sup> *Finney*, *supra* note 37 at paras 44-45; *Montambault*, *supra* note 28 at para 112.

<sup>65</sup> *Montambault*, *ibid* at paras 83-86; **see also** *Hinse*, *supra* note 34 at para 21; *CFIA*, *supra* note 34 at para 25; *Sibeca*, *supra* note 34 at para 16; *Finney*, *ibid* at para 40; *Prud'homme*, *supra* note 37 at para 31; *Imperial Tobacco (QC CA)*, *supra* note 41 at para 123.

<sup>66</sup> **In the context of administrative law** *see* *British Columbia (Securities Commission) v McLean*, 2013 SCC 67 at paras 37-70, [2013] 3 SCR 895; *Construction Labour Relations Assn (Alberta) v Driver Iron Inc*, 2012 SCC 65 at para 3, [2012] 3 SCR 405; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 9, [2011] 3 SCR 708; *New Brunswick (Board of Management) v Dunsmuir*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]; *Ayanru v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1017 at para 8, 235 ACWS (3d) 787; *Li v Canada (Minister of Citizenship & Immigration)*, 2009 FC 623 at para 28, [2010] 2 FCR 467; *Lymburner v Nova Scotia (Minister of Health and Wellness)*, 2016 NSSC 23 at paras 54-56, 2016 CarswellNS 21(WL Can); **in the context of civil law** *see* *St. Lawrence Cement*, *supra* note 51 at para 34; *Prud'homme*, *ibid* at para 62; *Gil*, *supra* note 51 at para 43; *Trocchia c Dea*, 2003 CarswellQue 4958 at para 12 (WL Can), EYB 2003-39846 (QC CS); *Germain c Restaurants McDonald's du Canada ltée*, JE 96-424 at paras 17-18, [1996] RRA 184 (QC CS); *Paquette c Fex*, 2015 QCCQ 12854 at para 32, EYB 2015-260230; *Lowe c Plaisance*, 2015 QCCQ 11835 at paras 54-55, EYB 2015-259721.

<sup>67</sup> *Paradis Honey*, *supra* note 29 at paras 127-31.

establishing the duties of a certain administrative decision-maker in specific circumstances, private law cannot, and should not, be completely set aside in favour of public law tools even when dealing with civil law claims against a public authority. The *Crown Liability and Proceedings Act* is clear: private law rules apply in civil actions against the Crown.<sup>68</sup> This approach is also consistent with the principle of bijuralism put forward by the Constitution.<sup>69</sup>

**d) *If injury results from the fault, the Crown is liable for damages***

35. The injury claimed must be direct and certain.<sup>70</sup> Adequate causation is established when the damages are the logical, direct and immediate consequences of the fault.<sup>71</sup>

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<sup>68</sup> *Crown Liability Act*, *supra* note 34, s 3(a).

<sup>69</sup> **Regarding Canadian bijuralism see:** *Quebec Act, 1774* (UK), 14 Geo III, c 83, reprinted in RSC 1985, Appendix II, No 2, s 8; *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, s 92 (13); *Federal Law-Civil Law Harmonization Act, No 1*, SC 2001, c 4, Preamble; *Schreiber v Canada (Attorney General)*, 2002 SCC 62 at paras 69-71, 216 DLR (4th) 513; *Salaberry-de-Valleyfield (Ville) c Lavigne*, 2014 QCCA 937 at paras 24, 27, JE 2014-929; *House of Commons Debates*, 37<sup>th</sup> Parl, 1<sup>st</sup> Sess, No 56 (7 May 2001) at 1205 (Hon Anne McLellan); Lionel A Levert, “La cohabitation du bilinguisme et du bijuridisme dans la législation fédérale canadienne: mythe ou réalité ?” (2000) 3:1 RCLF 127 at 130-33; **regarding the distinction between Crown liability in Quebec and other provinces see:** *Crown Liability Act*, *ibid*; *Hinse*, *supra* note 34 at paras 157-59; *CFIA*, *supra* note 34 at para 25; *Imperial Tobacco* (QC CA), *supra* note 41 at para 123.

<sup>70</sup> *Infineon Technologies AG v Option consommateurs*, 2013 SCC 59 at para 149, [2013] 3 SCR 600; Baudouin, *supra* note 47 at paras 330-66.

<sup>71</sup> Arts 1457, 1607 CCQ; *Hinse*, *supra* note 34 at para 132; *St. Lawrence Cement*, *supra* note 51 at para 21; *Prud’homme*, *supra* note 37 at para 32; *Quebec (Public Curator) v Syndicat national des employés de l’hôpital St-Ferdinand*, [1996] 3 RCS 211 at para 64, 138 DLR (4th) 577; *Parrot v Thompson et al*, [1984] 1 SCR 57 at 71, 23 ACWS (2th) 499; *Volkert v Diamond Truck Co*, [1940] SCR 455 at 458, [1940] 2 DLR 673; Baudouin, *ibid* at paras 330-66, 663.

**II. *Ms. Beaulac must be awarded damages for the injury she suffered as a result of being illegally and unfairly denied a Press Pass***

**a) *The decision to deny Ms. Beaulac a Press Pass is not a true policy decision subject to Crown immunity***

36. Denying Ms. Beaulac a Press Pass is the epitome of operational decision-making. It is an individualized application of established policies and criteria to a set of facts. In itself, it is not motivated by broader policy concerns. It is not subject to Crown immunity.

**b) *The Committee committed multiple faults as it wrongfully rejected Ms. Beaulac's application and denied her due process***

37. The Committee denied Ms. Beaulac a Press Pass based on the allegedly purely satirical nature of her blog<sup>72</sup> and failed to inform her of the changes to the applicable criteria.<sup>73</sup> Nothing in the evidence suggests that her application was initially rejected on the basis of her language.

**(i) *The decision to deny Ms. Beaulac a Press Pass was unlawful and constitutes a fault since it solely relied on a non-existent criterion banning satirical content***

38. A reasonable and prudent decision-maker would not have concluded that banning political satire was a logical step required to improve Canadians' understanding of the political process and achieve more diverse electoral coverage.<sup>74</sup> Political satire improves younger generations' participation in the electoral process and understanding of various political issues. It encourages people to seek out additional

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<sup>72</sup> *Beaulac v R, FC, supra* note 1 at para 22.

<sup>73</sup> *Ibid* at paras 18-19.

<sup>74</sup> *Ibid* at paras 16, 19.



news information from traditional sources and follow the course of political campaigns.<sup>75</sup>

39. In any event, the Committee mistakenly qualified Ms. Beaulac's blog as purely satirical.<sup>76</sup> It is apparent from the Committee's terse statement following Ms. Beaulac's request for re-consideration that the real reason for denying her a Press Pass is the allegedly "purely satirical" content of her blog.<sup>77</sup> On the contrary, the evidence shows that Ms. Beaulac's blog has, "at times", a humorous and satirical bent.<sup>78</sup> The Federal Court's finding to that effect is not an overriding and palpable error.

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<sup>75</sup> Hoon Lee & Nojin Kwak, "The Affect Effect of Political Satire: Sarcastic Humor, Negative Emotions, and Political Participation" (2014) 17:3 MC&S 307 at 310-15, 322; Dannagal G Young, "Lighten up: How Satire Will Make American Politics Relevant Again" (2013) 52:2 Columbia J Rev 26 at 27-32; Amy B Becker & Don J Waisanen, "From Funny Features to Entertaining Effects: Connecting Approaches to Communication Research on Political Comedy" (2013) 13:3 Rev Comm 161 at 169-70; Amy B Becker, "Political Humor as Democratic Relief? The Effects of Exposure to Comedy and Straight News on Trust and Efficacy" (2011) 19:5 Atl J Comm 235 at 236, 238-39, 246-48; Dannagal G Young & Lindsay Hoffman, "Satire, Punch Lines, and the Nightly News: Untangling Media Effects on Political Participation" (2011) 28:2 Commun Res Rep 159 at 161, 165-66; Paul Brewer & Xiaoxia Cao, "Late Night Comedy Television Shows as News Sources: What the Polls Say" in Jody C Baumgartner & Jonathan S Morris, eds, *Laughing Matters: Humor and American Politics in the Media Age* (New York: Routledge, 2008) 263 at 263-78; Paul R Brewer & Xiaoxia Cao, "Political Comedy Shows and Public Participation in Politics" (2008) 20:1 Int J Public Opin Res 90 at 90-91, 96-97; Xiaoxia Cao, "Political Comedy Shows and Knowledge about Primary Campaigns: The Moderating Effects of Age and Education" (2008) 11:1 MC&S 43 at 44-47, 58-60; Dannagal Goldthwaite Young & Lauren Feldman, "Late-Night Comedy as a Gateway to Traditional News: An Analysis of Time Trends in News Attention Among Late-Night Comedy Viewers During the 2004 Presidential Primaries" (2008) 25:4 Polit Commun 401 at 401-06, 416-17; Lance R Holbert et al, "Primacy Effects of The Daily Show and National TV News Viewing: Young Viewers, Political Gratifications, and Internal Political Self-Efficacy" (2007) 51:1 J Broadcast Electron Media 20 at 20-23, 32-35; Jody C Baumgartner & Jonathan S Morris, "The Daily Show Effect: Candidate Evaluations, Efficacy, and American Youth", (2006) 34:3 Am Polit Res 341 at 344, 361-63; Michael Xenos, Patricia Moy & Verena Hess, "Communication and Citizenship: Mapping the Political Effects of Infotainment" (2005) 8:2 MC&S 111 at 113, 123-26; Stephen R Schmidt, "The Humour Effect: Differential Processing and Privileged Rretrieval" (2002) 10:2 Mem 127 at 127-31, 135-37; Alan R Williams & Stephen R Schmidt, "Memory for Humorous Cartoons" (2001) 29:2 Mem Cognit 305 at 305-06, 310-11; Stephen R Schmidt, "Effects of Humor on Sentence Memory" (1994) 20:4 J Exp Psychol Learn Mem Cogn 953 at 964-65; Charles S Gulas & Marc G Weinberger, "The Impact of Humor in Advertising: A Review", (1992) 21:4 J Advert 35 at 56-57.

<sup>76</sup> *Beaulac v R*, FC, *supra* note 1 at para 22.

<sup>77</sup> *Ibid* at para 52.

<sup>78</sup> *Ibid* at para 13.

40. The Committee's decision is based on none of the established criteria in effect at the time of Ms. Beaulac's application, or even at the time of rendering the decision. For instance, the quality of Ms. Beaulac's coverage, commended multiples times by colleagues and politicians, and her significant readership throughout the franco-phone communities across Canada, were at no point considered by the Committee.<sup>79</sup> The Committee completely ventured outside the limits of its discretion.<sup>80</sup>

**(ii) *The Committee did not inform Ms. Beaulac of the changes to its policy and criteria***

41. Ms. Beaulac is owed a stringent duty of fairness. The decision to deny her a Press Pass has major financial repercussions. As a political journalist, Ms. Beaulac's capacity to write interesting articles and make a living is inextricably linked to her ability to access genuine and exclusive information. Furthermore, the Committee's decision is without appeal<sup>81</sup> and will not even be reconsidered.<sup>82</sup>

42. This stringent duty of fairness required the Committee to inform Ms. Beaulac of any changes to policies or criteria after the filing of her application, allowing her to update it accordingly.<sup>83</sup>

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<sup>79</sup> *Beaulac v R*, *supra* note 1 at para 14.

<sup>80</sup> *Imperial Tobacco*, *supra* note 38 at para 72; *Montambault*, *supra* note 28 at paras 81-82.

<sup>81</sup> *Beaulac v R*, FC, *supra* note 1 at para 9.

<sup>82</sup> *Ibid* at para 22.

<sup>83</sup> **Regarding the duty to inform see** *Thorne v Canada (Minister of employment & Immigration)*, 1993 CarswellNat 413 at para 8 (WL Can), 62 FTR 124; *Haghighi v Canada (Minister of Citizenship and Immigration)*, [2000] 4 FC 407 at para 37, 189 DLR (4th) 268; *Muliadi v Canada (Minister of Employment & Immigration)*, [1986] 2 FC 205 at para 17, 18 Admin LR 243 (FCA); *Chénier v SCEP*, 2011 CIRB 596 at para 38, 2011 CarswellNat 6278 (WL Can).

43. The Committee knowingly or negligently decided not to inform Ms. Beaulac. The Committee should have informed all applicants by email. This procedure would have posed no material and time constraints on the Committee. Ms. Beaulac's situation illustrates the importance of this simple procedure and the impact of the failure to use it. Had she been informed by email, Ms. Beaulac would have had a chance to update her application.

**c) *Ms. Beaulac lost profits as a result of being wrongfully denied a Press Pass***

44. Ms. Beaulac is a renowned journalist with a wide readership in Canada. She was granted a Press Pass to cover the 2008 and 2011 elections.<sup>84</sup> On a balance of probabilities,<sup>85</sup> Ms. Beaulac would have received a Press Pass but for the Committee's faults.

45. Press Passes have a significant pecuniary value.<sup>86</sup> Journalists who hold them benefit from exposure to party leaders and see their readership or viewership increase as a consequence.<sup>87</sup>

46. Having been denied close access to party leaders, Ms. Beaulac was prevented from writing a book and articles presenting an up-close and unique viewpoint on the 2015 federal election. As a direct and logical consequence, she lost a publishing deal and her blog readership dropped well below average, causing several advertis-

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<sup>84</sup> *Beaulac v R*, FC, *supra* note 1 at para 14.

<sup>85</sup> Art 2804 CCQ.

<sup>86</sup> *Beaulac v R*, FC, *supra* note 1 at para 11.

<sup>87</sup> *Ibid.*

ers to refuse to renew their contracts with her website.<sup>88</sup> There is no overriding and palpable error in this finding of fact.

47. The Federal Court did not determine the amount of the damages suffered by Ms. Beaulac. The matter must be returned to the trial judge for determination.<sup>89</sup>

### **III. Conclusion**

48. The Committee's operational decision is not immune from liability. The Committee made two faults: it denied Ms. Beaulac a Press Pass based on a non-existent criterion banning satire, and it did not notify her regarding the changes made to the policies and criteria, which prevented her from updating her application. This caused Ms. Beaulac to suffer an injury, the exact value of which is yet to be determined by the trial court. The Federal Court committed an overriding and palpable error. The Federal Court of Appeal rightly intervened.

## **C. THE UNJUSTIFIED DECISION TO DENY MS. BEAULAC A PRESS PASS VIOLATES HER FREEDOM OF EXPRESSION**

### **I. The liability of the federal Crown for a breach of freedom of expression**

49. The *Charter* applies to legislation, common law principles, and actions of a delegated decision-maker.<sup>90</sup> A court may award damages under section 24(1) of the

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<sup>88</sup> *Beaulac v R*, *supra* note 1 at para 23.

<sup>89</sup> *R v Beaulac*, FCA, *supra* note 27 at para 31.

<sup>90</sup> *Charter*, *supra* note 22, s 32; *Doré*, *supra* note 25 at para 28; *PHS Community Services Society v Canada (Attorney General)*, 2011 SCC 44 at para 82, [2011] 3 SCR 134 [*PHS*]; *Multani v Marguerite-Bourgeoys (Commission scolaire)*, 2006 SCC 6 at para 22, [2006] 1 SCR 256 [*Multani*]; *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 35, [2000] 2 SCR 307; *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 21, 151 DLR (4th) 577 [*Eldridge*]; *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at paras 68-69, 126 DLR (4th) 129; *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at para 71, 120 DLR (4th)

*Charter* if a claimant establishes (1) a *Charter* violation and (2) that damages are an appropriate and just remedy.<sup>91</sup>

a) ***The claimant must establish a violation of his freedom of expression***

50. To establish a limitation to freedom of expression, one must demonstrate (1) that the restricted activity aims to convey a meaning related to the values underlying the protection of free expression, such as the pursuit of truth and participation in social and political decision-making, and (2) that the effect of the government action directly restricts the form or the content of expression.<sup>92</sup>

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12 [*Dagenais*]; *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038 at 1077-78, 59 DLR (4th) 416 [*Slaight*]; *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 at 574, 33 DLR (4th) 174 [*Dolphin Delivery*]; *Bank of British Columbia v Canadian Broadcasting Corp*, 126 DLR (4th) 644 at paras 53-54, [1995] BCJ No 1640.

<sup>91</sup> *Vancouver (City) v Ward*, 2010 SCC 27 at paras 23-24, [2010] 2 SCR 28 [*Ward*].

<sup>92</sup> *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 931, 967-77, 58 DLR (4th) 577 [*Irwin Toy*]; **see also** *Criminal Lawyers*, *supra* note 54 at paras 32-34; *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 at paras 27-30, [2009] 2 SCR 295 [*Greater Vancouver*]; *Baier v Alberta*, 2007 SCC 31 at para 19, [2007] 2 SCR 673 [*Baier*]; *Montréal (City) v 2952-1366 Québec inc*, 2005 SCC 62 at paras 56-57, [2005] 3 SCR 141 [*Montréal v 2952-1366*]; *R v Sharpe*, 2001 SCC 2 at paras 21-23, [2001] 1 SCR 45 [*Sharpe*]; *Libman v Québec (Attorney General)*, [1997] 3 SCR 569 at paras 28-33; 151 DLR (4th) 385; *Ross v New Brunswick School District No 15*, [1996] 1 SCR 825 at paras 60-65, 133 DLR (4th) 1 [*Ross*]; *Ramsden v Peterborough (City)*, [1993] 2 SCR 1084 at 1096, 106 DLR (4th) 233; *R v Zundel*, [1992] 2 SCR 731 at 752-754, 95 DLR (4th) 202; *R v Keegstra*, [1990] 3 SCR 697 at 725-30, [1991] 2 WWR 1 [*Keegstra*]; *Rocket v Royal College of Dental Surgeons of Ontario*, [1990] 2 SCR 232 at 241-42, 71 DLR (4th) 68; *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712 at para 57, 54 DLR (4th) 577 [*Ford*] (on the values of freedom of expression); *Québec (Procureur général) c Arnold*, 2015 QCCS 3369 at para 68, JE 2015-1366 [*Arnold*]; *Garbeau c Montréal (Ville de)*, 2015 QCCS 5246 at para 96, JE 2015-1850; *Crouch v Snell*, 2015 NSSC 340 at paras 100-09, 2015 CarswellNS 995 (WL Can) [*Crouch*]; *Goddard v Day*, 2000 ABQB 942 at para 34, 276 AR 279 (enunciation of values); **regarding limitations to freedom of expression (violence and location)** *see R v Khawaja*, 2012 SCC 69 at paras 67, 71, [2012] 3 SCR 555; *Baier*, *ibid* at para 20; *Sharpe*, *ibid* at para 22; *Montréal c 2952-1366*, *ibid* at para 79; *Keegstra*, *ibid* at 729; *Irwin Toy*, *ibid* at 970; *Dolphin Delivery*, *supra* note 90 at 588.

**(i) *Restricting the right to gather news and information limits freedom of expression***

51. Freedom of expression should be liberally interpreted in order to fulfil the purpose of the guarantee and to secure the full benefit of the protection.<sup>93</sup>
52. Freedom of expression protects more than everyone's right to articulate words.<sup>94</sup> The right to gather news and information without undue governmental interference is included in the freedom of expression,<sup>95</sup> provided it is a necessary precondition of meaningful expression on the function of democracy.<sup>96</sup> The fundamental nature of the right to gather news and information is also recognized in international law.<sup>97</sup>

**(ii) *A restriction to the right to gather news and information is a violation of freedom of expression unless it is justified under section 1 of the Charter***

53. The *R v Oakes*<sup>98</sup> analysis is a proven framework that allows for an efficient, coherent and pragmatic application of section 1 of the *Charter* that has been applied

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<sup>93</sup> *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at para 117, 18 DLR (4th) 321; *Irwin Toy*, *ibid* at 970.

<sup>94</sup> *See Irwin Toy*, *ibid* at 968.

<sup>95</sup> *Canadian Broadcasting Corp v Lessard*, [1991] 3 RCS 421 at 429-30, 67 CCC (3d) 517; **see also** *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25 at para 79, [2011] 2 SCR 306; *Canada Broadcasting Corp v New Brunswick (Attorney General)*, [1996] 3 SCR 480 at para 24, 110 CCC (3d) 193.

<sup>96</sup> *Criminal Lawyers*, *supra* note 54 at para 36; *R v Andrews*, [1988] 28 OAC 161 at para 52, 65 OR (2d) 161.

<sup>97</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47, art 19(2) (entered into force 23 March 1976); *American Convention on Human Rights "Pact of San Jose"*, 22 November 1969, 1144 UNTS 145, art 13 (entered into force 18 July 1978); *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 UNTS 217, art 9 (entered into force 28 December 1988); *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Eur TS No 5, 213 UNTS 221, art 10 (entered into force 3 September 1953).

<sup>98</sup> [1986] 1 SCR 103, 26 DLR (4th) 200.

multiple times to discretionary administrative decisions engaging *Charter* rights or freedoms.<sup>99</sup>

54. In order to justify the infringement of a *Charter* right or freedom under the *Oakes* framework, the federal Crown must demonstrate that the decision (1) relates to concerns that are pressing and substantial, (2) is rationally connected to the statutory objectives, (3) constitutes a minimal impairment to the right in question and (4) that its effects are proportional to the objectives.<sup>100</sup>
55. The *Doré* approach, which applies the reasonableness standard of review when *Charter* interests are implicated, must be rejected.<sup>101</sup> It allows for an administrative decision to be considered reasonable even though, for example, it does not minimally impair on *Charter* rights. This grants undue deference towards administrative decision-makers.<sup>102</sup> Constitutional issues are outside their sphere of specialization and are of central importance to the legal system as a whole; judicial reviews on these matters must always occur on a standard of correctness.<sup>103</sup> Administrative

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<sup>99</sup> *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at paras 113-14, [2015] 1 SCR 613 (McLachlin CJC and Moldaver J, dissenting); *PHS*, *supra* note 90 at paras 137-40; *Multani*, *supra* note 90 at paras 24-30; *R v Mentuck*, 2001 SCC 76 at para 27, [2001] 3 SCR 442; *United States of America v Burns*, 2001 SCC 7 at para 134, [2001] 1 SCR 283; *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 at paras 101, 143, [2000] 2 SCR 1120; *Eldridge*, *supra* note 90 at paras 84-85; *Ross*, *supra* note 92 at paras 77-78; *Dagenais*, *supra* note 90 at 887-89; *Stoffman v Vancouver General Hospital*, [1990] 3 SCR 483 at 548, [1990] SCJ No 125; *Slaight*, *supra* note 90 at 1050.

<sup>100</sup> *Charter*, *supra* note 22, s 1; *Greater Vancouver*, *supra* note 92 at para 48.

<sup>101</sup> *Doré*, *supra* note 25 at paras 7, 45.

<sup>102</sup> Alexander Pless, “Judicial Review and the Charter from *Multani* to *Doré*” in Graham Mayeda & Peter Oliver, eds, *Principles and Pragmatism-Essays in Honour of Louise Charron* (Markham, Ont: LexisNexis, 2014) 293 at 317-18 [Pless].

<sup>103</sup> *Dunsmuir* *supra* note 66 at para 58; *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at para 62, [2003] 3 SCR 77; *Nova Scotia (Workers’ Compensation Board) v Martin*, 2003 SCC 54 at para 31, [2003] 2 SCR 504; *Barrie Public Utilities v Canadian Cable Television Assn*, 2003 SCC 28 at para 66, [2003] 1 SCR 476; *Westcoast Energy Inc v Canada (National Energy Board)*, [1998] 1 SCR 322 at

law principles cannot supersede rights and freedoms guaranteed under the Constitution.<sup>104</sup>

56. The *Doré* framework unconstitutionally shifts the burden of justification on the victim of a *Charter* infringement. The onus to demonstrate that an administrative decision is unreasonable lies upon the party seeking judicial review.<sup>105</sup> However, section 1 of the *Charter* clearly states, through the use of the word “demonstrably”, that the onus of justification is on the party seeking to limit the rights and freedom it protects.<sup>106</sup>

**b) *The claimant must demonstrate that awarding damages is an appropriate and just remedy***

57. A functional approach must be applied to establish whether damages are an appropriate and just remedy.<sup>107</sup> An appropriate and just remedy will vindicate the rights

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para 40, 156 DLR (4th) 456; *Cuddy Chicks Ltd v Ontario (Labour Relations Board)*, [1991] 2 SCR 5 at 16-17, 81 DLR (4th) 121; **see also** *Multani*, *supra* note 90 at para 20.

<sup>104</sup> *Charter*, *supra* note 22, s 52(1).

<sup>105</sup> *Khela*, *supra* note 53 at para 40; *May v Ferndale Institution*, 2005 SCC 82 at para 71, [2005] 3 SCR 809; *Chaudhary v Canada (Public Safety and Emergency Preparedness)*, 2015 ONCA 700 at paras 95-96, 390 DLR (4th) 598; *Taylor-Baptiste v OPSEU*, 2015 ONCA 495 at para 42, 255 ACWS (3d) 954; Pless, *supra* note 102 at 308-10; **see also** *Peel Law Association v Pieters*, 2013 ONCA 396 at para 132, 363 DLR (4th) 598.

<sup>106</sup> *Charter*, *supra* note 22, s 1; *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 at para 139, [2015] 1 SCR 3; *Multani* *supra* note 90 at para 43; *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713 at 768, 35 DLR (4th) 1; *Oakes*, *supra* note 98 at para 66; *Hunter et al v Southam Inc*, [1984] 2 SCR 145 at 169, 11 DLR (4th) 641; Pless, *supra* note 102 at 308-10; **see also** *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 134 [2009] 2 SCR 567; *Health Services and Support - Facilities Subsector Bargaining Assn. v British Columbia*, 2007 SCC 27 at para 139, [2007] 2 SCR 391; *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139 at 243-44, 77 DLR (4th) 385.

<sup>107</sup> *Ward*, *supra* note 91 at para 24; *Mills v R*, [1986] 1 SCR 863 at 881-83, [1986] DLQ 438; **for a similar approach in liability actions see** *Andrews v Grand & Toy Ltd*, [1978] 2 SCR 229 at 262-63, 83 DLR (3th) 452.



and freedoms of the claimants through legitimate means fair to the party against whom the order is made, while invoking the function and powers of the court.<sup>108</sup>

58. Damages for violation of a *Charter* right are an appropriate and just remedy if they compensate for a loss, vindicate a right or deter future violations of a right.<sup>109</sup>

## II. *The Committee unduly restricted Ms. Beaulac's freedom of expression*

### a) *Denying Ms. Beaulac close access to party leaders restricts her right to gather news and information*

59. Journalists access to party leaders during an election is a necessary precondition of meaningful expression on the function of democracy and is protected under section 2(b) of the *Charter*.
60. The electoral process is a cornerstone of Canadian democracy<sup>110</sup> through which the average citizen takes part in the open debate that animates the determination of social policy.<sup>111</sup>

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<sup>108</sup> *Ward*, *ibid* at para 20; *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at paras 55-58, [2003] 3 SCR 3 [*Doucet-Boudreau*].

<sup>109</sup> *Ward*, *ibid* at paras 21, 25; *Henry v British Columbia (Attorney General)*, 2015 SCC 24 at paras 116-17, [2015] 2 SCR 214 [*Henry*]; *Bérubé c Québec (Ville)*, 2014 QCCQ 8967 at para 69, JE 2014-1823 [*Bérubé*]; *Gilbert v Canada (Attorney General)*, 2014 NBBR 194 at para 48, 245 ACWS (3d) 946 [*Gilbert*].

<sup>110</sup> *Harper v Canada (Attorney General)*, 2004 SCC 33 at paras 1, 26, [2004] 1 SCR 827 [*Harper*]; *Thomson News Paper Co v Canada (Attorney General)*, [1998] 1 SCR 877 at para 24, 159 DLR (4th) 385 [*Thomson News Paper*]; *Harvey v New Brunswick* [1996] 2 SCR 876 at para 38, 137 DLR (4th) 385; *Haig v R*, [1993] 2 SCR 995 at para 109, 105 DLR (4th) 577; *Fraser v Public Service Staff Relation Board*, [1985] 2 SCR 455 at para 20, 23 DLR (4th) 122 [*Fraser*]; *Reform Party of Canada v Canada (Attorney General)*, 123 DLR (4th) 366 at para 186, 53 ACWS (3d) 1243 (AB QB) [*Reform Party*]; *Devinder Shory Campaign v Richard*, 301 DLR (4th) 673 at, para 16 [2009] AWLD 1664; *Jong v Ontario (Attorney General)*, 287 DLR(4th) 90 at para 24, 88 OR (3d) 335 (ON SC) [*Jong*]; *Canada (Treasury Board) v Professional Institute of the Public Service of Canada*, 2009 CarswellNat 3470 at para 140 (WL Can), 2009 PSLRB 120; *Australian Capital Television Pty Ltd & New South Wales v Commonwealth*, [1992] HCA 45 at para 39, 177 CLR 106.

61. Few voters directly participate in the electoral process and fewer will meet party leaders in person. Without information, citizens' ability to make enlightened political decisions and participate meaningfully in public life is undermined and the right to vote, which is protected under section 3 of the *Charter*, loses its genuine strength and significance.<sup>112</sup>
62. For most people, media represent the only source of information regarding the developing political realities in the country.<sup>113</sup> Journalists like Ms. Beaulac are key members of our society who facilitate popular participation in the political decision-making process. Their access to party leaders during an electoral campaign is a matter of public importance.<sup>114</sup> The denial of a close access to party leaders deprived Ms. Beaulac's large readership of her meaningful insights into Canadian politics, which undermines the underlying values of freedom of expression.
63. This is the basis of Ms. Beaulac's *Charter* claim. She is not seeking a positive entitlement to a government action,<sup>115</sup> for a broader access to the program,<sup>116</sup> or for the

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<sup>111</sup> *Harper, ibid* at para 1; *Figueroa v Canada (Attorney General)*, 2003 SCC 37 at para 29, [2003] 1 SCR 912 [*Figueroa*].

<sup>112</sup> *Harper, ibid* at para 17; *Figueroa v Canada, ibid* at para 19; *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326 at 1339-40, 64 DLR (4th) 577 [*Edmonton Journal*]; *Reform Party, supra* note 110 at para 46; *Jong, supra* note 110 at para 25; *Belczowski v R*, [1991] 3 FC 151 at para 25, 6 CRR (2d) 345; *Dixon v British Columbia (Attorney General)*, 59 DLR (4th) 247 at para 40, [1989] 4 WWR 393; *My Vote Counts NPC v Speaker of the National Assembly and Others*, [2015] ZACC 31 at paras 38-41 (S Afr Const Ct) [*My Vote Counts*].

<sup>113</sup> Donald L Shaw & Maxwell E McCombs, "The Agenda-Setting Function of Mass Media", (1972) 36:2 POQ 176 at 185.

<sup>114</sup> *Edmonton Journal, supra* note 112 at 1337; *Beaulac v R, FC, supra* note 1 at para 1.

<sup>115</sup> *Baier, supra* note 92 at para 30.

<sup>116</sup> See *Greater Vancouver, supra* note 92 at para 32.

program to be declared constitutionally invalid.<sup>117</sup> She is claiming *Charter* damages for having been unduly denied close access to party leaders. This was decided on the basis of the allegedly purely satirical nature of her blog, an inexistent criterion, and infringes her right to gather news and information.

**b) *The limit to Ms. Beaulac's freedom of expression is not justified under section 1 of the Charter***

64. The objectives underlying the Press Pass program are pressing and substantial concerns. However, the decision to deny Ms. Beaulac a Press Pass based on the allegedly purely satirical nature of her blog<sup>118</sup> is not rationally connected to these objectives. Satire and humor have been known to engage social debate and ease understanding of complex issues.<sup>119</sup>
65. The impairment to Ms. Beaulac's freedom of expression is not minimal. Instead of imposing an outright ban on satirical publications based on an inexistent criterion, the Committee should individually assess every applicant's contribution to Canadians' understanding of the political process.
66. The negative effects of the decision to deny Ms. Beaulac a Press Pass outweigh any beneficial purposes. The Committee's decision deprived Ms. Beaulac's Canada-wide readership of her praised electoral coverage.<sup>120</sup> It also diminished the variety

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<sup>117</sup> *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62 at para 22, [2010] 3 SCR 585; *Schachter v Canada*, [1992] 2 SCR 679 at 720, 93 DLR (4th) 1.

<sup>118</sup> *Beaulac v R*, FC, *supra* note 1 at para 22.

<sup>119</sup> See note 75 on the benefits of satire; *Hustler Magazine v Falwell*, 485 US 46 at 54 (1988).

<sup>120</sup> *Beaulac v R*, *supra* note 1 at para 14.

of quality news sources appealing to young francophone voters across Canada<sup>121</sup>. These negative effects are of greater consequences in the context of an electoral process.

### III. *Compensatory and punitive damages are an appropriate and just remedy*

67. Compensatory damages are an appropriate and just remedy for Ms. Beaulac's losses<sup>122</sup> that she suffered as a consequence of her being unduly denied a Press Pass. The nature of those losses has been addressed above.<sup>123</sup>
68. Punitive damages are warranted in this case to vindicate Ms. Beaulac's rights and to deter the Committee from violating journalists' right to gather news and information. Administrative bodies like the Committee must be made aware that their decisions cannot violate *Charter* rights.<sup>124</sup> The Committee's decision disparages freedom of expression, a cornerstone of democracy, and must be met with a deterring sanction. The Federal Court's decision to award Ms. Beaulac \$5,000 is not fraught with an overriding and palpable error.

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<sup>121</sup> *Beaulac v R*, FC, *supra* note 1 at para 14; **see also** note 75 on benefit of satire.

<sup>122</sup> *Ward*, *supra* note 91 at para 53; *Henry*, *supra* note 109 at para 34; *de Montigny v Brossard (Succession)*, 2010 SCC 51 at paras 51-52, [2010] 3 SCR 64; *Pearson v R*, 2007 FCA 380 at para 6, 162 ACWS (3d) 598; *Moodie v Canada (Ministry of National Defence)*, 2008 FC 1233 at para 31, 172 ACWS (3d) 626; *Bérubé*, *supra* note 109 at para 69; *Gilbert*, *supra* note 109 at para 41; Errol Mendes and Stéphane Beaulac, *Canadian Charter of Rights and Freedoms*, 5<sup>th</sup> ed (Markham, Ont: LexisNexis, 2013) at 1162.

<sup>123</sup> **See** para 28 of this *factum*.

<sup>124</sup> *Ward*, *supra* note 91 at para 56; *Mackin v New Brunswick (Minister of Finance)*, 2002 SCC 13 at para 79, [2002] 1 SCR 405.

#### **IV. Conclusion**

69. The Committee's decision unduly interferes with Ms. Beaulac's right to gather news and information. It is not saved by section 1 of the *Charter* and constitutes a violation of her freedom of expression. Compensatory and punitive damages are an appropriate and just remedy in this case. The Federal Court did not commit any palpable and overriding error in awarding Ms. Beaulac \$5,000. The Federal Court of Appeal should not have intervened on this point.

#### **PART IV: ORDER SOUGHT AND NAMES OF COUNSEL**

70. The decision to deny Ms. Beaulac a Press Pass is the cause of Ms. Beaulac's financial losses and the very foundation of the current damages claim. The decision rendered by the Committee is unlawful and unreasonable and resulted in Ms. Beaulac's loss of readership, advertisement revenues and publishing contract. The decision to deny Ms. Beaulac a Press Pass also violates her right to freedom of expression allowing her to obtain compensatory and punitive damages under section 24(1) of the *Charter*.

71. Ms. Beaulac requests that the Canadian Court of Justice:

DISMISS the appeal regarding the Crown's liability claim;

REMIT the matter to the Federal Court for determination of Ms. Beaulac's damages resulting from her loss of profits and any additional amount that Ms. Beaulac may prove, with interests at the legal rate plus the additional indemnity under section 1619 CCQ;

ALLOW the cross-appeal regarding the violation of Ms. Beaulac's freedom of expression and RESTORE the Federal Court's award of \$5,000;

THE WHOLE, with costs throughout.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

February 8, 2016

Julien Dubé-Sénécal

Andréanne Martel

COUNSEL FOR THE RESPONDENT /  
APPELLANT ON CROSS-APPEAL

## ANNEX A — LIST OF AUTHORITIES REFERRED TO

### LEGISLATION

- Canada Elections Act*, SC 2000, c 9.  
*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11.  
*Civil Code of Québec*, CQLR c C-1991.  
*Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.  
*Crown Liability and Proceedings Act*, RSC 1985, c C-50.  
*Federal Law–Civil Law Harmonization Act, No. 1*, SC 2001, c 4.  
*Quebec Act, 1774* (UK), 14 Geo III, c 83, reprinted in RSC 1985, Appendix II, No 2.

### INTERNATIONAL TREATIES

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*American Convention on Human Rights "Pact of San Jose, Costa Rica"*, 22 November 1969, 1144 UNTS 145, (entered into force 18 July 1978).  
*European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).  
*International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

### JURISPRUDENCE: CANADA

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*Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567.  
*Andrews v Grand & Toy Ltd*, [1978] 2 SCR 229, 83 DLR (3d) 452.  
*Association pour le Lac Heney c Gestion Serge Lafrenière inc*, JE 98-1676, 1998 CarswellQue 2571 (WL Can) (QC CS).  
*Audet c Transamerica Life Canada*, 2012 QCCA 1746, JE 2012-1924.  
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*Baker v Canada (Minister of Citizenship & Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193.  
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*Baratt v Corporation of North Vancouver*, [1980] 2 SCR 418, 114 DLR (3d) 557.  
*Barrie Public Utilities v Canadian Cable Television Assn*, 2003 SCC 28, [2003] 1 SCR 476.  
*Beaulac v R*, 2015 FC 87.  
*Bélanger c Gestion André Houle Inc*, JE 2001-1538, [2001] RRA 596 (QC CS).  
*Belczowski v R*, [1991] 3 FC 151, 6 CRR (2d) 345.

*Bendahmane v Canada (Minister of Employment and Immigration)*, [1989] 3 FC 16, 15 ACWS (3d) 243 (CA).

*Bernèche c Canada (Procureur général)*, 2007 QCCS 2945, [2007] RJQ 1602.

*Bérubé c Québec (Ville)*, 2014 QCCQ 8967 JE 2014-1823.

*Bhagwandass v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 49, [2001] 3 FCR 3.

*Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307.

*Boness c Jewish General Hospital*, 2013 QCCQ 13928.

*Bou Malhab v Diffusion Métromédia CMR inc*, 2011 SCC 9, [2011] 1 SCR 214.

*British Columbia (Securities Commission) v McLean*, 2013 SCC 67, [2013] 3 SCR 895.

*Brown v British Columbia (Minister of Transportation and Highways)*, [1994] 1 SCR 420, 112 DLR (4th) 1.

*Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62, [2010] 3 SCR 585.

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*Canadian Broadcasting Corp v Lessard*, [1991] 3 RCS 421, 67 CCC (3d) 517.

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*Council of Canadians with Disabilities v VIA Rail Canada Inc*, 2007 SCC 15, [2007] 1 SCR 650.

*Crouch v Snell*, 2015 NSSC 340.

*Cuddy Chicks Ltd v Ontario (Labour Relations Board)*, [1991] 2 SCR 5, 81 DLR (4th) 121.

*Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835, 120 DLR (4th) 12.

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*Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, 151 DLR (4th) 577.  
*Empire Cold Storage Co c Cie de volailles Maxi ltée*, JE 95-1986, [1995] RRA 846 (QC CA).  
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*Figuerola v Canada (Attorney General)*, 2003 SCC 37, [2003] 1 SCR 912.  
*Finney v Barreau du Québec*, 2004 SCC 36, [2004] 2 SCR 17.  
*Fletcher v Manitoba Public Insurance Co*, [1990] 3 SCR 191, 74 DLR (4th) 636.  
*Ford v Quebec (Attorney General)*, [1988] 2 SCR 712, 54 DLR (4th) 577.  
*Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 245, 246 ACWS (3d) 191.  
*Fraser v Public Service Staff Relation Board*, [1985] 2 SCR 455, 23 DLR (4th) 122.  
*Garbeau c Montréal (Ville de)*, 2015 QCCS 5246, JE 2015-1850.  
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*Mercier-Néron v Canada (Minister of National Health and Welfare)* (1995), 98 FTR 36, 57 ACWS (3d) 400.

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